Boston College Law Review

Volume 16
Issue 2 *Number 2*

Article 4

1-1-1975

Administrative Law -- Freedom of Information Act -- Personal Information Exempted from Disclosure -- Wine Hobby USA, Inc. v. IRS

Barry Larman

does the standard of good faith expose the employer to frivolous law suits whenever an employee is discharged. If the court had adopted a standard of good cause, the employee would only have to allege and prove an involuntary termination of the employment contract and the burden would immediately shift to the employer to justify the termination. The employer's failure to meet this burden would result in victory for the employee. Such a standard would certainly create a greater possibility of frivolous law suits. However, under the standard of good faith adopted by the court, the burden is on the employee to prove not only involuntary termination but also bad faith motivation. Faced with an inability to meet such a burden, it is likely that most employees will be deterred from maintaining frivolous suits against the employer. In addition, such frivolous suits could be disposed of without difficulty by a motion to dismiss.

Historically, the employment at will relationship has been heavily one sided; accommodating only the interests of the employer although the employee also has important interests at stake in the relationship. Accordingly, the New Hampshire decision in *Beebe Rubber* must be applauded as an attempt to accommodate the interests of both the employer and the employee in the employment at will relationship, without unduly burdening or seriously jeopardizing the traditional interests of the employer in running his business as he believes is best. It is strongly urged that the courts of other states follow the New Hampshire decision and incorporate this development into the common law.[65]

ALAN S. POLACKWICH

Administrative Law—Freedom of Information Act—Personal Information Exempted from Disclosure—*Wine Hobby USA, Inc. v. IRS*.[1]—Wine Hobby USA, Inc. (Wine Hobby), a Pennsylvania corporation engaged in the sale and distribution of winemaking equipment, sought from the United States Bureau of Alcohol, Tobacco and Firearms (the Bureau) a list containing the names and addresses of all persons in the Bureau's Mid-Atlantic Region who had registered with the Bureau to produce wine for family consumption.[2]

[65] No other jurisdiction has been squarely presented with the same issue as was presented in this case. However, in the case of Geary v. United States Steel Corp., — Pa. —, 319 A.2d 174 (1974), the Supreme Court of Pennsylvania refused to allow a cause of action in tort where a salesman, employed at will, was discharged for questioning the safeness of a product about to be marketed by his employer. 319 A.2d at 178. Citing Monge v. Beebe Rubber Co., Justice Roberts stated in a dissenting opinion: "This court should, in my view, fulfill its societal role and its responsibility to the public interest by recognizing a cause of action for wrongful discharge where the dismissal offends public policy." Id. at 185 (dissenting opinion).

[1] 502 F.2d 133 (3d Cir. 1974).

[2] Id. at 134. All persons who produce wine are subject to certain tax, bonding and

Wine Hobby's sole interest in obtaining this list was its planned use of the names and addresses in an advertising campaign in which various announcements regarding equipment and supplies sold by Wine Hobby would be forwarded to the registrants.[3]

Upon the Bureau's refusal to disclose the requested names and addresses, Wine Hobby brought suit under the Freedom of Information Act (FOIA or the Act)[4] requesting that the court order the

permit requirements. 26 U.S.C. §§ 5041(a), (d), 5043(a), (b) (1970); 27 U.S.C. § 203(b)(1) (1970). A "duly registered head of any family," however, who produces "for family use and not for sale an amount of wine not exceeding 200 gallons per annum" is exempted from these requirements. 26 U.S.C. § 5042(a)(2) (1970). Such a person may become "duly registered" by filing a Bureau of Alcohol, Tobacco and Firearms Form 1541. 26 C.F.R. §§ 240.540-43 (1974). If the Bureau approves the form, it is stamped, a copy is returned to the registrant and the other copy is kept on file with the Bureau. 502 F.2d at 134.

[3] 502 F.2d at 134.

[4] 5 U.S.C. § 552 (1970), formerly ch. 324, § 3, 60 Stat. 238 (1946). The Act provides that each agency shall publish in the Federal Register: (1) a description of its central and field organization; (2) a description of its procedures, both formal and informal; (3) its rules of procedure; (4) descriptions of the agency's forms and where they can be obtained; (5) substantive rules and (6) statements of general policy. Each agency must also, in accordance with its published rules, make available for public inspection and copying: (1) final opinions; (2) statements of policy and interpretations which have not been published in the Federal Register; (3) staff manuals; and (4) instructions which might affect the public. More pertinent to the controversy in *Wine Hobby* however, is 5 U.S.C. § 552(a)(3) (1970) which provides, *inter alia:*

> [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. 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 agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action.

81 Stat. 55 (1967).

The Act sets out nine specific exemptions to the general rule of disclosure. It does not apply to matters which are:

> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from a 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 files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> (8) contained in or related to examination, operating, or 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.

5 U.S.C. § 552(b) (1970).

The last section of the Act states that "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." 5 U.S.C. § 552(c) (1970).

Bureau to disclose this information. The Bureau contended that Wine Hobby was not entitled to the information sought, since such information was specifically exempted from the requirement of disclosure under subsection (b)(6)[5] [hereinafter referred to as exemption 6]. Exemption 6 excludes from the requirement of disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[6] Alternatively, the Bureau argued that, even if the names and addresses did not fall within the scope of exemption 6, the court could, in the exercise of its equitable discretion, decline to order disclosure.[7]

Upon cross motions for summary judgment, the United States District Court for the Eastern District of Pennsylvania ordered disclosure of the requested information to Wine Hobby.[8] In a somewhat ambiguous opinion, the court held that the list of names and addresses could not be withheld under the authority of exemption 6, and that, since the information sought was not specifically exempted by the Act, the district court did not have discretionary power to refuse to order disclosure.[9]

In reversing this decision,[10] the United States Court of Appeals for the Third Circuit HELD: the list of names and addresses sought by Wine Hobby was a "file" similar to the medical and personnel files specifically referred to in exemption 6;[11] and that the disclosure of such information would result in a "clearly unwarranted invasion of personal privacy."[12] In making the latter determination, the court stated that it was required to balance the public interest which would be served by disclosure against the severity of the harm which disclosure would cause the individual.[13] Since Wine Hobby's interest was purely economic, the court reasoned that no public interest would be served by disclosure and, therefore, concluded that disclosure was not mandated by the Act.[14] As a result of this disposition, the court believed it unnecessary to decide whether a district court possesses discretion to decline to order disclosure where the material requested is not specifically exempted by the Act.[15]

The significance of *Wine Hobby* lies in the interpretation which

---

[5] 502 F.2d at 134.

[6] 5 U.S.C. § 552(b)(6) (1970).

[7] 502 F.2d at 134.

[8] Wine Hobby, USA, Inc. v. United States Bureau of Alcohol, Tobacco & Firearms, 363 F. Supp. 231, 237 (E.D. Pa. 1973).

[9] Id. at 236.

[10] It should be noted that Wine Hobby did not participate in the appeal to the Third Circuit. It filed no brief and it did not participate in oral argument. 502 F.2d at 134 n.7.

[11] Id. at 135.

[12] Id. at 137.

[13] Id. at 136.

[14] Id. at 137.

[15] Id. at 137-38.

the court gave to exemption 6 in order to reach its apparent goal of preventing the commercial exploitation of the FOIA. This note will focus upon an examination of that interpretation. Specifically, the holding in *Wine Hobby* that a list of names and addresses is a file similar to a medical or personnel file will be analyzed in order to determine whether such a construction can be supported in light of both the language and the legislative history of exemption 6. The balancing concept used by the court in its determination of whether disclosure was warranted will then be discussed. The purpose of the Act, and the language which Congress chose to accomplish that purpose will be cited in support of this balancing test. Finally, the discretion allowed the courts to refuse disclosure when the information sought is not specifically exempted will be considered. It will be suggested that, if correctly interpreted, the FOIA requires governmental agencies to release from their files lists of names and addresses to any commercial enterprise which requests them, even though the firm's sole intention is to use these lists in a campaign of direct mail advertising. While this construction of the FOIA would appear to be more consistent with the express statutory language, it will be submitted that the resulting disclosure would be contrary to the purpose of the FOIA, and that the Act should therefore be amended to preclude such a result.

The FOIA was enacted to assure the free flow of governmental information "necessary to an informed electorate."[16] It was not, however, the first attempt of Congress to enact such a statute. The FOIA amended section 3 of the Administrative Procedure Act (APA).[17] This amendment, in effect, replaced a "withholding statute" with a disclosure statute.[18] The failure of the APA to provide for adequate access to governmental information resulted from the two qualifications which it placed upon disclosure: material could be withheld either "for good cause,"[19] or where the party seeking the disclosure was not "properly and directly concerned."[20] These somewhat nebulous standards gave rise to a situation in which the APA could be cited as authority for the withholding of virtually any data, thereby allowing governmental agencies to exercise "a sort of personal ownership" over information in their possession.[21] The FOIA was intended to remedy this situation[22] by mandating liberal disclosure, judicially enforceable upon complaint by the aggrieved party,[23] and by replacing the vague "for good cause" exemption

[16] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1967) [hereinafter cited as H.R. Rep.].

[17] Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

[18] EPA v. Mink, 410 U.S. 73, 79 (1973).

[19] Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

[20] Id.

[21] See H.R. Rep., supra note 16, at 2.

[22] S. Rep. No. 813, 89th Cong., 1st Sess. 3, 5-6 (1967) [hereinafter cited as S. Rep.]; H.R. Rep., supra note 16, at 1-2, 12.

[23] 5 U.S.C. § 552(a)(3) (1970). See note 4 supra.

with nine specific exemptions.[24] Moreover, the necessity that the requesting party be "properly and directly concerned" was abolished—the new act providing for disclosure to "any person."[25]

The goal of providing public access to governmental records, however, is in many instances inconsistent with another important interest: that of protecting the personal privacy of each individual from unnecessary invasion. Two provisions of the FOIA, exemption 6 and subsection (a)(2), embody the congressional resolution of this conflict.[26] Exemption 6, the provision which is the primary focus of this note, has spawned vastly differing interpretations.[27]

Exemption 6 provides that the general rule of required disclosure does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[28] For information to fall within the scope of this exemption, then, it must possess two distinct characteristics: first, it must be a medical file, a personnel file or a similar file; second, its disclosure must constitute "a clearly unwarranted invasion of personal privacy." Neither characteristic, by itself, is sufficient to avoid the requirement of disclosure. Both must exist together.[29] Moreover, whether certain information is such a file must be determined independently of whether its disclosure would compromise an individual's privacy. The definition of the term "file" is limited only by the words "personnel," "medical," and "similar." While a finding that disclosure would result in an invasion of privacy may, in some instances, be relevant to the determination of what is a "similar" file, the major relevance of this consideration is in the determination of whether the information may be withheld—*after* the finding has already been made that the material sought is a personnel file, a medical file, or a similar file. The language of the exemption cannot be read faithfully in any other manner.[30] Consequently, if the material sought is not a personnel file, a medical file, or a similar file, then regardless of its content, it is not within the pale of exemption 6.

The court in *Wine Hobby* held that a list of names and addres-

---

[24] 5 U.S.C. § 552(b) (1970). See note 4 supra.

[25] 5 U.S.C. § 552(a)(3) (1970).

[26] 5 U.S.C. §§ 552(a)(2), 552(b)(6) (1970). Subsection (a)(2) provides:

> 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 of instruction. However, in each case the justification for the deletion shall be explained fully in writing.

5 U.S.C. § 552(a)(2) (1970).

[27] See text at notes 31-95 infra.

[28] 5 U.S.C. § 552(b)(6) (1970).

[29] Ditlow v. Shultz, 379 F. Supp. 326, 329 (D.D.C. 1974). See Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973); Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971).

[30] The Act refers to certain files, "the disclosure *of which* would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1970) (emphasis added).

ses was a "similar file" within the meaning of exemption 6.[31] In arriving at this conclusion, however, the court paid little heed to the Act's express language, stating:

> A broad interpretation of the statutory term to include names and addresses is necessary to avoid a denial of statutory protection in a case where release of requested materials would result in a clearly unwarranted invasion of personal privacy. Since the thrust of the exemption is to avoid unwarranted invasions of privacy, the term "file" should not be given an interpretation that would often preclude inquiry into this more crucial question.[32]

Through this approach, the court disregarded the well-settled rule that "[a] broad construction of the exemptions [is] contrary to the express language of the Act."[33] This rule would appear to be mandated by the language of the FOIA's last subsection, which states that the Act "does not authorize withholding of information . . . except as *specifically stated* in this section."[34]

In its interpretation of the statutory provisions, the court relied upon the second criterion—whether disclosure would constitute a clearly unwarranted invasion of personal privacy—to define the first—personnel and medical files and similar files.[35] This approach rendered the qualifying phrase "similar files" meaningless. Under the *Wine Hobby* formulation, all data, the disclosure of which is found to constitute a clearly unwarranted invasion of an individual's privacy, must be construed as a file similar to a medical or personnel file. In essence, the court's interpretation would operate to exclude the production of "*all matter* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This interpretation cannot be supported by either the language or the legislative history of the Act.[36]

Exemption 6 refers specifically to "personnel and medical files and similar files . . . ." In construing this phrase to include a list of names and addresses, the court disregarded the accepted principle of

---

[31] 502 F.2d at 135.

[32] Id.

[33] Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971). Accord, Rose v. Department of Air Force, 495 F.2d 261, 263 (2d Cir. 1974); Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); Getman v. NLRB, 450 F.2d 670, 672 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.) cert. denied, 400 U.S. 824 (1970).

[34] 5 U.S.C. § 552(c) (1970) (emphasis added).

[35] See 502 F.2d at 135.

[36] Several bills had been submitted in the House, some of which used the phrase "similar files," and some of which used the phrase "similar matters." Compare H.R. 5237, 5406, 5520, 89th Cong., 1st Sess. (1965) ("similar matters") with H.R. 12682, 14735, 89th Cong. 2d Sess. (1966) ("similar files"). The House would appear to have specifically rejected the use of the phrase "similar matters" in its adoption of the FOIA which used, instead, the phrase "similar files." 5 U.S.C. § 552(b)(6) (1970).

ejusdem generis which provides that when "general words follow an enumeration of . . . things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to . . . things of the same general kind or class as those specifically mentioned."[37] Assuming that a list of names and addresses is a "file" as that word is generally understood, surely it cannot be maintained that such a file is similar in nature to a personnel or medical file. A name and address give little personal information about the individual. The opposite is true of medical and personnel records, and it was the disclosure of such personal information which Congress sought to avoid. In defining the phrase, "similar files," the Senate Report refers specifically to files kept by the Selective Service, the Veterans' Administration, and the Department of Health, Education and Welfare. Such agencies, the report states, are those to which "persons are required to submit vast amounts of personal data . . . ."[38] The House Report referred to the files of those agencies and of the Bureau of Prisons, noting that they contained "intimate details . . . the disclosure of which might harm the individual."[39] It seems clear, therefore, that a list of names and addresses is not the type of file to which the Act or the congressional reports make reference.

Further support is lent to this interpretation by the decision in *Robles v. EPA,*[40] where the Fourth Circuit, unlike the court in *Wine Hobby,* applied the rule of *ejusdem generis* and remained faithful to the congressional reports. The court in *Robles* noted that:

> The term "similar" was used, it seems, to indicate that, while the exemption was not limited to strictly medical or personnel files, the files covered in this third category must have the same characteristics of confidentiality that ordinarily attach to information in medical or personnel files; that is, to such extent as they contain " 'intimate details' of a 'highly personal' nature", they are within the umbrella of the exemption.[41]

This construction of exemption 6 would appear to require the disclosure of the list sought by Wine Hobby. While such a result would seem to be contrary to the purpose of the FOIA, since the Act's goal was merely to promote the education of the electorate,[42] and not to assist a private enterprise in its search for profit, it would appear that the *Robles* construction is the only one which the language of

---

[37] Black's Law Dictionary 608 (revised 4th ed. 1968) (citations omitted).
[38] S. Rep., supra note 22, at 9.
[39] H.R. Rep., supra note 16, at 11.
[40] 484 F.2d 843 (4th Cir. 1973).
[41] Id. at 845.
[42] See text at notes 16-26 supra.

exemption 6 will permit. The choice of the phrase "similar files" may have been unfortunate;[43] however it was not accidental,[44] and it cannot be ignored.

Had the court in *Wine Hobby* adopted this construction, it would have been dispositive of the case and disclosure would have been ordered unless the court found that disclosure could be denied upon equitable principles.[45] Exemption 6 is inapplicable to information which is not in the nature of a medical file or a personnel file.[46] All other issues are immaterial, and disclosure would have been required. Since the court held that the information sought by Wine Hobby was a "similar file" within the meaning of the exemption, it proceeded to examine whether its disclosure would result in a "clearly unwarranted invasion of personal privacy."[47]

In determining whether the disclosure of the requested names and addresses would "constitute a clearly unwarranted invasion of personal privacy," the court in *Wine Hobby* noted that, initially, it was necessary to establish whether the disclosure would result in *any* invasion of privacy.[48] Should an invasion be found, it would then be necessary to "balance the seriousness of that invasion with the purpose asserted for release."[49] According to the Third Circuit, if the benefits expected to accrue to the public from the disclosure appeared greater than the probable harm to the individual, disclosure would be ordered. Conversely, if the privacy interest protected by withholding the material outweighed the public interest in disclosure, then disclosure of the information would not be required. The court indicated that the use of this test was compelled by the express statutory language.[50] Applying this formula to the facts of *Wine Hobby,* the court concluded that disclosure would result in an invasion of privacy.[51] Since the appellee's sole motive in requesting

[43] Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797-98 (1967).

[44] See note 36 supra.

[45] See text at notes 88-95 infra.

[46] See text at notes 28-30 supra.

[47] For cases which hold that the requested material is a "similar file" within the meaning of exemption 6, see Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974) (materials contained in an investigation of governmental housing discrimination in Florida); Rose v. Department of Air Force, 495 F.2d 261, 266 (2d Cir. 1974) (case summaries of Honor and Ethic Code adjudications at Air Force Academy); Ditlow v. Shultz, 379 F. Supp. 326, 329 (D.D.C. 1974) (customs declarations).

For cases which have dealt with the disclosure of names and addresses, but which did not specifically decide whether such information came within the meaning of the term "similar file," see Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Tuchinsky v. Selective Serv. Sys., 418 F.2d 155 (7th Cir. 1969); Ditlow v. Shultz, 379 F. Supp. 326 (D.D.C. 1974). The district court in *Wine Hobby* also avoided this issue. See Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco & Firearms, 363 F. Supp. 231 (E.D. Pa. 1973).

[48] 502 F.2d at 136.

[49] Id.

[50] Id.

[51] Id. The court stated:

the information was of a pecuniary nature, the court found that disclosure would be clearly unwarranted.[52]

This balancing test, however, is not universally accepted.[53] Opponents argue that the change from the APA requirement that persons seeking disclosure be "properly and directly concerned,"[54] to the FOIA provision requiring disclosure to "any person,"[55] demonstrates that balancing is the very abuse which the Congress sought to eliminate.[56] As a result of using the balancing test, disclosure may remain dependent upon the identity of the party who is seeking it. While a commercial enterprise might not be entitled to the names and addresses sought by Wine Hobby, it is probable that their disclosure would be ordered on behalf of a professor of medicine studying alcoholic consumption. This apparent "double standard" can be seen clearly by comparing the result in *Wine Hobby* with that in *Getman v. NLRB*.[57] In *Getman,* two professors of labor law studying union election tactics sought from the NLRB the names and addresses of employees in thirty-five businesses where representation elections were to be held.[58] In opposing the request, the NLRB argued that such information was protected from disclosure by exemption 6.[59] The District of Columbia Circuit utilized the balancing test[60] and ordered disclosure,[61] noting that "the loss of privacy resulting from this particular disclosure should be characterized as relatively minor,"[62] that the appellees were "highly qualified specialists in labor law,"[63] and that the particular study in which they were engaged had "been reviewed and supported by virtually every major scholar in the labor law field."[64] Thus, both the *Getman* and the *Wine Hobby* courts employed the balancing test

---

> [T]here are few things which pertain to an individual in which his privacy has traditionally been more respected than his home. . . . Disclosure . . . would involve a release of each registrant's home address, . . . information concerning personal activities within the home, namely winemaking . . . [and] information concerning the family status of the registrant, including the fact that he is not living alone and that he exercises family control or responsibility in the household.

Id. at 137.

[52] Id. at 137.

[53] See Robles v. EPA, 484 F.2d 843, 846-47 (4th Cir. 1973); K. Davis, Administrative Law § 3A.4, at 121 (Supp. 1970); Note, 40 Geo. Wash. L. Rev. 527 (1972).

[54] Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

[55] 5 U.S.C. § 552(a)(3) (1970).

[56] Robles v. EPA, 484 F.2d 843, 847 (4th Cir. 1973); K. Davis, supra note 53, at § 3A.4, at 120; Note, 40 Geo. Wash. L. Rev. 527, 529 (1972).

[57] 450 F.2d 670 (D.C. Cir. 1971).

[58] Id. at 671. The professors sought to interview selected employees before and after these elections. Id.

[59] Id. at 672.

[60] Id. at 674-77.

[61] Id. at 680.

[62] Id. at 675.

[63] Id. at 676.

[64] Id.

in determining whether disclosure of names and addresses was warranted under exemption 6. The courts reached opposite conclusions, however, since in *Getman* the requesting parties were academically motivated professors, while in *Wine Hobby,* the plaintiff was a business motivated by the desire for profit.

In *Robles v. EPA,*[65] the United States Court of Appeals for the Fourth Circuit criticized this "double standard" and rejected application of the balancing test. In that case the appellants sought the results of an EPA survey of approximately 15,000 structures which had been built upon fill containing radioactive matter.[66] The EPA contended that the information in the survey was a "similar file" within the meaning of exemption 6,[67] and, in advocating use of the balancing test, argued that disclosure was not warranted since the public interest in the results of the survey was negligible.[68] The court rejected this contention and stated that it "misconceives the plain intent of the Act."[69] According to the court, the change in the FOIA to "any person" demonstrated "beyond argument that disclosure was never meant to depend upon the interest or lack of interest of the party seeking disclosure."[70]

As the cases show, however, it is clearly not "beyond argument" that such an interest can be taken into account.[71] In *Getman v. NLRB,*[72] the District of Columbia Circuit agreed with *Robles,* stating that "discretionary balancing of the competing interests [is] necessarily inconsistent with the purpose of the Act . . . ."[73] Continuing, however, the court went on to state that "[e]xemption (6), by its explicit language, calls for such balancing and must therefore be viewed as an exception to the general thrust of the Act."[74] Support for this conclusion can be found in the Senate Report which states that "[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."[75] While the report also states that the FOIA will increase access to governmental information by eliminat-

---

[65] 484 F.2d 843 (4th Cir. 1973). See text at notes 40-41 supra.

[66] Id. at 844. The opinion does not mention the purpose for which the information was sought.

[67] Id. at 845.

[68] Id. at 846-47.

[69] Id. at 847.

[70] Id.

[71] See Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); Rose v. Department of Air Force, 495 F.2d 261, 269-70 (2d Cir. 1974); Getman v. NLRB, 450 F.2d 670, 674-75 (D.C. Cir. 1971); Ditlow v. Shultz, 379 F. Supp. 326, 330-32 (D.D.C. 1974).

[72] 450 F.2d 670 (D.C. Cir. 1971). For the facts of this case, see text at notes 58-64 supra.

[73] Id. at 674 n.10.

[74] Id.

[75] S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1967) [hereinafter cited as S. Rep.].

ing inquiry into the purpose for which disclosure is sought,[76] it adds that "[t]here is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside of these limited areas, all citizens have a right to know."[77] Consequently, only *non-exempt* material must be disclosed to "any person." With respect to information covered by a specific exemption, all persons do not have a right to know.

One commentary has suggested that the court or the agency need only look to the gravity of the invasion of privacy, and can disregard the countervailing interest in disclosure.[78] It is the authors' position that the references to balancing in the congressional reports can be read to mean that Congress itself struck the balance, "leaving the agency or court only application of that standard without further balancing . . . ."[79] While the House Report might support this position,[80] the Senate Report does not;[81] and because the House Report was submitted after the Senate had already passed its bill, the Senate Report is generally given preference over the House Report as an indication of legislative intent.[82]

It is submitted that the words "clearly unwarranted" imply that decisions will be made in light of the totality of the circumstances, thus requiring some type of balancing. Judgments which sift the unwarranted invasions from the warranted must be made. It is highly unlikely that Congress would have chosen this language had it intended that only the extent of the invasion be considered without inquiry into the purpose for which disclosure was sought. Phrases such as "a serious" or "a severe invasion of personal privacy" would certainly have shown that intent much more clearly if indeed that intent was meant to be expressed.[83] It appears that a

---

[76] Id. at 5.

[77] Id. at 6.

[78] Note, 40 Geo. Wash. L. Rev. 527, 535 n.48 (1972).

[79] Id.

[80] The House Report states that "[t]he limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Governmental information . . . ." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1967) [hereinafter cited as H.R. Rep.].

[81] S. Rep., supra note 75, at 9. See text at note 75 supra.

[82] E.g., Hawkes v. IRS, 467 F.2d 787, 794 (6th Cir. 1972); Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971); Consumers Union of the United States, Inc. v. Veterans' Adm'n, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971); Benson v. General Servs. Adm'n, 289 F. Supp. 590, 595 (W.D. Wash. 1968), aff'd on other grounds, 415 F.2d 878 (9th Cir. 1969).

Professor Davis has written:

> The content of the law must depend upon the intent of both Houses, not of just one. In this instance, only the bill, not the House Committee's statements at variance with the bill, reflects the intent of both Houses. *Indeed, no one will ever know whether the Senate committee or the Senate would have concurred in the restrictions written into the House committee report.*

Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 810 (1967).

[83] The legislative history shows that the phrase "clearly unwarranted" was intentionally

correct reading of exemption 6 reveals that Congress expressed its intention that the invasion of privacy be serious by providing that only "personnel and medical files and similar files" were subject to the exemption. The second requirement of exemption 6—that the disclosure would constitute a clearly unwarranted invasion of personal privacy—was intended to give the agencies and the courts guidance as to the circumstances under which those materials could be withheld.

It should also be remembered that the FOIA is a disclosure act.[84] Where the production of certain information "necessary to an informed electorate"[85] compromises the privacy of an individual, it is inconsistent with the clear intent of the Act to look merely at the invasion of privacy, without also weighing the public's need for that information. For these reasons, the treatment given to the language in the latter part of exemption 6 by the court in *Wine Hobby* appears to be more convincing, and better supported, than that given by the court in *Robles*.

The result in *Wine Hobby* would appear to be correct in instances where the information requested contained "intimate details of a highly personal nature,"[86] since the public interest served by one individual's pursuit of profit would not appear to outweigh the interest of another individual in withholding personal matters from the public. This is not the case presented in *Wine Hobby,* however, since disclosure of the requested names and addresses would result in only a minor invasion of personal privacy. The fact that one is the head of a household and produces wine for family consumption is not a fact which most people would actively strive to keep secret. Since the persons involved are individuals who make wine in their homes, it may reasonably be assumed that many would welcome, and even desire, information concerning winemaking equipment and supplies.[87] The disclosure of the requested data would not only be advantageous to these particular persons, but the public at large could also benefit through resulting increases in economic activity and tax revenue. It is submitted, therefore, that all interests in personal privacy do not necessarily outweigh all interests connected with the pursuit of profit. Where the invasion of privacy is minor, as in *Wine Hobby,* the scales could tip in favor of profit.

Since the *Wine Hobby* court held that the requested materials could be withheld under the authority of exemption 6, any consider-

---

included by Congress. At the hearings on the bill, it was urged by several agency spokesmen that either the word "clearly" or the entire phrase "clearly unwarranted" be deleted. These words were included in the Act only after much deliberation by both Houses. Getman v. NLRB, 450 F.2d 670, 674 n.11 (D.C. Cir. 1971).

[84] EPA v. Mink, 410 U.S. 73, 79 (1973).

[85] H.R. Rep., supra note 80, at 12. See text at note 16 supra.

[86] Robles v. EPA, 484 F.2d 843, 845 (4th Cir. 1973). See text at note 41 supra.

[87] See Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco & Firearms, 363 F. Supp. 231, 237 (E.D. Pa. 1973).

ation of whether the court would have been required to order disclosure had the names and addresses not fallen within the specific exemption was unnecessary.[88] The language of subsection (c) which states that the Act does not authorize the withholding of information, "except as specifically stated in this section"[89] would seem to settle this issue. However, it has been argued that the courts possess equitable discretion to decline to order disclosure in such circumstances.[90] Professor Davis argues that the district courts are not required to enforce the FOIA,[91] and cites in support of this position subsection (a)(3) which provides: "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records . . . ."[92] It is his position that the court has jurisdiction to enforce the FOIA, but that it is not required to do so.[93] Furthermore, he argues that the word "enjoin" brings into play the traditional principles of equity, and that "an equity court by its intrinsic nature has a discretionary power to refuse to participate in bringing about results that are inconsistent with sound equitable practice."[94] Both of these viewpoints have been followed in the courts of appeals,[95] and it would appear that definitive Supreme Court guidance on this question is warranted.

CONCLUSION

It is submitted that *Wine Hobby* was wrongly decided. Although the court was correct in holding that exemption 6 of the FOIA calls for the balancing of various interests in determining whether the requested disclosure is warranted, that concept had no application to the particular facts which were before the court. For

---

[88] 502 F.2d at 137-38. It is probable, however, that the court in *Wine Hobby* felt that no such discretion was allowed—hence the need to rest its decision upon such a broad reading of exemption 6, rather than upon accepted principles of equity.

[89] 5 U.S.C. § 552(c) (1970).

[90] See, e.g., General Serv. Adm'n v. Benson, 415 F.2d 878, 880 (9th Cir. 1969); Consumers Union of the United States, Inc. v. Veterans' Adm'n, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

[91] K. Davis, supra note 53, at § 3A.6, at 123.

[92] 5 U.S.C. § 552(a)(3) (1970).

[93] K. Davis, supra note 53, at § 3A.6, at 123.

[94] Id. This argument finds support in the House Report: "The Court will have authority *whenever it considers such action equitable and appropriate* to enjoin the agency from withholding its records and to order the production of agency records improperly held." H.R. Rep., supra note 80, at 9 (emphasis added). The report further states that "[t]he purpose of this subsection is to make clear beyond doubt that all the materials of Government are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) [§ 552(b)] *or limitations spelled out in earlier subsections.*" H.R. Rep., supra note 80, at 11 (emphasis added).

[95] Compare Robles v. EPA, 484 F.2d 843, 847 (4th Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 792 n.6 (6th Cir. 1972); Getman v. NLRB, 450 F.2d 670, 677-80 (D.C. Cir. 1971) (discretion not allowed) with Wu v. National Endowment for Humanities, 460 F.2d 1030, 1034 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); General Serv. Adm'n v. Benson, 415 F.2d 878, 880 (9th Cir. 1969) (discretion allowed).

material to come within the scope of that exemption, it first must be in the nature of a medical file, a personnel file, or a similar file. It does not appear that a list of names and addresses comes within these terms. Moreover, even if such a list could be construed as a "similar file," the balance which the court struck is arguably incorrect.

It is submitted that a faithful reading of the exemption clearly reveals that Congress has provided no shield against the required disclosure of names and addresses in cases such as this one. If this analysis of exemption 6 is correct, then, in its present form, the FOIA mandates the disclosure of these lists on demand and governmental agencies are presently vulnerable to wholesale requests for lists of names and addresses, even though the party seeking them has the singular intention of using this information in commercial mailing lists.[96] If these requests are made, the FOIA requires that they be honored. Only Congress can remedy this situation by amending the Act, and there are several bills presently being studied by the House Committee on Government Operations which focus upon this problem.[97] A narrowly drawn amendment prohibiting only the disclosure of names and addresses which are sought solely for commercial purposes would solve the type of problem presented in *Wine Hobby* and would render unnecessary the type of strained statutory construction used by that court to reach a result it felt to be both equitable and in accord with the purpose of the

---

[96] See Getman v. NLRB, 450 F.2d 670, 680-81 (D.C. Cir. 1971) (MacKinnon, J., concurring).

[97] H.R. 889, 1779, 2578, 3995, 5434, 6838-40, 8086, 93d Cong., 1st Sess. (1973); H.R. 12558, 93d Cong., 2d Sess. (1974). H.R. 6840, supra, virtually identical to the other bills listed, provides for the amendment of the FOIA by redesignating subsection (c) as subsection (d) and by adding in its place a provision which prohibits any agency from disclosing the names and addresses of: present or former employees of any agency, present or former members of the armed forces, persons registered or required to file information with any agency, or persons licensed by any agency. However, paragraphs (2) and (3) provide for three exceptions to this rule:

> (2) An agency may make available a list of names and addresses of persons referred to in paragraph (1)—
>
> (A) if the person to whom such list is made available certifies (in such manner as the agency shall by regulation prescribe) that—
>
> (i) such list will not be used for purposes of commercial or other solicitation, and
>
> (ii) such list will not be used for any purpose which is unlawful under any State or Federal law, or
>
> (B) if the list is made available by the agency as a necessary part of its statutory functions or requirements (other than requirements imposed by this section).
>
> (3) Any agency may make available a list of names and addresses if specifically authorized to do so by statute (other than this section).

Any person who were to use for purposes of commercial or other solicitation, a list obtained under paragraph (2)(A), or who failed to remove from such a list the name of a person who had been solicited and who had requested that his name be removed, would be subject to imprisonment for not more than one year, a fine of not more than $10,000 or both. H.R. 6840, supra.

legislation.[98] The enactment of such an amendment is, therefore, recommended.*

BARRY LARMAN

Civil Procedure—Class Actions—Notice Obligations of Representative Plaintiff—*Eisen v. Carlisle & Jacquelin.*[1]—In 1966, Morton Eisen filed a suit in the United States District Court for the Southern District of New York on behalf of himself and all other persons who had purchased or sold odd-lots[2] on the New York Stock Exchange from May 1, 1962 through June 30, 1966.[3] In the complaint, two of the Exchange's major odd-lot brokerage firms, Carlisle & Jacquelin and DeCoppet & Doremus, were charged with monopolizing odd-lot trading and charging excessive fees.[4] A third defendant, the New York Stock Exchange, was charged with failing to regulate the fees charged by the two firms.[5] Eisen's individual claim included treble damages for the amount of the overcharge and amounted to a total of seventy dollars.[6] The claim for the class as a whole, which

[98] The bills cited in note 97 supra would appear to be unnecessarily broad. The proposed amendments provide that an agency is merely permitted to make disclosure of names and addresses after the necessary certification has been made; it is not required to do so. See bills cited in note 97 supra. Such discretion could possibly result in the refusal of all requests for names and addresses regardless of the purpose for which they were sought—for if there is any lesson to be learned from the history of the FOIA, it is that where disclosure is discretionary, there is likely to be no disclosure at all. See text at notes 16-25 supra. This problem cannot be solved merely by making disclosure mandatory upon certification. Such a provision would require disclosure in all instances, without regard to the resulting invasion of privacy suffered by the individuals concerned. Some type of balancing, therefore, would appear to be required in determining whether non-commercial requests for names and addresses should be granted.

It is also suggested that the provision which requires a certification that the list "will not be used for purposes of commercial or *other* solicitation . . . ." is unduly restrictive. H.R. 6840, 93d Cong., 1st Sess., ¶ (2)(A)(i) (1973) (emphasis added). Courts and agencies might construe such a provision as empowering an agency to refuse disclosure in instances where the requesting party seeks merely to interview or otherwise question persons whose names appear on the disclosed list. Such a restriction would make the execution of a study such as that which was at issue in *Getman* totally dependent upon the whim of agency bureaucrats. See text at notes 57-64 supra. This is the very situation which the FOIA was intented to prevent.

* As this article was going to press, Congress passed certain amendments to the FOIA over President Ford's veto. This legislation is not relevant to the issues presented in *Wine Hobby*.

[1] 417 U.S. 156 (1974).

[2] "Odd-lots" are shares traded in lots of less then a hundred. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y. 1966).

[3] Eisen v. Carlisle & Jacquelin, 417 U.S. at 160.

[4] The defendant firms were alleged to have violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970). 417 U.S. at 160.

[5] The Exchange was alleged to have violated §§ 6 and 19 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78f, 78s (1970). 94 U.S. at 160.

[6] 417 U.S. at 161.