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perfected status, and thus could not prevail over the trustee's inclusion into the bankrupt's estate. On July 1, 1971 §9-401 was amended to change the proper place for filing a financial statement from the circuit courts to the State Department of Assessments and Taxation. Instead of filing the third statement with the Department, the creditor acted as he had the first two instances and filed this final statement with the Circuit Court. The basic issue here was whether the final statement modified the earlier filings. In rejection of the trustee's argument, the court conceded that the third filing was ineffective, but that under §9-401(d) such error had no effect on the properly filed statements.

Court Shoots Down Air Force

by Thomas G. Ross
Lawrence C. Dominic, Esq.

The August 30, 1977 decision in *Mead Data Central, Inc. v. United States Department of the Air Force, et al.* (No. 75-2218), ___ U.S.App.D.C. ___, ___ F.2d ___, concerned the applicability and scope of exemption five of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(5)(1970 Supp. V 1975). The appellant appealed from a summary judgment in favor of the Air Force in which the U.S. District Court for the District of Columbia denied Mead Data's request for an injunction to compel the Air Force to disclose the contents of seven documents relating to a licensing agreement between the Air Force and the West Publishing Company. The court held that the requested documents were not subject to disclosure because the fifth of nine exemptions enumerated within the FOIA specifically protected the Air Force against mandatory release of the documents.

Enacted in 1966, the FOIA was intended to increase public access to

government records and to encourage agency responsibility. Congress, through the Act, changed its policy from one favoring nondisclosure of governmental information (under the Administrative Procedure Act [APA] of 1946) to one of mandatory disclosure. Whereas the APA was very restrictive and often abused, requiring access only to "persons properly and directly concerned" with the matter, the FOIA mandates disclosure of identifiable governmental records to "any person" requesting them, subject to the nine specific exemptions, and provides for judicial remedy for a government agency's improper withholding of information. 86 HARV. L. REV. 1047-1048 (1973).

The United States Supreme Court in *N.L.R.B. v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975), held that the "purpose of the [FOIA] is to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language" and that the Act's intent was to assure the public's right of access to virtually all governmental agency documents. The Court reiterated its position on the FOIA's function in *Dept. of Air Force v. Rose*, 425 U.S. 352 (1976), holding that "disclosure, not secrecy, is the dominant objective of the Act."

Congress did, however, recognize the need to allow government agencies the right of nondisclosure for certain documents. The information, to be protected, must be within one of the following nine specific exemptions:

1. national defense or foreign policy interests;
2. agency's internal personnel rules and practices;
3. specific statutory exemption;
4. trade secrets;
5. inter-agency or intra-agency memoranda;
6. invasion of personal privacy;
7. investigatory files for law enforcement purposes;
8. regulation of financial institutions; and
9. information concerning oil wells.

See 5 U.S.C. §§552(b)(1) through (9).

In *Mead Data*, the Air Force was successful at the trial court level after asserting a claim that the seven documents requested by Mead Data were privileged in

that they fell within exemption five of the FOIA. That exemption, at 5 U.S.C. §552(b)(5), states:

[The Act does not apply to] inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.

The broad and unclear language of exemption five thrusts upon the courts a major role in the administration of the Act. 86 HARV. L. REV. at 1066-67 (1973). The two basic defense claims that can be made to invoke the privilege under this exemption are the attorney-client privilege and the privilege protecting those memoranda involved in the deliberation and decision-making governmental process. See generally C. M. Marvick (Ed.), *Litigation Under the Amended Freedom of Information Act* (ACLU 1976).

The seven documents that Mead Data sought to have disclosed dealt with an Air Force project involving a computerized legal research system. Of these, the Air Force claimed that three were legal opinions in which Air Force attorneys were advising their client as to applicable law concerning contract negotiations. The Air Force further asserted that the other four documents were privileged as internal memoranda prepared by its employees.

Mead Data argued that the information requested was purely factual and thus subject to disclosure, while the Air Force asserted that it consisted of advisory opinions and deliberations protected from disclosure by exemption five.

The circuit court agreed with the trial court's ruling that both the attorney-client and deliberative process privileges are incorporated into exemption five. However, it reversed the judgment of the district court due to its "impermissibly broad interpretation" of these privileges and remanded for a decision based on narrower constructions outlined in the case. No. 75-2218 slip op. at 34. The court noted that the congressional intent was that the exemption be applied "as narrowly as consistent with efficient government operation." *Id.*, at 11, n. 16; S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

ATTORNEY-CLIENT PRIVILEGE

While the court viewed this privilege as necessary to maintain the quality and independence of agency decision-making, it ordered the disclosure of the three documents on remand unless the Air Force could meet its burden by sufficient demonstration of the applicability of the privilege to this situation. Agreeing that the documents were products of the attorney-client relationship, the court, however, refused to hold them exempt under the privilege absent a showing by the Air Force that one document was confidential in itself and that two others were based on confidential information provided by the client. In the first case, one document sought to be withheld was known and disclosed to parties outside of the attorney-client relationship (West Publishing Co.); as to the other two the Air Force sought to protect under the privilege theory, it was found that they were not based on information "supplied by the Air Force with the expectation of secrecy." *Id.* at 14-18.

DELIBERATIVE PROCESS PRIVILEGE (Internal Memoranda)

This privilege turns on the distinction between information which is essentially factual and documents involving deliberation and policy-making. The Supreme Court held that the former requires disclosure, *EPA v. Mink*, 410 U.S. 72 (1973), while documents revealing agency policy making and deliberative processes may be withheld. *Id.* at 19-20.

Of the four documents the Air Force sought to withhold under this privilege, one was found to be exempt from disclosure. As to two others, the court stated that its policy of "promoting the free flow of ideas" protected from disclosure those parts of the documents reflecting the opinions of Air Force employees concerning the status of negotiations with West. Slip op. at 22. The court found that the fourth document, dealing with various offers and counter-offers by both West and the Air Force, was not exempt simply because it reflected "negotiating positions" prior to a final contract. While such deliberations within an agency structure



photo by John Clark Mayden

are protected, those involving an outside party are not. The court remanded to compel disclosure of this document and any parts of the others dealing with specific negotiations with West. *Id.* at 22-24.

SEGREGABILITY

The court went on to hold that the Air Force had not adequately justified its claim that the requested documents contained no non-exempt information that could be "reasonably segregable" from that information the Air Force asserted to be privileged under exemption five. The court further directed that an agency is required to provide an adequate description of a document's content and its reasons for believing the information to be non-segregable before refusing to disclose. *Id.* at 2.

"The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing it contains some exempt material." Slip op. at 27-28.

On remand, the Air Force was ordered to provide a detailed justification for withholding the seven documents. In addition, the court stated that a further requirement of a party asserting that the information in a document was not segregable from exempted information is a description of the portion of information contained in a file that is non-exempt and how that information is dispersed throughout the entire document. The court reasoned that this information would better enable a court to establish the validity of an agency's assertion that non-privileged information was not segregable from that which was exempt. *Id.* at 29-30, 34.

A narrow construction of exemption five places it in its proper context. For the attorney-client privilege to possess any gravity it must be circumscribed to protect communication between the lawyer and her client which is made with reliance on secrecy. The expectation of confidentiality is often a condition precedent to any communication at all. Where parties' deliberations are protected to permit the "free flow of ideas" without threat of disclosure, opinion making and discussion flourishes. In the agency milieu, however, that crucial expectation of confidentiality is limited. Where attorney-client consultations demand secrecy in order to meet an objective, and where administrative deliberations must be confidential to avoid a chill on the "free flow of ideas," the exemption shall apply. Not intended by the Congress was protection of the mundane communication within the agency context, information necessarily subject to examination by third parties or the frustration of the public's reasonable right to access to information of its government.

Prejudicial Joinder

by John Jeffrey Ross

John Lee McKnight was arrested and accused of committing four robberies within the same area of Baltimore during a single month in 1974. After an unsuccessful motion to sever the informations joined in a single prosecution under Mary-