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Sears, Roebuck and Company brought an action under the Freedom of Information Act (FOIA)\(^1\) to compel disclosure of Advice and Appeals Memoranda issued by the General Counsel of the National Labor Relations Board.\(^2\) In ordering disclosure of both sets of

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(a) Each agency shall make available to the public information as follows:

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. 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. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published.

(4)(B) On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

See note 14 infra for the nine exemptions from the requirement of disclosure.

2. The NLRB is charged with the responsibility of monitoring and adjudicating claims of unfair labor practices by unions or employers. 29 U.S.C. §§ 153–68 (1970). Regional Directors initially receive such complaints, and are empowered to investigate as they find necessary. 29 C.F.R. §§ 101.2, .4 (1975). The Sears opinion contains a detailed explanation of agency procedure upon receiving a complaint. As explained by the Court, the Regional Directors may seek the aid of the Office of the General Counsel. If such aid is sought, the Counsel responds with an Advice Memorandum. After the Regional Directors reach a decision, the charging parties may appeal any adverse result to the General Counsel. The General Counsel then issues an Appeals Memorandum, which directs either the filing of a complaint or the dismissal of the charges. 421 U.S. at 138–42. See also 29 C.F.R. §§ 101.2–8 (1970). 29 U.S.C. § 153(d) (1970) reads: “[The General Counsel] shall have final authority, on behalf of
documents, the district court held that Advice Memoranda qualified under the Act as "'instructions' [to staff] which affect a member of the public," but that Appeals Memoranda were "final opinions" which did not fall within the Act's exemption for "intra-agency memoranda." The Court of Appeals for the District of Columbia affirmed without opinion.

In another case requiring interpretation of the FOIA, Grumman Aircraft Engineering Corporation brought suit in the same court, seeking regional board reports and division reports of the Renegotiation Board. The district court ordered disclosure of the reports as "final opinions." The Court of Appeals for the District of Columbia affirmed.

On appeal to the United States Supreme Court the cases were consolidated. Held: (1) Advice and Appeals Memoranda prepared by the General Counsel of the NLRB directing dismissal of charges of unfair labor practices are final opinions disclosable under the FOIA; and (2) neither Advice and Appeals Memoranda which direct filing of complaints nor regional board and division reports of the Renegotiation Board are final opinions of an agency within the meaning of the FOIA, but instead are exempt from disclosure as predecisional intra-agency memoranda. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975).

As this note will demonstrate, the Sears and Grumman decisions thwart congressional intent by restricting disclosure under the FOIA. The effect of the Supreme Court analysis is to narrow the concept of


5. Regional Boards of the Renegotiation Board perform initial investigation into defense contract profits. See note 7 infra. The Regional Board makes findings and forwards to the Renegotiation Board a decision on the propriety of the profits earned by defense contractors. See note 29 infra.

6. The Renegotiation Board may assign cases before it to a subdivision of that Board, known as a Division. 50 U.S.C. § 1217(e) (app. 1970). That Division may prepare a report to be considered by the Board as a whole. See note 29 infra.

7. The Renegotiation Board is established and governed by 50 U.S.C. §§ 1211–33 (app. 1970). Its purpose is to monitor the profits made by defense contractors and to require the refund of excess profits to the government. See note 29 infra.


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finality under the FOIA and, at the same time, to expand the applicability of the exemption for intra-agency memoranda. The Court's approach unnecessarily compromises the public's need to know the working law of administrative agencies, thereby blunting the force of the FOIA disclosure requirements. It is submitted that the purposes of the FOIA would have been served more faithfully had the Court adopted a policy of in camera review of agency documents, allowing selective deletion of exempt material, rather than permitting blanket protection for such documents.

I. THE FOIA AND THE DEVELOPING DOCTRINE

The FOIA was enacted in 1966 "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . ."10 It was designed to overcome the shortcomings of its predecessor, Section 3 of the Administrative Procedure Act,11 which ironically was employed to facilitate agency

10. S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965). See also H.R. REP. No. 1497, 89th Cong., 2d Sess. 5–6 (1966). The Senate report construction of the Act contemplates broader disclosure of information than does the House report. In areas of conflict, the courts have recognized the Senate report as the more authoritative, because it was available for consideration by both houses while the House report was not. See, e.g., Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971); Benson v. General Servs. Administration, 289 F. Supp. 590, 595 (W.D. Wash. 1968), aff'd on other grounds, 415 F.2d 878 (9th Cir. 1969).


The serious deficiencies in this present statute are obvious. They fall into four
secrecy rather than to provide public access to government information. In order to overcome the infirmities of Section 3, the FOIA provides for disclosure of several classes of documents including all agency final opinions and orders issued under an agency's adjudicatory authority. The Act sets forth nine specific exemptions to the otherwise broad disclosure mandate of the Act, and directs that they are to be narrowly construed.

(1) There is excepted from the operation of the whole section "any function of the United States requiring secrecy in the public interest." There is no attempt in the bill or its legislative history to delimit "in the public interest," and there is no authority granted for any review of the use of this vague phrase by Federal officials who wish to withhold information.

(2) Although subsection (b) requires the agency to make available to public inspection "all final opinions or orders in the adjudication of cases," it vitiates this command by adding the following limitation: "* * * except those required for good cause to be held confidential." This is a double-barreled loophole because not only is there the vague phrase "for good cause found," there is also a further excuse for withholding if persons are not "properly and directly concerned."

(3) As to public records generally, subsection (c) requires their availability "to persons properly and directly concerned except information held confidential for good cause found." This is a double-barreled loophole because not only is there the vague phrase "for good cause found," there is also a further excuse for withholding if persons are not "properly and directly concerned."

(4) There is no remedy in case of wrongful withholding of information from citizens by Government officials.

One result of Congress' effort to remedy these problems is the more detailed description in 5 U.S.C. § 552(a) (1970) of the documents which must be disclosed as well as the more carefully described exemptions of id. § 552(b). In addition, the present FOIA contains no need requirement; the first line of the current Act states simply that information is to be made "available to the public." Thus, the merely curious have as much right to the materials made available under the provisions of the FOIA as those with a vital interest at stake. Finally, id. § 552(a)(4)(B) gives any member of the public a judicial remedy for wrongful withholding of administrative records by entitling the complainant to a court order compelling the respondent agency to produce the information at issue.

As the Senate Committee report concluded:

[T]he present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed, it has had precisely the opposite effect; it is cited as statutory authority for the withholding of virtually any piece of information that an official or agency does not wish to disclose.

This section does not apply to matters that are—

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

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

(c) specifically exempted from disclosure by statute;

(d) trade secrets and commercial or financial information obtained from a
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The Supreme Court purported to recognize the broad disclosure requirements of the FOIA in *EPA v. Mink*, where Justice White, speaking for the Court, identified the philosophical underpinnings of the Act in the following terms:

person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

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

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

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

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

In addition, § 552(c) of the Act clearly indicates a congressional intent that the nine exemptions are to be narrowly construed:

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

Id. § 552(c) (1970).


16. Id. at 80. *Mink* involved an attempt by members of Congress to compel disclosure of executive classified documents. The defendants invoked the protection of exemption 1 and, alternatively, exemption 5, see note 14 infra. The lower courts had ordered the defendants to bring the documents forward for *in camera* inspection, but the Supreme Court reversed. While the Court did not declare that such inspection was always improper, it did state that requiring *in camera* inspection in every case would defeat exemption 5's purpose of protecting free and frank agency discussion. 410 U.S. at 93. Thus, the documents at issue in *Mink* could not be reviewed by the district court to separate disclosable and nondisclosable materials. Congress disagreed with the *Mink* decision and within six weeks of the decision a bill was introduced into the House (H.R. 4960, 93d Cong., 1st Sess. (1973)) designed to reverse the result in *Mink*. See Note, *The Freedom of Information Act Amendment of 1974: An Analysis*, 26 SYRACUSE L. REV. 951, 956 n.29 (1975).

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.

But the Court's protection of the documents in question under exemption 1, which provides for secrecy in the interest of national defense or foreign policy, emphasized that the manner in which the FOIA is implemented will depend largely upon the scope which judicial interpretations give to the nine specific exemptions listed in the Act.

In particular, the disclosability of many agency documents will turn upon how narrowly the courts construe exemption 5. This exemption provides that the FOIA disclosure provisions do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The purpose of the exemption is to protect the agency decisionmaking process by exempting from disclosure memoranda reflecting predecisional opinions and exchanges.

The lower courts, particularly the Court of Appeals for the District of Columbia, have recognized and implemented the broad disclosure purposes of the FOIA by restricting the reach of exemption 5 to those situations in which the exemption clearly fulfills the specific purposes for which it was designed. In American Mail Line, Ltd. v. Gulick, the Court of Appeals for the District of Columbia held that internal memoranda normally afforded protection under exemption 5 lose that protection when an agency relies upon them or incorporates them by reference into an agency decision. The court recognized that when a memorandum incorporated into a final decision becomes an integral part of that decision, the rationale of the exemption no longer applies, and disclosure of the memorandum is required to avoid unreasonable circumvention of the FOIA.

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20. See also Sterling Drug Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971), in which the court ordered the Federal Trade Commission (FTC) to disclose memoranda previously prepared by the Commission for use in a prior case. Although the memoranda were prepared prior to the final decision, the FTC issued no opinion after the decision was made; the court believed that these prior memoranda stated the reasons for the decision reached by the FTC. The court did rely, however, on exemption 5 to protect memoranda prepared by individual Commission members...
Two years later the same court further clarified FOIA disclosure requirements by distinguishing between exempt and non-exempt material contained within the same document. In *Soucie v. David* the court ordered disclosure of any factual information, although opinions and advice of agency personnel within the same memoranda were protected by exemption 5. Because protection of factual material

and staff personnel. *Id.* at 707. See also Bristol-Myers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir. 1970) (district court ordered on remand to consider whether the agency incorporated predecisional memoranda in the final opinion); Washington Research Project, Inc. v. H.E.W., 366 F. Supp. 929 (D.D.C. 1973) ("site visit reports" prepared by investigating staff and incorporated into final agency decision by review groups held disclosable).

21. 448 F.2d 1067 (D.C. Cir. 1971). In *Soucie*, private citizens brought suit under the FOIA against the Director of the Office of Science and Technology to compel release of a report evaluating the federal government's program for development of supersonic transports. In remanding the case, the court suggested that whether statutory or constitutional exemptions protected the report could be most effectively determined by examination of the report in camera.

22. *Id.* at 1077–78. A more recent case, *Montrose Chem. Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), refines this fact-opinion distinction. In that case, highly selective summaries of more than 9,000 pages of facts were prepared by staff members for the decisionmaker. The entire 9,200 pages of facts were made available by the agency, but the agency withheld the summaries on the ground that they contained highly subjective staff evaluations of determinative issues in the case before the agency. In upholding the right of the agency to withhold the summaries, the court declared:

Our solution rests on the interpretation of the purpose of exemption 5. If the exemption is intended to protect only deliberative materials, then a factual summary of evidence on the record would not be exempt from disclosure. But if the exemption is to be interpreted to protect the agency's deliberative process, then a factual summary prepared to aid an administrator in resolution of a difficult, complex question would be within the scope of the exemption.

*Id.* at 68 (emphasis in original). The court thus concluded that protection of the decisionmaking process was required. The summaries were protected because the factual material was inseparable from the exercise of predecisional judgment and discretion by staff personnel; disclosure would allow the public to probe the predecisional mental processes of agency personnel in violation of exemption 5.

See also *Mink v. EPA*, 464 F.2d 742 (D.C. Cir. 1972), rev'd on other grounds, 410 U.S. 73 (1973) (exemption 5 inapplicable to factual material contained within otherwise exempt classified documents of the executive branch); Bristol-Myers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir. 1970) (district court ordered on remand to evaluate materials in light of fact-opinion distinction); Rabbitt v. Department of the Air Force, 383 F. Supp. 1068 (S.D.N.Y. 1974) (in camera inspection ordered to determine whether all factual material had been released from Air Force airplane crash report); Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401 (Cust. Ct. 1972) (written data and work notes compiled during scientific examination of fabrics must be disclosed by the agency, because they represent factual material).

Other courts have recognized the fact-opinion distinction but found it inapplicable in the circumstances of the cases before them. See *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975) (statements of witnesses in airplane crash investigation protected under discovery rules, because facts contained therein were not adequately separable from the exempt material); K.C. Wu v. National Endowment for the Humanities, 460 F.2d 1030 (5th Cir. 1972) (opinions and recommendations received from outside scholars on proposed projects for grants held not dis-
does not serve any conceivable exemption 5 purpose, the court declared that such material can be shielded "only if it is inextricably intertwined with policy-making processes."23

The Soucie fact-opinion distinction was codified by the 1974 amendments to the FOIA. Section 552(b) now requires that "[a]ny 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."24 Thus, prior to the Supreme Court decisions in Sears and Grumman, the narrow scope of exemption 5 was well established judicially and endorsed legislatively.

II. THE COURT'S REASONING: FINAL OPINIONS AND EXEMPTION 5 UNDER SEARS AND GRUMMAN

In analyzing the disclosure requirements of the FOIA, the Supreme Court began in both Sears and Grumman with a lengthy examination of the agency decisionmaking process and the material sought in each case. The Court recognized that "[c]rucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them."25 The Act's requirement that all "final opinions" and "orders made in the adjudication of cases" be made available to the public necessitated an evaluation of the finality of the particular agency actions involved.

In Sears, Justice White, speaking for the Court, concluded that under NLRB procedures26 the General Counsel's decision not to file a complaint is final, because it effectively disposes of the case—the decision is not subject to review.27 Conversely, a memorandum that directs the filing of a complaint is not, in terms of exemption 5, a " 'final opinion' in the 'adjudication' of a 'case' because it does not effect a 'final disposition' . . . ."28 In similar fashion, Justice White analyzed the procedures of the Renegotiation Board29 in Grumman and con-

23. 448 F.2d at 1077–78.
25. 421 U.S. at 138.
26. See note 2 supra.
27. 421 U.S. at 155.
28. Id. at 160.
29. See 32 C.F.R. pt. 1421 (1976). Cases are assigned to the Regional Board to
cluded that opinions of the Regional Board are not final, because only the official action of the entire Board truly disposes of cases. The Regional Boards and Divisions do not issue final opinions, because they have "no legal authority to decide." Accordingly, only opinions and orders which technically dispose of agency cases were considered by the Court to be final for purposes of the FOIA. The Court's characterization of a particular document as a "final opinion" automatically precluded agency reliance on exemption 5's protection of "intra-agency memoranda," because the two statutory terms were found to be mutually exclusive.

In holding that exemption 5 cannot be applied to final opinions of an agency, the Court explained the dual purposes of the FOIA exemption for "intra-agency memoranda." On the one hand, the exemption was designed to safeguard the quality and integrity of the administrative decisionmaking process, which the Court recognized as the "executive privilege" of a governmental agency. In applying the executive privilege rationale, the Court emphasized that the confidentiality of intra-agency exchanges would be upheld only with respect to predecisional memoranda serving a consultative function and not memoranda reflecting decisions already reached. Thus the agency decisionmaking process is protected, while the product of that process is not. Applying this analysis in Sears, the Court concluded that the General Counsel decisions to dismiss complaints reflect the product of agency process, because they terminate NLRB action with respect to those complaints. Decisions to file complaints, however, constitute part of ongoing agency process and are protected. The Court simi-

consider the question of excess profits in defense contracts. Id. § 1422.231. In some classes of cases, the Regional Board has authority to make ultimate decisions while in others it makes only an initial determination. Id. § 1422.232–2. The Grumman case fell into the latter category. For a detailed exposition of the renegotiation procedures see Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 325 F. Supp. 1146, 1148–54 (1971). See also 421 U.S. 168, 170–79 (1975). It should be noted that the National Board is not required to write opinions. Although made subject to the disclosure provisions of the Administrative Procedure Act, the Board is exempted from all other requirements of the APA. 50 U.S.C. § 1221 (app. 1970).

30. 421 U.S. at 184–85.
31. Id. at 189.
32. Id. at 153–54. The Court noted: "Exemption 5 does not apply to any document which falls within the meaning of the phrase 'final opinion . . . made in the adjudication of cases.'" Id. at 148.
34. 421 U.S. at 149, 151–52.
35. Id. at 155.
36. Id.
larly protected the Regional Board and Division Reports in *Grumman* by concluding that they are predecisional memoranda within exemption 5.37

In addition to recognizing the executive privilege function served by exemption 5, the Court noted that the exemption incorporated the attorney work-product rule familiar in the civil discovery context.38 Applying the work-product rule to government attorneys involved in litigation would prevent access to memoranda "prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy."39 In *Sears*, the Court relied primarily on the work-product aspect of exemption 5 in declining to compel disclosure of Advice and Appeals Memoranda that direct the filing of a complaint, because the General Counsel who makes the decision to issue the complaint must subsequently serve as the litigator of the case before the NLRB.40

III. IMPLEMENTING THE FOIA: A SUGGESTED APPROACH

A. Defining "Orders" of "Agencies" Under the FOIA

The FOIA puts explicit limitations upon the kind of material which is subject to its provisions. The test of disclosability is two-fold: before an organization can be compelled to produce documents, both the documents sought and the organization approached must qualify for the disclosure mandates of the FOIA.

First, documents qualify for disclosure only if they are "final opinions" or "orders made in the adjudication of cases."41 Although the Act contains no specific definition of "final opinion," "order" is de-

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37. *Id.* at 186.
38. The Court stated:
   "It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 . . . . The Senate Report states that Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." S. Rep. No. 813, p. 2; and the case law clearly makes the attorney's work-product rule of *Hickman v. Taylor*, 329 U.S. 495 (1947), applicable to Government attorneys in litigation.

39. *Id.* at 154
40. *Id.* at 159–60.
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fined as "the whole or part of a final disposition . . . of an agency in any matter other than rule making but including licensing." In addition, "adjudication" is defined very broadly as "agency process for the formulation of an order." Thus, the scope of the phrase "orders made in the adjudication of cases" is necessarily broad; any order issued as part of the process of adjudication leading to a final disposition must be disclosed. By implication, opinions accompanying those orders are final and subject to disclosure.

Required disclosure under the FOIA therefore should cover a very wide range of documents. "Finality" should not be limited to the single ultimate disposition of the agency, as the Supreme Court opinions appear to suggest that it is. The Court seems to push the finality concept under the FOIA toward the much narrower administrative law doctrine of finality for purposes of judicial review. Yet, because of the disparate functions that these two finality doctrines perform, applying reviewability standards to FOIA finality provisions is unwar-

43. Id. § 551(7).
44. The Attorney General attempted to avoid this interpretation of the Act in his Memorandum. The Memorandum declared:

Neither the previous section 3 nor the revised section contemplates the public availability of every "order," as the word is thus defined. The expression "orders made in the adjudication of cases" is intended to limit the requirement to orders which are issued as part of the final disposition of an adjudicative proceeding.

MEMORANDUM, supra note 10, at 15. Thus, the Attorney General asserted that the phrase, "made in the adjudication of cases" substantially limits the availability of "orders." This assertion requires a narrow reading of the term "adjudication," a reading which the definitions in the Act clearly repudiate. 5 U.S.C. § 551(7)(1970). Professor Davis recognizes and highlights the fallacy of the Attorney General's declarations:

"Order" and "adjudication" are much broader concepts under section 2 of the APA than one not familiar with section 2 might suppose. . . . I think the Memorandum is clearly mistaken because section 2(d) . . . provides: "'Adjudication' means agency process for the formulation of an order." Under the APA-definitions, every order is issued as part of the final disposition of an adjudication.

Therefore, the correct statement is precisely the opposite of what the Attorney General says: Both the previous section 3 and the revised section contemplate the public availability of every "order" as defined by section 2(d).

K. DAVIS, supra note 10, at § 3A.8 (emphasis added).
45. See 421 U.S. at 152 n.19.
46. The main requirement of finality for purposes of judicial review is expressed in the traditional administrative law doctrine of exhaustion. Essentially it is a requirement that administrative law remedies be fully pursued prior to seeking judicial review. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (1965). The purpose of the doctrine of exhaustion is to prevent courts from interfering with the adjudicatory process before it is complete. See K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 20 (1958). Thus, reviewability is largely a matter of the completion of the entire administrative process. The underlying policy is to recognize the autonomy of the agency.
ranted; the justification for the limitations which the reviewability standard imposes is inapplicable to exemption 5.47

Secondly, governmental units are subject to the FOIA disclosure provisions only if they qualify as “agencies.” This requirement needs little examination with regard to the Advice and Appeals Memoranda prepared by the General Counsel; the Counsel’s decision whether to file a complaint is made on behalf of the agency and is unreviewable.48 Defining the Regional Boards as “agencies” is somewhat more complicated, given the reviewability of its findings by the National Renegotiation Board. Nevertheless, the result of careful analysis is the same: the Regional Boards should be considered agencies subject to the disclosure requirements of the Act. The statutory definition of “agency” is supplied by provisions of the original Administrative Procedure Act (APA) which remain in force: “‘agency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . .”49 The court of appeals in Grumman, quoting its own opinion in Soucie,50 noted that under this definition any “‘administrative unit with substantial authority in the exercise of specific functions’” is an agency under the APA.51 Relying on this analysis, the court refused to apply exemption 5 to the decisions of the Regional Boards, because those Boards “serve as a discrete, decision-producing layer in the renegotiation process.”52 In addition, by the terms of the Renegotiation Act,53 the National Board is specifically authorized to establish agencies and delegate functions, powers, and duties to them.54 Because the

47. Because the purposes of the FOIA have nothing to do with autonomy or separation of powers, equating FOIA finality with reviewability is inappropriate. The purpose of the FOIA involves disclosure, not review:

   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 and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies.


49. 5 U.S.C. § 551(1) (1970) (emphasis added). For the purposes of the FOIA, the term “agency” was explained, and perhaps expanded, in id. § 552(e) (Supp. V. 1975). See note 55 infra.

50. See notes 21–23 and accompanying text supra.

51. 482 F.2d at 715.

52. Id.


54. The Act reads in pertinent part:

   The Board may delegate in whole or in part any function, power, or duty
Regional Boards are established under this authority, it is inconceivable that the “agency” label can be withheld from them.\textsuperscript{55} As an agency, each Regional Board is governed by the provisions of the FOIA.

\textbf{B. Balancing the Interests: Confidentiality v. Disclosure}

\textit{Sears} and \textit{Grumman} evidence the Supreme Court’s view that the FOIA applies only to memoranda which reflect ultimate administrative dispositions of cases. The main objection to the Court’s decisions, however, is the overly broad construction of exemption 5 adopted in the effort to protect the agency decisionmaking process. Once the Court found exemption 5 to be applicable, it extended the exemption’s coverage to the entirety of the General Counsel’s and Regional Board’s memoranda. This approach lacks flexibility and fails to lend itself to the balancing of governmental and private interests required by the FOIA. Instead, the Court extends exemption 5 far beyond its supporting rationale.

Exemption 5 represents a deliberate congressional attempt to recognize an agency’s legitimate interest in preserving the integrity of its decisionmaking process by insulating deliberations that precede a decision.\textsuperscript{56} Granting administrative anonymity encourages more careful

\begin{footnotesize}
\textsuperscript{55} The Senate report on the 1974 amendments initially might appear to contradict this conclusion. It states that “it is not intended that the term ‘agency’ be applied to subdivisions, offices, or units within an agency.” S. Rep. No. 1200, 93rd Cong., 2d Sess. 15 (1974). However, the amendments do not repeal any of the definitions of “agency” contained in § 551(1). Indeed, the only changes Congress made in the definition of agency expanded its meaning: “For purposes of this section, the term ‘agency’ as defined in § 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. § 552(e) (Supp. V, 1975). Indeed, the Senate report explicitly declares: “Expansion of the definition of ‘agency’ in this subsection is intended to broaden the applicability of the Freedom of Information Act . . . .” S. Rep. No. 1200 \textit{supra}, at 15. The Regional Boards qualify as “agencies” under their own statutory basis, see note 54 \textit{supra}, as well as under the definition of “agency” for the FOIA. The divisions of the National Board, on the other hand, probably do not meet the requirements for an agency; they lack requisite “independent authority in the exercise of specific functions.” Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

\end{footnotesize}
and fully considered decisions, because the agencies are not inhibited by public scrutiny during the predecisional process. But protecting the agency's interest in predecisional confidentiality does not infringe significantly upon the public's right to know, because, as the Court noted, "[t]he public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy . . ." Once a decision is made, however, disclosure no longer can affect the quality of a decision already reached.

It is at this point that the comparative weights of the interests involved shift dramatically. While the agency's legitimate interest in secrecy becomes negligible, the public's interest in the contents of that decision increases sharply. Indeed, the Court recognized that "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency."

This analysis appears singularly applicable to General Counsel decisions regarding the issuance of unfair labor practice complaints. Labor and industry alike are entitled to be apprised of the standards used by the General Counsel in making prosecutorial decisions. Neither unions nor employers can be expected to comport effectively and purposefully with standards which remain a mystery.

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57. "The privilege aims to protect 'free discussion' of prospective operations and policy." Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 947 (Ct. Cl. 1958). Professor Davis has suggested that the exemption should apply only to "papers which reflect the agency's group thinking in the process of working out its policy and determining what its law should be." Davis, The Information Act, supra note 10, at 797.


58. 421 U.S. at 152.

59. The Court stated:

The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected . . . by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed . . . .

Id. at 151.

60. Id. at 152-53 (emphasis added).

61. Commentators have expressed dissatisfaction with agencies' general failure
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any articulate and successful challenge to the General Counsel's actions must be based on a familiarity with the "working law" of the agency. Identifying departures from administrative standards is impossible without access to the materials which set out the standards as they are applied.62 Indeed, the Sears Court acknowledged that the General Counsel's memoranda reflect decisions with important aspects of finality that significantly affect the parties charged:63

We recognize that an Advice or Appeals Memorandum directing the filing of a complaint . . . has many of the characteristics of [a final order]. . . . [T]he memorandum does explain a decision already reached by the General Counsel which has real operative effect—it permits litigation before the Board . . . .

For much the same reasons, the Regional Board Reports of the Renegotiation Board contain information of potential significance to the public. The standards employed by the Regional Boards provide essential insight into the working law of the National Board, especially in view of the National Board's prerogative to dispense with written opinions or other explanations for its rulings.64 As a minimum, the memoranda of the Regional Board reflect the ultimate disposition of the case at that level of the administrative process,65 and any

to make the rules and policies that govern agency action publicly available. See H. Friendly, The Federal Administrative Agencies 5-6 (1962); Gardner, The Procedures by Which Informal Action Is Taken, 24 Ad. L. Rev. 155 (1972). Much of the commentary in this area focuses upon the choice between rulemaking and adjudication; the NLRB in particular is often criticized for announcing rules in adjudication, a practice which minimizes public knowledge and understanding of the standards which are being employed. See Bernstein, The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act, 79 YALE L.J. 571 (1970); Peck, The Atrophied Rulemaking Powers of the National Labor Relations Board, 70 YALE L.J. 729 (1961); Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 HARV. L. Rev. 921 (1965).

62. The mechanics of obtaining judicial review of administrative action is beyond the scope of this note. It is sufficient here to note that when the courts can discern precedents and standards in the agency decisionmaking process, they may refuse to sanction an unexplained departure from those standards. See, e.g., West Ohio Gas Co. v. Public Util. Comm'n, 294 U.S. 63 (1935); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974); Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971); A.B.C. Air Freight Co. v. CAB, 391 F.2d 295 (2d Cir. 1968), cert. denied, 397 U.S. 1006 (1970); Transcontinental Bus Sys. Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968); Lawrence v. CAB, 343 F.2d 583 (1st Cir. 1965); Boston & Main R.R. v. United States, 202 F. Supp. 830 (D. Mass. 1962), aff'd per curiam, 373 U.S. 372 (1963). In each of the above cases, because the previous standards were identifiable the complaining party was able to successfully challenge the departure from those standards.

63. 421 U.S. at 160 (emphasis added).

64. See note 29 supra.

65. See Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710, 713
agency interest in their protection is unrelated to exemption 5's executive privilege pertaining to predecisional memoranda.

Yet in both Sears and Grumman the Court allowed the reach of exemption 5 to extend to entire memoranda. The Court made no attempt to analyze the contents of the memoranda for portions that could be made available to the public without impinging on the agency decisionmaking process. Such wholesale concealment of agency records ignores the public's interest in understanding the working law of administrative bodies—an interest given substantial weight by the disclosure policy of FOIA.66

C. Attorney Work-Product and Discovery

Part of exemption 5's purpose in protecting agency memoranda is to incorporate the attorney work-product privilege applicable in civil discovery.67 This is important in Sears because, as the Court noted, the General Counsel's investigation prior to filing a complaint uncovers material later used in litigating that complaint. A strong tension exists between the interest of disclosure and privacy. The memorandum directing the filing of a complaint will inevitably include privileged material. But because the General Counsel serves in the first instance as a...
neutral decisionmaker and only later as an advocate\textsuperscript{68} at least a portion of the memorandum presumably is nonprivileged.\textsuperscript{69}

Although the FOIA incorporates the civil discovery privilege into its test of disclosability,\textsuperscript{70} it is important to recognize the difficulties inherent in the application of this test to disclosure controversies under the FOIA. Disclosability in civil discovery turns upon the \textit{concrete factual situation} of each case; the need of the particular party involved and the relevancy of the material sought are essential factors considered.\textsuperscript{71} Conversely, determinations of disclosability under the FOIA must occur in a vacuum; neither identity nor need of the party seeking disclosure is to be evaluated.\textsuperscript{72} Consequently, while discovery in civil litigation turns on practical and immediate considerations, disclosability under the FOIA rests on abstract, theoretical ones. As the Supreme Court has noted, discovery rules can be applied to the FOIA only "by way of rough analogies."\textsuperscript{73} Because evaluation under these circumstances inevitably yields ambiguity and uncertainty, the civil

\textsuperscript{68} See note 2 supra.
\textsuperscript{69} Professor Davis notes:
I think the work product of a private attorney is something altogether different from a basic memorandum by the legal staff of an agency which is used by the agency as a guide in the handling of cases involving private parties. To the extent that such a memorandum states the effective law of the agency, its adoption by the agency makes it something more than the work product of the legal staff . . . .
K. Davis, supra note 10, at § 3A.21.
\textsuperscript{71} The Federal Rules of Civil Procedure provide:
Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .
Fed. R. Civ. P. 26(b)(1). As to material prepared in contemplation of trial, the rules provide:
[A] party may obtain discovery of documents and tangible things [meeting relevancy requirements] prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. . . .
Id. 26(b)(3).
\textsuperscript{73} EPA v. Mink, 410 U.S. 73, 86 (1973).
discovery analogy is not helpful in the marginal cases, in which a workable standard is most necessary. When the issue is in doubt, the courts must revert to analysis of the interests that the FOIA disclosure requirements and exemptions were intended to serve. Under this analysis, at least portions of the General Counsel’s memoranda should be considered non-exempt, because neither the executive privilege nor attorney work-product privileges embodied in exemption 5 will support protection of all the material within the memoranda.

D. Carrying Out the FOIA: In Camera Inspection and Selective Deletion

If the memoranda at issue in Sears contained any disclosable material, the Court’s decision violates the explicit terms of the FOIA itself and departs from established and well reasoned lower court doctrine. In addition to the requirement that the exemptions are to be narrowly construed,74 the 1974 amendments require disclosure of any reasonably segregable material, contained within an otherwise exempt document, which does not qualify for exemption 5 protection.75 This is compelling evidence of congressional determination to limit the reach of exemption 5 to only those circumstances in which the attorney client or executive privilege rationales for the exemption apply. The Soucie court’s fact-opinion distinction76 is an example of the precise and exacting application of exemption 5 which the FOIA demands; that exemption “does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum.”77

To narrow the scope of exemption 5, the FOIA establishes a presumption for disclosure,78 thereby requiring an agency to justify any failure to disclose. Accommodating the legitimate purposes of exemption 5 while at the same time requiring disclosure of all material not subject to its protection necessitates in camera inspection of doubtful documents and selective deletions of nondisclosable materials.79 The

76. See notes 21–24 and accompanying text supra.
79. One approach to selective deletion and in camera inspection of agency memorandum has been suggested by two NLRB employees:
   [Advice and Appeals Memoranda] identify specific witnesses, contain staff cred-
1974 amendments specifically authorize this approach.80

Application of *in camera* inspection and selective deletion to the documents sought in *Sears* would operate to protect the executive privilege and the attorney work-product character of the General Counsel's memoranda directing the filing of a complaint, while also furthering the public's understanding of the working law of the NLRB.

Because the Court concedes that Advice and Appeals Memoranda directing dismissal of complaints are disclosable, at least some portion of memoranda directing the issuance of complaints should be also. The requirement of disclosure should depend on the *fact* of the decision rather than on the decision's *content*. The selective deletion approach allows for more flexible enforcement of the FOIA disclosure requirements and offers an alternative to the wholesale protection of agency memoranda adopted by the Court.

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Even prior to the FOIA, *in camera* inspection was used in civil discovery proceedings to determine whether privilege attached to disputed documents. *See, e.g.,* Machin v. Zuckert, 316 F.2d 336, *cert. denied,* 375 U.S. 896 (1963).
IV. THE RAMIFICATIONS OF SEARS AND GRUMMAN: A SUMMARY

The Supreme Court construction of the FOIA disclosure requirements detrimentally restricts the applicability of those provisions without bringing about significant concomitant benefits. The Renegotiation Board, exempted from writing decisions, will continue to accept without comment the now secret determinations of the Regional Boards. The General Counsel of the NLRB will continue to make prosecutorial decisions for that agency without providing general access to memoranda containing the reasons for such decisions. In each case, the result will be to insulate from public scrutiny and review the standards these agencies apply in carrying out their administrative and adjudicative functions.

Additionally, according a blanket exemption 5 privilege to the entirety of the General Counsel's memoranda will continue to protect non-exempt materials, merely because they are contained within the same document as exempt material. This failure to differentiate materials subject to the executive privilege aspect of exemption 5 leads to inflexible and overbroad application of that exemption in direct contravention of the disclosure mandates of the FOIA. The Court's analytical framework is clearly unsuited to identifying with precision the point at which the agency's legitimate interest in protection ends and the public interest in disclosure begins. The Court used a cleaver instead of a scalpel, severing the disclosable from the nondisclosable in a way which is certain to maintain the confidentiality of any conceivably exempt material and, incidentally, significant non-exempt material. Without the aid of in camera inspection and selective deletion, exemption 5 becomes a clumsy, ponderous, and inexact tool for delineating the contours of the FOIA disclosure requirements. The end result of the Supreme Court's decisions in Sears and Grumman is that judicial enforcement of the FOIA will err strongly on the side of protection of administrative documents.

The flexibility of the selective deletion approach specifically endorsed by the 1974 amendments to the FOIA suggests that the Court should acknowledge and accept in camera inspection and selective deletion as a viable alternative to blanket protection. Otherwise, the FOIA as applied becomes little more than a parody of the FOIA as enacted. Indeed, it begins to resemble in effect its predecessor, Section
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3 of the Administrative Procedure Act, hailing disclosure in theory while affirmatively frustrating it in practice.

Greg Adams