ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES DEPARTMENT OF DEFENSE, ET AL., Petitioners v. FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

CASE NO: 92-1223

PLACE: Washington, D.C.

DATE: Monday, November 8, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES DEPARTMENT OF :

DEFENSE, ET AL., :

Petitioners :

v. : No. 92-1223

FEDERAL LABOR RELATIONS :

AUTHORITY, ET AL. :

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Washington, D.C.

Monday, November 8, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

DAVID M. SMITH, ESQ., Solicitor, FLRA, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-1223, United States Department of Defense v. Federal Labor Relations Authority.

Mr. Wright.

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

ON BEHALF OF THE PETITIONERS

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

The issue in this case is whether Federal agencies must disclose the home addresses of Federal employees to unions. Three statutes are involved. The Federal labor relations statute provides that, to the extent not prohibited by law, unions are entitled to information that's necessary for collective bargaining.

The parties agree that "to the extent not prohibited by law" references the Privacy Act, and the parties further agree that in the absence of an applicable exception to the Privacy Act, the home addresses are not discloseable. So the legal issue here is whether an exception to the Privacy Act authorizes the disclosure of home addresses.

The parties further agree that the only arguably relevant exception here is exception (b)(2) to the Privacy

Act. That exception says that information that has to be disclosed under the Freedom of Information Act may be disclosed under the Privacy Act. And the parties also agree that when analyzed under FOIA, the question is whether FOIA Exemption 6 applies. It states that information should not be disclosed when that would constitute a clearly unwarranted invasion of personal privacy.

Now, at this point the agreement between the parties ceases. The Federal Labor Relations Authority takes the position that home addresses must be disclosed to unions. Critical to its conclusion in that regard is its contention that in deciding what gets weighed under FOIA Exemption 6, that collective bargaining interests get weighed in that FOIA balance.

We disagree. We agree with the D.C. Circuit, which analyzed this case and said that all that gets weighed on the FOIA side of the balance is the interest in disclosing what the Government's up to. And we agree with the D.C. Circuit that it would, in fact, require an imaginative reconstruction of the statutes at issue to read them the way the FLRA has read them.

QUESTION: And yet it's true that every circuit so construed this complex of statutes until this Court's decision in Reporters Committee, is that not right?

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MR. WRIGHT: That's correct, Your Honor, and the Fifth Circuit noted that in its decision in this case. I would say that really what that shows is that prior to this Court's decision in Reporters Committee, a handful of courts of appeals had misconstrued FOIA. Each of those courts had concluded that collective bargaining agreements -- or, excuse me, collective bargaining interests could be weighed on the FOIA side of the balance.

QUESTION: It was -- it was more than collective bargaining interests in itself. It was another statute.

MR. WRIGHT: That's correct. Those courts had held that the interests that can be weighed on the FOIA side of the balance are not limited to those interests that tell you what the Government's up to or that open the light of agency action to public scrutiny, the interests that this Court identified in Reporters Committee as the sole -- as the sole interest that may be weighed on the FOIA side of the balance.

QUESTION: So do I take it that your position is that the labor management relations statute counts for nothing? It seems that it's no different, in your analysis. If this had been a plain old FOIA request from any member of the public, that we should regard this situation precisely the same way. It doesn't matter that

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it's a union making the request. It doesn't matter that the request emanates initially from the labor management relations statute. Is that correct?

MR. WRIGHT: That's how we read the -- that's how we read the statutes. The Federal -- the case starts with the Federal labor relations statute. It references the Privacy Act. We all agree that if the case ended there, home addresses would not be discloseable. The only arguable exception is this FOIA exception, and once placed wholly within FOIA's domain, in our view, the union stands in no different position than any member of the general public.

And the further point follows that if -- if, in fact, home addresses are discloseable to unions, then under Reporters Committee they're discloseable to everyone, thus magnifying --

QUESTION: Why does that -- why does that follow? I mean if it's discloseable to unions, presumably it's because the weighing process is giving effect to Federal statutory policy. That is not going to affect a request from somebody off the street.

MR. WRIGHT: Well, it's -- unless this Court goes back on what it says in Reporters Committee, the identity of the requester makes no difference. If in fact -- if in fact that's the law under Reporters

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Committee, as this Court said, then anyone gets the information. If this Court engages in an imaginative reconstruction, as we would put it, and limits --

QUESTION: But in Reporters Committee there was no other Federal statute that came into play, was there?

MR. WRIGHT: Well, Your Honor, in Reporters Committee the Court -- the Court emphasized that there's a very strong public interest in learning about anyone's criminal history. Rap sheets were an issue there.

QUESTION: There was nothing comparable to the -- that was a straight FOIA request by the Reporters Committee. Here we have a request that is made not under FOIA, but under the labor management relations statute. And that's -- the presence of another statute was not a factor in Reporters Committee.

MR. WRIGHT: Let me -- let me make two responses there. First -- first, of course, you're correct. But the way the statutes read with the Federal labor relations statute and the Privacy Act interaction, then passing it wholly off to the FOIA area, we don't think the fact that another statute could be referenced makes a difference.

But as I was saying, there is a legitimate public interest in identifying -- in learning about people's criminal histories. And I suppose someone could have -- could have identified a recidivist statute or

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various other sorts of statutes as showing that there's a public interest that's on the books, that shows that there's interest in finding out whether people are convicted felons or not.

QUESTION: I took it to be one of the bases of our decision in Reporters Committee that the personnel at agencies who have to deal with FOIA requests cannot be expected to inquire into the individuated needs of each requester. And so you have to decide it on an in gross basis, should the public at large.

Now, assuming -- assuming that that's correct, would it make an enormous exception from that to say, well, we won't consider the individuated needs of the public at large, but we will consider policies that are set forth in Federal statutes. How much of a big exception would that be to the policy we were trying to further in Reporters Committee?

MR. WRIGHT: Well, I -- the U.S. Code is pretty big these days. I assume lots of people could come up with statutes that arguably supported their position. I mean, obviously what the -- the exception the union's trying to create here is somewhat narrower, certainly, than --

QUESTION: Well, what other statutes would be called into play, for example?

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MR. WRIGHT: If some --

QUESTION: Are there many? I haven't --

MR. WRIGHT: If someone made a FOIA request, I'm sure they could -- since the Federal Government is involved in so many things these days, I'm sure that they could -- they could -- people could make claims. But I'm certainly willing to concede that it would be a narrower exception. It would still be -- there would still be important infringement of privacy interests, as all -- as all concede, even if -- even if the union, the collective bargaining area were the only exception that would be open.

QUESTION: Well, I suppose that the -- that the inconvenience or the impracticality for the -- for the FOIA processor is not simply the number of statutes, but rather the necessity of figuring out who the requestor is.

MR. WRIGHT: Well that --

QUESTION: Even if there are only a few statutes, you would add to the FOIA process the necessity of determining that this is, indeed, a labor union or a labor union officer, or whatever other individual is the beneficiary of one particular Federal statute or another, whereas currently you don't have to know who the requestor is. It doesn't matter what his name is, right?

MR. WRIGHT: Well, you know, we look at this as

a Privacy Act case. I mean, our focus isn't so much on people in agencies who are trying to process FOIA requests. Our focus is on the Privacy Act, which all agree protects this sort of information in the absence of an applicable exception, and we don't see one.

There are -- there are, in fact, 12 exceptions to the Privacy Act. Not one of them mentions collective bargaining interest. And in our view, what the FLRA is trying to do is write a thirteenth exception. The exception that they're arguing for talks about FOIA, and in Reporters Committee this Court went on at some length, correctly concluding that Congress did not intend to turn the Federal Government into a clearing house for personal information. It -- it intended to open agency action to the light of public scrutiny.

And it's conceded here -- the Fifth Circuit ruled against us here, but the Fifth Circuit candidly acknowledged that if -- if what gets weighed on the disclosure side of the FOIA balance here is what this information tells about what the Government's doing, we win.

QUESTION: I don't find it very appealing as a Privacy Act case, to tell you the truth, Mr. Wright. I, you know -- I've been talking about it as a FOIA case only because the Privacy Act exception refers you to FOIA. And

so thereafter you analyze it like a FOIA case. But if it's -- if you're just appealing to privacy interests, I find it really very strange that the Federal Government should not allow to be obtained from Federal employees what it requires to be provided from non-Federal employees.

I mean, if anything, you would think that Federal employees would be -- certainly in other areas Federal employees have less privacy than private citizens, and you're telling us that we have a statute here which gives more privacy to Federal employees than to private citizens, because a private citizen, his address is obtainable by a labor union.

MR. WRIGHT: Well, if I can make both a legal and an equitable argument to that point. The legal argument is that the Privacy Act applies here and it doesn't apply in the private sector, and that seems to us to be a very important difference and indicates that Federal employees have privacy rights that private employees don't.

Turning to the equitable point, I think that there are some very important differences between the private sector and the Federal sector, and the chief of which is that it's clear that Federal unions can arrange to get adequate contact with employees at the workplace.

One key difference is that there's a Federal Service Impasses Panel that can impose proposals on agency management over their objection.

So if unions want more contact with employees at work -- and there's no real issue here that unions have plenty of -- Federal unions have plenty of contact at work. They can -- they can get more contact. They can certainly get enough contact to ask the employees for their home address.

I mean, as a practical matter, what's at issue here is whether we're going to override the choices of Federal employees who have not made their home addresses available to unions, and hold that those home addresses have to be disclosed anyway, even though the employees don't want their home addresses disclosed. That happened in the Riverside case where there were -- there were 34 members of the bargaining unit. 22 said that they didn't want their home addresses disclosed to the union; the FLRA disclosed them anyway.

QUESTION: On your -- on your first argument, the Privacy Act applies to the public sector and not the private sector, but the -- the union, it applies to the public sector, but in the interests of private people as well as public employees, right, the Privacy Act?

MR. WRIGHT: That's true.

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QUESTION: So it's, as far as the employee is concerned, a little hard to distinguish the situation of the employee.

MR. WRIGHT: Well, Federal employees are protected by the Privacy Act and private employees, as employees, are not. You know, we think that's --

QUESTION: Because they happen to work for a Federal agency, not because there's something about their employee status that would require -- that indicates a congressional policy to give them greater protection.

MR. WRIGHT: Well, the -- the Privacy Act applies in the -- to Federal employees. I mean, you know, we think that that indicates a congressional policy.

QUESTION: And so does the labor management relations statute, which would otherwise make this information -- at least that's a given in this case, isn't it, that were it not for the reference to the Privacy Act, that this information would be relevant to the collective bargaining function --

MR. WRIGHT: Yeah, we --

QUESTION: -- And therefore discloseable?

MR. WRIGHT: We haven't challenged the FLRA's decision in that respect. But if I can --

QUESTION: That's another factor in this case, of course, is not only is this request arguably supported

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by a statute. And you said, well there are lots of statutes. Here we have an agency of the Federal Government which has taken a position saying that it's necessary for the functions of that agency to be performed that the information be disclosed.

Does the Federal Labor Relations service promulgate regulations?

MR. WRIGHT: I'm not sure. I certainly haven't seen any relevant to the issue here. And let me make clear in this regard that the -- that the FLRA, any deference that's due to it is due to it with respect to -- to the Federal labor relations statute. No deference is due to it in interpreting the Privacy Act or the Freedom of Information Act.

QUESTION: I agree. Yet, to the extent that they have expressed their position through the proper authority and the proper methods of promulgating their position, we have something more than just a citizen citing a statute. We have a citizen citing the mandate of the Federal agency.

MR. WRIGHT: Well, the FLRA also agrees with us, I might -- might mention, that the phrase "to the extent not prohibited by law" in the labor relations statute references the Privacy Act. Now, we think they're clearly right about that, but that's the point at which deference

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to them ends.

Let me add in respect to the privacy concerns here, in the D.C. circuit case -- I'm not sure we cited it, but they cite the Prudential decision where Judge Friendly talked at some length about a private sector case. And, you know, he pointed out that, citing Justice Frankfurter, judges shouldn't close their eyes as judges to what they know to be true as men.

I mean, what's really going on here is that the unions want to contact people personally at home who are not union members to try to convince them to join the unions. That's what this fight is really about. There's plenty of contact at the workplace.

QUESTION: But that happens in the private sector.

MR. WRIGHT: That's true. That's true, but there's more contact at the workplace in the Federal sector. We think that there's -- their union are adequately -- their needs are adequately fulfilled in the Federal Government in terms of the contact they can arrange at work, and that there is no need there for them to go contact employees at home to urge them to join the unions.

But that's -- I mean, that's what -- that's what really at issue here. And there's a real privacy

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issue here. And, of course, that's assuming that you can somehow read these statutes to let the unions and only the unions get this information. It seems to me that if you read Reporters Committee to mean what it says, then everyone has to get these home addresses.

QUESTION: Did Congress -- in the private sector area, is it a provision of the National Labor Relations Act that unions have to provided with the home addresses of employees? Or is --

MR. WRIGHT: No, that's not in the -- that's --

QUESTION: -- That's a determination --

MR. WRIGHT: -- Of the board.

QUESTION: -- Probably not by rulemaking, but by adjudication, right, of the National Labor Relations Board?

MR. WRIGHT: Yeah. I think it grows out of the Excelsior case.

QUESTION: And presumably you think -- do you think -- do you think the National Labor Relations Board might come out the other way on that subject and still -- and still be upheld by this Court?

MR. WRIGHT: Could the -- could the board decide that --

QUESTION: That there's enough of a privacy interest on the part of -- on the part of private

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citizens, that their home addresses should not be given by private sector -- to private sector --

MR. WRIGHT: Of course, they haven't come out that way. But in a case where --

QUESTION: If they did, do you think it would contravene the Federal Labor Relations Act?

MR. WRIGHT: You mean --

QUESTION: I mean the National Labor Relations Act.

MR. WRIGHT: No. No, we don't think -- we don't think it would. And the board --

QUESTION: So you can't really say that there is a congressional policy in the private sector that would permit what we are -- would not be permitting here if we took your position. You wouldn't really say that there's a labor board policy in that area.

MR. WRIGHT: Well, I certainly think it's fine for the National Labor Relations Board to consider privacy interests, but it's not directed by the Privacy Act to do so. The Privacy Act, all agree, applies here, and in the absence of an applicable exception, bars release of home addresses.

QUESTION: Mr. Wright, would you just help me out on the private sector law and the private sector. Is it clear that -- I gather a collective bargaining

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representative has access to names and addresses of everybody in the union. But during organizing campaigns before a collective bargaining representative has been selected when two unions are competing for support among employees, are the competing unions entitled to get these names and addresses in the private sector?

MR. WRIGHT: Yes. That's the -- that's the Excelsior rule that --

QUESTION: Both --

MR. WRIGHT: -- During an election campaign time.

QUESTION: Do you have that sort of situation often in the Federal sector where you have two unions trying to --

MR. WRIGHT: Yes. And I'll tell you what happens. There's -- it's 5 U.S.C. 7133(a), I believe, says that -- that the competing union gets the same access to employees that the incumbent union has. And what that means in practice is that the incumbent union almost always has rights to send letters and use the internal mail service to contact employees. And during an election, the challenging union gets that same right. And, frankly, the issue hasn't arisen in litigation, I assume because given all that contact that's common in the Federal sector, it hasn't been a problem.

QUESTION: Sending letters to the shop, but not to the home.

MR. WRIGHT: That's right. That -- right. And as I've -- as I've tried to stress, that is commonly done and can easily -- easily be arranged for Federal employees. Certainly, it can easily be arranged in the course of doing that, to ask them if they want their home addresses, if they'll provide their home addresses.

And so that's why we come down to the situation here that all that's really at issue is whether or not those employees who choose not to provide their home addresses to unions have to provide them anyway. And it's quite clear that the unions are not satisfied with just the lists of people who want to give it to them; that this case is about -- is about getting everyone's home address, even those people who don't want to provide them.

If there are no further questions, at this time I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Wright.

Mr. Smith, we'll hear from you.

ORAL ARGUMENT OF DAVID M. SMITH

ON BEHALF OF THE RESPONDENTS

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

The most important thing this Court should bear

in mind today is that this is a case which arose under the Federal sector labor management relations statute, and not the Freedom of Information Act. This case involves --

QUESTION: May I just interrupt you. Would it make a difference -- could the union go directly under FOIA and get the material and make the same arguments you make?

MR. SMITH: Justice Stevens.

QUESTION: Say we need them for organizing purposes and so forth.

MR. SMITH: Justice Stevens, when unions have tried to do that, the courts have uniformly said no. There's a cased cited in our brief in the Fourth Circuit Court of Appeals --

QUESTION: Have they uniformly held that the disclosure is not required under the FOIA, then?

MR. SMITH: If the request is made purely under the Freedom of Information Act, as opposed to under the Federal sector labor relations statute where the request was made in this case, the courts have said no. There are two cases available.

QUESTION: But then how do you get around the language "required under section 552 of this title?"

MR. SMITH: How do we get around the language of the Privacy Act?

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QUESTION: The language in the Privacy Act, yeah.

MR. SMITH: We get around it by remembering where this case emanates. This case is first and foremost a Federal sector labor relations case. Only one entity in the world can make a request for information under the Federal sector labor relations statute. When they make that request, the statute admittedly does direct you to whether or not the information is prohibited by law.

But when you go to these other sources, specifically the Privacy Act and, in turn, the Freedom of Information Act, you cannot forget where you started. You must at all times keep in mind that the request emanated under the Federal sector labor relations statute.

QUESTION: Well, why is that so, Mr. Smith? I presume that almost every sort of request for information to which the privacy applies -- Privacy Act applies comes under some other statute or some other interest. Why should this particular source be more important than other sources?

MR. SMITH: Several reasons, Mr. Chief Justice. To begin with, research has revealed no other statute comparable to the Federal sector labor relations statute which directs you through the Privacy Act to the Freedom of Information Act. So we're not talking about opening

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Freedom of Information Act law, if you will, to a broad range of exceptions.

Secondly, within the four corners of the Federal sector labor relations statute, we have articulated a specified congressional interest in collective bargaining and in Federal sector unions. These interests must be balanced when contemplating whether or not --

QUESTION: Well, you can bargain collectively without having the names of employees who don't want to give -- without the union having the names of employees who don't want to give their names to the union.

MR. SMITH: We take exception to the notion -- and, indeed, there's no evidence in the record to support the conclusion that the only addresses that the Federal sector unions do not have are those of employees who have chosen not to provide them. Indeed, there are all sorts of reasons why a Federal sector union might not have the name and address of a Federal sector employee.

For instance, a new employee coming on board might not yet have provided their name to the union. In this very case, the union represents -- the AFGE local represents 70 bargaining units at worldwide locations. It defies logic to presume that the union's been able to contact every one of those unions at 70 different worldwide locations and obtain their name and home

address.

Some employees are apathetic. Some may be reluctant to provide the union with their name and home address. Some may not want to pay dues. There are all sorts of reasons why an employee might not provide a union with a name and home address, but there's no support in this case for the notion that the Solicitor General urges, that employees who've not provided them don't want to provide them.

QUESTION: Well, certainly your request would cover that kind of employees. You're saying it would cover other employees too.

MR. SMITH: Indeed, it would. I think the most important thing this Court should keep in mind is that this is a Federal sector labor relations case. The Authority in this case concluded that the bargaining -- that the Defense agencies committed unfair labor practices when they refused to turn over the names and home addresses of employees in bargaining units represented by the two locals concerned.

QUESTION: It seems to me that doesn't answer the question. I mean, of course it's a Federal sector labor relations case and it's a -- it's a labor relations request. But the argument being made is in this very field Congress said you get what you're entitled to,

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except the Privacy Act has to be complied with. And the Privacy Act says there's an exception for anything that has to be disclosed under FOIA.

So it is a Federal case, labor relations case, but the issue is what has Congress provided for in this area. And if you -- if you walk that progression through, they've provided that Federal employees have a privacy interest except to the extent there's an exception from FOIA, because of FOIA.

MR. SMITH: Justice Scalia, we agree that Federal employees have a privacy interest. But it's important to remember that Congress never contemplated that Federal employees would be able to prevent unconsented to disclosure of private-in-nature information. In fact, at the time that the Privacy Act was passed in 1974, the state of the law was that names and home addresses were being released under the Freedom of Information Act.

Secondly, that Congress has articulated a Privacy Act and has drafted and enacted a Freedom of Act, does not lead inescapably to the conclusion that you should ignore the considerations in the Federal sector labor relations statute in evaluating whether or not disclosure would prevail under the Freedom of Information Act.

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The fact of the matter is that Congress enacted the Federal Labor Relations Act, as this Court found in 1983 in its Bureau of Alcohol, Tobacco and Firearms case, in -- in enacting the Federal sector labor relations statute, this Court found that it was modeled after the National Labor Relations Act. At the time that the Civil Service Reform Act was passed in the late seventies, the state of the law was that names and home addresses were being provided to private sector unions.

QUESTION: But does the Federal -- does the National Labor Relations Act have a privacy guarantee for employees?

MR. SMITH: No, sir, nothing -- nothing in line with the Privacy Act.

QUESTION: But this -- but the Federal Labor Relations Act does have it, so to that extent it's not modeled after the NLRA.

MR. SMITH: Well, we don't contend that they are mirror images, but there's no salient public policy reason why you would discriminate in this case, why you would allow to private sector unions a tool which this Court has recognized they need, but deny the same to Federal --

QUESTION: Well the reason -- the reason is the language of the statute. I mean, it seems to me you're arguing that Congress should have written the statute

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differently, and isn't that for Congress to decide.

MR. SMITH: Justice O'Connor, we think the language of the statute holds us in good stead in this case. The language of the statute where we ultimately wind up if you speak to the Freedom of Information Act, is that disclosure will attend, absent a clearly unwarranted invasion of personal privacy. We do not see the release of Federal sector employees' name and home address as a clearly unwarranted invasion of public -- personal privacy.

QUESTION: Well, you have to view it in the context of the Reporters Committee decision, I suppose.

MR. SMITH: We don't think you do. And if you'd permit me, I'd like to say why. In the context of the Reporters Committee decision, this Court identified a specific public interest which must be considered in a Freedom of Information Act context. This Court declined to allow courts to consider an amorphous public opinion -- public interest, but instead specified a specific interest of what the Government is up to as being the specific interest.

That was the case where the request was a Freedom of Information Act request. There's no Freedom of Information Act request in this case. That was a case where the information sought were FBI rap sheets,

obviously an item which this Court said was clearly embarrassing. Here we seek names and home addresses, I submit to you a much less intrusive invasion.

QUESTION: Well, but, Mr. Smith, if they're not a clearly unwarranted invasion of privacy, and I understand your argument, then I should think you should get them directly under FOIA.

MR. SMITH: Well, we would -- as a fallback position, we would contend as much.

QUESTION: It seems to me you really should argue that in the alternative.

MR. SMITH: Well, we think it more important that this Court recognize the importance of collective bargaining considerations in evaluating whether or not Federal sector unions obtain information.

QUESTION: Well, but, as Justice Scalia was suggesting to -- in colloquy with your opponent earlier, if we look at policies of other statutes in interpreting the exception to FOIA, we could look at it even if the requests were made directly under FOIA. You didn't even have to -- you just say the policy of the Federal Labor Relations Act supports the conclusion that it's not a clearly unwarranted invasion of privacy.

MR. SMITH: Indeed --

QUESTION: You could make that the direct

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argument, it seems to me.

MR. SMITH: I think it does, Your Honor. And we would -- we would contend to this Court --

QUESTION: Mr. Smith, isn't the difference, and what makes this a hard case, is under the Freedom of Information Act the union has no better standing than anyone else?

But you're kind of claiming here that since your -- since your original request is not made under FOIA, but made under the Labor Relations Act, that the union uniquely can have access to this information. That the weighing -- the public interest to be weighed is the union's special interest in collective bargaining, so that you could screen out other requesters if you can attribute this collective bargaining purpose as something to be weighed against the privacy interest, which an ordinary requester wouldn't -- wouldn't have. Isn't that really what you're saying?

MR. SMITH: I think that's a good articulation of our position, Justice Ginsburg. The point seems to be that you don't -- simply because you look to the Freedom of Information Act, and we admit that you do, in fact, ultimately look to the Freedom of Information Act, you do not turn this into a FOIA request. Remember that we're --

QUESTION: So is it -- and I want to be clear on

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what your position is. Are you saying that if the FLRA's view of this prevails, then the union will have access to this information, but it doesn't follow that any other requester would have access to it?

MR. SMITH: That is exactly our point. The -- there's only one entity, one that's already been granted exclusive recognition stature by the Federal Labor Relations Authority, that's entitled to make a request for information under the federal labor relations statute. So --

QUESTION: But if "clearly unwarranted" can take account of that individuating characteristic, why should it not take account of all individuating characteristics? I mean, it seems to me that's contrary to the whole letter and spirit of Reporters Committee. We say away with individuating characteristics, and you're coming and saying, well, we're just not any requester under FOIA, we are a labor union, and we're requesting under this Federal statute here.

It seems to me you're in the soup and you convert all FOIA requests into requests that have to looked at in light of who the requester is. I don't know why -- why that principle should not apply across the board. How do you -- how do you just say only in this case are we going to take account of individuation?

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MR. SMITH: At page 771 of your Reporters Committee opinion, Justice Scalia, the Court said: "The identity of the requesting party has no bearing upon the merits of his or her FOIA request." That's where we draw the line. This case does not involve a Freedom of Information Act request. We look to the FOIA, we adapt FOIA, but we don't turn a request for information under a statute created by Congress into a FOIA case.

QUESTION: You've just changed your answer to Justice Stevens' early question, then. You don't any longer assert that you could get it under FOIA alone, or else you'd have to give me a different answer.

MR. SMITH: Our position is we don't need to look to the Freedom of Information Act in this case.

QUESTION: Well, I understand you don't need to. But either change your answer to my question or abandon your earlier fallback argument that you should get it under FOIA anyway.

MR. SMITH: I'll try once more to save both positions and then abandon one if I have to.

(Laughter.)

MR. SMITH: First and foremost, disclosure should attend here because the request for information is made under the Federal sector labor relations statute. Failing that, if we treat this case as a pure Freedom of

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Information Act case, which the Solicitor General urges this Court to do, we feel like the invasion of privacy is not so significant that the information shouldn't be released in any event.

QUESTION: Mr. Smith, you had said earlier, I guess in answering Justice Stevens' question, as I understood you, not that you did not believe that you were entitled to get it if you asked under FOIA, but simply that the courts had not been giving it to you under FOIA. They had -- they had denied your -- the requests under FOIA, is that correct?

MR. SMITH: That's correct.

QUESTION: What -- what were the rationales in the -- in those cases for refusing the requests under FOIA?

MR. SMITH: The court engaged in traditional Exemption 6 balancing in the two cases that I'm familiar with. Specifically the AFGE --

QUESTION: Did it bring the Privacy Act concern into the balance?

MR. SMITH: Yes, it did, and in those cases determined that the invasion of privacy outweighed the public interest. Which I think goes to make our point in this case, Justice Souter.

Because in the Fourth Circuit where the court

specifically, under a Freedom of Information Act request, said that this information is not available, 4 years later the exact same request was made by the exact same local, a Baltimore social security outfit, to the exact same agency of Government, Health and Human Services, and the Fourth Circuit reversed itself and said now the request comes under the Federal sector labor relations statute, we will provide the information to the other side.

So when you properly balance collective bargaining considerations, the information will be disclosed. But when you treat this case as a pure FOIA case, it's tougher -- it's tougher, indeed, to justify release because you can't consider the very real significant interest which attends in Federal sector collective bargaining and Federal sector unions.

It's important to realize the ramifications of this case go beyond mere names and home addresses. The Government would have you adopt the what the Government is up to standard, the pure Reporters Committee standard, to every single request for information that a Federal sector union makes.

If you take a fairly simple scenario, let's suppose two employees both receive a performance evaluation. One is dissatisfied with his performance evaluation, feels as though union animus had something to

do with that. He is -- so let's say an active member of a union, a coworker is not. He goes to his union and complains. The union makes a request under the labor statute for the performance evaluation of the other employee in order to do a comparison and see if, in fact, there has been discriminatory treatment.

The Government would tell you that the personnel office of the agency concerned cannot turn this document over unless that particular performance appraisal of, shall we say, a low-level clerk tells you what the Government's up to. I submit to you that makes no sense. That's not what Congress intended when it passed the Federal sector labor relations statute.

QUESTION: But doesn't that tell you what the Government's up to?

MR. SMITH: Well, perhaps it would, but that's a pretty rigorous standard in every request for --

QUESTION: But, I mean, if it would, then your parade of horribles is short by at least one example.

MR. SMITH: If -- if the -- if that's true, that would be fine. But I would cite to you the case of the Department of Commerce v. the FLRA decided in 1992 in the District of Columbia Circuit, not a case particularly different from the hypothetical I just gave you. The Authority had ordered the release of a dozen -- of a

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selected group of performance appraisals, people that -- the list of names of people who had received outstanding performance appraisals.

The union was wanting to pursue a case to determine whether or not disparate treatment was occurring and to monitor the performance appraisal system of a given agency. The Authority ordered release. In so doing, the Authority noted this Court's 1967 Acme Industrial Company precedent that release of information in a situation like this leads to the early resolution of grievances. The Authority was reversed by the D.C. Circuit, who said this information doesn't tell you a whole lot about what an agency of Government is up to.

So it's a situation, Justice Souter, where the courts are doing just that. If they're gonna apply Reporters Committee in a strict myopic fashion, union requests for information done to sort through and sift out and determine whether grievances are unmeritorious are going to dry up, and what we're going to get to is unions are not going to have --

QUESTION: In your performance evaluation hypothetical you couldn't -- the employee could give the permission to have the performance evaluation.

MR. SMITH: The Solicitor General notes in their reply brief that that is, in fact, the answer. I submit

to you that employees might be reluctant to provide that information.

QUESTION: I'm assuming you've got a case where the employee is the one who's prosecuting the grievance. And he's certainly -- if you're going to prosecute his grievance, would be willing to give up -- to give the consent to get all the records, wouldn't he?

MR. SMITH: Yes, Your Honor. He --

QUESTION: That's what I thought your hypothetical was.

MR. SMITH: No. I'm suggesting that in attempting to obtain a performance appraisal of the other employee --

QUESTION: Oh, I see.

MR. SMITH: The one who's been complained about, that employee would not be likely to provide consent.

QUESTION: So it's not all grievances. It's that limited category of grievance where what you're talking about is somebody else got a promotion when -- or I got fired when the other one -- or demoted when the other one didn't. That's a pretty limited category. What about the routine-use exemption, having it simply declared a routine-use? Couldn't the -- couldn't the union seek to get the agency to declare such a use a routine-use?

MR. SMITH: I'd like to respond to your first

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point and then answer your second question, if I could, Justice Scalia.

QUESTION: Uh-hum.

MR. SMITH: We don't agree it's a pretty limited category. Any requests for information that would in any way involve a system of records implicated by the Privacy Act would, in fact, fall within the hypothetical situation that I depicted to you.

QUESTION: No -- not within a hypothetical where the person effected would not be entirely willing to give his consent. I mean most of your grievances, it seems to me, will involve situations where the union -- where the employee will be perfectly willing to say I waive my Privacy Act rights.

The only -- the only situation you're in trouble is where you need information -- in order to pursue this grievance, you need information about another employee who may not be willing to waive it. And that seems to me to be not the -- not the -- not the majority of situations, a relatively small minority of situations.

MR. SMITH: Well, I would disagree with you, but let me turn to the second point.

With respect to routine use, the Government would tell you that routine use is the panacea to this problem. The Court should, however, examine that point

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very closely. If routine use were available to solve our problem, we wouldn't have litigated this case for the past 7 years from one end of this country to the other.

They have said that while routine-use available, it's not available in this particular case because there are alternative means of obtaining the information. Also, it should be borne in mind that routine-use wouldn't assist --

QUESTION: Excuse me. I'm talking about routine use of personnel records, not routine use of employees' addresses.

MR. SMITH: With respect --

QUESTION: You're quite right. You have an uphill battle to get it declared a routine-use of employees' addresses that they be given out. But just as far as prosecuting grievances is concerned, you could not have it declared a routine-use of personnel information to give it to a union prosecuting a grievance?

MR. SMITH: It already has been declared a routine-use. However, it is up to the agency of government to decide whether or not the union needs the information, whether it's relevant and necessary for the union prosecuting the grievance. So we're placing the agencies of government under the routine-use exemption -- I'm sorry, exception to the Privacy Act, in the position

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of determining what it is the unions get.

I would point out that there is already a routine-use which authorizes the release of names and home addresses to Federal sector collective bargaining units. However, as with the wording in the other routine-use, it's up to the agencies of Government to determine whether or not the information is relevant and necessary. So --

QUESTION: If I understand you correctly, you really can't say you don't get anything in this grievance situation. You're just saying you don't get it if the agency makes the determination that you don't need it.

MR. SMITH: Under the routine-use exemption, that's correct.

QUESTION: Right. So you can get it whenever the agency agrees with you that you need it to prosecute your grievance. How could any agency possibly say that when your grievance is a comparative grievance like this, you've received discriminatory treatment -- how could any agency policy -- possibly say that you don't need it in order to compare it to the other employees? Have some done that?

MR. SMITH: Yes, they have. I remind you once again of the case that I cited earlier, Federal Labor Relations Authority v. Department of Commerce, where what the union sought were performance appraisals in order to

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determine whether or not the performance appraisal system was being fairly run in one particular agency of Government.

Admittedly, that's a bit broader than a one-at-a-time case, but the fact of the matter is the agencies have used the routine-use to deny information to unions and they continue to do it. And remember, the wording of the routine-use is such that it's totally up to the agencies to determine sort of as a benevolent godfather, if you will, what it is they will provide the Federal sector unions and what it is they will not provide the Federal sector unions.

QUESTION: Well, it seems to me you ought to -- you ought to fight that out on the proper -- on the proper field, and that is on the field of whether that's a proper interpretation of the routine-use exemption or not.

MR. SMITH: Well, it has -- it has been fought a good deal. But I think it important to recall this is not a routine-use case.

QUESTION: Mr. Smith, on the routine-use part, that seems -- there was some confusion over the role that that, in fact, plays in this picture. One of the union briefs seemed to be saying that what the agencies are doing here -- they're not serving the purpose of the labor management relations statute, they're not serving the

purpose of FOIA, really.

What they are serving the purpose of is maximum executive control, because if they wanted this information available it's in their hands to do so by declaring it a routine-use. So they're -- what the -- their argument is, essentially, maximum executive discretion, not the privacy interest of the employees.

MR. SMITH: You're right, Justice Ginsburg. In fact --

QUESTION: But the FLRA didn't seem to go that far in its argument. AFGE did in its brief. And I was wondering how -- what FLRA's position is on the routine-use?

MR. SMITH: Well, the FLRA's position was, at the time that it issued its decision in 1990 in its Portsmouth Naval Shipyard case decision, that this information was discloseable as a routine-use. That position has ultimately been taken away from the Authority by the publishing in September of 1992 of FPM Letter 711-164, wherein the Office of Personnel Management specify how the routine-use should be construed in this particular case.

Getting to your larger point, however, we think it counterintuitive for agencies to suggest on the one hand that Federal sector employees have a significant

privacy interest in not disclosing the names and home addresses of Federal employees, yet acknowledging at the same time that they could change the routine-use in the morning and disclose this very information.

Indeed, under current FPM Letter 17 -- the FPM Letter I referenced earlier, the information can be disclosed. The privacy interest can be overrun if the agency concludes that the union -- union does not have alternative means of obtaining the information. So I agree with your point.

QUESTION: But that's not the hypocrisy of the Government. It seems to me that's the way that -- that's the way FOIA is written. I mean, if that is -- if that is something of an irony, it's an irony that's -- that's within the Privacy Act. Once it's declared a routine-use, despite all your privacy interests in it, it's gone.

MR. SMITH: I think your point is well taken, that perhaps the law could be better written in that guard -- regard. But it does sort of question the issue of how significant the privacy interest is in this particular case, Justice Scalia.

A couple of points were made by the Solicitor General in the opening argument that I'd like to respond to. Justice Scalia, you raised the point about whether or not the National Labor Relations Board has a policy on

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names and home addresses and could that be changed. It could be changed. The Excelsior Underwear case could be changed, but they would have to overrule the precedent of this Court. Your Wyman and Gordon decision in 1969 specifically enforced the Excelsior Underwear case and provided that names and home addresses --

QUESTION: Well, did Wyman and Gordon indicate that the board would have had to reach that result, or just that it was a permissible conclusion?

MR. SMITH: The latter, Mr. Chief Justice.

QUESTION: Well, then why would you say we would have to overrule Wyman and Gordon?

MR. SMITH: I would say the board is pretty well frozen on the release of names and home addresses issue, absent a change in the opinion of this particular Court. It's not just this Court that's gone that far. Following your Wyman and Gordon decision, courts of appeal for the First, Second, and Ninth Circuits have also said that names and home addresses will have to be released to unions. So the board would have a significant uphill battle in turning around that position.

QUESTION: I think you're -- I'm sorry, Chief.

QUESTION: Go ahead. Go ahead.

QUESTION: I -- my only point on it was you're quite correct, it is a Federal policy, but it is not a

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congressionally enunciated policy. I'm just suggesting your point would be a lot stronger if the labor relations -- if the National Labor Relations Act said, Congress said unions need employees addresses. And then the very same Congress -- well, what we call the very same Congress enacts the Federal Labor Relations Act. Then you could say, gee, they couldn't have both of these things in mind at the same time.

But, in fact, we don't know what Congress thought about this. We don't know what Congress thinks about it today, what it thinks about providing employees addresses even in the private sector. You still have an argument that it's a Federal policy, but you cannot make the argument that it is a congressionally mandated policy. It's a policy that Congress let the board adopt.

MR. SMITH: We do know that at the time the Federal sector labor management relations statute was enacted, the policy clearly was and had been for some 10 years that names and home addresses were released. We do know, as found by this Court, that the Federal sector labor management relations statute was modeled after the National Labor Relations Act, and the Authority was modeled after the National Labor Relations Board. Admittedly, there's no specific proviso.

QUESTION: Mr. Smith, are you arguing that the

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FLRA deserves the same respect in what it thinks the Federal labor statute means as the NLRB does in its field?

MR. SMITH: Absolutely. Which is what this Court pretty much said in your Bureau of Alcohol, Tobacco and Firearms case in 1983, that the Authority is entitled to deference within -- when it acts within the provisions of the Federal sector labor management relations statute. And this certainly is a matter which affects Federal sector labor relations, whether or not Federal employee unions are able to receive this information.

Which every court of appeal has said is vital to the interest of the unions. That it's the most effective, efficient means of dealing with -- with their employees, and it's an effective means of communication. That really is not a point that's in dispute. The only dispute is whether or not we're going to provide Federal sector unions with a tool they need to contact their employees to facilitate collective bargaining in the Federal workplace.

In conclusion, we ask that this Court bear in mind that this is a Federal sector labor relations case, not a request for information under the Freedom of Information Act. The Congress has specifically declared its support for the public interest in collective bargaining and Federal sector labor organizations. The decision of this Court should protect and honor the

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interests so specified by Congress.

This Court should uphold the Authority's harmonizing of the Privacy Act, the Freedom of Information Act, and the Federal sector labor relations statute, and not allow the Federal sector labor relations statute to be trumped by the Freedom of Information Act and dry up the information which Federal sector unions need to do their job.

Recognizing the importance of collective bargaining in considering and analyzing information requests does minimal harm to the private interests of Federal sector employees, gives import to the public interest in collective bargaining, and is supported by this Court's prior decisions. The Authority asks that the decision of the court below be affirmed and its orders be enforced.

Thank you.

QUESTION: Thank you, Mr. Smith.

Mr. Wright, you have 9 minutes remaining.

REBUTTAL ARGUMENT OF CHRISTOPHER J. WRIGHT

ON BEHALF OF PETITIONERS

MR. WRIGHT: Thank you, Mr. Chief Justice.

Let me make clear that the unions have the names of the employees in the bargaining unit, and they have the work addresses of the employees in the bargaining unit.

And Mr. Smith went on at some length about how it can be difficult to get a hold of new employees' addresses.

Let me make clear that there are many collective bargaining agreements that require management four times a year, for example, to provide to the union a list of the names and worksite mailing addresses of all employees in the unit, highlighting those hired during the prior quarter. So it's quite easy to get a hold of the names and work addresses of Federal employees, and it's done all the time.

Let me way a word about the routine-use exception. Two points. One, of course, is that the routine-use exception is clearly limited to unions. Private information that is disclosed under routine use only goes to unions, not to the general public.

Let me say as well that we can't just decide tomorrow morning to make a routine-use and give something out. The statute provides, first, various procedural requirements. But also that it has -- that the information has to be used for a purpose that is compatible with the purpose for which it was collected.

OPM has construed that to mean that home addresses may be disclosed when there is no good way to get a hold of employees at the workplace. OPM thinks it's compatible with the purpose for which home addresses are

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collected to contact employees at home when there is some sort of emergency or when you can't collect them at work. And they certainly don't think that these can be handed out left and right despite the Privacy Act.

QUESTION: Mr. Wright, can I ask you a question about the exempt -- the language of Exemption 6. Let's assume you have to -- your opponent has to win by proving it can be -- information can be obtained under FOIA. Why cannot --

MR. WRIGHT: I like that assumption.

QUESTION: Pardon me?

MR. WRIGHT: I like that assumption.

QUESTION: I know. That's what the statute says, so we'll at least assume that's what it means also. But why -- why is it not permissible when you're asking the question whether -- a request for the names and addresses of all the employees within a large governmental office being requested, whether the -- that's a clearly unwarranted invasion of personal privacy if it's perfectly obvious from the face of the request that the purpose of the request is to facilitate collective bargaining and so forth?

Why doesn't -- isn't it necessary to take a look at that to decide whether or not the invasion is clearly unwarranted?

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MR. WRIGHT: I think Justice Scalia answered that for me by saying that the whole thrust of Reporters Committee, as I read it, is that individuating characteristics don't count. I mean, the Court clearly said that the identity of the requester doesn't count and, frankly, that seems to us to be clearly in line with what Congress had in mind when it -- when it enacted the Freedom of Information Act, which, of course, is designed to provide information to the general public, not to particular subclasses of the general public.

QUESTION: Information is releasable or not releasable. It's not -- it's not releasable to -- if it's releasable to any individual under FOIA, it's releasable to the public at large, isn't it?

MR. WRIGHT: That's -- that's the whole thrust of FOIA. This Court certainly said it in Reporters Committee and that's how we think it ought to be continued to be construed.

QUESTION: And it's clearly unwarranted. All you have to do is say it's covered by the Privacy Act, and that's the end of it, it's unwarranted.

MR. WRIGHT: Well, when -- when you get -- the way these statutes work is that the Privacy Act exception that's at issue here puts the issue wholly within FOIA's domain, and the question really is whether --

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QUESTION: Well, I understand that. I'm just -- I'm just trying to think through whether even assuming it's wholly within FOIA's domain and even assuming the identity of requester is irrelevant, what -- exactly what is weighed when you compare "clearly unwarranted" on the one hand and "could reasonably be expected to constitute an unwarranted" on the other. It's the difference between six and seven.

MR. WRIGHT: Well, I guess I think that the identity of the requester goes hand in hand with the purpose for which the requester wants the information.

QUESTION: So this is just as though it was an advertising agency wanting to make up a list of people to send catalogs to, or something like that.

MR. WRIGHT: And, of course, many of those people have requested lists of Federal employees' home addresses.

QUESTION: Yeah.

QUESTION: Mr. Smith --

QUESTION: Mr. Smith, you recognize no difference between the identify of the requester and the purpose of the request. It's one thing to say we weigh the interest in privacy against nothing on the -- on the other side, or we weigh the interest in privacy against the interests in collective bargaining as advanced by the

labor management relations statute. Are you saying that in this calculus you do not weigh, you may not weigh the -- the public interest reflected in the labor management relations statute?

MR. WRIGHT: Right. And, of course, seven courts of appeals, I should mention, have -- have read the decision that way, and our logic has been described as irreproachable.

QUESTION: Is the result -- you had a good adjective there.

(Laughter.)

QUESTION: Is the -- is the result going to be the same in Mr. Smith's hypothetical in which the request for the information is to determine whether -- whether union members are getting performance evaluations which, because of their union membership, are unfavorable?

MR. WRIGHT: Well --

QUESTION: I suggested to him that that purpose, at least, was -- was, indeed, to find out what the Government is up to. Would you agree that they're entitled to it in that case?

MR. WRIGHT: There's probably a good -- a good argument to that effect. What usually happens is that -- is that redactions are done and the information is sanitized and turned over in sanitized fashion, and that's

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usually satisfactory to the unions.

In addition, you can make an argument that -- that some of the information unions request tells you something about what the Government is up to, some of it is available under the routine-use exception. And, of course, if the person to whom the information relates consents, the information is turned over.

QUESTION: Sure.

MR. WRIGHT: So this parade of horribles was quite exaggerated. There are many ways unions get this information.

QUESTION: Mr. Wright, could I ask about deference. There -- there are two arguments being made here by the labor board. One is that the statute does not, as you say, refer everything to FOIA. That it -- it refers it to FOIA but with something of its own in it. And the other argument is that even under FOIA, they -- simpliciter, they ought to get it.

Now, as to the latter, I think you've -- the argument in your brief that no deference is owed is quite correct. But as to the former, don't you have to give deference? I mean isn't your argument as to the former, yes, we owe them deference but this goes beyond the scope of the reasonable, and therefore the deference doesn't carry us that far?

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MR. WRIGHT: Right. That -- well, they get deference under -- under section 7114 of the federal labor relations statute, but that leads you right to the Privacy Act. They don't get deference in construing the Privacy Act, which is what directs you to FOIA, or under FOIA.

QUESTION: So there's deference in making the argument that this doesn't -- doesn't adopt the Privacy Act unamended. It puts into the Privacy Act when you're making your request under the labor statute, this -- this modification. That's the argument they're making. And the only response to that, it seems to me, has to be, well, yes, you're -- you know, there's deference, but fun's fun, but you can't die laughing. That's your argument.

MR. WRIGHT: I hadn't actually looked at their argument that way, but if what they're really trying to do -- and I guess this is what they're really trying to do, is read a thirteenth exception into the Privacy Act, and deference won't carry them that far.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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UNITED STATES DEPARTMENT OF DEFENSE, ET AL V.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL

CASE 92-1223

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BY Ann Mari Federico

(REPORTER)