In the

Supreme Court of the United States

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL,

Petitioner

v.

REUBEN B. ROBERTSON, III, ET AL

No. 74-450

Washington, D. C.
April 15, 1975

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ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL, Petitioner	:	
v.	:	No. 74-450
REUBEN B. ROBERTSON, III, ET AL	:	

Washington, D. C.

Tuesday, April 15, 1975

The above-entitled matter came on for argument at 11:25 o'clock a.m.

BEFORE:

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

ALAN B. MORRISON, ESQ., Suite 700, 2000 P. Street, N.W., Washington, D. C. 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. 74-450, Federal Aviation Administration against Reuben Robertson et al.

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

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

Exemption three to the Freedom of Information Act covers matters that are specifically exempted from disclosure by statute.

The question in this case, which is here on a writ of certiorari to the Court of Appeals for the District of Columbia Circuit, is whether, by this provision, Congress intended to continue in effect the large number of prior and existing federal statutes which provided for non-disclosure of government material on various terms and conditions rather than, as the Court of Appeals held, is limited to particular statutes that specify the particular material involved and which provide a more specific standard for non-disclosure than the public interest.

The case involves certain documents produced by the Federal Aviation Administration which it does pursuant to its

systems worthiness analysis program which I shall refer to by its commonly-accepted acronym of SCRAP.

What these reports are, are the result of a program that the Federal Aviation Administration conducts involving a detailed study and analysis of air carrier systems. They study --

QUESTION: It is SWAP, not SCRAP, isn't it?

MR. FRIEDMAN: I'm sorry, Mr. Justice, SWAP. I apologize.

QUESTION: SCRAP is something else that we have had to deal with in the past here.

MR. FRIEDMAN: SCRAP is another case, yes.

SWAP. It involves a detailed study and analysis of the operations and the maintenance programs of the carriers to ascertain whether the carriers' own programs are functioning properly.

The purpose of the program is to try to uncover, before they mature, anything that might lead to an unsafe operation.

A major aspect of this program is free and frank discussion between the team of SOA people, the SWAP team that conducts the investigation, and the management of the carrier. They discuss the thing; they analyze the problem; they point out the difficulties.

In an affidavit on file in this case that is

uncontroverted by Mr. Shaffer, the Administrator of FAA, which is set forth at pages 40 to 42 of the record, he explains how this thing operates and the importance of the informal, frank discussion. He said the -- this is page 40, paragraph six, "A SWAP investigative team works in close cooperation with airline management to find any area of maintenance operations, management or overall performance which needs improvement.

"The system depends upon the frank and full disclosure of the airline."

It also points out that information investigated includes financial and operational matters which would not customarily be released to the public and that much of the material is of the nature which would not be disclosed to competitors.

and then in paragraph number 12 on page 41, he says, "The SWAP Program operates with the understanding between the airlines and the FAA that the information will not be disclosed to the public."

At the end of the SWAP investigation, which may take anywhere from two weeks to much longer and is conducted by teams of four or five people, a final report is made in which detailed findings are made, the problems of the carrier analyzed and recommendations are proposed.

Now, neither the report nor the informational

findings in it is made available to the public although, as Mr. Shaffer said at page 42 of the record in his affidavit, "The findings made by the SCRAP team are frequently disclosed to the carrier management in order to enable there to be the kind of frank discussions necessary and to enable the carrier to take corrective action."

The Respondent in this case, Mr. Robertson, is connected with the Center for the Study of Responsive Law and is director of the Aviation Consumer Action Project.

In the summer of 1970, this group was conducting a study of airline safety and they requested the Federal Aviation Administration to make available to them all of the SWAP reports in 1969.

The Administration refused to do this and they filed a petition for rehearing and while the petition for rehearing was pending, the air carrier industry, appearing through the Air Transport Association, its trade association, requested the Administrator, under Section 1104 of the Federal Aviation Act, not to disclose this material.

Section 1104, which is set out at pages three to four of our brief, provides that, in response to a written objection to disclosure of either information contained in an application report or document filed with either the Civil Aeronautics Board or the Federal Aviation Administration, and I refer in this case only to the Administration,

or information that the Administration has obtained pursuant to the Act, when such a written objection is made, the Administrator shall order the information withheld from public disclosure when, in his judgment, a disclosure of the information will adversely affect the interest of the person seeking non-disclosure and is not required in the public interest.

The letter by which the Air Transport Association requested the Administration to keep this information confidential is set forth at pages 112 to 113 of the record and in that letter, they point out that the information which they give to the SWAP team during the investigation voluntarily is now required to be disclosed by any regulation of the Federal Aviation Administration and they said, "If public disclosure of the SWAP reports were made, the interest of aviation safety would be in danger of being subordinated in some degree to legal considerations in the presentation of information to the FAA."

They also pointed out that the present informal practice of frank and free discussion that encourages a spirit of openness on the part of ARI management, which is vital to the promotion of aviation safety.

On the basis following this submission, the Administrator made a determination under Section 1104, which is set forth at page 115 of the record, deciding not to make

public the SWAP reports. He made the determination in the language of the statute that disclosure of the information in the reports would adversely affect the interest of the airline being investigated and is not required in the public interest.

Following this determination, the FAA denied reconsideration of the Respondents' request for the SWAP reports. The suit was brought. The District Court ordered disclosure of the SWAP reports and a divided Court of Appeals affirmed.

The majority held two things. First, it held that the reference to Section 1104, the material specifically exempted from disclosure by statute, was only applicable if the statute itself specified the documents or categories of documents it authorizes to be withheld and it said that 1104 didn't come within this because it didn't specify any particular class of documents.

Secondly, it said that the standard in Section 1104 of the public interest was not a specific exemption by statute within the meaning of Exemption three.

There was a dissenting opinion by Judge Robb in which he referred to the legislative history which I will allude to shortly, pointing out that there is / strong Congressional intent in Exemption three to continue the effectiveness of this large number of statutes and he said he didn't believe

in the light of that that Exemption three could be viewed as repealing by implication the specific provisions of Section 1104.

Now, the Freedom of Information Act was enacted because of dissatisfaction with the way the old Public Information section of the Administrative Procedure Act had worked.

There was considerable feeling in Congress and elsewhere that under this statute, the public was not being furnished with the information it was entitled to receive and one serious flaw, as this Court pointed out in its Mink opinion two terms ago, was one of the provisions of that statute which permitted to the withholding from disclosure of material relating to any function of the United States requiring secrecy in the public interest.

And it was felt that this standard, which was a general standard covering the whole gamut of Government operations, just didn't provide any guidelines that Government officials could easily say, we think it is not in the public interest to disclose it and keep it secret.

The respnse Congress gave in the Freedom of Information Act was generally -- generally to open up all identifiable Government records to disclosure but subject to nine specific exemptions and of course, the nine specific exemptions dealing with various areas reflected a

recognition that the effective operation of Government requires, in some instances, that material be kept confidential in order to permit the Government to function properly.

QUESTION: We have here only Exemption three under consideration.

MR. FRIEDMAN: Only Exemption three, Mr. Justice.

QUESTION: And if you should not prevail on that one, you still may win your case under one or the other of the exemptions.

MR. FRIEDMAN: We may, Mr. Justice, because the exemptions sometimes overlap but we think on this issue, we think that we are entitled to prevail under Exemption six.

Now, of the nine exemptions that Congress created, seven of them contain their own standards. Two of them, however, do not. Exemption three and Exemption one, which this Court had before it in the Mink case which referred to matter specifically required by Executive order to be kept confidential.

The two provisions -- Exemption three and Exemption one in effect incorporate by reference other standards of confidentiality which reflected in the one case an Executive order and in the other case a statute.

Now, at the time that the Freedom of Information Act was enacted in 1966, there were in existence a large

number of Government statutes. The number is uncertain. There is some reference in the legislative history to 80, 78, almost 100.

But these are all statutes in which Congress, specifically dealing with a particular problem, had concluded that Government information should be kept confidential.

The terms of these statutes varied. In some instances, they provided generally that the material was to be made public unless it was determined by the administrative agency or the Government officials, it should be kept confidential in this case.

In other instances there are situations in which the statute provided that the material was to be generally kept confidential unless the Government official decided that it should be made public.

The terms varied also, whether it dealt with the general categories of material or dealt with specific material and it also varied with respect to the basis upon which the Government official would act.

Now, we think the legislative history shows, and the background of the Freedom of Information Act shows that when Congress, in Exemption three referred to material specifically exempted from disclosure by statute, what it meant to do was to preserve intact all of these existing statutes.

It used, we think, the word "specifically exempted," not in terms that the statute specified the particular documents to be withheld, as the Court of Appeals held, as our opponents argue, but that the statute was the statute that specified nondisclosure in terms rather than merely implying it.

That is, a statute which would be relied upon because of the public policy reflected in the statute and by implication sanctioning nondisclosure.

The purpose of Exemption three and the purpose of the whole Freedome of Information Act was to eliminate the prior practice under the Administrative Procedure Act by which all Government officials could just keep anything they wanted secret on a simple decision that it was required in the public interest.

We have set forth in considerable detail in our brief the legislative history of Exemption three and it shows that over a period of eight years, during which Congress considered a number of bills containing this identical language, that the Congress was aware that there are a large number of these statutes and that Congress intended not to change them, keep them intact, to leave them as they were.

Let me just refer to two items which I think show this rather clearly. In the 1966 House Committee Report

which we have quoted at page 18 of our brief, which was the report on the bill actually enacted, the Committee stated that there are nearly 100 statutes or parts of statutes which were strict public access to specific government records. These would not be modified by the public records provision of S1160 which is the bill ultimately enacted.

Then over on page 19 is a statement by Senator Hruska during the 1963 hearings at an earlier phase of the consideration of this litigation.

I'm sorry, Senator Long. I stand corrected. He was one of the sponsors and proponents of the bill and what he said was,"Statutes which curtail the availability of information to the public are not intended to be affected by the enactment of this bill," and, two sentences after that, "It should be made clear that this bill in no way limits statutes specifically written with the Congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies."

In other words, what Congress was doing here was, it was deferring to the judgment of earlier legislative bodies made as a result of specific consideration of the particular problem, it was deferring to their judgment that certain situation that was to be non-disclosure.

It did not intend, we think, very clearly, by Exemption three, to appeal by implication any of the

existing statutes.

We think the case thus closely parallels the Mink case where in the Mink case it was argued that because the Executive order that was relied on as the basis for classifying the material secret and top secret did not itself refer to the particular documents.

The claim was, They are not covered by Exemption one. This Court rejected it.

Similarly, it seems to us here the fact that the particular statute may not have been as detailed and the specificity may vary considerably, that is no basis for saying that Congress did not intend them to be covered or that Congress intended in each instance for the Court considering this and, I add, for the Administrative official having to make the decision whether to disclose, for him to try to figure out whether the particular statute was specific enough to to bring it within the coverage of Exemption three.

Congress was not making that kind of a determination. Congress was adopting all of these many, many statutes that had previously been enacted and was leaving them as they were.

It said, in effect, "We will accept what other Congresses have concluded when they specifically dealt with a particular problem."

Now, our opponents tell us it is inconsistent with the determination that Congress made in the Freedom of Information Act to eliminate the old public interest standards under the Administrative Procedure Act while at the same time to have intended to permit the nondisclosure of material under the Standard in Section 1104 which refers to the public interest.

Now, we think there is a very significant difference between it because in 1104, Congress made a specific determination with respect to the circumstances under which the material of the Federal Aviation Administration was to be disclosed.

So we are saying this was not part of a program under which everybody could disclose.

Congress made a determination way back in 1938 when it first enacted the Civil Aeronautics Act that when there was a protest to material in the hands of the Federal Aviation Administration, that it was up to the Administrator with his expert judgment to balance on the one hand the injury that would result to the people protesting the documents.

That is, the adverse effect upon the people who were protesting.

And on the other hand, the public interest in disclosure. And it left it to the Administrator to make that

balance. That is Congress.

And in this statute, it specifically focused on this problem and we --

QUESTION: Well, prior to the Freedom of Information Act of 1966, the Federal Aviation Administrator could have withheld, either under the standard of the old Freedom of Information Act or under the 1938 statute. Is that correct?

MR. FRIEDMAN: That is correct. He may have had to make a somewhat different determination under the old Freedom of Information Act -- I'm sorry, under the old Administrative Procedure Act. But he certainly -- and he could have withheld under this statute and there would have been no basis on which I don't think that could have been obtained prior to the Freedom of Information Act.

So the basic argument, of course, is that somehow in Exemption three, when they spoke of a meterial specifically exempted from disclosure in statute, they somehow, by implication, repealed the provision of 1104 and that is -- we don't think that is what Congress intended.

We think that Congress intended to continue all of these statutes.

QUESTION: Well, I think you are twisting your opponent's argument a little bit. The argument is that the enactment of the Freedom of Information Act served to repeal 1104 and that Exemption three doesn't cover it.

MR. FRIEDMAN: Well, I don't think so, Mr. Justice. I don't understand him to say that the enactment of the entire statute will repeal 1104.

QUESTION: Well, that 1104 is not under any of the exemptions and explicitly not under Exemption three because, well, you know the arguments.

MR. FRIEDMAN: Yes. Well, it's not --

QUESTION: It is not a statute that is specific in saying what shall --

MR. FRIEDMAN: Well, my only point is, Mr. Justice, if 1104 is not under Exemption three and if we don't know whether it would be covered by the other exemptions, the practical effect of that is that, at least as far as 1104 is concerned, the Administrator can no longer rely on that provision, it seems to me, as a basis for keeping it confidential and that is the provision that Congress provided almost 40 years ago and we therefore think that the Administrator correctly -- or did in this case -- that the SWAP reports are materials specifically exempted from disclosure under Exemption three and that therefore, the Respondents are not entitled to obtain.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Friedman.

Mr. Morrison.

ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.

ON BEHALF OF RESPONDENTS

MR. MORRISON: Mr. Chief Justice and may it please the Court:

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

This matter began in the summer of 1970, when the Respondents and others sought to learn more about aviation safety in this country and they sought access to a number of documents under the Freedom of Information Act, including the SWAP reports, which are the only documents still at issue in this case.

QUESTION: Mr. Morrison, was this inquiry prompted by some formal study of some sort? I couldn't quite glean that.

MR. MORRISON: Your Honor, Mr. Robertson and Mr. Simandle were both engaged in an ongoing study at the Aviation [Administration]. Mr. Simandle is a student now and has left that particular study which he was just working on that particular summer. But they are engaged in a continuing on-going surveillance through the Aviation Consumer Action Project of trying to find out whether all aspects of the aviation industry, that is, the safety aspects which are handled by the FAA, which is before us and whether the economic aspects handled by the CAB are designed in a way

and operated in a way to benefit the public and the consumers at large.

QUESTION: They are acting in private capacity entirely.

MR. MORRISON: That is correct, your Honor. That is correct.

QUESTION: Would any citizen have the same right to bring their suit?

MR. MORRISON: Absolutely, your Honor. And that is one of the important aspects of the Freedom of Information Act and why it is different from the law before 1966 which Justice Rehnquist mentioned just a minute ago that, regardless of whatever test it was, your Honor, it would not have made any difference what test applied because a citizen had to be properly and directly concerned with the information before he could pry it loose from the Government and there was no way that an ordinary citizen, just simply wanting to find out whether airlines are operating properly, could have gotten this information regardless of whether 1104 was an actual barrier.

QUESTION: Well, there were two changes, really, weren't there? Probably more than that. But one was to do away with the so-called "standing requirement." You had to show an interest in the thing.

MR. MORRISON: Absolutely correct.

QUESTION: And the second was to do away with the general right of a Government official to say that public interest requires this to be classified in secret.

MR. MORRISON: That is right. But Congress made the legislative judgments in 1966 as to what ought to be withheld as being in the public interest and everything else had to be disclosed. Everything had to be disclosed but for the specific exemptions.

So the Respondents wanted these documents for two reasons. One, to check on the airlines themselves to see whether the airlines were doing what they could to prevent accidents from taking place before they took place.

And, second, to see whether the FAA was doing its job keeping an eye on the airlines.

Now, while their request was administratively pending, the ATA -- Air Transport Association, on behalf of 28 airlines, unbeknownst to Respondent, sent a two-page letter to the FAA which is reproduced at pages 112 and 113 of the Appendix and they simply said, we invoke 1104 and ask you to invoke 1104 to prohibit these documents from being disclosed.

Section 1104 permits two agencies and only two agencies of the Government, the FAA for safety and the CAB for economic regulation matters relating to the airlines, to withhold from the public any document that those agencies see

fit, if they make the determination that to release the documents is not required in the public interest.

Now, without the knowledge of the Respondents and without asking for their position, the FAA simply, based on this two-page conclusiory letter, ruled that all past, present and future SWAP reports that might be prepared by any Administrator, or under his direction, of the FAA from now or hereafter were to be exempt as not in the public interest regardless of the special need, regardless of the special circumstances or anything whatsoever.

It was almost a rule, wherever --

QUESTION: Would your client have had a right to appeal that under the Administrative Procedure Act?

MR. MORRISON: Well, your Honor, the Government says that we could take an appeal on that order under 49 USC, Section 1486. The CAB and the FAA have jurisdictional appeals to the Court of Appeals as opposed to the District Court. I don't know what the test for standing is going to be under that provision. I would think that the Government would assert, may well assert that we have to have a specialized interest on it.

QUESTION: But if your quarrel is with the propriety of that particular determination rather than with the fact that however sound that determination is, it can't prevail over the Freedom of Information Act.

I should think your remedy would be by appeal of that determination.

MR. MORRISON: That is right. My point is not specifically that that determination was wrong, although I believe it to be wrong and we so urge it, your Honor. But I believe that the problem is created by the fact that if, for instance, the Government is correct that we do have a remedy and assuming that they don't argue standing and that we can get into Court, we then go to the Court of Appeals for the District of Columbia Circuit, for instance.

Well, there we are in the Court of Appeals with our 1104 issue but meanwhile, the Government has said, oh, you can't get these documents for three other reasons.

Exemption four says they are confidential commercial financial information.

Exemption five says these are intraagency memoranda, all of which, of course, were prepared by the FAA although, of c ourse, given to the airlines and then they also said, well, they are investigatory files.

QUESTION: Well, nobody promised you a rose garden.

MR. MORRISON: No, your Honor, but I would at least like to know where I can take my client to court. Do we go to the Court of Appeals with all the claims? And if we go there with all the claims, are the busy judges of the United States Court of Appeals going to try the factual questions

arising under these exemptions? What about other rights, rights to expedition, rights to standing, rights to attorneys' fees, all of these are special rights created under the Freedom of Information Act.

Do we take them all with us to the Court of Appeals as we go under 1486? Well, I don't know what the answer to that question is but if we don't go there, do we go to the District Court and do we have a bifurcated proceeding of some kind with one proceeding in one court and one in the other?

These problems, your Honor, are not insoluble. They could be worked out if it were necessary but we suggest that the very practical reasons counsel against having this kind of a situation where we end up in one Court with one issue, one with another issue and create a procedural quagmire which Congress surely never could have intended and can readily be averted by simply saying to the FAA and the CAB, look, you are just like everybody else. You have got all the rest of your defenses under the Freedom of Information Act. Don't look for a home run with Section 1104 because that is what it is. It takes us right out of the ball park.

Any document whatsoever in the possession of the Administrator or the CAB, it is out. We can't get it unless we can convince the Court of Appeals, according to the Government, that it is not in the public interest.

What is the standard of review?

Under the Freedom of Information Act, we are entitled to a trial de novo. Are we going to have a trial de novo on this? No, I don't think so.

I am sure the Government would not argue that we are entitled to it so there we are, back with a very limited scope of review based upon the kind of record we have here, which is almost nonreviewable.

QUESTION: Mr. Morrison, coming back to the question I asked you, you responded that any citizen would have the same right to sue. Let's assume you win this case.

Would any citizen have to make any showing to be entitled to the documents and reports that you desire? Or would it suffice if you merely wrote a letter to the FAA and said, "Please put me on your mailing list. From now on, I want every one of these reports, otherwise, I am going to sue."

MR. MORRISON: Your Honor, in most cases the Government agencies, once a final, authoritative ruling by either this Court or appropriate Court of Appeals has been issued, has been following the Freedom of Information Act and has been adhering to the rule -- the rule that has been enunciated and we would expect, as it happened in this case, your Honor, once we were judged to be entitled to the MRR's, those mechanical reliability reports that were not appealed

by the Government, we got those reports. We were put on the mailing list and it is my understanding that anyone now can go in and ask for the same reports and get them just as we do so I would assume that the good faith of the Government would be such that no one would have to sue the FAA again to get these particular reports.

We would be more than glad to furnish them to anyone who is prepared to pay the cost to us.

QUESTION: You are offering to pay the costs yourself, aren't you?

MR. MORRISON: For copies, yes, your Honor. There are provisions in the statute that permit the waiving of fees. We may, in some of these cases, not want to actually copy the documents.

The Act provides for two means of access. One is access. That is, you can go over and look at the documents and inspect them. If you decide you want them, you can have them.

It also provides for copies at cost and there are provisions of waivers for cost. Whether we would want all of the documents all of the time, I couldn't say, your Honor, but we do want the access to them so we can start to look at them and see what is really in them.

Incidentally, there is a portion of one of these SWAP reports which is reproduced in the Joint Appendix that I

commend to your examination.

QUESTION: Do you remember what page?

MR. MORRISON: I think it is about page 40 but I am not positive -- 34 to 36.

QUESTION: Thank you.

MR. MORRISON: So, based upon the determination by the --

QUESTION: How did this get into the record, incidentally?

MR. MORRISON: Your Honor, a copy of that was attached -- that was attached to the affidavit of the Plaintiff, Mr. Robertson. He obtained a copy of it and that was put in the record to give the District Court an idea --

QUESTION: Of what kind of an animal we are talking about.

MR. MORRISON: That is exactly right, your Honor. That is exactly right.

QUESTION: How did he obtain this?

MR. MORRISON: Your Honor, I was not counsel at the time that that was put in and I do not know, your Honor.

These doucments are not classified in the sense that a top secret document would be classified. They are available and around and, while it was on the understanding between the Agency and the air carrier that the documents are not to be -- are not generally made available to the

the public and it so stated in the handbook which is prepared that they are not generally made available to the public, there was no formal ruling and, indeed, the specific request of the ATA in this case to hold these things confidential belies the notion that it was a generally-accepted practice that even -- that notwithstanding the Freedom of Information Act, it could be withheld.

Incidentally, in that regard, I may point out that the fact that a particular individual may have expected the Government to keep a document confidential is, of course, no defense to a request under the Freedom of Information Act.

Now, the Congress has overridden that and a private agreement between a particular individual and the Government is not itself a reason unless the document otherwise comes within one of the exemptions to the Act.

Based upon the determination by the FAA that 1104 applied and that it ought to be invoked, the Respondents' request was denied and based upon the three other exemptions I mentioned earlier, the Respondents' final administrative remedies were exhausted and this action thereafter ensued.

The District Court rejected all of the defenses raised by the Petitioners and the Court of Appeals ruled solely on the Exemption three claim and therefore that is the only issue we have before this Court.

It remanded the matter for further proceedings with

respect to the other defenses raised by the Government.

Now, Exemption three permits the withholding of documents which are, in the language of that provision, specifically exempted from disclosure by statute and the question presented is, are the SWAP reports specifically exempted from disclosure by Section 1104, as the Petitioners urge, even though these reports are not mentioned in Section 1104 and the basis for withholding them is the determination by the head of the FAA that the public interest does not require their disclosure.

Now, we suggest that if the position of the Government is indeed adopted here, the result would be a creation of a wholesale exception to the Freedom of Information Act for these two agencies, the FAA for safety and the CAB for economics.

They could simply decide for themselves where the public interest lies and hold or release documents accordingly.

Now, we believe that that was not Congressional intent.

Moreover, the result in this situation that the Government urges here is inconsistent with the intent in Congress in repealing former Section three of the APA and enacting the Freedom of Information Act.

MR. CHIEF JUSTICE BURGER: We'll resume there at

1:00 o'clock.

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

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Morrison, you may continue.

MR. MORRISON: Mr. Chief Justice and may it please the Court:

The result that the Plaintiff and Respondents are urging in this case is supported amply by an examination of the overall Congressional purpose in enacting the Freedom of Information Act.

Now, this purpose was plainly to replace the vast administrative discretion that was available under the old APA Section three to withhold and which ran rampant under that statute so that, as this Court said in Mink, the statute became more of a withholding than a disclosing statute. And Congress decided that it, rather than the Agency, should decide what documents ought to be disclosed and where the public interest lay in specific situations and it did this in the following way:

It said that all documents were to be disclosed except for those specifically exempted. It set up nine specific exemptions in Section 552B. Now, for eight of these, Congress, that wrote the Freedom of Information Act

in 1966, set forth those standards and I include in those eight, Exemption one because the important thing about Exemption one is, although it may reference to an executive order, it was an executive order which permitted withholding only in the interest of national defense or foreign policy.

And that, in our view, readily distinguishes it from the kind of open-ended statute we have here. It makes the national defense standard of exemption one similar to other kind of standards that are set forth in the other provision of the Freedom of Information Act although, in fact, the mechanism for bringing it about is somewhat different.

But, basically, there is a Congressional imposition of a standard there, just as there was a Congressional imposition of a standed regarding the other substantive exemption.

Now, with respect to the last exemption, Exemption number three, the one we have before this Court, the Court decided that, rather than striking a new balance between where the public interest lay, where Congress had previously spoken, it decided to defer to the judgment of prior Congresses and that is by going back and saying, we'll continue, in effect, prior statutory exemptions. We won't second-guess the determinations, specific judgments made by the prior Congress.

Indeed, the Government's reply brief in this Court said that what Congress was really doing was that it decided it would not attempt to reexamine or distinguish prior legislative judgments.

The question we have to ask here is, was there the kind of legislative judgment in Section 1104, given the fact that it is so open-ended, both with respect to the kind of documents and the standards for disclosure.

QUESTION: Well, doesn't 1104, though, rest on some additional finding about an adverse effect upon the interests of private parties?

MR. MORRISON: Yes, your Honor, there is that --

QUESTION: And it isn't that the public interest requires -- that the public interest requires it to remain secret, but that the interest -- and that disclosure is not required in the public interest.

MR. MORRISON: Both phrases are in there, your Honor.

QUESTION: But they must find that private interests would be adversely affected.

MR. MORRISON: Whatever the interest is of the requesting party and your Honor, as we read the statute, indeed, even another FAA official could make the request that the information not be disclosed. It simply says, "Any person may make a request." There is nothing specifically

limited in that.

But confining it specifically to the question that your Honor asked, we view the adversely affected simply as another side of the same public interest determination that, really, once someone has requested that a document be made available, it is, after all, a Government document, that it ought in the general course to be made available as being in the public interest for the public to know what is going on, unless there is some kind of adverse interest.

We suggested in our brief at footnote seven on page 13 that, indeed, the adversely-affected standard was subsumed in, as part of the same public interest standard.

We don't understand --

QUESTION: Well, I would think you would argue that the Board doesn't even have to find that the public interest requires that it be kept secret, that it is a much -- even a lesser standard than that.

All that it requires is --

QUESTION: It is conjunctive.

MR. MORRISON: It is conjunctive, yes, sir. I believe they must find it as adversely --

QUESTION: That is right. I know, but it doesn't -- but all they have to find is that the public interest, that it doesn't require the disclosure. It doesn't have to find that the public interest requires non-disclosure.

MR. MORRISON: That is right. I understand your point, I think. I adopt it and do so vigorously, that it is an even less-restricted standard. That is, the burden is almost on the public rather than on the withholding, rather than the other way around. We don't have to find that the secrecy is required as the old APA did, but merely that the public interest doesn't require that the document be released.

QUESTION: If it adversely affects that.

MR. MORRISON: That's right. And we say that that is all really partially subsumed in the same standard.

QUESTION: But that does narrow the area, it seems to me, in terms of whether it is open-ended or not. Somebody has to file something and say, here is why, and the board has to find it adversely affects the interest of somebody.

Now, that certainly just isn't an open-ended invitation to the agency.

MR. MORRISON: Well, there is somebody that has to make that determination. I don't know whether the Board or the FAA could do it on their own. We believe they could.

Indeed, in a case -- in a couple of cases we cited in our brief --

QUESTION: Well, it didn't here, anyway.

MR. MORRISON: No, your Honor, it did not here.

That is correct, at least as far as the record discloses.

QUESTION: Well, for example, under 1104A, suppose one of these SWAP reports spoke disparagingly of a particular mechanic.

MR. MORRISON: That is right.

QUESTION: By name.

MR. MORRISON: Yes, sir.

QUESTION: Now, under 1104A, could he come in and ask that that SWAP report could not be published because, he says, that is going to affect me personally.

MR. MORRISON: He could.

QUESTION: And then, I gather, the board has to make the further inquiry whether nevertheless the interest of the public would require it.

MR. MORRISON: But more importantly, your Honor, for the purpose of the Freedom of Information Act, that mechanic would -- may well be protected under the Sixth Exemption which prevents clearly unwarranted invasions of personal privacy.

The important thing about 1104, it is not either/or or nothing. The sole defense does not become 1104 or nothing, it is 1104 or whatever else every other agency has.

QUESTION: But you would -- in Mr. Justice Brennan's example you would say that that document is not exempt under this particular section.

MR. MORRISON: That is correct.

QUESTION: Despite this exemption. Despite the adverse effect on them that 1104 just has no application whatsoever.

MR. MORRISON: That is right. That is precisely our position.

QUESTION: But it has been, in effect, repealed.

MR. MORRISON: Except -- except, your Honor, to this limited area it provides a mechanism for persons who wish to have documents that are otherwise -- that the Agency might release if it chose.

For instance, in this mechanic's report, the Sixth Exemption is discretionary. The Agency need not withhold documents imply because it might withhold the document.

QUESTION: Well, I gather what you are saying is, to have something which would protect the mechanic, you would have to be, under three, that is, there would have to be an explicit statute which said "And no SWAP reports that involve a mechanic and they adversely affect him, shall be published."

MR. MORRISON: I think we can go -- make it a broader statute than that, your Honor. For in tance --

QUESTION: How much broader?

MR. MORRISON: Well, let's take the area of the Veterans' Administration which would be not dissimilar.

QUESTION: Anybody named Jones, huh?

MR. MORRISON: Anybody named Jones or mechanics -- the Veterans' Administration has a statute, Title 38, Section 3301, which says that any matter relating to any claim of a veteran under this chapter may be -- shall be withheld unless one of the following conditions. No question in our mind about that.

QUESTION: No, I mean any matter involving any mechanic.

MR. MORRISON: That's right. If that is what the statute said, we don't have any problems with that. If the problem here is --

QUESTION: But unless it is like that you say it doesn't come within --

MR. MORRISON: Exemption three.

QUESTION: Exemption three.

MR. MORRISON: Because Exemption three uses some words that we believe are fairly narrow words. They are not the clearest words that I have ever seen written and I couldn't say that they are, but they do suggest a narrow construction, specifically exempted from disclosure by statute.

The "by statute --"

QUESTION: I know, but if they are that ambiguous,

I take it then, the legislative history becomes quite important, doesn't it?

MR.MORRISON: The general legislative history does, yes, your Honor. We don't think that -- we think that they suggest and strongly infer that it is the statute that must have a major important role in making the exemption rather than the Administrator.

Here, everything is on the Administrator. There is nothing that the statute commands to do except set the most general terms of the exemption. It does not constitute, in our view, a legislative judgment.

Congress did not sit down and say, well, now, what are we going to do about this kind of problem? It didn't focus in as it did on, for instance, tax returns and said, across-the-board tax returns shall not be disclosed except in certain circumstances.

We think that is what Congress did with the other exemptions and that it simply, in the third Exemption, adopted prior legislative judgments that were similar in kind to the kind it was making in 1966 with regard to all of the exemptions except number three.

QUESTION: What is it that is protected if it is "specifically exempted from disclosure by statute"?

It is not documents, is it? It is matters.

MR. MORRISON: That is right. And that, I think,

your Honor, means that portions of documents can be withheld whereas the entire document may not be. And that is as I interpret it.

Originally, when the statute was written, it referred to particularized records of the statutes, were rearranged and shuffled around but I don't think anyone believes that there is any difference between the particularized records that could be withheld and the matters that are now focused on.

This has even been made very clear in the recent amendments to the Freedom of Information Act where they specifically spell out that certain parts of documents can't be made available, a practice which had been followed before, even though other parts might have to be disclosed.

QUESTION: But the fact that the phrase is matters rather that documents may conceivably shed some light on the meaning of specifically exempted from disclosure by statute, may it not?

MR. MORRISON: It might, your Honor, but there is no legislative history, and we have gone over every bit of it that we could.

QUESTION: Well, I was just thinking of the legislative language, rather than the legislative history.

MR. MORRISON: Well, I would say this, your Honor. There is no indication that any place in the Congress anyone

focused on the words "matters" as opposed to "documents" or "particularized records." There doesn't seem to be any precise focus on these matters, as we suggest there was no focus on the language, for instance, comparing the First Exemption or the Third Exemption. They just were treated differently and I don't think that there has been any evidence of any focus --

QUESTION: But surely, "matters" has a broader connotation than the word "document."

MR. MORRISON: Well, I --

QUESTION: Doesn't it?

MR. MORRISON: I would say --

QUESTION: I mean, literally.

MR. MORRISON: Yes, that is right. But I mean, in the context, matters in general might. But in the context of the Freedom of Information Act where we are, after all, only talking about documents -- records is the precise term the Act has.

QUESTION: But neither is there any suggestion in legislative history that any of these statutes such as 1104 were intended to be repealed.

MR. MORRISON: That is correct, your Honor.

QUESTION: And --

MR. MORRISON: We don't believe it was repealed. OUr question really is, did Congress intend to encompass

within Exemption three, an open-ended statute like 1104?

QUESTION: Would your argument be the same if Congress today passed a statute like 1104?

MR. MORRISON: YOur Honor, I was thinking about that before I came here today.

QUESTION: Well, I would think you would, yes.

MR. MORRISON: Yes. And the answer is, I would suggest, yes, to your HOnor, the answer is yes.

QUESTION: Well, you would have to, wouldn't you?

MR. MORRISON: Well, I would suppose you would have a little legislative history at that point, your Honor, and I think it probably could be --

QUESTION: Well, were any of the 100 statutes that -- or, has Congress passed any statutes such as this since the Freedom of Information Act?

MR. MORRISON: Well, they have passed statutes that have, in some respects, restricted access to documents but all of them have had either a standard as to the type of documents, for instance, the Transportation Board statute last year --

QUESTION: The mechanic's-type document.

MR. MORRISON: Well, I would say much broader than that, your Honor. I would say, it was documents in connection with the safety investigation shall not be disclosed or may not be disclosed except in certain circumstances. They

either tell us what kind of documents we are dealing with.

They are in some sense specific. Indeed, the House report speaks about specific records which are withheld by these statutes, the very House report relied on by the Government and we suggest that in this exemption that Congress was talking about specific records and not merely the kind of general open-ended application to any documents in the files of CAB or the FAA. The Government says those can be withheld under 1104.

QUESTION: When was the compilation of 100 statutes made?

MR. MORRISON: Your Honor, I can't tell you when it was because I don't think there was one. There was a 1960 compilation prepared by the Library of Congress. We went back and tallied those yesterday, your Honor.

QUESTION: Was it ever done by a legislative committee or by --

MR. MORRISON: No, that was referred to by -- it was actually put into a legislative form by a committee of the House of Representatives in 1960. But that particular document has far more than 100 statutes in it.

QUESTION: When was the FEderal Aviation Act passed?

MR. MORRISON: 1938 and then it was --

QUESTION: Was it reenacted?

MR. MORRISON: It was reenacted in 1958.

QUESTION: With this section in it.

MR. MORRISON: That is correct. It was the Civil Aeronautics Act in 1938, and then 1958 and there have been some changes and codifications but, essentially, 1104 has remained practically unchanged and for these purposes, unchanged since then.

The 1960 compilation has, under the list of disclosure discretionary statutes, it has 79. National Security disclosure prohibited 26 and the general confidentiality, 68. I don't know quite what that totals up to, but that's far more than 100 and I might also point out, your Honor, that 1104, the statute relied upon by the Government, is not in that list of 100 any place.

The only time it ever appears any place is as an exhibit to a 1958 hearing that was closed before the exhibit got there and the same organization, the Library of Congress, which prepared that exhibit in 1958, also prepared this document here two years later and did not include it.

So I think that our search for a single touchstone is bound to fail.

QUESTION: Is there anything illogical or extraordinary about the fact that Congress, in passing an Act in such sweeping terms, would not pause to try to identify all of the specific statutes which they had previously passed granting nondisclosure? The acts of Congress, now,

not by some administrative decision.

MR. MORRISON: Yes, sir.

QUESTION: Is there anything unusual about their saying, "As to all the matters on which we, previously, made a legislative judgment, we are going to preserve that privilege of nondisclosure"?

MR. MORRISON: No, I don't think there is anything necessarily illogical. We would simply say, your Honor, that 1104 doesn't represent the kind of legislative judgment that we think is required before the statute comes within Exemption three.

After all, the real import of the Freedom of Information Act was that Congress was taking control of it itself. It was taking it away from the administration.

QUESTION: How do you distinguish between -- you lost me there, Mr. Morrison, as to different kinds of legislative judgment.

MR. MORRISON: Well, we --

QUESTION: I thought they were all about the same, althogh some good, some bad, but they are all on the same level in terms of how they do it, aren't they?

MR. MORRISON: In terms of how they do it, your Honor, but the question of whether Congress has made a determination as to what lies in the public interest in terms of disclosure, the legislative judgment in this sense.

We say a legislative judgment is reflected by one of three characteristics, either the particular document that is to be withheld is to be described in the legislation, tax returns, for example. Or Congress has said, the document may not be disclosed -- as it said -- for tax returns, materials from the CIA -- shall not be disclosed -- atomic energy information.

Or, third, it has proscribed some standards under which the Administrator may exercise its discretion.

In other words, we view it as a kind of a reduction in the amount of delegation.

Previously, the administrative agencies had a lot of delegation and we think Congress intended very narrowly to reduce that delegation to a much lower level than had previously existed.

That is why we believe that 1104, which is far broader than any other statute, does not apply here.

QUESTION: Well, in order to say that, wouldn't you have to include in 1104 "well-drawn statutes" or some phrase like that?

MR. MORRISON: I'm sorry. I don't quite --

QUESTION: Well, you say this -- the one is not properly drawn. It didn't have legislative clout to it and all? How do you classify it like that? How could Congress classify it?

MR. MORRISON: Well, I don't see that there is anything wrong with the legislative technique in drawing -- in drafting 1104, your Honor.

My question is whether Congress intended to bring it within, specifically exempted from disclosure by statute provisions within 1104 and where it --

QUESTION: There was a specific exemption for CAB and FAA, both.

MR. MORRISON: But it wasn't by the statute, your Honor. It was by the administrative action and, true, the Administrator had some authority from the statute, but we believe that that wasn't enough.

QUESTION: It has to be more than an authorizing statute.

MR. MORRISON: Exactly, your Honor.

QUESTION: It has to be more specific, but 1104 didn't say that.

MR. MORRISON: 1104 didn't say anything about that, no; 1104 is the statute we are trying to deal with in the context of Exemption three.

QUESTION: Exemption three doesn't say that. That is the point.

MR. MORRISON: Yes, sir. Yes, sir.

QUESTION: Was 1104 in existence before '58?

MR. MORRISON: Yes, it was, 1938, your Honor.

QUESTION: But was it -- did they amend it in '58?

MR. MORRISON: I believe it was slightly -- the phrases were slightly modified. The provision about national defense was turned around a little bit and the last --

QUESTION: But it does say these "documents shall be exempt from public disclosure," doesn't it?

MR. MORRISON: 1104?

QUESTION: Yes.

It says, "The Board of Administration shall order the information withheld from public disclosure."

MR. MORRISON: That is right. That is right.

Let me just -- were you -- I'm sorry, your Honor.

"This information shall be withheld from public disclosure when in their judgment --" That is right. That is the phrase, yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Morrison.

Mr. Friedman.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

MR. FRIEDMAN: I'd just like to say one thing in rebuttal. As we read the statute and the history of it and the language of it, there is nothing in the history or the language of Exemption three suggesting that Congress intended to limit the applicability of the statutes that it was continuing to ones that reflected a particular type of

legislative judgment. We think the Congress speaks -- we don't know how many are there, 70, 80, 90, 100, but Congress intended to keep all of them in existence. That is what the legislation --

QUESTION: As I gather, Mr. Friedman, that is really that if the subject is non-disclosure, no matter what form it takes, that is within Exemption three.

MR. MORRISON: That is precisely it, Mr. Justice and the reason, the reason for this we think is that when Congress came to deal with the problem of what to do with prior statutes that provided for non-disclosure, it decided to leave the situation as it was and this statute, 1104, represents a particularized Congressional treatment of this problem.

Congress decided in this area it was going to leave it to the informed discretion of the Administrator reflecting on the one hand, injury to the people who were protesting it and, second, on the other hand, whether, despite this injury, it was required in the public interest and we think Congress, in Exemption three, intended to defer to that judgment and as in this case, when the Administrator made that judgment, Exemption three requires that this material not be disclosed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:21 o'clock p.m., the case was submitted.]