United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,573

GARY A. SOUCIE, ET AL., APPELLANTS

v.

EDWARD E. DAVID, JR., DIRECTOR
OFFICE OF SCIENCE AND TECHNOLOGY, ET AL.

Appeal from the United States District Court
for the District of Columbia

Decided April 13, 1971

Mr. Peter L. Koff, with whom *Messrs. Lawrence Speiser* and *Melvin L. Wulf* were on the brief, for appellants. *Mrs. Hope Eastman* also entered an appearance for appellants.

Mr. Jeffrey F. Axelrad, Attorney, Department of Justice, with whom *Messrs. Thomas A. Flannery*, United States Attorney, *Robert V. Zener* and *Harland F. Leathers*, Attorneys, Department of Justice, were on the brief, for appellees. *Mr. Morton Hollander*, Attorney, Department of Justice, also entered an appearance for appellees.

Mr. Peter L. Koff, Assistant Corporation Counsel for the City of Boston, Massachusetts, filed a brief on behalf of the City of Boston as *amicus curiae.*

Before BAZELON, *Chief Judge,* VAN DUSEN,* *Circuit Judge,* U.S. Court of Appeals for the Third Circuit, and WILKEY, *Circuit Judge.*

BAZELON, *Chief Judge*: This is an appeal from the dismissal of a suit for injunctive relief under the Freedom of Information Act.[1] Two citizens seek to compel the Director of the Office of Science and Technology (OST)[2] to release to them a document, known as the Garwin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft (SST).[3]

The Report originated in the following manner. The President asked the Director of the OST, then Dr. Lee A.

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* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1964).

[1] Pub. L. No. 89-487, 80 Stat. 250 (1966), *amending* Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946), 5 U.S.C. § 1002 (1964). Pub. L. No. 89-487 was repealed, but its substantive provisions enacted into the United States Code, by Pub. L. No. 90-23, 81 Stat. 54 (1967), 5 U.S.C. § 552 (Supp. V, 1970).

[2] The OST was established in the Executive Office of the President by Reorganization Plan No. 2 of 1962, Pt. I, 3 C.F.R. 879 (1959-63 Compilation), 5 U.S.C. § 133z-15 (1964).

[3] The statutory basis for the SST program is a provision in the Federal Aviation Act of 1958 authorizing the Administrator of the Federal Aviation Agency to undertake research and development in aviation. Pub. L. No. 85-726, Tit. III, § 312(c), 72 Stat. 752 (1958), 49 U.S.C. § 1353(c) (1964). This function was transferred to the Secretary of Transportation, to be exercised by the Federal Aviation Administrator, by the Department of Transportation Act. Pub. L. No. 89-670, § 6(c)(1), 80 Stat. 938 (1966), 49 U.S.C. § 1655(c)(1) (Supp. V, 1970).

DuBridge,[4] to provide him with an "independent assessment" of the SST program. Dr. DuBridge convened a panel of experts, headed by Dr. Richard L. Garwin, to assist him. When the President learned of the panel, he asked to see its report. Dr. DuBridge subsequently transmitted the Garwin Report, along with his own evaluation, to the President.[5]

When appellants inquired about the Garwin Report, the OST indicated that it would not release the Report to members of the public because the Report was a Presidential document over which the OST had no control, and was "in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President."[6] Appellants

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[4] Dr. Edward E. David, Jr. has replaced Dr. DuBridge as Director of the OST and as a party to this litigation.

[5] These uncontroverted facts are set forth in the record in statements of Dr. DuBridge. Affidavit of Dr. Lee A. DuBridge, Appendix at 14-16; Letter of April 3, 1970 from Dr. Lee A. DuBridge to The Honorable Henry S. Reuss, Member of the United States House of Representatives, Appendix at 8-9.

[6] Letter of May 20, 1970 from Mr. John D. Ehrlichman, Assistant to the President for Domestic Affairs, to The Honorable Henry S. Reuss, Member of the United States House of Representatives, Appendix at 11. In two letters to Dr. DuBridge, Mr. Reuss had tried to obtain the Garwin Report. Appendix at 6-7. Dr. DuBridge sent two letters in reply, the second of which referred Mr. Reuss' request to the Counsel to the President. Appendix at 8-10. Then Mr. Ehrlichman declined to release the Report to Mr. Reuss for the reason quoted in text above. When appellants' attorney Koff asked the OST about the availability of the Report, the Special Assistant to the Director told him that the OST "was without authority to make available to a member of the public the report of Dr. Garwin, since this matter involved a Presidential document over which the [OST] had no control, and that the [OST] would abide by the ruling of John D.

brought suit under the Freedom of Information Act to compel disclosure of the Report.[7] The District Court dismissed the complaint with a brief order stating that the Report is a Presidential document, and consequently, that the court has neither authority to compel its release nor jurisdiction over a suit to obtain that relief. At the hearing,

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Ehrlichman . . . as contained in his May 20, 1970 letter to The Honorable Henry S. Reuss . . . if a request for said report was made by a member of the public." Affidavit of Peter L. Koff, Appendix at 12-13.

This chain of events provided ample basis for appellants to bypass as futile the step of filing a written request for the document, as ordinarily required by the OST, 32 Fed. Reg. 11,060 (1967). *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 20.07-.08 (1958, Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425-37, 446-49 (1965). The OST's refusal to disclose the Report to Mr. Reuss is especially significant, for while his right as a citizen to obtain the Report under the Act is equal to that of appellants, his right as a Congressman is presumably greater. *See* H.R. REP. No. 1497, 89th Cong., 2d Sess. 11-12 (1966).

[7] The Act provides:

> [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint [sic]. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee . . . .

5 U.S.C. § 552(a)(3) (Supp. V, 1970).

the trial judge discussed the basis for his ruling. He stated that the OST is not an "agency" for the purposes of the Freedom of Information Act, but rather a part of the Office of the President, and that the Garwin Report is protected from compulsory disclosure by the doctrine of executive privilege.

In Part I of this opinion we review the origin and functions of the OST and conclude that the OST is an agency, and that the Garwin Report is an agency record. Consequently, subject to any constitutional issues which may be raised, the complaint states a cause of action under the Freedom of Information Act, and the District Court erred in dismissing the suit. The case must be remanded for that court to consider whether the document is protected, in whole or in part, by any of the specific exemptions enumerated in the Act. In Part II of this opinion we indicate some of the considerations that will be relevant to that determination.

While the District Court referred to the doctrine of executive privilege in support of its decision, the privilege was not expressly invoked by the Government, and therefore, it was not properly before the court.[8] Serious constitutional questions would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act,[9] and the court should avoid the unnecessary

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[8] *See* United States v. Reynolds, 345 U.S. 1, 7-8 (1953):

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. [footnotes omitted.]

See also General Services Administration v. Benson, 415 F.2d 878, 879 (9th Cir. 1969)

[9] The doctrine of executive privilege is to some degree inherent in the constitutional requirement of separation of

decision of those questions.[10] Accordingly, whether or not the Government makes a claim of privilege on remand, the court should first consider whether the Report falls within any statutory exemption.[11] Only if the Act seems to re-

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powers. *See, e.g.*, Berger, *Executive Privilege V. Congressional Inquiry (Pts. I & II)*, 12 U.C.L.A.L. REV. 1043, 1287 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 763-65 (1967). As the concurring opinion points out, the power of Congress to compel disclosure of agency records to the public is no greater than its power to compel disclosure to Congress itself. Since 1789, Congress has frequently exercised the latter power in statutes requiring executive officers to transmit information to Congress. *See, e.g.*, Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, *as amended*, 31 U.S.C. § 1002 (Supp. V, 1970) (Sec'y of Treasury must give certain information to either house of Congress on request); Act of May 29, 1928, ch. 901, § 2, 45 Stat. 996, *as amended*, 5 U.S.C. § 2954 (Supp. V, 1970) (each executive agency must disclose certain information to Gov't Operations Committees of House and Senate on request). However, courts have never been asked to rule on the scope of executive privilege in the context of a congressional command to disclose information. They have considered the scope of the privilege only in ruling on a litigant's request for discovery of information held by the Government, both in litigation with the Government, *e.g.*, Roviaro v. United States, 353 U.S. 53 (1957); United States v. Reynolds, 345 U.S. 1 (1953), and in litigation between private parties, *e.g.*, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam*, 128 U.S.App.D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967).

[10] *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

[11] If the Government asserts a constitutional privilege on remand, the court will not thereby be deprived of jurisdiction, for the judicial power extends to resolving the questions of separation of powers raised by the constitutional claim. *See* Powell v. McCormack, 395 U.S. 486, 512-22, 548-

quire disclosure, and if the Government makes an express claim of executive privilege, will it be necessary for the court to consider whether the disclosure provisions of the Act exceed the constitutional power of Congress to control the actions of the executive branch.[12]

I

Congress passed the Freedom of Information Act in 1966 to strengthen the disclosure requirements of the Administrative Procedure Act (APA). Each federal agency subject to the APA must now make its records, with certain specific exceptions, available to "any person" who requests them; district courts have jurisdiction to order the production of any "identifiable record" which is "improperly withheld," and "the burden is on the agency to sustain its action."

Under the APA, an agency is any "authority of the Government of the United States, whether or not it is

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49 (1969); Baker v. Carr, 369 U.S. 186, 198-204, 208-37 (1962); *cf.* Berger (Pt. II), *supra* note 9, at 1349-60. The precise limits of legislative authority over the executive branch are not clear. In discussing the President's power to remove officers, the Supreme Court has drawn an uncertain distinction between officers who exercise purely executive functions, and those whose functions are quasi-legislative or quasi-judicial; only the former are removable at the will of the President in spite of a contrary congressional enactment. *Compare* Wiener v. United States, 357 U.S. 349 (1958), *and* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), *with* Myers v. United States, 272 U.S. 52 (1926). *See also* Kendall v. United States, 37 U.S. (12 Pet.) 524, 610, 612-13 (1838).

[12] The fact that the President may have ordered the Director of the OST not to release the Garwin Report does not leave the courts without power to review the legality of withholding the Report, for courts have power to compel subordinate executive officials to disobey illegal Presidential commands. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). If nondisclosure of the Garwin Report

within or subject to review by another agency." [13] The statutory definition of "agency" is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.[14] While the primary purpose of the APA is to regulate the processes of rule making and adjudication, administrative entities that perform neither function are nevertheless agencies, and therefore subject to the public information provisions of the APA, *i.e.*, the Freedom of Information Act.[15]

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is not supported by a statutory exemption or a constitutional executive privilege, the Freedom of Information Act requires issuance of an injunction to compel the OST to release the Report, whether the refusal to disclose is attributable to the OST or to the President. The President is not an indispensable party, because a "decree granting the relief sought will [not] require him to take action, either by exercising a power lodged in him or by having a subordinate exercise it for him," and because "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." Williams v. Fanning, 332 U.S. 490, 493, 494 (1947).

[13] 5 U.S.C. § 551(1) (Supp. V, 1970).

[14] *See* H.R. REP. No. 1980, 79th Cong., 2d Sess. 19 (1946); S. REP. No. 752, 79th Cong., 1st Sess. 10 (1945); STAFF OF SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT 2 (Comm. Print 1945); ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REPORT, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. No. 8, 77th Cong., 1st Sess. 7 (1941); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9-10 (1947). *See generally* Freedman, *Administrative Procedure and the Control of Foreign Direct Investment,* 119 U. PA. L. REV. 1, 4-18 (1970).

[15] *See* H.R. REP. No. 1980, 79th Cong., 2d Sess. 19 (1946); STAFF OF SENATE COMM. ON THE JUDICIARY, 79th CONG., 1ST SESS., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT 2 (Comm. Print 1945); ATTORNEY GENERAL'S MEMORANDUM ON

The District Court ruled that the OST is not an agency, but merely staff to the President.[16] On that theory, the only "authority" controlling the Garwin Report is the President, and the trial court held that the President is not subject to the disclosure provisions of the APA. We need not determine whether Congress intended the APA to apply to the President,[17] and whether the Constitution would permit Congress to require disclosure of his records,[18] for we have concluded that the OST is a separate agency, subject to the requirements of the Freedom of Information Act, and that the Garwin Report is a record of that agency.

THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 4 (1967). For example, the APA's definition of agency apparently includes the U.S. Commission on Civil Rights, which investigates, evaluates and recommends, but does not adjudicate. Civil Rights Act of 1957, Pub. L. No. 85-315, Pt. I, 71 Stat. 635, *as amended,* 42 U.S.C. § 1975c (Supp. V, 1970); Larche v. Hannah, 176 F. Supp. 791, 796 & n.15 (W.D. La. 1959) (Comm'n is an agency and subject to APA's adjudication provisions), *adopted in* 177 F. Supp. 816, 819 n.5 (W.D. La. 1959) (three-judge court), *rev'd on other grounds,* 363 U.S. 420, 441, 452-53 (1960) (Comm'n is not subject to APA's adjudication provisions). *See also* Exec. Order No. 11,236, 3 C.F.R. 329 (1964-65 Compilation); Skolnick v. Parsons, 397 F.2d 523 (7th Cir. 1968) (President's Comm'n on Law Enforcement & Admin. of Justice).

[16] *Compare* International Paper Co. v. FPC, Civ. No. 69-5169 (S.D.N.Y., May 15, 1970) (typewritten opinion at 12-13) (staff of FPC is not a separate agency) (unreported; typewritten opinion filed in this action in the District Court, Civ. No. 1571-70, D.D.C.).

[17] The statutory definition of "agency" specifically excludes Congress and the courts of the United States, but does not specifically exclude the President. 5 U.S.C. § 551(1) (Supp. V, 1970).

[18] *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499-501 (1867).

The OST, created in 1962 by an executive reorganization plan, is authorized (1) to evaluate the scientific research programs of the various federal agencies, and (2) to advise and assist the President in achieving coordinated federal policies in science and technology.[19] Its functions had previously been assigned to the National Science Foundation,[20] but the President found that arrangement unsatisfactory:[21]

> [T]he Foundation, being at the same organizational level as other agencies, cannot satisfactorily coordinate Federal science policies or evaluate programs of other agencies. Science policies, transcending agency lines, need to be coordinated and shaped at the level of the Executive Office of the President drawing upon many resources both within and outside of Government. Similarly, staff efforts at that higher level are required for the evaluation of Government programs in science and technology.

The President therefore proposed a reorganization plan that transferred certain functions to an administrative unit "outside the White House Office, but in the Executive Office of the President on roughly the same basis as the Budget

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[19] Reorganization Plan No. 2 of 1962, Pt. I, § 3, 3 C.F.R. 879, 879-80 (1959-63 Compilation), 5 U.S.C. § 133z-15 (1964).

[20] National Science Foundation Act of 1950, ch. 171, § 3(a)(1) & (6), 64 Stat. 149, *as amended*, 42 U.S.C. § 1862(a)(1) & (6) (1964); *see* Exec. Order No. 10,521, 3 C.F.R. 183 (1954-58 Compilation), 42 U.S.C. § 1862 (1964), *as amended by* Exec. Order No. 10,807, § 6(b), 3 C.F.R. 329, 331 (1959-63 Compilation), 42 U.S.C. § 1862 (1964).

[21] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING REORGANIZATION PLAN NO. 2 OF 1962, PROVIDING FOR CERTAIN REORGANIZATIONS IN THE FIELD OF SCIENCE AND TECHNOLOGY, H.R. DOC. NO. 372, 87th Cong., 2d Sess. (1962), *reproduced in* 108 CONG. REC. 5439-40, 5456-57 (1962). *See also* H.R. REP. No. 34, 90th Cong., 1st Sess. 6 (1967); S. REP. No. 1137, 90th Cong., 2d Sess. 7 (1968).

Bureau, the Council of Economic Advisors, the National Security Council, and the Office of Emergency Planning." [22]

A reorganization plan proposed by the President can take effect only if both houses of Congress acquiesce, *i.e.*, if neither house passes a resolution disapproving the plan within a fixed period of time.[23] The congressional understanding of a proposed plan is therefore entitled to considerable weight in determining its effect. The one house of Congress that explicitly considered the plan creating the OST [24] clearly contemplated that the OST would function as a distinct entity and not merely as part of the President's staff. The House Committee on Government Operations stated: [25]

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[22] H.R. REP. No. 1635, 87th Cong., 2d Sess. 9 (1962), *quoting Hearings on Reorganization Plan No. 2 of 1962 Before the Subcomm. on Executive and Legislative Reorganization of the House Comm. on Gov't Operations,* 87th Cong., 2d Sess. 11 (1962) (statement of Elmer B. Staats, Deputy Director, Bureau of the Budget). *See also* 108 CONG. REC. 8469, 8471-72 (1962) (remarks of Reps. Anderson and Monagan). In 1968, the National Science Foundation Act of 1950 was amended to reflect the new distribution of functions. Pub. L. No. 90-407, 82 Stat. 360 (1968), 42 U.S.C. § 1862(a)(5) & (d) (Supp. V, 1970); *see* H.R. REP. No. 34, 90th Cong., 1st Sess. 6, 21 (1967); S. REP. No. 1137, 90th Cong., 2d Sess. 7, 16 (1968). The Director of the OST was also expected to replace the President's Special Assistant for Science and Technology in the capacity of personal adviser to the President on scientific matters. *See* H.R. REP. No. 1635, *supra,* at 5; *Hearings, supra,* at 10-11, 13-15.

[23] Reorganization Act of 1949, ch. 226, § 6, 63 Stat. 205, *as amended,* 5 U.S.C. § 906 (Supp. V. 1970).

[24] A resolution disapproving the plan which created the OST was introduced in the House of Representatives, but did not pass. H.R. Res. 595, 87th Cong., 2d Sess. (1962); 108 CONG. REC. 8473 (1962).

[25] H.R. REP. No. 1635, 87th Cong., 2d Sess. 9 (1962).

> Heretofore, the Congress has not been able to obtain adequate information on Government-wide science matters because the President's Special Assistant for Science has been unavailable for questioning by congressional committees due to his confidential relationship with the President. We express no opinion here on the merits of this reasoning but this committee's position on excessive invocation of executive privilege is well known. With the creation of the new office the Director will become available to Congress and provide us with more information than we now obtain.

A Congressman commenting on the plan emphasized the same point: [26]

> With an Office established by the reorganization plan, and a Director and Deputy Director to head it, congressional committees will be able to deal with this organization on the same basis as they do with the Bureau of the Budget and the Council of Economic Advisers. We will have a responsible officer to whom we can direct inquiries, and whom we can summon to committees to give testimony on subjects of the greatest national importance.

If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry [27] in

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[26] 108 CONG. REC. 8473 (1962) (statement of Rep. Holifield). *See also id.* at 8472 ("I think the very fact that this makes the scientific program more answerable to the Congress in itself justifies the establishment of this Office . . . .") (remarks of Rep. Holifield).

[27] The power of investigation has long been recognized as an incident of legislative power necessary to the enactment and effective enforcement of wise laws. *See, e.g.,* McGrain

order to improve the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President—a relation that might result in the use of such information as a basis for advice to the President.[28] By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act.

Moreover, the OST's interpretation of its own charter in 1967 lends additional support to the conclusion that it is a separate administrative entity.[29] At that time, the OST apparently considered itself an agency subject to the APA, for it published a notice in the Federal Register describing the information available to the public from the OST under the new Freedom of Information Act, and

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v. Daugherty, 273 U.S. 135 (1927). The chief limitation on congressional inquiry is that it must be exercised for valid legislative purposes and not in derogation of fundamental personal liberties. *See, e.g.*, Watkins v. United States, 354 U.S. 178, 187, 198 (1957). Congress has often delegated portions of its investigatory power to administrative agencies. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.01-.14 (1958, Supp. 1970).

[28] *See Hearings, supra* note 22, at 13-14 (remarks of Elmer B. Staats, Deputy Director, Bureau of the Budget, and of Reps. Anderson and Holifield).

[29] *See* Udall v. Tallman, 380 U.S. 1, 16, (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

setting forth procedures for obtaining that information.[30]

Having concluded that the OST is an agency, we think it clear that the Garwin Report is a record of that agency for purposes of a suit under the Freedom of Information Act. The function of the OST is to evaluate federal scientific programs.[31] Consequently, any report prepared by the agency or its consultants in fulfillment of that function must be regarded as a record of the agency. It is true that the SST program was selected for evaluation because the President had requested an assessment of it. That request may bring the document within a statutory or constitutional exemption from the disclosure requirements of the Act.[32] But the request does not deprive the Garwin Report of its character as the record of a study made in the performance of the ordinary functions of the agency.

II

The conclusion that the Garwin Report is an agency record is only the beginning of the inquiry required under the Freedom of Information Act. The Act enumerates nine

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[30] 32 Fed. Reg. 11,060 (1967).

[31] The Garwin Report is precisely the sort of evaluation the OST is authorized to undertake, *i.e.*, an evaluation of another agency's scientific program involving technological developments and applications. The National Science Foundation, focusing its efforts on basic science, had not gathered much information on technological applications and developments, nor had it studied agency programs. The Foundation's function of evaluating federal programs was transferred to the OST to improve performance in these very respects. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING REORGANIZATION PLAN NO. 2 OF 1962, PROVIDING FOR CERTAIN REORGANIZATIONS IN THE FIELD OF SCIENCE AND TECHNOLOGY, H.R. DOC. NO. 372, 87th Cong., 2d Sess. (1962), *reproduced in* 108 CONG. REC. 5439-40, 5456-57 (1962); H.R. REP. NO. 1635, 87th Cong., 2d Sess. 7-8 (1962).

[32] *See* pp. 17-19 *infra*.

specific exemptions to its general requirement of disclosure.[33] On remand, the trial court must determine whether any of those exemptions is applicable.

It has been argued that courts may recognize other grounds for nondisclosure, apart from the statutory exemptions. At least one court has held that the Act's grant of "jurisdiction to enjoin" improper withholding of agency records leaves district courts with discretion to deny relief on general equitable grounds, even when no exemption is applicable.[34] But Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here.[35]

Prior to the Freedom of Information Act, the disclosure provisions of the APA allowed the agencies to withhold information "in the public interest," or "for good cause shown," or on the ground that the person seeking the record was not "properly and directly concerned."[36] The

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[33] 5 U.S.C. § 552(b)(1)-(9) (Supp. V, 1970).

[34] Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806-08 (S.D.N.Y. 1969); *see* General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.6 (Supp. 1970).

[35] *Compare* United Steelworkers v. United States, 361 U.S. 39, 55-59 (1959) (Frankfurter, J., concurring) (80-day injunction against strike causing national emergency is mandatory), *with* Hecht Co. v. Bowles, 321 U.S. 321, 326-31 (1944) (injunction against violation of Emergency Price Control Act is discretionary). *See* Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration,* 45 IND. L. J. 421 (1970). It is well established that Congress may modify the usually strict standards for equitable relief in providing for injunctions in aid of important federal policies. *See, e.g.,* Virginia Ry. v. System Fed'n. No. 40, 300 U.S. 515, 552, (1937).

[36] 5 U.S.C. § 1002 (1964).