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ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT—PRIVACY EXEMPTION—HOW SIMILAR IS A "SIMILAR FILE"?—Pacific Molasses Co. v. NLRB Regional Office No. 15, 577 F.2d 1172 (5th Cir. 1978)

Barbara A. Joseph

ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT—PRIVACY EXEMPTION—How Similar Is a "Similar File"?—*Pacific Molasses Co. v. NLRB Regional Office No. 15*, 577 F.2d 1172 (5th Cir. 1978).

I. INTRODUCTION

The need for making information contained in government files available to the public[1] was the major force behind passage of the Freedom of Information Act (FOIA) by Congress in 1966.[2] In the past, government agencies[3] had successfully avoided disclosure to the public of the significant amounts of information within their control.[4] Citizens denied access to this information had no opportunity to scrutinize government decisions or to hold federal agencies accountable for their actions. Congress intended the FOIA to help end government abuse of its powers.[5]

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1. *See* J. O'REILLY, FEDERAL INFORMATION DISCLOSURE 1-5 (1978). Federal records are potentially a major source of information on a variety of subjects ranging from nuclear power to housing discrimination. The studies and information held by the government lose much of their usefulness when the public does not have access to them.

2. 5 U.S.C. § 552 (1976). *See* J. O'REILLY, *supra* note 1, at 1-1 to 4-12.

3. An agency, for Freedom of Information Act (FOIA) purposes, includes any federal or executive branch entity exercising the authority of the United States government. Independence of authority is the key criterion used to determine which institutions qualify as agencies. Private corporations, as well as state and local governments, are excluded from the provisions of the FOIA. The National Labor Relations Board (NLRB) is clearly an agency. *See* 5 U.S.C. § 552(e) (1976). *See also* Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

4. Until the 1950's, agencies had full power to do as they wished with information, and they frequently kept their files to themselves. Through the Housekeeping Statutes, 5 U.S.C. § 301 (1976), based on enactments in 1789, federal agency heads have traditionally had control over possession of files and were not inclined to disclose them to the public. *See generally* J. O'REILLY, *supra* note 1, at 2-1–2-16. *See also* Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.—C.L. L. REV. 1 (1970) (discusses avoidance techniques agencies use to withhold information).

5. A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating. . . . The needs of the electorate have outpaced the laws which guarantee public access to the facts in Government. . . . S. 1160 [The Freedom of Information Act] will correct this situation. It provides the necessary machinery to assure the availability of Government information necessary to an informed electorate.

H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12 (1965), *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS 2418, 2429.

Despite the Act's emphasis on the public's right to know, Congress also explicitly recognized the importance of withholding documents in certain circumstances. As part of the FOIA, Congress passed nine exemptions[6] which specify instances in which considerations other than public access take precedence.[7] One exemption, known as the privacy exemption, attempts to protect individual rights. This exemption acknowledges that a democratic government

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6. The FOIA includes the following exemptions:

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

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(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 which would not be available by law to a party other than an agency in litigation with the agency;

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

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(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.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

5 U.S.C. § 552(b) (1976).

7. *See* Comment, *The Freedom of Information Act: A Survey of Litigation Under the Exemptions*, 48 MISS. L.J. 784 (1977) (for a discussion of the FOIA exemptions). *See also* Note, *Developments Under the Freedom of Information Act—1977*, 1978 DUKE L. J. 189.

open to public scrutiny does not inherently require that there be public disclosure of personal details relating to individuals. The privacy exemption balances individual rights against public demands, permitting agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . ."[8]

In a case of first impression, the United States Court of Appeals for the Fifth Circuit in *Pacific Molasses Co. v. NLRB Regional Office No. 15*[9] confronted the appropriate application of the privacy exemption. In attempting to strike a balance between the FOIA's purpose of disclosure and the individual right to privacy, the court used a broad construction of the privacy exemption to withhold union authorization cards.[10] By such an interpretation of the exemption, the court limited the expressed policy of the FOIA.

Early in 1977, the Oil, Chemical, and Atomic Workers Union began unionization efforts at the Pacific Molasses Company. Following standard procedures, the union obtained signatures of the Pacific Molasses employees on authorization cards. These cards serve as records indicating that a worker wants an opportunity to vote on whether a union election should be held. An election was held, however, the employees ultimately voted against a union. The Pacific Molasses Company demanded to review the cards with the intent of attacking the validity of the signatures and the accuracy of the dates,[11] and thereby challenge the validity of an election. The Company's efforts to obtain the authorization cards were presumably intended to discourage future unionization attempts.

The National Labor Relations Board (NLRB), which was holding the cards, refused to release them to the Company.[12] Pacific Molasses brought suit under the FOIA in April 1977, in the United States District Court for the Eastern District of Louisiana to com-

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8. 5 U.S.C. § 552(b)(6) (1976).

9. 577 F.2d 1172 (5th Cir. 1978).

10. Union authorization cards when signed by an employee constitute a showing of interest by that employee to schedule a union election. *Id.* at 1177. The information contained on a card includes the employee's name, address, telephone number, department, shift and job classification as well as the employer's name and location. *Id.* at 1175. The Third Circuit, in Committee on Masonic Homes v. NLRB, 566 F.2d 214 (3d Cir. 1977), is the only other circuit to have heard the issue of the FOIA and union authorization cards. *See* Sobol, *An Example of Judicial Legislation: The Third Circuit's Expansion of Exemption 6 of the Freedom of Information Act to Include Union Authorization Cards*, 23 VILL. L. REV. 751 (1977-1978).

11. 577 F.2d at 1176.

12. *Id.*

pel the NLRB Regional Office to release the cards,[13] claiming that they were government records which were subject to disclosure under the FOIA.[14] The NLRB argued that the protection of the employees' privacy took precedence over the employer's desire to view the signatures. The district court ordered the NLRB to disclose the cards to the employer, holding that the information on the cards, which included each employee's name, job classification, and signature, was not sufficiently personal to warrant their exemption.[15]

The NLRB appealed to the Fifth Circuit, which reversed,

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13. *Id.* Although in this case, the union was not supported by the workers in the election, valid reasons exist for an employer desiring access to the cards. In the past, instances of fraud or misunderstanding by employees signing the cards have occurred so that an employer's refusal to trust the validity of the cards could be justified. Rather than allow the company to see the authorization cards, however, the remedy by the courts in such cases has been to deny the NLRB's order for the employer to bargain. *See* NLRB v. J.M. Mach. Corp., 410 F.2d 587 (5th Cir. 1969), in which the court found that the employer's refusal to bargain was not in bad faith where those employees signing the cards did not know that the purpose was solely to obtain an election. *See also* Schwarzenback-Huber Co. v. NLRB, 408 F.2d 236 (2d Cir. 1969), *cert. denied*, 396 U.S. 960 (1969), in which misrepresentation to employees that signing the cards was simply to have an election, was grounds for invalidating those cards, when in fact, a signature meant an intent to join the union.

Prior to the passage of the FOIA, at least one case held that the employer was not allowed to see authorization cards based on the secrecy of union elections provided for by statute. 29 U.S.C. § 159 (1973). *See* NLRB v. New Era Die Co., 118 F.2d 500 (3d Cir. 1941). *See also* 29 C.F.R. § 102.117 (1979); C. MORRIS, THE DEVELOPING LABOR LAW 156 (1971); Note, *The Right to Disclosure of NLRB Documents Under the Freedom of Information Act*, 5 FORDHAM URB. L.J. 119 (1976).

The NLRB has attempted to avoid disclosure under exemptions other than the privacy exemption. The exemptions most frequently used include exemption 5, pertaining to inter-agency or intra-agency memoranda or letters, and exemption 7, regarding investigatory records compiled for law enforcement purposes. 5 U.S.C. § 552(b)(5), (7) (1976). The courts have shown confusion in these areas equal to that of the privacy exemption. *See* NLRB v. Biophysics Sys., Inc., 78 Lab. Cas. 20,781 (S.D.N.Y. 1976) (cards exempt under exemption 7); *cf.*, Donn Prods., Inc. v. NLRB, 229 N.L.R.B. 116 (cards not exempt under either exemption 5 or 7); Gerico, Inc. v. NLRB, 92 L.R.R.M. 2713 (D. Colo. 1976) (cards exempt under exemption 7A during pendency of unfair labor practice proceeding, but not after). *See also* Wiegmann, *The Scope of FOIA Exemptions*, 1977 ANN. SURVEY AM. L. 1.

14. Questions have arisen as to what information falls under the jurisdiction of the FOIA, what constitutes a "record", and what constitutes "in the possession" of an agency. *See* Comment, *What is a Record? Two Approaches to the Freedom of Information Act's Threshold Requirement*, 1978 B.Y.L. REV. 408; Note, *Applying the FOIA in the Area of Federal Grant Law: Exploring An Unknown Entity*, 27 CLEV. ST. L. REV. 294 (1978); Note, *The Definition of Agency Records under the Freedom of Information Act*, 31 STAN. L. REV. 1093 (1979). *See also* Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (a clear determination of what constitutes a record).

15. 577 F.2d at 1176.

finding the cards exempt from disclosure under the FOIA privacy exemption. The majority held that an individual's decision about whether a union election should be scheduled is a matter of personal choice, and thereby concluded that disclosure of the authorization cards would be an unwarranted invasion of personal privacy protected by the privacy exemption.[16]

Fifth Circuit Senior Judge Skelton dissented.[17] Judge Skelton discussed the problem that cases like *Pacific Molasses* create when the privacy exemption is given a broad interpretation. He contended that the court's improper use of the test for determining disclosure has expanded the exemption to the extent that any invasion of privacy, no matter how insubstantial, will result in nondisclosure by an agency. Consequently, the privacy exemption creates a loophole that facilitates government secrecy. Judge Skelton stated that the holding in *Pacific Molasses* is inconsistent with congressional intent of full disclosure of information held by the government.[18] This note analyzes *Pacific Molasses* and the conflicting standards used in construing the privacy exemption. An examination of the legislative history reveals the competing purposes of the FOIA and its privacy exemption.

II. Availability of Agency Information

The philosophy behind the FOIA is rooted in the Administrative Procedure Act (APA) of 1946.[19] The APA was Congress' first

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16. *See* Committee on Masonic Homes v. NLRB, 556 F.2d 214 (3d Cir. 1977), which describes more thoroughly the personal nature used to exempt authorization cards.

17. 577 F.2d at 1184.

18. *Id.* at 1188.

19. Section 3 of the Administrative Procedure Act is as follows:

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No per-

attempt to rectify government secrecy. This legislation was aimed at all federal agencies, and specifically at those, such as the Veteran's Administration and the Federal Bureau of Investigation, which were accumulating large amounts of information about individuals, yet denying the public access to that material.[20]

The APA generally was unsuccessful in accomplishing its purpose. Government agencies commonly avoided disclosing information under the APA because of two primary interpretational difficulties in the Act's provisions. The first difficulty under the APA centered on the provision which allowed an exemption to disclosure "for good cause."[21] The absence of standards defining the term "good cause" allowed agencies to interpret it to their benefit. Consequently, whenever agency personnel felt there was a sufficient reason to withhold information, the material was kept confidential.[22] The second loophole involved the APA's provision granting standing to sue for information only to those persons "directly and properly concerned" with obtaining such information.[23] The legislative history contains no definition of "directly and properly concerned." By alleging that the requester had no inherent right to the material, agencies had further leeway to prevent dis-

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son shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those requried for good cause to be held confidential and not cited as precedents) and all rules.

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

5 U.S.C. §§ 1002(a)-(c) (1976).

20. *See generally* J. O'REILLY, *supra* note 1; Note, *Freedom of Information and the Individual's Right to Privacy: Department of the Air Force v. Rose*, 14 CALIF. W. L. REV. 183 (1978); Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME LAW. 417 (1965).

21. 5 U.S.C. § 1002(c) (1976).

22. The statutory requirement that information about routine administrative actions need be given only to "persons properly and directly concerned" has been relied upon almost daily to withhold Government information from the public. . . . If none of the other restrictive phrases of 5 U.S.C. 1002 [The Administrative Procedure Act] applies to the official Government record which an agency wishes to keep confidential, it can be hidden behind the "good cause found" shield.

H.R. REP., *supra* note 5, at 6, *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS at 2423.

23. *Id.* at 6, *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS at 2423.

closure.[24] Thus, the wide discretion arising under the APA in many cases precluded the public from obtaining agency information.

Realizing that too much information was being withheld without an actual basis,[25] Congress again decided to attack the problem. In 1965, it drafted the FOIA,[26] which dealt with and modified the two areas of the APA that had proven troublesome. This newer statute was clearly designed to emphasize disclosure. The APA's "good cause" standard was replaced by specific exemptions to disclosure which were intended to reduce government abuse by limiting the criteria upon which information could be withheld.[27] The "directly and properly concerned" test was also rejected in favor of a standard that allowed disclosure to "any person,"[28] thereby alleviating court scrutiny of any person requesting information. The "any person" standard of the FOIA aids in opening agency files to the public.[29] The FOIA has simplified the procedure by which the public can gain access to government files. The FOIA has not,

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24. "[T]here is no remedy available to a citizen who has been wrongfully denied access to the Government's public records." *Id.* at 5, *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS at 2422.

25. "Withholding instances mounted, and stirred the concern that the APA § 3 qualifications had made that public information law into a large loophole for agency secrecy." *See* J. O'REILLY, *supra* note 1, at 2-4.

26. For the legislative history on the need for the FOIA, *see* H.R. REP., *supra* note 5, *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS at 2418.

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.

Id. at 6, *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS at 2423.

27. 5 U.S.C. § 552(b) (1976).

28. (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3) (1976).

29. In addition to attempting to solve the APA problems, other FOIA requirements include that each agency publish its rules and methods of organization and operation in the *Federal Register*, and give to any person access to agency policies, opinions, orders and administrative manuals. Materials not in the *Federal Register* must be indexed so that they can be found by laypersons. These other requirements of the FOIA strive to assure openness of agency policies and attempt to foster familiarity with agency procedure on the part of laypersons. *See id.* § 552(a)(1),(2).

however, eliminated the substantive problems in determining what information should be available for public scrutiny.

III. THE NEED FOR PRIVACY

The FOIA's goal of total disclosure was necessarily thwarted by Congress' awareness that not all information should be disclosed. The nine statutory exemptions to disclosure[30] provide that certain records specified in the Act can legitimately be withheld from the public because of the importance of other interests which outweigh public desire for the information.

The personal privacy exemption is based on a long-standing, yet not clearly articulated, philosophy that people have an inherent right to be let alone.[31] By providing for nondisclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ,"[32] the privacy exemption emphasizes the rights of individuals to have information about their personal lives, health, and past history remain confidential.[33]

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30. *Id.* § 552(b).

31. Although no specific constitutional amendment designates the right to privacy, this right is found in various areas of the law. *See* Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979); Vache & Makibe, *Privacy in Government Records: Philosophical Perspectives and Proposals for Legislation*, 14 GONZ. L. REV. 515 (1979). The United States Supreme Court has extended constitutional recognition of the right to privacy as a penumbra of the Bill of Rights. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). Passage of the Federal Privacy Act, 5 U.S.C. § 552a (1976), is further evidence of renewed public awareness of government invasion into our lives. This Act regulates conditions of disclosure of records regarding individuals. *Id.*

The right to be "let alone" is also a basic concept behind the creation of the invasion of privacy tort cause of action. *See* Sternal, *Informational Privacy and Public Records*, 8 PAC. L.J. 25 (1977). *See also* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1282-1303 (1975). For information on the NLRB and privacy, see Irving & DeDeo, *The Right to Privacy and the Freedom in Information: The NLRB and Issues Under the Privacy Act and the Freedom of Information Act*, 29 N.Y.U. CONF. LAB. 49, 81 (1976).

32. 5 U.S.C. § 552(b) (1976).

33. The legislative history names the Veteran's Administration, HEW, and the Selective Service as agencies whose files should remain closed, but the list was not meant to be all-inclusive. Because the history is so brief, however, it has not provided an adequate background on which courts can base their determinations. The legislative history notes as follows:

> Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy: Such agencies as the Veterans' Administration, Department of Health, Education,

The privacy exemption contains a technical procedure, a two-pronged test, for determining whether a file qualifies for non-disclosure. The test is derived directly from the wording of the exemption.[34] Under the first step, a threshold determination is made as to whether a file is personnel, medical, or similar to those types of files. Under the second step, a balance is struck between disclosure of personnel, medical, or similar types of files and the seriousness of the invasion of privacy that disclosure would cause. Therefore, even if a file contains personnel, medical, or similar types of information, disclosure is not to be withheld solely because of the nature of the file. Rather, it is legally mandated that the information be kept private only if disclosure would violate the second prong of the test by "constitut[ing] a clearly unwarranted invasion of personal privacy."

The first two specifications in the exemption, which preclude disclosure of personnel or medical files, are self-explanatory.[35] Such files clearly have privacy values attached. Legislative history cites these categories as particularly deserving of protection from public knowledge.[36]

> and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records.

H.R. REP., *supra* note 5, at 11, *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS at 2428 (footnote omitted).

34. 5 U.S.C. § 552(b) (1976).

35. One problem with the definition of personnel and medical files is whether the phrase "a clearly unwarranted invasion of personal privacy" modifies them. One view specifies that any file that is clearly personnel or medical is exempt. Department of the Air Force v. Rose, 425 U.S. 352, 387 (Blackmun, J., dissenting). A second view is that neither personnel nor medical files are automatically exempt unless disclosure would constitute a clearly unwarranted invasion of personal privacy. *Id.* at 373 (Brennan, J.).

36. At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records." S. REP. NO. 813, 89th CONG., 2d Sess., 3 (1966).

The exemption for "similar files," however, is not adequately defined in the FOIA and its interpretation has proved to be troublesome. Apparently, the term was used by the drafters of the FOIA as a catch-all provision to prevent disclosure of information which is not technically personnel or medical but analogous in nature, thus warranting protection from public eyes. The use of this broad term "similar" by the drafters eliminated the need to decide application to each of an exhaustive list of files in the possession of the federal government.[37] Unfortunately, although the term simplified matters for the legislature, the inherent problems in its interpretation have confused the courts.[38] The legislative history of the privacy exemption has not provided an adequate background for determining which agency information qualifies as "similar." Consequently, holdings of cases involving "similar files" are inconsistent.

IV. INTERPRETATION OF "SIMILAR FILES" BY THE COURTS

The ambiguity of the nine exemptions to the FOIA has been criticized for causing confusion in both agencies and the courts.[39] In the instance of the privacy exemption, the lack of clear

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37. *Id.*

38. As well as the interpretative confusion over "similar" files, courts have split on the weight to be given to the second prong balancing test of a "clearly unwarranted invasion of personal privacy." An agency, or court, after having decided that a file is similar, personnel, or medical, should then determine whether disclosure of such file would constitute an invasion of privacy clearly unwarranted by the FOIA. This balancing test is used to analyze the conflicting interest. Circuits, however, have varied on the interests to be weighed. *See* Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (privacy interests on the individual should be balanced against the purpose to be served by the party requesting disclosure); *cf.* Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975) (unclear whether balance should be in the context of unrestricted disclosure to the public or use-specified release to the requestors); Robles v. EPA, 484 F.2d 843 (4th Cir. 1973) (interests of the individual should be balanced against the general public interest in disclosure).

The use of the term "clearly" in the second prong has also caused confusion. Courts have failed to note the strong mandate toward disclosure set forth by use of the term. The fact that some agencies strongly disapproved of its insertion into the privacy exemption is convincing that "clearly" serves to limit the amount of information that can be statutorily exempt. *See* Department of the Air Force v. Rose, 425 U.S. 352, 378 n.16 (1976). Exemption 7(C), 5 U.S.C. § 552(b)(7)(C) (1976), requires a less strict standard of disclosure, due solely to the absence of the word "clearly."

39. *See* Washington Research Project, Inc. v. HEW, 366 F. Supp. 929 (D.D.C. 1973), *modified*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Emerson, *The Danger of State Secrecy*, 218 NATION 395, 398 (1974); Wade, *Freedom of Information—Officials Thwart Public Right to Know*, 175 SCIENCE 498 (1972).

standards results in unpredictability of court decisions.[40] Courts taking a broad interpretation of "similar files" emphasize the importance of privacy over disclosure.[41] *Wine Hobby USA, Inc. v. IRS*[42] exemplifies this view. There, the Third Circuit implied that information does not have to be closely related to personnel or medical files to be exempt under the privacy exemption. The file in question in *Wine Hobby* consisted simply of names and addresses of persons required to register with the United States Bureau of Alcohol, Tobacco, and Firearms.[43] The court was satisfied that the names and addresses were sufficiently personal to warrant protection from disclosure under the privacy exemption. The Third Circuit judges thus believed that the term "similar" was not intended to permit the release of files where common sense would dictate that they be exempt.[44]

In the Fourth Circuit, in contrast, the test for "similar files" has been narrowly construed, tilting the balance toward public disclosure to facilitate the apparent intent of the FOIA.[45] In *Robles v. EPA*,[46] the Fourth Circuit held that "similar files" must contain

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40. J. O'REILLY, *supra* note 1, at 1-4. The author predicts that case law will remain inconsistent because of the different facts of each case, the varying agencies' attitudes and the lack of weight which each circuit gives to the opinion of the other circuits. *Id.*

41. Since the thrust of the exemption is to avoid unwarranted invasions of privacy, the term "files" should not be given an interpretation that would often preclude inquiry into this more crucial question. Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135 (3d Cir. 1974).

42. 502 F.2d 133 (3d Cir. 1974).

43. Under federal regulations, anyone making wine solely for family use is exempt from taxation. Wine Hobby USA, Inc. v. IRS, 502 F.2d at 134. Registration with the United States Bureau of Alcohol, Tobacco, and Firearms is required. The plaintiff, a Pennsylvania corporation engaged in the manufacturing and sale of home wine-making kits, sought disclosure of all registrants with the Bureau. The registrants numbered several thousand. The corporation, Wine Hobby USA, Inc., wanted the names to conduct an advertising campaign. *Id.*

44. *See* note 40 and accompanying text *supra*.

45. *See* Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977); New England Medical Center v. NLRB, 548 F.2d 377 (1st Cir. 1976); Title Guar. Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976), *cert. denied*, 429 U.S. 834 (1976); Metropolitan Life Ins. v. Usery, 426 F. Supp. 150, 166 (D.D.C. 1976); Waples, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974).

46. 484 F.2d 843 (D.C. Cir. 1973). The EPA in 1970 studied radiation levels in homes and buildings where such uranium had been used. Uranium tailings, a by-product of uranium processing, were commonly used as clean fill dirt in communities. The agency denied the plaintiff the results, offering all but the names and addresses of homeowners.

" 'intimate details' of a 'highly personal' nature"[47] to qualify under the privacy exemption. The court reached this conclusion by finding that the basis for the personnel file exemption was the inclusion of personal details. By analogy, the court concluded that "similar files" should contain similar information.[48] The *Robles* court, in contrast to *Wine Hobby*, based its narrow interpretation of "similar files" on a leading FOIA case, *Getman v. NLRB*.[49] *Getman*, like *Wine Hobby*, involved the disclosure of names and addresses. The names and addresses were of employees involved in union efforts. The requesters were law professors working on a publication regarding workers and unions. The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Getman* differs from that of the Third Circuit in that it did allow the names and addresses of the workers to be turned over to the requesters. The *Getman* court found that the intent of the FOIA was best served by allowing exemption only for files which are unquestionably private in nature.[50]

Rural Housing Alliance v. Department of Agriculture[51] is an example of information clearly containing the narrow "intimate details" required in the *Robles* test. The document in question was a housing report made in a study conducted by the Department of Agriculture.[52] The court of appeals found this report to be a similar file because it contained "information regarding marital status, le-

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47. *Id.* at 845; *cf.* Wine Hobby USA, Inc. v. IRS, 502 F.2d at 133 (standards used for determining a similar file are less strict).

48. *See, e.g.*, Nationwide Mut. Ins. Co. v. Friedman, 451 F. Supp. 736 (D. Md. 1978). In that case, an Employer Information Report form filed by Nationwide Insurance with the Social Security Administration was disclosed to the American Jewish Committee and the Anti-Defamation League of B'nai B'rith. *Id.* at 738. The insurance company sought to have the information withheld, yet the court, emphasizing the strong intent toward disclosure, construed the exemptions narrowly. *Id.* at 740.

49. 450 F.2d 670 (D.C. Cir. 1971). *Getman* allowed disclosure of names and addresses of certain employees to law professors who were engaged in a study of union election procedures.

50. Both the House and Senate reports on the bill which became the Freedom of Information Act indicate that the real thrust of Exemption (6) is to guard against unnecessary disclosure of files of such agencies as the Veterans Administration or the Welfare Department or Selective Service or Bureau of Prisons, which would contain "intimate details" of a "highly personal" nature. *Id.* at 675 (footnotes omitted).

51. 498 F.2d 73 (D.C. Cir. 1974).

52. The study stemmed from allegations by the Rural Housing Alliance that discrimination existed in the dissemination of loans. *Id.* at 75. The District of Columbia Circuit found that the study was a "similar" file and remanded for a determination of whether disclosure would constitute a clearly unwarranted invasion of personal privacy. *Id.* at 76.

gitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, [and] reputation. . . ."[53] Anyone gaining access to this report clearly would have personal details of the participants' style of living and could use this information to the disadvantage of the individual respondent, who at the time of taking part in the study would have been unaware that such information would be made public. Because of the many personal details of this report, the court of appeals reasoned that such intimacy should not be public information.

The United States Supreme Court has interpreted the term "similar" in only one privacy exemption case, *Department of the Air Force v. Rose*.[54] Although the opinion has not greatly aided the circuits in their need for a uniform approach, Justice Brennan, writing for the majority, persuasively cites legislative history to support a narrow construction of the term. The information sought was case summaries of students of the United States Air Force Academy which were kept in the Honor and Ethics Code files. The summaries were usually developed when a student was accused of a violation of the Honor Code, a potentially damaging situation. Brennan noted that the files are not actually personnel files but are in fact similar files.[55] The files were termed "similar" because the material contained in them consisted of personal details and because privacy values attached to the reports made on the students' conduct. Even with the finding that the similar files were private in nature, however, the Supreme Court held that in light of the broad intent toward disclosure of government information, the individual student in question would not be unduly harmed by public knowledge of the material in his file. Thus, even where a file is termed "similar," nondisclosure is not inevitable. The second prong, the determination of whether disclosure would clearly invade privacy, can be decisive.

The Third Circuit in *Wine Hobby* and the Fourth Circuit in *Robles* demonstrate a conflict, which the Fifth Circuit accentuates.

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53. 498 F.2d at 77.

54. 425 U.S. 352 (1976).

55. Another issue in the privacy exemption, not definitively answered, is whether the phrase "clearly unwarranted invasion of personal privacy" modifies the terms "personnel" and "medical" as well as the term "similar." *Id.* Justice Brennan holds that all three categories are modified by the phrase. *Id.* at 373. *But cf. id.* at 387 (Blackmun, J., dissenting) (the restrictive phrase applies only to "similar"; the exemption for personnel and medical files is clear and unembellished).

The issue in this conflict is whether common sense or legislative mandate should be followed in deciding a privacy case. The Third Circuit in *Wine Hobby* chose a result-oriented approach. The Fourth Circuit in *Robles*, on the other hand, set a standard based on the legislative mandate of the FOIA. Ideally, Congress incorporates both common sense and public sentiment into legislation. In privacy exemption cases, it is difficult to fulfill the goal of interpreting the meaning of "similar files" while balancing the need to protect certain privacy rights. *Pacific Molasses* is evidence of the tension that is created by these two aims.

V. ANALYSIS

The document in *Pacific Molasses* does not on its face contain personal details similar to those in *Rural Housing Alliance*.[56] The *Pacific Molasses* court notes at the outset of its opinion that the proper formula for determining whether the privacy exemption should apply to a document consists of first deciding if the cards fall into the category of personnel, medical, or similar files. The second inquiry is whether disclosure of cards would be an unwarranted invasion of personal privacy.[57] The court, in contravention to this formula, determined that the union authorization cards should not be accessible to the requester. While it discusses the two-pronged test, it fails to adhere to it in its actual determination of whether the cards should be disclosed.[58] Instead of finding the cards to be similar based on the amount and type of information they contain, the court exempts them because it contends that their disclosure would be a clearly unwarranted invasion of the employees' privacy.[59] The court, in effect, uses the second prong to determine the applicability of the first prong of the test. The Fifth Circuit notes in its opinion that it feels, as does the Third Circuit, that the emphasis should be placed on whether disclosure will result in a clearly unwarranted invasion of privacy, rather than allowing the classification given to the material as personnel, medical, or similar to prevent application of the exemption.

The court relies on case law to support its decision. One of the factors relied on is the "personal nature" criteria set out in *Rose*.[60]

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56. 498 F.2d at 73. *See also* text accompanying notes 51-53 *supra*.

57. 577 F.2d at 1178.

58. *See id.* at 1180-81 n.5. The court here openly rejects the "intimate details" test used in *Robles*. *Id. See also*, notes 51-53 *supra* and accompanying text.

59. 577 F.2d at 1182. The judges base their feelings on the chilling effect language which permeates the NLRA. *See* text accompanying note 69 *infra*.

60. 425 U.S. at 352.

This reliance is misplaced because *Rose* is distinguishable from *Pacific Molasses*. The files in *Rose* contain detailed information about an indivudual and his past. Presumably, summaries of cadets' alleged wrongdoing contain information having a great potential to inflict harm upon the individual if such knowledge becomes public. *Pacific Molasses* concerns only the limited job information listed on an authorization card. In *Rose*, the Supreme Court declined to withhold the cadets' files, even though there was a clear potential for harm. Such harm is not as clear in *Pacific Molasses*, yet the court chose to exempt the cards from disclosure.

Pacific Molasses also relies on the holding of *Wine Hobby* which held that the term "files" should be construed broadly to include any information that a court feels would violate privacy rights.[61] This view conflicts with the thrust of the FOIA that there be disclosure, and it reflects the Third Circuit's bias toward privacy rights. The *Wine Hobby* rationale contributes to the logic used by the *Pacific Molasses* court in its expansive use of the exemption.

Committee on Masonic Homes v. NLRB,[62] which closely resembles the facts and holding of *Pacific Molasses*, provides the third criteria which the Fifth Circuit followed. In *Masonic Homes*, the Third Circuit found that union authorization cards contain a "thumbnail sketch"[63] of an employee's job classification and status. From this analysis, it reasons that the files are similar. *Pacific Molasses* cited *Masonic Homes* with little of its own analysis as to why such information should be considered "similar."

Disclosure of an employee's job classification and status is not necessarily a clearly unwarranted invasion of privacy. Although an individual employee's request to schedule a union election is a personal decision with which the Fifth Circuit sympathized and wanted to protect,[64] the privacy exemption should not be applied for such arbitrary reasons. The "thumbnail sketch" of one's current employment is not persuasive for application of the standards of the privacy exemption, because the card, with the "sketch" it con-

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61. 502 F.2d at 133.

62. 556 F.2d 214 (3d Cir. 1977); *accord*, United Supermarkets, Inc. v. NLRB, 449 F. Supp. 407 (N.D. Tex. 1978). *Contra*, Howard Johnson Co. v. NLRB, 444 F. Supp. 843 (E.D. Mich. 1977) (union authorization cards not exempt under the privacy exemption). *See* Sobol, *supra* note 10.

63. 556 F.2d at 220.

64. *See* Davis, *supra* note 39, at 762. "[O]ne recurring problem is what to do when no exemption specifically authorizes non-disclosure but when common sense obviously requires it." *Id.*

tains, is not similar to a personnel file.[65] An authorization card containing an employee's name, address, employer, and job classification has little of the data that a similar file should contain. As Judge Skelton notes, a file similar to a personnel file should contain "vast amounts of personal data . . . showing, for example, where . . . [the individual] was born, the names of his parents, where he had lived from time to time, his high school or other school record, results of examinations, [and] evaluations of his work performance.[66] The authorization card certainly is not of the detailed nature of the study found, for example, in either *Rural Housing* or *Rose*.[67]

In the split between FOIA and the National Labor Relations Act (NLRA)[68] policy, the Fifth Circuit clearly falls on the side of labor rather than the FOIA. First, the judges invoke the "chilling effect"[69] doctrine as evidence of the need for protection of the cards. They speculate that disclosure would effectively foreclose use of the cards because employees would be afraid to sign them. Consequently, the employees' right to organize as set forth in section 7 of the NLRA would be impeded.[70] The court analogizes disclosure of the cards to the posting of a sign in the workplace saying: "Sign up for the union here."[71] Just as few workers would join under the watchful eyes of the employer, the court believes most workers would decline to sign a card that they thought would be viewed by the employer. Second, the court notes that the general secrecy of union proceedings, and specifically of union elections, is a characteristic of labor organizing that should be maintained. While the actual ballots used in an election are confidential by statute,[72] the judges maintained that the secrecy of ballots should be extended to authorization cards. This perspective is drawn more from a desire to foster the right to unionize rather than from a knowledge of the intent of the FOIA.

The judges fail to note that, although the secrecy of ballots is

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65. *See* note 13 *supra* for a discussion of the treatment of authorization cards under other exemptions to the FOIA.

66. 577 F.2d at 1185 (quoting Department of the Air Force v. Rose, 425 U.S. at 377).

67. *See* text accompanying notes 51-55 *supra*.

68. 29 U.S.C. §§ 151-169 (1976).

69. *See* 577 F.2d at 1181.

70. 29 U.S.C. § 157 (1976).

71. 577 F.2d at 1181 (quoting Committee on Masonic Homes v. NLRB, 556 F.2d at 221).

72. 29 U.S.C. § 159(e)(1) (1976).

authorized by statute,[73] the confidentiality of union authorization cards is not specified by the NLRA. Without the statutory authorization of privacy for the cards, the act of the judges in protecting the cards constitutes judicial legislation. An amendment to the NLRA by Congress specifically mandating secrecy of authorization cards would solve the problem. The cards then could be exempt under exemption three of the FOIA, which exempts from public access matters "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . ."[74] Under exemption three of the FOIA, a statute calling for withholding of information takes precedence over the policy of the FOIA.[75] Thus, if authorization cards were protected by statute, the issue faced by the Fifth Circuit would be moot.

In *Pacific Molasses*, the judicial interpretation of "similar files" has protected the authorization cards without resort to congressional action. Yet, the purpose of the two-pronged test is to allow for the disclosure of as much material as possible. This purpose is defeated by the treatment *Pacific Molasses* gives the exemption in its manipulation of the clearly unwarranted invasion standard in a manner that precludes a strict determination of the classification of a file.

VI. CONCLUSION

In *Pacific Molasses*, the Fifth Circuit interprets the privacy exemption of the FOIA. The privacy exemption[76] is designed to allow nondisclosure only of information private in nature, that is, information which is a "personnel [or] . . . medical [or] . . . similar [file] . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[77] The court terms union authorization cards as "similar files" and holds that they are not subject to disclosure. In its determination that the cards are exempt, the court twists the test that the privacy exemption estab-

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73. *Id.*

74. 5 U.S.C. § 552(b)(3) (1976).

75. *See* Comment, *Developments Under the Freedom of Information Act—1978*, 1979 DUKE L.J. 327, 332-45 (discussing the use of the withholding statute exemption).

76. 5 U.S.C. § 552(b) (1976).

77. *Id.* § 552(b)(6).

lishes. By its holding, the court verges on allowing any invasion of privacy to trigger application of the exemption.[78] This weakens the goal of the FOIA, which was to allow full disclosure to the public. Also, it permits a possible return to pre-FOIA days when agencies were able to avoid giving information to the public.

The pull between common sense and a literal application of the privacy exemption creates a tension for judges and agencies which ultimately forces the courts to twist the wording of the exemption in an attempt to reach a practical solution. Congressional review is clearly preferable to the continued confusion over, and redefinition of, the privacy exemption, which causes courts to create their own standards.[79] The courts, the administrative agencies, and the citizens for whom the FOIA was drafted will benefit from reevaluation of the balance between privacy and the public's access to government documents.

Barbara A. Joseph

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78. "Under this holding any invasion of personal privacy would result in nondisclosure regardless of whether the material was a personnel, medical or similar file." 577 F.2d at 1188. *See* Note, *Disclosure of Union Authorization Cards Under the Freedom of Information Act—Interpreting the Personal Privacy Exemptions*, 62 MINN. L. REV. 949 (1978) (stating that the broad interpretation set forth in *Wine Hobby* and followed by *Rose* and *Masonic Homes* impliedly does away with the classification of personnel, medical, or similar files).

79. Various possibilities for revamping the privacy exemption have been suggested and subsequently criticized. *See* Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189, 220 (1972) (no interference by the judiciary); Project, *supra* note 31, at 1085 (amendment of the balancing test to strike out the "clearly unwarranted invasion" test, protecting even minor invasions of privacy); Note, *Freedom of Information and the Individual's Right to Privacy: Department of the Air Force v. Rose*, 14 CAL. W. L. REV. 183, 203 (alleviation of the balancing test); Note, *supra* note 78 (congressional guidelines needed to limit the broad interpretation given by cases such as *Pacific Molasses*, and the amendment of the NLRA to specifically prohibit disclosure of the authorization cards).