

# The Freedom of Information Act: An Historical Examination of the First Exemption in Legislation and Litigation

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The first legislative attempt to guarantee citizens the right of access to agency organization, procedures, and rules was the Federal Administrative Procedure Act of 1946.<sup>1</sup> Specifically, chapter 324, section 3, entitled "Public Information," dealt with materials to be published and exceptions to these rules. Congress subsequently discovered that the Act was being used more as a means of withholding information than of revealing it. For more than ten years the Public Information Section was cited by agencies as authority for withholding information. Twenty-four separate terms—apart from "Top Secret," "Secret," and "Confidential"—were spawned during this period, terms ranging from "Official Use Only" to "Limitation on Availability of Equipment Files for public Service."<sup>2</sup> In 1965, in response to a Congressional survey, ten agencies and cabinet level departments cited the Act as authority for withholding documents.<sup>3</sup>

The Public Information Section encouraged abuse, for the language was vague and all-encompassing. Materials exempted were those which "required secrecy in the public interest," were "related solely to the internal management of an agency" or were "held confidential for good cause found." Those entitled to access to information were "persons properly and directly concerned."<sup>4</sup>

In the 86th and 87th Congresses eight bills were introduced to correct these and other deficiencies. Although interest was

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aroused and some hearings held, none received serious treatment. On 4 June 1963, two bills were introduced in the Senate. One, S. 1666, sought to amend section 3 of the Administrative Procedure Act. The bill proposed "to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language, and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld."<sup>5</sup> This bill was revised and in the next congressional session S. 1160 was passed by both the House and the Senate.

As stated previously, the Freedom of Information Act of 1966 attempted to correct many of the defects inherent in the Public Information Section of the Administrative Procedure Act. The phrase "persons properly and directly concerned" was replaced by subsection (f) of the Freedom of Information Act which made information available to all. Subsection (c) was added specifying judicial jurisdiction and procedure. The District Court of the U. S. in the district where the plaintiff resides or has his principal place of business has jurisdiction. The Court was required to determine the matter *de novo* with the burden being placed on the agency to sustain its action. Subsection (b) of the Administrative Procedure Act permitted an agency's orders and opinions to be withheld if the material is required to be held "confidential for good cause." The Freedom of Information Act deleted this general provision and substituted nine categories of materials which might be exempted from disclosure.<sup>6</sup>

Clearly, the Freedom of Information Act was an advance over the Administrative Procedure Act in terms of the goal of full disclosure; yet it left much to be desired. The exemptions which have been the focus of much litigation were awkwardly drawn, forcing the courts to define their meaning and application.<sup>7</sup>

Perhaps the most contested issue concerned the articulation between the exemptions and the remainder of the Act. While it is stated that "the provisions of this section shall not be

applicable to matters that are [exempted]," it is also stated that the District Court "shall have the jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant."<sup>8</sup> This and other problems warrant closer attention for the strength of the Act rests largely on the interpretation given the exemptions. I have therefore chosen to examine the first exemption of the Freedom of Information Act to determine its fate in the courts and in subsequent legislation.

Exemption one states: "[the provisions of this section shall not be applicable to matters that are] specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."<sup>9</sup>

Chronologically, the first case and one of the most important was *Epstein v. Resor*.<sup>10</sup> Julius Epstein, an historian, sought a file from the Department of the Army entitled *Forced Repatriation of Displaced Soviet Citizens—Operation Keelhaul*. The file, which was generated by the Allied Force Headquarters during World War II, had been classified "Top Secret" since 1948. Accordingly, the Department of the Army denied Epstein's request for the file, and he filed a suit.

District Judge Oliver Carter in his memorandum tacitly acknowledged the conflict between the exemptions and the other sections in attempting simultaneously to apply and not apply section (a) (3) to them. With regard to this provision, which states that the court has the power to determine *de novo* the merits of the classification, Carter stated: "The Court is of the opinion the Congress did not intend to subject such classifications to judicial scrutiny to that extent."<sup>11</sup> He went on to state that "To hold that agencies have the burden of proving their action proper even in areas covered by the exemptions would render the exemption provision meaningless. If a determination *de novo* is made by this Court on whether the 'Top Secret' classification by the Department of the Army is proper, with the burden on the Secretary to sustain its action, the Court would be giving identical treatment to information with-

held by an agency whether it fell within the exemption or not. Apparently, Congress did not intend such a result."<sup>12</sup> But he stated that "it is equally without merit to say that Congress intended absolutely no effect by the Act on information that falls with the areas covered by the exemptions. The District Courts at least have jurisdiction to determine whether the exemption applies in a given situation.... It is reasonable to say that Congress intended the courts to determine whether classification within the first exemption is clearly arbitrary and unsupported." <sup>13</sup>

Judge Carter believed that the criterion for applicability of an exemption to a document was a determination of whether the classification was capricious. He advocated circumstantial evidence in lieu of *in camera* inspection of the documents as in *U. S. v. Reynolds*.<sup>14</sup> Judge Carter thus accepted an affidavit from Major General Wickersham as evidence that the document was correctly classified and on the basis of this ruled in favor of the defendant. Judge Carter thereby skirted the issue of the applicability of subsection (a) (3) to exemption one by proposing that the section has some control over the exemptions but not as stated in the subsection itself.

In short, Judge Carter set a precedent in forthcoming FOIA cases. He ruled that identical judicial treatment was not to be accorded to exempted and non-exempted documents, that District Courts had jurisdiction to determine whether the exemption applied to a document withheld, that their jurisdiction was in determining whether the classification was clearly arbitrary, and that such determination was to be based on whether the classifier of the document acted capriciously, this to be determined from an affidavit from the defendant which summarized the contents and defended the classification.

The definitive case was *Mink v. Environmental Protection Agency*.<sup>15</sup> In July 1971 an article appeared in a Washington, D. C., newspaper stating that the President had received conflicting recommendations on the advisability of an underground nuclear test for the fall.<sup>16</sup> It further stated that the latest

recommendations were the product of a departmental undersecretary committee named to investigate the controversy. Two days later, Congresswoman Patsy Mink and thirty-two of her colleagues in the House began an action under the Freedom of Information Act.<sup>17</sup>

The District Court entered summary judgement for the defendant and the case was appealed. The Court of Appeals (whose ruling was subsequently overturned) entered a judgement worth noting. With regard to the application of classification to documents, the Court ruled that if several documents are included in a file, each must be separately classified.<sup>18</sup>

The Court relied on the wording of exemption one in making this determination.<sup>19</sup> It concluded that the word "specifically" was meant to restrict the use of the exemption to documents singularly classified. The Court noted that only three of the contested documents were labeled "separately classified." It therefore questioned the propriety of classification of the file as a whole on the basis of a few documents. In connection with this, the Court ordered *in camera* consideration of the documents in order to separate those which had been independently classified from those which had not.<sup>20</sup>

Finally, the Court ruled that despite the spirit of the Act which would favor a narrow interpretation of the exemptions,<sup>21</sup> this admonition must be tempered somewhat when the documents contain security and diplomatically sensitive data.

Based on the materials thus far presented, a trend can be perceived. Broadly, court procedure as specified in subsection (a) (3) was not found strictly applicable to exemption one. More specifically, *in camera* investigation of documents and *de novo* determination of a document's classification were not procedures applicable to exemption one. Moreover, the courts have been quite hesitant to deal with the classification and declassification of documents. The predominant opinion seems to be that judicial review of classification endangers the separation of powers. This trend is all the more evident in the

final stage of *Mink v. EPA*, the Supreme Court decision.

When the Court of Appeals reversed the District Court's decision, the Environmental Protection Agency filed for and was granted a writ of *certiorari* by the Supreme Court. The Court overturned the D. C. Appellate decision, delivering the death blow to judicial relief in exemption one cases.

This Court interpreted the exemption quite broadly, completing the trend toward denial of access to classified material. It was determined that mere classification as "Top Secret" or "Secret" pursuant to Executive Order 10501 was sufficient to exempt documents from disclosure under subsection (b) (1). The Court cited Senate Report 813<sup>22</sup> to show that the language of the exemption was carefully chosen. According to the Senate Judiciary Committee, "the change of standard from 'in the public interest' is made to delimit more narrowly the exception and to give a more precise definition." That the intention of Congress was to exempt all classified documents pursuant to Executive Order 10501 was shown through the legislative history. Chairman Moss of the House Subcommittee on Foreign Relations and Government Operations was cited as stating that the exemption "was intended to specifically recognize Executive Order 10501 and was drafted in conformity with that order."<sup>23</sup> Representative Gallagher, a member of the Subcommittee, stated that the legislation and the committee report made it "crystal clear that the bill in no way affects categories of information which the president ... has determined must be classified to protect the national defense or to advance foreign policy."<sup>24</sup> The Court maintained that the wording of the exemption was such as to provide the criterion for inclusion under the exemption. The criterion was simply whether the President<sup>25</sup> had determined that particular documents were to be kept secret.<sup>26</sup>

House Report 1497 stated in respect to subsection (b) (1) that "citizens both in and out of government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense

or to advance foreign policy such as matters classified pursuant to Executive Order 10501.<sup>27</sup>

The Court also denied the privilege of an *in camera* inspection of classified documents on the grounds that the exemption does not allow for judicial review. *In camera* inspection would be necessary only if a determination were to be made based on the content of the documents. This, however, is not permitted by the exemption. As in the case of *Epstein v. Resor*, the Court accorded great weight to the affidavit of the defendant. In this case, the Irwin affidavit stated that each of the six documents for which exemption one was claimed "was classified 'Top Secret' [or] 'Secret' pursuant to Executive Order 10501 and contained highly sensitive matter that is vital to our national defense and foreign policy."<sup>28</sup> The Court ruled that this was sufficient to show that the petitioners had met their burden of demonstrating that the documents were entitled to protection under exemption one.

Justice Brennan, dissenting in part, argued that there was no evidence to prove that subsection (a) (3) was not meant to apply to exemption one. He found the majority opinion inconsistent in allowing that some of the documents covered under exemption five<sup>29</sup> were subject to *in camera* inspection while those claimed under exemption one were not. He found nothing in either the wording of the legislation or the legislative history which would allow for this distinction to be made. His opinion was that subsection (a) (3) which required *de novo* determination of the classification with the burden on the agency to sustain its action was applicable to both exemptions. In fact it was the cornerstone of the Congressional plan "essential in order that the ultimate decision as to the propriety of the agency's action is made by the Court [to] prevent it from becoming meaningless judicial sanctioning of agency discretion."<sup>30</sup> The Executive was not to be allowed to file an affidavit stating that the documents are exempt and by so doing to foreclose any other determination of fact. With regard to *in camera* inspection of documents, Justice Brennan opined that the Court

of Appeals' construction of exemption one was correct. He noted that, in response to the passage of the Freedom of Information Act, Executive Order 10501 was revoked and replaced by Executive Order 11652.

The order was drafted in large part due to the President's desire to accommodate classification procedures to the objectives of the Act. Accordingly, it states that "some official information and material... bears directly on the effectiveness of our national defence and the conduct of our foreign relations" and that "this official information or material referred to as classified information or material... is expressly exempted from public disclosure by section 552 (b) (1) of [the Freedom of Information Act]." The new order further states that "each classified document shall... to the extent practicable be so marked as to indicate which portions are classified, at what level, and which portions are not classified..."<sup>31</sup> President Nixon clearly recognized that exemption one only applied to material specifically classified "in the interest of national defense or foreign policy" and that *in camera* inspection was therefore an inextricable part of the Act.

It would seem that that the intention of Congress was not to seal documents claimed under exemption one from scrutiny as tightly as the Court did. Congressman John Moss, sponsor and main author of the Act, filed an affidavit in the case of *Epstein v. Resor* which stated that "It was the overriding concern of Congress that disclosure be the general rule, not the exception, that the burden be on the agency to justify the withholding of a document and not on the person who requests it, that individuals improperly denied access to documents have a right to seek injunctive relief in the courts, and that in general the statute be a disclosure statute and not a withholding statute; specifically, it was the intent of Congress to grant the District Court the broadest latitude to review all agency acts in this regard including the correctness of a designation by an agency bringing documents within an exemption found in section (e) of the Act; and that the powers granted to the Court and the burden placed upon the government in section (e)



were meant to include rather than exclude the exemptions."<sup>32</sup>

Further evidence may be gleaned from later Congressional action. About one month after the Supreme Court decision in *Mink*, H. R. 4960 was introduced. Several other bills followed. H. R. 12471 was introduced in early 1974, reported on favorably on 5 March, and passed by the full House on 15 March. The Senate version passed on 30 May. A compromise bill was drafted and passed by Congress, vetoed by President Ford, and passed over his veto on 21 November 1974.<sup>33</sup> This bill made fourteen revisions of the previous Freedom of Information Act. Those with which I am concerned are the changes in the first exemption. The exemption states that "[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."<sup>34</sup>

In this emendation the clause "authorized under criteria established by an" was substituted for "required by" and clause (B) was added.

It is noteworthy that clause (B) was added to exemption one. The other eight exemptions had been found subject to *in camera* review by the courts, exemption one being the exception. Clause (B) is aimed directly at this misconception by explicitly stating that documents classified pursuant to an Executive order must be properly classified. In addition, amended subsection (a) (4) (B) states that "In such a case the court shall determine the matter *de novo* and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."<sup>35</sup>

Section (A) of the amended exemption specifies that procedural criteria must be met as well. These criteria as specified in Executive Order 11652 provide security classification categories and procedures for declassification and downgrading of existing classifications.<sup>36</sup>

The 1974 amendments have clarified a few ambiguous points in the Act of 1966 and have once again permitted a broad disclosure policy. However, the 1974 Act is not without some difficulties. Perhaps one of the most apparent is the problem of separation of powers. Implicit in the judicial power to review classification is the prerogative to question the propriety of documents originally classified by the Executive. It then becomes a question as to which branch of government is the final arbiter in decisions pertaining to classification.

Another problem is that the relationship between the exemptions and the rest of the Act is still unclear. Did Congress really mean that section 552 did not apply to the exemption? If so, how will the Act govern the exemptions? If not, how is the explicitness of the language to be explained? Despite the progress toward an act of disclosure, the Freedom of Information Act of 1974 is still somewhat problematical. Judicial interpretation shall perhaps resolve these difficulties.

#### *Footnotes*

1. *Syracuse Law Review* 26: 953, 1975. *Administrative Procedure Act, Statutes at Large* 60, chapter 324. 238 (1946).
2. U.S., Congress, Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Freedom of Information Sourcebook: Legislative Materials, Cases, Articles*, 1974, p. 27.
3. U.S., Congress, House, Committee on Government Operations, *Clarifying and Protecting the Right of the Public to Information. Report to Accompany S. 1160. H. Rept. 1497, 89th Cong., 2d sess., 1966*, in *Syracuse Law Review* 26: 953, 1975.
4. *Administrative Procedure Act*, chapter 324.
5. U.S., Congress, Senate, Committee on the Judiciary, *Clarifying and Protecting the Right of the Public to Information and for Other Purposes. S. Rept. 1219, 88th Cong., 2d sess., 1964*, p. 8.
6. *Freedom of Information Act, Statutes at Large* 80, 251 (1966).
7. *Georgetown Law Journal* 62 177, (1973):
8. *Freedom of Information Act, Statutes at Large* 80, 251 (1966).
9. *Ibid.*
10. 296 *Federal Supp.* 214.
11. *Ibid.*, at 216.

12. *Ibid.*, at 217.
13. *Ibid.*
14. "It may be possible to satisfy the Court, from all the circumstances of the case, that there is reasonable danger that compulsion of the evidence will expose military matters which in the interest of national security should not be divulged .... The Court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of evidence, even by the judge alone in his chambers." *U.S. v. Reynolds*, 345 U.S. 1 at 8-10.
15. 410 U.S. 73.
16. James Welsh, "Agency Views Differ on Amchitka Test Blast," *Washington, D.C., Evening Star*, 29 July 1971, sec. B-11, p. 24.
17. *Environmental Reporter Cases* 4: 1913.
18. *Federal Reporter 2d* 464: 742 at 745.
19. "This section does not apply to matters that are specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." *U.S. Code*, Title 5, sec. 552 (b) (1) (1970).
20. *Federal Reporter 2d* 464: 746.
21. See *Soucie v. David*, *Federal Reporter 2d* 448: 1067, in which the same court argued for a narrow interpretation of exemptions 4, 6, 8.
22. U.S., Congress, Senate, Committee on the Judiciary, *Clarifying and Protecting the Right of the Public to Information and for Other Purposes*. S. Rept. 813, 89th Cong., 1st sess., 1965.
23. U.S., Congress, House, Committee on Government Operations, Subcommittee on Foreign Operations and Government Information, *Hearings on a Proposed Federal Public Records Law*. 89th Cong., 2d sess., 1965, in *Environmental Reporter Cases* 4: 1916.
24. U.S., Congress, House, 89th Cong., 2d sess., 20 June 1966, *Congressional Record* 112: 13659.
25. Executive Order 10501 specifies that the power to classify is distributed to many positions within the Executive.
26. *Environmental Reporter Cases* 4: 1916.
27. U.S., Congress, House, Committee on Government Operations, *Clarifying and Protecting the Right of the Public to Information*. H. Rept. 1497, 89th Cong., 2d sess., 1966, pp. 8-9.
28. *Environmental Reporter Cases* 4: 1917.
29. "[This section does not apply to matters that are] interagency or intra-agency memorandums or letters which would not be available in litigation with the agency." *U.S. Code*, Title 5, sec. 552, 1970.
30. S. Rept. 813 in *Environmental Reporter Cases* 4: 1923.
31. 3A *Code of Federal Regulations*, 1972 compilation, pp. 154, 158.

32. *Lincoln Law Review* 7: 88, 1971.
33. *Syracuse Law Review* 26: 957-58, 1975.
34. *U.S. Code*, Supplement V, vol. 1 (1975), Title 5, sec. 552 (b) (1).
35. *Ibid.*, sec. 552 (a) (4) (B).
36. *3A Code of Federal Regulations*, 1972 compilation, pp. 157-66.

### References

1. Baach, Martin R. "Classification of Files Pursuant to Executive Order Is Not Subject to Judicial Review under the Freedom of Information Act. *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973)." *University of Cincinnati Law Review* 42: 529-39, October 1973.
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5. Lacher, M. David. "The Freedom of Information Act Amendments of 1974: An Analysis." *Syracuse Law Review* 26: 951-93.
6. Levi, Edward H. *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act*. Washington, D.C.: Government Printing Office, 1975.
7. *Julius Epstein v. Stanley Resor*. *Federal Supplement* 296: 214-19, 1969.
8. Gary A. Soucie et al. v. Edward E. David. *Federal Reporter 2d* 448: 1067-85, 1971.
9. Patsy Mink et al. v. Environmental Protection Agency. *Federal Reporter 2d* 464: 742-47, 1973.
10. *EPA v. Mink*. *Environmental Reporter Cases* 4: 1913-26.
11. Bertram D. Wolfe et al. v. Robert F. Roehlke. *Federal Supplement* 358: 1318-21, 1973.
12. Title 5, sec. 552, *U.S. Code Annotated*, 58-63, 32-41, 1970 1975.
13. *Administrative Procedure Act. Statutes at Large*, vol. 60, 1946.
14. *An Act to Amend Section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to Clarify and Protect the Right of the Public to Information, and for Other Purposes (Freedom of Information Act)*. *Statutes at Large*, vol. 80, 1966.
15. *An Act to Amend Section 552 of Title 5 United States Code, to Codify the Provisions of Public Law 89-487*. *Statutes at Large*, vol. 81, 1967.

16. U.S. Congress. House. Committee on Government Operations. Subcommittee on Government Information and Individual Rights. *Freedom of Information Act and Amendments of 1974 (P.L. 93-507) Sourcebook: Legislative History, Texts, and Other Documents*. Washington, D. C.: Government Printing Office, 1975.
17. U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. *Freedom of Information Act Sourcebook: Legislative Materials, Cases, Articles*. Washington, D.C.: Government Printing Office, 1974.