



DCN: 12147
 DEPARTMENT OF DEFENSE
 WASHINGTON HEADQUARTERS SERVICES
 WASHINGTON, DC 20301-1155

Caroline - you
FTI
 ok to keep offi
 Personnel Files
 however they must
 be locked and have
 limited access. Please
 let me know who will
 have access.

16 APR 1991
 Thanks
 Bob
 More
 G.C.

(71703)

(Personnel and Security)

MEMORANDUM FOR STAFF DIRECTOR, BASE CLOSURE AND RELOCATION COMMISSION

SUBJECT: Release of Records

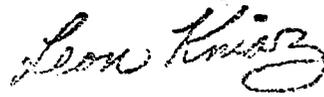
Earlier this month, we discussed a number of issues touching interests of the Base Closure and Relocation Commission. In that get-acquainted session with the Commission's General Counsel, the matter of release of certain categories of information was a topic of particular interest to me. As you know, PL101-510 prescribes that..."all the proceedings, information, and deliberations of the Commission shall be open, upon request, to..." specified Members of Congress. Similarly, I understand that this "spirit of release" will apply to interested members of the Public. Notwithstanding these strong and entirely proper biases the Commission must operate under, I want to take this opportunity to set down a few principles of nonconsensual release concerning personnel records. In some respects these principles contravene the general operating bias.

Although there may be a number of reasons for nonrelease of personnel records, the most frequent one is that disclosure would result in a clearly unwarranted invasion of personal privacy. Records of this sort (the Official Personnel Folder (OPF), medical files, employee performance files, and similar records) are maintained by the Directorate for Personnel and Security. The OPF is maintained custodially for the Office of Personnel Management. Release of information about an individual contained in a Privacy System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. Most informal office records of this sort maintained at Commission offices are also insulated from outside scrutiny by the same privacy considerations.

Attachment (A) provides a listing of privacy records maintained by the Directorate for Personnel and Security. Attachments (B) and (C) are the Directives controlling the DoD Freedom of Information Act and Privacy Act Programs. Although they do not apply directly to the Commission, much of the philosophies of release is appropriate to Commission operations.

**71703 - Lowman*
607 [redacted] - 3426 - OPM
OGC
695 3341
Bob Gillett
** Pat Kep OGC*
5-3392
FOIA-
7-1180

In the event individuals or groups outside the Commission request information concerning your employees that may be protected information, please consult both your General Counsel and me. I appreciate your help.

A handwritten signature in cursive script that reads "Leon Kniaz".

Leon Kniaz
Director

Attachments
As Stated

cc:
BCC General Counsel

MEMORANDUM

To: Commission Staff

From: Mary Ann Hook, General Counsel

Date: October 11, 1994

Re: Privacy Act

The Privacy Act of 1974 protects individuals against unwarranted invasions of privacy stemming from federal agencies' collection, maintenance, use and disclosure of information about them. The Act applies to the Commission. However, due to our payment and personnel arrangements with DoD, we fall under the DoD's regulations.

We are liable for the release of material protected under the Act. Substantial fines are assessed to those who violate the Act by revealing private information about, not only government employees, but any person who has contact with the Commission, i.e. a mayor who testifies before the Commission.

We do not have to publish our own regulations to implement the Privacy Act unless we create and maintain a system of records that are retrievable by name or another personnel information. Therefore, the following must be the practice of the Commission:

- 1- Our personnel records may be kept by name since DoD is maintaining the official and original documents. Any changes must be done on DoD's official forms -- and replicated on our documents in our "custodian" files.
- 2- The Commission's personnel files - both here and at DoD - should consist of more than one file for each person. Subjects should be grouped separately. For example, a person's SF 171 form should not be filed with his performance reviews. There should be separate files for different information. It should be organized into logical files so if a person wants to look for one point of fact, the entire file will not be revealed.
- 3- When anyone internally wants to use the file - the official ones are regarded as accurate. We technically are holding only copies.
 - a. On that note, access to the files should be limited to Administration personnel and the Staff Director and the General Counsel - for a limited and specific purpose.
- 4- Any requests for information that are of a personal nature, where someone's name is used as part of the request, may fall under the Privacy Act and should be directed to General Counsel's office.

5- For maintaining all other files, the Commission, including but not limited to the Executive Secretariat, should not keep files organized by peoples' names, social security numbers or other similar identifiers. For example, the testimony provided to the Commission is located by reading the transcripts or by looking through base specific material - not by looking at a list of names of those who testified. Rolodexes are exempt - as is the computer card file. The card files should be limited to names, addresses and telephone numbers. Records should be kept by date, base or subject matter. Any other system of records that has names as a way of indexing information is not acceptable. All staff should be made aware of these restrictions now and for the 1995 cycle.

If you have any questions, please feel free to ask.



Freedom of Information and Privacy Acts: A Guide to Their Use IP 47F

The Freedom of Information Act (FOIA), enacted in 1966, presumes that records of the executive branch of the U.S. Government are accessible to the public. The Privacy Act of 1974 is a companion to the FOIA and regulates Government agency record-keeping and disclosure practices. The Freedom of Information Act provides that citizens have access to Federal Government files with certain restrictions. The Privacy Act provides certain safeguards for individuals against invasion of privacy by Federal agencies and permits them to see most records pertaining to them maintained by the Federal Government.

The enclosed report, *A Citizen's Guide on Using the Freedom of Information Act and Privacy Act of 1974*, House Report 102-146, dated July 10, 1991, and issued by the House Committee on Government Operations, explains how to use the two laws and serves as a guide to obtaining information from Federal agencies. This report, revised by the committee in 1993, was reissued on May 24, 1993, with the same title but a new number, House Report 103-104. The changes were technical in nature; therefore we are continuing to use the old version until supplies are depleted.

The complete texts of the Freedom of Information Act, as amended (5 U.S.C. 552), and the Privacy Act, as amended (5 U.S.C. 552a), are reprinted in the back of the enclosed pamphlet.

The Privacy Act requires each executive agency of the Federal Government to publish in the *Federal Register* its regulations for complying with the Act and descriptions of all its systems of records maintained on individuals. Each cumulative issue of the *Federal Register Index* has a listing in the back of citations to these Privacy Act regulations. The Privacy Act citations are followed by a "Guide to Freedom of Information Indexes." The *Federal Register* is available for use at many large libraries, particularly those that are depositories of U.S. Government publications.

(over)

There are additional Federal statutes relating to the privacy of personal records, such as certain banking and educational records, kept by companies or agencies other than those of the Federal Government. These statutes can be identified by consulting the general index to the *United States Code* under the subject terms, "Right of Privacy" and "Right to Financial Privacy." The *United States Code* is available in many public libraries. Moreover, many States also have enacted right to privacy laws as well as freedom of information laws.

Neither the Privacy Act nor this Info Pack addresses Federal constitutional questions such as freedom of association, freedom of the press, or the fourth amendment's protection against unreasonable searches and seizures.

Members of Congress who want further information on this topic may contact CRS at 7-5700. Additional CRS Reports may be identified by looking in the current *Guide to CRS Products* (for congressional use only) and in the latest *Update* under "Government information."

Constituents may find additional information on this topic in a local library through the use of printed and electronic indexes, such as *Readers' Guide to Periodical Literature*, Public Affairs Information Service *Bulletin* (PAIS), and various newspaper indexes. Books on this subject may be identified through the library's catalog or the most recent edition of *Subject Guide to Books in Print*.

We hope this information will be helpful.

Congressional Reference
Division

456 U.S. 595 printed in FULL format.

UNITED STATES DEPARTMENT OF STATE ET AL. v. WASHINGTON POST
CO.

No. 81-535

SUPREME COURT OF THE UNITED STATES

456 U.S. 595; 102 S. Ct. 1957; 1982 U.S. LEXIS 106; 72 L.
Ed. 2d 358; 50 U.S.L.W. 4522; 8 Media L. Rep. 1521

March 31, 1982, Argued
May 17, 1982, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT.

DISPOSITION: 207 U. S. App. D. C. 372, 647 F.2d 197, reversed and remanded.

SYLLABUS: Respondent filed a request with petitioner United States Department of State under the Freedom of Information Act for documents indicating whether certain Iranian nationals held valid United States passports. The State Department denied the request on the ground that the requested information was exempt from disclosure under Exemption 6 of the Act, which provides that the Act's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Pending an ultimately unsuccessful administrative appeal, respondent brought an action in Federal District Court to enjoin petitioners from withholding the requested documents, and the court granted summary judgment for respondent. The Court of Appeals affirmed, holding that because the citizenship status of the individuals in question was less intimate than information normally contained in personnel and medical files, it was not contained in "similar files" within the meaning of Exemption 6, and that therefore there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.

Held: The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and hence the State Department's denial of the request should have been sustained upon a showing that release of the information would constitute a clearly unwarranted invasion of personal privacy. Although Exemption 6's language sheds little light on what Congress meant by "similar files," the legislative history indicates that Congress did not mean to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information, but that "similar files" was to have a broad, rather than a narrow, meaning. Exemption 6's protection is not determined merely by the nature of the file containing the requested information, and its protection is not lost merely because an agency stores information about an individual in records other than "personnel" or "medical" files. Pp. 599-603.

COUNSEL: Deputy Solicitor General Geller argued the cause for petitioners. With him on the briefs were Solicitor General Lee, Assistant Attorney General McGrath, Elinor Hadley Stillman, Leonard Schaitman, Bruce G. Forrest, and Margaret E. Clark.

456 U.S. 595, *; 102 S. Ct. 1957;
1982 U.S. LEXIS 106; 72 L. Ed. 2d 358

David E. Kendall argued the cause for respondent. With him on the brief were Edward Bennett Williams and Lon S. Babby. *

* Bruce W. Sanford, W. Terry Maguire, Erwin G. Krasnow, and Arthur B. Sackler filed a brief for the American Newspaper Publishers Association et al. as amici curiae urging affirmance.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., concurred in the judgment.

OPINIONBY: REHNQUIST

OPINION: [*596] JUSTICE REHNQUIST delivered the opinion of the Court.

In September 1979, respondent Washington Post Co. filed a request under the Freedom of Information Act (FOIA), 5 U. S. C. @ 552, requesting certain documents from petitioner United States Department of State. The subject of the request was defined as "documents indicating whether Dr. Ali Behzadnia and Dr. Ibrahim Yazdi . . . hold valid U.S. passports." App. 8. The request indicated that respondent would "accept any record held by the Passport Office indicating whether either of these persons is an American citizen." Ibid. At the time of the request, both Behzadnia and Yazdi were Iranian nationals living in Iran.

The State Department denied respondent's request the following month, stating that release of the requested information "would be 'a clearly unwarranted invasion of [the] personal privacy' of these persons," id., at 14 (quoting 5 U. S. C. @ 552(b)(6)), and therefore was exempt from disclosure under Exemption 6 of the FOIA. n1 Denial of respondent's request [*597] was affirmed on appeal by the Department's Council on Classification Policy, which concluded that "the privacy interests to be protected are not incidental ones, but rather are such that they clearly outweigh any public interests which might be served by release of the requested information." Id., at 22-23.

- - - - -Footnotes- - - - -

n1 Exemption 6 provides that the disclosure requirements of the FOIA do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U. S. C. @ 552(b)(6).

- - - - -End Footnotes- - - - -

While pursuing the administrative appeal, respondent brought an action in the United States District Court for the District of Columbia to enjoin petitioners from withholding the requested documents. Both sides filed affidavits and motions for summary judgment. Petitioners' affidavit, from the Assistant Secretary of State for Near Eastern and South Asian Affairs, explained that both Behzadnia and Yazdi were prominent figures in Iran's Revolutionary Government and that compliance with respondent's request would "cause a real threat of physical harm" to both men. n2 The District Court nonetheless granted respondent's motion for summary judgment.

- - - - -Footnotes- - - - -

456 U.S. 595, *597; 102 S. Ct. 1957;
1982 U.S. LEXIS 106; 72 L. Ed. 2d 358

n2 Petitioners' original affidavit stated:

"There is intense anti-American sentiment in Iran and several Iranian revolutionary leaders have been strongly criticized in the press for their alleged ties to the United States. Any individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust. An official of the Government of Iran who is reputed to be an American citizen would, in my opinion, be in physical danger from some of the revolutionary groups that are prone to violence.

. . . .

"It is the position of the Department of State that any statement at this time by the United States Government which could be construed or misconstrued to indicate that any Iranian public official is currently a United States citizen is likely to cause a real threat of physical harm to that person." Affidavit of Harold H. Saunders, Jan. 14, 1980, App. 17.

The affidavit reported that Yazdi, who had previously held the position of Foreign Minister, was currently a member of the Revolutionary Council and was responsible for solving problems in various regions of Iran. It also indicated that Behzadnia had been a senior official in the Ministry of National Guidance, but that the State Department had not received any report of his activities in recent weeks. Ibid. A supplemental affidavit, executed three months after the first affidavit, stated that Yazdi had been elected to the Iranian National Assembly, but that the activities of Behzadnia were still unreported. Supplemental Affidavit of Harold H. Saunders, Apr. 22, 1980, App. 41.

- - - - -End Footnotes- - - - -

[*598] Petitioners appealed, and the Court of Appeals for the District of Columbia Circuit affirmed. 207 U. S. App. D. C. 372, 647 F.2d 197 (1981). As construed by the Court of Appeals, Exemption 6 permits the withholding of information only when two requirements have been met: first, the information must be contained in personnel, medical, or "similar" files, and second, the information must be of such a nature that its disclosure would constitute a clearly unwarranted invasion of personal privacy. Id., at 373, 647 F.2d, at 198. Petitioners argued that the first requirement was satisfied because the information sought by respondent was contained in "similar files." The Court of Appeals disagreed, holding that the phrase "similar files" applies only to those records which contain information "'of the same magnitude -- as highly personal or as intimate in nature -- as that at stake in personnel and medical records.'" Id., at 373-374, 647 F.2d, at 198-199 (quoting Simpson v. Vance, 208 U. S. App. D. C. 270, 273, 648 F.2d 10, 13 (1980), in turn quoting Board of Trade v. Commodity Futures Trading Comm'n, 200 U. S. App. D. C. 339, 345, 627 F.2d 392, 398 (1980)). Because it found the citizenship status of Behzadnia and Yazdi to be less intimate than information normally contained in personnel and medical files, the Court of Appeals held that it was not contained in "similar files." Therefore, the Court of Appeals reasoned, there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy; having failed to meet the first requirement of Exemption 6, the information had to be disclosed under the mandate of the

456 U.S. 595, *598; 102 S. Ct. 1957;
1982 U.S. LEXIS 106; 72 L. Ed. 2d 358

FOIA. We granted certiorari, 454 U.S. 1030 (1981), to review the Court of Appeals' construction of the "similar files" language, and we now reverse.

[*599] The language of Exemption 6 sheds little light on what Congress meant by "similar files." Fortunately, the legislative history is somewhat more illuminating. The House and Senate Reports, although not defining the phrase "similar files," suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information. After referring to the "great quantities of [Federal Government] files containing intimate details about millions of citizens," the House Report explains that the exemption is "general" in nature and seeks to protect individuals:

"A general exemption for [this] category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H. R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966) (emphasis added).

Similarly, the Senate Judiciary Committee reached a "consensus that these [personal] files should not be opened to the public, and . . . decided upon a general exemption rather than a number of specific statutory authorizations for various agencies." S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965) (emphasis added). The Committee concluded that the balancing of private against public interests, not the nature of the files in which the information was contained, should limit the scope of the exemption: "It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" Ibid. Thus, "the primary concern of Congress in drafting [*600] Exemption 6 was to provide for the confidentiality of personal matters." Department of Air Force v. Rose, 425 U.S. 352, 375, n. 14 (1976).

Respondent relies upon passing references in the legislative history to argue that the phrase "similar files" does not include all files which contain information about particular individuals, but instead is limited to files containing "intimate details" and "highly personal" information. See H. R. Rep. No. 1497, supra, at 11; S. Rep. No. 813, supra, at 9. We disagree. Passing references and isolated phrases are not controlling when analyzing a legislative history. Congress' statements that it was creating a "general exemption" for information contained in "great quantities of files," H. R. Rep. No. 1497, supra, at 11, suggest that the phrase "similar files" was to have a broad, rather than a narrow, meaning. This impression is confirmed by the frequent characterization of the "clearly unwarranted invasion of personal privacy" language as a "limitation" which holds Exemption 6 "within bounds." S. Rep. No. 813, supra, at 9. See also, H. R. Rep. No. 1497, supra, at 11; S. Rep. No. 1219, 88th Cong., 2d Sess., 14 (1964). Had the words "similar files" been intended to be only a narrow addition to "personnel and medical files," there would seem to be no reason for concern about the exemption's being "held within bounds," and there surely would be clear suggestions in the legislative history that such a narrow meaning was intended. We have found none.

456 U.S. 595, *600; 102 S. Ct. 1957;
1982 U.S. LEXIS 106; 72 L. Ed. 2d 358

A proper analysis of the exemption must also take into account the fact that "personnel and medical files," the two benchmarks for measuring the term "similar files," are likely to contain much information about a particular individual that is not intimate. Information such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet respondent does not disagree that such information, if contained in a "personnel" or "medical" file, would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy. The passport information [*601] here requested, if it exists, presumably would be found in files containing much of the same kind of information. Such files would contain at least the information that normally is required from a passport applicant. See 22 U. S. C. @ 213. It strains the normal meaning of the word to say that such files are not "similar" to personnel or medical files.

We agree with petitioners' argument that adoption of respondent's limited view of Exemption 6 would produce anomalous results. Under the plain language of the exemption, nonintimate information about a particular individual which happens to be contained in a personnel or medical file can be withheld if its release would constitute a clearly unwarranted invasion of personal privacy. And yet under respondent's view of the exemption, the very same information, being nonintimate and therefore not within the "similar files" language, would be subject to mandatory disclosure if it happened to be contained in records other than personnel or medical files. "[The] protection of an individual's right of privacy" which Congress sought to achieve by preventing "the disclosure of [information] which might harm the individual," H. R. Rep. No. 1497, supra, at 11, surely was not intended to turn upon the label of the file which contains the damaging information. In Department of Air Force v. Rose, supra, at 372, we recognized that the protection of Exemption 6 is not determined merely by the nature of the file in which the requested information is contained:

"Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files."

By the same reasoning, information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than "personnel" or "medical" files.

[*602] In sum, we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, "[the] exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." H. R. Rep. No. 1497, supra, at 11. n3 When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy. n4

- - - - -Footnotes- - - - -

456 U.S. 595, *602; 102 S. Ct. 1957;
1982 U.S. LEXIS 106; 72 L. Ed. 2d 358

n3 This view of Exemption 6 was adopted by the Attorney General shortly after enactment of the FOIA in a memorandum explaining the meaning of the Act to various federal agencies:

"It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 36 (June 1967) (emphasis added).

n4 This construction of Exemption 6 will not render meaningless the threshold requirement that information be contained in personnel, medical, and similar files by reducing it to a test which fails to screen out any information that will not be screened out by the balancing of private against public interests. As petitioners point out, there are undoubtedly many Government files which contain information not personal to any particular individual, the disclosure of which would nonetheless cause embarrassment to certain persons. Information unrelated to any particular person presumably would not satisfy the threshold test.

- - - - -End Footnotes- - - - -

The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and petitioners' denial of the request should have been sustained upon a showing by the Government that release of the information would constitute a clearly unwarranted invasion of personal privacy. n5 The Court of Appeals expressly declined to consider [*603] the effect of disclosure upon the privacy interests of Behzadnia and Yazdi, and we think that such balancing should be left to the Court of Appeals or to the District Court on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

- - - - -Footnotes- - - - -

n5 In holding that "similar files" are limited to those containing intimate details about individuals such as might also be contained in personnel or medical files, the Court of Appeals relied on its decision in Simpson v. Vance, 208 U. S. App. D. C. 270, 648 F.2d 10 (1980). In Simpson, the Court of Appeals held that portions of the State Department's Biographical Register could not be considered a "similar file" because such information was currently available to the public. Id., at 275, 648 F.2d, at 15. At the same time, Simpson held that release of information pertaining to an individual's marital status and the name of the individual's spouse "would not be appropriate." Id., at 277, 648 F.2d, at 17. Respondent contends that information concerning the citizenship of Behzadnia and Yazdi likewise cannot be withheld as contained in "similar files" because United States citizenship is a matter of public record.

Even under the Court of Appeals' holding in Simpson, however, the fact that citizenship is a matter of public record somewhere in the Nation cannot be decisive, since it would seem almost certain that the information concerning marital status that was withheld in Simpson would likewise be contained in public records. In addition, "personnel" files, which expressly come within Exemption 6, are likely to contain much information that is equally a matter

456 U.S. 595, *603; 102 S. Ct. 1957;
1982 U.S. LEXIS 106; 72 L. Ed. 2d 358

of public record. Place of birth, date of birth, marital status, past criminal convictions, and acquisition of citizenship are some examples. The public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a "clearly unwarranted invasion of personal privacy," but it does not militate against a conclusion that files are "similar" to personnel and medical files.

- - - - -End Footnotes- - - - -

It is so ordered.

JUSTICE O'CONNOR concurs in the judgment.

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627 F.2d 392 printed in FULL format.

BOARD OF TRADE OF THE CITY OF CHICAGO v. COMMODITY FUTURES
TRADING COMMISSION, APPELLANT

No. 78-1089

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA
CIRCUIT

627 F.2d 392; 200 U.S. App. D.C. 339

Argued January 23, 1979
May 13, 1980

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 77-0560)

COUNSEL: Jeffrey Axelrad, Attorney, Department of Justice, with whom Earl J. Silbert, United States Attorney at the time the brief was filed, Barbara Allen Babcock, Assistant Attorney General, and Leonard Schaitman, Attorney, Department of Justice, were on the brief, for appellant.

Mahlon M. Frankhauser, with whom David R. Schwiesaw was on the brief, for appellee.

OPINIONBY: ROBINSON

OPINION: [*394]

Before ROBINSON and ROBB, Circuit Judges, and RICHEY *, United States District Judge for the District of Columbia.

* Sitting by designation pursuant to 28 U.S.C. @ 292(a) (1976).

Opinion for the Court filed by Circuit Judge ROBINSON.

ROBINSON, Circuit Judge: This case is the aftermath of the Commodity Futures Trading Commission's refusal to divulge to the Board of Trade of the City of Chicago the identities of "trade sources" who have supplied information to the Commission concerning the Board's plywood futures contract. The Commission argues that its release of all materials in its possession, but with identifying details deleted, is in full compliance with the disclosure requirements of the Freedom of Information Act, n1 assertedly because these excisions are permitted by Exemptions 4 n2 and 6 n3 of the Act. The District Court granted the Board's motion for judgment on the pleadings n4 and ordered full disclosure on the ground that neither exemption justifies the deletions. We affirm the District Court's conclusion that the Commission's reliance on Exemption 6 is misplaced, n5 but remand for further consideration of the Exemption 4 claim. n6

n1 Pub. L. No. 89-554, 80 Stat. 383 (1966), 5 U.S.C. @ 552 (1976) [hereinafter cited as codified].

n2 5 U.S.C. @ 552(b)(4), quoted in text infra at note 61.

n3 5 U.S.C. @ 552(b)(6), quoted in text infra at note 21.

n4 Board of Trade v. CFTC, No. 77-560, at 4 (D.D.C. Oct. 28, 1977), App. 136, 139. The Commission had moved for summary judgment, but the court denied that motion and instead awarded judgment on the pleadings in the Board's favor -- precisely what the latter had sought. Since, however, the record contains matter outside the pleadings highly relevant to the issues, it may be that the Board's motion should more properly have been taken as one for summary judgment. See Fed. R. Civ. P. 12(c). We so treat the Board's motion in order that we may give the record before us its broadest consideration. See text infra at notes 83-85.

n5 See Part II infra.

n6 See Part III infra.

I. BACKGROUND

The information in dispute was acquired by the Commission n7 in the course of an investigation undertaken to ensure the continued conformance of the Board's plywood futures contract n8 with statutory standards n9 and Commission guidelines. Plywood futures were first traded on the Board in 1969, and the exchange was designated as the contract market for the commodity in 1974. n10 Pursuant to its statutory responsibility for overseeing contracts for the sale of commodities for future delivery traded or executed on boards of trade or [*395] commodity exchanges, n11 the Commission has established guidelines for approval of such contracts for trading: each must serve a reasonable economic purpose, its terms and conditions must be commercially viable, and the contract designation must not be contrary to the public interest. n12 The Commission periodically conducts investigations to determine whether existing commodities futures contracts meet these requirements.

n7 The Commodity Futures Trading Commission is an independent regulatory agency created by the Commodity Futures Trading Act of 1974. Commodity Exchange Act, 42 Stat. 998 (1922), as amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, 7 U.S.C. @@ 1 et seq. (1976) [hereinafter cited as codified].

n8 Initially, the Commission sought reports from the Board on both the plywood and stud lumber futures contracts. The request was withdrawn with respect to the latter after the Commission was informed that stud lumber futures were no longer actively traded on the Board. See Letter from Warren W. Lebeck, President of the Chicago Board of Trade, to Stanley S. Ostrowski, Acting Director of the Market Analysis Division of the CFTC, July 12, 1976, Appendix (App.) 21; Letter from Mark J. Powers, Chief Economist of CFTC, to Warren W. Lebeck, President of the Chicago Board of Trade, Sept. 8, 1976, App. 23.

n9 It is unlawful to offer for sale or to effect the sale of a futures contract otherwise than "by or through a member of a board of trade which has been designated by the Commission as a contract 'market' "for that commodity. 7 U.S.C. @ 6 (1976).

n10 A board of trade seeking designation as a contract market must "[demonstrate] that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public

interest." 7 U.S.C. @ 7(g) (1976). In addition to meeting this statutory standard, the board must comply with Commission guidelines.

n11 See 7 U.S.C. @ 2 (1976).

n12 Commodity Futures Law Reports P20,041, at 20,619 (CCH 1975), App. 58.

The inquiry into the plywood futures contract focused particularly on its delivery provisions, a subject with respect to which the Commission had received several complaints. n13 Criticisms and proposed alternatives were solicited from persons utilizing the contract, and at least some of those who responded did so with the understanding that their identities would be kept confidential. n14 Subsequent to these consultations, the Commission requested a report from the Board concerning the contract's shipping certificate specification. The Commission received this report, but when it called for a more detailed analysis of the certificate -- obliging the Board to respond to complaints by "trade sources," to "discuss the legitimacy of [enumerated] trade-alleged problems," and to consider "industry-proposed alternatives" to the current shipping certificate n15 -- the Board declined to comply. The basis for the Board's refusal was its contention that the "analysis could properly be made only if the sources of the criticisms and proposed alternatives were identified and the data supporting the proposals were made available for review." n16

n13 For example, in a letter seeking information from the Board, the Commission related that "trade sources [had] complained to the CFTC that nonconvergence has discouraged hedging activity in plywood." Letter from Stanley S. Ostrowski, Acting Director of the Marketing Analysis Division of CFTC, to Warren W. Lebeck, President of the Chicago Board of Trade, July 9, 1976, at 1, App. 18. The same letter also advised the Board that the Commission had received allegations to the effect that "regular warehousemen (particularly public warehousemen who do not merchandise plywood in the cash market) incur losses on inbound freight when certificate holders elect to keep plywood in store for longer than a year." Id. at 2, App. 19.

n14 "The interviews were conducted under the express or implied understanding that the identities of the interviewees would be held in confidence." Brief for Appellants at 15.

n15 Ostrowski-Lebeck letter, supra note 13, at 1-2, App. 18-19. Complaint at 6 P11, App. 12.

n16 Brief for Appellee at 5.

The Board then engaged in a series of informal attempts to acquire the names and supporting facts from the Commission. When these efforts failed, the Board made a formal Freedom of Information Act request for any "data or analysis... submitted or developed in connection with the 'industry-proposed alternatives,'" as well as the identity of the so-called "trade sources" -- including persons who had complained of "trade-alleged problems" and those who had offered "industry-proposed alternatives." n17 In response, the Commission's Office of Public Information decided to release the documents in its possession related to the inquiry but with all identifying details excised, n18 a decision affirmed on appeal within the agency. n19 The Commission justified these deletions on the basis of Exemptions 4 and 6 of the Act. n20 [*396] Following receipt of the redacted documents, the Board commenced this litigation in the District Court.

n17 Letter (FOIA request) from Mahlon M. Frankhauser, Attorney for the Chicago Board of Trade, to De Van L. Shumway, Director of CFTC Office of Public Information, Nov. 8, 1976, at 2, App. 27.

n18 Letter from Ray K. Schleeter, Deputy Director of CFTC Office of Public Information, to Mahlon M. Frankhauser, Attorney for the Chicago Board of Trade, Nov. 30, 1976, App. 28.

n19 Letter from Richard E. Nathan, Acting General Counsel of CFTC, to Mahlon M. Frankhauser, Attorney for the Chicago Board of Trade, Jan. 26, 1977, App. 37. The Commission upheld the denial by its Office of Public Information of the Board's request for identities of the trade sources, but ordered the release, with identifying details omitted, of documents from an additional file discovered after the initial documents were turned over the the Board.

n20 5 U.S.C. §§ 552(b)(4), 552(b)(6), quoted in text infra at notes 61 and 21, respectively.

II. EXEMPTION 6

Exemption 6 of the Freedom of Information Act removes from coverage "matters that are... personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." n21 An agency predicating denial of a request for information on Exemption 6 must demonstrate that both prongs of this statutory test are satisfied. n22 In the instant case, the District Court looked first to the question whether the materials sought by the Board constituted "personnel," "medical," or "similar files," and found that "[the] Government [had made] no pretense that they [were]." n23 Without reaching the invasion-of-privacy question, the court then held that the Commission's refusal to supply the identities of the trade sources could not be justified by reliance on Exemption 6. n24

n21 5 U.S.C. § 552(b)(6) (1976).

n22 See, e.g., *Ditlow v. Shultz*, 170 U.S.App.D.C. 352, 355, 517 F.2d 166, 169 (1975), *Rural Housing Alliance v. Department of Agriculture*, 162 U.S.App.D.C. 122, 126, 498 F.2d 73, 77 (1974); *Getman v. NLRB*, 146 U.S.App.D.C. 209, 213, 450 F.2d 670, 674, stay denied, 404 U.S. 1204, 92 S.Ct. 7, 30 L.Ed. 2d 8 (1971) (Justice Black, as Acting Circuit Justice); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 135 (3d Cir. 1974); Note, *The Freedom of Information Act: A Seven-Year Assignment*, 74 Colum. L. Rev. 895, 953 (1974).

n23 *Board of Trade v. CFTC*, supra note 4, at 4, App. 139.

n24 *Id.*

The Commission argues that the District Court's ruling is erroneous because release of the identities would infringe upon privacy interests similar to those protected by the statutory liberation of personnel files from disclosure. In support of this contention, the Commission opines that if the names of the trade sources are made public, these "individuals may find themselves subject to pressure from their colleagues or from persons with whom they do business"; n25 moreover, in the Commission's view, there is a "strong possibility that [the Board] will contact the sources and attempt to pressure them" as well. n26 Consequently, the Commission asserts that the interests at stake are of the

magnitude of those Congress intended to safeguard by the "similar files" language of Exemption 6.

n25 Brief for Appellant at 21.

n26 Reply Brief for Appellant at 17.

We agree with the District Court that Exemption 6 does not shield the information sought by the Board. The dispositive inquiry with respect to the Commission's claim is whether the desired information is contained in documents that are "similar files" within the purview of the exemption, n27 since they clearly are neither medical nor personnel rerecords. We hold that they are not similar files either.

n27 The Third Circuit has held that a list of names and addresses is a "file" within the meaning of Exemption 6. *Wine Hobby USA, Inc. v. IRS*, supra note 22, 502 F.2d at 135. Although we have had occasion to assume arguendo that such a list would be a "file," *Getman v. NLRB*, supra note 22, 146 U.S.App.D.C. at 213, 450 F.2d at 674, we have yet to decide that question, and we do not reach it in this case. The identities here are not simply a list of names; rather, they are linked to specific comments on the functioning of the Board of Trade. In this context, names take on a far different character than they do in a compilation such as the list of employees in *Getman*. For the facts of *Getman*, see note 33 infra. See also note 69 infra.

In reaching this conclusion, we have detected some apparent inconsistency in our earlier decisions as to the precise manner of approach to the problem. In *Rural Housing Alliance v. United States Department of Agriculture*, n28 we indicated that the question whether materials withheld on the basis of Exemption 6 is a similar file within the meaning thereof must be answered before the court will undertake to balance the personal privacy interests involved against the public interest in the free availability of [*397] information. n29 Conversely, in *Getman v. NLRB* n30 and *Ditlow v. Shultz*, n31 we engaged almost immediately in weighing such competing concerns in situations involving relatively minor losses of privacy. n32 Careful analysis, however, reveals that *Getman* looked to the relative importance of public and private interests only after assuming arguendo that the data sought n33 could be characterized as personnel, medical or similar files; n34 regardless of their status as such, we held that their release would not result in a clearly unwarranted invasion of privacy, and that withholding was therefore unsupportable under Exemption 6. n35 In *Ditlow*, where an information-requester sought an injunction, pending his appeal from an adverse judgment, to restrain the agency from destroying the records concerned, as was customarily done after a given period of time, we noted the complex issues presented and recognized the differing approaches of *Getman* and *Rural Housing*. n36 Without drawing any conclusions or attempting to resolve the dissimilarity, we weighed the competing interesets -- despite our view that the privacy concerns involved were minimal -- and held that the supplicant's "challenge to the District Court's dismissal of his FOIA action [was] sufficiently substantial to warrant an order requiring the [agency] to preserve the requested customs forms to avoid mootng the case," n37 pending resolution of the merits of the appeal. n38

n28 Supra note 22.

n29 See 162 U.S.App.D.C. at 125-126, 498 F.2d at 76-77.

n30 Supra note i2.

n31 Supra note 22.

n32 See 170 U.S.App.D.C. at 356, 517 F.2d at 170.

n33 In Getman, supra note 22, a group of law professors engaged in a labor voting study sought a number of Excelsior lists -- names and addresses of employees eligible to vote in certain representation elections, maintained by the National Labor Relations Board pursuant to its decision in Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966) -- in the Board's possession in order to facilitate contact with employees who voted in specific elections. The Board denied the request, relying on Exemptions 4, 6 and 7, 5 U.S.C. §§ 552(b)(4), 552(b)(6), 552(b)(7) (1976).

n34 146 U.S.App.D.C. at i13, 450 F.2d at 674.

n35 Id. at 216, 450 F.2d at 677.

n36 Ditlow v. Shultz, supra note i2, 170 U.S.App.D.C. at 356, 517 F.2d at 170. Ditlow had previously initiated an antitrust suit against ten airlines, alleging overcharges for transpacific flights to the United States between May 1 and September 1, 1973. The District Court dismissed that action, and at the time Ditlow v. Shultz was decided the appeal of the dismissal of the antitrust case was pending in this court. Ditlow planned to seek certification of the antitrust litigation as a class action if he succeeded in obtaining a reversal on the appeal therein, and in order to discover the names and addresses of the class members, he sought access pursuant to the Freedom of Information Act to United States customs declaration forms filled out by travelers returning from Asia and Australia during the period in question. The Secretary of the Treasury denied Ditlow's request, and he appealed to this court. Because there was a substantial likelihood that the customs forms would be destroyed -- as they regularly were -- before either appeal was decided, Ditlow moved for an injunction to preserve them. We granted the injunction pending further developments in the antitrust litigation. Id. at 359-360, 517 F.2d at 173-174.

n37 Id. at 359, 517 F.2d at 173.

n38 Id.

The differences between Getman and Rural Housing discerned in Ditlow are more apparent than real, however. There is, to a large extent, an essential interrelationship between the question whether information to which access is denied under the aegis of Exemption 6 is "similar" to personnel or medical files and the inquiry whether disclosure of the information would result in an unwarranted invasion of privacy. In the first instance, both questions turn on whether the facts that would be revealed would infringe on some privacy interest, for the very purpose of this exemption is "to protect certain... important rights of privacy" of individuals. n39 Once it is ascertained that such an [*398] interest exists, it must be determined whether it is of the same magnitude -- as highly personal or as intimate in nature -- as that at stake in personnel and medical records. If the personal quality of the information rises to this level, then it is "similar" to personnel and medical

files within the meaning of Exemption 6. n40

n39 See note 41 *infra*. The Commission relies heavily on *Wine Hobby USA, Inc. v. United States*, *supra* note 22, where a Pennsylvania corporation sought access to the names and addresses of all persons registered with the United States Bureau of Alcohol, Tobacco and Firearms as producers of wine for family use in the Mid-Atlantic region. The Third Circuit reversed a district court decision that the names and addresses were not protected from disclosure under Exemption 6 because that ruling was rested on the thesis that such a list is not a "file" within the meaning of the exemption. We find it unnecessary to decide whether names constitute "files" because the crucial element here is the linkage of the names with the information in the documents that contain them. See note 22 *supra*.

n40 See text *supra* at note 21.

Once this first prong of the statutory test is met, the court must proceed to weigh the privacy concerns against the public interest in general disclosure. If the balance favors the privacy element, the agency is justified in withholding the data; if the interests of the public in full revelation are stronger, the information must be released; and if the weights are approximately equal, the court must tilt the balance in favor of disclosure, the overriding policy of the Act. n41

n41 The Senate Report states:

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....

* * *

At the same time... it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files....

* * *

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

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

It is not always necessary to consider the issues in the order above discussed, however. In some cases it may be readily apparent to the court that the balance required by the second prong of the test calls clearly for divulgence because, whatever the precise nature of the privacy interest, it is evident that the public benefit gained from making information freely available is far greater. In such instances the court may find that the question whether release of the information would constitute an unwarranted invasion of privacy is simpler to answer than the question whether it constitutes "personnel and medical [or] similar files." n42 If so, the court may well dispose of the matter on the basis of the second facet of the test.

n42 See text supra at note 21.

When viewed in this light, any apparent inconsistencies in our earlier opinions disappear. In Rural Housing, we employed a straight-forward approach: the documents sought were determined to be within the scope of the "similar files" language of Exemption 6, and the case was remanded for further consideration of the invasion-of-privacy issue. n43 In Getman, discerning whether the information fell within the "similar files" language proved to be more difficult than the question whether its release would result in a plainly unreasonable invasion of the rights of the individuals involved; n44 consequently we found it more expeditious to dispose of the case on the basis of the agency's failure to satisfy the second branch of the test. n45 In Ditlow we were faced with the need to decide quickly whether to grant an injunction prohibiting destruction of the sought-after records, and in those circumstances we concluded that it would not be a necessary or appropriate use of judicial power to furnish, on the motion for an injunction, answers to the complex [*399] questions that would ultimately determine whether the data in dispute would be revealed. Accordingly, we granted the injunction pending future developments. n46

n43 Rural Housing Alliance v. United States Dep't of Agriculture, supra note 22, 162 U.S.App.D.C. at 127, 498 F.2d at 78.

n44 Getman v. NLRB, supra note 22, 146 U.S.App.D.C. at 213, 450 F.2d at 674.

n45 Id. at 216, 450 F.2d at 677.

n46 Ditlow v. Shultz, supra note 22, 170 U.S.App.D.C. at 359-360, 517 F.2d at 173-174.

In the case at bar, the District Court, following the Rural Housing approach, focused on the first prong of the statutory test, and reached its decision with respect to the Exemption 6 claim on the ground that the identities of the Commission's trade sources are not "similar files" within the meaning of the exemption. n47 We agree.

n47 Board of Trade v. CFTC, supra note 4, at 4, App. 139.

In previous cases, we have held that 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." n48 Although in Rural Housing we noted that the exemption "is phrased broadly to protect individuals from a wide range of embarrassing disclosures," n49 it is clear from the context of that statement that the "embarrassing disclosures" of which we spoke are those that involve "intimate personal details." Employing this formulation, we have held that "information regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights [and] reputation" is within the purview of Exemption 6. n50 Similarly, Air Force Academy case summaries of honors and ethics hearings fall within the exemption n51 to the extent that they may only be released after deletion of identifying details. n52 In contrast, names and addresses of employees eligible to vote in labor representation elections are not exempt, n53 nor are names and addresses of persons whose homes were built on uranium tailings. n54

n48 Rural Housing Alliance v. United States Dep't of Agriculture, supra note 22, 162 U.S.App.D.C. at 126, 498 F.2d at 77; see Robles v. EPA, 484 F.2d 843, 845 (4th Cir. 1973) (the term "similar files" applies only to "information which relates to a specific person or individual, to 'intimate details' of a 'highly personal nature' in that individual's employment record or health history or the like").

n49 Rural Housing Alliance v. United States Dep't of Agriculture, supra note 22, 162 U.S.App.D.C. at 126, 498 F.2d at 77.

n50 Id.

n51 Department of Air Force v. Rose, 425 U.S. 352, 376-377, 96 S.Ct. 1592, 1606-1607, 48 L.Ed.2d 11, 30-31 (1976).

n52 Id. at 380-382, 96 S.Ct. at 1608-1609, 48 L.Ed.2d at 32-33.

n53 See Getman v. NLRB, supra note 22, 146 U.S.App.D.C. at 213-215, 450 F.2d at 674-676 (suggesting that such information is not a similar file, but holding that even if it were, release would not be a clearly unwarranted invasion of privacy").

n54 See Robles v. EPA, supra note 48, 484 F.2d at 845-848 (suggesting that such records are not similar files, but holding that in any event release would not constitute a "clearly unwarranted invasion of privacy").

Applying this test in the instant case, we conclude that the records incorporating the data sought by the Board of Trade are not "similar files" within the contemplation of Exemption 6. The information which the Commission withheld -- identification of trade sources criticizing the shipping provisions of the plywood futures contract or proposing alternatives thereto -- reveals no more than how particular persons connected with the Board view its functioning with respect to the plywood futures contract. To be sure, there may be some slight privacy interest involved here -- insofar as release of identifying details would expose the occupations of these sources, their relationship to the Board, and how they perceive the workings of the market enterprise from which they derive at least part of their livelihood. n55 But the fact remains that the withheld information associates these individuals with business of the Board, and not [*400] with any aspect of their personal lives. The interest in nondisclosure thus asserted is not in continued privacy of personal matters, but in anonymity of criticism on purely commercial matters. n56 Certainly no fact of an intimate nature is likely to be revealed by providing the Board of Trade with access to the names of those who censured the shipping provisions or proposed alternatives. n57 Consequently, we agree with the District Court that the identities of the trade sources do not constitute "similar files" within the ambit of Exemption 6.

n55 The Board claims that the "trade sources" are corporation personnel rather than persons acting in their individual capacities. Brief for Appellee at 32 n.22. The Commission has not responded to this allegation.

n56 Whether purely commercial information is protected from disclosure turns on the applicability of Exemption 4, 5 U.S.C. @ 552(b)(6) (1976). See Part III infra.

n57 In support of its argument that the names and details tending to identify the trade sources are shielded by Exemption 6, the Commission also cites two Third Circuit cases, *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977), and *Wine Hobby USA, Inc. v. IRS*, supra note 22. In *Committee on Masonic Homes* union cards revealing employee names, addresses, union affiliations and job descriptions were held to be "similar files," 556 F.2d at 220, and in *Wine Hobby USA* completed forms in the possession of the Bureau of Alcohol, Tobacco and Firearms were held to be exempt because, in addition to the name of each registrant, the forms divulged his or her address, family status and the fact that winemaking activities were being conducted by the household. 502 F.2d at 137. In the instant case, however, we are not called upon to decide such arguably close questions. The disputed identities are linked to financial and commercial information regarding the business of the Board of Trade, see text supra at notes 54-56, rather than to the types of personal details at issue in the above situations.

Moreover, even were we to reach the stage of balancing in this case, n58 we could not say that the privacy interests asserted by the Commission outweigh the public interest in complete disclosure of the governmental documents at issue. The Commission's allegation that access to the information identifying the trade sources would undermine its ability to make independent assessments of the functioning of the Board of Trade as a commodity futures exchange is not germane to the character of the privacy interests involved. The only remaining interest in withholding trade-source identities advanced by the Commission is avoidance of possible harassment of those sources by the Board or others with whom they work and associate. In support of this apprehension, the Commission cites the affidavit of the president of the Board, who professed a concern in finding out why these individuals chose to go to the Commission rather than to employ the Board's own established grievance and suggestion procedures. n59 Whether or not it is within the realm of the Commission's expertise to equate his desire for talks with a strong potential for harassment, we find it difficult to believe that the Commission could not utilize its broad regulatory powers to prevent any improper conduct on the part of Board representatives. At any rate, we are not persuaded by the Commission's claim that divulgence of withheld materials serving to identify the trade sources "would constitute a clearly unwarranted invasion of personal privacy." n60

n58 See text supra at notes 28-42.

n59 Affidavit of Warren W. Lebeck, at 4-5, App. 104-105.

n60 See text supra at note 21.

III. EXEMPTION 4

Exemption 4 of the Freedom of Information Act relieves from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." n61 In response to the Commission's contention that this exemption authorizes withholding of the trade source identities, the District Court ruled that

n61 5 U.S.C. @ 552(b)(4) (1976).
this is not an Exemption 4 case. The legislative history of Exemption 4 indicates that the provision was intended to shield information "obtained by the Government through questionnaires or other inquiries, but which would

customarily not be released to the public by the person from whom it was obtained."... In view of the fact that the Commission [*401] has already disclosed the financial and commercial portion of the gathered information, it cannot now claim that it is the type "not customarily released to the public." And since the names and identifying details are not "independently confidential within the meaning of Exemption 4,"... they must be disclosed unless protected by a different exemption. n62

n62 Board of Trade v. CFTC, supra note 4, at 3, App. 138, first quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added), and then quoting Fisher v. Renegotiation Bd., 153 U.S.App.D.C. 398, 402, 473 F.2d 109, 113 (1972) (footnotes omitted).

We think the District Court's reasoning reflects a fundamental misunderstanding both of the proper method of analysis to be employed and the appropriate standards to be utilized in evaluating a claim that material falls within Exemption 4.

Procedurally, when faced with a question of Exemption 4 coverage, the determining body -- agency or court -- must first examine the "requested [documents], with details identifying the [suppliers] not deleted," n68 and ascertain whether they contain protected information. If, after applying the appropriate tests, n64 the body concludes that all or part of the sought-after material is shielded by this exception to the Act, it must then determine whether suitable deletions of identifying or exempt matter may be made which will enable to it reveal the remaining information. This technique, which we have employed in numerous cases, n65 derives from express provisions of the Act and its legislative history as well.

n63 Fisher v. Renegotiation Bd., supra note 62, 153 U.S.App.D.C. at 402, 473 F.2d at 113.

n64 See text infra at notes 76-82.

n65 See Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd., 164 U.S.App.D.C. 276, 278, 505 F.2d 383, 385 (1974) (after applying Exemption 4 tests, "the agency resisting disclosure must" consider "the extent to which any [harm] [to confidentiality interests] could be reduced or eliminated by non-disclosure of the identity of the person submitting the information in dispute"); Rural Housing Alliance v. United States Dep't of Agriculture, supra note 22, 162 U.S.App.D.C. at 128, 498 F.2d at 79 (case remanded for application of Exemption 4 tests; District Court cautioned that although "several of our Circuit's cases support the idea of deletions to permit disclosure of the remainder of [a] report, we fear that" on the facts of this case "deletions are ineffective to protect the privacy and confidentiality of the individuals involved"); Fisher v. Renegotiation Bd., supra note 62, 153 U.S.App.D.C. at 402, 473 F.2d at 113 (case remanded for determination "whether the commercial and financial data contained in the requested opinions and orders, with details identifying the contractors not deleted, were independently confidential within the meaning of Exemption 4. If... any of such information is exempt from disclosure, then the deletion of the identifying details which have been made by the Board shall not be disturbed, since such information has already been disclosed in this case."); Soucie v. David, 145 U.S.App.D.C. 144, 155-156, 448 F.2d 1067, 1078-1079 (1971) ("[if] the [requested] Report contains material protected by [Exemption 4], then that material should be deleted before disclosure of the remainder may be required."); Bristol-Myers Co. v. FTC, 138

U.S.App.D.C. 22, 25-26, 424 F.2d 935, 938-939, cert. denied, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970) ("[the] court may well conclude that portions of the requested material are protected [by Exemption 4], and it may be that identifying details or secret matters can be deleted from a document to render it subject to disclosure."). Cf. Department of Air Force v. Rose, supra note 51, 425 U.S. at 373-375, 378-382, 96 S.Ct. at 1607-1609, 48 L.Ed.2d at 30-31 (taking same approach in Exemption 6 context).

The Act has always specified that "[to] the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction." n66 More broadly, the Act, as amended in 1974, mandates that "[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." n67 Beyond that, the courts have relied on the Act's overriding policy in [*402] favor of disclosure n68 to require eradication of identifying details -- not exempt in themselves n69 -- when such an excision renders otherwise exempt material disclosable. n70 The Senate cited this approach with approval in its report accompanying the 1974 amendments to the Act, n71 noting that under the new "segregable portion" provision courts must "examine the records themselves and require the release of portions to which the purposes of the exemption under which they are withheld does not apply." n72 The Supreme Court has placed the stamp of its approval on this technique by requiring disclosure of information, after deletion of identifying details, that otherwise would have been protected by Exemption 6. n73

n66 5 U.S.C. @ 552(a)(2) (1976).

n67 5 U.S.C. @ 552(b) (1976).

n68 See note 41 supra .

n69 See Fisher v. Renegotiation Bd., supra note 62, 153 U.S.App.D.C. at 402, 473 F.2d at 113 ("[the] question is one of confidentiality under Exemption 4. Identifying details... do not so qualify in and of themselves"); Getman v. NLRB, supra note 22, 146 U.S.App.D.C. at 212, 450 F.2d at 673 ("[obviously], a bare list of names and addresses of employees... which cannot be fairly characterized as 'trade secrets' or 'financial' or 'commercial' information is not exempted from disclosure by Subsection (b)(4)."). Thus, in the instant case, had the Board clearly sought only a list of trade source interviewees, this information would probably have not been immunized by Exemption 4. The Board's demand, however, included the following language:

Pursuant to the Freedom of Information Act... we hereby request copies of any Commission records or other records in the Commission's possession that reflect, relate or refer to the complaints from "trade sources," the "trade alleged problems" and the "industry proposed alternatives...." Freedom of Information Act Request at 1, App. 26. The Board treated the request as one for the underlying records and not just for the trade-source identities. See Letter from Ray K. Schleeter, Deputy Director of CFTC Office of Public Information, to Mahlon M. Frankhauser, Attorney for the Board of Trade of the City of Chicago at 1 (Nov. 30, 1976), Apr. 28.

n70 See *Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd.*, supra note 65; *Rural Housing Alliance v. United States Dep't of Agriculture*, supra note 22; *Bristol-Myers Co. v. FTC*, supra note 65.

n71 S. Rep. No. 854, 93d Cong., 2d Sess. 31 (1974) ("[the] court may well conclude that portions of the requested material are protected, and it may be that identifying details or secret matters can be deleted from a document to render it subject to disclosure," quoting *Bristol-Myers Co. v. FTC*, supra note 65, 138 U.S.App.D.C. at 25-26, 424 F.2d at 938-939).

n72 S. Rep. No. 854, 93d Cong., 2d Sess. 32 (1974).

n73 *Department of Air Force v. Rose*, supra note 51.

In the case before us, the Commission attempted to follow this procedure. Having concluded -- correctly or incorrectly -- that the requested material was exempt, the Commission, while still asserting the right to preserve the confidentiality of its sources under Exemption 4, laudibly sought to reveal as much information as it could. The District Court, however, made separate evaluations of the deleted identities and the released criticisms and alternative proposals supplied by the trade sources. Concluding that neither type of information, standing alone, fell within Exemption 4, the court ordered divulgence of the withheld sources.

The District Court's approach failed to recognize that although some commercial and financial information remains confidential in nature even after the identity of its source has been extirpated, n74 a significant portion of the information protected by Exemption 4 derives its exempt status wholly from its relationship to a particular person or commercial enterprise, and that, stripped of its identifying features, it takes on the character of statistics. The District Court was undoubtedly correct in its conclusion that, viewed independently, the names of the sources are neither "confidential" nor [*403] "financial or commercial" information; n75 and the Commission's disclosure of the redacted survey results may indicate that it deemed the latter data, in and of themselves, nonconfidential in nature. This bifurcated analysis, however, has no bearing whatever on whether the Commission in its disclosure can be forced to tie the trade sources to the information they supplied. The whole purpose of blotting out identities is to render the remaining contents of documents nonexempt, and the Commission's success in doing just that cannot be turned against it as a reason for requiring reinsertion of the identifying details.

n74 See *Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd.*, supra note 65, 164 U.S.App.D.C. at 278, 505 F.2d at 385 ("the agency resisting disclosure" may claim "that the information itself discloses to knowledgeable people the identity of the person who supplied it, [but] some factual basis for that conclusion must be advanced to support the [agency's] non-disclosure."); *Rural Housing Alliance v. United States Dep't of Agriculture*, supra note 22, 162 U.S.App.D.C. at 128, 498 F.2d at 79 (deletions may be "ineffective to protect the privacy and confidentiality of the individuals involved").

n75 See note 69 supra .

In addition to its procedural error in bifurcating the evaluation of the requested records, the District Court either failed to apply, or misapplied,

the tests this court has established as appropriate for use in assessing claims under Exemption 4. We have held that, aside from trade secrets, the exemption applies only to "information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." n76 Lacking any legislative history defining the scope of the terms "commercial" and "financial," n77 courts have given them their ordinary meanings, n78 and have read the requirement that information [*404] be "obtained from a person" to restrict the exemption's application to data which have not been generated within the Government. n79 The word "confidential," on the other hand, has been the subject of considerable interpretation. The legislative history of Exemption 4 tells us that information is confidential if it "would customarily not be released to the public by the person from whom it was obtained." n80 We ourselves have further held that this

n76 *Getman v. NLRB*, supra note 22, 146 U.S.App.D.C. at 212, 450 F.2d at 673, quoting *Consumers Union v. Veterans Administration*, 301 F.Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971); accord, *National Parks & Conservation Ass'n v. Morton*, 162 U.S.App.D.C. 223, 224, 498 F.2d 765, 766 (1974); *Brockway v. Department of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975); *Sears Roebuck & Co. v. GSA*, 384 F.Supp. 996, 1005 (D.D.C. 1974); *Tax Analysts & Advocates v. IRS*, 362 F.Supp. 1298, 1307 (D.D.C. 1973), modified in part on other grounds, 164 U.S.App.D.C. 243, 505 F.2d 350 (1974). Although this much of the exemption on its face seemingly applies only to commercial and financial non-trade-secret information, language in the House and Senate Reports suggesting exempt status for all privileged and confidential information led to some initial uncertainty concerning the scope of Exemption 4. Professor Davis, however, in an early article on the Act, noted that: the discrepancy between the statutory language and the reports turns out to be a mere inadvertance. The Senate committee simply failed to alter its earlier report, based on [an] earlier bill without the words "commercial or financial," to reflect the addition of the words "commercial or financial." And the House committee seven months later copied most of the Senate committee report. Davis, *The Information Act: A Preliminary Analysis*, 34 U. of Chicago, L. Rev. at 761, 790 (1967) (footnote omitted). Courts have consistently credited the narrow statutory language over the more inclusive congressional reports. See, e.g., *Brockway v. Department of Air Force*, supra, 518 F.2d at 1189 ("[the] tendency has been to grant little weight to these passages from the reports on the theory that the passages were taken from previous congressional reports on an earlier draft of the Freedom of Information bill which did in fact exempt confidential, non-commercial and non-financial matters.").

n77 Perhaps the most important fact in the legislative history is that no explanation appears for the addition to the fourth exemption of the words "commercial or financial." The 1964 version of the bill, S. 1666, provided for exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential." That version was adopted by the Senate but the House did not act, and when the bill, S. 1160, was reintroduced in the next Congress as S. 1160, two changes had been made: the word "customarily" was out, and the words "commercial or financial" were in.

Not only was no explanation ever offered for the addition of "commercial or financial," but the Senate and House Committees in their reports both seemed to read the words "commercial or financial" as if they were not there. Davis, supra note 76, at 790.

n78 See, e.g., *Brockway v. Department of Air Force*, supra note 76, 518 F.2d at 1188-1189 (witness statements concerning cause of airplane crash not commercial or financial in nature); *Getman v. NLRB*, supra note 22, 146 U.S.App.D.C. at 212, 450 F.2d at 673 ("a bare list of names and addresses of employees... cannot be fairly characterized as... 'financial' or 'commercial' information"). In another case, we passed on the applicability of the terms to research designs created by biomedical scientists, and suggested that "the reach of [Exemption 4] is not necessarily coextensive with the existence of competition in any form." *Washington Research Project, Inc. v. HEW*, 164 U.S.App.D.C. 169, 175, 504 F.2d 238, 244 (1974), cert. denied, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975). We went on to say, however, that "[it] is clear enough that a non-commercial scientist's research design is not... [an] item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce." *Id.* at 181, 504 F.2d at 244. We also noted that "the Act's recognized mandate to construe exemptions narrowly" precludes us from "[extending] them by analogies that lead... far away from the plain meaning of Exemption 4." *Id.* at 182, 504 F.2d at 245.

n79 See *Soucie v. David*, supra note 65, 145 U.S.App.D.C. at 156 n.47, 448 F.2d at 1079 n.47; *Consumers Union v. Veterans Administration*, supra note 76, 301 F.Supp. at 802-803; *Benson v. GSA*, 289 F.Supp. 590, 594 (W.D. Wash. 1968), aff'd 415 F.2d 878 (9th Cir. 1969).

n80 S. Rep. No. 813, 8.th Cong., 1st Sess. 9 (1965); accord, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).
is not the only relevant inquiry in determining whether... information is "confidential" for purposes of [Exemption 4]. A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption. n81

n81 *National Parks & Conservation Ass'n v. Morton*, supra note 76, 162 U.S.App.D.C. at 225, 498 F.2d at 767.
An examination of that legislative purpose has led us to conclude that commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. n82

n82 *Id.* at 228, 498 F.2d at 770 (footnote omitted).

Unfortunately, the District Court's analysis was cut short by its bifurcated consideration of the exemption status of the trade-source identities and the survey results. The identities were not themselves subjected to the confidentiality test because the court decided that they were not "commercial or financial" information. With respect to the trade-source comments, only the first step of the confidentiality test was reached; the court concluded that because the industry suggestions had already been released, they could not be the type of information that is customarily withheld from the public, and therefore could not be confidential within the meaning of the exemption. We have already noted the error in this reasoning. n83

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n83 See text supra at notes 61-76.

The District Court's misapprehension of controlling law foreclosed the determinations essential to proper assessment of the validity of the Commission's invocation of Exemption 4. Moreover, those determinations would in any event have been inappropriately undertaken on the Board's summary-judgment motion because the record before us reveals disputes as to material issues of fact n84 -- particularly with respect to whether disclosure of the trade-source identities would "impair the [Commission's] ability to obtain necessary information in the future." n85 We are unable, therefore, to [*405] resolve the controversy with respect to Exemption 4, but rather must remand to the District Court for full findings of fact and conclusions of law. On remand, the court will examine the information derived from the survey and ascertain whether any part of it is "commercial or financial" in nature, n86 and whether that information -- which was clearly "obtained from a person" within the meaning of the Act n87 -- is confidential as defined in our prior cases. n88

n86 See note 78 supra and accompanying text.

n87 See note 79 supra and accompanying text.

n88 See notes 80-82 supra and accompanying text. The District Court's review of the Commission's action in withholding the disputed information will, of course, be a de novo review. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1965).

We are mindful at this juncture of the Board's contention that the trade-source comments here involved are not exempt at all. The argument is that they refer solely to business affairs of the Board, and that Exemption 4 safeguards commercial information only insofar as it concerns the source of the information, and not commercial and financial data supplied to a third party. n89 The Commission counters that this position is without legal basis, asserting that, in any case, the disputed documents do reveal trade-source business information. n90

n89 See Brief of Appellee at 19-21. This theory of the inapplicability of Exemption 4 was not raised at any stage of the District Court proceedings. Though we thus are not required to entertain the question on appeal, we do so in the interest of judicial economy to assist the court on remand in its task of determining whether the information is "commercial" or "financial."

n90 See Reply Brief for Appellant at 7-11.

We are in agreement with the Commission that the Board's view of the law is erroneous. In plain language Exemption 4 refers only to "commercial" and "financial" information; it does not in any way suggest that this information must relate to the affairs of the provider. n91 As we have already noted, the legislative history does not elucidate the terms "commercial" and "financial," n92 and courts have given them their ordinary meaning, n93 which in no way connotes the limitation urged by the Board. On the contrary, the purposes revealed by our much earlier examination of the Act's history n94 are sufficiently broad to encompass financial and commercial information concerning a third party so long as it is privileged or confidential. In this respect our view is consonant with that implicit in earlier decisions in which we assumed the applicability of the exemption in situations where information obtained from one person has concerned the confidential business affairs of a third party. n95

n91 See text supra at note 61.

n92 See note 77 supra and accompanying text.

n93 See note 78 supra and accompanying text.

n94 National Parks & Conservation Ass'n v. Morton, supra note 76, 192 U.S.App.D.C. at 224-228, 498 F.2d at 766-770.

n95 See Rural Housing Alliance v. U.S. Dep't of Agriculture, supra note 22, 162 U.S.App.D.C. at 124 n.4, 128, 498 F.2d at 75 n.4, 79 (Exemption 4 held applicable to a report which "includes... information given by and with respect to borrowers and applicants for loans") (emphasis added); Soucie v. David, supra note 65, 145 U.S.App.D.C. at 147, 156 & n.47, 448 F.2d at 1070, 1079 & n.47 (confidential views of members of a panel of experts convened to provide an independent assessment of a governmental program eligible for protection by Exemption 4); see also Benson v. GSA, supra note 79, 289 F.Supp. at 594 (Dunn and Bradstreet credit report on a private company constituted "financial information obtained from a person and confidential"). [*406]

In support of its position, the Board points to the legislative history and observes that the specific examples of exempt information enumerated there all relate to the data source. n96 While this illustrates the obvious -- that first-party information is covered by Exemption 4 -- it does not convincingly demonstrate that Congress intended to exclude third-party commercial information from the exemption. In short, the history does not present a sufficiently clear design to overrule the unambiguous language of the exemption and the unmistakable congressional purpose of avoiding impairment of the Government's ability to obtain necessary information. n97 Thus, on remand, the Commission need not establish that the information relates to the business affairs of the trade sources, but only that it is commercial or financial in nature.

n96 See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (May 9, 1966) ("[the] exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the... lender-borrower [privilege] such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency."); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (Oct. 4, 1965) (the exemption "would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the... lender-borrower... [privilege]. Specifically, it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.").

n97 See note 81 supra and accompanying text.

If the Commission satisfies its burden of showing the commercial and confidential nature of the disputed records, the deletions of the identities of the sources of that information must stand. n98 Ordinarily, it would be necessary for the District Court to determine whether the Commission could withhold the documents in their entirety because their release might reveal the identities of the suppliers of the information contained therein. n99 This inquiry need not be pursued in the instant case since the redacted records

have already been disclosed. n100

n98 Of course, only the sources actually providing Exemption 4 materials may be deleted; that is, the presence in a document of some such material does not warrant expunction of identities of all trade sources appearing in the document, but only those that actually provided the exempt data.

n99 See note 74 supra and accompanying text.

n100 See Fisher v. Renegotiation Bd., supra note 62, 153 U.S.App.D.C. at 402, 473 F.2d at 113.

We affirm the District Court insofar as it determined that the documents and identities in question do not fall within Exemption 6 of the Act. We reverse and remand the record for further findings of fact and conclusions of law on the question of Exemption 4 coverage.

So ordered .