In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD ET AL,	)	
Petitioners	)	
v.	)	No. 73-1233
SEARS, ROEBUCK AND CO.	)	

Washington, D. C.
January 14, 1975

Pages 1 thru 54

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v.	:	
SEARS, ROEBUCK AND CO.	:	

Washington, D. C.

Tuesday, January 14, 1975

The above-entitled matter came on for argument at 11:18 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530
For the Petitioners

GERARD C. SMETANA, ESQ., Suite 6800, 233 South Wacker Drive, Chicago, Illinois 60684
For the Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1233, National Labor Relations Board versus Sears, Roebuck and Company.

Mr. Friedman, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF PAUL L. FRIEDMAN, ESQ.,

ON BEHALF OF PETITIONER

MR. FRIEDMAN: Mr. Chief Justice.

May it Please the Court:

The question in this case, here on a writ of certiorari to the Court of Appeals from the District of Columbia Circuit, is whether the Freedom of Information Act requires the disclosure of certain documents generated by the General Counsel of the National Labor Relations Board, so-called "Advice and Appeals Memoranda" which relate to the prosecution of unfair labor practices before the board by the General Counsel.

And in order to put the issue in context, I'd like at the outset to describe briefly the procedures that are followed within the General Counsel's office in deciding whether or not to prosecute an unfair labor practice charge before the board.

As this Court is aware, the National Labor Relations Board itself has no authority to bring an unfair labor

practice charge. It can only act in response to a charge that has been filed with it.

If a charge is filed and any person can file a charge, then the General Counsel, if he wishes to, may prosecute the charge but only in response to someone else bringing the matter to the attention of the board formally may the board issue an unfair labor practice complaint.

Now, the General Counsel of the board, who is a Presidential appointee, serves two functions in connection with the handling of cases before the board.

First, he is the one, when a complaint has been issued, who prosecutes the case before the board.

Secondly, he has final authority to determine whether or not a complaint should be issued and that is, if, after examining a case, the General Counsel decides not to issue a complaint, that is the end of that case as far as the board is concerned.

QUESTION: Wholly unreviewable.

MR. FRIEDMAN: Wholly unreviewable, held by a number of courts to that effect.

Now, the General Counsel in turn has relegated to the board's regional directors, of whom there are some 30-odd, the authority initially to process unfair labor charges.

When a charge is filed with one of the regional directors, he investigates it. He ordinarily will interrogate

witnesses, look at documents and so on and after he has completed his investigation, there are three possible things he may do.

First, he may conclude that there is nothing here that warrants the issuance of a complaint and he decides not to issue a complaint.

Secondly, he may conclude on the basis of his investigation that there is enough here to warrant the issuance of a complaint and he issues the complaint.

Third, he may submit the matter to the General Counsel's office in Washington for advice on whether or not he should issue a complaint.

The General Counsel has put out instructions to the regional directors that they are to refer two categories of cases to Washington for advice.

One, cases that present novel or complex problems or, two, cases that involve certain issues which the General Counsel has specified should be submitted to him in Washington in order to assure a uniform prosecutorial policy with respect to these cases.

Now, when the General Counsel receives from the Regional Director a request for advice, the matter is submitted to something called the Office of Appeals in the General Counsel's office where the case is thoroughly and carefully reviewed by a number of people and this review

process culminates in something called an "advice memorandum" in which the General Counsel sometimes acts himself, more frequently acting through the man in charge of the Office of Advice, advises the regional director on whether or not he should issue a complaint.

These advice memoranda, the General Counsel gives the reasons for his decision, discusses the evidence of the case, analyzes what precedents and if the advice is that a complaint should issue, he generally gives the theory upon which he believes the case should proceed.

Now, although the representative in examples included in the record of advice memoranda contained nothing making any reference to the possibility of settlements, the report -- the two reports in this record presented by the practice and procedure committee of the Labor Law Section of the American Bar Association on which Sears relies very heavily and in one of those reports set forth at page 71 of the Appendix, the committee, which represents, of course, the experts in this field, both on the labor and the management side, recognizes that not infrequently these advice memoranda will refer to settlement possibilities.

It is in the middle of page 71 and the statement is: "The response to the region will sometimes include specifics with respect to the kind of settlement or other action and will set forth the theories upon which such course of action

is based," and I stress that because the ultimate question in the case is what these things are. Are they just a statement of legal position or do they involve something more?

They basically reflect the strategy, the litigation strategy that the General Counsel has recommended be followed and we think the fact that they fefer to settlement negotiations and suggest a basis upon settlement to us is very clear evidence of that.

Now, if the regional director should decide not to issue a complaint, either because of the advice he has received from the General Counsel or because his own investigation indicates that a complaint is not appropriate, then the charging party has the right to appeal that determination to the General Counsel.

The matter is then similarly reviewed except by a different office by something called the "Office of Appeals."

If the Office of Appeals upholds the regional director's determination, it so advises him and the parties with a rather brief statement giving the reasons for his decision.

If, however, the regional counsel is reversed and the General Counsel concludes that a complaint should issue, they then prepare something called an "Appeals Memoranda" and the Appeals Memoranda is similar to the

Advice Memoranda in that it, too, describes the case, suggests theories, gives the reasoning of the General Counsel.

Now, it is these two categories of --

QUESTION: And the Appeals Memorandum is sent back to the regional --

MR. FRIEDMAN: To the regional director.

QUESTION: And to nobody else?

MR. FRIEDMAN: To nobody else. These are the two things they want to see.

QUESTION: I know that.

MR. FRIEDMAN: Yes, this is an internal document in which the General Counsel explains to the regional director why he thinks the case should go forward, suggests legal theories of the case, discusses the evidence, may again refer to settlement negotiations and will discuss the applicable board and the court precedents.

I'd like to just make one other point here because the claim is that somehow these appeals memoranda represent the law of the General Counsel.

They are not the law of the General Counsel.

The General Counsel makes no law. All he does is applies the law as the board and the courts have developed it. He is the prosecuting arm -- prosecuting arm of the board in handling of these unfair labor practice --

QUESTION: There is an appeal only in the event

that the regional director decides not to.

MR. FRIEDMAN: That is correct.

QUESTION: And what are the mechanics of that appeal? I didn't know about that appeal before.

MR. FRIEDMAN: The mechanics of that appeal are, the charging party, who --

QUESTION: First of all, the regional director, I suppose, has to advise the charging party that he has decided not to --

MR. FRIEDMAN: He advises the charging party -- there are some examples of that, giving the reasons why he has decided not to issue a complaint advising the charging party -- I believe it is within ten days that he may appeal to the General Counsel.

QUESTION: Uh huh and then how is that appeal taken?

MR. FRIEDMAN: That is a written piece of paper that is sent to the General Counsel indicating why the charging party believes that a complaint should issue in this case.

If the charging party wishes to, he may have the opportunity to argue orally before the General Counsel's office in Washington.

QUESTION: It is an ex parte appeal? The potential chargee is not notified?

MR. FRIEDMAN: No. No, the potential chargee is not a party. Although the potential chargee may have the opportunity, if he wishes to be heard also. This is a relatively infrequent thing.

QUESTION: It is not simultaneous?

MR. FRIEDMAN: No, no. There is no -- there is nothing comparable to the argument before this Court. It is heard ex parte by each side.

QUESTION: How does the chargee -- potential chargee know about it?

MR. FRIEDMAN: Well, he is given notice of the appeal by the -- when -- I believe when the General -- when the charging party files a notice of appeal, this notice is given to the chargee because --

QUESTION: Is that the first notice he gets?

MR. FRIEDMAN: Of the appeal but, no, when a charge is filed initially --

QUESTION: With the General Counsel --

MR. FRIEDMAN: With the regional director, he informs the party charged --

QUESTION: Who is "he?"

MR. FRIEDMAN: The regional director.

Well, let me -- under the board's regulation, the charging party has a responsibility to serve a copy of the charge upon the person charged.

QUESTION: Chargee.

MR. FRIEDMAN: So he is put on notice and, normally, in this situation or, not normally, but frequently, the board or the regional director's representative's may interrogate the -- and go out and talk to the charged party to see what his side of the case is.

QUESTION: Yes.

MR. FRIEDMAN: But you get one side from the charging party. The charged party may have a wholly different point of view.

QUESTION: And the regional director, if and only if, he decides with or without having sought advice from Washington, not to file a complaint, then and then only is there an appeal.

MR. FRIEDMAN: That is correct.

QUESTION: And it is preliminarily an ex parte appeal.

MR. FRIEDMAN: Yes.

QUESTION: Later, there may be or is an opportunity by the potential chargee to be heard also in Washington.

MR. FRIEDMAN: Yes.

QUESTION: And it is all -- and it is done on the papers but sometimes also in an oral hearing.

MR. FRIEDMAN: Sometimes in an oral hearing with extensive review of the case in the Office of Appeals. That

is, that it is assigned to a lawyer who studies it. Then a group of people study the case. It is very extensively considered.

QUESTION: And how long a process is this?

MR. FRIEDMAN: Oh, it might be --

QUESTION: In any given case.

MR. FRIEDMAN: -- a week, two weeks. It would vary, I suppose, depending on whether there is going to be a hearing. What may sometimes happen occasionally when the case gets to the General Counsel's office, it may be sent directly to the General Counsel himself and he may consider it.

And let me say that this is -- this is exactly, if I may come to this right now, this is exactly what happened in this case -- in this case. What happened in this case --

QUESTION: Well, Mr. Friedman --

MR. FRIEDMAN: Yes.

QUESTION: Before you finish, I want to get this procedure --

MR. FRIEDMAN: All right, let me try to --

QUESTION: -- straight because I didn't know anything about that until I read these briefs on this case.

Then, if the -- if the General Counsel's office upholds the decision of the regional director not to --

MR. FRIEDMAN: Issue a charge.

QUESTION: -- file a complaint, then what?

MR. FRIEDMAN: Then a notice to that effect is sent to the charging party and to the regional director and that is the end.

QUESTION: That is the end of it and there is no memo and there is nothing --

MR. FRIEDMAN: There is no --

QUESTION: There are no papers there in that kind of a situation that are involved in this case.

MR. FRIEDMAN: That is correct.

QUESTION: There are none.

MR. FRIEDMAN: There are none, other than the letter, which is a public document because it is sent to the parties.

QUESTION: Just a notice.

MR. FRIEDMAN: Yes. There is no other thing.

QUESTION: So it is only in the event that the tentative decision or the decision of the regional director is reversed.

MR. FRIEDMAN: That is correct.

QUESTION: The papers are produced that are the subject --

MR. FRIEDMAN: That is right.

QUESTION: -- among others, of this lawsuit.

MR. FRIEDMAN: That's right. When, in effect, the General Counsel has made the decision to authorize the

prosecution of the case --

QUESTION: Directly.

MR. FRIEDMAN: -- that is what is involved in this lawsuit.

QUESTION: And there is, under the statute, his ultimate and unreviewable decision, that is, of the General Counsel.

MR. FRIEDMAN: That is --

QUESTION: So it is just something that this is delegated as a matter within the bureaucracy, this portion of it, to the regional director. Right?

MR. FRIEDMAN: The General Counsel has --

QUESTION: Has the statutory --

MR. FRIEDMAN: Authority and he has delegated it to the regional director.

QUESTION: -- authority to decide whether or not to file a complaint after a charge has been filed.

MR. FRIEDMAN: That is right. That is right and he has delegated to the regional director the initial processing of these complaints.

QUESTION: The initial processing.

MR. FRIEDMAN: That is correct.

QUESTION: Thank you very much.

QUESTION: I believe the General Counsel has a tenure of office that is fixed by statute, does he not?

MR. FRIEDMAN: Four years, Mr. Chief Justice.

QUESTION: And he can only be removed for cause, is that not so?

MR. FRIEDMAN: I believe so, yes.

Let me just come back, if I may, with one more thing to describe a little bit about these appeals memoranda and the advice memoranda here.

All that they really decide -- all that the General Counsel is deciding when he either recommends in the advice memorandum when he authorizes a complaint or, at the appeals stage in the appeals memorandum when he tells him to go ahead and file it, is that this is a matter that warrants presentation to the board.

He is not deciding that there is a violation and that is shown rather explicitly;in this record there are at least three examples in the advice and appeals memoranda and also in two letters sent to counsel for charging parties in which it is explicitly stated that this is a matter that warrants passing on by the board.

Let me just refer the Court to two of these and then I will cite the others -- at page 191 is an advice memorandum which ends up that "Authorization of complaint was warranted to place the issues of the case before the board," and then at page 206, which is an appeal memorandum, in the second full paragraph under "Reason for action," it

said, "Issues were raised with respect to various issues which warranted board determination on the basis of record testimony."

Another example of that is at page 211 of the record and then at page 32 and 199 of the record, letters sent by the General Counsel to counsel for the charging parties.

Now, let me come to the facts of this case very briefly.

In this case, Sears filed -- Sears, Roebuck, the Respondent, filed with the regional director a charge against a union alleging that the union had refused to bargain. That alleged refusal to bargain, whether there was a refusal to bargain, turned upon whether Sears had properly withdrawn from a multi-employer unit prior to the time that bargaining began.

This is a matter of some dispute within the board. There is a lot of board precedence on this, a lot of litigation on this as to just when an employer or a union may withdraw from multi-unit bargaining.

The regional director referred this case to the General Counsel for advice.

The next thing that we know by the record is that the regional director advised Sears that he was not filing a complaint in the case.

Sears then appealed this to the General Counsel and the General Counsel reversed and advised Sears that a complaint would be filed stating, and it is again coming back to what I said a minute ago, that this case raised issues warranting board determination.

That is at page 32 of the Appendix. And then the regional director subsequently issued a complaint.

Now, prior to the time that Sears appealed from the regional director's refusal to issue a complaint to the General Counsel it requested the General Counsel to furnish it, under the Freedom of Information Act, with three things.

First, the advice memorandum that the General Counsel had submitted to the regional director advising it not to issue a complaint in this case.

Secondly, all advice and appeals memoranda relating to the same subject. That is, the timeliness of employer withdrawal from multi-employer bargaining units, all of those appeals and advice memoranda rendered within the past five years and, third, an index or a digest to the advice and appeals memoranda.

What it stated was, it needed this information in order to successfully prosecute its appeal to the General Counsel.

The General Counsel refused to furnish these memoranda under the Freedom of Information Act, relying on

exemptions 5 and 7 of the Act which I will discuss shortly, and also saying that these memos were not a final disposition of the case, but were merely guides to the regional directors on how to prosecute the case.

Sears then filed this action in the District of Columbia District Court to obtain this information.

While the case was pending before the District Court, the General Counsel of the Labor Board announced that, as a matter of discretion and not because it was required by the Freedom of Information Act, that he was going to make available to the public copies of all of the appeals and advice memoranda in so-called "Closed cases," that is, cases where the board proceeding had been completed.

He stated he was doing this in order to provide the public and the labor bar with further information as to how his office was functioning.

Now, both sides in this case moved for summary judgment. The District Court granted Sears' motion and entered a rather broad order set forth at pages 9 to 10 of the record which directed the board's general counsel to provide all advice and appeals memoranda.

Sears had broadened its claim in its complaint so we were directed to produce all advice and appeals memoranda for the past five years, including anything incorporated by reference in those things.

That is, if, for example, as we read the order, if the order directed them to produce an appeals memorandum and the appeals memorandum said, "For reasons stated in the regional director's memorandum, we conclude we will not authorize a complaint in this case," that would have to be produced.

They also -- it also said that where it used some vague language, such as in the circumstances of this case, the General Counsel would have to explicate that and explain exactly what was meant.

Now, let me say that this kind of thing and the circumstances of this case as set forth in the reasons given in the appeals memoranda or the request for advice from the regional director -- these are just kind of short-handed phrases within the informal administrative procedure that is followed, what is done in this situation is the parties, the General Counsel is dealing with the people in the regional director's office in the region. They are familiar with these things.

QUESTION: Are you saying, Mr. Friedman, that the District Court required the General Counsel to prepare material that wasn't in existence in order to --

MR. FRIEDMAN: It may -- it may, Mr. Justice, because when they -- what he said was "That Defendants produce explanatory material including existing documents "--

QUESTION: Where is this?

MR. FRIEDMAN: Page 10a of the Petition for Certiorari where the District Court's opinion --

"Defendants produce explanatory material including existing documents in those instances where advice or appeals memoranda rely upon the circumstances of the case or some other vague and imprecise reference without delineating what those circumstances are except where they can demonstrate that the documents are exempt under the Act," which it seems to us just leaves the thing very far-reaching because --

QUESTION: When you say, "Including the existing documents," the inference is perhaps of more than existing documents.

MR. FRIEDMAN: It may well be. For example, if some of the basis for the action of the General Counsel's office was in discussions, informal discussions or telephone conversations they had with the people in the regional office which sometimes happens, I assume they would have to -- unless they could show that this was exempt -- they would have to make this available.

They might have to reduce to writing some of the things that they had -- some notes that they had to make this into a formal memorandum.

As the Court of Appeals summarily affirmed on the

basis of the decision of the District Court and also cited its opinion in the Grumman case, which is another Freedom of Information Act case to be argued immediately following this case.

Now, in the Freedom of Information Act, what Congress has done is to provide three different categories of information that are subject to production.

First, there is one category which has to be published in the Federal Register.

Then there is another category consisting of three components which has to be produced and indexed.

Finally, there is a third category of identifiable records which just have to be produced.

But then the Act goes on in subsection B and lists nine specific categories to which it says the Act does not apply. Now, our submission to this Court is that three of those exemptions cover this material and if we are right in that, if we are right on any one of those, if any one of those exemptions covers this material that, of course, is the end of the case.

You never have to reach the argument upon which Sears relies so heavily that these documents are comprehended within the three subcategories which are required to be published and indexed and so I will address primarily -- and perhaps exclusively depending on how the time runs, the

reasons why we think the exemptions cover this and we have discussed the other issues fully in our brief.

Now, our principle reliance and our reliance in the lower court was on Exemption Number 5 which was before this Court two terms ago in the Mink case which provides for 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.

There is no question these are intra-agency memoranda.

This provision of the Act, I might add, is on page 14a of our Petition for Certiorari and also will be found at page 56 of our brief on the merits.

QUESTION: I take it, then, that the government does not contest the assertion that the General Counsel is an agency?

MR. FRIEDMAN: We conceded that -- we conceded that in the District Court, Mr. Justice.

QUESTION: And still do.

MR. FRIEDMAN: If I may say, we don't concede it but we don't contest it.

QUESTION: So we treat the General Counsel separately from the board for purposes of this case.

MR. FRIEDMAN: For purposes of this case, although if we didn't raise anything because we conceded in the District

Court -- I think an argument could be made that he isn't. We are not making that here.

QUESTION: So is your argument just simply on the exemptions rather than on the earlier part of the Act?

MR. FRIEDMAN: No, we argue first the exemptions and then we argue the earlier part of the Act.

But the distinction between them is, if we lose on the exemptions, under subparagraph three all we are required to do is to produce them.

On the other hand, if they come within any of the three subcategories of the earlier part of the Act which we don't think apply, we are required not only to produce them but also to index them so that our reliance is, first we say we don't have to produce them because they are exempt.

Secondly, we say if we do have to produce them, if we do have to produce them, they are not under subparagraph two, which are the three categories, but under subparagraph three with respect to which there is no indexing required, but we --

QUESTION: Mr. Friedman, I gather any question whether the General Counsel is an agency would have been resolved in any event, isn't it, by the Amendment of '74?

MR. FRIEDMAN: It may or may not have been but we are not -- I want to make clear, we are not charging

or contesting that in this --

QUESTION: Is there any establishment in the Executive Branch of the government?

MR. FRIEDMAN: Well, there is some legislative history suggesting that perhaps Congress didn't intend to deal with subcategories.

QUESTION: Well, suppose none of the exemptions apply? Under what category specified in the early part of the Act would these memoranda -- would these advice or appeals memoranda fall?

MR. FRIEDMAN: Well, they would certainly be identifiable records. Under page -- on page 55 of our brief, subparagraph 3 --

QUESTION: Of 522.

MR. FRIEDMAN: Of 522a(3) they would be identifiable records.

It is also contended that they are final opinions -- this is on page -- subparagraph 2 at page 54, final opinions made in the adjudication of cases, statements of policy and interpretation --

QUESTION: Now, do you say that they are not?

MR. FRIEDMAN: We say that they are not any of those three, that is right.

QUESTION: Any of those three.

QUESTION: But you concede that they are

identifiable records?

MR. FRIEDMAN: Yes. Yes, we do.

QUESTION: And you say that they are not opinions? I suppose you must mean that the General Counsel has no final opinions because he doesn't adjudicate.

MR. FRIEDMAN: That is correct. He doesn't render final opinions because he doesn't adjudicate. These are not interpretations which the General Counsel has adopted.

QUESTION: Why isn't the rejection of a complaint an adjudication?

MR. FRIEDMAN: Well, because we think that, as used in the Freedom of Information Act, what Congress was referring to was a determination of the legal issue and the General Counsel has not determined the legal issue when he refuses to issue a complaint.

QUESTION: Well, is it an adjudication under the Administrative Procedure Act?

MR. FRIEDMAN: It might be. It might be but we would contest it and --

QUESTION: Well, is it or isn't it? You don't think and adjudication that -- you don't think the word "adjudication" in the Freedom of Information Act should have the meaning it has in the Administrative --

MR. FRIEDMAN: I think in determining whether something is an adjudication under the Freedom of Information

Act you have to look at the purposes of that statute, you have to look at the purposes of that statute.

QUESTION: So your answer is, no, it doesn't have the meaning that it does in the Administrative --

MR. FRIEDMAN: I would say, not in all cases.

And we also think, finally, that these are not administrative instructions to staff because the legislative history shows that administrative instructions and"administrative instructions" was put in there, that specific modifying word was put in there to make it clear that this dealt with administrative matters and not instructions relating to law enforcement or litigation.

Let me just come to what the Court said in Mink about Exemption 5. What the Court said in Mink in Exemption 5 was that there Congress incorporated the special and settled rule that confidential intra-agency advisory opinions are not privileged from inspection and that the question in each case is whether production of a contested document would be injurious to the consultative functions of government that the privilege of non-disclosure protects.

You also said that Congress in this exemption was -- intended to permit discovery of purely factual matters appearing in government documents that could be separated out from the non-factual.

Now, we think that these documents -- we think are

the essence of government's consultative functions. This is the way within the General Counsel's office advice is sent out to the field on whether to prosecute a case, how to prosecute a case, what theory is to be followed.

The documents -- these are not documents in which you can separate out the factual from the nonfactual. They are intertwined. They are inextricably intertwined because the theory of the case is tied with the facts.

Indeed, when the people in the General Counsel's office marshal the facts to explain the facts, that itself is the essence of a lawyer's job.

He looks at the facts, decides how to present the facts in the way that will be most effective. It is really either is or is certainly analagous to the lawyer's work products which traditionally is not available in discovery.

And, indeed, I think it is very revealing at page 131 of the record in this case that Sears itself apparently recognized that these documents are being sought for something more than just information.

They wanted them, as they said, in order to help prepare to litigate this case, first to take the appeal and then to litigate it before the board.

At page 131 a letter in which Sears requested the General Counsel to extend the time for its hearing, stated that "We need this material to prepare witnesses prior to

the board hearing."

Well, any lawyer would be delighted if he could have access to the material in his opponent's files showing how his opponent was going to try the case, what his strategy was, how he viewed the evidence, how he would marshal it.

That, we submit, is precisely the kind of information that Congress intended to protect against disclosure in Exemption 5 of the Freedom of Information Act.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Smetana.

QUESTION: The Freedom of Information Statute is not a very well-drawn statute.

MR. FRIEDMAN: Well, it is -- unfortunately, it is a difficult subject. There have been recent amendments attempting to clarify it but none of the recent amendments deals with Exemption 5, I may say, Mr. Justice.

It is a difficult thing and I think basically you have got to look at the purpose of Congress in these amendments, that Congress recognized that there was a strong public interest in making things public but also that government couldn't operate in a fishbowl and that in certain instances it was important to preserve the confidentiality of government material.

MR. CHIEF JUSTICE BURGER: Mr. Smetana.

ORAL ARGUMENT OF GERARD C. SMETANA, ESQ.

ON BEHALF OF RESPONDENTS

MR. SMETANA: Mr. Chief Justice and may it Please the Court:

I think in beginning I would like to spend some time in responding to Mr. Friedman's arguments.

But perhaps I ought first to give the Court just a basic outline of what our position is and that is, it is our position, as opposed to the position of the Solicitor General that if the documents in question fall within Two A, B or C of the Freedom -- and are required to be disclosed as either final opinions in adjudication, statements of policy or administrative instructions affecting staff, then you never reach the exemptions because they are -- the exemptions insofar as the kinds of documents involved here are mutually exclusive for the reason that, your onor, if, in fact, these are declarations of substantive law -- and, obviously, I have to develop that whole point -- and if this is an agency, which has been conceded, and these are the declarations of this agency, then it would be contrary to the very basic principles of the Freedom of Information Act to permit an agency, simply by passing documents back and forth, to create the very kind of secret law which the Freedom of Information Act was designed to avoid.

QUESTION: Do you think that the Freedom of

Information Act would reach the communications between a division of the Department of Justice or the Labor Board and the Solicitor General's office?

MR. SMETANA: Your Honor, in answer to that question, I must confess to begin that in terms of the specifics of all of the various agencies that might or might not be affected by a decision here, I cannot speak for.

But I can answer it in this fashion, that the record does reflect what type of documents are involved here and the kinds of documents which were admitted, the documents, the procedure that we followed here was before the Mink case but we agreed upon representative samples of the kinds of documents.

After 12 weeks of going through the documents in the General Counsel's office and the advice memos were in fact documents that he gave us and the appeals memos were documents that we found.

These very documents, however, do not deal with the kinds of information that Mr. Friedman speaks of, perhaps except on rare occasions.

They do not speak of trial tactics.

They do not speak of settlement.

They do not -- they -- they do one thing. They inform the public or the parties, as is presently the case, as to what the law is.

Now, I would submit in answer to your question, your Honor, if the Justice Department, as a prosecutorial agency, were to inform people as to what the law is -- in other words, only the basis of their proceeding, not the how, not the witnesses, not how they were going to try the case, that is what is involved here and it may be that in the nature of Justice Department or the other agency proceedings, the instructions or the trial tactics or the names of witnesses or the facts may be so intertwined that for that reason, those agencies' documents may not have to be produced and may fall under one of the exemptions.

But in this case where the documents are pure and pristine questions of law and where the District Court judge quite correctly and affirmed by the Court of Appeals struck and said that settlements discussions, names of witnesses or anything else that is exempt can be eliminated from the documents and they can in the nature of these documents, then, I submit, that we don't have a problem in terms of the varied kinds of fears that Mr. Friedman quite properly sets forth.

QUESTION: What if the United States Attorney, say, in the District of Missouri, writes back to the criminal division of the Justice Department and gives him a set of facts and wants to know whether to go ahead and maintain the prosecution and the Criminal Division replies, well, the

Eighth Circuit, the way it is constituted now, isn't apt to go for this kind of a case. We think maybe the Seventh Circuit might be better so the way the law stands in those two circuits, wait for one to come up in the Seventh Circuit.

MR. SMETANA: I would submit that those are the very types of consultative functions that would be exempt under Exemption B5.

QUESTION: Even though their discussion strictly is of legal points.

MR. SMETANA: Well, because the very nature of the hypothetical you give me, your Honor, is one that deals with instructions, which are not involved in this case.

This case would be a situation where the Attorney General or the U.S. Attorney would not not -- in Washington or wherever -- would not give any instructions with respect to how to try the case, which circuit is better, but only as to what his view of the law is and with respect to anything else that would remain confidential and not be subject to disclosure.

QUESTION: I had understood your position was -- generally, on the law, that if a document falls under the definition of 552, 2, A, B or C, then it is produceable and you don't even get to the exceptions.

MR. SMETANA: That is correct.

Oh, only because -- I wouldn't say that is true.

QUESTION: Well, let me just follow that up, if you say that is correct, then, of course, explain it, but my brother Rehnquist's example, it seemed to me, gave you, in his hypothetical, a document that probably would fall under either B or C and yet you conceded that the exception would be applicable.

MR. SMETANA: For this reason, your Honor. I think we read A, B and C as being -- as referring to that portion of a document that is the final opinion or the substantive law.

Mr. Justice Rehnquist's example, I would submit that if those portions were included in the document that also talked about what the law was, then those portions of the document would not be A, B or C, they would merely be identifiable, as Mr. Friedman says, under 3 and then they would be exempt under one of the exemptions B5.

QUESTION: What the law is is as available to you as it is to the Criminal Division if you are only talking about published opinions of the Courts of Appeal.

MR. SMETANA: What we are talking about here, your Honor, as opposed to published opinions, are the -- are the secret law, if you will of the General Counsel of the National Labor Relations Board.

And I call -- I call your honors' attention in that regard particularly to the Quarterly Report of the

General Counsel.

Now, the General Counsel -- and this is on page 150 of the Appendix -- now, the General -- and it goes on and on.

Now, every quarter -- in other words, four times a year, he selects certain cases, advice and appeals decisions, that he believes that it would be helpful if the public knew how he was proceeding.

It is interesting to note that those cases cited in the Appendix are cases which are open cases, cases in which he is proceeding.

In fact, they go to the very point Mr. Justice Rehnquist made. He has been able, through the device of publication, although selective publication, those cases that he chooses, by simply limiting the announcement as to what the law is and it is also significant that the General Counsel has been called -- I mean, he has the unreviewable discretion to proceed or not to proceed and this Court is only too familiar with the complexities of the labor law and in exercising those decisions, he essentially shapes the law because by not proceeding, he makes as much law as he does by proceeding.

Now, Mr. Friedman called your attention to the fact that --

QUESTION: Well, the decision to proceed is going to

be made by the board, I take it.

MR. SMETANA: Well, but it is a separate agency. I call your Honors' --

QUESTION: That isn't what I asked you.

The law would be made -- where a complaint is filed, the law is ultimately going to be made by the board.

MR. SMETANA: Yes, there is no --

QUESTION: Not by the Counsel.

MR. SMETANA: -- no question. In that situation the law is ultimately made.

However, if he was in error --

QUESTION: What you are really saying, when he turns down something you say he makes law but he may have reasons for turning them down. No doubt he does. And you call those reasons law.

MR. SMETANA: That is correct. But I would also submit, your Honor, even when the decision is to proceed, he makes law because in the nature of the way this agency operates, more than 90 percent of the cases are settled and so that even after he decides to proceed, the case will be settled based on the theory of which the General Counsel has proceeded. It never gets to the board.

Some cases, some settlements are reviewed by the board but most of them are informal in nature and are not reviewed by the board and I also would like to call your

Honors' attention, Mr. Friedman made a statement that when there is a decision to proceed after this appeals process he talked about, there is never a memo.

Now, it is admitted that there is rarely a memo but I think a very good case in point is the Appendix to the Chamber's amicus brief in this case.

That is about a 20-page opinion of the General Counsel on a case where he is dismissed on appeal, and --

QUESTION: Well, do you think his -- did you think the General Counsel's refusals are adjudication?

MR. SMETANA: Yes, your Honor, they are adjudications for the very reasons stated in your opinion this morning in the ITT case.

This is -- they are first of all decisions -- they are first of all decisions made not within an agency as the Ten Cay [?] proceeding was in that situation, but this is the Agency and more importantly, on page 15 of the slip opinion in that --

QUESTION: Well, they ought to be reviewable, then, I take it.

MR. SMETANA: Well, that is not before this Court today. I would think they would be, but that is my personal view and not the view of anyone else, that I am aware of.

QUESTION: They said they were unreviewable, did they not?

MR. SMETANA: The state makes them unreviewable. However, there was a statement in Mr. Justice Douglas' dissent in the Lockeridge case that indicates this Court has never passed upon that and there are decisions of the D. C. Circuit and other circuits that indicate that they might be reviewable on an abuse-of-discretion basis.

QUESTION: Well, if there are adjudications under the APA you don't need the Freedom of Information Act to require that it be made public. The APA requires the findings of fact, conclusions of law.

MR. SMETANA: Well, your Honor, the fact is that they haven't been and, in fact, we are -- we are one of the very few people who have gotten him to make them public.

I am a member of that APA committee that has been working for ten years, that Mr. Friedman spoke about, that are trying to get these matters produced and it is the position of the APA that they are public and are the law and we haven't been successful.

QUESTION: For you to win under 2(A) you have to arrive at the conclusion that these are adjudications.

MR. SMETANA: No, your Honor, I do not.

QUESTION: On the 2(A).

MR. SMETANA: On the 2(A) alone, yes, I do.

QUESTION: That is what I say.

MR. SMETANA: Yes.

QUESTION: On the 2(A) you must say they are adjudications.

MR. SMETANA: That is right. That is correct.

MR. CHIEF JUSTICE BURGER: We will resume at that point in one hour.

[Whereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Smetana, you may proceed.

MR. SMETANA: Mr. Chief Justice and may it Please the Court:

In resuming, I think it might be most effective and efficient if we could go right into the heart of the argument that the Respondent wishes to present to the Court and that is, as I had outlined at the outset, that it is our contention that the documents here involved are the law of the General Counsel under Section A(2) and I think we -- I want to consider the three areas.

And the first is, is it final opinion under 2(A)?

With respect -- and, of course, the area in dispute is whether it is in a final opinion in the adjudication of the case.

QUESTION: Are you talking about both the advice memorandum and the appeals memorandum? You are lumping them

together?

MR. SMETANA: Yes, your Honor. I think in that regard perhaps I ought just to say in passing that, as Mr. Friedman accurately described, they have a different genesis, so far as their effect. They have an equal effect.

For example, in the situation -- well, perhaps the best example I can use is the appeals memorandum attached to the Chamber's brief, which I briefly referred to. It is the Appendix to the amicus brief.

That memorandum was prepared -- it took the General Counsel probably the best part of a year of consultations, briefs from the various parties -- there were perhaps six or eight cases involving the particular question under Section 8(E) of the act, a very complex area which your Honors have before you in the Connell case and, as a matter of interest to the Court, to show the significance that the unions in the Connell case placed upon this, that is 73-1256, Connell Construction versus Plumbers and Steamfitters Local 100. They attached the identical memorandum as appendix to their brief to support their position.

Now, I am not going to talk about there is merit to that part at all but I think it is significant in the Connell case that Connell appendix also contains the advice of the appeals letter.

And then there is the appeals memorandum which is

essentially the document in the Chamber's brief in the Bonner case.

Now the -- prior to this appeals memorandum, however, these cases were submitted for advice so there was -- we have never seen that advice memorandum. It was a very secret document and the parties had to argue in the dark as to what the position of the General Counsel was.

In fact, in the very Connell case, the Fifth Circuit, which is before you in that case, the Fifth Circuit was critical of the General Counsel for not acting.

Now, he has it within his prerogative and on review of the discretion whether to proceed or not. But the fact remains that until this memorandum was published and this General Counsel, in his grace, decided to make it available to the Bar, the Bar had no way of knowing for ten years or thereabouts why the General Counsel refused to give this question to the board and in this instance he, of course, gave it to the board.

Now, in an advice situation, the advice memorandum is every bit as final, your Honor as the appeals memorandum if the party chooses not to appeal because that is the law.

Whether or not the party chooses to appeal in the underlying Sears case, for example, we presented oral argument. I did myself to the office of the General Counsel and it was because of that oral -- and the first time around, it was to

no avail. The advice memorandum was against us and we never did see exactly what was in -- we have seen it recently because the case is now closed but we never did see the advice memorandum.

As a result, when we filed the appeal, we were arguing in the dark.

Now, the General Counsel attempted to give us some more information as this process went forward in this case, again as a matter of grace, and I think the Appendix reflects the letter of the regional director which is exhibit -- page 21 where the regional director, after we made the demand for the advice memorandum the first time indicating that we were proceeding with respect to the Freedom of Information Act, the first paragraph of that letter states, "This letter sets forth with greater particularity my reasons for refusing to issue complaint in the above-captioned case and is sent pursuant to the teletype of July 21, '71 from Acting General Counsel Goslee to you."

I think that is very significant, that letter, for a number of reasons.

First of all, it shows that the director is, in essence, acting in a ministerial capacity and Judge Corcoran below quite correctly made that finding based on the facts of this case and these facts are not unique.

The record includes the operations of the General

Counsel, which is his statement to the House Committee in 1961 which continues to be so and it includes the lengthy ABA report.

I think also this underlying case -- and, again, this is page 21 of the Appendix -- points up the fact that the General Counsel on three occasions changed his theory.

Now he is permitted to do that. We ultimately won because he issued a complaint in our favor but at no time did we really know what his theory was the first time and at no time did we really know what his theory finally was when he was going to proceed.

So it was very difficult to act and it certainly would be very difficult for the other side if they were in disagreement with the basis of his action.

And yet if we had chosen not to file the appeal or a party chooses not to appeal, that is final, final not only as to that party, but, moreover, final because the law of the advice -- that is the law of the General Counsel if it is not appealed and it is interesting to note that while parties are informed of an appeals decision, parties are not informed when the matter goes to advice.

Now, I think sophisticated practitioners before the board know to ask the right questions and if you do ask, they will tell you, but you might not ever know when you get a letter from a regional director that it was pursuant to an

advice determination unless these advice determinations are made public.

Now, also in terms of how the procedure works while we are on the procedure, I would call the Court's attention to Appendix -- the Appendix attached to the Respondent's brief in the case here and particularly 3a, the second paragraph on that -- in that Appendix --

QUESTION: Page?

MR. SMETANA: Page 3a of the Respondent's Appendix, your Honor.

QUESTION: Thank you.

MR. SMETANA: And this is from the admitted statement as to how the office works given by the General Counsel to the House of Congress.

It says -- the second paragraph, "Secondly, the advice branch does not ordinarily review the regional director's factual determinations and conclusions. It does not interfere with the investigatory duties of the regional director but rather, it concerns itself with the interpretations and applications of legal principles."

And going on, your Honors, to page 4 at the top of the following page, "There are four consultative functions that take place," and I talk about advice but it is conceded and the judge found and in this operations memorandum it is conceded that the appeals functions essentially the same

way except it is on appeal rather than on advice and there are four steps before this final decision is rendered by the General Counsel.

Step one on page 4a, "The reviewing attorney researches all cases in point and ascertains the applicability of prior advice determinations."

And I should add that while the General Counsel in the Quarterly Report in which he -- which is published at page 150 of the regular Appendix -- in one of the cases specifically cites to a prior Quarterly Report -- to a prior decision in a prior Quarterly Report.

I can't find it at this moment, your Honor, but it is there.

The second thing that happens in this procedure is, having reviewed the case it is then submitted for further consideration to an advice agenda and then it goes on to explain all the people that are at the agenda and this is essentially a conference where the legal issues are batted around.

Then it goes on to say, "Depending upon the complexity of the case, cases may be submitted to the agenda orally or by written memorandum."

I should add, at the time this agenda takes place, the oral argument of counsel will have been presented, not face-to-face but separately. The legal position of the

region will have been presented and the submission of the parties to the case will have been presented.

Then, the agenda decision -- there is a decision rendered. The decision is submitted to the General Counsel and then finally, at the second paragraph on 4a, the General Counsel's final determination is communicated to the regional office by way of a memorandum from advice and that is the memorandum we are talking about.

And the record reflects there is no instance, no instance in this record where a regional director has ever not followed that advice and the advice, obviously, is a euphemism in the circumstances.

Now, in terms of why these are final opinions and, Mr. Justice Stewart, the same is true of appeals in the way it works. We say it essentially --

QUESTION: Would you tell me again how the record shows that an advice memo is always followed?

MR. SMETANA: How it shows it is always followed. Well --

QUESTION: I take it that is Sears position here.

MR. SMETANA: Yes. I think it is shown in a number of ways. First of all, it was essentially conceded that this is a stipulated record and it was their -- it was the government's burden and there is no instance in this record where they produced any evidence to show that it was not

followed -- an advice decision was not followed and, moreover, the General Counsel has conceded in his brief on page 6 -- and it was also conceded earlier in the open court that rarely, if ever, does a regional director disregard an advice decision.

And I think if you will think of the nature of this whole process, the General Counsel indicates -- requires -- I don't want to spend all the time going through it, but the words are that it is required that certain things be submitted and their instructions that return from Washington -- it is for the purpose of the General Counsel administering his 41 regions so that a uniform --

QUESTION: Is that page 6, Mr. Smetana?

MR. SMETANA: Of the Petitioner's brief.

QUESTION: The brown-covered government brief.

MR. SMETANA: The grey, sir, I'm sorry.

QUESTION: Grey. Thank you.

MR. SMETANA: Now, let me, if I may, come back to the Section 2(A) and why it is a final opinion.

First of all, I think it has been conceded it is a separate agency and an agency under the APA, not just under the Freedom of Information Act and interestingly, of course, Mr. Friedman tries to suggest that perhaps there might be some difference in the definition of adjudication of the Freedom of Information Act but of course it is all one act.

The APA is a part of the Freedom of Information Act.

And the APA defines adjudication to mean, agency process in the formulation of an order.

And an order to mean, in whole or in part, any part of the final disposition of an agency and turning to your Honors' decision this morning with respect to the ITT case, at page 15 of the slip opinion, your Honors state, "When Congress defined order in terms of a final disposition, it required that final disposition to have some determinate consequence for the party to the proceeding."

Now, there is no question that the consequence is grave here. Party to the proceeding either gets the remedy that he seeks or he does not.

QUESTION: Well, but you are reading two ways. There was a final opinion and your are reading it two ways. In every single instance of adjudication in the Administrative Procedure Act, I certainly don't read two ways on it.

MR. SMETANA: Well, your Honor, I must say, first of all, it is -- our argument is that it is an agency and this agency has the responsibility for making vast decisions with respect to the development of the law and this is how it speaks, only through this fashion.

When this agency decides not to proceed, that is the law of the land. There is nothing -- no individual in this country can bring a suit to change that law if the

General Counsel, in his wisdom, decides not to proceed.

And decisions not to proceed are every bit as much the law's decisions to proceed and these memoranda simply explicate that.

QUESTION: DOes this sound to you as if it were addressed to this type of prosecutorial decision, final opinions including concurring and dissenting opinions?

You don't get that kind of a thing out of a prosecutor's office.

MR. SMETANA: Well, you do in the nature -- you do in the nature of this agency. It may be, your Honor, in the Justice Department it is different.

The nature of this agency, having worked at the agency, there are -- when the document comes into -- from the field, there is a majority opinion, frequently a dissenting opinion. There is a lot of due process and justice within the agency. It is just not publicized and there are dissenting opinions.

Now, I am not sure there are dissenting opinions in the adjudication of this but, of course, that is not critical.

But I would say, your Honor, that we don't only rely on 2(A).

We said that, in the alternative, even if it is not 2(A), it is clearly -- it is clearly 2(B) and 2(B) --

these are statements of policy specifically adopted by an agency and the General Counsel, in his quarterly report, page 150 of the Appendix, specifically publishes that adopted policy and he states at the opening of that report, "In my judgment, this publication produces a better-informed Labor Bar."

Now, presumably, he thought publication would help not to interfere with law enforcement. These are open cases.

If the concern of your Honor were there -- now, he may have been wrong in his wisdom but if you look at the very documents in issue here, your Honor, I think you will find that these documents do not interfere with law enforcement. I think that is certainly one of the critical policy questions.

If you take, for example, a sample of an appeals memorandum, apart from the one I had referred to, is on page 81 of the Appendix. Very short memorandum, it cites the name of the case. It cites the disposition, doesn't give any special information. It says, action, appeal denied. Reasons for action, in view of the attached amendment to the ITU negotiation plan, further proceedings would not effectuate the policies of the act.

So that is the end of it.

Now, one of the issues of this case, a collateral

issue perhaps, is where is that attached amendment?

Now, the -- Judge Corker I think quite properly said that where it is specifically referred to, we should see it because we were trying to decide how we could present our case and if these matters are final, or if they are agency opinions, we are entitled to the entire opinion.

And here this document is appended and specifically identified and we submit, therefore, it ought to be produced, subject to the General Counsel's showing why it might fall into one of the exceptions.

If it does, if, for some reason, the document is not final, if it is in negotiations, that might be something else.

We turn the page, your Honor, to page 83 and there we have an advice memorandum.

Unfortunately, this record doesn't indicate the heading but that is an advice memorandum and if you look through it, it says on the very first page, this was submitted for advice because it is a novel question of law concerning a union's withdrawal from multi-union, multi-employer bargaining.

That was the very issue in the underlying Sears case.

We needed to know this rationale. This was based on these kinds of rationale that we were able to proceed and

just so your Honors are clear with respect to this Appendix, just as a matter of housekeeping, starting at page 185 to the end --

QUESTION: Mr. Smetana.

MR. SMETANA: Sorry.

QUESTION: This memorandum you are talking about on pages 83, 84, 85 of the Appendix, a good part of it is just the General Counsel's interpretation of the board's decision.

I mean, presumably Sears has its own legal department. They can interpret the board's decision.

MR. SMETANA: No, your Honor -- certainly we can, but there are no board decisions. That is really the problem.

The last decision of the board here was probably ten years ago, the Retail Associates case --

QUESTION: Well, take a look at the thing on page 83 through 85. I see one, two, three, four citations to the board opinions in that memorandum.

MR. SMETANA: Right. But, your Honor, the point is this is how he interprets them and he will decide to proceed or not to proceed.

In this particular case, he decided not to proceed. As a matter of fact, until our case came along the General Counsel just refused to proceed on relitigating the

issue of what constitutes withdrawal from a multi-employer bargaining unit and there was nothing you could do to get him to proceed in that fashion.

QUESTION: I have forgotten what term you used, but you said you needed to know or you almost implied that it was imperative to know. Well, of course, all lawyers know it is very interesting to know what the other fellow is thinking on the other side, but that doesn't mean that you have got to -- this statute contemplates that you should know his thought processes any more than people can find out the thought processes or reasons why certiorari is denied in this Court sometimes.

MR. SMETANA: I think the test, your Honor, I think the test, your Honor, is that there is no question this is the law of this agency. That is how he proceeds and I think the test, as has been said by the Hawkes court, the Sixth Circuit, is whether or not it will promote or impede law enforcement and there is nothing in these documents that, in our view, will impede the enforcement of the law.

In fact, the General Counsel himself believes they promote the enforcement of the law.

Now, let me turn, very briefly, if I may, to the exemptions and why we are not covered. I have already said that the exemptions are mutually exclusive because if, in fact, these are final, substantive opinions of an agency,

then for the agency simply to be able to pass them between itself intra-agency would create the very body of secret law which is not desired and Mr. Justice Basil -- Chief Judge Basilon of the D. C. Circuit in the Sterling case which is cited in our brief essentially drew the distinction between formulations of policy and substantive declarations as to whether the exemptions applied.

We submit these are clearly substantive declarations of policy rather than the formulation of the policy.

The formulation is what I described in going through the advice and appeals memoranda.

So far as B(7) is concerned, the Congress recently amended B(7) of the act to specifically take out what is in issue here because they indicated -- and I am reading from the New Amendments to the Freedom of Information Act B(7), "Investigatory records are exempt but only to the extent such records would interfere with law enforcement proceedings," which is, again, the same as the Hawkes test.

And, more importantly, in the conference report on page 12, describing that language, the Congress says, "Nor is this exemption intended to include records falling within the scope of subsection 52(A)(2), which is A, B, C, which is the very thing that we are talking about here.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: I think your time is used up, Mr. Friedman.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:19 o'clock p.m., the case was submitted.]