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What Is a Record? Two Approaches to the Freedom of Information Act's Threshold Requirement

I. INTRODUCTION

The Freedom of Information Act (FOIA),¹ enacted in 1966, requires all governmental agencies to make their records available to any person who submits a request which reasonably identifies the records sought.² This general rule of disclosure has only a few narrow exceptions.³ Since the FOIA only purports to make information available if contained in a *record*, the meaning of that term is basic to the operation of the Act; however, a definition of the term "record" is conspicuously lacking.⁴ In the absence of legislative guidance, litigants have sought to stretch or shrink the meaning of the word in an attempt either to compel disclosure or to justify withholding information within agency control.⁵

These attempts to mold the definition of the term "record" have received inconsistent treatment by the courts. Since the interpretation of this key word can have a significant impact upon the scope and effectiveness of the FOIA, it is imperative that a reasoned and consistent viewpoint be maintained.⁶ This

1. 5 U.S.C. § 552 (1976). The statute was originally enacted as the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) and was codified by Pub. L. No. 90-23, 81 Stat. 54 (1967) at 5 U.S.C. § 552. The FOIA was amended in the 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974), and again in the Government in the Sunshine Act § 4, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976).

For background on the history, purposes, and operation of the Act, see generally Clark, *Holding Government Accountable: The Amended Freedom of Information Act: An Article in Honor of Fred Rodell*, 84 YALE L.J. 741 (1975); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L.L. REV. 1 (1970); Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974) [hereinafter cited as *FOIA Assessment*]; Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18 (1967).

2. 5 U.S.C. § 552(a)(3) (1976).

3. *Id.* § 552(b) (1976). For the text of these exemptions, see note 8 *infra*.

4. The Administrative Procedure Act (APA), 5 U.S.C. §§ 500-559 (1976), of which the FOIA is part, is similarly devoid of any clarification of the meaning of "record" for FOIA purposes. Section 552a of the APA does define the term with respect to privacy of information compiled about individuals, 5 U.S.C. § 552a(a)(4) (1976), but that definition is not pertinent to a general disclosure provision. See note 59 *infra*.

5. *E.g.*, *SDC Dev. Corp. v. Matthews*, 542 F.2d 1116 (9th Cir. 1976); *Save the Dolphins v. United States Dep't of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975); *Nixon v. Sampson*, 389 F. Supp. 107, 131, 145 (D.D.C.), *stayed sub nom. Nixon v. Richey*, 513 F.2d 427 (D.C. Cir.), *motion to vacate stay denied per curiam*, 513 F.2d 430 (D.C. Cir. 1975), *dismissed as moot*, 437 F. Supp. 654 (D.D.C. 1977); *Nichols v. United States*, 325 F. Supp. 130 (D. Kan. 1971), *aff'd on other grounds*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972).

6. It has been asserted that most intellectual effort spent defining the term "record"

Comment will explore the operation and background of the FOIA, compare different analytical approaches to interpreting the term "record," and suggest a conceptual model for dealing with the "record question."

A. *The FOIA: A Balance of Conflicting Interests*

In its attempt to open governmental processes to public scrutiny via freedom of information legislation, Congress undertook the delicate task of striking a proper balance between the public's interest in knowing what government is doing and the government's interest in preserving the confidentiality or secrecy of certain types of information. The Senate report noted:

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. *Success lies in providing a workable formula which encompasses, balances, and protects all interests*, yet places emphasis on the fullest responsible disclosure.⁷

The balance the FOIA strikes between these interests requires agencies to disclose all information unless it falls into one of nine exemptions stated in the Act.⁸ Specifically, a large class

in connection with the FOIA has been unnecessary. Sherwood, *The Freedom of Information Act: A Compendium for the Military Lawyer*, 52 MIL. L. REV. 103, 109 (1971). Since disputes continue to center on the meaning of the term, however, it can be argued that such efforts, rather than having been wasted, were merely unsuccessful. In that light, an attempt to provide a coherent and reasoned approach to treating the term is especially appropriate.

7. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) (emphasis added). See also *EPA v. Mink*, 410 U.S. 73, 80 (1973).

8. 5 U.S.C. § 552(b) (1976). The text of these exemptions is as follows:

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

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

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

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(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

of government-held information—agency records—is included within the scope of the Act.⁹ Within that class of information, certain types of records—final opinions, policy statements, orders, administrative staff manuals, and generally applicable substantive and procedural rules—are singled out for special disclosure.¹⁰ Other types of records, such as investigatory files and classified documents, are recognized as posing special problems, and much of that information is exempted from disclosure by the statute.¹¹ Finally, a general policy of disclosure of all other records is established.¹²

To ensure that a proper balance was maintained between disclosure and confidentiality, Congress incorporated two enforcement provisions into the FOIA. The first of these provisions is embodied in subsection (c) of the Act, which states in pertinent part: "This section does not authorize withholding of information . . . except as specifically stated in this section."¹³ Courts and commentators have noted that the emphasis of subsection (c) is to narrow the scope of the exemptions and to make them exclu-

would constitute a clearly unwarranted invasion of personal privacy;

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

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

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

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

Id.

9. Only one subsection of the Act singles out agency records for disclosure, however. The other disclosure subsections refer to information which is in record form, such as final opinions, orders, and staff manuals. Compare 5 U.S.C. § 552(a)(3) (1976) with 5 U.S.C. § 552(a)(1)-(2) (1976).

10. Subsection (a)(1) of the Act lists the records which must be published in the *Federal Register*, while subsection (a)(2) lists specific records which must be made available to the public. 5 U.S.C. § 552(a)(1)-(2) (1976).

11. See note 8 *supra*.

12. 5 U.S.C. § 552(a)(3) (1976). See also S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

13. 5 U.S.C. § 552(c) (1976).

sive.¹⁴ In the second provision, Congress attempted to prevent agency abuse by giving federal courts specific statutory review powers over agency decisions denying access to requested records.¹⁵ The courts are given power to enjoin agencies from withholding records and to order the production of records which are unjustifiably withheld.¹⁶ The burden of justifying a decision to deny access is upon the agency.¹⁷

A critical question raised early in the FOIA's history was whether the balance struck had been cast in stone, or whether Congress left the Act flexible enough to admit of minor adjustments by the courts.¹⁸ By adding subsection (c), which limited exemptions to the Act to those specifically listed in the Act, Congress seemed to be eliminating the discretion of all interpreters, whether administrative or judicial. However, considering the volume and variety of governmental recordkeeping, it should be apparent that any attempt to exhaustively enumerate the individual and public interests in need of protection must of necessity fall short of conclusiveness.¹⁹ In this respect Professor Kenneth Culp Davis has observed that although Congress has the power to limit interpreters to the specific provisions of an act, "it may be very unwise in exercising this power. Its own competence to make law on a complex subject may be so limited that it should invite, not prevent, the help of administrative and judicial interpreters to make its enactments workable and sensible."²⁰

The most potent avenue for allowing flexibility in FOIA cases was the argument that, despite subsection (c), courts retain their inherent power of equitable discretion in the issuance of FOIA injunctions. Unfortunately, perhaps, that argument has generally been rejected.²¹ As will be shown later in this Comment, some recognition of the courts' equitable discretion may be vital to a reasoned application of the policies underlying the FOIA. Other theories that would allow for flexibility, such as a broad reading

14. See, e.g., *Getman v. NLRB*, 450 F.2d 670, 679 (D.C. Cir. 1971); Davis, *supra* note 1, at 783.

15. 5 U.S.C. § 552(a)(4)(B) (1976).

16. *Id.*

17. *Id.*

18. See Davis, *supra* note 1, at 766-67.

19. An excellent illustration of Congress' failure to enumerate many of the public interests in need of protection can be found in the rise of "reverse FOIA" suits. See generally Comment, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. REV. 995 (1976).

20. Davis, *supra* note 1, at 784.

21. For a discussion of the status of the equitable discretion doctrine, see notes 79-103 and accompanying text *infra*.

of the statutory exemptions, have also been rejected.²² However, one such avenue to flexibility, the claim that certain types of information are not records within the purview of the FOIA, unlike other arguments, has met with some positive results.

B. *Two Approaches to the Record Question*

Cases dealing with the question of whether an item requested under the FOIA is a record have developed two different analytical approaches. With the first approach the court resorts to dictionaries and other sources to develop a denotative definition dispositive of the case; the second approach involves the court's consideration of policy issues. These approaches are best illustrated by two cases.

1. *Nichols v. United States*²³

In *Nichols v. United States*, a district court was faced with deciding whether the FOIA entitled a licensed and qualified pathologist to have access to certain physical objects associated with the assassination of President Kennedy.²⁴ Nichols hoped to perform his own tests on the items and compare his results with those reached by the Warren Commission. The Government resisted, contending that the objects were not records subject to disclosure under the FOIA and, additionally, were statutorily exempted from disclosure under subsection (b)(3)²⁵ even if they could be considered records.

The district court, although sympathizing with Nichols' de-

22. See, e.g., *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Arguments have also been made that certain governmental organizations are not agencies, freeing them from the strictures of FOIA disclosure requirements. See, e.g., *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir.1971) (reversing district court determination that the Office of Science and Technology is not an agency); *Ciba-Geigy Corp. v. Matthews*, 428 F. Supp. 523, 528 (S.D.N.Y. 1977) (University Group Diabetes Program not an agency).

Congress resolved this problem by adding a definition of "agency" that is nearly all-inclusive. 5 U.S.C. § 552(e) (1976).

23. 325 F. Supp. 130 (D. Kan. 1971), *aff'd on other grounds*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972). For a similar case, see *Save the Dolphins v. United States Dep't of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975).

24. Nichols requested, among other things, access to the coat and shirt worn by President Kennedy at the moment of his assassination, a 6.5 mm Mannlicher-Carcano rifle believed to be the weapon used by Lee Harvey Oswald in the assassination, several bullets and cartridge cases, metal fragments removed from Governor Connally's wrist and from President Kennedy's brain, and histological preparations made as a part of the Bethesda autopsy. 325 F. Supp. at 135-37.

25. See note 8 *supra*.

sires, agreed with the Government on both grounds.²⁶ In evaluating the argument that the objects were not records, the court found little guidance in the statute or its accompanying regulations. It did find help, however, in "a dictionary of respected ancestry," and in reliance on the dictionary concluded that a record is an "evidence of something written, said or done and is not kept to gratify the curious or suspicious."²⁷ Under that definition the court found that most of the items requested were not records and, therefore, were not subject to the FOIA disclosure requirements. The decision was affirmed by the Tenth Circuit on the statutory exemption ground.²⁸ The circuit court found it unnecessary to address the record question since it determined that all the items requested by the plaintiff were exempted by subsection (b)(3).²⁹

2. SDC Development Corp. v. Matthews³⁰

The second illustrative case was decided by the Ninth Circuit in 1976. SDC Development Corporation, the plaintiff-appellant, sought a copy of the MEDLARS tapes—a computerized compilation of over two million abstracts of medical articles developed by the National Library of Medicine. Since the tapes were already available to the public,³¹ the conflict actually cen-

26. While holding for the government on both issues, Judge Templar made it quite clear that he did so only because he felt compelled by the Act. Among other things, he stated:

Until Congress sees fit to wipe out these exemptions, so far as it is constitutionally able to do so, a person in plaintiff's position, though he be possessed with superb qualifications, has the purest intentions and be ever so objective in his research and entitled to pursue it, will be thwarted by the influence and pressures exerted by bureaucrats which will likely hamper his investigations, no matter how noble and patriotic his purpose.

325 F. Supp. at 138.

27. *Id.* at 135.

28. *Nichols v. United States*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972).

29. At that time, subsection (b)(3) exempted any records which were "specifically exempted from disclosure by statute." The statute relied upon by the court is one which authorizes the government archives to receive gifts, subject to restrictions placed upon by the gifts by the donor. 44 U.S.C. §§ 2107, 2108(c) (1970 & Supp. V 1975).

Subsection (b)(3) has since been amended in order to more closely define the phrase "specifically exempted from disclosure by statute." See note 8 *supra*. It is doubtful that the statute relied upon by the court would qualify under the amended section.

30. 542 F.2d 1116 (9th Cir. 1976).

31. The MEDLARS tapes are available to the public by subscription to MEDLINE, an on-line computer terminal, at rates of \$15 per hour at peak use time and \$8 per hour at other times. A copy of the tapes may be purchased outright at a cost of \$50,000, although their accuracy is only guaranteed for one year. *Id.* at 1117-18.

tered not on *access* to the tapes but on their *cost*. Plaintiff claimed that the FOIA entitled him to a copy at the cost of reproducing the tapes,³² while the library claimed authority to set its own price.³³

Faced with this unique situation, the court noted that the agency was not attempting to hide its operations from public view—the practice at which the FOIA was primarily aimed. Neither was the library guilty of withholding information. Its purpose, the court concluded, was merely to protect its method of information distribution and, ultimately, its ability to collect information.³⁴ To make the tapes available under the FOIA's nominal cost provisions, the court noted, could seriously impair the operations of the library.³⁵

To avoid such harm to the library, the court concluded that the MEDLARS tapes "are not 'records' or 'agency records' which must be made available . . . pursuant to [the FOIA]." ³⁶ In reaching this conclusion, it relied upon a Supreme Court statement that "the FOIA must be read in a manner consistent with previously existing statutes, insofar as such reading is compatible with the Act's purposes."³⁷ To avoid possible conflict with the National Library of Medicine Act,³⁸ the court read the FOIA as requiring disclosure of only those records which "directly reflect the structure, operation, or decision-making functions of the agency."³⁹ Since the tapes did not fit into any of these categories, the court reasoned, they could not be termed records and were therefore unavailable under the Act.

32. Under the FOIA, an agency is allowed to charge a reasonable fee in order to cover the costs of searching and duplicating the material requested. 5 U.S.C. § 552(a)(4)(A) (1976). Plaintiff submitted a check for \$500 with his request, the amount he estimated would cover the searching and duplicating costs.

33. The provisions of the National Library of Medicine Act allow the library to charge users of its materials a fee which, in its discretion, may exceed the costs of finding and copying the materials. See National Library of Medicine Act § 372(c)(2), 42 U.S.C. § 276(c)(2)(1970); Independent Offices Appropriations Act tit. V, 31 U.S.C. § 483a (1970); Bureau of the Budget [now Office of Management and Budget], Circular No. A-25 (Sept. 23, 1959). These provisions have been generally recognized as allowing the agency to recoup some of its expenses in compiling and producing these materials. Cf. National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) (recoupment impossible unless agency provides special benefit to recipient).

34. 542 F.2d at 1120.

35. *Id.*

36. *Id.*

37. *Id.* at 1118 (citing *FAA Adm'r v. Robertson*, 422 U.S. 255 (1975)).

38. 42 U.S.C. §§ 275-280a (1970 & Supp. V 1975).

39. 542 F.2d at 1120.

3. *A comparison of the cases*

In each of the above cases, the term "record" was a threshold requirement. Because the FOIA only purports to require disclosure of *records*, in order to qualify for FOIA disclosure an item of information must have the characteristics which allow it to be classified as a record. The cases, however, present quite different approaches to the question of whether an item of information is a record disclosable under the Act.

In *Nichols* the court made that determination turn on a simple definition of the term "record." By so doing, the court endeavored to treat the term in a traditional, commonsense manner, independent of its usage in the Act. The public importance of the information that could be gleaned from the objects, although great, played no part in determining the characteristics of a record. The *SDC Development* case, on the other hand, concerned itself with issues of public policy in delineating the record threshold. It was not contended that in common terminology the MEDLARS tapes were not records. Nevertheless, because of the devastating effect the FOIA's nominal cost disclosure would wreak upon the MEDLARS program, the court developed a specialized definition of "record." That definition turned upon an analysis of the Act's purpose rather than an independent interpretation of the meaning of the term.

Since the *SDC Development* approach focuses upon whether public policy dictates that an item of information should be disclosed, it will be referred to herein as the policy approach. The *Nichols* approach will be labeled the definitional approach.⁴⁰

The definitional and the policy approaches have the potential of causing diametrically opposite results in an identical case. Had the *Nichols* court used the policy approach applied in *SDC Development*, for example, it could well have concluded that the items were of sufficient public importance to outweigh any possible detrimental effect on governmental programs. Conversely, had the MEDLARS tapes been subjected to the definitional approach, they may have been considered records.

40. Others have suggested different approaches to defining the term "record" than those which will be treated herein. For example, in Note, *The Freedom of Information Act—A Potential Alternative to Conventional Criminal Discovery*, 14 AM. CRIM. L. REV. 73 (1976), one commentator suggests that a definition of "record" might be approached in terms of form or in terms of the agency's purpose for holding it. However, he rejects the latter as productive of results inconsistent with the Act, *id.* at 100-01, and the treatment of "record" in terms of physical form alone is oversimplistic. See note 56 and accompanying text *infra*.

Given the distinction between the two approaches, it is appropriate to inquire into the proper role of each. Is there a place for purely definitional considerations, or should the availability of every item of information turn upon a "balanced appraisal of the policies underlying disclosure and exemption"?⁴¹ Which approach better satisfies the legislative intent behind the FOIA? And, is there an alternative approach which allows a court flexibility to reach sensible results consistent with the policies of the Act?

The balance of this Comment will focus on these questions. First the definitional approach will be analyzed in terms of reason, principles of statutory construction, and the FOIA's legislative history and purpose. Attention will then turn to the advantages and disadvantages of the policy approach. That analysis will lead to a suggested model for dealing with the threshold record requirement and to a preferable method for responding to the questions the policy approach attempts to answer.

II. THE DEFINITIONAL APPROACH

There are a variety of aids available in the search for a proper definition of the word "record" in a government recordkeeping setting. The *Nichols* court, for example, turned to statutory and regulatory definitions, a dictionary, and *Words and Phrases* in the course of its search.⁴² Also available are the well-recognized principles of statutory construction. This section will briefly evaluate the merits of these various aids in arriving at a proper definition of the term "record," and will then turn to a discussion of the advantages and disadvantages of adopting a definitional approach to the record requirement.

A. Aids to Finding a Proper Definition

1. Principles of statutory interpretation

Courts have frequently been required to interpret or construe the meaning of disputed statutory language, and a substantial body of principles of statutory construction has resulted.⁴³ All such principles are, in theory, aimed at serving the intent of the legislature. Although some scholars have criticized the search for legislative intent,⁴⁴ "it is an article of faith among American law-

41. *FOIA Assessment*, *supra* note 1, at 904 n.55.

42. 325 F. Supp. at 134-35.

43. See generally C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* (4th ed. 1973).

44. In what has been termed the "Radin Onslaught," Dickerson, *Statutory Interpre-*

yers that the function of a court when dealing with a statute is to ascertain and effectuate the intention of the legislature."⁴⁵

Despite this unity of purpose, the methodology of statutory interpretation can vary widely. At one end of the scale is the approach that emphasizes the search of historical and legislative materials for answers to questions of construction.⁴⁶ As applied to the problem of interpreting the term "record," however, the value of the historical approach is minimal. No piece of legislative history speaks to the point.⁴⁷ While a consideration of the FOIA's

tation: A Peek into the Mind and Will of a Legislature, 50 IND. L.J. 206, 207 (1975), Professor Radin attacked the notion of "legislative intent" as being, among other things, a contradiction in terms. How, he asked, can one speak of the intent of a collective body? If such a concept can even exist, how can it be objectively ascertained to any degree of reliability? Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930). Since that time many competent scholars have joined in this philosophical debate. See generally Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); Mac Callum, *Legislative Intent*, 75 YALE L.J. 754 (1966); Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W.L. REV. 128 (1972).

45. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975).

46. Under this methodology, the historical setting of legislation, legislative history, implicit policies, and other such indications of intent are deemed most important in determining the meaning of a word, phrase, or section of a statute. See 2A C. SANDS, *supra* note 43, §§ 47.06, 48.02-.03, 49.01-.03.

47. The most pertinent piece of legislative history is a technical amendment made by the 89th Congress to S. 1160, the precursor of the FOIA. Before the amendment, subsection (c) (now subsection (a)(4)) read: "[T]he district court . . . shall have jurisdiction to enjoin the agency from the withholding of agency records and information and to order the production of any agency records or information improperly withheld from the complainant." *Administrative Procedure Act: Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 7 (1965) (emphasis added). In statements submitted to the subcommittee, the Departments of Agriculture and Defense, NASA, and the Committee on Labor and Public Welfare observed that the inclusion of the words "and information" served but to confuse the scope of the term "records." *Id.* at 382, 416, 483, 497.

NASA's comment was somewhat broader than the rest, and is especially pertinent:

There is no precise meaning attached to the term "records" as it appears in the subsection. It could mean any document or item containing information in the possession of the agency including such diverse objects as contracts, invoices, transcription belts, and tape recordings. Moreover, there later appears in the subsection the phrase "records and information." It is not clear whether the term "records," when it first appears, is intended to encompass "information" as well. And what does information mean opposed to "records"? If it means something different from records, then it would not be available under agency procedures which only encompass means of acquiring "records," leaving "information" to be acquired through court process.

Id. at 483.

Presumably because of these comments, the phrases "and information" and "or information" were deleted in committee. S. REP. NO. 813, 89th Cong., 1st Sess. 1-2 (1965).

history discloses that it was meant to make more information in agency files available to the public, that purpose has little probative value as to the intended *scope* of such disclosure.

At the other end of the methodological scale is the literalistic approach to statutory construction. This approach relies heavily on the statute itself, applying principles developed over time to aid in ferreting out the meaning of ambiguous terms.⁴⁸ As with the first method, most literalistic principles give little guidance in resolving the present question. The Act does not define the term. While the duplication and document search provision⁴⁹ implies that a record must have certain characteristics,⁵⁰ the Act's emphasis on simply making agency records *available* dilutes the strength of any such inference. The Act did not set out to describe records—only to make them available.

One literalistic principle of statutory interpretation, however, does lend some direction. When commonly used terms have been employed by a legislature, it is generally recognized that they should be given their "common meaning."⁵¹ As Justice Frankfurter explained, "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to

The most this deletion can indicate, however, is that the committee intended that information be contained in a record before it becomes available under the FOIA. It says nothing about the scope of the term "record," nor does it intimate any idea of the types of items which might be considered by the courts or the agencies.

The problem at which the amendment was probably aimed is illustrated in *Electronic Memories & Magnetics Corp. v. United States*, 431 F. Supp. 356 (C.D. Cal. 1977), wherein the plaintiff requested a narrative explanation of some factual determinations made regarding him by an agency. *Id.* at 359-60. That request would have required the compilation of information *into* a record, not the production of information already in recorded form.

48. Such principles include the "plain-meaning" rule, the familiar rule of *ejusdem generis*, and "whole statute" interpretation, among others. See generally 2A C. SANDS, *supra* note 43, §§ 46.05, 47.01-.38; Murphy, note 45 *supra*.

49. 5 U.S.C. § 552(a)(4)(A) (1976).

50. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, reprinted in 20 AD. L. REV. 263 (1967). The memorandum concludes that the emphasis upon the right to a copy forecloses the possibility that "objects or articles such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, etc., whatever their historical value or value 'as evidence'" would fall within the records classification. *Id.*, reprinted in 20 AD. L. REV. 263, 291 (1967). But see Note, *The Freedom of Information Act—A Potential Alternative to Conventional Criminal Discovery*, 14 AM. CRIM. L. REV. 73, 100-01 (1976).

51. For different formulations of the "common meaning" rule, see 2A C. SANDS, *supra* note 43, § 47.28.

him.”⁵² Although the common meaning principle is necessarily vague, where legislative history and other aids are wholly absent it seems to be the most reliable indicator of legislative intent available.

2. *Definitions: dictionaries, unrelated statutes, and regulations*

Definitions of the term “record” can be found in dictionaries, agency regulations adopted in response to the FOIA, and unrelated statutes. There are two common types of definitions, the descriptive and the illustrative. A descriptive definition of the word “record” is found in all dictionaries, and is an abstract statement of the qualities possessed by the class of items called “records.” For example, the *Nichols* court cited *Webster’s New International Dictionary* and *Webster’s New Collegiate Dictionary*, both of which define “record” as “that which is written or transcribed to perpetuate knowledge. . . .”⁵³ A more recent edition of *Webster’s New Collegiate Dictionary* speaks in somewhat less general terms: “[S]omething that recalls or relates past events, an official document that records the acts of a public body or officer, an authentic official copy of a document deposited with a legally designated officer”⁵⁴

The illustrative definition, common to statutory and regulatory materials, tends to be an enumeration of the types of articles which are classified as records. Most agencies have adopted regulatory definitions in response to the FOIA, the majority of which follow the pattern set by a statute relating to the management and disposal of records by the Administrator of General Services.⁵⁵

“[R]ecords” includes all books, papers, maps, photographs, machine readable materials, or other documentary materials,

52. *Addison v. Holly Hill Fruit Prod., Inc.*, 322 U.S. 607, 618 (1944). Justice Frankfurter also observed: “To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.” *Id.* at 617.

In that case, the Court refused to allow the Administrator of the Wage and Hour Division of the Department of Labor to define the “area of production” exception to the Fair Labor Standards Act in any terms other than geographical. The Administrator had defined that word both in terms of geography and number of employees.

53. 325 F. Supp. at 135.

54. WEBSTER’S NEW COLLEGIATE DICTIONARY 966 (1974 ed.).

55. Examples of regulations defining “record” for purposes of the FOIA can be found in: 7 C.F.R. § 661.3 (1977) (Soil Conservation Service); 14 C.F.R. § 310.2(a) (1977) (CAB); 14 C.F.R. § 1206.101(a) (1977) (NASA); 22 C.F.R. § 6.1(b) (1977) (Dep’t of State); 32 C.F.R. § 701.4 (1976) (Dep’t of the Navy); 32 C.F.R. § 1900.3(g) (1977) (CIA); 41 C.F.R. § 105-60.103(a) (1977) (GSA); 45 C.F.R. § 5.5 (1976) (Dep’t of HEW).

regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved only for convenience of reference, and stocks of publications and of processed documents are not included.⁵⁶

3. *A commonsense meaning*

Some of the aids discussed above have as their objective a generally applicable description of the term "record"; others are aimed at the special setting of government recordkeeping. All of them, within their own settings, try to arrive at the commonsense meaning of the term. It might be helpful at this point to inquire independently into the notions which form the core of the concept "record" in a government recordkeeping context in order to lend some perspective to the definitional sources described above. What follows is by no means a test by which all items can be classified as records or nonrecords, but is rather an attempt to articulate some of the factors to be considered in arriving at a satisfactory definition.

First, in the governmental recordkeeping setting a record presupposes information preserved by design. If an item does not contain any information, or if information is preserved only by happenstance, it should not usually be considered a record. Concededly, in other contexts the word "record" can refer to items which do not follow this pattern. For example, in other contexts a murder weapon, geological formations, and a person's memory could be considered records, although they cannot be said to contain information that is preserved by design. However, it is quite unlikely that, by enacting the FOIA, Congress intended to require disclosure of these items.

A second notion which seems to be involved is that a record is usually intended to be a convenient method of preserving information. For example, a scientist does not save for posterity the chemicals he has combined; rather, he preserves his notes and observations. Abstractions such as ideas and policies must necessarily be placed in a more convenient form than memory in order

56. 44 U.S.C.A. § 3301 (West 1977).

to form an agency record. Still, a record need not be the most convenient form of information storage, but only a more convenient form than that in which the information had its genesis. Similarly, the notion of convenience does not mandate that a record be of a certain physical form, such as written or printed. Computer tapes, punched cards, movies, and so on can easily be included within its scope.

In drawing the line between records and nonrecords, the court's guiding star should be the Act's stated policy of achieving the greatest level of agency disclosure consistent with governmental interests in need of protection. Consistent with that policy, if error is to be made in formulating a commonsense meaning of the term "record," it should be made on the side of overinclusiveness rather than underinclusiveness.

B. Strengths and Weaknesses of the Definitional Approach

One commentator has suggested that a purely definitional approach to the question of whether an item is a record within the scope of the FOIA is oversimplistic.⁵⁷ That is, to enter into any analysis which largely ignores the policies favoring and disfavoring disclosure could result in decisions that frustrate rather than effectuate the FOIA's purpose. One is nevertheless uncomfortable with a blanket rejection of definitional analysis, since the implication of a strict policy approach is that any object or article could be considered a record if the reason for disclosure is sufficiently compelling. Congress could have used language that included any object or article, but it chose not to do so.⁵⁸ The term "record" is not all-inclusive. Rather, some sort of basic qualitative characterization is necessary as a threshold.

The principle drawback of the definitional approach is that arriving at any definition comfortably dividing the world into records and nonrecords is difficult, if not impossible. The descriptive definition and the common meaning approach are too abstract to be of decisive weight in borderline cases; the illustrative definition, because of its specificity, tends to be underinclusive. Moreover, illustrative definitions are often written with a particular context in mind; their applicability to a different situation may be questionable.⁵⁹

57. *FOIA Assessment*, *supra* note 1, at 904 n.55.

58. *See* note 47 *supra*.

59. "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original

It is of some consolation that this drawback of the definitional approach is not unique to the FOIA context. In constitutional litigation, for example, courts have found ways of dealing with the problem of vague standards,⁶⁰ and there seems to be no reason to expect a contrary result in FOIA cases. The vagaries of constitutional standards are much greater than those of the definition of "record."

III. THE POLICY APPROACH

The policy approach to setting forth what constitutes a record, like the definitional approach, is a method of determining the scope of disclosure that may be compelled under the FOIA. Unlike the definitional approach, which defines "record" without reference to the FOIA's special purposes, the policy approach is an attempt to deal with policy problems in the determination of whether or not an item of information is disclosable upon proper request.⁶¹ In theory, under this approach a court could order disclosure when, under the definitional approach, the item would not be classified as a record. Conversely, as illustrated by *SDC Development*, a court might refuse to order disclosure of an item of information that would normally be classified as a record.

The factors which could bear on the disclosure or withholding of information under the policy approach are potentially as numerous and varied as the types of records compiled by the several agencies;⁶² any attempt to list and evaluate them is beyond the scope of this Comment. Rather than discuss individual policies, this Section will evaluate the policy approach in the abstract.

A. Advantages of the Policy Approach

It has been suggested that any determination of whether an

sin and must constantly be guarded against." W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 159 (1949).

60. Probably the best example of vague constitutional standards is found in the first amendment free speech cases. For a discussion of several ways that the Supreme Court has attempted to deal with that problem, see Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 939-42 (1968).

61. See *FOIA Assessment*, *supra* note 1, at 904 n.55.

62. One of the difficulties with the policy approach is that it can potentially involve policies external to the FOIA. In *SDC Development*, for example, reliance was placed upon the importance of the recoupment powers of the National Library of Medicine. 542 F.2d at 1120. In *Nichols*, the court might have relied upon the importance of the government archives' ability to protect donors' wishes. What about a request for a NASA computer program that could design spaceship components? The possibilities are endless.

item of information should be disclosed should turn exclusively upon policy considerations.⁶³ Two advantages to this kind of policy-based decision are evident.

First, by allowing a court to use the record requirement as a means of withholding information that would otherwise be disclosed under the Act, the FOIA is given a flexibility of interpretation that it would lack under a strict definitional approach. In the *SDC Development* context, for example, if the court had followed a strict definitional approach it may have required disclosure of the MEDLARS tapes, since they would most likely be considered records to which no statutory exemption applied.⁶⁴ That result, which would merely reduce the cost of tapes already publicly available, would have significantly harmed the National Library of Medicine's program. The policy approach gave the court a rationale to justify its clearly equitable result within the traditional framework of the Act.

A second advantage of the policy approach is related to the first. By treating each record question in terms of policy, some items of information which traditionally would not be considered records may nevertheless become available for public scrutiny. The *Nichols* case is illustrative. Assuming for the present that no statutory exemption applied to the articles requested in that case, their informational value could possibly have allowed their disclosure when weighed against countervailing considerations.

B. Disadvantages of the Policy Approach

As discussed earlier, Congress is not omniscient in legislating on complex matters.⁶⁵ In considering the balance that should be struck in freedom of information legislation, it could not deal with all the special problems raised by the infinite variety of governmental records. As with most legislation, the FOIA evidences only the broad policy judgments that should play an important role in the statute's administration.⁶⁶

Nevertheless, instead of inviting courts and agencies to use these policy judgments as the basis for an independent determi-

63. *FOIA Assessment*, *supra* note 1, at 904 n.55.

64. For an argument that another means of withholding the tapes is available, see notes 79-103 and accompanying text *infra*.

65. Notes 18-20 and accompanying text *supra*.

66. In this respect, the FOIA resembles the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975), much more closely than the Internal Revenue Code. Using that analogy, it could be concluded that broad discretion, like that given the National Labor Relations Board, should be given to the courts in FOIA administration.

nation of the applicability of the Act to specific types of information, Congress seemingly restricted them to a consideration of the specific factors listed in the Act.⁶⁷ By so doing, Congress limited the courts' role in the administration of the FOIA. The policy approach tends to undercut this limited role by allowing courts to go outside the specific factors listed in the Act and, in effect, to add a judicially created exemption to it.⁶⁸ It is unlikely that the Act's sponsors contemplated licensing courts to determine whether an item is or is not a record by reference to the same criteria that led to creation of the statutory exemptions.

Because of this limited role, courts are embarking on a dangerous journey when they begin to use policy considerations to withhold information not specifically exempted by the FOIA. This problem is compounded since the exemption comes at the threshold determination. In cases where policy problems are raised, the variety of considerations which could potentially enter into different cases makes it difficult to define a threshold equally applicable to all cases. For example, the threshold developed in *SDC Development* was that of records which touch upon "the structure, operation, or decision-making functions of the agency."⁶⁹ Yet in several cases, records having little to do with any of these criteria have been disclosed.⁷⁰

Possibly the most serious problem with the policy approach is that it tends to mask the true issue with a fictitious one.⁷¹ While purporting to define "record," the court is actually balancing the considerations for and against disclosure. The court asks whether the item is a record for FOIA purposes instead of the real question: Despite the lack of a statutory exemption, do special considerations require that the record be withheld from the public? Placing policy analysis into a definitional framework is a return to the immature jurisprudence of making "a fortress out of the dictionary;"⁷² litigants are encouraged to invent strained defini-

67. 5 U.S.C. § 552(c) (1976); notes 13-14, 18-20 and accompanying text *supra*.

68. See 80 HARV. L. REV. 909, 911 (1966).

69. 542 F.2d at 1120.

70. *E.g.*, *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971) (lists of employees eligible to vote in union representation elections); *Save the Dolphins v. United States Dep't of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975) (movie about commercial fishing techniques).

71. This criticism has arisen in other legal contexts. For example, see Professor Green's criticism of the proximate cause doctrine in L. GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927). A similar criticism has been levied in the statutory interpretation context against the "plain-meaning" rule. Murphy, *supra* note 45.

72. This phrase is borrowed from Judge Learned Hand's opinion in *Cabell v. Markham*, 148 F.2d 737 (2d Cir. 1945). Judge Hand's entire statement is worthy of note: "[I]t

tions of a term in order to justify a decision which should result from a more straightforward argument.

Despite its drawbacks, however, a complete rejection of a policy analysis is discomfoting. To deprive the courts of what little flexibility they possess, turning their decisions into mechanical applications of the Act, would lead to as many detrimental results as beneficial ones. Thus, in any model developed, some means of using policy analysis to achieve a level of flexibility must be retained.

IV. A MODEL FOR ANALYZING THE RECORD QUESTION

In the previous sections the advantages and disadvantages of definitional and policy approaches to the record question have been discussed. With that background, attention will now turn to a consideration of the proper role for each approach. Should one or the other be used in making the threshold determination of what constitutes a record? Can both play some part in the FOIA's interpretation? What practical considerations might a court consider in answering the question of whether an item is or is not a record subject to disclosure under the Act?

A. *Defining the Threshold*

1. *Choosing an approach*

In defining what is meant by the record threshold, courts could take either or both of the approaches outlined above. However, the use of different approaches by different courts, or even by the same court in different circumstances, can only result in inconsistency and uncertainty. It seems preferable, therefore, to consistently apply either one or the other.

The policy approach gives a court flexibility, albeit a flexibility which Congress did not likely intend. By determining policy under the guise of defining "record," the record requirement becomes a tool to achieve results seemingly forbidden by the Act, yet desirable in terms of public interest. This artificial use of the record requirement does not seem warranted unless no other avenue exists for permitting courts the flexibility they need.

The definitional approach, on the other hand, does not allow for the flexibility provided by the policy approach, but has the

is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Id.* at 739.

discrete advantage of being a more accurate threshold. There is no indication that Congress meant the term "record" to be used in other than a traditional manner. With the exception of borderline cases, the definitional test is consistent and relatively easy to apply, and because most requests under the FOIA are for items that are clearly records under the definitional approach, the borderline cases will be rare. Since, as shall be argued herein, an acceptable means of achieving flexibility through policy analysis does exist,⁷³ the definitional approach should be used to define the threshold record requirement. In using the definitional approach, there are several practical considerations that should be addressed.

2. *Deciding the record question*

Before addressing the task of defining the term "record," a court would be wise to consider whether the case can be decided on alternative grounds. Since there is no easy answer to a close question of whether an item is a record, there seems to be no reason to initiate an inquiry fraught with uncertainties when a more commonly traveled path will lead to a conclusive determination of the case. One example of an alternative ground for deciding a case would be a statutory exemption from disclosure available to the agency.⁷⁴ Another example might be when an agency's own definition of "record" clearly includes the item in question within its scope, since those definitions are binding upon the agency.⁷⁵

If there is no alternative ground for deciding the case, the court must determine whether the requested information fits within the term "record." It would appear that an ad hoc determination of cases would be preferable to trying to determine an all-inclusive definition—one which comfortably divides the world

73. See notes 79-103 and accompanying text *infra*.

74. In this regard, the Tenth Circuit's example in *Nichols v. United States*, 460 F.2d 671, *cert. denied*, 409 U.S. 966 (1972), is instructive. The district court noted that the items requested by the plaintiff, even if they were records, were exempt from disclosure under the FOIA. 325 F. Supp. at 136-37. The Tenth Circuit based its decision exclusively on that rationale, finding it unnecessary to even consider the record question. 460 F.2d at 673.

75. See *Service v. Dulles*, 354 U.S. 363, 388-89 (1957).

Although in some cases agencies have been allowed to violate their own regulations, *e.g.*, *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970), those cases have generally dealt with internal agency procedures rather than with the protection of an adverse party's interests. See Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 629-30 (1974). See also Berger, *Do Regulations Really Bind Regulators?*, 62 NW. U.L. REV. 137 (1967).

into records and nonrecords.⁷⁶ Of course, the drawback to any ad hoc approach is the lack of guidance it gives to the public, the agencies, and the lower courts.⁷⁷ However, under this model the question of whether an item is truly a record will be rather rare. The overwhelming majority of requests have been, and will likely continue to be, for items of information that fit squarely within the common conception of the term. Because the issue does not commonly arise, there seems to be little need to formulate a definition that would probably lead to more problems than solutions.

In making an ad hoc determination, a court would turn to the definitional approach for a standard. By consulting statutory and dictionary sources, and by employing the common meaning rule discussed above, the court can formulate an idea of how the characteristics of the item in question square with the term "record." After a sufficient number of cases arise which present this question, a court might even be able to generalize from past experiences and, at least in part, do away with the ad hoc approach by formulating a rule based upon that experience.

The result of adopting a definitional approach to the record threshold is to place a low threshold on the availability of information under the FOIA. Almost all requests for information will concern items that easily fall within the commonplace notions of the term "record." This result is entirely consistent with, if not mandated by, the FOIA's object of achieving the greatest level of disclosure consistent with legitimate governmental interests.⁷⁸

B. An Alternative Method of Achieving Flexibility

By adopting the definitional approach as the exclusive means of answering the record question, the flexibility inherent in the policy approach is lost. An alternative means of achieving that flexibility lies in a limited return to the doctrine of equitable discretion, based upon the court's inherent equitable powers attendant to the issuance of injunctions.

1. Background of the equitable discretion doctrine

Soon after the passage of the Act, it was advocated that courts have power independent of the Act to refuse to enjoin an

76. At this point in our experience of dealing with the record question under the FOIA it would be difficult, if not impossible, to formulate an effective standard for determining whether or not an item is a record.

77. Nimmer, *supra* note 60, at 939-42.

78. See *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

agency from withholding records.⁷⁹ Since that time, strong arguments have been made both for and against the judicial exercise of equitable power in FOIA cases.⁸⁰ The primary objections to the exercise of equitable discretion, or balancing the equities, have been twofold. First, the statute and its legislative history have been interpreted so as to deny the courts any right to refuse injunctive relief on grounds other than those specified in the Act.⁸¹ Second, it is feared that the exercise of broad equitable

79. Davis, *supra* note 1, at 767.

80. "Much ink has been spilled on this issue, both by courts and commentators" Rose v. Department of Air Force, 495 F.2d 261, 269 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976). See, e.g., Soucie v. David, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971) (no equitable discretion); *id.* at 1083-84 (Wilkey, J., concurring) (equitable discretion exists); FOIA Assessment, *supra* note 1, at 911-20 (equitable discretion exists); Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration*, 45 IND. L.J. 421 (1970) (no equitable discretion).

Despite the extensive comments, however, the Ninth Circuit is presently the only circuit expressly allowing equitable discretion. See Theriault v. United States, 503 F.2d 390, 392 (9th Cir. 1974); GSA v. Benson, 415 F.2d 878, 880 (9th Cir. 1969). In Theriault the court noted:

We realize that a given agency might fail to show a specific exemption protecting a given record and yet in good faith claim that dire adverse potentialities will occur and result from a disclosure of a given record.

". . . In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles, and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration."

503 F.2d at 392 (quoting GSA v. Benson, 415 F.2d at 880).

Despite this attitude, district courts in the Ninth Circuit have split on the issue. Accord, Theriault v. United States, 395 F. Supp. 637, 641-42 (C.D. Cal. 1975), *on remand from* 503 F.2d 390 (9th Cir. 1974); Long v. United States IRS, 349 F. Supp. 871, 873, 875 (W.D. Wash. 1972). *Contra*, Church of Scientology v. United States Dep't of Justice, 410 F. Supp. 1297, 1301 (C.D. Cal. 1976); Save the Dolphins v. United States Dep't of Commerce, 404 F. Supp. 407, 413 (N.D. Cal. 1975); Legal Aid Soc'y v. Schultz, 349 F. Supp. 771, 776 (N.D. Cal. 1972) (dictum).

For the status of the equitable discretion doctrine in the other circuits, see notes 91-92 *infra*.

81. See, e.g., Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

Cases denying the existence of equitable powers rely upon subsection (c) of the Act (subsection (f) of the original bill) and its explanatory section in the Senate report, which states: "The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available . . . unless explicitly allowed to be kept secret" S. REP. NO. 813, 89th Cong., 1st Sess. 10 (1965) (emphasis in original). Although this language is also found in the House report, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2429, that report also states that a court should issue injunctions "whenever it considers such action equitable and appropriate." *Id.* at 9, [1966] U.S. CODE CONG. & AD. NEWS at 2426. The House report, however, has been dismissed as a less reliable indicator of legislative intent. Getman v. NLRB, 450 F.2d 670 n.32 (D.C. Cir. 1971). See also Soucie v. David, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971). In another context, however, Justice Douglas has cited the disputed House language approvingly. Renegotiation Bd. v. Bannerkraft Clothing Co., 415 U.S. 1, 34 (1973) (Douglas, J., dissenting).

power would frustrate the policies expressed in the Act. For example, it has been asserted that "interjection of discretion would result in perennial uncertainty as to the result of a particular case,"⁸² that agencies would use such discretion as a means of forcing requesters to court even though a strong possibility exists that no statutory exemption is applicable,⁸³ and that courts will disregard the policies of the Act under the guise of balancing the equities.⁸⁴

In response to the lack-of-power argument, commentators have recognized the real possibility that such discretion does exist in a limited sphere.⁸⁵ The argument, in capsulized form, is that neither the statute nor its legislative history expressly forbids the courts from exercising their discretionary power to grant or deny injunctions. Since the court's equity powers cannot be revoked unless expressly stated in the Act,⁸⁶ it is argued that "the conflict in the language of the Act must be resolved in favor of preserving the equitable discretion of the district courts."⁸⁷

The second objection, based upon a fear that courts will frustrate the policies of the Act, has also been answered. Commentators have recognized that clear and workable limits can be placed on the exercise of such equitable power.⁸⁸ One suggested limita-

82. Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration*, 45 IND. L.J. 421, 432 (1970).

83. *Id.* at 433-34. This problem has been mitigated in part by the 1974 amendments to the Act. One of those amendments provides for a review of agency employees' actions by the Civil Service Commission when the withholding of a record is deemed arbitrary and capricious. 5 U.S.C. § 552(a)(4)(F) (1976). Another provides for the award of attorney's fees to successful plaintiffs. *Id.* § 552(a)(4)(E).

84. *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971). That argument seems especially pertinent where a litigant is contending that all equitable notions (e.g., "clean hands" doctrine) should be applicable to FOIA cases. See, e.g., *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429 (4th Cir. 1974).

85. See, e.g., *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 663 (6th Cir. 1972) (Miller, J., concurring); *Soucie v. David*, 448 F.2d 1067, 1083-84 (D.C. Cir. 1971) (Wilkey, J., concurring); Davis, *supra* note 1, at 767.

Probably the best explication of that argument is found in *FOIA Assessment*, *supra* note 1, at 911-20. Although a student work, it has been cited with great respect in cases and law review articles. E.g., *Department of Air Force v. Rose*, 425 U.S. 352, 370 n.7 (1976); Clark, *supra* note 1, at 748 n.30. It forms the basis for the arguments made herein.

86. See *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). But see *United Steelworkers of America v. United States*, 361 U.S. 39 (1959) (per curiam). For a reconciliation of these cases and an application of their authority to the instant problem, see *FOIA Assessment*, *supra* note 1, at 915-18.

87. *FOIA Assessment*, *supra* note 1, at 914.

88. *Id.* at 918-20. Although litigants may have pressed this issue, no court or commentator has seriously argued that all equitable doctrines should be applied to FOIA matters. The arguments for equitable discretion have generally involved a balancing-of-equities approach, presumably the governments' interests versus the plaintiff's interests.

tion is to deny injunctive relief only when a court concludes that the adverse impact upon governmental programs will be high and that the equitable interests of the person requesting the information are low.⁸⁹ Courts that have employed the equitable discretion technique, although never expressly discussing the issue, have implicitly limited their exercise of discretion by demonstrating an honest respect for the underlying policies of the Act—*e.g.*, broad disclosure of information.⁹⁰

Regardless of the arguments made in favor of equitable discretion, however, courts that have considered the issue have almost uniformly found that no *general* equitable discretion exists to withhold information that is not specifically exempted.⁹¹ The courts that have not specifically addressed the question also appear to lean in that direction.⁹² Even so, it has been conceded that

89. *Id.* One serious difficulty with this approach is that it considers the motives and interests of the individual requesting the information. Such an inquiry was expressly rejected with the adoption of the Act and the consequent dropping of the "directly and properly concerned" test under the original section. See S. REP. No. 813, 89th Cong., 1st Sess. 5-6 (1965).

90. Courts have been perceived as being sensitive to the FOIA's policies. Clark, *supra* note 1, at 748, 752.

It is interesting that in two of the three Ninth Circuit cases adopting the equitable discretion approach, the court nevertheless issued the injunction. *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Long v. United States IRS*, 349 F. Supp. 871 (W.D. Wash. 1972). But see *Therault v. United States*, 395 F. Supp. 637 (C.D. Cal. 1975).

91. The D.C. Circuit, in *Soucie v. David*, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971), was the first to reject the arguments favoring equitable discretion with persuasive dictum that was soon confirmed in *Getman v. NLRB*, 450 F.2d 670, 677-80 (D.C. Cir. 1971).

The Fourth Circuit followed that lead in a slightly different context when, in *Wellford v. Hardin*, 444 F.2d 21, 24-25 (4th Cir. 1971), it refused to balance the same interests Congress had considered in determining whether privacy concerns should play a part in the investigatory files exemption. In *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973), the court reconfirmed its view, and one year later nailed the lid on the coffin, saying curtly that subsection (c) "means what it says." *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429 (4th Cir. 1974).

The Sixth Circuit has similarly rejected a general equitable approach to FOIA injunctions. *Freuhauf Corp. v. IRS*, 522 F.2d 284, 291-92 (6th Cir. 1975), *vacated and remanded on other grounds*, 429 U.S. 1085 (1977); *Hawkes v. IRS*, 467 F.2d 787, 792 n.6 (6th Cir. 1972); *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 662 (6th Cir. 1972).

92. Case law in the Second Circuit is still inconclusive. In *Rose v. Department of Air Force*, 495 F.2d 261 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976), the court refused to pass on the issue while noting "that generally the Act constrains the use of broad judicial discretion to block disclosure." *Id.* at 269-70 (emphasis in original). However, in denying a litigant his attorney's fees, the United States District Court for the Southern District of New York mentioned that the use of equitable discretion might have been particularly appropriate were the case not moot. *Kaye v. Burns*, 411 F. Supp. 897, 904 n.10 (S.D.N.Y. 1976) (letter withheld from person being investigated by grand jury at request of Justice Department despite his FOIA request). In a recent case, the same district court *sua sponte* found equitable jurisdiction to withhold portions of a pamphlet of the Bureau of Alcohol, Tobacco, and Firearms entitled *Raids and Searches*. *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 77 Civ. 4313 (S.D.N.Y., decided Jan. 13, 1978).

there may be room for the exercise of a limited discretion in an appropriate case. *Soucie v. David*,⁹³ the first case to conclude that discretion does not exist, noted that "[t]here may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion"⁹⁴ Other courts have joined in this observation.⁹⁵

Because of the admitted possibility of an exceptional case, courts and commentators may not disagree as much as it would seem. Indeed, one court noted that the only question may be what constitutes an appropriate case:

We are not sure how real the conflict is in most instances, since even the courts that are cited as opposing the notion of general equity power to refuse disclosure recognize that a truly exceptional case might require it. . . . It may be that the true controversy is over the definition of an exceptional case⁹⁶

The process of defining "an exceptional case" and the process of placing proper limitations upon the exercise of equitable

In the Third Circuit, one district court has found no equitable discretion to exist. *Wine Hobby, USA, Inc. v. United States Bureau of Alcohol, Tobacco & Firearms*, 363 F. Supp. 231, 234-36 (E.D. Pa. 1973), *rev'd on other grounds sub nom. Wine Hobby USA, Inc. v. United States IRS*, 502 F.2d 133 (3d Cir. 1974). The Third Circuit reversed that case on other grounds finding it unnecessary to reach the equitable discretion issue. *Wine Hobby USA, Inc. v. United States IRS*, 502 F.2d 133, 137-38 (3d Cir. 1974).

The opinions in the Fifth Circuit are also unclear. *Stokes v. Hodgson*, 347 F. Supp. 1371, 1376-77 (N.D. Ga. 1972), *aff'd sub nom. Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973), in which a district court found no equitable jurisdiction, was affirmed without mention of that issue. *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973). Although a balance-of-equities argument was used to support nondisclosure in *Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1034 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973), language in a recent case seems to lead to contrary conclusion. *Kent Corp. v. NLRB*, 530 F.2d 612 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

93. 448 F.2d 1067 (D.C. Cir. 1971).

94. *Id.* at 1077.

It should be noted that the case which adopted the *Soucie* dictum as law, although quoting from the opinion with approval, did not quote this language. *Getman v. NLRB*, 450 F.2d 670, 680 (D.C. Cir. 1971). This could lead to a conclusion that the court was not willing to allow any possibility for the exercise of discretion notwithstanding the *Soucie* dictum. However, in *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974), the court hinted that it might reconsider the *Getman* and *Soucie* holdings if an appropriate case were to arise. *Id.* at 355. See also *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 66 n.15 (D.C. Cir. 1974).

95. This view was also adopted by the Fourth Circuit in *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657 (6th Cir. 1972), wherein the court reviewed the *Soucie* language and added that "[t]his case does not afford any special circumstances which can properly be argued as overriding the statutory mandates." *Id.* at 662.

96. *Rose v. Department of Air Force*, 495 F.2d 261, 269 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976) (citations omitted). This observation is in harmony with the conclusion that any "resort to equity would be a truly extraordinary measure, rarely invoked." *FOIA Assessment*, *supra* note 1, at 920.

discretion are, in essence, the same. If those proper limits may be established, the concern that equitable discretion will frustrate the purpose of the Act may be alleviated. The possibility of establishing those limits will now be explored.

2. *Equitable discretion's limited role*

Commentators have recognized that the circumstances in which discretion may be properly exercised will be rare,⁹⁷ but how are those circumstances to be ascertained? Although it would be naive to assume that Congress considered all possibilities in enacting the FOIA, it did consider several categories of information.⁹⁸ Therefore, the exercise of equitable discretion should at least be limited to those categories of information not specifically considered by Congress when it struck the balance. If, for example, a requested record could be classified as an investigatory file,⁹⁹ yet it was not the type of file which was exempted by the Act, no discretion should be available. In addition to the exempted categories of records, information which reflects the structure, operation, or decisionmaking processes of the agency should not admit to the exercise of discretion.¹⁰⁰

Once a court has determined that an item of information is of a type which Congress did not specifically consider, other policies impacting on the exercise of discretion should affect the court's decision. The court must keep in mind the heavy presumption favoring disclosure established by the Act.¹⁰¹ Thus, when balancing the considerations for and against disclosure, the scales must be heavily weighted for disclosure before discretion favoring secrecy should be exercised. However, in this balancing process it should be the information's value to the public rather than the particular personal interests of the requesting party that should be weighed against any countervailing considerations.¹⁰² Therefore, when the adverse impact of disclosure upon an estab-

97. *FOIA Assessment*, *supra* note 1, at 920.

98. See notes 8-12 and accompanying text *supra*.

99. 5 U.S.C. § 552(b)(7) (1976).

100. This is the general category of information treated by subsections (a)(1) and (2) of the FOIA. It is also the clearest and most longstanding target of Congress' attempts to open up governmental processes to public view. See S. REP. NO. 813, 89th Cong., 1st Sess. (1965).

101. S. REP. NO. 813, 89th Cong., 1st Sess. 6, 8-9 (1965).

102. One of the FOIA's principal accomplishments was to drop the "directly and properly concerned" test contained in its predecessor statute and to allow "any person" to receive agency information not otherwise exempted. The result of that change was to foreclose any judicial inquiry into the motives or interests of any particular requesting party. See *id.* at 5-6.

lished governmental program would be great, and when the informational value of the record to the public is comparatively slight, a court might refuse to require disclosure of the information.

At this point one might legitimately ask if the equitable discretion doctrine avoids the difficulties presented by the policy approach.¹⁰³ Although both methods share the advantage of giving a court flexibility in making decisions, equitable discretion is preferable because it does not purport to deal with the threshold record requirement. Since the court is not forced to resort to an artificial definition of "record" in order to arrive at a just result—a definition that might confuse analysis in other cases—it can deal with the issue in a straightforward, forthright manner.

Concededly, because courts only have a limited role in the FOIA's administration, any exercise of discretion may border on judicial legislation. That problem is inherent in *any* attempt to achieve a degree of flexibility. Rather than force courts into an inflexible approach to the Act, however, this limited role should serve to suggest a final limitation on the use of equitable discretion: a healthy judicial respect for the purpose behind the FOIA and an honest recognition that discretion must truly be limited to the exceptional case.

C. *The Model in Practice*

In order to visualize this model in action, let us return briefly to the sample cases. In the *Nichols* case, the Tenth Circuit's disposition of the record question on the statutory exemption ground was appropriate under this model. Assuming, however, that an alternative ground did not exist, the district court reached the right conclusion, albeit by a somewhat less analytical route than the model would require. Instead of analyzing the characteristics of the items in question and comparing them with the characteristics which make items records, the court simply reviewed several definitions and concluded that clothing, histological preparations, and the other objects in question are not records. Under the model the court should have compared the informational characteristics of the items with the dictionary, statutory, and common meaning rule aids in making its determination. It would have shunned the formulation of a definition applicable to all cases, but would have concluded that, whatever the definition might ultimately be, these articles were not included within it.

103. See notes 65-72 and accompanying text *supra*.

The facts in *SDC Development* illustrate the other half of the model. After a court determined that computer tapes squared with the common conception of the term "record," it would proceed to equitable discretion analysis. First, it is clear that the records do not contain any of the types of information specifically considered by Congress; they do not deal with the structure, operation, or decisionmaking processes of the agency, nor are they covered by a statutory exemption.¹⁰⁴ Equitable discretion, therefore, might be appropriate. The court would then examine the equities of the case. Disclosure of the MEDLARS tapes under the FOIA would be significantly detrimental to the National Library of Medicine.¹⁰⁵ The library would lose its ability to recoup its developmental costs and gain valuable assistance from other institutions and universities. The increased public benefit would be slight, since the tapes are already available to the public through libraries and other institutions. Making them available through the FOIA serves only to reduce the cost. Because the records were not a type specifically considered by Congress when enacting the FOIA, and since the equities favor nondisclosure, the court could exercise its discretion to refuse to compel disclosure, preserving the integrity of the National Library of Medicine while not significantly affecting the public's interests under the Act.

V. CONCLUSION

By limiting FOIA disclosure to information stored in agency records, Congress impliedly placed a qualitative threshold requirement on information disclosure. Courts can treat the record requirement in terms of policies internal and external to the FOIA or in terms of the traditional notions attached to the term "record." The policy approach, while having the advantage of adding flexibility to FOIA administration, is not a true threshold. Rather, it is a means of exempting from disclosure those categories of records that the court does not believe to be the type which Congress intended that the FOIA reach.

Serious difficulties, both legal and theoretical, attend an analysis based upon policy considerations. Apart from the lack of indication in the history and structure of the Act that such a result was contemplated, a policy analysis tends to put the court

104. Because of the narrow construction given to the statutory exemptions, *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976), the library's claim that the charge provisions of the National Library of Medicine Act constitute a specific exemption of the tapes from FOIA disclosure could not withstand scrutiny.

105. 542 F.2d at 1120.

into the position of a legislature. By dealing with the record requirement in terms of policy, the court adds an artificial requirement to the Act, with a resultant confusion as to what the record requirement actually is.

The more proper threshold exists in a commonsense approach to the record requirement. By treating the term "record" in the commonly understood manner in which it is used, the threshold attains a level of certainty that is not possible under the policy approach.

Nevertheless, mere mechanical application of an act as vague as the FOIA is not justified in light of the seriousness of the interests competing for the court's favor, nor by the history or purpose of the Act. Some flexibility must be maintained. It is in the doctrine of a limited and controlled equitable discretion, not in an artificial definition of "record," that such flexibility should be found.

Stephen D. Hall