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Administrative Law - Freedom of Information Acti: Exemption 5 - Information Concerning Grounds for Some Renegotiation Board Decisions Made Unavailable - Renegotiation Board v. Grumman Aircraft Engineering Corp.

CASE NOTES

Administrative Law—FREEDOM OF INFORMATION ACT: EXEMPTION 5—INFORMATION CONCERNING GROUNDS FOR SOME RENEGOTIATION BOARD DECISIONS MADE UNAVAILABLE—*Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975).

Pursuant to the Freedom of Information Act (FOIA),[1] Grumman Aircraft Engineering Corporation commenced an action in federal district court to compel the Renegotiation Board (the Board) to disclose "certain final opinions, orders and identifiable records" related to or issued during renegotiation proceedings conducted to determine whether "excessive profits" had been realized by fourteen companies in their contracts with the Government during the years 1962-1965.[2] The district court denied relief.[3] On appeal, the Court of Appeals for the District of Columbia reversed and remanded,[4] ordering the requested documents to be made available after deletion of statutorily protected confidential information.[5]

The plaintiff, "not satisfied with the documents so disclosed,"[6] moved in the district court for the disclosure of additional records, namely, Regional Board reports and Division reports. These reports had been written to aid the Board in deciding whether contractors had realized any excessive profits, and if so, to what extent.[7] Although these reports were considered carefully by the Board in making its decisions, it was bound neither by their reasoning nor their conclusions. Further, even when the Board agreed with the recommendation of a report, private parties had no way of determining whether the report's reasoning was adopted.

The district court found both the Regional Board reports and Division reports to be "final opinions" for the purposes of the

1. 5 U.S.C. § 552 (1970). The FOIA was enacted in 1966.

2. 421 U.S. 168, 179 (1975). The plaintiff also sought information concerning its then pending renegotiation before the Board.

3. The first district court order was handed down without opinion.

4. Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970).

5. 5 U.S.C. § 552(b)(4) (1970) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

6. 421 U.S. at 181.

7. The Board sought to terminate its cases by agreement, as set out in 50 U.S.C. § 1215(a) (1970). Regional Board reports and Division reports were generated only upon the failure of contractors to reach agreements with the Board.

FOIA and ordered their disclosure.[8] The Court of Appeals affirmed.[9] The United States Supreme Court reversed,[10] finding both Regional Board reports and Division reports to be precisely the kind of predecisional consultative memoranda exempted from disclosure by exemption 5 of the FOIA.[11]

I. A Brief History of Exemption 5 of the FOIA

The FOIA was enacted to make certain agency records available to the public.[12] It replaced section 3 of the Administrative Procedure Act (APA),[13] which had been effectively manipulated by administrative agencies to "deny legitimate information to the public."[14] Nevertheless, even under the FOIA, the right of the public to agency information is not absolute. Contained in the FOIA are nine exemptions which protect certain kinds of documents from disclosure.[15]

One of these, exemption 5, allows an agency to withhold memoranda or letters that a party could not obtain from the agency if sought through the discovery process in civil litigation.[16] This exemption has been interpreted to disallow the disclosure of advisory memoranda in the interest of protecting the consultative functions of government.[17] This interpretation is supported by the

8. Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 325 F. Supp. 1146 (D.D.C. 1971), *aff'd*, 482 F.2d 710 (D.C. Cir. 1973), *rev'd*, 421 U.S. 168 (1975).

9. 482 F.2d 710 (D.C. Cir. 1973).

10. 421 U.S. 168 (1975).

11. *Id.* at 184. 5 U.S.C. § 552(b)(5) exempts "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."

12. The language of the FOIA states that "identifiable records" are to be made available to "any person." 5 U.S.C. § 552(a)(3) (1970). This replaced the provision of section 3 of the Administrative Procedure Act limiting disclosure of records to those "properly and directly concerned." Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

13. *Id.*

14. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. Rep.]. For a discussion of agency abuse of the public information section of the APA see H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1965) [hereinafter cited as H.R. Rep.]; Note, *The Freedom of Information Act and the Exemption for Intra-agency Memoranda*, 86 Harv. L. Rev. 1047 n.3 (1973) [hereinafter cited as 86 Harv. L. Rev.].

15. 5 U.S.C. § 552(b) (1970).

16. *See, e.g.*, H.R. Rep. 10, S. Rep. 9. The U.S. Supreme Court has narrowly interpreted exemption 5, concluding that "the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'" EPA v. Mink, 410 U.S. 73, 86 (1973) (citations omitted).

17. For a thorough discussion of the privilege within the context of the FOIA see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-54 (1975). For a pre-FOIA discussion of the privilege see Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-25

notion that government decisions are best made in an open, frank atmosphere where opinions may be freely rendered without fear of premature public criticism.[18]

The advisory opinion privilege of exemption 5 is limited, however, by the well accepted rule that agencies ought to make public the *general* policies applied in dealing with private parties, thereby eliminating the possibility that a body of "secret" agency law could be created.[19] This rule is manifest in affirmative provisions of the FOIA requiring disclosure of "final opinions," and "statements of policy and interpretations which have been adopted by an agency."[20] Several policy objectives underlie this rule that general agency law must be made public. One is to "prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way to discover it."[21] Another objective of disclosure is to encourage agency responsibility and accountability.[22] In any event, because of the existence of the general rule, exemption 5 protects only memoranda that are merely advisory; other writings which provide official explanations for agency deci-

(D.D.C. 1966), *aff'd per curium sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

18. H.R. REP. 10, S. REP. 9. *See also* 86 HARV. L. REV. 1049; Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1275-76 (1970).

19. In speaking of the broad purpose of the FOIA, one authority has concluded: "The governing principle, which I think is without exception, is that secret law is forbidden." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.21, at 159 (Supp. 1970). *See generally* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967).

20. 5 U.S.C. § 552(a)(2)(A), (B) (1970). It is theoretically possible that a conflict could arise between these disclosure requirements and exemption 5 since affirmative disclosure provisions of the FOIA do not apply to material exempted by 5 U.S.C. § 552(b). However, the U.S. Supreme Court has concluded that "Exemption 5 does not apply to any document which falls within the meaning of the phrase 'final opinion . . . made in the adjudication of cases.'" NLRB v. Sears, Roebuck & Co., 421 U.S. at 148. That is to say, final opinions and memoranda protected by exemption 5 form mutually exclusive categories. The reason for this conclusion is that final opinions constitute agency law which must be made public and therefore cannot fall under the protective cloak of exemption 5. Similarly, the Court would likely find that no statement of policy or interpretation adopted by an agency could be classified as advisory. *See* 86 HARV. L. REV. 1059; Note, *The Freedom of Information Act: A Seven-year Assessment*, 74 COLUM. L. REV. 895, 936-37 (1974).

21. S. REP. 7. This statement was made concerning the requirement in the FOIA that agencies index orders and opinions. Though it did not refer specifically to secret law, it does provide reasons for eliminating such law. Compelling agencies to index opinions and orders is itself an attempt to prevent the formation of a secret body of law.

22. *See* 86 HARV. L. REV. 1059. *See generally* K. DAVIS, *supra* note 19, at § 3A.11.

sions are beyond the scope of the exemption and must be disclosed.[23]

It is clear that memoranda labeled "final opinions" by agencies provide official explanations for agency decisions and are not protected from disclosure by exemption 5. Difficulty in determining whether disclosure is in order arises when a memorandum initially serves an advisory function but is then adopted, or appears to be adopted, by an agency as the official explanation for a decision. The first important case dealing with this problem was *American Mail Line, Ltd. v. Gulick*,[24] where disclosure of a memorandum was ordered because it had been cited by an agency as the sole basis for a decision.[25] *Gulick* was particularly significant in its demonstration that an otherwise privileged memorandum would lose its protected status if its reasoning were adopted by an agency. Nevertheless, agencies can easily avoid disclosure of advisory opinions under the rule of *Gulick* simply by not citing them as bases for decisions.

This "loophole" was partially eliminated in *Sterling Drug v. FTC*,[26] which reinforced *Gulick* and also indicated that any memoranda issued by an agency that announce or explain its decisions must be disclosed, whether labeled by the agency as final opinions or not.[27] The rule of *Sterling Drug* was expanded in *NLRB v. Sears, Roebuck & Co.*,[28] a companion case to the instant case. In *Sears*, private parties sought disclosure of memoranda issued by the NLRB's Office of General Counsel to announce and explain that office's decisions not to file charges with the NLRB. The United States Supreme Court held that because these memoranda explained decisions dispositive of adjudication they were final opinions for the purposes of the FOIA and were required to be disclosed.[29] Thus, memoranda issued by an authority with final decision-making power *within* an agency were added to those which could not seek shelter under exemption 5.

Gulick, Sterling Drug, and *Sears* are examples of attempts by the courts to prevent agencies from invoking exemption 5 with

23. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

24. 411 F.2d 696 (D.C. Cir. 1969).

25. *Id.* at 703. "We do not feel that appellee should be required to operate in a fishbowl; but by the same token we do not feel that appellants should be required to operate in a darkroom." *Id.*

26. 450 F.2d 698 (D.C. Cir. 1971).

27. *Id.* at 708.

28. 421 U.S. 132 (1975).

29. *Id.* at 150.

a claim that documents containing policy statements are merely predecisional consultative memoranda. The courts have been cautious, however, not to require disclosure of advisory memoranda unless they clearly contain the reasons for final agency decisions. In *Sterling Drug*, for example, disclosure of certain memoranda was denied because they "[did] not necessarily contain a full and accurate account of the grounds for . . . decision."[30] In *Fisher v. Renegotiation Board*,[31] the District of Columbia Court of Appeals, in rejecting a request for disclosure of consultative memoranda concerned with an announced Board decision, stated, "Exemption 5 applies according to the character of the memoranda, and not according to their chronological position in the decision-making process of which they might have been a part."[32] These two cases, and others, thus distinguish between memoranda that are merely advisory and those that serve to explain agency decisions; in making the distinction, the cases focus on whether the memoranda at issue have in fact been adopted by an agency. Before disclosure of disputed memoranda will be ordered, the fact that they express agency policy must be certain. Nevertheless, although the courts have made some attempt to articulate rules that would allow findings that memoranda have been adopted as agency policy without agency statements to that effect,[33] no court has yet made a determination that a memorandum provides the basis for an ultimate decision without some indication of that fact by the authority with final decision-making power.

II. Instant Case

The Court found the critical issue in the instant case to be whether Regional Board reports and Division reports were "predecisional memoranda prepared in order to assist a decision-maker in arriving at his decision, which are exempt from disclosure," or "postdecisional memoranda setting forth the reasons for an agency decision already made, which are not."[34] Neither Divisions of the Board nor Regional Boards had any final decision-making power. Regional Board reports and Division reports were prepared prior to decisions and used in the consultative process.

30. 450 F.2d at 708.
31. 473 F.2d 109 (D.C. Cir. 1972).
32. *Id.* at 115.
33. *See* notes 24-29 and accompanying text *supra*.
34. 421 U.S. at 184.

There was no evidence that the reasoning of the Regional Board reports or Division reports was adopted, although their conclusions might have been. For these reasons, the Court held that Regional Board reports and Division reports were not final opinions that would have to be disclosed; rather, they constituted predecisional consultative memoranda protected by exemption 5.[35]

In reaching its holding, the Court considered and rejected several arguments advanced by the plaintiff, including the argument that the status of Regional Boards was analogous to that of federal district courts which issue opinions subject to review by circuit courts of appeal; opinions of Regional Boards, therefore, like those of district courts, should be made public. In rejecting this argument, the court indicated that whereas the decision of a district court has operative effect independent of appellate court review, the recommendation of a Regional Board has no operative effect independent of full Board consideration. Regional Board reports, unlike district court opinions, are therefore advisory and thus exempt from disclosure.[36]

The Court also rejected the plaintiff's argument that Regional Boards are agencies for the purposes of the FOIA and that, as the final products of agencies, Regional Board reports are subject to disclosure. Whether Regional Boards are agencies or not, the Court found that exemption 5 applies to Regional Board reports. Exemption 5 does not distinguish between intra-agency and inter-agency memoranda.[37] In either case, the Court decided that memoranda such as Regional Board reports, which express the advisory opinions of a body with no final decision-making power, are protected by exemption 5.[38]

Finally, the Court rejected plaintiff's argument that, because those who prepare Division reports are members of the full Board, Division reports are not exempt from disclosure.[39] The Court noted that neither the reasoning nor the recommendations of Division reports are binding on the full Board and recognized the possibility that drafters of Division reports might change their minds after full Board discussion. The consultative function and non-binding effect of Division reports therefore brought them within the scope of exemption 5.

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35. *Id.* at 186, 189.
36. *Id.* at 186.
37. *See* note 11 *supra*.
38. 421 U.S. at 187.
39. *Id.* at 189-90.

III. ANALYSIS

A. Dependence on Voluntary Agency Disclosure

The instant case demonstrates the impossibility of the courts framing a rule that will identify, absent clear indications by agency decision makers, all memoranda containing official explanations for agency decisions. The holding that the reports at issue in the instant case should not be disclosed was based on the Court's determination that "the evidence utterly fails to support the conclusion that the reasoning in the Reports is adopted by the Board as its reasoning, even when it agrees with the conclusion of a Report . . . ."[40] As a practical matter, evidence of an agency's reasons for a decision can only come from the agency itself. Not surprisingly, the Board's failure or refusal to indicate that the reports at issue contained official explanations for its decisions resulted in the Court's conclusion that the evidence was insufficient to require disclosure. Clearly, in any similar case, only indications from a decision maker will constitute adequate evidence of reasons for decisions.

As a consequence of the courts' inability to identify, without the aid of decision makers, memoranda that contain explanations for agency decisions, some memoranda that ought to be disclosed as final opinions under the FOIA will likely remain sheltered from public scrutiny. For example, assume that only advisory memoranda are written by an agency during its adjudicative proceedings but that some of these memoranda contain official explanations for decisions. Under the FOIA, the public would be entitled to examine memoranda in the latter class.[41] Nevertheless, because of judicial inability to frame a rule which will identify such memoranda without indications of their nature by agencies, these memoranda will not be made public unless the agency voluntarily indicates that they express official policy. Thus, when dealing with agencies such as the Renegotiation Board, which are not usually required to provide final opinions for their decisions,[42] the

40. *Id.* at 184.

41. *See* notes 20 & 23 and accompanying text *supra*.

42. The Board is required to supply opinions only when requested by contractors:

> Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor with a statement of such determination, of the facts used as a basis therefore, and of its reasons for such determination.

50 U.S.C. § 1215(a) (1970).

public is dependent on agency sensitivity to public information needs and on agency inclination to voluntarily satisfy those needs.[43]

B. Agency Regulations as a Possible Solution

Promulgation of amendments to regulations governing the Renegotiation Board to require more information is a possible means of eliminating dependence on voluntary production of information by the Board. Indeed, during the course of the pre-Supreme Court litigation in the instant case, the Board amended its regulations "in an endeavor to provide contractors and the public with more information regarding the basis for findings and determinations in renegotiation proceedings."[44] Opinions are now routinely written to provide explanations for most orders issued by the Board or by Regional Boards in exercise of their delegated authority.[45]

Despite the well-intentioned efforts of the Board, however, the regulatory solution in general and the new regulations in particular are inadequate. First, the new regulations allow the Board not to provide opinions in certain circumstances.[46] Consequently, all Board decisions will not be explained. Second, the Renegotiation Act, pursuant to which regulations governing the Board are promulgated, requires opinions only when requested by contractors.[47] Therefore, regulations promulgated pursuant to the Act need only require opinions when requested by contractors. Hence, the circumstances in which opinions will not be written under the new regulations may expand to include all those where no requests for opinions are made by contractors. Were this to

43. "It is important to remember that the FOIA is a unique statute, since its spirit encourages government officials to display an 'obedience to the unenforceable.'" Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 2 (1970).

44. 19 RENEGOTIATION BD. ANN. REP. 6 (1974) [hereinafter cited as BD. REP.].

45. 32 C.F.R. § 1472.3(k)(4)(iii) (1975) provides for a Proposed Opinion to accompany the Regional Board's notice of finding excessive profits. 32 C.F.R. § 1472.3(b) (1975) provides that Regional Boards will issue contractors Regional Board Opinions in cases where the Regional Board makes a recommendation to the Renegotiation Board. 32 C.F.R. § 1475.4 (1975) requires the Board to furnish contractors with Final Opinions upon issuance of unilateral orders. Additional regulations describe other circumstances under which opinions are to be issued.

46. 32 C.F.R. § 1475.2 (1975) allows the Board to waive or modify opinion-writing procedures when the contractor fails to file a Standard Form of Contractor's Report or other necessary information requested by the Renegotiation Board or a Regional Board, or "if the interests of the Government otherwise so require."

47. 50 U.S.C. § 1215(a) (1970). *See* note 42 *supra*.

occur, the Board would prepare opinions with no more frequency than it did prior to the new regulations. Third, and this is perhaps the gravest deficiency in the regulatory solution, the Board may again amend its regulations to meet only the barest demands of the Renegotiation Act.[48] In short, promulgation of regulations alone is likely to prove inadequate as a means of providing information needed by the public.

C. *The Statutory Solution*

Statutory amendment will remedy the current information problem. There simply is no legal way of circumventing a statute that unambiguously requires opinions to be written in all cases. Nevertheless, before imposing such a statute on the Renegotiation Board (or any other agency), two determinations must be made. First, it must be found that the cost of requiring opinions in all cases is justifiable. Second, it must be decided which statute can most appropriately be amended to require opinion writing.

1. *Measuring the costs and benefits of written opinions*

The nature of Board proceedings makes information concerning excessive profits determinations important to the public. Renegotiation proceedings can correctly be termed negotiations only when contractors agree with the Board; otherwise the Board unilaterally issues orders to return excessive profits.[49] These orders are based on six vague statutory guidelines.[50] Without a

48. The Board, in its enlightened self-interest, may have decided that enacting its own opinion writing regulations would be an effective method of forestalling any move by the Congress to impose strict procedural requirements upon it. But the Board may just as easily eliminate that provision, leaving contractors in their undesireable pre-regulation position.

49. K. DAVIS, ADMINISTRATIVE LAW TEXT, § 16.09, at 339 (3d ed. 1972).

50. 50 U.S.C. App. § 1213(e) (1970) provides in part:

> In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:
>
> (1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;
>
> (2) The net worth, with particular regard to the amount and source of public and private capital employed;
>
> (3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

collection of opinions applying and interpreting those guidelines, contractors are at a serious negotiating disadvantage. They cannot argue based on precedent, and thus are somewhat at the mercy of the Board's ad hoc determinations. Although contractors are protected by the right of de novo trial in the Court of Claims,[51] such protection does not justify a lack of procedural fairness in agency adjudicative proceedings. Finally, without adequate information concerning grounds for Board decisions, contractors are confronted with exactly the kind of situation the FOIA was designed to eliminate, one in which citizens are unsure of the grounds for government action that may be taken against them.[52]

Explanations of all prior Board orders will provide more certainty concerning the Board's grounds for decisions, and thereby help increase the fairness of the renegotiation process. First, the resultant case law will impose increased pressure on the Board to be consistent in its rulings.[53] Confronted with case law, the Board will arguably be more hesitant to deviate from prior decisions without compelling reasons. Second, contractors, able to rely on explanations of prior decisions, will be in a more equal bargaining position, since the Board will have less opportunity to be arbitrary. Third, explanations will provide more rational bases for the decisions of contractors either to accept excessive profits determinations or to seek review in the Court of Claims.[54] Contractors therefore will be more likely to seek review when Board decisions seem erroneous or interpret uncertain points of law. They will likewise be less likely to make futile appeals.

In view of the public's need for the information that explanations would provide, the cost of producing them is not great.

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(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;
(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

51. 50 U.S.C. App. § 1218 (Supp. IV, 1974), *amending* 50 U.S.C. App. § 1218 (1970) (which had provided for review by the Tax Court).

52. *See* note 21 and accompanying text *supra*. *See also* Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 33 (Douglas, J. dissenting).

53. *See* note 22 and accompanying text *supra*.

54. *See* 415 U.S. at 33.

During fiscal year 1974 the Board made 153 excessive profits determinations, totalling $70,207,586.[55] It incurred expenses of $4,684,204.[56] The cost of 153 opinions would seem to be justifiable in view of the overall expenses of the Board, the amount of money it recovers, and the importance of the public's interest in providing explanations to contractors for excessive profits determinations.

2. Amending the appropriate statute

Three statutes are relevant to the production of information by the Renegotiation Board—the FOIA, the APA, and the Renegotiation Act. In considering the functions of these statutes, it is clear that the simplest way of imposing an opinion-writing requirement on the Board is to amend the Renegotiation Act. The FOIA cannot as appropriately be amended, since its purpose is not to require opinions to be written, but to require disclosure of those that are written.[57] The APA is likewise not a desirable vehicle for the change, since the Board is exempted from its opinion-writing provisions.[58] Even without the exemption, however, the APA would not apply to the Board because that statute does not require opinions to explain decisions which result from informal adjudicative proceedings such as those employed by the Board.[59] Therefore, the only way to correct the information deficiency pointed out by the instant case, without at the same time altering the Board's adjudicative procedures,[60] is to add a provision to the

55. BD. REP. 11.

56. *Id.* at 18.

57. 421 U.S. at 191.

58. 50 U.S.C. App. § 1221 (1970).

59. The opinion-writing section of the APA, 5 U.S.C. § 557, does not apply to agency decisions, such as those made by the Board, which are not required by statute to be reached after agency hearings and are subject to de novo review. 5 U.S.C. § 554(a) (1970).

60. If the Board were to adopt formal adjudicative proceedings and the exemption from the opinion-writing provisions of the APA did not exist, the Board would be required under the APA to write opinions. Changing the Board's procedures does not appear to be a likely possibility at the present time, however, as the following colloquy between Congressman Corman and Board Chairman Whitehead during hearings concerning extension of the Renegotiation Act demonstrates:

> Mr. Corman: How would you feel about a statutory requirement that [a contractor] be given due process at some point in this procedure?
> Mr. Whitehead: I wouldn't be in favor of getting involved at this late date in the administrative procedures process. I think perhaps if that had been wise initially or when the 1951 act was created, established, and enacted, it would have been given some serious consideration, and it no doubt was. The legislative history would probably prove this. At this particular time it would increase our

Renegotiation Act requiring opinions with all Board orders.

To add such a provision to the Renegotiation Act would be a relatively simple matter. As previously indicated, the Act already contains a provision requiring opinions in some instances.[61] This provision merely needs to be amended to require opinions in all cases.

IV. Conclusion

The instant case leads to two conclusions that may be more important in general than in the specific context of information production by the Renegotiation Board. First, the impossibility of determining when memoranda contain agency policy without specific agency indications to that effect demonstrates that the FOIA will work as intended only if agencies comply voluntarily. Second, FOIA litigation is likely, as in the instant case, to demonstrate public information needs that cannot be fulfilled under the provisions of existing law. Congress should be alert to such unmet but valid needs and respond by making the necessary statutory adjustments. Otherwise, the FOIA's job will remain unfinished.

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budget very substantially. I have never heard great beefing about or complaint about the lack of due process on the part of contractors in our prcoedures [sic]

. . . .

Mr. Corman: I am not at all eager to make it harder for you to do your job.

(There were no follow up questions.) *Hearing on Extension of the Renegotiation Act Before the House Committee on Ways and Means*, 93rd Cong., 2d Sess. 13, May 14, 1974.

61. 50 U.S.C. App. § 1215(a) (1970).