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Reverse Freedom of Information Act Litigation in a Non-Commercial Setting: The Case of Professor Doe

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REVERSE FREEDOM OF INFORMATION ACT LITIGATION IN A NON-COMMERCIAL SETTING: THE CASE OF PROFESSOR DOE

LAWRENCE A. SILVER*

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I. INTRODUCTION

SO COMPLEX ARE THE QUESTIONS of what the right of privacy is, and when and how it can be invoked, that special precautions must be taken to prevent an article dealing with it from drifting off into the fascinating but misty realms of metaphysical speculation. This Article will deal with an important issue raised but not answered by the Federal Freedom of Information and Privacy Acts: the rights of a private party who seeks to prevent the federal government from releasing information concerning him.

In a very limited context, the United States Supreme Court has already addressed this issue. In *Chrysler Corp. v. Brown*,¹ discussed at length below, it was held that a commercial entity (Chrysler) possessed a right of action when the federal government proposed to release information, supplied to it by the entity, in response to requests under the Freedom of Information Act (FOIA).² The nature of the Court's holding in *Chrysler*

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¹ 441 U.S. 281 (1979).

² 5 U.S.C. § 552 (1976).

left in doubt whether there are constitutional dimensions to the right asserted by one seeking to enjoin the government from releasing information—the so-called “reverse FOIA” litigant. The privacy aspects of the first and fourth amendments to the Constitution will be examined here as potential sources for a right of action for the non-commercial reverse FOIA litigant.

II. THESIS

The Freedom of Information Act reflects a strong policy of effectuating the sovereignty of the people by affording public access to information needed to monitor the activities of the federal government accurately. The possibility of such monitoring is a vital element of a democratic society.³ The FOIA, however, goes beyond ensuring access to information needed to monitor government; it affords access to most government-possessed information to virtually anyone, without regard to the purpose for which the information is sought.

There are sound reasons for this. It is hard to predict what information given to which requester will contribute to the monitoring process. Barriers to obtaining information created by earlier “access” provisions have historically shown an alarming tendency to swell and become well-nigh impenetrable.⁴ Common sense demands that the government being monitored have as little power as practical to block, divert or confuse the monitoring process.

³ “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 243 (1978). See also *GTE Sylvania v. Consumers Union*, 445 U.S. 375, 385 (1980); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

⁴ The Freedom of Information Act was a revision of section 3, the “public information” section, of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964 ed.). The prior law had failed to provide the desired access to information relied upon in government decision making, and in fact had become “the major statutory excuse for withholding government records from public view.” H.R. Rep. No. 1497, 89th Cong., 2d Sess., 3 (1966) . . . See also *id.* at 4, 12; S. Rep. No. 813, 89th Cong., 1st Sess., 3, 5 (1965) . . . *EPA v. Mink*, 410 U.S. 73, 79 (1973). Section 3 had several vague phrases upon which officials could rely to refuse requests for disclosure: “in the public interest,” “relating solely to the internal management of an agency,” “for good cause.” Even material on the public record was available only to “persons properly and directly concerned.” These undefined phrases placed broad discretion in the hands of agency officials in deciding what information to disclose, and that discretion was often abused.

GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 384-85 (1980).

“[T]he 1946 Administrative Procedure Act . . . stated that all public records were open for inspection unless for good cause they were held to be confidential. All secrecy-minded bureaucrats could, of course, find good cause, in the public interest, to withhold records.” Archibald, *The Freedom of Information Act Revisited*, 39 PUB. AD. REV. 311, 314 (1979).

Still, there are serious dangers which arise from almost unlimited informational access. One of these is the threat that the privacy of individuals will be subject to gross invasion. The federal government possesses vast stores of information which either directly or indirectly reflect private facts about individuals.⁵ The Privacy Act of 1974, passed to protect individual privacy, is a shield of limited utility in the context of an FOIA request.⁶ In the typical suit under FOIA, a requester seeks to force an unwilling government to divulge information. The so-called "reverse FOIA" suit is a situation in which the subject of the information seeks to force a willing government *not* to divulge. The reverse FOIA suit is thus a forum in which the policies favoring information release by the government must be balanced against claims that the information at issue should not be released.

This Article contends that the counter balance to the FOIA's policy of almost unlimited access is to be found in either the first or fourth amendment. Both of these amendments rest upon a fundamental recognition of the right of individuals to make self-governing choices, and it is the exercise of this right that is inhibited by the indiscriminate release of information. Of the two, the procedurally-oriented fourth amendment, with its emphasis upon the *reasonableness* of governmental action, is the more potent source for the rights claimed by the reverse FOIA litigant.

This Article deals with these matters in the purposely limited context of the standing possessed by a non-commercial reverse FOIA litigant. The question of who possesses a right of action has often been critical in reverse FOIA cases.⁷ An attempt to answer it with regard to the non-commercial litigant, as opposed to the typical commercial litigant who has an interesting technical statutory right of action pursuant to *Chrysler*, highlights the constitutional issues involved.

A. *The Freedom of Information Act*

The Freedom of Information Act provides an extraordinarily broad right for requesters to obtain information possessed by the federal government. In essence, *anyone* may request *any* information from the government and the government, if it possesses the information, *must* release it. The only significant exceptions to mandatory release provided by the FOIA

⁵ As of the end of 1978, Executive Branch agencies of the federal government maintained 5,881 *systems* of records on individuals which contained more than 3,652,600,000 *records* on individuals. OFFICE OF MANAGEMENT AND BUDGET, FEDERAL PERSONAL DATA SYSTEMS SUBJECT TO THE PRIVACY ACT OF 1974, FOURTH ANNUAL REPORT OF THE PRESIDENT 7 (1979) [hereinafter cited as OFFICE OF MANAGEMENT AND BUDGET REPORT].

⁶ 5 U.S.C. § 552(a) (1976).

⁷ See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Union Oil of Cal. v. FPC*, 542 F.2d 1036 (9th Cir. 1976); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

concern information described in one of nine narrow exemptions.⁸

The FOIA has "disclosure, not secrecy" as its "dominant objective."⁹ In the landmark *Chrysler Corp. v. Brown* decision, the Supreme Court determined "[t]hat the FOIA is exclusively a disclosure statute."¹⁰ In line with this, the nine statutory exemptions to disclosure under the FOIA

⁸ 5 U.S.C. § 552(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 any 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.

⁹ *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The Senate report accompanying the original (1966) Freedom of Information Act states that it reflects "a general philosophy of full agency disclosure." S. REP. NO. 813, 89th Cong., 1st Sess. 3, 8 (1965). In 1978, there were 719,496 requests for access to government records granted in whole or in part, as compared with 1,385 requests for access which were denied. OFFICE OF MANAGEMENT AND BUDGET REPORT, *supra* note 5, at 15.

¹⁰ 441 U.S. 281, 292 (1979).

are to be narrowly construed¹¹ and doubts as to whether material must be disclosed under the Act are to be resolved in favor of disclosure.¹²

It is generally agreed that the purpose behind the FOIA was to eliminate, to a far greater degree than ever before, the threat of "secret government."¹³

For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically [by the nine exemptions to FOIA]; but outside these limited areas, all citizens have a right to know.¹⁴

The FOIA provides:

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*.¹⁵

In carrying out this provision, the courts have seldom required any showing of need, or even of legitimate interest, in the requested materials by the requesting party. "FOIA . . . does not distinguish between litigants on the basis of their need for information."¹⁶ One seeking information from

¹¹ *Rose*, 425 U.S. at 361; *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949-50 (D.C. Cir. 1979).

¹² *Rose*, 425 U.S. at 366; *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

¹³ *Rose*, 425 U.S. at 361; *EPA v. Mink*, 410 U.S. 73, 80 (1973).

¹⁴ S. REP. NO. 813, 89th Cong., 1st Sess. 5-6 (1965). "The attention of Congress was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency." *GTE Sylvania v. Consumers Union*, 445 U.S. 375, 385 (1980).

¹⁵ 5 U.S.C. § 552(a)(3) (1976) (emphasis added).

Paragraphs (1) and (2) of § 552(a) refer to materials which agencies must publish in the Federal Register or which must be either automatically made available for public inspection and copying or published and offered for sale.

"The thrust of the laws Congress has enacted is that governmental records belong to the American people and should be accessible to them—barring security and privacy considerations—for legitimate historical and other research purposes." *American Friends Serv. Comm. v. Webster*, 485 F. Supp. 222, 235 (D.D.C. 1980).

¹⁶ *Bristol-Myers Co. v. FTC*, 598 F.2d 18, 29 (D.C. Cir. 1978). "The Freedom of Information Act may be invoked by any member of 'the public'—without a showing of need—to compel disclosure of confidential Government documents." *EPA v. Mink*, 410 U.S. 73, 92 (1971). See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); *Cooper v. Department of Navy*, 558 F.2d 274 (5th Cir. 1977); *Williams v. IRS*, 345 F. Supp. 591 (D.C. Del. 1972), *aff'd*, 479 F.2d 317 (3rd Cir.), *cert. denied*, 414 U.S. 1024 (1973).

a federal agency need not even reveal his identity to that agency.¹⁷

The Supreme Court has determined that the nine exemptions to the FOIA policy of mandatory disclosure are discretionary.¹⁸ That is, if information falling within one of the narrowly-construed exemptions set forth in section 552(b) is the subject of a request under the FOIA, the appropriate administrator or agency has discretion to release the exempted information. It has further been determined that courts are without equity power to enjoin the release of information falling outside the FOIA exemptions.¹⁹ The FOIA itself provides no right of action for the reverse FOIA litigant.

B. *The Privacy Act*

The Privacy Act of 1974 provides that:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains, unless the disclosure would be [within one of eleven exemptions].²⁰

The second exemption applies when the record is "required under section 552 of [FOIA]."²¹ As defined by the Privacy Act, an "individual" is a citizen or permanent alien resident of the United States,²² and a "record"

¹⁷ *Benson v. GSA*, 289 F. Supp. 590 (N.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969).

¹⁸ *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-94 (1979); *see also* *GTE Sylvania v. Consumers Union*, 445 U.S. 375, 378 (1980).

¹⁹ *Ray v. Turner*, 587 F.2d 1187, 1215 (D.C. Cir. 1978); *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 661-62 (6th Cir. 1972); *Getman v. NLRB*, 450 F.2d 670, 678 (D.C. Cir. 1971). *Contra* *Consumers Union v. Veterans Admin.*, 301 F. Supp. 796, 806 (S.D.N.Y. 1969).

There are indications in some of the cases in which the courts have found themselves without equitable power to enjoin the disclosure of non-exempt material that "exceptional circumstances," similar to those which would justify prior restraint under the first amendment, *might* permit a court to enjoin the release of material not within any of the FOIA exemptions. *Rose v. Department of Air Force*, 495 F.2d 261, 269 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976); *Halperin v. Department of State*, 565 F.2d 699, 706 (D.C. Cir. 1977); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

²⁰ 5 U.S.C. § 552a(b) (1976).

²¹ *Id.* at § 552a(b)(2). It should also be noted that, unlike most other disclosures, disclosures made pursuant to the FOIA are not required to have an accurate agency accounting made of them. *Id.* at § 552a(c)(1).

"The provision which exempts disclosures under the FOIA from the accounting requirement is one of the bridges between the two statutes. Consent for such disclosures need not be obtained and the agency need not review the record before disseminating it pursuant to a FOIA request." Note, *The Privacy Act of 1974: An Overview*, 1976 DUKE L.J. 301, 312.

²² 5 U.S.C. § 552a(a)(2).

is "any item, collection or grouping of material about an individual that is maintained by an agency . . . that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph."²³ A "system of records" is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particulars assigned to the individual."²⁴ *Thus, only information retrievable by the name or other identifying particulars of an individual is covered by the provisions of the Privacy Act which forbid release without prior consent.*²⁵ Information about an individual contained in a record not so retrievable is outside the Privacy Act's coverage despite the potential for the invasion of an individual's privacy.

III. THE CASE OF PROFESSOR DOE

The potential threat to an individual's privacy posed by information contained in records outside the Privacy Act's coverage and subject to FOIA requests may be usefully illustrated through the hypothetical situation set out below. While hypothetical the circumstances outlined are by no means improbable.

Professor John Doe, of the University of Xanth, discovers that the Department of Education, in response to an FOIA request from a professor of education at another university, is going to release materials it gathered while doing a study of Xanth to discover how that university has used its government grant money. Doe is alarmed because he recalls having been indiscreetly candid in talking to government investigators about the doings of his colleagues and superiors, and because he fears they may have been equally candid about him. He thinks that even if the Department should delete names before releasing the file—a procedure it is by no means certain to follow²⁶—anyone with a casual knowledge

²³ *Id.* at § 552a(a)(4).

²⁴ *Id.* at § 552a(a)(5).

²⁵ "[I]nformation pertaining to the requester . . . need not be disclosed unless the information is retrievable by means of the requester's own name or other personal identifier. That it can be easily retrieved in some other way by some other identifier is wholly beside the point." *Smierka v. Department of Treasury*, 447 F. Supp. 221, 228 (D.D.C. 1978).

²⁶ See *Sonderegger v. Department of Interior*, 424 F. Supp. 847 (D. Idaho 1976), in which a victim of a dam disaster sought to enjoin the release of the names of the compensated disaster victims, the amount they had claimed, the amount they actually collected and the category in which they collected.

In a 1979 article, the Freedom of Information officer for the Department of Health, Education and Welfare stressed the "broadest access" policy of that Department. He noted that "HEW's procedure has consistently been to interpret and implement the [Freedom of Information] Act's provisions for access to information in the broadest and most open fashion, *i.e.*, never to deny a request for records unless the records are legally exempt from disclosure *and there is*

of Xanth will be quite capable of reconstructing who said what about whom.²⁷

At this point, a working definition of "privacy" must be adopted to give substance to further discussions. At least in a rough sense, it must be made clear what is being "invaded" or "lost" when privacy is intruded upon. Following David M. O'Brien's analysis, privacy—an existential condition—must be distinguished from the concept of a *right* of privacy: an entitlement to maintain or achieve the condition.²⁸ Although it confuses the right to privacy with privacy itself, Professor Alan Westin's definition is useful: "the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."²⁹ Privacy, then, can be equated with control of information about oneself. Thus, it is a relative condition.

In theory, either total privacy (e.g., I am the only possessor of the fact that I wrongfully pulled a fire alarm in 1965) or virtually no privacy at all (e.g., I was caught in the act when I turned in that false alarm and every newspaper in the world has reported that fact, reprinting the story annually) are possible with regard to any given fact. In addition, privacy

a compelling need to withhold them . . ." Roberts, *Faithful Execution of the FOIA Act: One Executive Branch Experience*, 39 PUB. AD. REV. 318, 319 (1979) (emphasis added).

It is common sense that an agency will generally not go over a record carefully and delete identifying particulars which may cause an invasion of privacy unless that agency is either unusually scrupulous and well-funded or the agency's *own* institutional needs call for such a process.

²⁷ The Supreme Court, in *Rose*, 425 U.S. 352, noted that "[t]o be sure, redaction cannot eliminate all risk of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity [of Air Force cadets who had been the subject of disciplinary proceedings] can admittedly be severe." *Id.* at 381. The Court felt, however, that deletions would be sufficient for exemption 6 purposes if, while there were "incidental" invasions of privacy, there were no "such disclosures as would constitute 'clearly unwarranted' invasions of personal privacy." *Id.* at 382. Chief Justice Burger was strongly critical of the majority in his dissenting opinion, both because of the danger to individual privacy he saw in the majority's approach and because he viewed it as placing an "intolerable burden" on the district courts. *Id.* at 383-85.

See also *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 161 (D.D.C. 1976); *Church of Scientology of Cal. v. Department of Army*, 611 F.2d 738, 747 (9th Cir. 1979).

Courts which attempt to excise identifying material will necessarily be hampered by the fact that they will not be privy to the information which an outside party attempting reconstruction may have. For example, in our hypothetical situation, a colleague of Professor Doe may know that the chairman of Doe's department is the only member of the faculty to have had his home redone in the past few years. The fact that "[Blank] may have improperly used a government grant to redecorate [his/her] home" tells the colleague something about the chairman, despite the deletion of the more obvious identifiers.

²⁸ D. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* 15-17 (1979).

²⁹ A. WESTIN, *PRIVACY AND FREEDOM* 7 (1970).

can exist to almost any degree between the two extremes, as the individual loses more and more control over the personal information (e.g., my wife and I know I turned in a false alarm; my wife, Father Flannagan and I know; my wife, Father Flannagan, the C.I.A. and I know . . .). So long as *some* control over the datum is retained, *some* privacy is likewise retained. A fact revealed to another is not the same as a total voluntary loss of privacy, since there may be a reasonable expectation that the revealed fact will either not be given further publicity or will only be given limited publicity. In addition, sanctions may be imposed if private facts are revealed by a confidant. The privacy being "invaded" when a given fact about an individual becomes more widely known than he desires, is the sum total of his control over all facts concerning him. When a quantum of that control is lost, privacy is lost; when a quantum of that control is wrenched from someone, privacy is invaded.

The mere possession of privacy does not presuppose a *right* to it. A would-be assassin may possess privacy, *i.e.*, control over the dissemination of the fact that he plans to shoot the President. The invasion of his privacy is applauded if occasioned by a lawful investigation which discloses the private fact and prevents the crime. In contrast, the loss of privacy does not presuppose a loss of the *right* to privacy; a suit can vindicate an invaded right when an illegal invasion has taken place, applying the poultice of money to the wound.

The sources of rights to privacy are varied. Among them seem to be both the common law and the common law as pictured by Louis D. Brandeis and Samuel D. Warren writing in the *Harvard Law Review*.³⁰ This Article, however, will look to those rights of privacy that can fairly be said to have their origins in either the first or fourth amendment of the Constitution and are arguably relevant to the reverse FOIA litigant's situation.

Returning to the hypothetical Professor Doe, while it is too early to determine whether his *rights* to privacy are threatened, certainly his privacy *interests* are in peril. Information over which he has some control is at stake, since presumably only he and the government know what he told the investigators. One fact which will be revealed if the requested information is released, one over which Doe never had sole control, is the fact that he spoke to the government. Other facts were under his complete control at one time: his opinions of his colleagues. Still others were under his partial control: facts known to him and his colleagues, before the government collected the information, concerning the use of research grants. In a rough way, an individual's control of information lessens as the number of persons who share the datum in question increases and lessens in proportion to the probability that a sharer of the datum will communicate it beyond the circle of those who already have the information. The information obtained from Doe is in a file retrievable

³⁰ Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

by means of the title "Xanth University Use of Government Funds," which is part of a collection of files retrievable by means of the names of American universities.

Doe is concerned that: 1) his privacy will be invaded—that he will lose whatever remaining control he has over information contained in the requested file—and he will thus suffer an affront to his dignity;³¹ 2) he will suffer embarrassment both because information about him in the file will become public knowledge and because his colleagues will know he told the government unfavorable things about them, and his relations with them will consequently suffer; 3) his chances for tenure or promotion will be worsened if the information becomes public knowledge.

Doe is particularly worried about the revelation of two facts: 1) he told the government, truthfully, that the chairman of his department had used two-thirds of a government grant to redecorate his home; 2) he had told his colleagues that he spent one summer doing research pursuant to a government grant. In reality, he was in a camp run by a religious cult which is held in low repute by the general public.

Doe's first realization is that the Privacy Act of 1974³² does not require the Department of Education to obtain his or, indeed, anyone else's consent before releasing the requested information. Since the Xanth University file postulated above is not retrievable by Doe's name, or another identifying particular assigned to him, the Privacy Act does not afford him the right to be *informed* of the proposed release of a file containing information about him. Nor does the Privacy Act require that Xanth University give its consent; the Act applies only to individuals, *i.e.*, citizens of the United States or aliens lawfully admitted for permanent residence.³³ Such legal "persons" as corporations are not covered by the Act.³⁴

The reverse FOIA suit has developed as a potential remedy for those who, like Doe, find themselves threatened by a proposed release of information pursuant to an FOIA request. Reverse FOIA suits seeking an injunction have generally been brought by commercial entities who, having submitted arguably commercially valuable information to the federal government, are distressed when the government proposes to release that information.³⁵ The question of the standing of a commercial entity to bring such a suit was dealt with by the Supreme Court in *Chrysler Corp. v.*

³¹ "For privacy is the necessary context for relationships which we would hardly be human if we had to do without—the relationships of love, friendship, and trust." Fried, *Privacy*, 77 YALE L.J. 475, 484 (1968).

³² 5 U.S.C. § 552a (1976).

³³ *Id.* at §§ 552a(f)(1), 552a(a)(2), 552a(a)(5).

³⁴ *Dresser Indus. v. United States*, 596 F.2d 1231 (5th Cir. 1979).

³⁵ Typical cases include: *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980); *St. Mary's Hospital v. Harris*, 604 F.2d 407 (5th Cir. 1979); *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1977).

Brown,³⁶ a decision with important implications for all future reverse FOIA cases.

IV. STANDING OF THE COMMERCIAL REVERSE FOIA LITIGANT:

Chrysler Corp. v. Brown

Chrysler Corp. v. Brown presented the Supreme Court with a situation typical of most reverse FOIA cases which have been decided: A commercial entity which had submitted information to the government sought to prevent the release of that information to another entity or entities that might use it in a manner inimical to the interests of the submitter. So typical is this situation that at least one legal scholar apparently considers it the only situation meriting the rubric, "reverse FOIA litigation."³⁷

Chrysler sought to enjoin the release of information concerning its employment practices furnished to the Defense Logistics Agency in compliance with affirmative action programs.

Chrysler made three arguments in support of its prayer for an injunction: that disclosure was barred by the FOIA; that it was inconsistent with 18 U.S.C. Subsection 1905, 42 U.S.C. Section 2000e-8(e), and 44 U.S.C. Section 3508 . . . and finally that disclosure was an abuse of agency discretion insofar as it conflicted with OFCCP [Office of Federal Contract Compliance Programs] rules.³⁸

The threshold question, however, was whether Chrysler had a right of action at all.

The Court held that the FOIA, as an exclusively disclosure-oriented statute, never forbade the release of information by the government. Under this interpretation the nine exemptions to the mandatory disclosure provisions of the FOIA create categories of information which are unaffected by the statute. FOIA leaves it within the appropriate government official's discretion whether or not to invoke one of the exemptions and refuse to release requested information.

In Justice Rehnquist's rather complex decision, it was held that plaintiff Chrysler had standing to bring its non-disclosure suit under section 10(a) of the Administrative Procedure Act (APA) as a "person . . . adversely affected or aggrieved by agency action within the meaning of a

³⁶ 441 U.S. 281 (1979). Useful articles in this area include: Braverman, *Chrysler Corporation v. Brown—Protecting Business Secrets in the 80's*, 4 CORP. L. REV. 23 (1981); Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103 (1978); Drachsler, *FOIA and the "Right" of Non-disclosure*, 28 AD. L. REV. 1 (1976); Note, *The Reverse-FOIA Lawsuit: Routes to Nondisclosure After Chrysler: A New Direction*, 48 FORDHAM L. REV. 185 (1979); Note, *Protection From Governmental Disclosure—The Reverse FOIA Suit*, 1976 DUKE L.J. 330.

³⁷ Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103 (1978).

³⁸ 441 U.S. at 288.

relevant statute.”³⁹ The relevant statute in question was the Trade Secrets Act,⁴⁰ a criminal statute under which Chrysler had no independent cause of action. Section 10(a) of the APA does not in and of itself provide a right of action⁴¹ but does require that a person be “suffering legal wrong because of agency action or [be] adversely affected or aggrieved by agency action within the meaning of a relevant statute.”⁴² Section 10(a) gave Chrysler standing because of the possibility that the government, in proposing to release Chrysler’s affirmative action compliance materials, would violate the Trade Secrets Act. This resulted from the Court’s determination that the nine FOIA exemptions set a boundary to that Act’s scope and, therefore, releasing information covered by an exemption was “not authorized by law” (a requirement for the release of trade secrets), at least under the provisions of the FOIA.⁴³

It is unclear whether the fact that Chrysler itself had submitted the information covered by the FOIA request had any significance to the Court. Arguably, it should have been irrelevant. Chrysler would be damaged equally if information on its employment practices had been received by the government from a third party, rather than from Chrysler, and then revealed to Chrysler’s rivals; the Trade Secrets Act is violated merely by the revelation of a trade secret regardless of its source.⁴⁴

³⁹ 5 U.S.C. § 702 (1976).

⁴⁰ 18 U.S.C. § 1905 (1976) provides in pertinent part:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association, or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any other person except as provided by law; shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment.

⁴¹ *Califano v. Sanders*, 430 U.S. 599 (1977).

⁴² 5 U.S.C. § 702 (1976).

⁴³ 441 U.S. at 285. “Since materials that are exempt from disclosure under the FOIA are by virtue of Part II of this opinion outside the ambit of that Act, the Government cannot rely on the FOIA as congressional authorization for disclosure regulations that permit the release of information within the Act’s nine exemptions.” *Id.* at 303-04.

⁴⁴ It could, of course, be argued that if the information had been in the possession of the government due to active government investigation, its release would be more likely to serve the primary goal of the FOIA: prevention of secret government. The public, it would be contended, can only evaluate the worth of govern-

The private individual who is not a commercial entity cannot rely upon the *Chrysler* combination of section 10(a) of the APA and the Trade Secrets Act to give him standing; his secrets are not trade secrets. However, the *Chrysler* "10(a) plus" equation remains significant for the non-commercial reverse FOIA litigant. Provisions of the Constitution might perform the same service for a non-commercial litigant that the Trade Secrets Act performed for the commercial litigant in *Chrysler*. The Supreme Court has determined that the reverse FOIA litigant, in his pursuit of a right of action, may follow the procedural path set out by APA section 10(a). The problem of which constitutional equipment is more suitable on that path remains open.

Chrysler and *Department of Air Force v. Rose* have confined the courts' equity power so that they may not enjoin the release of information falling outside the nine FOIA exemptions.⁴⁵ Seemingly, to have a right of action, Doe will have to show that the Xanth material is within one of those FOIA exemptions.⁴⁶ By demonstrating that the release of the material is within the discretion of the federal agency involved, Doe should be able to prove that releasing the information would be an abuse of that discretion. The "10(a) plus" formula used by the *Chrysler* Court should be followed to show that Doe is a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" and is "entitled to judicial review."⁴⁷

Thus, it must first be determined whether the information postulated above is arguably within the coverage of an FOIA exemption. The most plausible exemption for Doe is exemption 6, "clearly unwarranted invasion of personal privacy."⁴⁸ Only if the information is arguably within an exemption, can the second question of whether or not the Constitution provides a privacy "right" which can appropriately be inserted in the *Chrysler* formula be addressed.

Arguably, the crucial issue of *notice* is being overlooked in the Doe example. After all, it seems likely that most subjects of information in

ment investigations by knowing their results; it can only evaluate a decision by having access to all the relevant information acquired by the government when it made the decision. Thus, there may be a valid distinction between information "passively" received by the government and "passively" used by it in routine oversight procedures and information which it actively seeks for some more specific narrow-range use. Under this analysis the second category of information should be more "releasable" under the general policy of preventing secret government, both of the FOIA and of the Privacy Act of 1974 as well.

⁴⁵ 441 U.S. at 292.

⁴⁶ In *Chrysler*, the corporate plaintiff claimed that the requested information was within the purview of exemption 4 (5 U.S.C. § 552(b)(4)) which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.* at 291.

⁴⁷ 5 U.S.C. § 702 (1976).

⁴⁸ *Id.* at § 552(b)(6).

files not covered by the Privacy Act will not be aware of a request for it until after the government has complied, if then. However, the issue of whether there is a right of privacy capable of being violated in the FOIA context must be answered first. If there is no such right, the issue of notice is moot. If there is a right, it can then and only then be determined whether the nature of the right, balanced against the extreme empiric difficulties of providing notice to every subject of information in every requested government file, demands that notice be given. The consequent impediment to the legitimate goals of "open government" expressed in the FOIA would also have to be considered. It seems possible that in the face of these difficulties notice may not be required and that the right, if it exists, would be more appropriately vindicated by a civil rights suit for damages under the Civil Rights Act⁴⁹ or even under the Federal Tort Claims Act.⁵⁰

V. FOIA EXEMPTION 6: PRIVACY

Section 552(b)(6) of the FOIA provides: "This section does not apply to . . . personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁵¹ This exemption calls for an exception to the general rule of FOIA analysis which balances the individual's interest in privacy against the public's interests in disclosure.⁵² In determining whether material falls within exemption 6, the courts must apply "a policy that will involve a balancing of interest between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right

⁴⁹ 42 U.S.C. § 1983 (1976).

⁵⁰ 28 U.S.C. § 2671 (1979). Any such tort suit, however, would be likely to fail based upon the "discretionary function or duty" exception to the general rule of federal tort liability contained in 28 U.S.C. § 2680(a) (1979).

⁵¹ 5 U.S.C. § 552(b)(6) (1976).

⁵² This may be contrasted to the general policy of FOIA in regard to privacy, in which the agency's need for providing its clientele with privacy was paramount. Illustrative of this is the Court's discussion of exemption 4 in *Chrysler*:

Congress appreciated that, with the expanding sphere of governmental regulation and enterprise, much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by these submitters. But the congressional concern was with the agency's need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

441 U.S. at 292-93 (footnotes omitted) (emphasis in original). "The (b)(6) exemption was meant to protect individuals from the disclosure of the intimate details of their personal lives." *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 458 (D.D.C. 1977).

to governmental information.”⁵³ Thus, the government seemingly adopts a more neutral role when exemption 6 is involved; the principal antagonists are the public and the individual.

The concept of “similar files” has been of crucial importance in cases concerning exemption 6.⁵⁴ In a widely-followed Third Circuit decision, *Wine Hobby U.S.A., Inc. v. IRS*,⁵⁵ wherein a maker of wine-making equipment sought the names and addresses of amateur wine-makers from the Internal Revenue Service, the court stated:

We believe that the list of names and addresses is a “file” within the meaning of Exemption (6). A broad interpretation of the statutory term to include names and addresses is necessary to avoid a denial of statutory protection in a case where release of requested materials would result in a clearly unwarranted invasion of personal privacy. 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.

Furthermore, we believe the list of names and addresses is a file “similar” to the personnel and medical files specifically referred to in the exemption. The common denominator in “personnel 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 personal privacy. We do not believe that the use of the term “similar” was intended to narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy.⁵⁶

Thus, data such as that contained on a union authorization card,⁵⁷ in a Department of Agriculture study of housing containing various details of family life,⁵⁸ or the personal or criminal activities of a member of organized crime⁵⁹ may all be sufficiently “personal” to be eligible for exemption 6 coverage, as was the list of names and addresses of the amateur wine-makers in *Wine Hobby*. The test is not whether information is of

⁵³ S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965).

⁵⁴ See *Department of Air Force v. Rose*, 425 U.S. 352 (1976); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977); *Harbolt v. Department of State*, 616 F.2d 772 (5th Cir.), cert. denied, 449 U.S. 856 (1980).

⁵⁵ 502 F.2d 133 (3d Cir. 1974).

⁵⁶ *Id.* at 135. See also *Department of Air Force v. Rose*, 425 U.S. 352 (1976).

⁵⁷ *Howard Johnson Co. v. NLRB*, 618 F.2d 1 (6th Cir. 1980); *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977).

⁵⁸ *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974).

⁵⁹ *Providence Journal v. FBI*, 460 F. Supp. 762 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979).

a "medical or personnel" character, but whether it is of a "personal nature"⁶⁰ which, compared to the type of information normally found in medical or personnel files, "implicates similar privacy values."⁶¹ As one circuit court stated, exemption 6

was designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files. The exemption is not limited to Veterans' Administration or Social Security files, but rather is phrased broadly to protect individuals from a wide range of embarrassing disclosures.⁶²

The Court of Appeals for the District of Columbia gave a good precis of the test for determining whether disclosure of a "medical, personnel or similar file" would constitute a "clearly unwarranted invasion of personal privacy":

In an opinion of Judge Wright [*Getman v. N.L.R.B.*, 450 F.2d 670 (1971)], this court has previously considered the scope of the "clearly unwarranted invasion" language. . . . We held that *exemption 6 involves a balancing of the interests of the individuals in their privacy against the interests of the public being informed.* We noted that the statute "instructs the court to tilt the balance in favor of disclosure." Specifically, we suggested that in balancing interests the court should first determine if disclosure would constitute an invasion of privacy, and how severe an invasion. Second, the court should weigh the public interest purpose of those seeking disclosure and whether other sources of information might suffice. Such balancing is unique for exemption 6; normally no inquiry into the use of the information is made, and the information is made available to any person.⁶³

The Xanth University file would arguably pass the first portion of the test for inclusion within exemption 6, since it is a file "similar" to a medical or personnel file containing material of a "personal nature" or including

⁶⁰ *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1180 (5th Cir. 1978).

⁶¹ *Department of Air Force v. Rose*, 425 U.S. 352, 376 (1976).

⁶² *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974) (footnotes omitted).

⁶³ *Id.* It is by no means certain that the circuit court was correct in its contention that the "public interest" which must be balanced against privacy interests should be measured by the *purpose* of the requesters. It would seem more in keeping with the spirit of the FOIA to measure the public interest by the *effect* the information's release would have or tend to have on that interest. Calling for an evaluation, in essence, of the "worthiness" of a FOIA requester creates an unnecessary exception to the FOIA principle of disclosure. This, of course, is in contrast to the necessary exception contended for by this Article. Making a FOIA requester's success dependent on his purpose creates a vague standard which is likely to be too prone to expansion.

"intimate details." The facts about Doe which can be derived from the Xanth file are similar to those protected in the union authorization card cases⁶⁴ or in *Metropolitan Life Insurance Co. v. Uesery*.⁶⁵ In *Metropolitan Life*, portions of reports submitted by insurance companies in compliance with affirmative action requirements "which contain[ed] data on promotions, job performance, job evaluations, and personal preferences and goals [constituted] 'similar files' in that they reflect[ed] highly personal details about company employees."⁶⁶ The more difficult question about the Doe material in the Xanth file in the exemption 6 context is whether disclosure is arguably "a clearly unwarranted invasion of privacy."

The legislative history of the FOIA and judicial interpretations of the FOIA are in agreement that, once a "medical" or "personnel" or "similar" file is involved, the interests of the public in disclosure must be balanced against the interest of an individual in keeping his private affairs private.⁶⁷ Further, there seems to be general agreement that "whether an invasion is unwarranted or clearly unwarranted necessarily depends upon a weighing of the interests on the other side."⁶⁸ These "interests on the other side" include the interests of the party who has actually applied for the information since, at the very least, he is a part of the "public" whose "right to know" is included in any FOIA analysis. At a minimum, his interest reflects a portion of the public interest.⁶⁹

⁶⁴ See *supra* note 57 and accompanying text.

⁶⁵ 426 F. Supp. 150 (D.D.C. 1976).

⁶⁶ *Id.* at 168. This case should be compared with *Poss v. NLRB*, 565 F.2d 654 (10th Cir. 1977), and *Columbia Packing Co. v. Department of Agriculture*, 563 F.2d 495 (1st Cir. 1977). In *Poss*, the court determined that exemption 7C, which exempts information gathered "for law enforcement purposes" from mandatory release when such release would "constitute an unwarranted invasion of personal privacy" did not apply to information gathered from fellow employees by the NLRB about the firing of a worker. In the circumstances, the employees who had spoken to the NLRB could have no high expectations of privacy, as they knew they might eventually be called upon to testify. In *Columbia Packing*, while the court found that meat inspectors, who had been convicted of taking bribes, had considerable expectations of privacy in their personnel files, the public interest in the circumstances of their corruption outweighed the privacy interests protected by exemption 6. Thus, in *Poss* there may be said to have been no invasion of privacy, whereas in *Columbia Packing* there was an invasion, but it was warranted by the public interest in corrupt public officials.

⁶⁷ "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965). See also *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 136 (3rd Cir. 1974); *Getman v. NLRB*, 450 F.2d 670, 674, 676 (D.C. Cir. 1971).

⁶⁸ 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 321 (1978).

⁶⁹ *Church of Scientology v. Department of Army*, 611 F.2d 738, 746 (9th Cir. 1979); *Campbell v. Civil Serv. Comm'n*, 539 F.2d 58, 61 (10th Cir. 1976); *Titlow v. Schultz*, 517 F.2d 166, 170-71 (D.C. Cir. 1975); *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971).

As noted above, the proposed disclosure of information concerning facts relative to an individual's employment, such as job performance, promotion prospects and the like, has, on occasion, been sufficient to warrant a finding that the material proposed for release was within exemption 6.⁷⁰ The courts, in making such findings, have not ignored the potential for embarrassment and ill-feeling between fellow employees if information concerning them was made public.⁷¹

In *Metropolitan Life*, portions of affirmative action reports filed by insurance companies were within exemption 6 because "the severity of the potential invasion outweigh[ed] the factors favoring disclosure."⁷² The requester in *Metropolitan Life* was the District of Columbia branch of the National Organization for Women which sought to investigate whether insurance companies were complying with the federal affirmative action and equal employment mandates in regard to women and minority group employees.⁷³ The revelation of personal but job-connected facts about Doe, as well as his opinions of his colleagues and his cult connection, will mean a loss of control over this information, and will threaten him with monetary and other injuries.

There would seem to be a legitimate public interest in the hypothesized Xanth file since it contains information showing how public money, supplied in the form of grants, was used. The information could conceivably be helpful in the evaluation of criteria currently used to determine whether to issue grant money and could be useful in formulating better criteria.⁷⁴ Against this public interest, the privacy rights of Doe, and those of his colleagues, would have to be balanced. It is not possible within the constraints of this Article to determine which set of interests must be of greater weight. The public's legitimate interest in the names of individual recipients of grants, or in the fact that Doe lied to his colleagues to conceal his connections with a religious cult, would most likely be minimal. However, for purposes of this Article it is unimportant whether Doe will win or lose his suit. What matters is that the requested information is colorably within exemption 6 because, if he possesses a constitutional right to informational privacy assertable in regard to the information, it would seem that the *Chrysler* requirements for a right of action have been satisfied.

Doe, in seeking to assert his own privacy interests under FOIA exemption 6, is in a different position from most litigants who have sought to

⁷⁰ *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976).

⁷¹ *Id.* at 168.

⁷² *Id.* at 169.

⁷³ *Id.*

⁷⁴ That the projected study for which material was being requested under the FOIA might result in more efficient NLRB procedures was considered significant by the court in *Getman v. NLRB*, 450 F.2d 670, 675-76 (D.C. Cir. 1971), where the NLRB claimed, *inter alia*, that the release of the requested information would violate exemption (b)(6) of the FOIA.

use the exemption in the past. Typically, the claim that the privacy protected by exemption 6 is in danger of suffering a "clearly unwarranted invasion" has been advanced by a government agency opposing the release of information.⁷⁵ Sometimes, the exemption is asserted by an employer seeking to enjoin disclosure of information which would allegedly violate the privacy of its employees.⁷⁶ Only in rare and unusual circumstances has the subject of information vulnerable to a claim of lying within exemption 6 been a party to the action.⁷⁷

The reasons for this are obvious. Seldom will the individual who is the subject of information not covered by the "record which is part of a system of records . . . recoverable by an identifying particular" requirement of the Privacy Act have notice that an FOIA request has been received by an agency for material including information concerning him before that request has been answered.⁷⁸ The empirical problems coupled with the current absence of such notice renders it unlikely. In addition, the party who goes to court seeking to protect his privacy often stands to lose more,

⁷⁵ See, e.g., *Department of Air Force v. Rose*, 425 U.S. 352 (1976); *Church of Scientology v. Department of Army*, 611 F.2d 738 (9th Cir. 1979); *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978).

⁷⁶ See, e.g., *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1977); *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976).

⁷⁷ The only case in which the circumstances have allowed the subject of files to successfully invoke exemption 6 is *Providence Journal Co. v. FBI*, 460 F. Supp. 762 (D.R.I. 1978), *rev'd on other grounds*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). See *infra* notes 91-98 and accompanying text.

⁷⁸ This problem is made particularly crucial by the apparent fact that: Some agencies have reorganized their files in an effort to subvert or avoid Privacy Act requirements. It has been reported that particular organizations no longer file certain sensitive information in record systems that are identified by personal information. Record systems which are not identified by data personal to the subject are not covered by the Privacy Act. Instead the Act covers information about an individual maintained in a system of records that is accessed by personal identifiers. Critics point out that permitting the Act to be turned on and off by the method of access is an open invitation to agencies to circumvent the Act. Another device used by agencies to avoid Privacy Act requirements is the creation of temporary or informal files. Material that should be placed in permanent files (and that was previously contained in such files) is now maintained informally and/or temporarily to avoid the creation of files subject to Privacy Act regulation. The Department of Justice, for example, no longer has a file for attorney applicants. Instead, resumes and related correspondence are maintained in an informal manner, shuffled from desk to desk and then destroyed when no longer needed.

Belair, *Agency Implementation of the Privacy Act and the Freedom of Information Act: Impact of the Government's Collection, Maintenance and Dissemination of Personally Identifiable Information*, 10 J. MAR. J. PRAC. & PROC. 465, 487 (1977) (footnotes omitted). The author of the above article was a consultant to the Commission on Federal Paperwork for privacy and freedom of information issues.

by his mere participation in such a suit, than he would gain from a favorable court decision.⁷⁹

As a general rule, an individual has standing only to vindicate his own rights, not those of another,⁸⁰ though there are exceptions.⁸¹ It is troubling that in an area so beset with uncertainties, the rights and desires of a person threatened with a possible invasion of his privacy should only have the protection offered by a litigant with interests quite divergent from his own.

It is inherent in this situation that the court, which decides a claim of coverage under exemption 6, runs the risk of conclusively determining the "interests" of an individual quite differently than that individual reasonably would. A claim of "privacy interests" may be used as camouflage for the desires of a party whose interest in concealment of information may well be adverse to the interests of the subject of that information. In addition, courts are forced into the dangerous realm of speculation; in plain terms, they must guess the interests in privacy possessed by the information's subject. The perils of such a situation, which is virtually certain to continue unless a broad right in individuals to bring reverse FOIA suits is recognized, can be illustrated by an examination of two FOIA suits in which rights of privacy were asserted.

In *Metropolitan Life Insurance Co. v. Uesery*,⁸² the District of Columbia branch of the National Organization for Women (D.C. NOW) sought documents relating to D.C. NOW, to various insurance companies' affirmative action programs, submitted by the companies themselves and

⁷⁹ The mere fact that one has brought a suit to prevent the release of personal information may serve to advertise widely the fact that there is information one wants to be kept secret. This was the problem the Supreme Court confronted in *NAACP v. Alabama*, 357 U.S. 449 (1958), wherein the NAACP was permitted to assert its members' rights to anonymity because it would plainly have been ludicrous, and possibly dangerous, to force an individual to step forward and declare that he wished to keep it a secret that he belonged to the NAACP.

⁸⁰ The general rule is usually expressed that "a litigant may only assert his own constitutional rights or immunities." *United States v. Raines*, 362 U.S. 17, 22 (1960). See also *Rakas v. Illinois*, 439 U.S. 128 (1978); *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974); *Alderman v. United States*, 394 U.S. 165 (1969); *McGowan v. Maryland*, 366 U.S. 420 (1961).

⁸¹ The exceptions depend upon the existence of "special circumstances" as in *Barrows v. Jackson*, 346 U.S. 249 (1953) ("a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Id.* at 257.), and *NAACP v. Alabama*, 357 U.S. 449 (1958) (association permitted to assert constitutional rights of members because, in the circumstances of the case in which the central issue was the right to prevent the release of the information that an individual was a member of the NAACP, "[t]o require that it be claimed by members themselves would result in nullification of the right at the very moment of its assertion." *Id.* at 459.). See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁸² 426 F. Supp. 150 (D.D.C. 1976).

reports on the same subject prepared by the government.⁸³ "Upon being informed by the ICS [the Insurance Compliance Staff of the Social Security Administration, to whom D.C. NOW's FOIA request was addressed] of D.C. NOW's request, the insurance companies objected to disclosure, arguing that the documents were exempted under sections (b)(3), (4), (6), and (7) of the Act's exemptions."⁸⁴

Over the companies' objections, the ICS determined to release most of the requested material, deleting "[w]age and salary information, the names, social security numbers, employee identification numbers, and 'other identifying information,' comments revealing the closing or reorganization of a unit or units not already publicly disclosed, and training data revealing entry into a new market."⁸⁵ Subsequently, the insurance companies brought a reverse FOIA action for a preliminary injunction against the release of all the material relating to them, which was consolidated with a suit D.C. NOW had brought before the final administrative determination to compel disclosure.⁸⁶

In determining the applicability of section (b)(6) of the FOIA the court, having determined that some of the material sought constituted "'similar files' in that they reflect[ed] highly personal details about company employees,"⁸⁷ proceeded *de novo* to "balance the severity of the invasion of personal privacy with the public interest in disclosure with a 'tilt' in favor of disclosure."⁸⁸ D.C. NOW claimed "that the public interest will be served by disclosure in that D.C. NOW intends to use the information to further the goals of equal employment opportunity and elimination of discrimination in employment."⁸⁹ The court balanced this claim against the employees' privacy interests, as those interests were presented to the court by the insurance companies. The court found that:

Much of the information, such as that concerning the employee's personal preferences and goals and job performance evaluation has little, if any, relevance to the public interest asserted. Thus

⁸³ *Id.* at 154.

⁸⁴ *Id.* at 154-55 (emphasis added).

⁸⁵ *Id.* at 155.

⁸⁶ *Id.*

⁸⁷ *Id.* at 168. See also *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974).

⁸⁸ 426 F. Supp. at 167. The district court applied the three-part test developed in *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974), and *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971). The test applied is as follows: "(1) the information must constitute personnel, medical or similar files; (2) the disclosure of the information must constitute an invasion of personal privacy; and (3) the severity of the invasion of personal privacy must outweigh the public interest in disclosure." 426 F. Supp. at 166-67. This test, which is similar to that used in other circuits, implies that no information is so private that its release could not be mandated by imperative public interest concerns.

⁸⁹ 426 F. Supp. at 169.

deletion of such information will have no effect on the public interest asserted. Some of such information may be relevant to this public interest. However, the information the disclosure of which this Court feels would result in a substantial invasion of personal privacy constitutes only a very small portion of the information contained in the AAPS. Deletion of this small amount of information should not significantly impair the achievement of D.C. NOW's goal. To the extent that any impairment may result from non-disclosure, the severity of the invasion outweighs such an impairment to the achievement of the public interest.⁹⁰

In a situation such as the one presented in *Metropolitan Life*, the privacy interests of the employees are not as easily discerned as the court indicated. Certainly, the possibility existed that women and minority group employees would choose, if the choice were theirs, that information about them already possessed by their employers and the government be put in the possession of D.C. NOW. If either women or minority group employees, or both, were not receiving the full benefit of affirmative action requirements, the potential benefit to them from disclosure of this fact might reasonably outweigh for them any potential privacy infringements. Potential class actions were stifled by the court's deletion of names for "privacy" reasons. No one knows what the employees saw their interests as being; they were never asked, nor were they represented in the suit. Instead, two self-appointed defenders of their interest, D.C. NOW and the insurance companies, fought to a temporary conclusion a battle whose outcome plainly concerned the employees' welfare. The government's role was virtually that of a neutral stakeholder.

That the interests of the employees in regard to privacy were considered by the court in *Metropolitan Life* is almost accidental. If the insurance companies had not opposed the release of the information requested by D.C. NOW, or had they not been informed of the D.C. NOW request, the employees' interests presumably would not have been raised. The privacy interests of the employees, however, remain the same whether or not advanced by their employers. If an "unwarranted" invasion would take place because of the release of names and personal data, that invasion would take place regardless of the insurance companies' attempt to vindicate their own reverse FOIA claims. A system which determines whether an individual's privacy is to be "unwarrantedly" invaded solely on the basis of whether another party, whose own "privacy" is not necessarily threatened, chooses to assert that individual's interests, requires substantial justification for its existence. Such justification does not seem readily apparent.

In *Providence Journal Co. v. FBI*,⁹¹ the government took a more active

⁹⁰ *Id.*

⁹¹ 460 F. Supp. 762 and 460 F. Supp. 778 (D.R.I. 1978), *rev'd*, 602 F.2d 1010 (1st Cir. 1979).

role. Having learned of the existence of logs and memoranda of an illegal wiretap of an alleged organized crime figure's telephone conversations, a Rhode Island newspaper made an FOIA request for them to the FBI. The paper "intended to publish the documents and to use them as the basis for investigative reporting."⁹² There was reason to believe that at least some of the conversations reported in the documents sought were either with or concerned various Rhode Island public officials.⁹³ The subject of the illegal electronic surveillance, Raymond S. Patriarca, sought to protect his interests by intervening as a defendant. His motion to intervene was strenuously opposed by the government defendant, the FBI.

The FBI claimed that it would adequately assert Mr. Patriarca's privacy interest and that his motion for intervention should be denied. The district court noted, somewhat sardonically:

Mr. Patriarca's reluctance to rely on the Department of Justice to protect his privacy is understandable. Having been the subject of continuous electronic surveillance by the F.B.I. for three years and the object of a successful United States prosecution for, among other charges, the use of the telephone in interstate commerce with the intent to commit murder and to further an unlawful gambling enterprise [citation omitted], Mr. Patriarca need not now rely on any supposed identity of interest between himself and the Government in keeping the fruits of its electronic surveillance confidential."⁹⁴

Both FOIA exemption 6 and exemption 7(c) (an exemption which affords "investigatory records compiled for law enforcement purposes" a protection similar, though not identical, to that afforded by exemption 6: protection against "an unwarranted invasion of personal privacy"⁹⁵) were at issue in the case. Its general posture was that of the standard FOIA case: a private party sought to force disclosure of a governmental file. The public interest at stake was substantial. Access by the newspapers to the products of the surveillance gave every promise of helping to expose the corruption of government officials. It is difficult not to share in the district court's suspicion that the motives of the FBI in preventing disclosure were separate and apart from those of Mr. Patriarca in seeking to intervene. Patriarca sought to prevent the details of his private life from becoming public and to prevent the revelation of possible wrongdoing on his and his associates' part. The FBI was seeking to prevent the revelation of the extent of its own wrongdoing and to prevent possible embarrassment occasioned by the inevitable publicity attendant upon the release of their illegally acquired information.⁹⁶

⁹² 460 F. Supp. at 764.

⁹³ *Id.*

⁹⁴ *Id.* at 766.

⁹⁵ 5 U.S.C. § 552(b)(7)(C) (1976).

⁹⁶ "For it [disclosure] might show the public that the F.B.I.'s reliance on illegal surveillance techniques altogether foreclosed its obtaining admissible

The district court allowed Mr. Patriarca to intervene in this matter in which large portions of the requested information dealt with details of Mr. Patriarca's personal and family life.⁹⁷

Mr. Patriarca has a particular, unique interest with regard to the logs and memoranda which differs from the more general interest which the Government has in protecting privacy and fulfilling its obligation under FOIA. The personal nature of the privacy interest makes intervention especially appropriate; *denial of intervention with the resulting dependence on the Government is especially onerous. No one can better assert an interest in personal privacy than the person whose privacy is at stake.*⁹⁸

Despite the fact that "the person whose privacy is at stake" has the most powerful motivations to maintain his privacy and is the party most likely to force an adequate consideration of his rights, only an individual of unusual perseverance will manage to be heard when intimate facts contained in a file not covered by the Privacy Act are to be revealed. In fact, if the government chooses not to oppose the release of such information following the FOIA's "general disclosure" principle, the affected person may not know that intimate facts have become "public knowledge" until after disclosure. In many respects, most of the American public is in Mr. Patriarca's position. They too have been the subject of wide-ranging and sometimes wrongful surveillance by the government. They too are asked to trust the protection of their privacy interests to the government whose actions created the threat of invasion. Americans should not be required to "rely on any supposed identity of interest between [themselves] and the government." The interests of the government are not those of the individual. A government agency may well be indifferent, or even hostile, to the privacy interests of the subjects of its files. The general advice of our Constitution is not to "rely upon the government to protect your rights;" instead, it is to "rely upon your rights to protect yourself from the government." If there is no constitutionally-based right to protect individuals from unwarranted government revelations of their private affairs, then the privacy of every citizen is at the mercy of chance. Absent a constitutional right, the protection of privacy would depend upon the discretion of a bureaucracy which is given incentive to release information by the consequent freedom from lengthy FOIA litigation and which possesses no powerful counter-incentive to cherish and protect privacy.⁹⁹

evidence of crimes. Disclosure might also show other failures of investigation and prosecution." 460 F. Supp. at 773.

⁹⁷ 460 F. Supp. at 789-90.

⁹⁸ 460 F. Supp. at 766 (emphasis added).

⁹⁹ The FOIA provides for a suit in federal district court to be brought by an unsuccessful FOIA requester seeking that the agency in question be enjoined from withholding the requested records. 5 U.S.C. § 552(a)(4)(B) (1976). The proceedings are to be expedited. *Id.* at § 552(a)(4)(D). If the complainant "has substantially

VI. THE FIRST AMENDMENT AS A SOURCE OF STANDING FOR THE REVERSE FOIA LITIGANT

At first glance, it may seem anomalous to press the first amendment into service in the cause of suppressing information. After all, the principle guardian of the right to free speech is traditionally thought of as guaranteeing speech, not as imposing silence. Nonetheless, the right of free speech is itself endangered if private information is given undesired and unnecessary publicity. As indicated below, such "freedom of association" cases as *NAACP v. Alabama*¹⁰⁰ recognized that publicity given to certain facts can powerfully inhibit the rights protected by the first amendment.

According to the philosopher and legal theorist Alexander Meiklejohn: "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned not with a principle right, but with a public power, a governmental responsibility."¹⁰¹ This "freedom of thought and communication" can only be effective if some right of privacy is included in the guarantees of the first amendment. The governing process covers more than the political activities and actions by which the State is ruled, policy is chosen, leaders are elected. The right to take part in the governing process includes the right of self-government: the right to make up one's mind; to make an informed choice regarding legal options. Meiklejohn's analysis does not go far enough. The first amendment must secure the power of individual self-governance or the "public power" it guarantees is meaningless. It is paradoxical to speak of the right to make political choices if the right to make personal choices is unprotected.

NAACP v. Alabama is typical of a line of Supreme Court cases recognizing both a right and a need to keep information secret in certain circum-

prevailed" the court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred" *Id.* at § 552(a)(4)(E).

The Privacy Act of 1974 provides for suits only when *its* provisions are violated and thus does not provide for an action brought to prevent the release of information about an individual not contained in a Privacy Act "system of records." *Id.* at § 552(a)(G).

The likelihood of a standard FOIA suit being brought to force a release of information when a request is refused, combined with the large volume of access requests being handled by a federal bureaucracy in difficult economic times, makes it probable that an agency will make the considerable effort required to protect individual privacy threatened by material in files not covered by the Privacy Act only when the agency's institutional interests are implicated. In short, other factors being equal, an agency will cause itself more trouble and expenditure of resources by refusing to release requested information than by complying with the request.

¹⁰⁰ 357 U.S. 449 (1978).

¹⁰¹ Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

stances in order to protect first amendment values. In *NAACP v. Alabama*, the State of Alabama sought the membership lists of the Alabama branch of the National Association for the Advancement of Colored People. Fearing, among other things, that the membership lists might become public and expose its membership to reprisals, the NAACP refused to supply the lists to the state. The Supreme Court upheld the NAACP's refusal, noting that "[t]his Court has recognized the vital relationship between freedom to associate and privacy in one's associations."¹⁰²

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech Of course, it is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious or cultural matters¹⁰³

In *NAACP v. Alabama* and such successor cases as *Shelton v. Tucker*¹⁰⁴ and *Bates v. Little Rock*,¹⁰⁵ the Court recognized both the intimate relation between first amendment rights of free speech and privacy, as well as the dangers posed to free speech by the possibility that the state may publicize private facts. These cases dealt with the private fact of membership in a controversial association. There seems to be no reason why the principle does not extend to the revelation of other private facts as well. The possibility that the government will reveal that a person informed on his colleagues, flunked out of college or authored the screenplay for a pornographic movie, serve as examples of titillating facts which might be revealed in response to an FOIA request. While the public may be interested in such facts, in terms of monitoring the government the revelation of such facts normally will not serve the public interest.

Just as the possibility that an individual's membership in the NAACP might be revealed chilled the self-governing rights of that organization's members, the possibility that the information about individuals contained in government files may be released to *any* applicant chills the ability to conduct life and make choices between various legal options. The FOIA, without a strongly based individual right of action for the reverse FOIA litigant, means that *any* action taken at *any* point in an individual's life may someday be revealed. The information may come into government hands from innumerable routes. Former employers, colleagues, acquaintances or associates may respond to government queries. Even if the government is not making a particular effort to discover facts about a given individual, the sheer magnitude and variety of information collected

¹⁰² 357 U.S. at 462.

¹⁰³ *Id.* at 460.

¹⁰⁴ 364 U.S. 479 (1960).

¹⁰⁵ 361 U.S. 516 (1960).

by the government means it *will* have information about most American citizens. Much of this information will be in files not covered by the Privacy Act. The inhibiting effect of an ever-present possibility that any act or expression by a private individual may someday be released by the government into the public domain is necessarily devastating to first amendment values.

*Whalen v. Roe*¹⁰⁶ was the occasion for a serious analysis of privacy interests by the Supreme Court. The case concerned a New York statute which mandated the creation and preservation for five years after the event, of a state maintained record of every prescription of a "dangerous" drug, complete with the name and address of its user and the prescribing doctor.¹⁰⁷ Extraordinary measures had been taken by the state to preserve the confidentiality of the information obtained under the statute, including steel fences, barriers to illicit attempts to "eavesdrop" by means of computer technology, and criminal penalties for the revelation of the identities of the subjects of the records.¹⁰⁸

Given the circumstances of the case, the serious problem with which the statute dealt (abuse of dangerous drugs) and the extraordinary precautions New York State had taken, Justice Stevens, writing for the Court, found the statute to be constitutional.

Recognizing that in some circumstances that duty [to avoid disclosures of personal information] arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedure, evidence a proper concern with, and protection of the individual's interest in privacy. . . . We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.¹⁰⁹

First amendment rights, of course, only restrict the states through the fourteenth amendment. Justice Brennan, Meiklejohn's foremost proponent on the Court,¹¹⁰ stated in concurrence that "[t]he Court recognize[d] that an individual's interest in avoiding disclosure of personal matters is an aspect of the right of privacy."¹¹¹

In *Whalen*, no right was invaded because the State had taken extreme precautions to prevent the revelation of a private fact: that an individual is taking "dangerous" drugs. The revelation of such a fact might cause

¹⁰⁶ 429 U.S. 589 (1977).

¹⁰⁷ *Id.* at 593.

¹⁰⁸ *Id.* at 594-95.

¹⁰⁹ *Id.* at 605-06.

¹¹⁰ Meiklejohn's influence on Justice Brennan is plainly discernible in Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). See also Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974).

¹¹¹ 429 U.S. at 606.

harm to its subject, in regard to his employment, social life and reputation. Unlike the New York statute in *Whalen*, however, the FOIA does not take precautions against invasions of privacy caused by the revelation of facts in the government's possession. Indeed, its sole purpose is disclosure; the only "protection" given to privacy is the rather flimsy shield of agency discretion if the projected invasion of privacy is *clearly* unwarranted.¹¹²

The two-stage conceptualization of freedom of expression proposed by the author of the article, *Privacy in the First Amendment*,¹¹³ is useful here.

Although the Court has never set out the elements of the free-expression system, its operation would seem to require two separate stages. Transmission of information from speaker to listener is only the first; the second is the application of that information—in the mind of the person who receives it—to the individual decisions of self-governance

Both stages of the process are needed to achieve what, in the Court's view, the Constitution envisions: free individual choice by each citizen. Yet the Court, in applying its concept of a system of free expression, has concerned itself almost solely with the first stage of that system—the process of communicating information from speaker to listener. In the context of that first stage, the Court has recognized that participation of individuals in a free-expression system can be inhibited, or chilled, in a variety of ways and that the result is to diminish the self-governing rights of at least those individuals.¹¹⁴

Both stages are implicated in the reverse FOIA situation. In the first stage, there is a direct chilling effect on speech itself which arises out of the possibility that the contents of expression will be stored in government files for subsequent release. The second stage right, however, may even be more significant. The right to speak is of little value if there is not a right to listen and reflect.

This second stage right, which is related to the right of privacy as "control of information about oneself," has been presented to the Court in such cases as *Laird v. Tatum*¹¹⁵ and *Nixon v. Administrator of General*

¹¹² The careful balancing performed by the Supreme Court in the line of "public figure/defamation" cases from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and beyond is yet another example of the close relation between rights of speech and rights of privacy. The first amendment rights of the press were weighed in those cases against the first amendment rights of the parties claiming defamation. That the "information" involved was false seemed to shift the balance a bit away from the press. That a party was a "public figure" and, in some sense, had courted publicity, served to shift the balance the other way.

¹¹³ Comment, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973).

¹¹⁴ *Id.* at 1464.

¹¹⁵ 408 U.S. 1 (1972).

Services.¹¹⁶ Often, as in *Laird*, where individual litigants declared themselves to be "chilled" in their exercise of first amendment rights by the mere existence of a system of Army surveillance of citizens' activities, the claim has failed because the Court has not discerned that the litigants have suffered the "injury in fact" required for them to have standing. Yet, if there is such a right based upon the first amendment as posited here, a reverse FOIA suit may be the more appropriate forum to raise it.

In a reverse FOIA suit, the plaintiff is claiming that he is threatened by a direct and personal injury. The loss of privacy may have economic consequences and damage reputations. An unwarranted invasion of privacy has long been recognized as the basis for a tort action. A court in a reverse FOIA suit may examine the contested material *in camera*. With a concrete set of facts and real injury threatened, a court can properly balance the competing constitutional rights. Additionally, equity powers can be used to carve out a result reasonably protecting the rights of all interested parties.

In the context of Professor Doe's reverse FOIA suit, a claim that his first amendment right of informational privacy is threatened by the proposed release of the file containing information from and about him seems to have substance. The threat to his interests is material: economic loss since his teaching career might be damaged by the release of information, as well as damage to his right to associate since others may be repelled by the intimate facts learned about him. The "concrete injury" which Doe may suffer is far greater than that alleged by the unsuccessful plaintiffs in *Laird*¹¹⁷ and *United States v. Richardson*.¹¹⁸ Indeed, the privacy rights of the chairman of Doe's department are also implicated. If the information Doe gave the Department of Education is revealed, pursuant to the FOIA request, the chairman will, in effect, be punished without having an opportunity to present a defense, unless he possesses his own reverse FOIA right of action.¹¹⁹

At least one court has held that the Privacy Act of 1974 and the FOIA are to be read and construed together.¹²⁰ The Privacy Act itself recognizes the relationship between privacy and the first amendment in its prohibition of governmental information gathering on first amendment activities except in extraordinary circumstances. The Act reads in pertinent part:

¹¹⁶ 433 U.S. 425 (1977).

¹¹⁷ 408 U.S. 1 (1972).

¹¹⁸ 418 U.S. 166 (1974).

¹¹⁹ It will, indeed, be a case of locking the barn after the horse is stolen for the chairman to bring his reverse FOIA action after the information is released. Even if he *can* justify his action, his explanation seems unlikely to catch up to the mildly scandalous revelation.

¹²⁰ *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *see also Painter v. FBI*, 615 F.2d 689 (6th Cir. 1980).

Each agency that maintains a system of records shall . . . (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement authority.¹²¹

This is especially significant as it indicates first amendment roots for a "right" of informational privacy in the context of a statute including congressional recognition that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States."¹²²

What constitutes "a record describing how any individual exercises rights guaranteed by the First Amendment" is not entirely clear. If construed as including even incidental descriptions of expressive actions (in files whose primary focus is not upon expression as such), it might exclude most descriptions of what citizens do, with the trivial exception of those expressive actions which might be characterized as "obscenity" or as "fighting words."¹²³ Plainly, Congress did not, in passing the Privacy Act, intend to create such an extreme limitation of the information which might be gathered by the federal government. The ambiguity of the Privacy Act's provision, along with the difficulty of its being effectively enforced, seems likely to reduce its impact and make it little more, legally, than a congressional endorsement of the first amendment.

The acceptance of the above analysis would not, of course, mean that Doe would necessarily succeed in having the information about him suppressed, or even having identifying factors deleted. When constitutional rights clash (and there would seem to be a first amendment right assertable by the information-requester here) there must be a balancing. "The Constitution, in other words, establishes the contest, not its resolution."¹²⁴

¹²¹ 5 U.S.C. § 552(a)(e)(7) (1976).

¹²² Privacy Act of 1974, 5 U.S.C. § 552a note (1976).

¹²³ The Supreme Court has never receded from Justice Murphy's statement in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), that

[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72. While one might take issue with the phrase "well-defined," especially in terms of recent obscenity decisions, there can be no question that the classes of expressive conduct not protected by the first amendment are, indeed, "narrowly limited."

¹²⁴ Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975).

VII. THE FOURTH AMENDMENT AS A SOURCE OF STANDING
FOR THE REVERSE FOIA LITIGANT

In the 1967 decision of *Warden v. Hayden*,¹²⁵ Justice Brennan stated for the majority that: "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers based on property concepts."¹²⁶ Later that same year, in the landmark *Katz v. United States*¹²⁷ decision, the Court, while finding that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,' "¹²⁸ established a test for fourth amendment protection which rested on privacy principles:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted]. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹²⁹

Since *Katz*, the Supreme Court has applied the "reasonable expectation of privacy" test derived from Justice Harlan's concurrence in that case. "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "¹³⁰ This requirement of actual expectation seems to be antithetic to the spirit of the *Katz* decision. It is odd, to say the least, to deny the application of *Katz* to a person in a coma, though such an individual may well have, for the moment, no actual expectations.¹³¹

¹²⁵ 387 U.S. 294 (1967).

¹²⁶ *Id.* at 304.

¹²⁷ 389 U.S. 347 (1967).

¹²⁸ *Id.* at 350.

¹²⁹ *Id.* at 351 (citations omitted).

¹³⁰ *Id.* at 361.

¹³¹ An actual subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and we were all forthwith being placed under comprehensive electronic surveillance.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

Professor Amsterdam noted that Justice Harlan had second thoughts about his formulation in *Katz*: "The analysis must, in my view, transcend the search

The Supreme Court has handed down many fourth amendment decisions since 1967 and its view of the extent of coverage afforded by the amendment has narrowed. In *Katz*, Justice Black, the lone dissenter, based his dissent on his belief that the fourth amendment by its terms covered only tangible things, *i.e.*, things which were physical and therefore capable of being "particularly described" for purposes of a warrant and being "seized." Mr. Katz's telephone conversation, which agents overheard by "bugging" his phone with a "bug" placed outside the booth, was simply not tangible enough to be the subject of a "search" or "seizure" and was therefore outside the coverage of the fourth amendment.¹³² While it has not yet reached so literalist a position, the Supreme Court of late has unquestionably been less inclined to see the language of the fourth amendment as "the skin of the living thought that dwells within."¹³³

Still, whether they are the essence of fourth amendment protections or merely the result of ingenious judicial constructions beginning with *Ex Parte Jackson*¹³⁴ and *Boyd v. United States*,¹³⁵ privacy concerns now seem to be an inextricable ingredient in fourth amendment analysis. In this regard, it is important that the fourth amendment does not speak solely to criminal investigations. Rather, it protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."¹³⁶ The majority of government searches and seizures which result in court decisions are indeed related to criminal or quasi-criminal investigations, but this is not of decisive import. Unfortunately, the large number of cases concerning the exclusionary rule, and their controversial nature, seem to obscure the role the fourth amendment can play outside the criminal context.

Thus, in *Providence Journal Co. v. FBI*,¹³⁷ Chief Judge Pettine noted that most of the recent Supreme Court fourth amendment cases have dealt with the peculiar circumstances surrounding the application of the exclusionary rule and have involved difficult decisions weighing the deterrent effect of the rule on police misconduct against the social costs of excluding otherwise probative evidence from criminal trials.

The Court has, by and large, not addressed the general rule,

for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of the laws that translate into rules the customs and values of the past and present." *United States v. White*, 401 U.S. 745, 786 (1971) (dissenting opinion). See also *Smith v. Maryland*, 442 U.S. 735 (1979) (Marshall, J., dissenting).

¹³² 389 U.S. 347, 364-67, 372 (1967).

¹³³ *Amsterdam*, *supra* note 131, at 433.

¹³⁴ 96 U.S. 727 (1877).

¹³⁵ 116 U.S. 616 (1886).

¹³⁶ U.S. CONST. amend. IV.

¹³⁷ 460 F. Supp. 762 (D.R.I. 1978), *rev'd on other grounds*, 602 F.2d 1010 (1st Cir. 1979).

derived from the reasonableness clause, which protects the privacy of life and a person's self-respect by preventing the use of information for impermissible governmental objectives, and by preventing the disclosure of private information obtained by searches so broad and improper, in method, scope or purpose, that no warrant could ever issue to authorize them.¹³⁸

The *Providence Journal* case concerned the efforts of the FBI and the subject of an illegal wiretap to prevent the release of logs and memoranda of tapped conversations to a newspaper which intended to publish and use them as the basis for investigative reports on organized crime. The district court stated that "the recent Supreme Court cases, while instructive on the deterrent rationale, do not foreclose this Court's protecting private information under the fourth amendment."¹³⁹ In the particular circumstances of *Providence Journal*, the Court found that the subject had waived his fourth amendment right to prevent disclosure by allowing eleven years to lapse after he learned of the tap and the records thereof before he attempted to make use of available remedies to have the relevant records sealed.¹⁴⁰

While still haunted by property concepts, the Supreme Court sometimes seems willing to almost turn the fourth amendment on its head. That is, instead of examining the circumstances to determine if there was a search and/or seizure and then, if there was one, whether it was "unreasonable," the Court has first decided that something "unreasonable" has occurred and then characterized that something as a search or seizure and therefore forbidden by the fourth amendment. Justice Brennan's majority opinion in *Warden v. Hayden*¹⁴¹ characterized the decision in *Silverthorne Lumber Co. v. United States*¹⁴² as follows: "Recognition that the role of the fourth amendment was to protect against invasions of privacy demanded a remedy to condemn the seizure of *Silverthorne*, although no possible common law claim existed for the return of the copies made by the government of the papers it had seized."¹⁴³ In other words, because there had been an invasion of privacy, the fourth amendment was to be construed as providing relief. In Professor Amsterdam's view, "*Katz* held, as *Boyd* had, that whatever 'is a material ingredient and effects the sole object and purpose of search and seizure' is a search and seizure in the only sense that the Constitution demands."¹⁴⁴

If "the role of the Fourth Amendment . . . [is] to protect against inva-

¹³⁸ 460 F. Supp. at 773 n.29.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 774-75.

¹⁴¹ 387 U.S. 294 (1967).

¹⁴² 251 U.S. 385 (1920).

¹⁴³ 387 U.S. at 305.

¹⁴⁴ Amsterdam, *supra* note 131, at 384 (footnote omitted) (*quoting Boyd v. United States*, 116 U.S. 616 (1886)).

sions of privacy," its role in the reverse FOIA suit is plain. It should be irrelevant that the invasions of privacy caused by the government will result from compliance with the FOIA policy of full disclosure, rather than from police activities. Just as "[p]rivacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruits or contraband,"¹⁴⁵ it is disturbed no less by an invasion by the government in aid of "the public's right to know" than by one in aid of the detection, punishment, or prevention of crimes. Although the government may have initially acquired the private information pursuant to some legitimate governmental objective, the unreasonableness of releasing information when such a release causes an unwarranted invasion of privacy is not altered. It would seem incontestable that the same information which could be reasonably sought for the purpose of convicting a person of dealing in drugs could not be reasonably sought by the government for the sole purpose of being leaked to the press in order to discredit an individual's political views.¹⁴⁶

The damage which can be done by disclosing intimate facts about an individual's life is evident from such cases as *Sidis v. F-R Publishing Corp.*¹⁴⁷ in which *The New Yorker* magazine published a "profile" of a reclusive former child prodigy, who committed suicide shortly after losing his case against them for invasion of privacy, and *Briscoe v. Reader's Digest Ass'n*, where the California Supreme Court addressed the "consequences of revelations [that the petitioner had a criminal past] in this case—ostracism, isolation, and the alienation of one's family"¹⁴⁸

An argument likely to be raised against the above analysis and claim that FOIA-based release of information can give rise to an invasion of privacy forbidden by the fourth amendment, is that there is simply no "privacy" to be invaded under the circumstances. All information in government hands is, in a sense, "public information." What is more, the privacy of an individual as to information possessed by the government has already been breached, either by himself or someone else who has given this information to the government. The fourth amendment gives no protection to a person against a "friend" who supplied information to the government, *Hoffa v. United States*;¹⁴⁹ or against an informant wired

¹⁴⁵ *Warden v. Hayden*, 387 U.S. 294, 301 (1967). In *Warden*, the "mere evidence" rule, which distinguished the instrumentalities or fruits of a crime, contraband and weapons by which the escape of an arrested person might be made, which could be seized, from "merely evidentiary material," which could not be validly seized, even under a search warrant, was found not to be required by the fourth amendment. The analysis used by Justice Brennan, in his opinion for the Court, focused on the severity of potential invasions of privacy as the key to determining the applicability of the amendment.

¹⁴⁶ For an incisive discussion of this point see Amsterdam, *supra* note 131, at 372-74, 434-39, and the cases cited therein.

¹⁴⁷ 113 F.2d 806 (2d Cir. 1940).

¹⁴⁸ 4 Cal. 3d 529, 542, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971).

¹⁴⁹ 385 U.S. 293 (1966).

for sound by the government, *United States v. White*,¹⁵⁰ or against the telephone company making, at government request, a list of all the telephone numbers a person dials, *Smith v. Maryland*,¹⁵¹ or against a bank being required to keep a record of depositor's transactions, *California Bankers Ass'n v. Shultz*,¹⁵² or against a bank revealing these records to government agents, *United States v. Miller*.¹⁵³

The *Miller* decision is especially interesting in this regard. There, an alleged "moonshiner" was protesting a subpoena of records of his banking transactions which his banks had kept in accordance with the requirements of the Bank Secrecy Act.¹⁵⁴ The Supreme Court found that Congress had assumed, in passing the Bank Secrecy Act, that there was no legitimate expectation of privacy in bank records. "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government."¹⁵⁵ Here, as in *California Bankers* and various other fourth amendment decisions, the Court seemed to use an over-simplistic "all-or-nothing" notion of privacy. Once an individual lets information about himself slip from his exclusive possession, without some express and reasonable assurance of confidentiality, at least so long as it is his privacy as to that information is relinquished.¹⁵⁶

The model of privacy used by the Court in these cases cannot be reconciled with the *Katz* "reasonable expectations" test. It is untrue that our society considers it the only reasonable course to treat all friends and acquaintances as actual or potential government "agents." If every bit of personal data is revealed at one's peril and there is then no further

¹⁵⁰ 401 U.S. 745 (1971).

¹⁵¹ 442 U.S. 735 (1979).

¹⁵² 416 U.S. 21 (1974).

¹⁵³ 425 U.S. 435 (1976).

¹⁵⁴ 12 U.S.C. § 1829b(d) (1976).

¹⁵⁵ 425 U.S. at 443.

¹⁵⁶ This approach is typified by such decisions as *Smith v. Maryland*, 442 U.S. 735 (1979), where the Court determined that no reasonable expectation of privacy was violated when the telephone company turned over to federal investigators the records of telephone numbers dialed from a criminal suspect's telephone; a telephone user was aware of the fact that the numbers he dialed might be recorded by the telephone company for billing purposes. *See also* *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 93 (1974) (Marshall, J., dissenting). Justice Marshall reaffirmed his view in his dissenting opinion in *Smith v. Maryland*, 442 U.S. 735, 749-50 (1979), where he said:

Privacy is not a discrete commodity, possessed absolutely or not at all. . . . In my view, whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society. By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility.

Id.

control over its dissemination, then privacy can only be maintained at a cost of absurd and anti-social secrecy. Only in a police state is such a course the sole "reasonable" one.

A powerful implicit criticism of the "all or nothing" view can be found in *Burrows v. Superior Court of San Bernardino County*.¹⁵⁷ In *Burrows*, the California Supreme Court construed the California Constitution's equivalent of the fourth amendment according to the principles of *Katz*. The case involved the acquisition of a lawyer's financial statements from his bank without a warrant or court process. In determining that the lawyer's reasonable expectations of privacy had been frustrated, the court, per Chief Justice Mosk, stated:

The mere fact that the bank purports to own the records which it provided to the detective is not, in our view, determinative of the issue at stake. The disclosure by the depositor to the bank is made for the limited purpose of facilitating the conduct of his financial affairs; *it seems evident that his expectation of privacy is not diminished by the bank's retention of a record of such disclosures. . . . It is not the right of privacy of the bank but of the petitioner which is at issue, and thus it would be untenable to conclude that the bank, a neutral entity with no significant interest in the matter, may validly consent to an invasion of its depositors' rights.*

. . .
For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor may reveal many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography. . . . To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy or other traditional requirements of legal process, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power.¹⁵⁸

In a reverse FOIA situation, there are certain striking resemblances to the circumstances dealt with by Chief Justice Mosk. Just as it is "impossible to participate in the economic life of modern society without maintaining a bank account," thereby giving the bank a "virtual current biography," so is it impossible to participate in life in the United States

¹⁵⁷ 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1975).

¹⁵⁸ *Id.* at 244, 247, 529 P.2d at 594, 596, 118 Cal. Rptr. at 170, 172 (emphasis added).

without leaving the materials for a detailed portrait of oneself scattered in the files of various federal agencies.¹⁵⁹ Just as the bank is "a neutral entity with no significant interest in the matter," the federal government is a neutral entity in the reverse FOIA situation. It possesses the information requested but, save for the requirements of the FOIA, it is hard to conceive that the government "cares" whether much of its information is released; whether the requester achieves his interest or whether his interest be prurient, sternly scientific or somewhere in between.

To paraphrase Justice Mosk's reasoning, it is not the right of the federal government, but of the subject of the requested information which is at issue, and thus it would be untenable to conclude that the government, a neutral entity with no significant interest in the matter, may validly consent to an invasion of the subject's rights. Of course, the government does consent in the majority of cases to release the information "without any judicial control as to relevancy or other traditional requirements of legal process."¹⁶⁰

In some ways, the release of information by the government in the reverse FOIA situation is even worse than the release of information by the bank in *Burrows*. The police generally have a socially palatable motive for their searches and seizures, *viz.*, the prevention of crime or the apprehension of criminals. Even so, except in very limited situations, police may only search and seize on the basis of a warrant satisfying fourth amendment requirements. The FOIA requester need go to no neutral magistrate. The slightest whim on his part, or the most vile intent, will serve to support his request. The preservation and extension of "open government" are valuable goals, but are they more important than dealing with crime? Are there truly valid reasons why a citizen's privacy, threatened by a criminal investigation, must be protected by elaborate constitutionally-based procedural requirements, but privacy threatened by an FOIA request, can command only the shaky defenses offered by the Privacy Act? It is submitted here that there are not and the fourth amendment provides a constitutional basis for the protection of privacy

¹⁵⁹ See OFFICE OF MANAGEMENT AND BUDGET REPORT, *supra* note 5. At the end of 1978, more than 100 distinct federal agencies were administering almost 6,000 systems of records on almost 3,652,600,000 individuals. A mere listing of Privacy Act of 1974 "systems of records" as of the end of 1978 occupied 183 closely-printed pages in an appendix to the OFFICE OF MANAGEMENT AND BUDGET REPORT. The individual who could live in the United States and not supply at least the outlines of his life story through his social security filings, applications for government loans or government-approved mortgages, and the countless other materials filed with federal agencies would need to be cautious and wily to an almost unimaginable degree. Some may take comfort in the thought that if our civilization were to perish tomorrow, but our records survive, future archeologists would be able to reconstruct our individual daily lives in great detail.

¹⁶⁰ *Burrows v. Superior Court*, 13 Cal. 3d 238, 247, 529 P.2d 590, 596, 118 Cal. Rptr. 166, 172 (1975).

and should be construed as providing standing for the reverse FOIA litigant.

Part of the reason the Supreme Court has seemed to take a somewhat narrow view of the privacy protections of the fourth amendment is because they are often invoked in situations in which the fourth amendment is advanced to support the exclusion of otherwise probative evidence in a criminal trial which has a large social cost. The Court has narrowly focused on the "wrongdoer" in such cases as *Hoffa* where the Court indicated that: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a *wrongdoer's* misplaced belief that a person to whom he confides his wrongdoing will not reveal it";¹⁶¹ and *United States v. White* where the Court stated that: "If the law gives no protection to the *wrongdoer* whose trusted accomplice is or becomes a police agent, *neither should it protect him* when that same agent has recorded or transmitted the conversations . . ."¹⁶² This narrow focus tends to distort the view of the fourth amendment. Of course, the "wrongdoer" should not be protected. The unhappy fact is, however, that there seems to be no way that the ordinary law-abiding citizen can enjoy his right to privacy unless the wrongdoer receives incidental benefits. The entire purpose of the fourth amendment is skewed when treated as dealing with only two classes: wrongdoers and police. The principles which underlie the fourth amendment, as was understood as long ago as 1765 in *Entick v. Carrington*,¹⁶³ underlie the "right to be let alone" which is basic in a democratic society. This right is threatened by the denial of reverse FOIA standing under current interpretations of the law.

Returning to the hypothetical situation, both Professor Doe and the chairman of his department have assertable fourth amendment rights in regard to the proposed release of the Xanth University file. It is arguably unreasonable for the government to divulge the fact Doe is a cult member, and, though somewhat less so, that the chairman misused his grant. Only by a balancing of the public interest in the various facts contained in the file can the issue of "unreasonableness" be determined.

VIII. CONCLUSION

Of the two amendments considered, the fourth, on the whole, is a more likely source for the "plus" factor in the *Chrysler v. Brown* "10(a) plus" formula than the first amendment, in regard to a non-commercial reverse FOIA litigant such as Professor Doe. The connection between the first amendment's protection of free speech and Doe's claim of a right to prevent the government from releasing information he had supplied is real, but perhaps too attenuated. After all, it might be argued, Doe knew of

¹⁶¹ 385 U.S. 293, 302 (1966) (emphasis added).

¹⁶² 401 U.S. 745, 752 (1971).

¹⁶³ 19 How. St. Tr. 1029 (1765).

the possibility, or should have known, that his information might be the object of an FOIA request when he supplied it to the government. He made a "self-governing" choice in supplying it and should not now be heard to protest the result. Nonetheless, this leaves open the questions of whether the information was supplied in a fully voluntary manner, and of the effect of the first amendment on the release of information about a subject when the information was not supplied *by* the subject. An example of this would be the position of Doe's chairman. At the very least, first amendment interests are *implicated* by the release of information by the government.

The fourth amendment offers protection against government actions which invade *reasonable* expectations of privacy. This "reasonableness" cannot be based on subjective expectations. If it was, as has been often pointed out, the government could make all searches and seizures "reasonable" simply by making frequent announcements that, in the future, it would routinely carry out extensive spying operations against anyone suspected of anything. It is absurd to suppose that Mr. Katz, with a shrewd suspicion that his phone booth might be bugged, should have fewer rights than Mr. Katz without such a suspicion.

Thus, "reasonable expectations of privacy" means expectations of privacy which are accepted by society as ones a member *ought* to have. In this sense, the expectations an individual has that the government will not broadcast the information it has about him is a reasonable expectation of privacy, entitled to fourth amendment protection.

It is unnecessary to show here that there is a pure first or fourth amendment right of action to enjoin the release of private information. All *Chrysler* demands is the possibility that the proposed information release be wrongful, not that its release, but for FOIA, would create a private right of action. This possibility of wrongdoing is supplied by the potential for invasion of the right of informational privacy protected by both amendments in the service of the basic right of self-governance.

The first and fourth amendments overlap in the area of informational privacy. At the root of them both is the notion of a right to be let alone. This right to be let alone is seriously devalued by the possibility FOIA presents of everyone knowing everything about everyone else. If there is no right of action requiring the demands of privacy to be balanced against the urgent requirements of public monitoring of the government, all must live with the constant and inhibiting awareness of the possibility of our most intimate secrets becoming widely known. It is against having to live with such an awareness that the privacy guarantees implicit in the first and fourth amendments must be employed.

