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Note: Disclosure of Union Authorization Cards Under the Freedom of Information Act—Interpreting the Personal Privacy Exemptions

The Freedom of Information Act (FOIA)¹ was enacted by Congress in 1966 “to establish a general philosophy of full agency disclosure.”² The Act creates a general right of access to federal agency records,³ subject only to nine specific exemptions.⁴ Much of the litigation

1. 5 U.S.C. § 552 (1976). See generally SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (Comm. Print 1974); see also HOUSE COMM. ON GOVERNMENT OPERATIONS & SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 SOURCEBOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS (Joint Comm. Print 1975).

2. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as SENATE REPORT].

3. [E]ach agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3) (1976).

4. The rule of disclosure does not apply to records that are

(1) . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy. . . ;

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

(3) specifically exempted from disclosure by statute (other than [the Government in the Sunshine Act, 5 U.S.C. § 552b (1976)]), 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 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 .

tion concerning the scope of these exemptions has involved the National Labor Relations Board (Board), which has long sought to protect the confidentiality of the records it uses as a basis for union representation elections and unfair labor practice proceedings.⁵

The FOIA exemptions most frequently invoked by the Board have been exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"⁶ and exemption 7, which applies to "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . interfere with enforcement proceedings . . . [or] constitute an unwarranted invasion of personal privacy."⁷ Courts have generally preserved the confidentiality of witness affidavits and Board agents' reports under exemption 7 by adopting a broad interpretation of "law enforcement purposes" and by finding that disclosure of such records would interfere with these purposes.⁸ Courts are divided, however, on whether either exemption 6 or exemption 7 justifies the

only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

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

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

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

Id. § 552(b).

5. See generally PROJECT ON NATIONAL SECURITY AND CIVIL LIBERTIES OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LITIGATION UNDER THE AMENDED FEDERAL FREEDOM OF INFORMATION ACT 73 (2d ed. 1977) [hereinafter cited as ACLU PROJECT]; Connolly & Fox, *Employer Rights and Access to Documents Under the Freedom of Information Act*, 46 FORDHAM L. REV. 203, 230-37 (1977); Weigman, *Administrative Law: The Scope of the FOIA Exemptions*, 1977 ANN. SURVEY AM. L. 1; Note, *The Right to Disclosure of NLRB Documents Under the Freedom of Information Act*, 5 FORDHAM URB. L.J. 119 (1976); Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery*, 8 LOY. CHI. L.J. 145 (1976) [hereinafter cited as *Backdooring the NLRB*]; Note, *The Impact of the FOIA on NLRB Discovery Procedures*, 10 MICH. J.L. REF. 476 (1977); 45 GEO. WASH. L. REV. 114 (1976).

6. 5 U.S.C. § 552(b)(6) (1976).

7. *Id.* § 552(b)(7)(A), (C). Exemption 5, *id.* § 552(b)(5), which deals with inter-agency and intra-agency memoranda, has also been invoked by the Board, see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), but the exemption has no application to authorization cards.

8. See, e.g., *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976); *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir. 1974). See generally notes 37-39, 102-03 *infra* and accompanying text.

Board's refusal to reveal union authorization cards.⁹ This divergence of views is based on a more fundamental disagreement about how broadly the exemptions of the FOIA should be construed in order to accommodate the policy of the National Labor Relations Act (NLRA),¹⁰ which protects employees' freedom of association and organization.¹¹

This Note analyzes the issues raised by the authorization card cases. After outlining the policies and procedures of the NLRA and the FOIA, the Note examines judicial constructions of exemptions 6 and 7 and argues that disclosure of authorization cards would infringe both the statutory and constitutional rights of employees under the NLRA. Finally, the Note discusses the problems inherent in attempting to use a broad interpretation of the exemptions and proposes an alternative method for protecting the rights of employees without sacrificing the general policy of the FOIA in favor of full agency disclosure.

I. THE PROBLEM

The NLRA was enacted to reduce industrial strife by encouraging collective bargaining and "by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."¹² To help achieve this goal, the NLRA empowers and requires the Board to certify the employees' choice of bargaining representatives and to promulgate election rules to guarantee the freedom of such a choice.¹³ An important goal in the development of these election rules has been to ensure that election campaigns are held in "laboratory conditions,"¹⁴ free of undue influence by either the union or the employer. Speedy elections and a policy of confidentiality for records revealing the union sentiments of employees are among the methods by which the Board has sought to achieve these conditions.¹⁵

9. See notes 40-48 *infra* and accompanying text. A survey of several of these decisions is found in Weigman, *supra* note 5, at 21.

10. 29 U.S.C. §§ 141-168 (1970).

11. See *id.* § 157.

12. *Id.* § 151.

13. See *id.* §§ 151, 156, 159.

14. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative. . . .

. . . .
. . . In election proceedings, it is the Board's function to provide a laboratory . . . as nearly ideal as possible, to determine the uninhibited desires of the employees.

General Shoe Corp., 77 N.L.R.B. 124, 126-27 (1948).

15. These two methods are designed to neutralize the influential leverage of

Required by statute to conduct a secret ballot election when it appears that a substantial number of employees in a given bargaining unit wish to be represented by a union,¹⁶ the Board has promulgated a rule that a group petitioning for a representation election must present evidence that thirty percent of the workers in the bargaining unit desire representation by a particular union.¹⁷ This evidence usually takes the form of union authorization cards,¹⁸ which employ-

employers that inheres in the employee-employer relationship. *See Intertype Co. v. NLRB*, 401 F.2d 41, 44, 45 (4th Cir. 1968); *cf.* 29 U.S.C. § 657(f)(1) (1970) (employees reporting OSHA violations may request that their names not be released to their employers). Limited discovery rules serve a similar goal in unfair labor practice proceedings. *See Title Guarantee Co. v. NLRB*, 534 F.2d 484, 487 n.7, 491 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976).

16. Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1) (1970).

17. *See* 29 C.F.R. § 101.18(a) (1977). After an election petition is filed, a Board agent investigates its validity and the appropriateness of the proposed bargaining unit. If the parties cannot agree on election terms, an administrative hearing is held to determine the adequacy of the showing of interest and the appropriateness of the bargaining unit. If the hearing examiner determines that "a question . . . of representation affecting commerce exists," 29 U.S.C. § 159(c)(1) (1970), he then directs that an election be held, usually within thirty days of his decision. *See* 29 C.F.R. § 101.21(d) (1977).

The requirement of a thirty percent showing of interest, along with the requirement of a petition and representation hearing, was developed as an administrative guideline during the early 1940's and officially announced by the Board in 1945. *See Brad Foote Gear Works, Inc.*, 60 N.L.R.B. 97, 99 n.4 (1945); 10 NLRB ANN. REP. 16 n.7 (1945).

18. The Board has also accepted, as suitable evidence of support, signatures on a petition, signed union application cards, and cards expressing a desire for an election and for certification of the petitioning union. *See NLRB v. Somerset Shoe Co.*, 111 F.2d 681 (1st Cir. 1940); *Potomac Elec. Power Co.*, 111 N.L.R.B. 553 (1955).

ees sign to authorize a union to represent them for all purposes of collective bargaining.¹⁹

Other than cases arising under the FOIA, demands for access to authorization cards have been rare, and the Board has effectively preserved the confidentiality of these cards through a policy that precludes any legal challenge to their validity.²⁰ Such challenges are disallowed because they would delay the election process²¹ and because the Board-administered election is regarded as a more reliable measure of union support than the showing of interest, which is only an administrative yardstick to determine whether an election is worthwhile.²²

Prior to the enactment of the FOIA, the nearest approximation of a direct request to see authorization cards occurred in 1941 in a case where the employer disputed a Board order to bargain based on a showing of majority support for the union.²³ The employer's claim that he was entitled to access to the cards in order to determine their validity was rejected on the ground that disclosure would "deprive the employees of their secrecy of choice which the Act is designed to secure."²⁴ This language suggests that the confidentiality of union authorization cards is protected not only as a part of the Board's efforts to preserve laboratory conditions during an election campaign,

19. On a typical union authorization card the employee states that "I, the undersigned employee of [name of company] hereby authorize the [name of union] to represent me for all purposes of collective bargaining in respect to wages, hours and other conditions of employment in accordance with the provisions of the National Labor Relations Act." *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 217 n.2 (3d Cir. 1977). The card also contains space for the employee's name, address, and signature. *See id.* *See also* *Silver Fleet, Inc.*, 174 N.L.R.B. 873, 875 n.8 (1969) (concurring opinion) (proposal for a model authorization card).

20. *See NLRB v. P.A.F. Equipment Co.*, 528 F.2d 286 (10th Cir. 1976); *Intertype Co. v. NLRB*, 401 F.2d 41 (4th Cir. 1968); *NLRB v. Air Control Prods.*, 335 F.2d 245 (5th Cir. 1964); *Kearney & Trecker Corp. v. NLRB*, 209 F.2d 782 (7th Cir. 1953); *NLRB v. J.I. Case Co.*, 201 F.2d 597, 600 (9th Cir. 1953) ("Among other undesirable consequences, a trial of [the sufficiency of a union's showing of interest] would bring about disclosure of the individual employees' desires with respect to representation and would violate the long-established policy of secrecy of the employees' choice in such matters.").

21. "Since time is often a critical factor in election cases, . . . it is essential that representation petitions be processed expeditiously with a view to holding the election as soon after the filing of the petition as is reasonably possible." *Intertype Co. v. NLRB*, 401 F.2d 41, 44 (4th Cir. 1968) (citation omitted) (holding that employer could not challenge validity of authorization cards).

22. *See NLRB v. J.I. Case Co.*, 201 F.2d 597, 600 (9th Cir. 1953). *See generally* *NLRB v. P.A.F. Equipment Co.*, 528 F.2d 286 (10th Cir. 1976); *Intertype Co. v. NLRB*, 401 F.2d 41 (4th Cir. 1968); *NLRB v. Air Control Prods.*, 335 F.2d 245 (5th Cir. 1964); *Kearney & Trecker Corp. v. NLRB*, 209 F.2d 782 (7th Cir. 1953).

23. *See NLRB v. New Era Die Co.*, 118 F.2d 500 (3d Cir. 1941).

24. *Id.* at 504. *See generally* 29 U.S.C. § 159(c)(1) (1970) (requiring that the Board "direct an election by secret ballot").

but also as a part of the statutory requirement that elections be conducted by secret ballot.²⁵

While the NLRA thus seeks to preserve the confidentiality of union authorization cards, the FOIA mandates disclosure of all federal agency records to "any person"²⁶ who requests to see them, unless the records are explicitly exempted by the statute.²⁷ Any final agency refusal to disclose information is immediately reviewable by a federal district court.²⁸

In drafting and subsequently amending the nine statutory exemptions to the FOIA, Congress has sought to strike a balance between freedom of information and other important interests.²⁹ Congress was particularly concerned that a policy of full disclosure of governmental records would lead to improper invasions of privacy.³⁰ Rather than enacting a general exemption to protect personal privacy interests, however, Congress chose to limit such protection to two specific contexts.³¹ Under exemption 6 the agency may refuse to dis-

25. See notes 142-45 *infra* and accompanying text.

26. "[E]ach agency, upon any request for records . . . shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3) (1976).

27. *Id.* In reference to the exemptions, the FOIA states that "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress." *Id.* § 552(c).

Prior to the enactment of the FOIA, disclosure of information was governed by the Administrative Procedure Act, ch. 324, § 3, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 552 (1976)). The Senate Report on the FOIA characterized this section as a "withholding statute, not [a] disclosure statute." SENATE REPORT, *supra* note 2, at 5. The pre-FOIA Administrative Procedure Act allowed information to be withheld "for good cause" or when secrecy was "in the public interest," or when the person requesting the information was not "properly or directly concerned." Administrative Procedure Act, ch. 324, § 3, 60 Stat. 237 (1946) (current version at 5 U.S.C. § 552 (1976)). Final decisions on disclosure lay with governmental officials alone without effective judicial review of denied requests.

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

5 U.S.C. § 552(a)(4)(B) (1976).

29. See SENATE REPORT, *supra* note 2, at 3, 5, 7.

30. See generally Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975) [hereinafter cited as *Michigan Project*].

31. For discussion of the cases interpreting the protection of privacy under the FOIA, especially under exemption 6, see ACLU PROJECT, *supra* note 5, at 44-52, 75; *Michigan Project*, *supra* note 30, at 1078-85; Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 COLUM. L. REV. 895, 953-56 (1974); Comment, *The*

close "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,"³² and under exemption 7(C) "investigatory records compiled for law enforcement purposes" may be preserved from public scrutiny, "but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy."³³

In the balancing between disclosure and privacy, the legislative reports make clear that the interest in disclosure is at least as great as the interest in privacy.³⁴ Furthermore, the FOIA explicitly precludes consideration of privacy interests other than those specifically enumerated in the exemptions,³⁵ and the Supreme Court has read this limitation as indicating that the exemptions themselves are to be construed narrowly.³⁶

Until recently, conflicts between the FOIA and the NLRA generally arose when a party requested to see the affidavit of a witness in an unfair labor practice proceeding.³⁷ Suits were brought under the

Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974, 11 HARV. C.R.-C.L. L. REV. 596 (1976).

32. 5 U.S.C. § 552(b)(6) (1976).

33. *Id.* § 552(b)(7)(C).

34. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6 (1966), reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2423 [hereinafter cited as HOUSE REPORT]:

It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to confide in his Government. This bill strikes a balance in considering all these interests.

The Senate Report describes this balance as "a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." SENATE REPORT, *supra* note 2, at 3. This emphasis is reflected in the "clearly unwarranted" and "unwarranted" invasion of privacy language of exemptions 6 and 7.

35. See 5 U.S.C. § 552(c) (1976) (withholding of information is not authorized "except as specifically stated" in the exemptions).

36. "These exemptions are explicitly made exclusive," *EPA v. Mink*, 410 U.S. 73, 79 (1973), and must be construed narrowly, *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). See also *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

37. Unfair labor practice proceedings must be initiated by the filing of a charge with the Board by an aggrieved person, employer, or qualified labor organization within six months of the alleged unfair labor practice. See 29 U.S.C. § 160(b) (1970). The charging party usually submits supporting evidence in the form of affidavits and lists of witnesses. The Board then makes an investigation of the charges. If the charges are substantiated and a settlement is not reached, the Regional Director will issue a complaint and a hearing will be held before an administrative law judge, who prepares a decision containing proposed findings of fact and recommendations for the disposition of the case to the Board. For cases and commentary concerning requests for affidavits gathered during Board investigation, see note 5 *supra*.

FOIA in order to circumvent the limited discovery privileges allowed under Board regulations.³⁸ Since formal proceedings were underway in these cases, most of the decisions turned on the question whether disclosure would, in terms of exemption 7(A), "interfere with law enforcement proceedings."³⁹ Given the applicability of exemption 7(A), the courts did not have to determine whether disclosure would constitute an unwarranted invasion of privacy under exemption 6 or 7(C).

Since 1976, however, there have been several cases to which exemption 7(A) has not applied.⁴⁰ In each case, the regional office of the

38. The Board does not allow the discovery of witness statements in the possession of the Board until the witness has testified. See 29 C.F.R. §§ 102, 118(b)(1) (1977). Courts have criticized this narrow discovery policy as promoting "trial by ambush." See *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559, 563 (6th Cir. 1977); *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377, 387 (1st Cir. 1977). Recently, the Chairman's Task Force on the NLRB has recommended the establishment of more extensive discovery procedures. See CHAIRMAN'S TASK FORCE ON THE NLRB, 1976 INTERIM REPORT AND RECOMMENDATIONS, reprinted in 93 LAB. REL. REP. (BNA) 221, 247 (1976).

39. Exemption 7(A) excludes from disclosure under the FOIA any "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . interfere with law enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (1976). The Supreme Court has concluded that exemption 7(A) was not intended "to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *NLRB v. Robbins Tire & Rubber Co.*, 98 S. Ct. 2311, 2324 (1978). Applying this conclusion to the facts presented, the Court in *Robbins Tire* held "that witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until the completion of the Board's hearing." *Id.* In its opinion, the Court noted that the weight of authority in the circuit courts of appeals had followed the Second Circuit's lead in *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2d Cir.), cert. denied, 429 U.S. 834 (1976), which had also held witness affidavits exempt from disclosure under exemption 7(A). See 98 S. Ct. at 2315. See generally *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977); *Bellingham Frozen Foods v. Henderson*, No. 76-1684 (9th Cir. May 3, 1977), rev'g 91 L.R.R.M. 2761 (W.D. Wash. 1976); *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139 (9th Cir. 1976); *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976); *Cessna Aircraft Co. v. NLRB*, 542 F.2d 834 (10th Cir. 1976); *Maremount Corp. v. NLRB*, 93 L.R.R.M. 2799 (10th Cir. 1976); *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63 (10th Cir. 1976); *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976); *Goodfriend W. Corp. v. Fuchs*, 535 F.2d 145 (1st Cir.), cert. denied, 429 U.S. 895 (1976); *Kent Corp. v. NLRB*, 530 F.2d 612 (5th Cir.), cert. denied, 429 U.S. 920 (1976).

40. In these cases, no unfair labor practice complaint had been issued against the party seeking disclosure, so that the courts could not rely on exemption 7(A). See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977), rev'g 414 F. Supp. 426 (E.D. Pa. 1976); *Madeira Nursing Center v. NLRB*, 96 L.R.R.M. 2411 (S.D. Ohio 1977), appeal docketed, No. 77-3370 (6th Cir. July 19, 1977); *Howard Johnson Co. v. NLRB* (Region 3), 96 L.R.R.M. 2214 (W.D.N.Y. 1977); *Pacific Molasses Co. v. NLRB*, 95 L.R.R.M. 2638 (E.D. La. 1977), rev'd, 577 F.2d 1172 (5th Cir. 1978); *Howard Johnson Co. v. NLRB* (Region 7), 444 F. Supp. 843 (E.D. Mich. 1977), appeal docketed, No. 77-1763 (6th Cir. Dec. 19, 1977).

Board was presented with petitions for an election supported by union authorization cards that substantiated an adequate showing of interest. The plaintiff-employers, seeking to challenge the adequacy of the showing prior to the representation hearing, requested to see the cards. When the Board refused,⁴¹ the employers brought suits under the FOIA to compel disclosure.⁴²

In deciding these authorization card cases the courts have been far from unanimous in either result or rationale. Four federal district courts have ordered disclosure of the cards upon finding that none of the FOIA exemptions was applicable.⁴³ Reviewing one such decision, the Third Circuit first agreed that exemption 7 did not apply, but then reversed the district court on the ground that the cards were protected from disclosure by exemption 6.⁴⁴ In reversing another such district court decision, the Fifth Circuit has recently followed the reasoning of the Third Circuit as to exemption 6 without reaching the question of the applicability of exemption 7.⁴⁵ Two federal district courts have held the cards exempt under both exemptions 6 and 7,⁴⁶ while another court has applied exemption 6 without rejecting the possible application of exemption 7.⁴⁷ Finally, one federal district

41. Courts presumably would not order that the actual cards be handed over, but rather that a photostatic copy of them or a list of those signing the cards be disclosed. This distinction may be important in light of the Third Circuit's statement that the photostatic copies of the cards are the "agency record," not the cards themselves since "there is a plausible argument that the cards are union property, merely in the temporary possession of the NLRB." *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 218 n.4 (3d Cir. 1977).

42. In four other authorization card cases, plaintiffs were involved in unfair labor practice proceedings at the time the FOIA suits were brought. See *L'eggs Prods., Inc. v. NLRB*, 93 L.R.R.M. 2488 (C.D. Cal. 1976) (cards exempt under exemptions 6 and 7(C)); *Donn Prods., Inc. v. NLRB*, 93 L.R.R.M. 2065 (N.D. Ohio 1976) (cards not exempt under either exemption 6 or 7); *Gerico, Inc. v. NLRB*, 92 L.R.R.M. 2713 (D. Colo. 1976) (cards exempt under exemption 7(A) during pendency of proceedings, but after proceeding may be released along with other records); *NLRB v. Biophysics Sys., Inc.*, 91 L.R.R.M. 3079 (S.D.N.Y. 1976) (cards exempt under 7(C)).

43. See *Pacific Molasses Co. v. NLRB*, 95 L.R.R.M. 2638 (E.D. La. 1977), *rev'd*, 577 F.2d 1172 (5th Cir. 1978); *Howard Johnson Co. v. NLRB* (Region 7), 444 F. Supp. 845 (W.D. Mich. 1977), *appeal docketed*, No. 77-1763 (6th Cir. Dec. 19, 1977); *Donn Prods., Inc. v. NLRB*, 93 L.R.R.M. 2065 (N.D. Ohio 1976); *Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426 (E.D. Pa. 1976), *rev'd*, 556 F.2d 214 (3d Cir. 1977).

44. See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 218-19, 221 (3d Cir. 1977), *rev'g* 414 F. Supp. 426 (E.D. Pa. 1976).

45. See *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978), *rev'g* 95 L.R.R.M. 2638 (E.D. La. 1977).

46. See *Howard Johnson Co. v. NLRB* (Region 3), 96 L.R.R.M. 2214 (W.D.N.Y. 1977); *L'eggs Prods., Inc. v. NLRB*, 93 L.R.R.M. 2488 (C.D. Cal. 1976).

47. See *Madeira Nursing Center v. NLRB*, 96 L.R.R.M. 2411 (S.D. Ohio 1977), *appeal docketed*, No. 77-3370 (6th Cir. July 19, 1977).

court has relied exclusively on exemption 7 in refusing to order disclosure.⁴⁸

To understand this disagreement among the courts, it is necessary to examine the two general questions of interpretation that the decisions have considered. Because Congress decided to limit consideration of privacy interests to specific types of materials, a consideration of an employer's claim to access involves two steps.⁴⁹ The first question is whether the cards are "similar" to the personnel and medical files covered by exemption 6,⁵⁰ or are "investigatory records compiled for law enforcement purposes" under exemption 7.⁵¹ The second question, under either exemption, is whether the disclosure of the cards would constitute an "unwarranted invasion of personal privacy."⁵²

II. THRESHOLD REQUIREMENTS

A. EXEMPTION 6: "PERSONNEL AND MEDICAL FILES AND SIMILAR FILES"

In attempting to determine the applicability of exemption 6 to union authorization cards, the threshold question is whether such cards are sufficiently similar to medical and personnel files for them to fall within the exemption.⁵³ The legislative reports mention the files maintained by the Veteran's Administration, the Department of Health, Education and Welfare, the Selective Service, and the Bureau of Prisons as the types of files covered by the exemption,⁵⁴ al-

48. See *NLRB v. Biophysics Sys., Inc.*, 91 L.R.R.M. 3079 (S.D.N.Y. 1976).

49. Although this two-step inquiry, first into threshold requirements and then into the invasion of privacy issue, is not as clearly delineated in exemption 6 as in exemption 7, one must recall that the current exemption 7 is the product of a 1974 amendment to the FOIA and reflects the lessons learned from eight years of experience with the Act. Infrequently litigated, exemption 6 has not been altered or clarified by Congress since its enactment. Nevertheless, in the only Supreme Court test of exemption 6, the Court held that it does not establish a blanket exemption for all personnel and medical files. See *Department of Air Force v. Rose*, 425 U.S. 352 (1976). The Court insisted that disclosure of a file, whether medical, personnel, or similar, must constitute an unwarranted invasion of privacy to be exempt. See *id.* at 371.

50. 5 U.S.C. § 552(b)(6) (1976).

51. *Id.* § 552(b)(7).

52. *Id.* § 552(b)(6). Exemption 6 requires that the invasion of privacy be "clearly unwarranted." *Id.* (emphasis added); see note 114 *infra*.

53. See 5 U.S.C. § 552(b)(6) (1976). For discussions of the meaning of "similar files," see Belair, *Agency Implementation of the Privacy Act and the FOIA, Impact of the Government's Collection, Maintenance and Dissemination of Personally Identifiable Information*, 10 J. MAR. J. PRAC. & PROC. 465, 468 (1977); *Michigan Project*, *supra* note 30, at 1078-85; Note, *supra* note 31, at 953; Comment, *supra* note 31, at 601-04; Comment, *Freedom of Information Act: The Expansion of Exemption Six*, 27 U. FLA. L. REV. 848 (1975); 16 B.C. INDUS. & COM. L. REV. 240, 240-47 (1975).

54. See SENATE REPORT, *supra* note 2, at 9; HOUSE REPORT, *supra* note 34, at 11.

though they also make it clear that this list is not meant to be exhaustive.⁵⁵ The House report suggests that files are similar when they contain "intimate details" about individuals,⁵⁶ while the Senate report mentions records containing "vast amounts of personal data."⁵⁷ The authors of the House report evidently contemplated a very broad interpretation of "similar files" inasmuch as they concluded that exemption 6 would exempt "those kinds of files the disclosure of which might harm the individual."⁵⁸

Under the *ejusdem generis* canon of statutory construction,⁵⁹ however, the scope of "similar" would be restricted by the preceding, more particular, reference to "medical" and "personnel" files. This approach was taken by the Fourth Circuit in *Robles v. EPA*,⁶⁰ where the court stated that for a file to be "similar" it "must have the same characteristics of confidentiality that ordinarily attach to information in medical or personnel files; that is . . . 'intimate details' of a 'highly personal nature'"⁶¹ The material sought in *Robles* was an EPA survey of radiation levels of houses and buildings constructed on a fill containing uranium tailings.⁶² Since the information did not relate to individuals or contain "intimate details," the court did not believe that the threshold requirement for exemption 6 was met and ordered the survey disclosed.⁶³

In marked contrast is the expansive interpretation of "similar files" propounded by the Third Circuit in *Wine Hobby USA, Inc. v. IRS*.⁶⁴ In that case a distributor of amateur winemaking equipment had sought from the Bureau of Alcohol, Tobacco, and Firearms a list of heads of households who had requested permission to make wine

55. "[T]he committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies." SENATE REPORT, *supra* note 2, at 9. Both reports preface their list of agencies with "Such agencies as." *Id.*; HOUSE REPORT, *supra* note 34, at 11.

56. HOUSE REPORT, *supra* note 34, at 11.

57. SENATE REPORT, *supra* note 2, at 9.

58. HOUSE REPORT, *supra* note 34, at 11.

59. The rule of statutory construction that where general words follow a designation of particular subjects or classes or persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class or nature as those specifically enumerated

BALLANTINE'S LAW DICTIONARY 393 (3d ed. 1969).

60. 484 F.2d 843 (4th Cir. 1973).

61. *Id.* at 845; see 16 B.C. INDUS. & COM. L. REV. 240, 245-47 (1975).

62. See 484 F.2d at 844.

63. After the court stated that it did not believe the threshold requirement had been met, it assumed *arguendo* that the survey results were "similar files" in order to reach its alternate holding that disclosure would not result in an unwarranted invasion of privacy. See *id.* at 846-48.

64. 502 F.2d 133 (3d Cir. 1974).

for family use.⁶⁵ In determining whether these lists were similar to medical or personnel files, the court rejected any interpretation of "similar" that would "preclude inquiry into th[e] more crucial question" of whether an unwarranted invasion of privacy might result from disclosure.⁶⁶ The court ruled that the list of names and addresses sought by the company was a "similar file,"⁶⁷ effectively holding that whenever disclosure of a file would constitute an unwarranted invasion of privacy, there is a "personal quality" to the information that makes it similar to personnel or medical files.⁶⁸

This broad interpretation of "similar files" received support from the Supreme Court in *Department of the Air Force v. Rose*.⁶⁹ In holding that disciplinary case summaries of cadets at the Air Force Academy were similar to personnel files,⁷⁰ the Court stated that the most significant attribute that characterized the file as similar to a personnel file was that disclosure of the summaries "implicates similar privacy values."⁷¹ The Court reasoned that since disclosure of the summaries would cause the same type of embarrassment and harm as would disclosure of medical or personnel files, they were similar files. The Court's test for "similar files" therefore focused not on the physical resemblance of the files, but rather on the effect of their disclosure.⁷² Under this test, a file is a "similar file" whenever its disclosure would result in an invasion of privacy comparable to that which would result from disclosure of medical and personnel files.

Prior to the Supreme Court decision in *Rose*, a federal district court in *Committee on Masonic Homes v. NLRB*⁷³ had looked to the nature of the information contained in union authorization cards rather than the effect of their disclosure in determining whether the cards were "similar files." The court concluded that the data appearing on the card—name, address, department, work shift, and state-

65. See *id.* at 134.

66. *Id.* at 135 ("We do not believe that the use of the term 'similar' was intended to narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy.").

67. See *id.*

68. For criticism of this interpretation, see Comment, *supra* note 53; 16 B.C. INDUS. & COM. L. REV. 240 (1975).

69. 425 U.S. 352 (1976).

70. See *id.* at 376.

71. *Id.*

72. In reasoning that the summaries were similar to personnel files, the Court adopted the lower court's view that "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." *Id.* at 377 (quoting *Rose v. Department of Air Force*, 495 F.2d 261, 267 (2d Cir. 1974)).

73. 414 F. Supp. 426 (E.D. Pa. 1976), *rev'd*, 556 F.2d 214 (3d Cir. 1977).

ment of union support—were not intimate details of the sort found in medical histories and personnel files, and that therefore the cards were not similar files.⁷⁴ In reversing this ruling, the Third Circuit relied on *Rose* and its own expansive interpretation of “similar files” in *Wine Hobby* to support its conclusion that a narrow or technical reading of “similar” would defeat the purpose of exemption 6 by preventing consideration of the crucial question of privacy.⁷⁵ As in *Wine Hobby*, a conclusion that disclosure of the cards would constitute an invasion of privacy served also to support the characterization of the cards as “similar files.”⁷⁶

By defining “similar” in terms of the effect of disclosure rather than by the contents of the file, courts following *Wine Hobby* have effectively rejected any threshold requirement for exemption 6. Under this definition, “similar files” is rewritten to mean all files, and the sole criterion for nondisclosure under exemption 6 is whether disclosure would constitute an unwarranted invasion of privacy.⁷⁷ The

74. See *id.* at 432. Even if the court had followed the *Rose* “effect of disclosure” approach, however, it would have reached the same result, for, in considering the applicability of exemption 7(C), the court held that disclosure of authorization cards would not constitute an unwarranted invasion of privacy. See *id.* at 433.

75. See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 219 (3d Cir. 1977).

76. Despite the court’s emphasis on the result of disclosure in its definition of “similar,” the court went on to rule that the thumbnail sketch of an employee’s name, job classification, and shift found on the cards also made them analogous to personnel files. See *id.* at 220. The Third Circuit’s holding that authorization cards are exempt from disclosure under exemption 6 has been followed in *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978); *Madeira Nursing Center v. NLRB*, 96 L.R.R.M. 2411 (S.D. Ohio 1977), *appeal docketed*, No. 77-3370 (6th Cir. July 19, 1977); *Howard Johnson Co. v. NLRB* (Region 3), 96 L.R.R.M. 2214 (W.D.N.Y. 1977); and *L’eggs Prods., Inc. v. NLRB*, 93 L.R.R.M. 2488 (C.D. Cal. 1976).

In applying the *Wine Hobby* standard to authorization cards, the court in *Howard Johnson* relied heavily on an analogy to *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), discussed at notes 175-78 *infra* and accompanying text, which had indicated that lists of names and addresses of employees eligible to vote in union elections were “similar files” under exemption 6. The *Howard Johnson* court reasoned that authorization cards indicating an employee’s private choice to support a union are at least as confidential and worthy of protection from disclosure as were the employee lists considered in *Getman*. See 96 L.R.R.M. at 2216-17. The difficulty with the court’s analogy, however, is that *Getman* never actually held that these lists were similar files, but only assumed that classification *arguendo* to reach its holding that disclosure of the lists would not constitute an unwarranted invasion of privacy. See 450 F.2d at 674, 677. Despite this misplaced reliance on *Getman*, it does seem that disclosure of an employee’s statement of support for a union would result in as serious an invasion of privacy as the disclosure of the home winemaking lists in *Wine Hobby*. See notes 136-39 *infra* and accompanying text.

77. This point was expressly recognized in Judge Skelton’s concurring and dissenting opinion in *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978), a case that followed the reasoning of *Masonic Homes* as to the applicability of exemption 6 to the disclosure of union authorization cards:

problem with this approach is that the statute says "personnel and medical files and similar files."⁷⁸ While a general safeguard in the FOIA against all unwarranted invasions of privacy may be desirable, Congress did not provide one. Although there is some suggestion that Congress intended exemption 6 to serve as a general privacy protection clause,⁷⁹ Congress made clear in the statute itself that the exemptions do not "authorize withholding of information or limit the availability of records to the public, *except as specifically stated*."⁸⁰ Whatever the merits of the *Wine Hobby* approach from a practical standpoint, its reading of "similar files" as synonymous with all files clearly strains the "specifically stated" requirement to the limit.

B. EXEMPTION 7: "INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES"

In contrast to the ambiguous legislative history concerning the intended scope of exemption 6, Congress clearly expressed its intent

[The *Pacific Molasses* majority] hold[s] that the union cards are personal to the workmen and that disclosure would invade their privacy and, therefore, the cards are similar to personnel files and should not be disclosed. This result has been reached by reverse reasoning Under this holding any invasion of personal privacy would result in non-disclosure regardless of whether the material was a personnel, medical or similar file.

Id. at 1188.

It is interesting to note that this "reverse reasoning" was the interpretation of the exemption given by the Attorney General in 1967: "It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and *all private or personal information contained in other files* which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person" U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 36 (1967) (emphasis added).

78. 5 U.S.C. § 552(b)(6) (1976).

79. The Senate report refers to exemption 6 as a "general exemption," and without mentioning the "similar files" clause, states, "It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" SENATE REPORT, *supra* note 2, at 9. The House report states that the exemption is intended to exclude "those kinds of files the disclosure of which might harm the individual." HOUSE REPORT, *supra* note 34, at 11. One commentator has argued that

Congress did not say that such files were the only ones to be protected. The general context of the discussion indicates that these descriptive phrases [intimate details; highly personal nature] were used merely to illustrate the reach of the exemption and not to define a threshold issue. In the absence of a clearer indication that Congress actually wished to release some files which would cause a clearly unwarranted invasion of privacy, it is wiser to follow *Wine Hobby* and deny much limiting effect to the definition of "similar files."

Comment, *supra* note 31, at 603-04.

80. 5 U.S.C. § 552(c) (1976) (emphasis added).

that exemption 7's "law enforcement purposes" be construed narrowly in order to achieve full agency disclosure. Under the original version of exemption 7,⁸¹ the Circuit Court for the District of Columbia, in *Center for National Policy Review on Race & Urban Issues v. Weinberger*,⁸² denied a request for disclosure of public school records on segregation and discrimination practices that had been submitted to the Department of Health, Education, and Welfare (HEW). The court had characterized these records as being compiled for "law enforcement purposes" even though it was highly unlikely that HEW would ever use them in a proceeding to terminate federal funding.⁸³ Thereafter, Congress amended exemption 7 because it thought that *National Center* and several similar decisions⁸⁴ had created so large a loophole that the statute's goal of full disclosure would be defeated.⁸⁵ The authors of the amendment specifically indicated that the amendments were to override *National Center*.⁸⁶

This amendment has clear implications for a suit to compel disclosure of union authorization cards. Like HEW compliance forms, union authorization cards are collected as part of a regular agency procedure, and there is only a slight possibility that they will ever be

81. Prior to its amendment in 1974, the exemption read, "investigatory files compiled for law enforcement purposes except to the extent available to a private party." Act of July 4, 1966, Pub. L. No. 89-847, 80 Stat. 250 (current version at 5 U.S.C. § 552(b)(7) (1976)). The amended version of exemption 7 appears at note 4 *supra*.

82. 502 F.2d 370 (D.C. Cir. 1974).

83. See *id.* at 373-74.

84. See, e.g., *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.) (letters between the National Highway Traffic Safety Administration and automobile manufacturers concerning possible safety defects held exempt under exemption 7), *cert. denied*, 419 U.S. 974 (1974); *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc) (spectrographic analysis of the bullet that killed President Kennedy held exempt from disclosure as part of a file compiled for law enforcement purposes, even though the file and investigation were closed), *cert. denied*, 416 U.S. 993 (1974).

85. See H.R. REP. NO. 1380, 93d Cong., 2d Sess. 12 (1974) (conference report). See generally Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951 (1975); see also [1974] U.S. CODE CONG. & AD. NEWS 6267.

86. Mr. Kennedy. . . . Does the Senator's amendment in effect override the court decisions in . . . Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

As I understand it, the holdings in those particular cases are of the greatest concern to the Senator from Michigan. As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

Mr. Hart. The Senator from Michigan [*sic*] is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this.

120 CONG. REC. S9336 (daily ed. May 30, 1974); accord, H.R. REP. NO. 1380, 93d Cong., 2d Sess. 12 (1974) (conference report).

used by the Board in an enforcement proceeding. Unless the cards can somehow be distinguished from HEW compliance reports, it would be difficult for a court to disregard the congressional intent that such records are not within the ambit of exemption 7.

Apparently recognizing this fact, the Third Circuit narrowly interpreted "law enforcement purposes" in *Masonic Homes* to refer only to the prosecution of law violators in a pending formal proceeding.⁸⁷ Since the authorization cards in question were collected not to prove an employer violation but merely to ascertain a showing of interest in an election, the court ruled that the cards had not been compiled for law enforcement purposes and thus were not exempted from the FOIA full disclosure requirements by exemption 7.⁸⁸ The court distinguished another Third Circuit case, in which exemption 7 had been held applicable to witness affidavits,⁸⁹ on the ground that there the employer seeking disclosure was also involved in an unfair labor practice proceeding.⁹⁰ The court reasoned that only if the disclosure request were made in conjunction with a formal proceeding could an investigatory record be considered as compiled for "law enforcement purposes"; otherwise, all Board records would be exempt from disclosure, since all of its records are compiled for the enforcement of the NLRA.⁹¹

In *Donn Products, Inc v. NLRB*,⁹² an Ohio federal district court rejected this distinction by holding that exemption 7 did not prevent disclosure of authorization cards even though the request was made by an employer involved in an unfair labor practice proceeding.⁹³ The court reasoned that the cards were collected prior to and independent of any enforcement proceeding and did not become investigatory records compiled for law enforcement purposes simply because a complaint was subsequently filed against one of the parties.⁹⁴ The court in *Donn Products* expressed the fear that a broader reading of exemption 7's threshold language would render immune from disclosure every document in the Board's possession.⁹⁵

87. See 556 F.2d at 219.

88. See *id.* at 217-18.

89. *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976).

90. See *id.* at 81-82. In *Au & Son* the employer was involved in an unfair labor practice proceeding and had requested copies of all written statements of the charging parties or potential witnesses. The court held that disclosure would "interfere with enforcement proceedings" and that the documents were therefore exempted from disclosure under exemption 7(A). See *id.* at 83.

91. See 556 F.2d at 219.

92. 93 L.R.R.M. 2065 (N.D. Ohio 1976).

93. See *id.* at 2066.

94. See *id.*

95. See *id.*

The holding in *Donn Products* that the original purpose for collecting the cards determines whether they are investigatory records compiled for law enforcement purposes seems preferable to the dictum in *Masonic Homes* that authorization cards sought by employers in the midst of an unfair labor practice proceeding are "clearly compiled for law enforcement purposes," while cards sought prior to a representation hearing are not. The *Donn Products* analysis better fits the language of exemption 7, as the exemption's threshold requirement refers only to the purpose for compiling the records and not to their ultimate use.⁹⁶ Although union authorization cards may ultimately be used in an enforcement proceeding if the employer refuses to comply with an order to bargain,⁹⁷ the purpose for *compiling* authorization cards is always either to substantiate an adequate showing of interest in a union representation election or to demonstrate the majority status of the union.⁹⁸

Other courts, however, have held that authorization cards are compiled for law enforcement purposes under exemption 7. In *Howard Johnson Co. v. NLRB (Region 3)*,⁹⁹ for example, a federal district court reasoned that Congress' rejection of *National Center's* "possible law enforcement proceeding" rule¹⁰⁰ simply did not apply in a labor law context.¹⁰¹ The court noted that prior to the 1974 amendment of exemption 7, the Fourth Circuit in *Wellman Industries, Inc. v. NLRB*¹⁰² had ruled that affidavits gathered by a Board agent prior to the filing of an unfair labor practice complaint but requested after the filing of the complaint were exempt from disclosure. In *Wellman* the court had held that, since the affidavits were gathered as part of a procedure followed to enforce the rights established by the NLRA, they were compiled for law enforcement purposes.¹⁰³ The *Howard Johnson* court reasoned that because *Wellman*

96. The exemption is for "[i]nvestigatory records compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7) (1976).

97. See, e.g., *Donn Prods., Inc. v. NLRB*, 93 L.R.R.M. 2065, 2066 (N.D. Ohio 1976).

98. In situations where employers have committed pervasive unfair labor practices, the Board will sometimes, instead of holding an election, accept the cards as a demonstration of the union's majority status and order the employer to bargain with the union. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Since *Gissel*, unions have often tried to collect cards from a full majority of the employees in case a situation such as that in *Gissel* arises.

99. 96 L.R.R.M. 2214 (W.D.N.Y. 1977).

100. See notes 81-86 *supra* and accompanying text.

101. See 96 L.R.R.M. at 2217.

102. 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974).

103. See *id.* at 430 ("[T]he Board's purpose here was to protect and vindicate rights set out in Section 7. Though procedures vary, if aimed at enforcement of the NLRA we think they are for 'law enforcement purposes.'").

was not expressly mentioned by Congress as one of the cases overturned, it remained good law.¹⁰⁴

Given the factual differences between the two cases, the reliance on *Wellman* in *Howard Johnson* seems misplaced. Unlike *Wellman*, the prospect of an actual unfair labor practice complaint against the plaintiff-employer in *Howard Johnson* remained as speculative at the time of the FOIA suit as when the cards were originally collected. The mere fact that both *Wellman* and *Howard Johnson* are labor cases is insufficient justification for ignoring the clearly expressed congressional intent that records gathered for some indefinite future enforcement proceeding are not exempt from disclosure under exemption 7.¹⁰⁵

The *Howard Johnson* court did, however, suggest another rationale for the conclusion that the cards meet the exemption 7 threshold requirement. Rather than emphasizing the possibility of future law enforcement proceedings, the court considered the card compilation itself as part of a law enforcement proceeding.¹⁰⁶ This approach may be justified, inasmuch as a dissection of the Board's law enforcement procedures into precomplaint and postcomplaint periods does not reflect the special nature and sequence of the labor relations proceedings established by Congress. Federal court review of union certification procedures prior to the election is forbidden¹⁰⁷ in order to ensure that the process is free from the tensions and interferences that might accompany a protracted election period.¹⁰⁸ Only after an employer refuses to bargain with a certified union and the Board files a complaint are disputes about the validity of the election procedures fully adjudicated.¹⁰⁹ The process leading to such a complaint begins with

104. See 96 L.R.R.M. at 2217. See generally *Backdooring the NLRB*, *supra* note 5, at 171, 176-78.

105. "[S]uch a reading of the amended Act fails to take into account the depth of congressional concern with the expansive interpretation given the exemption by certain courts." *Backdooring the NLRB*, *supra* note 5, at 178.

106. "To be 'for law enforcement purposes', the anticipated use of the investigatory records does not require as their object adversary proceedings. Neutral investigatory proceedings, such as the pre-election proceedings in this case, are included." 96 L.R.R.M. at 2217 (emphasis added).

107. Board decisions in certification proceedings, including decisions relating to the employees' showing of interest, the eligibility of voters, the appropriate bargaining unit, and the conduct of the election, are not final orders reviewable by the courts of appeals under 29 U.S.C. § 160(f) (1970). See *AFL v. NLRB*, 308 U.S. 401, 407-09 (1940).

108. See generally notes 20-22 *supra* and accompanying text.

109. The Supreme Court has recognized that the pre-election representation hearing at which the showing of interest is determined and the unfair labor practice proceeding "are really one." See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 158 (1941). Because authorization cards are submitted as part of the investigation for the representation hearing, the compilation of the cards is arguably part and parcel of the investigation for an unfair labor practice proceeding.

the collection of authorization cards, which are instruments in the Board's pre-election investigation, and a hearing on the existence of "a question of representation affecting commerce."¹¹⁰ If the card collection process, forming as it does the necessary precondition for any refusal-to-bargain complaint, is considered to be a law enforcement proceeding, nondisclosure of authorization cards is arguably consonant with the congressional intent behind the 1974 amendment of exemption 7.

This approach parallels *Donn Products*, in that the court's characterization of the purpose for compiling the cards does not depend on the subsequent litigative status of the FOIA plaintiff, but rather on the original reason for compilation of the cards. In *Donn Products*, however, the court held that the original reason for card collection was not law enforcement,¹¹¹ and on the balance this would appear to be the better view. The relative infrequency of refusal-to-bargain suits in comparison to the routine gathering of cards demonstrates the speculativeness of the prospect of litigation. Moreover, unlike the HEW reports at issue in *National Center*, the authorization cards have a purpose wholly apart from enforcement.¹¹² They are primarily intended as an administrative device for determining whether an election is warranted. Thus, the distinctions between authorization cards and HEW reports appear to cut both ways. The *Howard Johnson* court's emphasis on the special procedures that govern union elections and unfair labor practice litigation led it to stretch the "law enforcement purposes" threshold to, and quite possibly beyond, the limit of Congress' clearly expressed intent.

C. SUMMARY

From the foregoing it appears that if the courts were to take seriously the clearly expressed congressional intent that agency documents be disclosed unless specifically exempted and that the exemptions themselves be narrowly construed, union authorization cards would have to be disclosed, for they do not satisfy the threshold requirement of either exemption 6 or 7. It cannot be denied, however, that the general reluctance of courts to reach this conclusion is grounded in some very real concerns, for disclosure of authorization cards infringes not only statutory but also constitutional rights of employees.

110. 29 U.S.C. § 159(c)(1) (1970).

111. See 93 L.R.R.M. at 2066.

112. In *National Center*, the Department of Health, Education, and Welfare required that reports be submitted only "when there [was] reason to suspect that a public school [was] practicing racial segregation." 502 F.2d at 372. Authorization cards, on the other hand, are voluntarily submitted to the NLRB by unions without any suspicion of wrongdoing on the part of the employer.

III. DISCLOSURE OF AUTHORIZATION CARDS AS AN UNWARRANTED INVASION OF PRIVACY

As a practical matter, the determination whether a record is a "similar file" or a record "compiled for law enforcement purposes" may ultimately depend on whether a court feels that disclosure would subject individuals to "unwarranted" invasions of privacy.¹¹³ The use of "unwarranted" in these two exemptions¹¹⁴ suggests that a court is to balance the conflicting considerations, but there is a dispute in the legislative history on this point. The Senate report indicates that the exemptions require "a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."¹¹⁵ The House report, however, states that the exemptions themselves "provided a proper balance" of these interests.¹¹⁶ Confronted with this basic conflict in the legislative history, almost all courts have found the Senate report the more reliable guide to congressional intent since the House report was written after the Senate had passed the bill.¹¹⁷ Moreover, the House interpretation is difficult to reconcile with the language of the exemption. The exemption does not say serious or grave, but rather "unwarranted" invasions of pri-

113. See notes 64-77 *supra* and accompanying text.

114. The addition of "clearly" in exemption 6 ostensibly requires the government to establish a stronger justification for nondisclosure under exemption 6 than under exemption 7. The Supreme Court in *Rose* stated that the addition of "clearly" reflects a "significant determination" since the drafting committees specifically rejected agency requests to delete the word. Further, in drafting exemption 7(C), the Conference Committee deleted "clearly" at the request of President Ford. See *Department of the Air Force v. Rose*, 425 U.S. 352, 378 n.16 (1976). "Clearly" also serves to remind the courts that they should "tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971). It has been observed, however, that "the difference in a practical sense is probably more apparent than real." ACLU PROJECT, *supra* note 5, at 70.

115. SENATE REPORT, *supra* note 2, at 9. Although the report discusses exemption 6, its interpretation of "unwarranted invasion of privacy" presumably applies to both exemptions.

116. HOUSE REPORT, *supra* note 34, at 11.

117. [T]he House report . . . should not be a guide to legislative intent, because it was written after the Senate had passed the bill. The courts have overwhelmingly adopted the . . . idea that the House report is relatively unreliable. See, e.g., *Soucie v David*, 448 F2d 1067, 1077, n39 (CA DC 1971); *Getman v NLRB*, 450 F2d 670, 673, n8 (CA DC 1971); *Hawkes v IRS*, 467 F2d 787, 797 (CA 6 1972): "To adopt the statutory interpretation put forward in the House Report would be to allow a single house of the Congress to effectively alter the meaning placed on proposed legislation by the other house without altering a word of the text. We do not believe that this represents a wise approach to statutory interpretation."

K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 3A.2, at 57-58 (1976).

vacy. It therefore seems to require that courts weigh the factors that warrant disclosure against the seriousness of the invasion of privacy to determine if the invasion is "unwarranted."¹¹⁸

This balancing test requires an analysis of both the privacy interest and the public's right to governmental information.¹¹⁹ To understand the tests applied in the authorization card cases, it is necessary to trace the analysis of these two competing interests in the judicial interpretations of exemptions 6 and 7(C).

A. EVALUATING THE INVASION OF PRIVACY

The courts analyzing "invasion of personal privacy" under exemptions 6 and 7 have generally focused on the embarrassment caused by disclosure.¹²⁰ In *Rural Housing Alliance v. United States Department of Agriculture*,¹²¹ for example, an invasion of privacy was defined as the "embarrassing" disclosure of "intimate details" such as "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcohol consumption, family fights, and reputation."¹²² The Supreme Court in *Department of the Air Force v. Rose*,¹²³ citing *Rural Housing*, also emphasized the "lifelong embarrassment, perhaps disgrace" that disclosure of disciplinary records might cause.¹²⁴

The *Rural Housing* standard of embarrassment, however, provides unreliable guidance in situations where the information disclosed is not itself particularly embarrassing but becomes so only

118. See *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 136 (3d Cir. 1974).

119. See generally Hulette, *Privacy and the Freedom of Information Act*, 27 ADMIN. L. REV. 275, 276-83 (1975); Tanner, *The Judge, The Philosopher, and The Personal Privacy Exemption of the FOIA: An Existential Search for Coherence*, in *PRIVACY AND PUBLIC DISCLOSURES UNDER THE FREEDOM OF INFORMATION ACT 1* (D. Anderson & B. Janes eds. 1976); *Michigan Project*, *supra* note 30, at 1078-85; Note, *supra* note 31, at 953-56; Note, *Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177, 196-99 (1973); Note, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 GEO. WASH. L. REV. 527 (1972) [hereinafter cited as *Invasion of Privacy*]; Note, *The Plain Meaning of the Freedom of Information Act: NLRB v. Getman*, 47 IND. L.J. 530 (1972); Note, *Privacy, Public Interest and Judicial Equitable Discretion Within the Freedom of Information Act*, 6 U. TOL. L. REV. 215 (1974); Comment, *supra* note 31; Comment, *supra* note 53; 16 B.C. INDUS. & COM. L. REV. 240 (1975).

120. Courts often assert that disclosure results in unwarranted invasion of privacy without explaining the basis of their conclusion. See, e.g., *Ditlow v. Schultz*, 517 F.2d 166, 170 (D.C. Cir. 1975) (customs declarations); *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971) (*Excelsior* lists); *Sonderegger v. United States Dep't of Interior*, 424 F. Supp. 847, 856 (D. Idaho 1976) (disaster payment claims).

121. 498 F.2d 73 (D.C. Cir. 1974).

122. *Id.* at 77.

123. 425 U.S. 352 (1976).

124. *Id.* at 377.

because of the nature of the list from which the information is taken. In prior cases involving similar situations, the application of the embarrassment standard by the courts has not led to consistent results. In *Disabled Officer's Association v. Rumsfeld*,¹²⁵ for example, the court held that disclosure of the names and addresses of persons identified as being disabled and retired military officers was not an invasion of privacy,¹²⁶ while in *Wine Hobby USA, Inc. v. IRS*¹²⁷ it was held that disclosure of the names and addresses of persons identified as being heads of households and home winemaking licensees did constitute an invasion of privacy.¹²⁸

The embarrassment standard was used by the district court in *Committee on Masonic Homes v. NLRB*¹²⁹ in ordering disclosure of the union authorization cards. Finding no reason "why a person should be embarrassed or harmed should it come to the employer's or anyone else's attention that such person executed a union authorization card,"¹³⁰ the district court held that disclosure involved no invasion of personal privacy.¹³¹

Even assuming that the embarrassment standard adequately illuminates the issue of personal privacy in an authorization card case,¹³² the district court in *Masonic Homes* misapplied the test in two respects. First, as noted by the Third Circuit in its reversal, the district court apparently based its finding of no embarrassment on the erroneous assumption that the NLRA gives employers the right to inspect authorization cards when recognition of a union is sought without an election, solely on the basis of the cards.¹³³ Relying on this faulty premise,¹³⁴ the district court reasoned that the employees

125. 428 F. Supp. 454 (D.D.C. 1977).

126. *Id.* at 459.

127. 502 F.2d 133 (3d Cir. 1974).

128. *Id.* at 137.

129. 414 F. Supp. 426 (E.D. Pa. 1976), *rev'd*, 556 F.2d 214 (3d Cir. 1977).

130. *Id.* at 432; *accord*, *Pacific Molasses Co. v. NLRB*, 95 L.R.R.M. 2638, 2641 (E.D. La. 1977) (authorization cards not exempt under exemption 6 since that exemption is limited to "intimate family relationships, personal health, religious and philosophical beliefs and matters that would prove personally embarrassing to an individual of normal sensibilities") (emphasis added), *rev'd*, 577 F.2d 1172 (1978).

131. 414 F. Supp. at 433.

132. The embarrassment standard has failed to produce consistent judicial results. See text accompanying notes 125-28 *supra*; notes 136-39 *infra* and accompanying text. A preferable analysis of the privacy interest in the authorization card cases is one based on the chilling effect of disclosure. See notes 140-71 *infra* and accompanying text.

133. See 556 F.2d at 218 n.3.

134. The court in *Howard Johnson Co. v. NLRB* (Region 7), 444 F. Supp. 843 (W.D. Mich. 1977), *appeal docketed*, No. 77-1763 (6th Cir. Dec. 19, 1977), also assumed that the Board discloses authorization cards to employers when it issues a *Gissel* order. In reversing the district court in *Masonic Homes*, the Third Circuit correctly stated that "[a]t most, unions in that position might have offered to have a neutral

signed the cards without any expectation of privacy.¹³⁵ The second problem with the district court's holding is that it is inconsistent with *Wine Hobby USA, Inc. v. IRS*,¹³⁶ one of the leading cases defining invasion of privacy in terms of personal embarrassment. In *Wine Hobby*, the embarrassment lay in being identified as the head of a household and as a winemaker.¹³⁷ In *Masonic Homes*, the potential embarrassment was far more serious—being identified as a supporter of a union wishing to organize the employer's plant.¹³⁸ In *Masonic Homes*, at least as much as in *Wine Hobby*, the information was of a sort that "the individual may fervently wish to remain confidential or only selectively released."¹³⁹

In lieu of the embarrassment test, courts have focused on the importance of authorization cards in the representation election process.¹⁴⁰ One court has emphasized the NLRA mandate that an employee be able to make a private choice of bargaining representatives: "The interest in confidentiality which attaches to a union authorization card approaches that which surrounds the secret ballot in an

third party check the cards." 556 F.2d at 218 n.3 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 587, 593 (1969)).

135. The district court stated that when a union sought recognition on the basis of authorization cards alone, "[t]he employer would be entitled to examine the authorization cards It is, therefore, unrealistic to claim that the disclosure of the authorization cards to the employer would be an unwarranted invasion of personal privacy." 414 F. Supp. at 432.

136. 502 F.2d 133 (3d Cir. 1974).

137. See *id.* at 136-37. The court found a threefold invasion of privacy: (1) unrestricted disclosure of a person's address, which may result in unsolicited and offensive mail; (2) disclosure of personal home winemaking activity; and (3) disclosure of who is the head of the household along with the fact that the person is not living alone (since persons living alone need not register). *Id.* at 137.

138. Disclosure of authorization cards could cause loss of face with fellow employees and with the employer. Employer retaliation is also a realistic possibility; employees continue to complain that employers use threats, coercion, and unfair discharges to thwart union organization. See H.R. REP. NO. 637, 95th Cong., 1st Sess. 8 (1977) (report of the Committee on Labor and Education on the proposed Labor Reform Act of 1977):

The extensive oversight hearings conducted by this committee occurring over a period of more than 16 years have led to two central conclusions: The Act today does not provide the "assurance" its sponsors intended to write into law—that the exercise by employees of their right to organize "will not result in discriminatory treatment or the loss of the opportunity to work"

Of the 23,496 alleged unfair labor practice charges filed against employers during the fiscal year ending June 30, 1976, 15,090 allegations included a charged violation of 29 U.S.C. § 158(a)(3) (1970). See 41 NLRB ANN. REP. 208 (1976).

139. 502 F.2d at 137.

140. See, e.g., *NLRB v. Biophysics Sys., Inc.*, 91 L.R.R.M. 3079, 3081 (S.D.N.Y. 1976).

election.”¹⁴¹ Thus, the Third Circuit in *Masonic Homes* reasoned that disclosure of the cards would “directly undercut” the policy behind section 9 of the NLRA,¹⁴² which requires an election by secret ballot.¹⁴³

While an authorization card is neither totally secret, in that the signer’s identity is revealed to the Board, nor a ballot, in that those who sign the cards are free to vote against the union in the actual election, an employee signing a card does not simply express an interest in having an election held,¹⁴⁴ but authorizes a specific union to be his representative in collective bargaining with his employer, just as he does on a ballot.¹⁴⁵ Because the secret ballot requirement is an attempt to shield an employee from having to reveal his decision concerning the designation of a bargaining representative, disclosure of the cards would largely defeat the statutory design.

Courts have also analyzed invasion of privacy in terms of the chilling effect that disclosure of the authorization cards would have on employees’ exercise of their statutory rights “to self-organization, to form, join or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.”¹⁴⁶ These courts have recognized that real or imagined threats of retaliation by employers influence the outcome of union organizational campaigns,¹⁴⁷ and that many employees would be reluctant to sign cards during the beginning stages of an election campaign if they thought their support of the union would be disclosed to their employers. Since

141. *Id.*

142. 29 U.S.C. § 159(c)(1) (1970).

143. 556 F.2d at 221.

144. See *NLRB v. Peterson Bros., Inc.*, 342 F.2d 221 (5th Cir. 1965); *Levi Strauss & Co.*, 172 N.L.R.B. 732, 733 (1968).

145. See 2 NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL § 11028 (1975).

146. 29 U.S.C. § 157 (1970). See *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1182 (5th Cir. 1978); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977); *Howard Johnson Co. v. NLRB* (Region 3), 96 L.R.R.M. 2214, 2218 (W.D.N.Y. 1977); *NLRB v. Biophysics Sys., Inc.*, 91 L.R.R.M. 3079, 3081 (S.D.N.Y. 1976).

147. See *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1182 (5th Cir. 1978) (“We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information.”); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977) (“We need only consider whether employees would be as likely to sign a prominently displayed notice at work, ‘Sign up for the union here. Organize for better working conditions and higher wages.’”); *Howard Johnson Co. v. NLRB* (Region 3), 96 L.R.R.M. 2214, 2218 (W.D.N.Y. 1977) (“The real or imagined threat of retaliation by an employer . . . may have a ‘chilling effect’ upon an employee taking part in any representation petition.”); *NLRB v. Biophysics Sys., Inc.*, 91 L.R.R.M. 3079, 3081 (S.D.N.Y. 1976) (“The NLRB’s recognition of [the delicate relationship between the employer and employee] explains its reluctance to release information which might tend to strain that relationship and unduly hamper the Board’s efforts to enforce federal labor legislation.”).

"[s]olicitation of authorization cards plays a vital role in organizational campaigns,"¹⁴⁸ government disclosures of the cards would chill employees in the exercise of "their protected rights to seek a representation election."¹⁴⁹

In its attempt to limit this chill on statutory rights and to maintain the laboratory conditions essential to the conduct of free elections,¹⁵⁰ the Board has adopted procedures that guarantee the confidentiality of the employee's choice to support a union.¹⁵¹ Under this analysis a privacy interest attaches to the cards not only as part of the secret ballot requirement of the NLRA,¹⁵² but also because it is essential to the policy of free employee choice that an employee be permitted to keep his union sympathies confidential.

In addition to chilling significant statutory rights, however, disclosure of union authorization cards may also infringe upon the exercise of first amendment rights. The first amendment protects the right of persons to come together freely and organize a union.¹⁵³ Since

148. Committee on Masonic Homes v. NLRB, 556 F.2d 214, 221 (3d Cir. 1977).

149. NLRB v. Biophysics Sys., Inc., 91 L.R.R.M. 3079, 3081 (S.D.N.Y. 1976). A concrete example of how employee activity might be chilled is provided in an appeal brief filed by the Board. See Brief for Appellee, Madeira Nursing Center, Inc. v. NLRB, No. 77-3370 (6th Cir., filed July 19, 1977). After a pre-election hearing, but prior to the hearing examiner's decision as to whether an election should be held, an employer enclosed a letter in the employees' pay envelopes advising them that it had sued the Board under the FOIA to allow the employer to inspect and authenticate the union authorization cards. The employer expressed its belief that "we will win this suit as other U.S. District Courts have allowed employers to inspect these cards. We want to dispel the myth that a majority of our people want representation by a union." See *id.* at app. 7. The letter then informed employees that they could get their card back by writing a letter to the Board. See *id.*

150. See General Shoe Corp., 77 N.L.R.B. 124 (1948); text accompanying notes 14-25 *supra*. The recent limitation on the laboratory conditions doctrine in Shopping Kart Food Mkt., 94 L.R.R.M. 1705 (N.L.R.B. 1977), does not constitute a complete rejection of the concept. While the Board announced in that case that it will no longer probe the truth or falsity of campaign statements, Chairman Murphy made clear that she would "continue to set aside an election in the event of misconduct involving threats, promises of benefit, or similar improprieties." *Id.* at 1708.

151. The Board and courts have attempted to prevent involuntary disclosure of employees' attitudes toward unionization by prohibiting employer surveillance of union activities, see Murray Ohio Mfg. Co., 156 N.L.R.B. 840, 851 (1966), by disallowing employer interrogation of employees regarding their signing authorization cards of other support for a union, see NLRB v. Cement Transp., Inc., 490 F.2d 1024, 1028 (6th Cir.), *cert. denied*, 419 U.S. 828 (1974), and by placing strict limitations on employer polling of employees, see Struksness Constr. Co., 165 N.L.R.B. 1062, 1064 (1967).

152. See text accompanying notes 144-45 *supra*.

153. "[T]he First Amendment's guarantees of free speech, petition and assembly give . . . workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them . . ." Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 5 (1964); see *UMW, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Connecticut State Fed'n of*

solicitation of the cards is essential to the effective organization of a union,¹⁵⁴ any governmental action that would chill card solicitation may infringe upon the employees' rights of free association.

In *NAACP v. Alabama ex rel. Patterson*,¹⁵⁵ the Supreme Court explicitly recognized "the vital relationship between the freedom to associate and privacy in one's associations Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association" ¹⁵⁶ The Court further noted that compelling "disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association" ¹⁵⁷

While a formal distinction can easily be drawn between *Patterson*, in which a state court ordered an organization to disclose to the state government information about its members,¹⁵⁸ and the authorization card cases, in which the government would merely disclose the personal information voluntarily submitted to it,¹⁵⁹ the distinction is unpersuasive. In *Patterson* the Court did not locate the chilling effect in the government's action per se, but rather found it in the exposure to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of community hostility,

Teachers v. Board of Educ., 538 F.2d 471, 478 (2d Cir. 1976); *Hanover Fed'n of Teachers Local 1954 v. Hanover Community School Corp.*, 457 F.2d 456, 460 (7th Cir. 1972); *American Fed'n of State, County, & Mun. Employees v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287, 289 (7th Cir. 1968); *University of N. H. Chapter of the Am. Ass'n of Univ. Professors v. Haselton*, 397 F. Supp. 107, 108-09 (D.N.H. 1975).

154. See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977).

155. 357 U.S. 449 (1958).

156. *Id.* at 462.

157. *Id.*

158. See also *Baird v. State Bar*, 401 U.S. 1 (1971); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1962); *Barenblatt v. United States*, 360 U.S. 109 (1959).

159. This distinction is usually cast in terms of rights of autonomy versus rights of disclosure or informational privacy:

Individual autonomy refers to the right to determine for oneself whether one will go through or abstain from certain experience, such as contraception or abortion. On the other hand, informational privacy is, as so well defined by Professor Alan F. Westin, "[the] claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others."

Leigh, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229, 236 (1976) (footnotes omitted) (quoting A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967)); see Beardsley, *Privacy: Autonomy and Selective Disclosure*, in *PRIVACY* 56 (J. Pennock & J. Chapman eds. 1971); *Michigan Project*, *supra* note 30, at 1292.

which may dissuade persons from joining or induce them to withdraw from the organization:¹⁶⁰

It is not sufficient to answer . . . that [the] repressive effect . . . follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.¹⁶¹

Although courts have not yet decided whether a right of informational privacy attaches to information voluntarily submitted to the government,¹⁶² the rationale of *Patterson* should apply since both forms of disclosure inevitably restrain citizens from freely exercising their first amendment rights.¹⁶³

Furthermore, since the Board requires petitioners seeking the benefit of a Board election to file authorization cards sufficient to establish a showing of interest,¹⁶⁴ the protection of petitioners' right to solicit the required cards is necessary for the preservation of their right to petition the government, as protected by the first amendment.¹⁶⁵ Because the right to petition is regarded as " 'among the most precious of liberties safeguarded by the Bill of Rights . . . laws which actually affect the exercise of these vital rights' need not do so directly or overtly to be adjudged constitutionally offensive."¹⁶⁶ Thus, in *Stern v. United States Gypsum, Inc.*,¹⁶⁷ the Seventh Circuit found a federal statute, under which an Internal Revenue Service official privately brought suit against persons who had complained about his performance, constitutionally offensive because "the prospect of a federal lawsuit resulting from any citizen complaint about the conduct of federal officials could chill the exercise of the right to peti-

160. See 357 U.S. at 462-63.

161. *Id.* at 463.

162. See Leigh, *supra* note 159, at 235 ("In its privacy decisions the Court has confined itself to the discussion of the right of individual autonomy, and has not yet addressed the right of informational privacy.").

163. For discussion of the right of informational or disclosural privacy and its various constitutional bases, see Leigh, *supra* note 159; *Michigan Project*, *supra* note 30, at 1277-97.

164. See notes 16-19 *supra* and accompanying text.

165. "Petitioners . . . have the right of access to the agencies and courts to be heard on applications That right . . . is part of the right of petition protected by the First Amendment." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); see *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5-6 (1964). See also *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

166. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-43 (7th Cir.) (quoting *UMW, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967)), *cert. denied*, 434 U.S. 975 (1977).

167. 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977).

tion."¹⁶⁸ In *Stern*, as in the authorization card cases, the court was not faced with a prohibition of petitioning activity, but with a federal statute that private individuals could use to harass citizens to prevent them from freely exercising their right to petition. The constitutionally offensive situation led the *Stern* court to construe the statute so as to deny the plaintiff a cause of action.¹⁶⁹ The same result should be reached where government disclosure of authorization cards could restrain employees from freely associating in a group and from making use of the Board procedures to advocate their views.

Since the statute can be interpreted to avoid disclosure, and because, as a matter of principle, courts will avoid the constitutional question in a case whenever possible, it is not necessary for courts to deny disclosure on constitutional grounds.¹⁷⁰ Still it is useful for courts to apply this constitutional analysis in determining whether there exists a right of privacy that could be invaded by disclosure. By defining the right in terms of first amendment values, disclosure would be warranted only where a compelling state interest is shown.¹⁷¹

B. THE PUBLIC'S RIGHT TO KNOW

Once a court determines that an invasion of privacy exists, it must decide whether the invasion is "unwarranted." As indicated in the Senate Judiciary Committee's report on the FOIA, such an invasion is warranted if it is necessary to preserve the public's right to governmental information.¹⁷² This right is ultimately based upon the necessity of an informed electorate in a democratic society.¹⁷³ Thus, in general terms, the standard for determining the public's need for

168. *Id.* at 1343.

169. *See id.* at 1344.

170. *See* *Crowell v. Benson*, 285 U.S. 22, 62 (1932). If the courts attempt to decide the authorization cases on constitutional grounds, they will have to decide whether the government is the proper party to assert the employees' right of first amendment privacy against the alleged improper state action. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court allowed the Association to assert the constitutional rights of its members: "To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *Id.* at 459. The Court has been sympathetic to this problem and has allowed a doctor to assert the rights of his patients, *see* *Griswold v. Connecticut*, 381 U.S. 479 (1963), and a white homeowner who was a party to a racially restrictive property covenant to bring suit on behalf of potential black purchasers, *see* *Barrows v. Jackson*, 346 U.S. 249 (1953). It is not clear, however, that this principle should be extended to allow the very governmental agency that will commit the improper state action of disclosure to be the representative of the party whose privacy will be invaded.

171. *See* *Connecticut State Fed'n of Teachers v. Board of Educ.*, 538 F.2d 471, 478 (2d Cir. 1976).

172. *See* SENATE REPORT, *supra* note 2, at 9.

173. *See id.* at 3.

specific records under the FOIA is based on the degree to which the requested information is necessary for the maintenance of an informed electorate.¹⁷⁴ A workable approach to evaluating the public's need to know has, however, proven elusive. The difficulties lie in identifying the public's interest in disclosure and in delineating where that interest overlaps with, and where it is distinct from, the interest of the individual litigant.

In *Getman v. NLRB*,¹⁷⁵ one of the first cases to construe exemption 6, two labor law professors conducting a study of union voting patterns sought disclosure of *Excelsior* lists—lists of the names and addresses of employees eligible to vote in upcoming union elections.¹⁷⁶ In defining the public interest in disclosure, the court felt compelled by the “clearly unwarranted” language of exemption 6 to disregard the FOIA requirement that disclosure be made to “any person” and thus considered the special qualifications of the requesting plaintiffs. The court noted that the plaintiffs were highly qualified researchers, that the public could benefit from their empirical study of election influences, and that the study was approved by experts around the country and funded by the National Science Foundation.¹⁷⁷ As a corollary to this plaintiff-oriented evaluation of the public interest, the court concluded that the invasion was warranted if the information, once disclosed, was used “only by the requesting party and for the public interest purpose upon which the balancing was based.”¹⁷⁸

By focusing on the plaintiff's grounds for seeking disclosure, the *Getman* approach allows a court to estimate not only the public interest to be served by the plaintiff's proposed use of the information, but also the seriousness of the invasion of privacy that disclosure entails. Under this approach, disclosure of private information depends on the extent to which it will serve a public purpose under the particular circumstances.¹⁷⁹

174. See *id.* See generally Comment, *supra* note 31, at 606-10.

175. 450 F.2d 670 (D.C. Cir. 1971).

176. Employers must provide the Board and union(s) with a list of the names and addresses of all employees eligible to vote in a representation election once it has been determined that an election must be held among the employers' work force. See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). These lists are commonly known as *Excelsior* lists.

177. See 450 F.2d at 674-77. The court also pointed out that the particular research model drawn up and tested by the plaintiffs did not appear to bias the interviewed employees. See *id.* at 676.

178. *Id.* at 677 n.24.

179. See generally Note, *The Privacy Act of 1974: An Overview and Critique*, 1976 WASH. U.L.Q. 667, 704-05. As noted by the court in *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974), there is an argument that the plaintiff-oriented approach in *Getman* is within the language of the FOIA since the “any person” requirement of section 552(a)(3) “applies only to matters not within any of the exemptions

This approach¹⁸⁰ must be evaluated, however, in the light of two important factors. First, the FOIA does not authorize judicial supervision of the use of disclosed information. If limited disclosure were allowed, each person needing information would have to bring a separate FOIA suit, the exact purpose for disclosure would have to be presented to the court, and there would have to be a policing mechanism to ensure that information was used as authorized in the disclosure order. That Congress did not outline such a scheme of disclosure indicates that such was not its intent.

Second, the *Getman* policy of limited disclosure stands in direct contradiction to the language and legislative history of the FOIA. Congress stated that nothing in the FOIA authorized limiting the availability of information to the public if it was not specifically exempted.¹⁸¹ Access by the general public to all information was thus a conscious policy choice by Congress.¹⁸² Moreover, in amending the information disclosure provisions of the Administrative Procedure Act¹⁸³ by enactment of the FOIA,¹⁸⁴ Congress expressly eliminated the requirement that a person seeking information be "properly and directly concerned"¹⁸⁵ and instead provided for disclosure "to any person."¹⁸⁶ It does not seem likely that after rejecting a plaintiff-oriented standard of disclosure, Congress intended to implicitly reinstate this approach by the use of "clearly unwarranted."

Taking a view sharply opposed to that of *Getman*, the Fourth Circuit in *Robles v. EPA*¹⁸⁷ rejected any balancing of interests under the "clearly unwarranted" clause.¹⁸⁸ The court restricted its inquiry

enumerated in § 552(b). Thus it is only the *non-exempt* material that must be made available to 'any person.'" *Id.* at 136.

180. For criticism of the *Getman* decision, see *Michigan Project*, *supra* note 30, at 1081-83; *Invasion of Privacy*, *supra* note 119; Comment, *supra* note 31, at 611-18.

181. See 5 U.S.C. § 552(c) (1976).

182. The FOIA "eliminates the test of who shall have the right to different information . . . [A]ll citizens have a right to know." SENATE REPORT, *supra* note 2, at 5-6.

183. Act of July 11, 1946, ch. 324, § 3, 60 Stat. 238 (current version at 5 U.S.C. § 552 (1976)).

184. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552 (1976)).

185. As the Senate Judiciary Committee noted, one of the serious deficiencies in the Administrative Procedure Act prior to the enactment of the FOIA was that section 3(c) limited the availability of public records "to persons properly and directly concerned . . ." SENATE REPORT, *supra* note 2, at 5.

186. 5 U.S.C. § 552(c) (1976).

187. 484 F.2d 843 (4th Cir. 1973).

188. See *id.* at 847-48. The court's analysis was confused in that it took the EPA's argument "that disclosure should be refused because it 'would do more harm than good,'" *id.* at 847, and collapsed it into the balancing approach suggested by the "clearly unwarranted" language of exemption 6. While the court recognized, and rejected, the EPA's argument as a basis for denying disclosure solely on equitable

to whether there was a serious invasion of privacy, stating that "the right to disclosure under the Act is not to be resolved by a balancing of equities or a weighing of need or even benefit."¹⁸⁹

The Supreme Court accepted neither of these approaches in *Department of the Air Force v. Rose*.¹⁹⁰ Instead, the Court enunciated the basic principle that exemption 6 requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act, 'to open agency action to the light of public scrutiny.'"¹⁹¹ Under such a test, the public interest is not coextensive with the special needs, interests, or intended uses of the plaintiff in an FOIA suit, but rather is evaluated in terms of the interest of the informed electorate in disclosure.¹⁹² Only to the extent that general disclosure reveals the workings of government to the public does it serve the public interest. But since the Court never actually reached the question whether the invasion of privacy was clearly unwarranted,¹⁹³ it left the lower courts with the difficult task of applying its test of public interest.

In *Committee on Masonic Homes v. NLRB*,¹⁹⁴ the Third Circuit acknowledged the *Rose* definition of public interest and found that disclosure of union authorization cards alone would reveal little about the operations of the National Labor Relations Board.¹⁹⁵ This analysis of the public interest, however, is too limited. While the public interest is not coextensive with the plaintiff's litigative interest in the cards,¹⁹⁶ it is certainly in the public interest to have citizens well informed in their dealings with administrative agencies.¹⁹⁷ Similarly, there is a "broader public interest in correct adjudication of adminis-

grounds, *see id.*, it apparently did not consider that such an argument could also be applied to a completely distinct analysis based on the statutory exemption as suggested by *Getman*. Compare *id.* at 847-48, with *Getman v. NLRB*, 450 F.2d 670, 674-78 (D.C. Cir. 1971).

189. 484 F.2d at 848.

190. 425 U.S. 352 (1976).

191. *Id.* at 372.

192. See Comment, *supra* note 31, at 607-10.

193. See 425 U.S. at 380-81.

194. 556 F.2d 214 (3d Cir. 1977).

195. See *id.* at 220. The court also rejected plaintiff's argument that the public would save tax monies by not having to pay the expenses of the Board in conducting an election. The court reasoned that card challenge proceedings were likely to cost taxpayers as much as a representation hearing. See *id.*

196. "[A litigant's] rights are neither increased nor decreased by reason of the fact that it claims an interest in the [documents sought] greater than that shared by the average member of the public." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); see *EPA v. Mink*, 410 U.S. 73, 79, 92 (1973).

197. The FOIA attempts "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." SENATE REPORT, *supra* note 2, at 7.

trative proceedings [and] in whether public servants carry out their duties in an efficient and law abiding manner."¹⁹⁸

In *Howard Johnson Co. v. NLRB (Region 3)*,¹⁹⁹ the court did consider disclosure of the authorization cards to be in the public interest to the extent it ensured the Board's efficient and proper use of its resources in connection with representation elections.²⁰⁰ The court observed, however, that the importance of informed litigants and correct administrative decisionmaking in this type of case is mitigated by the nature of the Board's proceedings. Collective bargaining is not forced upon an employer simply because a thirty percent showing of interest has been made. Generally, a secret ballot election stands between the employer and any government-enforced bargaining.²⁰¹ Although the representation election itself might constitute an unfair and inefficient Board action if an improper authentication of cards was made, disclosure of the cards would do little to improve upon the existing procedures for determining whether there is an adequate showing of interest.²⁰² An employer can already request the Board to compare signatures on the authorization cards with employees' payroll signatures and submit to the Board any information he has concerning card irregularities or fraud.²⁰³ The opportunity to examine the signed cards himself would not significantly increase the employer's ability to ensure proper agency action. Thus, even under a broad interpretation of public interest that recognizes the importance of fairness and efficiency in administrative proceedings, the benefit derived from disclosing authorization cards is minimal.

Since the public need for disclosure of authorization cards is not compelling under any view,²⁰⁴ results under the courts' balancing of

198. *Columbia Packing Co. v. United States Dep't of Agriculture*, 417 F. Supp. 651, 655 (D. Mass. 1976).

199. 96 L.R.R.M. 2214 (W.D.N.Y. 1977).

200. *Id.* at 2218; *accord*, *Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426, 433 (E.D. Pa. 1976) (disclosure of the cards might result in the Board making a more informed decision about whether to hold an election or in the employer agreeing to bargain without an election), *rev'd*, 556 F.2d 214 (3d Cir. 1977).

201. *See Howard Johnson Co. v. NLRB (Region 3)*, 96 L.R.R.M. 2214, 2218 (W.D.N.Y. 1977). When an employer has engaged in unfair labor practices, however, he may be ordered to bargain without an election solely upon a showing of majority interest as evidenced by signed authorization cards. *See NLRB v. Gissel*, 395 U.S. 575 (1969).

202. "[I]t is the election . . . which decides the substantive issue whether or not the [union] or another labor organization, if any, actually represents a majority of the employees involved in a representation case." *NLRB v. J.I. Case Co.*, 201 F.2d 597, 600 (9th Cir. 1953) (quoting *O.D. Jennings & Co.*, 68 N.L.R.B. 516, 518 (1946)).

203. *See Howard Johnson Co. v. NLRB (Region 3)*, 96 L.R.R.M. 2214, 2218 (W.D.N.Y. 1977).

204. Even the district court in *Masonic Homes* did not claim that the benefits noted in the opinion were very important. It said only that they "must not be over-

interests have been largely determined by the initial finding on the invasion of privacy issue. Thus, where the courts believed that statutory privacy interests might be violated by disclosure, the invasion was held to be unwarranted.²⁰⁵ On the other hand, where the court believed that disclosure would not be embarrassing, the modicum of public interest in card disclosure was sufficient to warrant the invasion of privacy.²⁰⁶

C. SUMMARY

The critical factor in the authorization card decisions has been the willingness of the courts to examine the role of the cards in light of current procedures designed to effectuate the organizational rights of employees under the NLRA.²⁰⁷ Since the privacy of the choice reflected in the signing of the cards is essential to the labor law policy of promoting free representation elections,²⁰⁸ most courts have recognized that the NLRA and Board procedures have created a privacy interest that is worthy of protection under the FOIA.

Courts adopting this approach have found that disclosure would produce a chilling effect on employees' rights to unionize and have therefore held that disclosure would constitute an unwarranted invasion of privacy. Following the lead of *Wine Hobby* and *Rose*, courts in *Masonic Homes* and *Howard Johnson* held that whenever a disclosure of an agency record would constitute an unwarranted invasion of privacy, the record is "similar" to a personnel or medical file.²⁰⁹ Similarly, the court in *Howard Johnson* was also willing to interpret the "law enforcement purposes" of exemption 7 broadly in order to avoid card disclosure.²¹⁰ The result, then, of emphasizing the labor law context of a request for union authorization cards is a rejection of any threshold requirement for exemption 6 by expanding "similar files" to mean all files, and a liberal interpretation of "law enforcement purposes" in the face of the clearly expressed congressional

looked." 414 F. Supp. at 433.

205. See *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1182 (1978); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977); *Howard Johnson Co. v. NLRB* (Region 3), 96 L.R.R.M. 2214, 2218 (W.D.N.Y. 1977); *NLRB v. Biophysics Sys., Inc.*, 91 L.R.R.M. 3079, 3081 (S.D.N.Y. 1976).

206. See *Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426, 433 (E.D. Pa. 1976), *rev'd*, 556 F.2d 214 (3d Cir. 1977).

207. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1970).

208. See notes 140-52 *supra* and accompanying text.

209. *Accord*, *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978). See generally notes 64-77 *supra* and accompanying text.

210. See notes 99-110 *supra* and accompanying text.

intent that this phrase be narrowly construed. On the other hand, those courts that have not emphasized the labor law aspects of the suits have held that card disclosure would not constitute an unwarranted invasion of privacy.²¹¹

IV. CONCLUSION

On the whole, the better view would be to protect authorization cards from disclosure. Disclosure would surely run counter to congressional intent embodied in the NLRA by frustrating well established procedures for the determination of bargaining representatives. More important, given the lack of any compelling state interest to justify disclosure and its concomitant chill on the employees' exercise of their rights of free association and petition, disclosure potentially constitutes an interference with first amendment rights.

In construing the FOIA so as to permit nondisclosure, exemption 6 provides a slightly preferred basis over exemption 7. A broad reading of exemption 6's threshold requirement that union authorization cards be "similar" to personnel files is consonant with prior judicial interpretation of exemption 6, including the Supreme Court's construction in *Rose*.²¹² On the other hand, although exemption 7's "investigatory records compiled for law enforcement purposes" language would seem more applicable to the cards if the unique sequence of NLRA investigation and litigation is taken into consideration, the application of exemption 7 has been expressly narrowed by Congress to exclude materials routinely gathered without connection to any specific adjudicatory proceeding.²¹³ In addition, the authorization cards are not clearly distinguishable from the records that the Senate sponsors of the 1974 amendments intended to exclude from the protection of exemption 7, and are, if anything, even less directly related to law enforcement proceedings than were the HEW reports at issue in *National Center*.²¹⁴

Broad construction of the exemptions in order to avoid chilling employees' statutory and constitutional rights raises serious problems of FOIA interpretation, however. First, a broad interpretation of exemption 6 and 7 threshold requirements runs counter to the general policy that FOIA exemptions be construed narrowly. More-

211. See *Donn Prods., Inc. v. NLRB*, 93 L.R.R.M. 2065, 2066 (N.D. Ohio 1976) (authorization cards are not investigatory records compiled for law enforcement purposes); *Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426, 432 (E.D. Pa. 1976) (authorization cards are not similar files), *rev'd*, 556 F.2d 214 (3d Cir. 1977).

212. See notes 64-72 *supra* and accompanying text. *But see* notes 77-79 *supra* and accompanying text.

213. See notes 84-86 *supra* and accompanying text.

214. See text accompanying notes 81-83 *supra*.

over, a broad reading of the threshold requirements may in the future allow the exemptions to be extended by analogy to less appropriate situations.²¹⁵ Such a reading also sets a precedent for broad construction of other exemptions, a result that would frustrate the statutory goal of fullest possible disclosure.²¹⁶

Further, a broad interpretation creates practical problems when the FOIA is read in conjunction with the Privacy Act of 1974.²¹⁷ Under the Privacy Act, a person may sue the government and collect damages, court costs, and attorneys' fees if an agency releases personal information without the individual's consent,²¹⁸ unless disclosure is required under the FOIA.²¹⁹ Since only costs and attorneys' fees are awarded in a successful FOIA disclosure suit,²²⁰ it would normally be cheaper for the government to defend and lose a FOIA suit than a Privacy Act suit. It is therefore possible that agencies may choose to refuse requests for disclosure made under the FOIA, rather than disclose the information and risk Privacy Act suits alleging that the information was exempted from disclosure by one of the nine FOIA exemptions.²²¹ Given the past record of agencies' attempts to avoid

215. See generally *Backdoorring the NLRB*, *supra* note 5, at 183 ("Deference to the labor posture of a case without reflection upon its FOIA implications may result in an evasion of congressional intent. Moreover, many courts have not restricted the precedential value of their holdings to the labor context.").

216. Congress has already expressed its displeasure with the gradual judicial extension of the limits of exemptions 3 and 7. In response to the broad judicial interpretations of the exemptions, Congress amended both exemptions, setting forth more exactly the grounds for withholding information. Exemption 7 was amended in response to the decision in *Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974). See notes 81-86 *supra* and accompanying text. Amendment of exemption 3 was prompted by the decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), which held reports on commercial airplane maintenance exempt from disclosure because the Administrator determined under the Federal Aviation Act § 1104, 49 U.S.C. § 1504 (1976), that disclosure might adversely affect the subjects of the records, and thus it was not in the public interest. Congress made clear that it did not intend such general statutory provisions to justify nondisclosure by changing part of the language of exemption 3 from "specifically exempted from disclosure by statute," Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (current version at 5 U.S.C. § 552(b)(3) (1976)), to "specifically exempted from disclosure by statute . . . , 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" 5 U.S.C. § 552(b)(3) (1976). See generally Halperin, *Exemption (b)(3)*, in *ACLU PROJECT*, *supra* note 5, at 25.

217. 5 U.S.C. § 552a (1976); see Comment, *supra* note 31, at 624-31, 628.

218. See 5 U.S.C. § 552a(g)(4) (1976).

219. See *id.* § 552a(b)(2).

220. See *id.* § 552(a)(4)(E).

221. See Comment, *supra* note 31, at 627-28.

disclosure of records,²²² the result of the Privacy Act may be a general reluctance to disclose voluntarily any record that the agencies could possibly contend fits into an expansive reading of exemptions 6 and 7.²²³ Ironically, it was just this problem of broad discretionary loopholes under the Administrative Procedure Act that originally prompted Congress to enact the FOIA with its specific exemptions and goal of full agency disclosure.²²⁴

At a minimum, the broad interpretation of the exemptions in the authorization card cases should not establish controlling precedent for subsequent construction of the FOIA exemptions in other contexts. Because the possible unconstitutionality of card disclosure dictates a liberal reading of the FOIA,²²⁵ the broad interpretation of exemptions 6 and 7 found in the authorization card cases is probably appropriate in that context, but should not be applied in any case in which a constitutional question has not been raised.

Where constitutional and significant statutory rights are jeopardized by disclosure, as is the case with union authorization cards, disclosure is probably inappropriate. But such an outcome is not without its costs. Courts continue to be burdened with a large number of FOIA suits challenging the Board's refusal to disclose not only authorization cards, but also witness affidavits and Board agents' reports.²²⁶ Perhaps more serious, however, is the danger that broad interpretation of the FOIA exemptions, made necessary by the threat disclosure poses, will undermine the entire structure of that Act and largely defeat the laudable congressional goal that underlies it. These problems should not be left to judicial construction or agency good faith. Congress itself must provide more concrete guidance.

There are two possibilities. First, the FOIA could be amended to provide a general exception for all matter, the disclosure of which would cause an unwarranted invasion of personal privacy. Indeed,

222. See generally, Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

223. Under a broad interpretation of "similar files," almost any record that contains personal information may be exempt from disclosure under exemption 6. Likewise, under a broad interpretation of "law enforcement purposes," many routine agency records only marginally connected with law enforcement may become exempt from disclosure under exemption 7.

224. The Senate report notes that under the Administrative Procedure Act, "any Government official can . . . withhold almost anything from any citizen under the vague standards . . . in section 3." The FOIA, it stated, "sets up workable standards In particular, it avoids the use of such vague phrases as 'good cause found' and replaces them with specific and limited types of information that may be withheld." SENATE REPORT, *supra* note 2, at 5.

225. See notes 153-69 *supra* and accompanying text.

226. See Connolly & Fox, *supra* note 5, at 230-37; *Backdoorring the NLRB*, *supra* note 5.

this is already the direction taken in judicial construction of exemption 6. Such a provision is unlikely for several years, however, if at all, until the practical difficulties of the recently enacted Privacy Act of 1974²²⁷ and Government in the Sunshine Act²²⁸ are revealed. More important, however, such a broad exemption would, as Congress must have recognized when it chose to limit privacy protection to two specific contexts, pose a serious threat to the goal of full disclosure. The concept of privacy is too amorphous to provide reliable guidance.

The second and better alternative is the more specific one. Congress should review NLRB procedures to determine exactly what information should not be disclosed and then amend the NLRA accordingly.²²⁹ Once the NLRA is so amended, exemption 3 of the FOIA would then clearly apply to prohibit disclosure of union authorization cards.²³⁰ Such an amendment would decrease the strain on the Board's legal staff and on court dockets.²³¹ More important, the amendment would allow courts to prevent disclosure of union authorization cards without having to adopt a broad construction of the

227. 5 U.S.C. § 552a (1976).

228. *Id.* § 552b.

229. Since the rights of employees threatened by disclosure of union authorization cards are so significant and the loss of information valuable to an informed electorate so slight, it appears that authorization cards should never be disclosed. The outcome of this balancing with respect to witness affidavits, however, is more problematic. In determining disclosure rules for these documents, Congress should balance the need for more modern discovery procedures in Board proceedings against the possible frustration of the Board's ability to enforce the NLRA against the invasion of employees' privacy and the consequent chill of their statutory and constitutional rights to associate freely and to petition the government.

230. Exemption 3 applies to records "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1976). The text of exemption 3 appears at note 4 *supra*.

Even if Congress does not specifically amend the NLRA to exclude disclosure of authorization cards and other documents, it can be argued that the cards are exempt under exemption 3. The Board requires that balloting in a representation election be secret, *see* 29 U.S.C. § 159(c)(1) (1970), and authorization cards are like ballots in that they reveal an employee's designation of a particular union to represent him in collective bargaining with his employer, *see* text accompanying notes 24-25 *supra*. Furthermore, in situations where an employer guilty of unfair labor practices is ordered to bargain solely on the basis of a majority showing of authorization cards, *see* *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the cards are the functional equivalent of ballots. Nondisclosure of the cards can be said to be dictated by the NLRA, therefore, because disclosure would reveal the very information that the statute seeks to keep confidential and because the cards sometimes take the place of ballots. The problem with this argument is that the cards are not completely identical to ballots, and amended exemption 3 has been construed very narrowly. *See* *Charlotte-Mecklenburg Hosp. Auth. v. Perry*, 571 F.2d 195, 198-201 (4th Cir. 1978). There is no reason, however, to read exemption 3 narrowly while broadly construing exemptions 6 and 7.

231. Over 75 FOIA suits seeking disclosure of authorization cards, witness affidavits, agent reports, and other Board documents have been filed against the Board in the past few years. *See* ACLU PROJECT, *supra* note 5.

threshold requirements of exemptions 6 and 7. Ultimately, it would serve to reinforce the right of citizen access to governmental information by removing a major impediment to a balanced interpretation of the FOIA exemptions.