

THE FREEDOM OF INFORMATION ACT AND THE NLRB

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The Freedom of Information Act¹ (FOIA), enacted by Congress on July 4, 1966, was part of an historical sweep in the 1960's to strip away the secrecy and mystery of governmental activities. It is designed to open up agency records, avoid agency actions based on covert documents, and provide public access to the voluminous information gathered, processed and used by federal agencies.

It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.²

The past and future impact of the FOIA upon the NLRB depends upon: the agency's voluntary action; the nature and number of requests from labor lawyers and academic researchers; and elucidating litigation. What the NLRB has done, how it has responded under the FOIA to opening up its records, what demands have been made upon it, and how the courts have interpreted and applied the FOIA to the NLRB provide an opportunity for examining law in action. The FOIA is a living law and the NLRB's almost 45,000 annual case intake is an operational reality affecting many aspects of labor-management relations in the United States. Hence public law and public policy confront each other when we explore the FOIA and the NLRB.

Before indicating the scope of this article, it should be noted that the NLRB, unlike other federal agencies, operates in a controversial and highly value-committed environment in which both

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¹ Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, codified in its present form in 1967, 5 U.S.C. § 552 (1970). The codification substantially changed the Act's format. Reference will be made to the codified version as found in 5 U.S.C. § 552 (1970); however, the legislative history, as well as several commentaries, discuss the Act in the originally enacted version.

² S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (hereinafter cited as S. Rep. No. 813).

pro-union and anti-union sentiments are strongly held. Collective bargaining and unionism have been idealized by some and severely criticised by others. The nature of the NLRB's clientele, the interaction of unions, management and the public, and the processes and institutions which have evolved shape American labor laws with a unique character.³

Faced with this reality, the NLRB must move nimbly and delicately, particularly in its efforts to resolve seemingly incompatible statutory goals. It is not uncommon for the NLRB to prosecute an employer for unfair labor practices charged by a union, and, simultaneously, to prosecute the charging union for unfair labor practices charged by the same employer. Realistic and constructive discussion and analysis of the FOIA in relation to the NLRB require appreciation of the NLRB's unusual position with respect to management, unions and the public.

To consider this subject in a systematic and useful way we have arranged the paper in four sections: (1) overview of the FOIA; (2) litigation involving the FOIA and the NLRB; (3) analysis; and (4) emerging themes.

SYNOPSIS OF THE FOIA

The purpose of the statute is to protect the right of the public to information.⁴ It requires federal agencies and departments to make available to the public all government records except those

³ For a brief but lucid discussion of the environment in which American labor laws are administered, see Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 *Harv. L. Rev.* 1394 (1971).

⁴ Justice White writing for the majority in *EPA v. Mink*, 410 U.S. 73 (1973), explained the reason for the enactment of this Act:

The Freedom of Information Act, 5 U.S.C. § 552, is a revision of § 3, the public disclosure section, of the Administrative Procedure Act, 5 U.S.C. § 1002. Section 3 was generally recognized as falling short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute. [Citations omitted.] The section was plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the public interest." Moreover, even "matters of official record" were only to be made available to "persons properly and directly concerned" with the information. The provisions of the Freedom of Information Act stand in sharp relief against those of § 3. The Act eliminates the "properly and directly concerned" test of access, stating repeatedly that official information shall be made available "to the public," "for public inspection." Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Aggrieved citizens are given a speedy remedy in district courts, where "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(3). Noncompliance with court orders may be punished by contempt. . . .

Id. at 79.

specifically named in one or more of the nine exemptions.⁵ This places the burden upon the agencies, not the public. We need not inquire why the public needs the information, but rather why the information should not be available to the public.⁶

FOIA section 552(a) begins with the directive in subparagraph (1) that "each agency . . . publish in the Federal Register" (A) descriptions of organization and function and means by which people may request information; (B) statements of both "formal and informal procedures"; (C) rules and regulations; (D) substantive rules of general applicability; and (E) all amendments and revisions to the above.⁷ And, except when actual and timely notice is given, "no person" will be required to resort to, or be adversely affected by, matter "required" to be published in the Federal Register which is not published.⁸

Subparagraph (a)(2) concerns Agency Opinions and Orders and requires agencies to make available "for public inspection and copying" (A) all final opinions, (B) statements of policy and interpretations not published in the Federal Register, and (C) administrative staff manuals and instructions affecting "any" member of the public.⁹ However, an agency may delete identifying details to prevent "unwarranted invasion of personal privacy," provided there is justification for such deletion.¹⁰ Further, a "current index" providing "identifying information" is to be kept on "any matter which is issued, adopted, or promulgated after the effective date."¹¹

Subparagraph (a)(3)¹² provides for a general right of public access to government records: "each agency, on request for identifiable records . . . shall make the records promptly available to any person." If the agency should improperly withhold such records, the district court of the United States "[shall have] jurisdiction to enjoin the agency."¹³ "In such a case the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action."¹⁴ Such proceedings are to be "expedited in every way," and given precedence over all other causes before the court except

⁵ *Id.*

⁶ Commentators have analyzed exhaustively each provision of the FOIA. Most extensive is the 47-page Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (GPO 1967). See also K. Davis, *Administrative Law Treatise*, at 114-80 (Supp., 1970).

⁷ 5 U.S.C. §§ 552(a)(1)(A)-(E) (1970).

⁸ 5 U.S.C. § 552(a)(1) (1970).

⁹ 5 U.S.C. §§ 552(a)(2)(A)-(C) (1970).

¹⁰ 5 U.S.C. § 552(a)(2)(C) (1970).

¹¹ *Id.*

¹² 5 U.S.C. § 552(a)(3) (1970).

¹³ *Id.*

¹⁴ *Id.*

for those that in the court's discretion it "considers of greater importance."¹⁵ Finally in the last subparagraph, (a)(4),¹⁶ the agencies are required to keep public records of the final votes of each member participating in agency decisions.

Section 552(b)¹⁷ sets forth a series of exemptions limiting the broad disclosure requirements of subsection (b). However, the statute admonishes in subsection (c),¹⁸ that only the subsection (b) exemptions, "specifically stated," shall justify the "withholding of information or limiting the availability of records to the public." Exempt are matters which are: (1) "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy"; (2) related to "internal personnel rules and practices"; (3) exempted specifically by statute from disclosure; (4) "trade secrets and commercial or financial information obtained from any person and privileged or confidential"; (5) "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency"; (6) personnel, medical, and "similar files" whose disclosure would be "clearly unwarranted invasion of personal privacy"; (7) "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency"; (8) "contained in or related to examination, operating, or conditions reports prepared by" or for an agency regulating or supervising financial institutions; and (9) geographical and geological information concerning wells.¹⁹

This overview of the FOIA indicates its principal aspects and demonstrates the obligations of agencies to make their records available to the public. The FOIA establishes certain standards required of agencies to comply with the statute, but also identifies specific exemptions. The Act indicates that Congress sought to achieve a balance between the public's right to know and an agency's need to maintain confidential records. Congress demonstrated recognition of the fact that agencies were empowered to carry out important public functions which could be impaired unless a line were drawn between accessible and inaccessible information. And most importantly, Congress did not want to disclose to the public, confidential matters relating to private persons.

LITIGATION INVOLVING THE FOIA AND THE NLRB

Although the NLRB has taken steps to satisfy the requirements of the FOIA,²⁰ its actions have not been deemed adequate by all

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 552(a)(4) (1970).

¹⁷ 5 U.S.C. § 552(b) (1970).

¹⁸ 5 U.S.C. § 552(c) (1970).

¹⁹ 5 U.S.C. §§ 552(b)(1)-(9) (1970).

parties. Clearly, the clientele²¹ dealing regularly with the NLRB would be most concerned with access to information. Within this category, management, more often than unions, has challenged the Board under the FOIA. Some have suggested that management is using the FOIA as a tactical device to serve its interests. But it should be noted that special-interest litigation may also serve the public interest.

Litigation directed at obtaining NLRB disclosure under the FOIA has increased in the past few years and has met with varying degrees of success. To discuss the litigation, we have divided it into five areas: (1) advice and appeals memoranda prepared by the regional offices and Washington; (2) indices of Board and regional representation case decisions; (3) evidence gathered by the regions while investigating both unfair labor practice and representation cases; (4) public availability of *Excelsior* lists²² and (5) NLRB forms.

Before discussing the substantive developments resulting from the decisions to date, we want to emphasize a corollary aspect of these cases. Plaintiffs have regularly sought not only specific information which the Board allegedly had to provide under the FOIA, but also an injunction restraining the Board from further processing

²⁰ When the FOIA became effective the Board made public a modified version of the manual used by agency employees in the regional offices, the "Field Manual," excluding from it portions which the agency concluded were exempt from disclosure. A Memorandum to the Board and the General Counsel prepared by a committee composed of senior agency personnel (Committee on Implementation of Public Information Act), and circulated at about the time the Field Manual was made public, states that it was the belief of the committee that other manuals such as the Legal Assistant's Manual, the Trial Examiner's Manual, and the Hearing Officer's Manual were not required to be made public. (Permission to refer to this memorandum has been issued by the NLRB, along with a disclaimer to the effect that the memorandum does not necessarily reflect either the current thinking or the current procedures of the Board, but rather, reflects the views of that Committee at that time.") Subsequently, however, the Board has released a public version of the Trial Examiner's Manual and is expected this year to release the entire "Field Manual." It is also expected that this year a guide to Law and Procedure in Representation Cases prepared by the General Counsel for use by regional office staff will be made public.

Items now required to be disclosed by the FOIA which the NLRB had made available to the public prior to the enactment of FOIA include: (1) decisions of the Board in representation and complaint cases; (2) the field manual; (3) records of votes of members; and (4) an index of Board decisions. Regional Directors' decisions in representation cases were, and are, available at the regional office where issued.

²¹ Although the term "public" is used frequently throughout this article, it is obvious that those who are most concerned with the interplay between the FOIA and the NLRB are the Board staff and the lawyers representing management and unions. Concededly, these people constitute a modest number of the entire "public," even though anyone from a rank-and-file worker to a senior member of a prestigious law firm has an equal right of access to NLRB information.

²² These election eligibility lists contain the names and addresses of all eligible voters and must be filed with regional directors within seven days of an agreement or stipulation for election, or after the Board or regional director directs an election. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966).

representation hearings and unfair labor practice trials pending disclosure. Significantly, the courts have rejected such requests.²³

The reasoning of the Court of Appeals for the District of Columbia in *Sears, Roebuck & Co. v. NLRB*²⁴ is representative of such decisions. The lower court had granted Sears' request for a preliminary injunction. This order prevented further administrative processing pending resolution of the issue of the Board's duty to make available, for public examination, Advice and Appeals memoranda prepared by the Office of the General Counsel for the guidance of Regional Directors.²⁵ The circuit court reversed and remanded, concluding that Sears had failed to justify enjoining the administrative process.²⁶

Although agreeing that the district court had authority to enjoin agency proceedings until resolution of the FOIA claim, the circuit court concluded that such action is only to be taken in "extraordinary circumstances" when there is a clear showing of "irreparable harm."²⁷ The latter is not to be established by "a mere" requirement that a party will have to submit to an agency hearing.²⁸ "This is a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention."²⁹ It therefore concluded:

In the case at bar we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration. Sears was successful in seeking the issuance by the Board of a complaint of unfair labor practice charge.³⁰

²³ *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 85 L.R.R.M. 2260 (4th Cir. 1974), aff'g 82 L.R.R.M. 2857 (D.S.C. 1973); *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 81 L.R.R.M. 2481 (D.C. Cir. 1972); *Polymers, Inc. v. NLRB*, 414 F.2d 999, 71 L.R.R.M. 3107 (2d Cir. 1969); *Boire v. Pilot Freight Carriers, Inc.* — F. Supp. —, 86 L.R.R.M. 2462 (M.D. Fla. 1974); *Safeway Stores, Inc. v. NLRB*, 84 L.R.R.M. 2536 (D.D.C. 1973); *Carrollton Motor Inn v. NLRB*, 84 L.R.R.M. 2385 (D.D.C. 1973); *Elsing Mfg. Co. v. NLRB*, 82 L.R.R.M. 3054 (E.D. Okla. 1973); *Teamsters Local 705 v. NLRB*, 82 L.R.R.M. 3014 (D.D.C. 1973); *Seattle Trade Council v. Henderson*, 82 L.R.R.M. 2362 (W.D. Wash. 1973); *Government Employees Ins. Co. v. McLeod*, 69 L.R.R.M. 2186 (S.D.N.Y. 1968); *Clement Bros. v. NLRB*, 282 F. Supp. 540, 68 L.R.R.M. 1086 (N.D. Ga. 1968); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 65 L.R.R.M. 3063 (D.P.R. 1967). But see *Automobile Club v. NLRB*, 84 L.R.R.M. 2423 (D.D.C. 1973).

²⁴ 473 F.2d 91, 81 L.R.R.M. 2481 (D.C. Cir. 1972).

²⁵ *Sears, Roebuck & Co. v. NLRB*, 79 L.R.R.M. 2942 (D.D.C. 1972).

²⁶ 473 F.2d at 93, 81 L.R.R.M. at 2482.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* See, *Hartford Fire Ins. Co. v. NLRB*, — F. Supp. —, 85 L.R.R.M. 2750 (D.D.C. 1974).

The court further stated, in what appears to be dicta, that in the event Sears should be entitled to the documents

and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review of enforcement in the event the Board issues an order.³¹

However, the court in *Automobile Club of Missouri v. NLRB*³² interpreted the circuit court's holding as follows:

It is not a matter of protecting A.C.M. against irreparable injury, such as was presented on the preliminary injunction phases of the Sears Roebuck case, but rather of taking an appropriate final injunctive step in equity to protect Plaintiff from the obvious disadvantages under which it labors, after weighing and balancing some of the countervailing factors³³

1. *Advice and Appeals Memoranda*

Advice and Appeals Memoranda are prepared under the authority of the General Counsel to "guide" the regional directors in the issuance of complaints against parties charged with committing unfair labor practices.³⁴

When a director concludes that a particular case raises novel and unusual legal issues, the director may submit the case to the Washington Advice Branch under the General Counsel. Responding, Advice informs the director, but not the parties, what action to take with respect to the case. Sometimes, Advice may return the case for either further investigation or analysis in light of new NLRB or court decisions. The memoranda between the region and Washington have been considered confidential for internal use.

The Washington Advice Branch may advise the director to issue a complaint, in the absence of settlement, or to refuse to issue a complaint. Where the director refuses to issue a complaint, either after Washington's "advice" or on his own authority, the charging party has the right to appeal the director's refusal to the General Counsel and he may either sustain the director's action, return the

³¹ 473 F.2d at 93, 81 L.R.R.M. at 2482.

³² 84 L.R.R.M. 2423 (D.D.C. 1973).

³³ 84 L.R.R.M. at 2426.

³⁴ See *Sears, Roebuck & Co. v. NLRB*, 346 F. Supp. 751, 753, 80 L.R.R.M. 3428, 3429 (D.D.C. 1972).

case for further investigation and analysis, or instruct the director to issue a complaint in the absence of settlement. The Washington Office of Appeals will prepare an Agenda Minute containing a brief summary of the pertinent facts, analysis of the facts and law, and conclusions. In some cases where the director is reversed and instructed to issue a complaint, the Minute may discuss the theory of the case and how it is to be tried. At the time Appeals communicates with the director, it also sends a letter to the parties indicating its conclusions and reasoning.

Probably the most controversial and the best known litigation involving the FOIA and the Board has also been the *Sears, Roebuck & Co.* case.³⁵ Sears filed an unfair labor practice charge in NLRB Region 19 alleging that the Retail Clerks' International Union had violated Section 8(b)(3) of the N.L.R.A.³⁶ Prior to the issuance of complaint, Sears requested that the Board make available any Advice or Appeals memoranda prepared in relation to its charge. The Board refused on the ground that such documents were intra-agency memoranda and therefore exempt from disclosure under Section 552(b)(5).³⁷ After the Director issued a complaint, Sears brought suit in the Federal District Court, District of Columbia to force the Office of the General Counsel to produce "Advice and Appeals memoranda, and certain other materials incorporated by reference therein."³⁸

The district court concluded that the Advice memoranda are "instructions mandatory in substance" and constitute "instructions to staff that affect a member of the public"³⁹ (5 U.S.C. section 552(a)(2)(C), not exempted by section 552(b)(5) exempting intra-agency memoranda). Similarly, the court found the Appeals memorandum to be the "final determination of the General Counsel's staff of the disposition of a charge" and, as such, not exempt from disclosure by section 552(b)(5).⁴⁰ Finally, the court concluded that "documents incorporated by reference in Advice and Appeals memoranda, even though possibly qualified for a section 552(b) exemption taken separately, must also be disclosed, since they have lost their exempt status by incorporation."⁴¹

Since the court concluded that the memoranda were not within

³⁵ *Sears, Roebuck & Co. v. NLRB*, 346 F. Supp. 751, 80 L.R.R.M. 3428 (D.D.C. 1972), aff'd, 480 F.2d 1195, 83 L.R.R.M. 3045 (D.C. Cir. 1973).

³⁶ 346 F. Supp. at 753, 80 L.R.R.M. at 3429.

³⁷ Id. at 753, 754, 80 L.R.R.M. at 3429, 3431.

³⁸ Id. at 752, 80 L.R.R.M. at 3429.

³⁹ Id. at 753, 80 L.R.R.M. at 3431. See also *Sears, Roebuck & Co. v. NLRB*, 81 L.R.R.M. 2676 (D.D.C. 1972).

⁴⁰ 346 F. Supp. at 754, 80 L.R.R.M. at 3430.

⁴¹ Id., 80 L.R.R.M. at 3430-31.

the exemptions of 552(b), it directed that these documents be made available to Sears. It specified that: (1) when reference in Appeals and Advice memoranda is made to the "circumstances" of the case the General Counsel is to provide an explanation including documents except to the extent that the documents are exempt; (2) references to parties, attorneys, prior memoranda, and all other information referred to are to be made available except for deletions justified in writing and the names of affiants; and (3) indices of the Advice and Appeals memoranda must be provided to the public from the effective date of the FOIA.⁴²

The District of Columbia Circuit affirmed⁴³ the trial court's decision in a *per curiam* order citing the district court's opinion and *Grumman Aircraft Engineering Corp. v. Renegotiation Board*.⁴⁴ The Supreme Court has granted writ of certiorari to the Board.⁴⁵

Plaintiffs in other district court proceedings have not been so successful in getting Advice and Appeals memoranda and materials incorporated therein. In *Seattle Trade Council v. Henderson*,⁴⁶ the court rejected the union's effort to enjoin the General Counsel from refusing to produce all Appeals and Advice memoranda and any documents incorporated by reference which related specifically to the allegations in the case that it violated Section 8(b)(4)(D) of the NLRB, as amended.⁴⁷ The court concluded that such information was intra-agency memoranda exempted under section 552(b)(5).⁴⁸ Similarly, in *Elsing Manufacturing Co. v. NLRB* the court denied⁴⁹

⁴² Id., 80 L.R.R.M. at 3431.

⁴³ 480 F.2d 1195, 83 L.R.R.M. 3045 (D.C. Cir. 1973). Although the opinion was not officially reported, it does appear in 83 L.R.R.M. 3045.

⁴⁴ 482 F.2d 710 (D.C. Cir. 1973).

⁴⁵ 42 U.S.L.W. 3645 (U.S. May 28, 1974).

⁴⁶ 82 L.R.R.M. 2362 (W.D. Wash. 1973).

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ 82 L.R.R.M. 3054-55 (E.D. Okla. 1973). The Board's Memorandum in *Kent Corp. v. NLRB*, Civil No. CA-73M1090 (N.D. Ala. 1974): states:

In any event, classification of both advice and appeals memoranda in closed cases on the *Classification Outline for Decision of the National Labor Relations Board and Related Court Decisions* is planned and will be made publicly available as soon as completed. In the meantime, the Board has prepared a memorandum setting forth the procedure for requesting advice and appeals memoranda in closed cases.

Kent Corp. v. NLRB, Civil No. CA-73M1090, at 3 n.2 (N.D. Ala., Jan. 2, 1974).

However in *Teamsters Local 705 (Associated Transport, Inc.)*, 209 N.L.R.B. No. 46, 86 L.R.R.M. 1119 (1974), the Board affirmed an Administrative Law Judge's revocation of a subpoena duces tecum requiring the regional director to produce memoranda from the General Counsel's Offices of Advice and Appeals relating to all closed "CB cases" involving the Charging Party and Respondent:

[T]he subpoenaed (sic) documents relate only to collateral issues and are not material to the case at bar. . . . Furthermore, in affirming his ruling, we would note that the Board does not in any way consider or rely on the material sought in reaching its decisions and, thus, did not have such before it in coming to its Decision and Order herein. Assuming arguendo, however, that Respondent was entitled to these docu-

plaintiff's request for the production of Advice and Appeals memoranda and all information incorporated by reference therein related to the Board's unfair labor practice then pending against the plaintiff-employer. The court determined that such documents are exempt from disclosure "during the pendency of litigation involving the documents."⁵⁰

2. *Indices of Board decisions*

The Board initially concluded that indices of unpublished Board and Regional Director decisions did not have to be indexed or digested as required by FOIA Section 552(a)(2)(C), because they are not used by the Board or the directors as precedent.⁵¹ However, this interpretation of the FOIA appears to be in question.

Judge Gesell in *Automobile Club of Missouri v. NLRB*⁵² found that in representation cases directors' decisions are final agency determinations of some precedential value requiring preparation of an index. Plaintiff had sought to enjoin representation proceedings until the Board made available an index of directors' decisions involving matters (*i.e.*, a unit of insurance salesmen) similar to that involved in the present proceeding. The Board had previously denied a request for such an index. The judge's oral opinion concluded that section 552(a)(2) specifically requires that "any matter which is issued" must be indexed as to its substantive matter and made available to the public.⁵³ This section is applicable to directors' decisions in representation proceedings since these decisions are "final orders and opinions made in the adjudication of cases."⁵⁴ Although rejecting the Board's contention that the indexing required

ments regardless of their relevancy or nonuse by us, Respondent has not shown any prejudice arising from the Administrative Law Judge's ruling.

209 N.L.R.B. No. 46 at 2 n.1, 86 L.R.R.M. at 1120. See *Boire v. Pilot Freight Carriers, Inc.* — F. Supp. —, 86 L.R.R.M. 2462 (M.D. Fla. 1974).

⁵⁰ 82 L.R.R.M. at 3055. On February 3, 1972, General Counsel decided that all Advice and Appeals memoranda in completed cases (cases where no complaint issued or Board has taken final action) would be made available to the public. *Sears, Roebuck & Co. v. NLRB*, 473 F.2d at 92 n.1, 81 L.R.R.M. at 2481 n.1 (D.C. Cir. 1972).

⁵¹ Memorandum of the NLRB Committee on Implementation of Public Information Act, note 20 *supra*, considered the indexing of regional directors' and unpublished Board decisions in 1967. The committee thought the digesting system then in use adequate. "This covers only such orders as the agency may wish to rely upon as precedent against a private party. Since Regional Directors' decisions in representation cases which have not been reviewed on the merits by the Board have no precedent value, they need not be indexed." *Id.* Likewise, an "unpublished" decision of the Board "need not be indexed so long as the Board does not rely on it as precedent against the party." *Id.* The committee recommended that both regional directors' decisions and unpublished Board decisions should be available for inspection.

⁵² 84 L.R.R.M. 2423, 2425 (D.D.C. 1973). See also *Automobile Club v. NLRB*, 84 L.R.R.M. 2422 (D.D.C. 1973).

⁵³ 84 L.R.R.M. at 2425.

⁵⁴ *Id.* at 2424.

is only applicable to decisions of precedent, Judge Gesell concluded that the decisions are "by the preponderance of the evidence relied on and used and cited as precedent within the meaning of the Act."⁵⁵ Accordingly, he directed that an index be prepared and he fashioned interim relief for the plaintiff. The Board was required to prepare an index of cases, with issues similar to those in *Automobile Club*, rendered by the regional director in whose jurisdiction the representation hearing is to be held.⁵⁶

The Court of Appeals for the District of Columbia Circuit, in a *per curiam* opinion, affirmed the ruling of the district court. It is uncertain at time of writing whether the Board will seek review by the Supreme Court.⁵⁷

In *Safeway Stores, Inc. v. NLRB*,⁵⁸ another federal district court judge for the District of Columbia concluded that the plaintiff had failed to establish irreparable harm to justify a temporary restraining order or an injunction postponing an unfair labor practice hearing until the NLRB complied with the FOIA requirement that it keep an up-to-date index of its published and unpublished decisions. The court concluded, relying on the *Sears Roebuck* case, that the burden of submitting to an agency hearing does not establish irreparable injury since plaintiff can challenge any decisions finally rendered by the Board⁵⁹ and further:

The Court concludes . . . that plaintiff's effort to demonstrate irreparable injury is speculative. Standard

⁵⁵ *Automobile Club v. NLRB*, 84 L.R.R.M. at 2425. It is difficult to determine exactly what the court relied on to make the determination. It relates that the decisions of the Regional Director, according to the rules and regulations of the Board, are to be accorded no precedent value. However, it was stated:

but the record does not disclose the extent to which Regional Directors may informally use or rely on prior decisions nor does it disclose in any great degree the extent to which practitioners before the Board utilize these in the give-and-take of the proceedings.

Id. at 2425. The court does note that in six months 34 out of 1005 regional director decisions did make mention of other regional directors' decisions which normally involve the same company.

More significantly, . . . the decisions are published, significant ones, at least, in various summary forms in the Board's weekly summary of NLRB cases. . . . [I]t is apparent that the decisions are considered of public interest and the Board is attempting to provide some limited identification to aid practitioner because of their significance in the operation of the Board's processes.

Id. at 2425.

⁵⁶ The court declined to issue an injunction pending the preparation of the entire index, which involved over 14,000 regional director decisions and was estimated to require a minimum of six months work, since the delay would "stultify the Board in this and by inference in other representation hearings and work hardship on parties entitled to prompt determination of the appropriate bargaining unit." Id. at 2426.

⁵⁷ — F.2d —, 86 L.R.R.M. 2064 (D.C. Cir. 1974).

⁵⁸ 84 L.R.R.M. 2536 (D.D.C. 1973).

⁵⁹ Id. at 2537.

commercial indices, such as Prentice Hall and Commerce Clearing House, report on a regular basis controlling N.L.R.B. decisions which plaintiff has every right to believe will be followed in the hearing set before the administrative law judge. . . .⁶⁰

3. *Materials in Investigatory Files*

Several cases have involved attempts to require the Board to reveal evidence gathered during informal investigations of unfair labor practices or objections to NLRB-conducted representation elections. In all instances the requests have been denied.

In *Barceloneta Shoe Corp. v. Compton*,⁶¹ filed about one month after the effective date of the FOIA, the employer sought to enjoin the Board from commencing a formal unfair labor practice trial until it was furnished statements and evidence adduced during the informal investigation of the charge. The court concluded that the seventh FOIA exemption relating to investigatory file materials was applicable. The employer-plaintiff was not accorded any greater right than given it by the Jencks Act,⁶² which does not require federal agencies in criminal proceedings to produce substantially verbatim statements of witnesses obtained during investigation until after witnesses give direct testimony at the trial. "To me, it is inconceivable that by the new Act, Congress intended to give private parties—employers, unions or employees—charged with the violation of federal regulatory statutes any greater right to inspect investigative file material, than has been granted to persons accused of violating Federal criminal law."⁶³

Finally, the court concluded that such statements obtained during the investigation are privileged or confidential within the 4th exemption:

persons interviewed by Board Agents in future investigations will not be as cooperative as they are now if they know that the information they give to the Board agents would be subject to public disclosure at any time before they have actually testified at a public hearing. . . . Under these circumstances the Defendant herein has shown a better right to keep his commitment to the persons giving such confidential statements, than have Plaintiffs made for the disclosure of said documents prior to the hearing.⁶⁴

⁶⁰ Id. at 2537.

⁶¹ 271 F. Supp. 591, 65 L.R.R.M. 3063 (D.P.R. 1967), cited with approval in *Bristol-Myers v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970).

⁶² 18 U.S.C. § 3500 (1970).

⁶³ 271 F. Supp. at 593, 65 L.R.R.M. at 3065.

⁶⁴ Id. at 594, 65 L.R.R.M. at 3065-66.

The Fourth Circuit followed the reasoning of *Barceloneta Shoe* in *NLRB v. Clement Brothers*.⁶⁵ It rejected the employer's contention that the fairness of the unfair labor practice and prior representation proceedings were impaired by the Board's refusal to furnish statements of persons who were interviewed in the prehearing, informal investigation but were not called as witnesses. It approved a prior unappealed district court ruling⁶⁶ that such statements were within the seventh FOIA exemption and quoted the following:

It would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures. The employee will be understandably reluctant to reveal information prejudicial to his employer when the employer can easily find out that he has done so. . . . In order to assure vindication of employee rights under the Act, it is essential that the Board be able to conduct effective investigations and secure supporting statements from employees. We feel that preserving the confidentiality of employee statements is conducive to this end.⁶⁷

In *Wellman Industries, Inc. v. NLRB*,⁶⁸ the Fourth Circuit reaffirmed the basic proposition underlying *Clement*. After the director had set aside the results of the first election, in which the employees rejected the union because Wellman engaged in election irregularities, a majority of Wellman's employees chose the union as their bargaining representative at a second election. Wellman refused to bargain and the director issued an unfair labor practice complaint. Wellman sought to enjoin the Board from proceeding further until it provided all affidavits obtained during the investigation of the union's objections to the first election and allegedly used as the basis for the director's decision setting aside the first election.

The district court had denied Wellman's demand for access on the ground that it was exercising its equitable discretion.⁶⁹ Although the Fourth Circuit rejected the approach of the district court, it affirmed the district court's denial of Wellman's request. According to the circuit court, the lower court erred in attempting to balance equities in applying the FOIA.⁷⁰ The FOIA grants to the district

⁶⁵ 407 F.2d 1027, 70 L.R.R.M. 2721 (5th Cir. 1969).

⁶⁶ *Clement Bros. Co. v. NLRB*, 282 F. Supp. 540, 68 L.R.R.M. 2131 (N.D. Ga. 1968).

⁶⁷ 407 F.2d at 1031, 70 L.R.R.M. at 2724, quoting from *Texas Indus., Inc. v. NLRB*, 336 F.2d 128, 134, 57 L.R.R.M. 2046, 2050 (5th Cir. 1964).

⁶⁸ 490 F.2d 427, 85 L.R.R.M. 2260 (4th Cir. 1974).

⁶⁹ 82 L.R.R.M. 2857 (D.S.C. 1973). The district court subsequently reheard the plaintiff's motion and affirmed its decision to dismiss the action for lack of jurisdiction. *Wellman Indus., Inc. v. NLRB*, 82 L.R.R.M. 3069 (D.S.C. 1973).

⁷⁰ 490 F.2d at 429, 85 L.R.R.M. at 2261.

court no equitable discretion to deny disclosure of documents beyond those contained in the statutory exemptions to the general requirement of full public disclosure of all government documents.⁷¹ The court considered it immaterial that the affidavits were obtained in the investigation of a representation election:

Whether or not resulting in an unfair labor practice charge, the Board's purpose here was to protect and vindicate rights set out in Section 7. Though procedures vary, if aimed at enforcement of the NLRA we think they are "for law enforcement purposes" [within the meaning of the 7th exemption].⁷²

Further, the court noted that practicalities require the application of the seventh exemption since failure to apply the latter would inhibit employees from making statements freely and voluntarily and would preclude "premature disclosure of an investigation so that the Board can present its strongest case in court."⁷³ Finally, the court concluded that Wellman must wait for final NLRB determination and then pursue its right to review the NLRB's decision.⁷⁴

4. *Public availability of Excelsior lists*

Unquestionably the most unusual litigation involving the Board and the FOIA concerns a request by two law school professors for *Excelsior* lists in about thirty-five representation cases for use in a behavioral study. The professors wanted to question employees about their attitudes toward the electoral process, and to document the impact of election tactics by employers and unions by interviewing employees before and after the elections. Contrary to the Board's view that such lists need not be furnished in light of the fourth and seventh exemptions in the FOIA, the Court of Appeals for the District of Columbia in *Getman v. NLRB*,⁷⁵ affirming the district

⁷¹ Id.

⁷² Id. at 430, 85 L.R.R.M. at 2262.

⁷³ Id. at 431, 85 L.R.R.M. at 2263.

⁷⁴ Id. In *Government Employees Ins. Co. v. McLeod*, 69 L.R.R.M. 2186 (S.D.N.Y. 1968), plaintiff sought, among other items, statements and reports including information and evidence which had served as the basis for the regional director's finding that the union had the requisite 30% showing of interest in the representation proceeding. The court concluded that plaintiff had failed to request this from the Executive Secretary of the Board or the General Counsel, as required in the NLRB's Rules and Regulations, before initiating the action in the district court. However, the court suggested that the Board should voluntarily furnish to plaintiff a copy of any order, opinion or other document or documents serving as the basis for determining that the Union had met the required showing of interest together with any written statements or reports describing the evidence upon which such a determination was based. Id.

⁷⁵ 450 F.2d 670, 78 L.R.R.M. 2101 (D.C. Cir. 1971), application for stay denied, 404 U.S. 1204 (1971).

court,⁷⁶ rejected the Board's contention that the fourth exemption was applicable since:

this section exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. . . . Obviously, a bare list of names and addresses which employers are required by law to give the Board, without any express promise of confidentiality, and which cannot be fairly characterized as "trade secrets" or "financial" or "commercial" information is not exempted from disclosure by Subsection (b)(4).⁷⁷

It also concluded that the seventh exemption was inapplicable:

The *Excelsior* lists are not files prepared primarily or even secondarily to prosecute law violators, and even if they ever were to be used for law enforcement purposes, it is impossible to imagine how their disclosure could prejudice the Government's case in court.⁷⁸

Having disposed of the fourth and seventh exemptions, the court found the sixth exemption applicable. The latter, according to the court, "requires a court reviewing the matter *de novo* to balance the right of privacy of affected individuals against the right of the public to be informed; and the statutory language 'clearly unwarranted' instructs the court to tilt the balance in favor of disclosure."⁷⁹

Balancing the invasion of privacy through disclosure of workers' names and addresses with the public interest benefits gained from such a study, the court found that:

although a limited number of employees will suffer an invasion of privacy in losing their anonymity and being asked over the telephone if they would be willing to be interviewed in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor (footnotes omitted).⁸⁰

⁷⁶ 77 L.R.R.M. 3063 (D.D.C. 1971).

⁷⁷ 450 F.2d at 673, 78 L.R.R.M. at 2103, quoting *Consumers Union of United States, Inc. v. Veterans Admin.*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969).

⁷⁸ 450 F.2d at 673, 78 L.R.R.M. at 2103.

⁷⁹ *Id.* at 674, 78 L.R.R.M. at 2103-04. In a footnote the court states that the balancing of equities required by exemption 6 is an exception to the general thrust of the FOIA denying the district courts the exercise of equitable discretion in determining whether agency records must be disclosed. *Id.* at 677 n.24, 78 L.R.R.M. at 2106 n.24.

⁸⁰ 450 F.2d at 674-75, 78 L.R.R.M. at 2104 (footnotes omitted).

Unlike the NLRB, whose interpretation and application of the FOIA persuaded it that the confidentiality of voters' names and addresses was of higher priority than a rare, systematic, well-financed and conceptually innovative empirical study intended to assist the Board and enhance the public interest, the court endorsed the usefulness of the study for improving the Board's election procedures because:

The public interest need for such an empirical investigation into the assumptions underlying the Board's regulation of campaign tactics has for some time been recognized by labor law scholars.⁸¹

The court also reasoned that the only method for conducting the study in an objective manner was by using *Excelsior* lists. The argument that the study would interfere with the "laboratory conditions"⁸² deemed essential by the Board in conducting elections did not persuade the court in *Getman*. It observed:

[W]e find it impossible to say that disclosure of the *Excelsior* lists would constitute a clearly unwarranted invasion of employee privacy under Exemption (6). . . . The invasion of employee privacy strikes us as very minimal, and the possible detrimental effects of the study in terms of delaying the election process as highly speculative. On the other hand, the study holds out an unusual promise.⁸³

Although concurring with the majority, Judge MacKinnon warned that:

Whether appellees' interference in these elections will be misunderstood and misinterpreted and will cause adverse reactions is unpredictable at this stage.

My principal concern is for the future. We are here following the dictates of Congress and are making information available for a use that may interfere with the proper functioning of government. This use may have its beneficial effects also, but before the good is harvested considerable turmoil and disruption may result. And this decision is only the beginning. We may expect similar wholesale demands for lists of names and addresses from other persons, not for what they may disclose about the

⁸¹ Id. at 675-76, 78 L.R.R.M. at 2105.

⁸² Id. at 676, 78 L.R.R.M. at 2105. See *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 69-70, 50 L.R.R.M. 1532, 1534-35 (1962).

⁸³ 450 F.2d at 677, 78 L.R.R.M. at 2106.

functioning of government, but for their collateral ability to aid the person requesting such information.⁸⁴

Thereafter, the Board filed an application with the Supreme Court to stay the district court's order. Justice Black denied the application finding "no exception . . . which would authorize the Board to refuse to turn over the requested records" because the delivery of the desired records "would interfere with the representation election procedures" under the LMRA.⁸⁵

5. *NLRB Manuals*

Since enactment of the FOIA the Board has made available to the public revised versions of most of its current operating manuals. And the Board is currently revising other manuals which will be similarly available.⁸⁶ In *Polymers, Inc., v. NLRB*,⁸⁷ the only case involving the issue of Manuals, the Second Circuit supported the Board's rejection⁸⁸ of the employer's objections to an election because it could not obtain a copy of the agency's manual, "Guide to the Conduct of Elections". It held applicable to this issue the second exemption of Section 552(b), which relates to internal rules and practices guiding the staff.⁸⁹ The court noted that the "Guide" was "an internal advisory document" used by agency staff and played "no significant role in the Board's adjudication of election disputes."⁹⁰ The court relied upon the House of Representatives' Report on the exemption that it covered "[o]perating rules, guidelines, and manuals of procedure for government investigators or examiners."⁹¹ But the court warned the Board: "We do not hold that under no circumstances would the Board be required to produce the Guide; but in the context of the instant case we will not disturb the refusal of the Board to produce the Guide."⁹²

Although we have discussed litigation involving the NLRB and the FOIA, we do not wish to leave the impression that the NLRB has refused to furnish data to parties except under court orders. Indeed, the Board has supplied various types of information to members of the public (mostly labor lawyers) so long as the data was

⁸⁴ Id. at 680-81, 78 L.R.R.M. at 2108 (concurring opinion).

⁸⁵ *NLRB v. Getman*, 404 U.S. 1204 (1971).

⁸⁶ It should be noted at this point, particularly for those unfamiliar with the practice of labor law, that since a large number of practicing labor lawyers formerly worked for the NLRB they either retained NLRB manuals when they left the agency or copied critical passages for private use.

⁸⁷ 414 F.2d 999, 71 L.R.R.M. 3107 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970).

⁸⁸ *Teamsters Local 597 (Polymers, Inc.)*, 170 N.L.R.B. 333, 67 L.R.R.M. 1433 (1968).

⁸⁹ 414 F.2d at 1006, 71 L.R.R.M. at 3111.

⁹⁰ Id.

⁹¹ Id., citing H. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966).

⁹² Id.

not exempted by the FOIA. It supplies copies of public documents (charges, complaints, election results, informal settlement agreements), makes available for daily inspection in each regional office a list of all charges and petitions filed, and will, for a reasonable charge, assemble categories of cases involving identified parties. Not infrequently, lawyers engaged in non-Board litigation seek publicly-available information and documents from NLRB files. In many ways the agency has taken various steps to implement both the letter and spirit of the FOIA and the consequence has been the dissemination of substantial information and documents to the public.

ANALYSIS

It is clear that the thrust of the FOIA is to increase every citizen's access to government records. It is similarly clear that the courts have interpreted the FOIA to require agencies to follow a liberal disclosure path, limited only by the specific, narrowly construed exemptions. The undergirding, unexpressed premise is that if federal agencies treat the public unfairly by denying it access to information, they are undermining the democratic principles of the "rule of law," "substantive due process," "equal protection under the law," and other such Lockean requisites of representative government.

The critical role of federal agencies, characterized by some as the "fourth branch of government," as well as the powers exercised by those agencies, impelled Congress to make agency records as open as is consistent with their operating responsibilities. No two agencies are alike and each operates in a different climate. In each agency a separate balance must be struck between the effective operations of that agency and the desire to make known to the public the operations of the agency. We have discussed the efforts of the NLRB and the courts to strike a consistent balance, through litigation, between the protection of all interests and the effort to make the fullest responsible disclosure. Certain themes which warrant comment have begun to arise from the litigation.

Clearly, in almost every case discussed, the courts have categorically rejected impeding the Board proceeding by injunctive relief, while FOIA claims are adjusted through court litigation. And indeed even where such claims for FOIA information have prevailed, as in *Automobile Club of Missouri*,⁹³ the courts have been most concerned with preventing an extended delay of Board proceedings which would cause hardship on other parties while the Board col-

⁹³ 84 L.R.R.M. 2423 (D.D.C. 1973).

lected and prepared the necessary information. The courts in such circumstances have sought to find temporary short-term remedies to supply the needs of the complaining party. This appears to be a reasonable approach since it prevents the use of FOIA litigation as a delaying tactic, permits the Board to process matters promptly, and at the same time, impels the Board to comply promptly and diligently with court orders to furnish certain information.

The Board not only must comply with the FOIA, but also, like the courts, must guard the privacy of witnesses prior to formal proceedings as well as the confidentiality of agency files. No court has questioned the right of the Board not to reveal such information. However, when it is ordered to furnish Advice and Appeals memoranda, both privacy and confidentiality are jeopardized. These memoranda identify specific witnesses, contain staff credibility findings, and detail the General Counsel's theory warranting complaint or dismissal of the charges.

Perhaps a reasonable approach to maintaining the sensitive balance in pending cases would be to excise from the memoranda everything but the factual findings, legal conclusions, and relevant precedents. Making available memoranda in their current style, form, and content could hinder the Board's operations in various ways, such as: limiting candid exchanges between agency personnel; impairing the confidentiality of Board investigations; and limiting agency discretion and flexibility in developing alternate remedies and legal theories. Another consequence of publicizing these memoranda would be to provide an advantage to respondents in unfair labor practice proceedings. Under present Board practice, without pre-trial disclosure, respondents, armed with these memoranda, would have an advantage not shared by agency trial lawyers.

Although we have indicated several unfavorable consequences likely to flow from making public these memoranda we should not exclude the possibility of at least one positive result. Aware of the facts and legal theories undergirding the General Counsel's case, respondents may approach settlements more realistically. Thus, more settlements may be obtained as a result of publicizing the memoranda.

A corollary of the foregoing type of disclosure of Advice and Appeals memoranda would be furnishing them where trials have been completed. At the trial most of the witnesses and their testimony would have been disclosed publicly, and the General Counsel's theory of the case would have been conveyed to all parties and to the Administrative Law Judge. Even this seemingly appealing approach intended to achieve a balance between access and

privacy contains dangers. The memoranda would reveal the names of witnesses and their testimony even if they were not called as witnesses. Employees could be reluctant to come forward if they knew that their testimony could be prematurely disclosed to employers or unions, especially if it were known that critical analysis of their statements, normally contained in memoranda, would be revealed to the public. No one likes to be called a liar in public. Such analysis should remain confidential for a reasonable number of years after the case is closed. Hard feelings arising from unfair labor practice allegations do not dissipate rapidly. Further, these memoranda frequently refer to correspondence and unsworn information from various individuals whose privacy and confidentiality would be impaired if such "old" memoranda were made available. It is obvious from the foregoing that public access to such memoranda is fraught with serious consequences both for those individuals and for the responsibilities of the NLRB.

There is no serious opposition to publicizing these memoranda in closed cases. Indeed, the General Counsel is preparing an index of them. But this may provide practitioners with another means of affecting General Counsel's action. The Board, not the General Counsel, decides finally the substantive law. Little would be gained by reviewing memoranda in cases not reaching the Board for determination. However, practitioners could use the index as a tool to check the consistency or inconsistency of General Counsel's refusal to issue complaints by showing that he is not following principles established in prior cases. Since the General Counsel's authority to decline to issue complaints is generally unreviewable by the courts, his asserted failure to follow the law set forth in the index could provide practitioners with grounds (arbitrary and capricious) for challenging the General Counsel in collateral Board proceedings.

Indexing directors' decisions involves neither privacy nor confidentiality. The delegation by the Board to directors, under the 1959 Landrum-Griffin amendments, to decide representation cases was intended to expedite the resolution of questions concerning representation. This has been achieved and everyone involved applauds the directors' fine record in this area. Will such an index contribute to better decisions, however "better" is defined? Will it slow down the proceedings? Will these decisions constitute precedents for the Board, or precedents for other directors?

However one views the purpose and use of such an index, one consequence may be delay. At present the Board adheres to its position that directors' decisions have no precedential value. It will only review a directors' decisions if they contain novel issues or are a

"departure from officially reported Board precedent."⁹⁴ However, it is uncertain how long the Board would be able to maintain such a posture, especially when challenged by practitioners in the courts, *i.e.*, consider how employers have successfully forced court review of "unreviewable" Board representation decisions by refusing to bargain with a certified union. If the Board and directors were forced to consider as precedent all directors' decisions (about 1,900 annually) issuing decisions would take more time. Directors would have to consider other directors' decisions to avoid inconsistent findings and conclusions; the Board would have the comparable task with respect to all directors' decisions; and all parties would face the same chore. Since the expedited processing of representation cases is so crucial for everyone, any action impeding this would be dysfunctional. However, we should resist the temptation of dire predictions, because federal agencies, like all organizations, usually find the means to accommodate performance of established tasks with new statutory obligations.

A review of NLRB litigation under the FOIA reveals that the District of Columbia courts have been most zealous in requiring the NLRB to furnish information. Why this happened is beyond the scope of this article. But the fact is important since the Board resides in Washington, D.C. where most of the litigation has occurred. We should expect, therefore, that litigants will continue filing actions to force the Board to make available publicly more and more information and documents. For whatever reasons, the board has voluntarily provided access to the public to materials hitherto unavailable. A comprehensive Field Manual containing the agency's principal operating procedure can be purchased by anyone. The Board is currently bringing up to date other manuals for public dissemination. Although the Board successfully resisted furnishing to a party its internal manual, "Guide to the Conduct of Elections," in the *Polymers*⁹⁵ case, it is preparing a public manual in the representation area and is planning to make available publicly other procedural manuals.

Our system of government recognizes and accepts no absolute rights and seeks to balance equally valid statutory goals. We try to reconcile forces of change and innovation with those of prudence and continuity. A fair appraisal of the Board's responses to the FOIA supports the conclusion that it has achieved a reasonable accommodation between the LMRA and the FOIA. Citizens have access to a substantial volume of NLRB materials and more are

⁹⁴ 29 C.F.R. § 102.67(c)(1) (1973).

⁹⁵ 414 F.2d 999, 71 L.R.R.M. 3107 (2d Cir. 1969).

being made available voluntarily and as a result of litigation. Not everyone is satisfied: neither the special clientele as the largest consumers of the Board's public services, nor the Board, which must consider privacy, confidentiality and possible impairment of its operating duties. Opening up agency records is part of a broad movement enlarging the citizen's right to know, and the NLRB's record demonstrates constructive implementation of this right.

EMERGING THEMES

Having reviewed and analyzed litigation involving the NLRB and the FOIA, we feel that principal notions deserve comment. Prescinding from the latter, we should clear the underbrush by noting that the goodness or badness of the FOIA is not relevant. Congress enacted the law in the public interest and federal agencies are required to implement it.

As always, differences regarding interpretation and application of the FOIA are bound to arise and the courts are called upon in specific cases to adjudicate between a party and a federal agency. Out of this elucidating process various principles and standards evolve. These are guides and constraints for parties and agencies, and a body of law is built for application to particular situations in our dynamic society. Just as certain procedures and legal principles become part of the structure and terrain determining what information parties may or may not obtain from the NLRB, so it is virtually inevitable that unforeseen and untoward consequences will flow from the administration of any new law.

One of the clearest results has been the strategic use of the FOIA by parties seeking to delay, or impede, if not frustrate, NLRB actions. As the cases illustrate, at some point in an NLRB proceeding a respondent demands documentary information and not infrequently asks the court to enjoin further NLRB action pending production of the requested documents. This ancillary litigation compels the Board to divert its scarce resources to respond to the suit and may postpone the ongoing NLRB proceeding.

Respondents would challenge this observation with the assertion that, if the Board had made available earlier the sought-after data, the respondent would not have to sue to obtain the documents. Yet, the Board has made public a substantial amount of materials since passage of the FOIA. Apparently, there is a continuing race between what the Board places in the public realm and what specific parties want. And we suspect that it is the nature of our administrative and judicial processes that such races never end.

Although the Board and charging parties may consider such

litigation strategic and dilatory, these suits have a positive consequence. As a result of the FOIA and in anticipation of demands for information, the NLRB is nudged, if not pushed, to re-examine its internal decision-making processes and memoranda. Whether under the FOIA, and particularly under the exemptions, a document is "internal" or a "final determination" becomes crucial since if it falls into the latter category the public has a right to obtain it. Hence, the Board will have to rationalize and revise its internal processes and memoranda. This should not only enhance the public's right-to-know, a foundation of our civil rights, but should also impel the Board to streamline and bring up to date obsolete and vestigial internal procedures and documents.

Another positive result of the FOIA is illustrated by the action initiated by Professors Goldberg and Getman. They were engaged in a substantial and significant empirical study of the behavior of voters in NLRB elections. The court's decision ordering the Board to make available *Excelsior* lists facilitated their study. But more importantly it demonstrated to everyone, particularly responsible scholars, that vital data in the NLRB's possession would be given to further objective studies.⁹⁶ This action should encourage others to develop empirical studies on the impact of the LMRA, a neglected area.⁹⁷

Lest the impression emerge from the litigation that the Board has resisted complying with the language and spirit of the FOIA, we want to emphasize that the agency has always made public substantial amounts of materials. Its annual reports are a rich reservoir of information and contain detailed statistical tables. Its monthly election reports and its quarterly reports on case developments provide rich sources of information and records of the agency's internal decisions. And the Board regularly complies with specific requests for data consistent with its responsibilities and the FOIA.

The FOIA requires the NLRB to draw a reasonable balance among the following: protecting the confidentiality of its files, fulfilling its operational responsibilities, and providing the public with certain documents. Each is a crucial obligation and accommodating all three is a vexing, delicate task. They are intertwined. For example, Appeals and Advice memoranda contain reference to and quotes from affidavits furnished by people not directly

⁹⁶ However, not all requests for the lists emanate from responsible and accredited scholars. Local unions, not involved in the specific elections, have asked the NLRB to furnish "old" *Excelsior* lists to assist such unions in their organizing campaigns. Up to now the Board has not complied with these requests. The operational problems and policy implications of furnishing these lists are serious and troublesome.

⁹⁷ Samoff, Research on National Labor Relations Board Decisions, 10 Ind. & Lab. Rel. Rev. 108 (1956).

involved. Should their names and testimony be revealed? Does the "special public" have a right to this information? Consider the invasion of their privacy and impairment of agency investigations! On the other hand, providing indices of directors' decisions would not have any of the above consequences. Similarly, making available NLRB data to responsible scholars with appropriate safeguards would neither invade privacy nor impair agency tasks.

To maintain a reasonable and prudent balance, the NLRB must look to the public and clientele for understanding and cooperation. And in carrying out its responsibilities the Board must be conscious of the overseeing courts. All, therefore,—the NLRB, the public, the clientele (unions and management) and the courts—are involved in this balancing process. If each acts only in its own self-interest to gain a selfish advantage, then the future will witness resistance, delay, strategic maneuvering and unachievable demands.

The FOIA is part of an historical legislative development to provide the public with access to agency documents. It seems to us a constructive move in enlarging the corpus of our civil rights. This should be welcomed by everyone, even though it raises difficulties for federal officials who may prefer less airing. Let all of us, federal officials, judges, individuals and management and union lawyers, use the FOIA and the NLRB in the public interest, for we are all citizens of one large community.

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