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THE IMPACT OF THE FOIA ON NLRB DISCOVERY PROCEDURES

Since the passage of the Freedom of Information Act (FOIA)\(^1\) in 1967, many suits have been brought against the National Labor Relations Board (hereinafter NLRB or Board) by citizens seeking to compel disclosure of its investigatory files.\(^2\) The most sought-after documents in such cases are witness statements or affidavits collected by the Board's field examiners prior to unfair labor practice hearings.\(^3\) These statements are the primary source of the

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\(^2\) The Comptroller of the NLRB estimates that FOIA suits cost the Board $400,000 in 1975. 27 Lab. L.J. 190 (1976).

\(^3\) Id. Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 (1970), defines an unfair labor practice as an interference with certain specified rights of employees by either an employer or a union.

The NLRB has divided the United States into thirteen regions, each headed by a Regional Director, who is under the direct supervision of the General Counsel of the NLRB. An unfair labor practice charge may be filed by any person with the regional offices of the NLRB. 29 C.F.R. § 101.2 (1976). After the charge is investigated by a Board field examiner the Regional Director determines whether a complaint should be issued against the charged party. 29 U.S.C. § 160(c) (1970); 29 C.F.R. § 101.4 (1976). If the Regional Director decides that the charge is without merit, he may recommend that the complainant voluntarily withdraw the charge, or may dismiss it himself. 29 C.F.R. § 101.6 (1976). If the charging party is dissatisfied with the dismissal, it may appeal to the Board's General Counsel. The General Counsel may uphold the dismissal, or direct the Regional Director to proceed with the case. If the General Counsel upholds the dismissal, he must state the grounds for his decision. 29 C.F.R. § 102.19(c) (1976).

When the General Counsel upholds the dismissal, the memoranda generated by his staff reflecting the decision-making process are discoverable. NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Although the General Counsel's decision is not reviewable within the NLRB, discovery of the reasoning behind his decision may help appellants perceive standards for successful appeals, and also give them grounds for seeking relief in the courts when it appears that the General Counsel's decision was arbitrary or capricious. Samoff & Falkin, *The FOIA and the NLRB*, 15 B.C. Indus. & Com. L. Rev. 1267, 1286 (1974).

If a complaint is issued, it must contain notice of the time and place of the scheduled hearing, as well as a description of the acts which constitute the alleged unfair labor practices. 29 U.S.C. § 160(b) (1970); 29 C.F.R. § 101.8 (1976). The Regional Director continues to investigate the charge, and if the matter cannot be settled, a Board attorney is appointed to present the evidence in support of the complaint. This occurs relatively
Board's evidence against parties that have allegedly committed unfair labor practices. A prerequisite to filing a suit under the FOIA is the exhaustion of administrative remedies; in an unfair labor practice hearing, this means petitioning the Board for discovery. The increase in the number of suits against the Board under the FOIA demonstrates a growing dissatisfaction with the Board's discovery procedures. This article will discuss the impact of the FOIA on the Board's policies and practices and will examine various factors which must be considered in applying the Act to the NLRB.

I. THE FRAMEWORK OF NLRB DISCOVERY

The National Labor Relations Act (NLRA) contains no provisions dealing specifically with discovery procedures. Section 10(b) provides, however, that Board proceedings shall be conducted in accordance with federal rules of evidence "so far as is practicable." One court has interpreted this language to mean that the discovery procedures available under the Federal Rules of Civil Procedure are applicable in Board proceedings. Most courts have decided, however, that section 10(b) of the NLRA does not provide for any particular discovery procedures and does not preclude the Board from promulgating its own discovery rules. The Board's

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4 See NLRB Case Handling Manual, Unfair Labor Practice Proceedings § 10056.2 (Apr. 1975): "Whenever possible the charging party's case, if one exists, should be established through interviews with the charging party and with witnesses offered by the charging party." See also id. at § 10058.2: "The keystone of the investigation is the affidavit." (Emphasis in original).

5 Vapor Blast Mfg. Co. v. Madden, 280 F.2d 205 (7th Cir. 1960), cert. denied, 364 U.S. 955 (1968).


7 29 U.S.C. § 160(b) (1970). The pertinent part of the statute provides: "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . ."


9 NLRB v. Interboro Contractors, Inc., 432 F.2d 854 (2d Cir. 1970); NLRB v. Lepriro Cheese Co., 424 F.2d 184 (10th Cir. 1970); Electromec Design & Dev. Co., Inc. v. NLRB, 409 F.2d 631 (9th Cir. 1969); NLRB v. Safway Steel Scaffolds Co., 383 F.2d 273 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968); Vapor Blast Mfg. Co. v. Madden, 280 F.2d 205 (7th
rules prohibit any discovery prior to the hearing, but allow disclosure of witness statements after the witness has testified at the hearing. NLRB regulations also prohibit Board employees from releasing information to the public without written permission from the Chairman of the NLRB or the Board’s General Counsel until after the witness has testified. Depositions are allowed only when witnesses are unable to testify at the hearing. Administrative law judges have discretion to allow discovery when there is good cause shown, but have rarely done so.

Prior to the enactment of the FOIA, there were relatively few suits to compel discovery in unfair labor practice proceedings. When discovery requests did come to trial, most courts would overturn a denial of discovery only where the administrative law judge had abused his discretion, resulting in prejudice to the charged party. Under this standard courts generally denied access to Board files, thereby discouraging requests for discovery. The leading case in this period was \textit{NLRB v. Vapor Blast Manufacturing Company}. Vapor Blast resisted enforcement of an NLRB order, claiming that the Board’s refusal to allow discovery of...
witness affidavits constituted a denial of procedural due process.\textsuperscript{18} In enforcing the Board's order, the court held that the discovery rules promulgated by the NLRB did not \textit{per se} violate Vapor Blast's constitutional right to procedural due process, and noted that the Board possessed broad power to formulate rules to guide its internal administration.\textsuperscript{19} The court, by applying the rational basis test, found that the confidentiality of employee affidavits was necessary to preclude employer retaliation and to insure full disclosure to field examiners.\textsuperscript{20} Moreover, it held that section 10(b) of the NLRA did not require the adoption of the entire discovery procedure contained in the Federal Rules of Civil Procedure. The court stressed that the Board had the responsibility of determining whether full disclosure was practical in unfair labor practice hearings.\textsuperscript{21} Finally, although the court recognized that the Board's insistence on compliance with discovery regulations might constitute an abuse of discretion where a party made a sufficient showing of need for the documents, it held that Vapor Blast had not demonstrated that it was "prejudiced, surprised, or in any way put at a disadvantage" because of the denial of discovery.\textsuperscript{22}

\section*{II. Due Process Considerations}

The legislative history of section 10(b) provides little insight into whether Congress intended NLRB discovery procedures to be governed by the Federal Rules of Civil Procedure. During the congressional debates on the Taft-Hartley Act,\textsuperscript{23} Senator Taft criticized the tendency of administrative law judges to admit virtually anything into evidence, thereby causing great delays in the adjudication of unfair labor practices.\textsuperscript{24} As a result of Senator Taft's comments section 10(b) was amended to establish guidelines, based upon the rules of evidence in use in federal district courts, for limiting what evidence could be admitted.\textsuperscript{25} The

\textsuperscript{18} 287 F.2d 402, 405 (1961).
\textsuperscript{19} The court noted that "[the Board] has determined that it is necessary to proper administration to stamp as confidential all documents in its possession." \textit{Id.} at 407 (emphasis added).
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 408. Later cases adopting this reasoning include Electromec Design & Dev. Co. v. NLRB, 409 F.2d 631 (9th Cir. 1969); NLRB v. Safway Steel Scaffolds Co., 383 F.2d 273 (5th Cir. 1967); Trojan Freight Lines, Inc. v. NLRB, 356 F.2d 947 (6th Cir. 1966). See NLRB v. Wichita Television Inc., 277 F.2d 579 (10th Cir. 1960); NLRB v. Gala-Mo Arts, Inc., 232 F.2d 102 (8th Cir. 1956), for decisions which preceded \textit{Vapor Blast}, but applied similar reasoning.
\textsuperscript{24} 93 Cong. Rec. 6860 (1947) (remarks of Sen. Taft).
\textsuperscript{25} \textit{Id.}.
“so far as is practicable” phrase was inserted to allow administrative law judges “considerable discretion” as to what evidence was admissible.\textsuperscript{26} There is no indication that Congress anticipated the considerable effect that application of these evidentiary rules would have on the Board’s discovery procedures.

An agency’s administrative procedures must satisfy the requirements of procedural due process.\textsuperscript{27} Considerations of procedural due process traditionally involve a balancing test between the government’s interest in the procedures adopted and the citizen’s interest in greater safeguards.\textsuperscript{28} In applying due process standards to NLRB discovery rules, the courts must consider the competing interests of charged parties, employee-witnesses, and the NLRB. The charged party is primarily concerned with having a full and fair hearing.\textsuperscript{29} In deciding whether NLRB hearings satisfy due process standards, the court must consider the unfairness to the charged party who may be tried without having been fully apprised of the circumstances surrounding the alleged unfair labor practice.\textsuperscript{30} Moreover, denial of discovery can deprive a charged party of the opportunity to adequately prepare a defense.\textsuperscript{31} Without discovery of witness statements, for example, the charged party may be unable to effectively cross-examine the Board’s witnesses.\textsuperscript{32} Moreover, the charged party may not be allowed sufficient time to gather evidence with which to rebut testimony, thus his chances of prevailing at the hearing would be greatly diminished.\textsuperscript{33} Due process also requires that the courts consider the severity of the punishment resulting from an adverse finding.\textsuperscript{34} The harsher the penalties, the greater the amount of due process protection that is required.\textsuperscript{35} Since the sanctions imposed by the NLRB are relatively slight, ranging from cease and desist orders to reinstatement with back pay,\textsuperscript{36} there may not be a compelling need to provide extensive procedural safeguards in Board hearings.

Drawing an analogy between NLRB proceedings and criminal

\textsuperscript{26} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 268.
\textsuperscript{30} Cf. Goldberg v. Kelly, 397 U.S. 254, 268 (1970). (The Court stated that in proceedings to deny welfare recipients their benefits, both a letter and personal meetings were effective to fully inform the recipients of the nature of the proceedings.).
\textsuperscript{32} Barnes & Noble Bookstores v. NLRB, 92 LRRM 2169 (S.D.N.Y. 1976).
\textsuperscript{33} Id.
\textsuperscript{34} Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).
trials, many courts have argued that the discovery rule contained in the Jencks Act\textsuperscript{37} should apply in NLRB proceedings.\textsuperscript{38} The Jencks Act provides that a witness affidavit may be disclosed only after the witness has testified in court. Courts favoring the application of this principle in NLRB hearings have argued that Congress could not have intended charged parties to have greater rights of discovery than criminal defendants.\textsuperscript{39} This view, however, does not consider that the more limited rights to discovery in the criminal setting are offset by procedural safeguards not available to respondents in agency proceedings, such as the right to a trial by jury and a greater burden of proof that must be satisfied before the defendant can be found guilty.\textsuperscript{40}

The employee-witness has an interest in protection from retaliation by his employer or union.\textsuperscript{41} Although section 8 of the NLRA\textsuperscript{42} makes it an unfair labor practice for an employer or union to retaliate against an employee for giving testimony, employers and unions may be able to fabricate "good cause" for their actions.\textsuperscript{43} Moreover, forcing an employee to file an unfair labor practice charge to enforce his rights places a heavy burden on those who give testimony to Board agents. Indeed, employer retaliation against employees who provide information to Board agents may tend to have a chilling effect on other potential witnesses who are thus discouraged from asserting their rights.

The interests of the Board are also undercut by employer and union retaliation because witness statements comprise the eviden-

\textsuperscript{37} 18 U.S.C. § 3500(a) (1970) provides:
In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

The Jencks Act was passed to regulate discovery procedures in criminal trials. The specific goals of the Act were to limit defendants' discovery to the signed witness statements, and to preclude any discovery of such statements prior to the witness' testimony in court. The purpose of the legislation was to limit the effects of the Supreme Court decision in Jenckes v. United States, 353 U.S. 657 (1957), which ordered the production of FBI reports containing the requested witness statements. See S. REP. NO. 981, 85th Cong., 1st Sess. (1957).


\textsuperscript{40} M. FORKOSCH, CONSTITUTIONAL LAW § 411 (1969).


\textsuperscript{43} Employers may coerce their employees in many ways. Besides discharge, employees could be transferred to less desirable or lower paying jobs, harassed, ostracized by fellow employees, or denied promotions, bonuses, or other fringe benefits. Unions might also coerce members who give testimony against them, either by informally ostracizing the members or by forcing employers to discharge them.
tiary basis of the Board's case in unfair labor practice hearings. Any premature release of such statements which might deter potential witnesses or unfairly benefit the charged party by revealing the Board's case would interfere with the Board's legitimate interest in prosecuting unfair labor practices. Since the Board releases witness statements immediately after testimony, however, the Board's present discovery policy merely delays, not eliminates, the possibility of retaliation. Moreover, in many cases a charged party may know who the witnesses for the Board will be before they testify. In sum, the fact that witness statements have been released may not contribute to the employer's or union's ability to retaliate.

In addition to the relative interests of the parties, there are other factors that may affect the application of due process standards. The nature of the requested materials may be an important additional factor. The sworn affidavit of a person who will later be called as a witness will not usually differ substantially from the testimony at the hearing, nor will it reveal the identity of one who would otherwise have remained anonymous. Thus, the disclosure of these documents would have few adverse consequences to either witnesses or the Board, but would aid charged parties in preparing their cases. On the other hand, the information contained in a field examiner's notes are likely to consist of the opinions or legal theories of the interviewer and thus offer an unfair advantage to the charged party if disclosed.

A second factor to be considered is whether the information is helpful or damaging to the charged party. By knowingly withholding a statement which tends to vindicate the charged party, the Board violates basic principles of fairness and undermines the validity of the hearings. There is also no incentive to retaliate against an employee for presenting favorable evidence. If the statement is damaging to the charged party, the issue is less clear. While the possibility of retaliation exists, disclosure of the statement may make the strength of the Board's case more apparent,

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44 See note 4 supra.
45 See note 10 supra.
47 The recognition a witness receives by having his statement released may afford some protection. In order to prevail on a charge of retaliation the Board need only show that the employer suspected that the employee spoke to Board agents. Maple City Stamping Co., 200 NLRB 743, 759 (1972). The release of the witness' statement informs the employer that the employee has cooperated with the Board. If retaliation ensues, the Board will have no trouble establishing the employer's knowledge. Where the Board's burden has been so greatly simplified, the employer may be inhibited from retaliatory action. See generally NLRB v. Scrivener, 405 U.S. 117 (1972).
and persuade the charged party to settle the matter more informally without a full-fledged hearing.\textsuperscript{50}

Finally, the relationship of the witness to the charged party is an important factor. When the witness is not susceptible to retaliation there is no compelling reason to deny discovery.\textsuperscript{51} For example, the Board should permit discovery when the witness is a union official testifying against an employer, a supervisor testifying against a union, or a nonemployee bystander unrelated to either side.

III. Post-FOIA Discovery

A. Background of the 1967 Act

Prior to the passage of the FOIA, federal agencies were generally able to withhold information from the public.\textsuperscript{52} Relying on the vague provisions of the Administrative Procedures Act (APA),\textsuperscript{53} the agencies justified nondisclosure on the grounds that the public interest required secrecy or that there was good cause for keeping the material confidential.\textsuperscript{54} The agencies also relied upon the APA requirement that a citizen be an interested party, properly and directly concerned with the requested information, to receive government documents.\textsuperscript{55}

Responding to widespread discontent over government secrecy, Congress amended the APA in 1967 by enacting the Freedom of Information Act,\textsuperscript{56} with the declared purpose of permitting greater access to government documents.\textsuperscript{57} In determining which documents should be withheld from the public, the FOIA seeks to establish a uniform standard for disclosure by balancing the public interest in obtaining information against the confidentiality interests of the agencies and individuals involved.\textsuperscript{58} The FOIA requires

\textsuperscript{50} See Baptist Memorial Hosp. v. NLRB, 92 LRRM 2645, 2647 (W.D. Tenn. 1976); Deering Milliken, Inc. v. Nash, 90 LRRM 3138, 3144 (D.S.C. 1975).
\textsuperscript{51} Id.
\textsuperscript{52} S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965).
\textsuperscript{53} 60 Stat. 238 (1946) provides in pertinent part: "Save as otherwise directed by statute, matters of official record shall in accordance with published rules be made available to persons properly and directly concerned except for information held confidential for good cause found."
\textsuperscript{54} H.R. REP. No. 1497, 89th Cong., 2d Sess. 4-6 (1966); S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965).
\textsuperscript{55} H.R. REP. No. 1497, 89th Cong., 2d Sess. 4-6 (1966); S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965).
\textsuperscript{56} See 5 U.S.C. § 552 (1967); S. REP. No. 813, 89th Cong., 1st Sess. 5-6 (1965).
\textsuperscript{57} S. REP. No. 813, 89th Cong., 1st Sess. 2, 3 (1965).
full disclosure of all agency material on demand, except for nine specific categories of documents. The agency has the burden of demonstrating that material comes within one of the exemptions, and an agency's refusal to supply information may be challenged in federal district court.

The Board has relied on only two of the specified exemptions in virtually all of the FOIA suits in which it has been a defendant; exemption 5, which deals with inter- and intra-agency memoranda, and exemption 7, which covers investigatory files of law enforcement agencies.

B. Exemption 5

Exemption 5 provides that inter-agency and intra-agency memoranda or letters which would not otherwise be available in litigation are exempt from the disclosure requirements of the FOIA. Congress enacted this provision because it feared that disclosure of agency memoranda would inhibit frank communication between and within agencies and impair agencies' operations by revealing their legal or investigative theories.

The courts have been divided over whether the Board can rely on exemption 5 to deny disclosure of witness statements. In

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59 5 U.S.C. § 552(b) (1970). See S. Rep. No. 813, 89th Cong., 1st Sess. 2, 3 (1967). The nine exempt categories pertain to documents which are (1) required by Executive order to be kept secret, (2) internal personnel rules, (3) exempted by another statute, (4) trade secrets, (5) inter- or intra-agency memoranda, (6) personnel and medical files, (7) investigatory files of law enforcement agencies, (8) condition reports of agencies regulating financial institutions, and (9) geological or geophysical data.


61 Id.


63 5 U.S.C. § 552(b)(5) (1970) provides: "This section does not apply to matters that are ... (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; ..."


Temple-Eastex, Inc. v. NLRB, the court held that witness statements did not fall within the scope of exemption 5 because they were not inter-agency or intra-agency memoranda. The court noted that witness statements were generated by private citizens, not transmitted from one government employee to another. The court also observed that no evidence of the deliberative processes of the Board were contained in the statements. Similarly, in Amerace Corporation v. NLRB, the court denied the Board’s right to withhold witness statements, finding that neither established precedent nor the legislative history of the FOIA indicated that purely factual information, such as that contained in witness statements, could be withheld from the public under exemption 5.

In Jamco International, Inc. v. NLRB, however, the court held that witness statements, field examiner’s notes, trial preparation materials of field examiners and attorneys, and similar documents gathered as evidence come within exemption 5. The court argued that exemption 5 was intended to employ the same criteria as Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides that purely factual material, if prepared in contemplation of litigation, constitutes an attorney’s work product and is not normally subject to discovery.

The decision whether an agency document is discoverable under exemption 5 should involve a two-step determination. First, the courts should determine whether the requested material is an inter- or intra-agency memorandum. If it is not an agency memorandum, it should be disclosed. If it is an agency memorandum, the courts must decide if it would ordinarily be discoverable in civil litigation. In making this determination, courts have considered whether the

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66 92 LRRM 2915 (E.D. Tex. 1976). After being charged with an unfair labor practice, Temple-Eastex sought witness statements from the Board. Disclosure was denied by the Regional Director and the General Counsel. Temple-Eastex then initiated a suit under the FOIA.

67 Id. at 2917.

68 Id. See EPA v. Mink, 410 U.S. 73, 89-90 (1973). The Supreme Court has endorsed a narrow reading of exemption 5 based on the distinction between materials which contain primarily factual information and those which reflect the deliberative process of the agency.

69 92 LRRM 3497 (W.D. Tenn. 1976).

70 Id. at 3498. This interpretation of exemption 5 has been adopted by courts in FOIA suits involving other agencies. In Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1976), for example, two private citizens sought disclosure of the federal government’s development plans for a supersonic transport aircraft. The defendant, director of the Office of Science and Technology, refused to comply with the request, claiming that the report was an inter-agency memorandum, exempt from disclosure under exemption 5. The court noted that the purpose of the exemption is to encourage a free exchange of ideas during the policymaking process. The court found, however, that this rationale did not apply to “purely factual or investigative reports.” 448 F.2d at 1007. See also Ethyl Corp. v. EPA 478 F.2d 47 (4th Cir. 1973).

71 91 LRRM 2446 (N.D. Okla. 1976).

72 Id. at 2449.

document was generated by agency personnel or by private citizens. A document which does not originate in an agency is not considered to be an inter- or intra-agency memorandum. Courts have also considered the relationship of the document to the deliberative or policymaking functions of the agency. If the material is an integral part of such processes, it is considered an agency memorandum, but where the material is purely factual, it is not viewed as an agency memorandum and disclosure has been allowed.

If the document is found to be an agency memorandum, a second determination is required to decide the document's discoverability. If the memorandum would be "otherwise available in litigation," discovery is permitted.

In Jamco, the court made the two determinations in reverse order, finding that the witness statements constituted attorney work products before determining whether they were agency memoranda. If the court had first considered whether the document was an agency memorandum, it would never have reached the "available in litigation" test, because witness statements do not qualify as inter- or intra-agency memoranda under exemption 5. Such statements neither originate with NLRB personnel, nor do they involve policymaking or deliberative functions; they are, ostensibly, factual documents.

C. Exemption 7

The other exemption relied upon by the NLRB in defending FOIA actions to discover witness statements is exemption 7. As

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74 See Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Robbins Tire & Rubber Co. v. NLRB, 92 LRRM 2586 (N.D. Ala. 1976).
75 See H. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966): "[A] full and frank exchange of opinions would be impossible if all internal communications were made public." (Emphasis added).
77 See notes 69-78 and accompanying text supra.
78 See note 62 and accompanying text supra.
originally enacted, it provided that information in the investigative files of law enforcement agencies, except that which would otherwise be available in litigation, was exempt from the disclosure requirements of the FOIA.\(^1\) Congress created this exemption to ensure that law enforcement agencies would be able to present as strong a case as possible in court.\(^2\) Although the FOIA was designed to encourage disclosure,\(^3\) courts initially adopted a broad interpretation of exemption 7 in suits against the NLRB.\(^4\) In the first case decided under the FOIA, *Barceloneta Shoe Corporation v. Compton*,\(^5\) the court held that witness statements were exempt from disclosure under exemption 7.\(^6\) Comparing NLRB witness statements to statements given to FBI agents, the court asserted that the former were within the scope of the law enforcement investigatory files definition.\(^7\) The court looked to the Jencks Act\(^8\) and found that neither it nor any other law required production of the witness statements.\(^9\) Subsequent decisions adopted the *Barceloneta* court’s interpretation of exemption 7 without closely examining its rationale.\(^10\) This approach resulted in the *per se*

\(^{1}\) 5 U.S.C. § 552(b)(7) (1970). This exemption originally provided: “This section does not apply to matters that are—

\[\ldots\] (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; \ldots\]


\(^{3}\) S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).


\(^{6}\) The Memorandum of Decision and Order in the *Barceloneta* case was issued after only one working day of preparation so that the order could take effect before the unfair labor practice hearing. 271 F. Supp. at 591, 593. Unfortunately, subsequent decisions adopted the *Barceloneta* court’s interpretation of the FOIA without carefully evaluating its hastily conceived analysis.

The court, as an alternative basis for denying disclosure, held that witness statements were exempt under the invasion of privacy provision. 271 F. Supp. at 594. See 5 U.S.C. § 552(b)(6) (1970). This exemption provides: “This section does not apply to matters that are . . . (6) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; . . .” This provision applies to all government documents, not merely investigatory files of law enforcement agencies, and is similar to the present exemption 7(C). 5 U.S.C. § 552(b)(7)(c). The Board has relied more often on exemption 7(C) than exemption 6. See notes 147-55 and accompanying text *infra*.


\(^{9}\) 271 F. Supp. 591, 593 (D.P.R. 1967). The court also relied on the possibility of employer retaliation and its chilling effect on testimony in subsequent investigations. *Id.* at 594.

denial of all open investigatory files. In *Wellman Industries, Inc. v. NLRB*, for example, the employer sought witness statements from the Board during an unfair labor practice hearing. In denying disclosure the court rejected a "balancing of equities" approach, finding that the statements were part of an open investigatory file and therefore per se nondisclosable.

Dissatisfied with this broad judicial interpretation of exemption 7, Congress amended the FOIA in 1974 to narrow the scope of exemption 7. Criticizing the prior judicial interpretation of exemption 7 as creating a "stone wall" to disclosure, Senator Hart, the author of the amendment, explained that its purpose was to preclude the per se denial of discovery of investigatory files and to require the courts to decide each case on its own merits.


Open investigatory files consist of material gathered in preparation for litigation which is not yet complete. Title Guar. Co. v. NLRB, 534 F.2d 484, 490 (2d Cir.), cert. denied, 45 U.S.L.W. 3251 (1976). Once all reasonably foreseeable litigation has ended, the files are designated "closed."


(b) This section does not apply to matters that are—

... (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 . . . .

120 CONG. REC. 517,033 (1974). During the debates on the 1974 Amendments Senator Hart summarized the purpose of the 1974 Amendments:

Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the
without resorting to judicially-created "wooden and mechanical" rules.98

As part of the congressional effort to aid the courts in deciding FOIA suits on a case-by-case basis, the 1974 Amendments provided that courts had the right to make in camera inspections of all requested documents prior to ruling on disclosure.99 This provision was a reaction to cases holding that no such right existed under the original FOIA.100 In camera inspection allows the court to weigh the interests of the parties and to insure that no disclosed information will unduly impinge on the interests of an individual or agency.

The 1974 Amendments have stipulated requests for disclosure of NLRB documents, especially witness statements.101 Adhering to its traditional policy, however, the Board has resisted disclosure of its documents.102 Although the courts have been more willing to compel disclosure under the 1974 Amendments than under the original FOIA,103 a majority of courts have upheld the Board's policy of nondisclosure.104

The exemption most effectively used by the Board is exemption

agency to show why the disclosure of the particular document should not be made. . . .

. . . Let me clarify the instances in which nondisclosure would obtain: First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

Id.

98 Id. at 517,034.
99 5 U.S.C. § 552(a)(4)(b) (Supp. V 1975). However, in EPA v. Mink, 410 U.S. 73 (1973), the Supreme Court ruled that when a document is classified as "top secret" by Executive Order or through the President's delegated authority, courts have no right to in camera inspection of the classified documents.
102 27 LAB. L.J. 190 (1976) (statement of Chairwoman Murphy). The NLRB has not amended its regulations concerning disclosure, 29 C.F.R. § 102.118 (1976), indicating that the policy of nondisclosure is still in force.
7(A), which allows agencies to withhold investigatory files compiled for law enforcement purposes if disclosure would interfere with their enforcement proceedings. The courts have generally upheld nondisclosure of witness statements under exemption 7(A), noting the danger of retaliation against witnesses, the possible prejudice to the Board’s case, and the chilling effect on future investigations.

The leading case dealing with exemption 7(A) is *Title Guarantee Company v. NLRB*, in which the Second Circuit held that witness statements in pending unfair labor practice proceedings were exempt from disclosure. Acknowledging that the 1974 amendments were intended to increase disclosure by narrowing the exemption, the court, nevertheless, noted that the legislative history distinguished between open and closed investigatory files. Since the adoption of the 1974 Amendments, closed files have generally been held to be disclosable.

Open files were *per se* nondisclosable under the original FOIA, and the *Title Guarantee* court found that the 1974 amendments were not intended by Congress to alter the disclosability of open files. Moreover, the court stated that disclosure of witness statements prior to testimony would necessarily interfere with the Board’s enforcement proceedings by revealing the Board’s case in advance, thereby allowing charged parties to develop defenses which might permit unfair labor practices to go unremedied. In the court’s view, disclosure would also inhibit potential witnesses from giving information to the Board for fear of retaliation. Finally, the court asserted that Congress could not have intended to alter NLRB discovery procedures by a “backdoor” amendment to the FOIA. In view of the delicate balance

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107 *Id.* at 492. See note 112 infra.
108 *Id.* at 490.
111 *Id.* at 491. The court rejected a third basis for interference; namely, that witness statements constituted attorney work products. See notes 78-79 and accompanying text supra. Investigative material other than witness statements was not found to be *per se* nondisclosable.
obtained by the NLRB in labor-management relations, it was un-
likely that the Board’s discovery procedures were meant to be
affected by a statute dealing with agency disclosure in general.\textsuperscript{113}

The reasoning of the \textit{Title Guarantee} court with respect to
exemption 7(A) was expressly adopted in \textit{Goodfriend Western
Corporation v. NLRB}.\textsuperscript{114} The First Circuit denied disclosure of
witness statements, specifically rejecting the district court’s at-
tempt to accommodate the interests of the charged party by allow-
ing disclosure twenty-four hours prior to the hearing.\textsuperscript{115} The court
noted that it was more efficient for the Board, rather than the
court, to make a case-by-case determination of what information
was disclosable.\textsuperscript{116} The court also stated that it was not the intent
of Congress to require courts to hear every request for disclo-
sure.\textsuperscript{117} The Tenth Circuit reached a similar result in \textit{Climax
Molybdenum Company v. NLRB},\textsuperscript{118} where it held that the 1974
Amendments applied only to closed investigatory files, and that
Congress did not intend to alter \textit{Wellman} and its progeny.\textsuperscript{119} The
court also rejected a case-by-case adjudication of NLRB disclosure
proceedings arising under the FOIA, relying on a presumption that
there is interference in enforcement proceedings whenever open
investigatory files are released.\textsuperscript{120}

Some courts have interpreted the 1974 Amendments differently.
In \textit{McDonnell Douglas Corporation v. NLRB},\textsuperscript{121} for example, the
court ordered disclosure of witness statements prior to an unfair
labor practice hearing, finding that they did not come within
exemption 7(A). An important factor in the decision was the fact
that the witnesses involved were not susceptible to retaliation
because they were nonemployee union officers.\textsuperscript{122} The court ob-
served, however, that where employer retribution was a possibil-
ity, nondisclosure of witness statements prior to the hearings could
only delay retaliation since the employer would receive the state-
ments immediately after the hearing.\textsuperscript{123} The court rejected the
Board’s contention that disclosure would prevent it from obtaining

\begin{enumerate}
\item[113] Id. at 491-92.
\item[114] 535 F.2d 145 (1st Cir.), cert. denied, 45 U.S.L.W. 3306 (1976).
\item[115] The district court contended that the twenty-four hour period would give the charged
party time for adequate pre-hearing preparation without creating an opportunity for retali-
ation against the witnesses. Goodfriend Western Corp. v. Fuchs, 411 F. Supp. 454, 458 (D.
\item[116] 535 F.2d at 147.
\item[117] Id.
\item[118] 92 LRRM 3466 (10th Cir. 1976).
\item[119] Id. at 3467-68.
\item[120] Id. at 3468.
\item[121] 92 LRRM 2072 (C.D. Cal. 1976).
\item[122] See note 48 and accompanying text \textit{supra}.
\item[123] 92 LRRM at 2075. \textit{See} note 46 and accompanying text \textit{supra}.
\end{enumerate}
evidence in the future due to the chilling effect on potential witnesses, and would make it more difficult to prevail against charged parties if the Board's strategies were revealed prior to the hearing. Relying on the legislative history of the 1974 Amendments, the court noted that investigatory files are not exempt per se and that an agency must satisfy the burden of proof by showing that a specific harm to its enforcement proceedings would result from disclosure.\(^{124}\) Emphasizing that the Board's position was tantamount to a return to the "wooden and mechanical" standards prevalent before the adoption of the 1974 Amendments,\(^{125}\) the court adopted a case-by-case approach\(^{126}\) involving in camera inspection of the files.\(^{127}\)

Similarly, in Deering Milliken, Inc. v. Nash\(^{128}\) the court, after discussing the legislative history of the FOIA, concluded that agencies relying on exemption 7(A) must demonstrate specific harm to its enforcement efforts. In rejecting a claim under exemption 7(A), the court declared that it would be directly contrary to the spirit of the 1974 amendments to refuse disclosure simply because the Board's own regulations did not allow discovery in an NLRB proceeding.\(^{129}\) The court also observed that disclosure of the requested information could only have a beneficial effect on the outcome of the proceedings.\(^{130}\)

In Temple-Eastex, Inc. v. NLRB\(^{131}\) the court adopted a middle position, balancing the various interests involved. The court noted that witness statements of those hostile to the charged party should be withheld to protect the witnesses from retaliation. The court held, however, that statements of witnesses favorable to the charged party were disclosable because there was no danger of retaliation.\(^{132}\) The court viewed the Board's refusal to release any statements as overly restrictive and inconsistent with the FOIA's purpose of providing the fullest possible disclosure.\(^{133}\) The Board's policy of releasing statements only after the witness had testified would preclude Temple-Eastex from ever seeing statements that

\(^{124}\) Id. at 2074-75. Other courts have applied this reasoning. See Robbins Tire & Rubber Co. v. NLRB, 92 LRRM 2586 (N.D. Ala. 1976); Barnes & Noble Bookstores v. NLRB, 92 LRRM 2169 (S.D.N.Y. 1976); NLRB v. Schill Steel Prod., Inc., 408 F.2d 803 (5th Cir. 1969).  
\(^{125}\) 92 LRRM at 2074-75.  
\(^{126}\) Id.  
\(^{127}\) Id. at 2075.  
\(^{128}\) 90 LRRM 3138 (D.S.C. 1975).  
\(^{129}\) Id. at 3143-44.  
\(^{130}\) Id. at 3144. See notes 49-50 and accompanying text supra.  
\(^{131}\) 92 LRRM 2915 (E.D. Tex. 1976).  
\(^{132}\) Id. at 2918. Here the employer was the charged party. The statements released to the employer were made by nonunion employees and were favorable to the employer, so there was no danger of retaliation by either the union or the employer.  
\(^{133}\) Id. at 2917.
might aid its case, since the Board would never call a witness who would testify on behalf of the charged party.\textsuperscript{134} Finally, the court observed that it could determine whether the statements were favorable or hostile by an \textit{in camera} inspection.

The expansive interpretation given exemption 7(A) by the courts in cases such as \textit{Title Guarantee} and \textit{Climax Molybdenum} conflicts with the purpose of the 1974 Amendments. The legislative history of exemption 7(A) does not support the reliance of these courts on the distinction between open and closed investigatory files as the basis for deciding whether disclosure is allowable. In discussing the Amendments, the only factor which Senator Hart referred to was whether the files would interfere with enforcement proceedings if released.\textsuperscript{135} In some cases it is possible to disclose open files without interfering with enforcement proceedings, or damaging an agency's case in court.\textsuperscript{136} The simplistic dichotomy between open and closed investigatory files does not account for the effect of disclosure on the interests of the parties.\textsuperscript{137} This distinction also fails to account for the identity of witnesses and the varying contents of their statements.\textsuperscript{138}

The rule that open investigatory files are \textit{per se} nondisclosable also renders much of the 1974 Amendments ineffective. FOIA cases were intended to be decided on a case-by-case basis,\textsuperscript{139} and if courts automatically deny disclosure of every open file, then the merits of any particular case are not considered.\textsuperscript{140} The \textit{per se} rule also precludes the effective use of the \textit{in camera} inspections, which are expressly permitted by the 1974 Amendments.\textsuperscript{141} The provision for \textit{in camera} inspections implicitly underscores the importance of a case-by-case approach to the FOIA; if documents were to be generically categorized as \textit{per se} disclosable or nondisclosable, there would be little use for \textit{in camera} inspection.

It has been argued that courts cannot fully consider each FOIA suit individually, and that in the interest of economy and efficiency they must either apply a rule allowing a quick disposition of the case,\textsuperscript{142} or defer to the authority of the respective agencies to determine the merits of each case.\textsuperscript{143} However, the purpose of the

\textsuperscript{134} Id.
\textsuperscript{135} \textsc{120 Cong. Rec.} 517,033 (1974) (remarks of Sen. Hart).
\textsuperscript{137} See notes 23-51 and accompanying text supra.
\textsuperscript{138} See notes 48-51 and accompanying text supra.
\textsuperscript{139} \textsc{120 Cong. Rec.} 517,034 (1974) (remarks of Sen. Hart).
\textsuperscript{140} \textit{Title Guar. Co.} v. NLRB, 534 F.2d 484, 490 (2d Cir. 1976).
\textsuperscript{141} See notes 99-100 and accompanying text supra.
\textsuperscript{142} See Goodfriend Western Co. v. Fuchs, 535 F.2d 145, 147 (1st Cir. 1976).
\textsuperscript{143} See Climax Molybdenum Co. v. NLRB, 92 LRRM 3466 (10th Cir. 1976).
1967 FOIA was to remove from the agencies the power to determine the disclosability of their own files. The elimination of the inflexible rules that summarily removed FOIA suits from the courts was another purpose of the 1974 Amendments. Moreover, the fear that the courts will be flooded with FOIA cases is groundless. Even if courts decide each FOIA case on its merits, a standard will evolve that will be perceptible to the NLRB and counsel for charged parties. Once this happens, the parties will know under what circumstances witness statements will not be available, and thus will seldom resort to litigation to contest instances of nondisclosure.

The other portions of exemption 7 relied upon by the Board to protect the confidentiality of its files have played a less prominent role in litigation. Although the Board has often sought to employ them, the courts have generally found these portions of exemption 7 inapplicable without extensive discussion. Exemption 7(C) provides that investigatory files compiled for law enforcement purposes may be withheld where disclosure of the requested material will constitute an unwarranted invasion of privacy. The Attorney General of the United States has taken the position that exemption 7(C) applies only to statements containing information relating to purely personal matters such as marital status, medical conditions and family disputes. In FOIA suits involving the NLRB as well as other agencies, the courts have uniformly agreed with this interpretation. In Marathon LeTourneau Company v. NLRB, the court rejected the Board's contention that "the right to privacy includes the right to select the people to whom one will communicate his ideas." The court relied on the personal data standard adopted by the Attorney General and other courts.

144 See notes 52-61 and accompanying text supra.
145 120 Cong. Rec. 517,040 (1974). Senator Hart stated, "Until about 9 or 12 months ago the courts consistently had approached [FOIA cases] on a balancing basis, which is exactly what this amendment seeks to do." Id.
150 See Wine Hobby USA, Inc. v IRS, 502 F.2d 133 (3d Cir. 1974); Rural Hous. Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974).
151 Id. at 1084.
152 Id.
153 See notes 147-48 and accompanying text supra.
Exemption 7(D) allows investigatory files of law enforcement agencies to be withheld from disclosure if they have been gathered from confidential sources.\textsuperscript{155} The purpose of the confidential source exemption is to protect the identity of the witness, not the content of the statement. In order to sustain a claim under exemption 7(D), prevailing authority required an agency to present evidence that the requested information was received by the agency under an express assurance of confidentiality.\textsuperscript{156} Courts have usually held that information obtained from "confidential sources" will never be released, even after the investigation has been concluded and all litigation ended.\textsuperscript{157} Since witness statements must be revealed after testimony, they should not be "confidential" under this definition. Nevertheless, in \textit{Baptist Memorial Hospital v. NLRB},\textsuperscript{158} the court allowed the Board to withhold statements of witnesses who had been told that their statements would not be released. The court stated, however, that if the Board called any of the witnesses who had been promised confidentiality, the statements would be given to the charged party after the witnesses had testified. This decision raises several questions. The Board has never empowered its field examiners to guarantee anonymity to witnesses.\textsuperscript{159} If the courts enforce unauthorized grants of confidentiality, they are rewarding the dishonesty of agents. On the other hand, if the courts decline to enforce these unauthorized guarantees of confidentiality, witnesses may be deceived into giving statements they would not have otherwise provided. In dealing with promises of confidentiality authorized by the Board, the courts are faced with a more difficult question. If the courts were to deny disclosure of witness statements elicited by such promises of confidentiality, the Board would circumvent the FOIA entirely by assuring all potential witnesses that their statements are confidence-
tial. There may be times when the Board has a legitimate interest in the confidentiality of witness statements, but the courts rather than the Board should determine when the Board's interests outweigh the interests of the party seeking disclosure. Strict adherence to the offer of confidentiality standard applied in Baptist Memorial invites abuse of the exemption, evades the purpose of the 1974 Amendments, and may unnecessarily compromise the rights of those requesting disclosure.

IV. CONCLUSION

Traditionally the NLRB has denied requests for discovery in unfair labor practice cases, and courts have been willing to enforce the Board's regulations concerning discovery. Since the enactment of the Freedom of Information Act in 1967, the Board has continued to contest requests for information by relying upon exemptions 5 and 7. In FOIA suits involving the NLRB many courts have applied a rule which defines NLRB investigatory files as nondisclosable per se.

The intent of the 1967 FOIA and its 1974 Amendments was to encourage full agency disclosure by declaring that all information is to be released unless covered by a specific exemption. The burden rests with the agency to prove the applicability of the exemption, and courts are to decide each request for information on a case-by-case basis. The influential decision of Title Guarantee Company v. NLRB, however, has led many courts to ignore congressional intent and cursorily dismiss all FOIA suits against the NLRB by application of the per se nondisclosable rule. Courts should reexamine the legislative history of the FOIA and seek to implement its purpose more fully by evaluating requests individually without resort to mechanical rules. Such rules neither require agencies to meet their statutorily prescribed burden of proof, nor do they allow full consideration of the public's interest in obtaining government information.

—Del Dillingham

160 Id. at 553.
161 See notes 41-47 and accompanying text supra.
162 See notes 52-61 and accompanying text supra.