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The Sanctions Provisions of the Freedom of Information Act

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THE SANCTIONS PROVISION OF THE FREEDOM OF INFORMATION ACT AMENDMENTS

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INTRODUCTION

The sanctions provision of the Freedom of Information Act amendments (Amendments)[1] provides a procedure whereby agency personnel who have withheld requested information may be subject to disciplinary action if a court, in ordering production of the documents and assessing against the United States reasonable attorneys' fees and other litigation costs, also issues a finding that a question of fact exists as to whether agency personnel acted arbitrarily or capriciously. Although the provision is relatively brief, it is potentially the most important amendment to the Freedom of Information Act (FOIA) and one of the most important congressional enactments in recent years. This article explores the legislative history of the sanctions provision, analyzes the present provision in detail, examines questions which may arise from interpretation and imple-

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1. 5 U.S.C.A. § 552(a)(4)(F) (Supp. 1, 1975), *amending* 5 U.S.C. § 552(a)(4) (1970). The amendment provides:

> Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

mentation of the provision, and discusses the importance of the sanctions provision in FOIA litigation.

I. LEGISLATIVE HISTORY

The sanctions provision developed as a response to commentary advocating the development of personal accountability of federal employees,[2] and followed some unsuccessful attempts to include sanctions provisions in other legislation.[3] Although other responses were suggested,[4] the recommendation that a sanctions provision be included in the FOIA amendments was made to the congressional subcommittees by Ralph Nader.[5] The original draft considered by

2. *See* R. VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM, ch. 8 (1975) (first released in draft form June, 1972). For an extended discussion of personal accountability see Vaughn, *The Personal Accountability of Public Employees, infra* at 85.

3. A proposed provision of the Consumer Product Safety Act, subsequently deleted, provided for civil action against an employee who breached his fiduciary duty to the public:

> Any person in the Agency, who administers, enforces or implements any portion of this Act is a fiduciary to any individual who might be personally injured or killed by any consumer product which presents an unreasonable risk of injury and, as a fiduciary, is obligated to prevent such injury or death by prohibiting the exposure of individuals to consumer products presenting unreasonable risk of injury or death. If the court finds that any person or persons in the Agency have breached their fiduciary duty by any act or omission or by any series of acts or omissions the court shall order performance or cessation of performance, as appropriate; may temporarily suspend any person or persons from the Agency for a period not exceeding three months; may remove an individual or individuals from the Agency; or may take any other appropriate action against any person or persons in the Agency who have breached the fiduciary relationship.

R. VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM 163 (1975), *quoting* STAFF OF SENATE COMMERCE COMMITTEE, 93D CONG., 2D SESS., CONSUMER PRODUCT SAFETY ACT (Comm. Print No. 2, 1972).

4. For example, Mitchell Rogovin, General Counsel of Common Cause, suggested a statutory annual report to Congress by each agency based "on the belief that no law can be enforced on the Federal bureaucracy without continuous outside reinforcement of the spirit of the law." *Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 2d Sess., vol. I, pt. 5, at 1491 (1972), *cited in* HOUSE COMM. ON GOV'T OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. No. 1419, 92d Cong., 2d Sess. 38 (1972) [hereinafter cited as HOUSE REPORT].

5. *Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073 Before the Subcomm. on Gov't Operations and the Subcomms. on Separation of Powers and Administrative Practice and Procedure of the Senate*

the Senate subcommittees would have allowed courts to apply criminal sanctions against a federal employee for withholding documents without a reasonable basis in law.[6] A subsequent draft provided for civil penalties, in the form of fines, to be assessed by courts.[7] The provision, as finally approved by the Senate Judiciary Committee and passed by the Senate, left it to courts to determine what constitutes a violation of the provision and imposed civil service sanctions rather than civil penalties.[8]

The House version of the FOIA amendments did not provide for any sanctions to be taken against individual government employees

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Comm. on the Judiciary, 93d Cong., 1st Sess., vol. I, at 209 (1973) [hereinafter cited as *Hearings*], *cited in* SENATE COMM. ON THE JUDICIARY, AMENDING THE FREEDOM OF INFORMATION ACT, S. REP. No. 854, 93d Cong., 2d Sess. 22 (1974) [hereinafter cited as SENATE REPORT]. Another witness stated:

> One major reason the bureaucratic attitude "when in doubt, withhold" is so entrenched is that it is rooted in legal self protection. An official is held individually accountable under criminal statutes for releasing trade secrets or other confidential information but faces no sanction at all if he illegally withholds information from the public.

Id., vol. II, at 105, *cited in* HOUSE REPORT, *supra* note 4, at 38.

Witnesses testified on the FOIA proposals on April 11-12, May 9, June 7-8, 11, and 26. *Id.*, vol. I, at 90-176, 321-74 & vol. II, at 1-275.

6. STAFF OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT PROVISIONS DRAFT NO. 1, on file at the offices of both the Subcommittee on Administrative Practice and Procedure and the American University Law Review.

7. STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT PROVISIONS DRAFT NO. 2, on file at the offices of both the Subcommittee on Administrative Practice and Procedure and the American University Law Review.

8. S. 2543, 93d Cong., 2d Sess. (1973) (as amended and passed). This version provided:

> Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

Id., *cited in* SENATE REPORT, *supra* note 5, at 51.

for unlawfully withholding information.[9] In conference committee proceedings, the House conferees strongly resisted attempts to include the sanctions provision as passed by the Senate. The House conferees objected that the Senate provision gave the court "unusual disciplinary powers over Federal employees" whereas the compromise version gave employees the benefit of normal civil service procedures.[10] As a result of the resistance of the House conferees, a compromise was reached which adopted the language contained in the present provision.[11]

The Amendments were vetoed by President Ford; however, he did not give as a reason for the veto the inclusion of the sanctions provision.[12] Subsequently the Amendments were passed over the presidential veto.[13]

The Senate report on the Amendments documents the need and purpose for such a provision.[14] The report notes that nowhere in federal law are there specific sanctions against government employees who violate the law by withholding information, and general administrative sanctions are not applied.[15] Furthermore, a number of states have enacted Freedom of Information statutes that include penalty provisions for violations of those statutes which are more stringent than the sanctions provision proposed by the Senate Judiciary Committee.[16] The Senate report also notes that the standard

9. *See* H.R. 12,471, 93d Cong., 2d Sess. (1974).

10. 120 CONG. REC. H 10,001 (daily ed. Oct. 7, 1974) (report of Representative Moorhead on the conference committee version of the FOIA amendments).

11. *Id.*

12. *See* H.R. EXEC. DOC. No. 383, 93d Cong., 2d Sess. (1974) (veto message).

13. *See* 120 CONG. REC. S 19,806 (daily ed. Nov. 21, 1974); 120 CONG. REC. H 10,864 (daily ed. Nov. 20, 1974).

14. SENATE REPORT, *supra* note 5, at 21.

15. *Id.* After citing several statutes that contain sanctions provisions against unauthorized disclosure, the Senate report describes the lack of sanctions for illegal withholdings:

> But nowhere in the federal law are there effective sanctions for government employees who violate the law by withholding information. Although general administrative sanctions are available against government employees who violate classification requirements (*e.g.*, E.O. 11652, sec. 13; 5 Foreign Aff. Man. § 992.1-4), Congressman Moorhead reported [Hearings, vol. I, *supra* note 4, at 187] that his investigation of the numerous sanctions against employees for disclosure of classified matter revealed that "not one case in 2,500 involved discipline for overclassification."

Id. See HOUSE REPORT, *supra* note 4, at 12-37.

16. CODE OF ALA. tit. 41, § 146 (1959); ARK. STAT. ANN. § 12-2807 (Supp. 1973); COLO. REV. STAT. ANN. § 113-2-6 (Supp. 1969); FLA. STAT. ANN. § 119.02 (1975);

to be applied — without reasonable basis in law — is neither vague nor uncertain, and "is substantially more specific than language presently in the law and regulations governing the conduct of employees and officials in the executive branch."[17]

The resistance of the House conferees to the Senate's enacted provision seems to have focused upon two major points: that it is inappropriate for a court to order an agency to take what is essentially an internal administrative action,[18] and that the procedure for determining which employee is responsible for the withholding and what sanctions should be applied is one which is overly complicated and poses significant risks to the protection of important rights of the employee.[19] The House conferees were particularly determined to preserve for employees the protections available to them under civil service provisions.[20]

The provision enacted into law places considerable responsibility for the application of the sanctions provision upon the United States Civil Service Commission. The provision sets out three requirements which must be met before Civil Service Commission participation in the application of the sanctions provision is invoked. These requirements are: 1) that the court must order the production of requested information; 2) that the court must have exercised its discretion in assessing against the United States reasonable attorneys' fees and other litigation costs; and 3) that the court must issue a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or

ILL. ANN. STAT. ch. 116, § 43.27 (Smith-Hurd Supp. 1975); IND. STAT. ANN. § 57-606 (Burns Supp. 1973); KAN. STAT. ANN. § 45-203 (1973); LA. REV. STAT. § 44-37 (1950); ME. REV. STAT. ANN. tit. 1, ch. 13, § 406 (1964); ANN. CODE MD. art. 76A, § 5 (1975); REV. STAT. NEB. § 84-712.03 (1971); NEV. REV. STAT. § 293.010(2) (1973); N.M. STAT. ANN. § 71-5-3 (1961); OHIO REV. CODE ANN. § 149.99 (Page 1969); TENN. CODE ANN. § 15-306 (1973). These statutes are collected in the SENATE REPORT, *supra* note 5, at 63-64.

17. SENATE REPORT, *supra* note 5, at 21-22.

18. The sanctions amendment, the most controversial part of the conference committee's deliberations, was opposed by many House conferees on the grounds that it gave the court such unusual disciplinary powers over federal employees. 120 CONG. REC. H 10,001 (daily ed. Oct. 7, 1974) (report of Representative Moorhead on the conference committee version of the Freedom of Information Act amendments).

19. This is evidenced by the conference resolution of the issue which ensures that the employee has full rights of due process and the right to appeal any adverse finding by the Commission. *Id.* at 10,002.

20. *See id.* at 10,001.

capriciously with respect to the withholding.[21] The court is not required to find that the agency acted arbitrarily or capriciously nor to find specific employees responsible, but it is required to find that the circumstances raise questions whether agency personnel acted arbitrarily or capriciously. Furthermore, a court need not be convinced that any agency personnel have acted arbitrarily or capriciously — only that the circumstances raise such a question.

If these three requirements are met, the Civil Service Commission is required to initiate promptly a proceeding to determine whether disciplinary action is warranted.[22] In such a proceeding, the Commission determines which officer or employee was primarily responsible for the withholding and after a consideration of the evidence submitted, makes findings and recommendations as to the appropriate actions to be taken. The Commission's recommendation is binding upon the administrative authority which is then required to take the action that the Commission recommends.

II. Analysis and Interpretation

A. *Applicability*

Several questions arise concerning the interpretation and implementation of the provision. First, over whom does the Commission have disciplinary authority? The provision states that "disciplinary action is warranted against the *officer or employee* who was primarily responsible for the withholding."[23] An argument could be made that the provision authorizes disciplinary action only against those employees over whom the Civil Service Commission presently has authority.[24] Such an interpretation would exclude certain executive

21. *See* 5 U.S.C.A. § 552(a)(4)(F) (Supp. 1975), *amending* 5 U.S.C. § 552(a)(4) (1970). It seems clear that a court would not have to grant access to all the information which the plaintiff requested. The provision reads "orders the production of *any* agency records." *Id.* (emphasis added). See discussion regarding attorneys' fees in text accompanying notes 52-58 *infra*.

22. *Id.* The sanctions provision uses the mandatory term "shall" and removes from the Commission any discretion about commencing a proceeding.

23. *Id.* (emphasis added).

24. With certain statutory exceptions such as those contained in the Civil Service Act, 5 U.S.C. §§ 7321-22 (1970), and the Veterans' Preference Act, 5 U.S.C. § 7701 (1970), Commission review of agency disciplinary action is limited to employees in the competitive services. 5 C.F.R. §§ 1.1-1.3 (1975). Commission "adverse actions" are authorized against an employee in the competitive service who is appointed subject to investigation. 5 C.F.R. §§ 754.101-05 (1975). Under the Hatch Act regulations the Commission initiates and adjudicates charges against employ-

employees: officers in the uniformed services, employees in the excepted service, and officials appointed with the advice and consent of the Senate. However, the legislative history of the provision would seem to indicate the much broader interpretation that the FOIA applies to all executive employees.[25] Thus, a more reasonable interpretation would be that the FOIA delegates authority to the Civil Service Commission over all employees within the executive branch.

If this broader interpretation is adopted, constitutional questions arise as to the application of the provision to political appointees who serve at the pleasure of the President. Specifically, the reasoning of the Supreme Court in *Myers v. United States*[26] seems to limit the power of the Civil Service Commission to remove a cabinet officer under the authority of the FOIA. In *Myers* the Court addressed the issue whether the President could remove, without the advice and consent of the Senate, a postmaster who had been confirmed by the Senate. In upholding the authority of the President to do so, the Court reasoned that unlike the power to confirm or reject a presidential nominee, the power to remove an existing cabinet officer is vested in "the governmental authority which has administrative control."[27] Strictly construed, the decision would seem to preclude removal of a presidential appointee by means of a congressional authorization (such as FOIA) without the independent concurrence of the President.

However, under the FOIA, the power of the President to remove a cabinet officer is not affected. The President may still remove a cabinet member in whom he has lost confidence. The FOIA provision is intended only as a method of ensuring that cabinet officials are subject to the law. It can be argued that the burden imposed

ees in the competitive service while agencies are responsible for those tasks for employees in the excepted service with the Commission reviewing the action on appeal. *Compare* 5 C.F.R. §§ 733.131-37 (1975), *with id.* §§ 733.201-04. Excepted service is defined in 5 C.F.R. § 1.4 (1975).

25. Both the House and Senate reports illustrate a range of abuses covering employees in the excepted and competitive services and in the uniformed services. *See* HOUSE REPORT, *supra* note 4, at 33-37; SENATE REPORT, *supra* note 5, at 3. Moreover, the Senate provision for which the conference provision was substituted applied as does the present provision to any officer or employee. The term employee is defined to include a member of a uniformed service. 5 U.S.C. § 2105(a)(1)(c) (1970).

26. 272 U.S. 52 (1926).

27. *Id.* at 121-22.

upon the executive to replace an officer suspended under the Act is no greater than the burden of replacement created when a presidential nominee is rejected by the Senate.

Removal of a cabinet officer by an authority other than the President presents additional constitutional problems. Removal of a cabinet officer who has the President's trust and confidence directly impinges upon the relationship between the President and the cabinet officer which is uniquely part of the executive power. This relationship rests upon the President's power of appointment.[28] If removal is seen as constitutionally inappropriate, a suspension, although analogous to a fine, removes from the President for a period of time the services of a cabinet official. In practice, however, there should arise few instances where this potential constitutional limitation on the authority of the Civil Service Commission would operate to prevent the application of sanctions.

Even if direct Commission discipline of cabinet officers were constitutionally prohibited, an alternative method exists of enforcing the Act. The Civil Service Commission could make the appropriate investigations as provided in the provision and recommend to the President appropriate disciplinary action to be taken against the cabinet officer. This procedure would ensure that the Civil Service Commission conducted a thorough investigation and that the President had complete information regarding the behavior of a cabinet official. In such a situation one would hope that the President would act, under the duty to faithfully execute the laws, to ensure that the purpose of the FOIA provision was fulfilled.

Other officials, including commissioners of the independent regulatory agencies, are subject to disciplinary action.[29] Two cases subsequent to *Myers, Humphrey's Executor v. United States*[30] and *Wiener v. United States*,[31] have limited the scope of presidential

28. U.S. CONST. art. II, § 2, cl. 2.

29. United States v. Perkins, 116 U.S. 483 (1886). The Court stated:

> We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

Id. at 485. *See* Myers v. United States, 272 U.S. 52, 161 (1926); White v. Gates, 253 F.2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958).

30. 295 U.S. 602 (1935).

31. 357 U.S. 349 (1958).

power to remove other employees. By stressing that officials who exercise independent, quasi-judicial, or legislative functions do not serve at the pleasure of the President, the cases would subject Commissioners of regulatory agencies to FOIA sanctions. The cases emphasize that the relationship between these officials and the President is not the same as that between the President and cabinet officers. For non-cabinet officials, Congress may specify terms and conditions of employment;[32] the FOIA sanctions provision is now one such condition.

B. The Scope of Corrective Action

A second potential ambiguity arises as to the nature of recommendations made to an agency by the Commission and implemented by the administrative authority. The provision first speaks of the *"disciplinary action . . .* warranted against the officer or employee" but in the last sentence states that the "administrative authority shall take the *corrective action* that the Commission recommends."[33] "Corrective action" could include action beyond "disciplinary action." In other words the Commission may have the authority to recommend to the appropriate administrative authority not only disciplinary action against a particular employee, but also action to be taken to correct the situation which gave rise to the arbitrary and capricious withholding. Such an interpretation might be appropriate in view of the Commission's function as the chief personnel agency of the federal government. Such recommendations for corrective action could include different administrative procedures or different forms of personnel control.

Militating against this interpretation is the inclusion in the Veterans' Preference Act[34] of the term "corrective action."[35] In that act

32. *E.g.*, Weiner v. United States, 357 U.S. 349 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

33. 5 U.S.C.A. § 552(a)(4)(F) (Supp. 1, 1975), *amending* 5 U.S.C. § 552(a)(4) (1970) (emphasis added).

34. 5 U.S.C. § 7701 (1970).

35. The last sentence of 5 U.S.C. § 7701 (1970) permits corrective action: "The administrative authority shall take the corrective action that the Commission finally recommends." This section resulted from agency contentions that the Commission's decisions on adverse action appeals of preference eligibles were only "advisory." Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Procedures*, 19 AM. U.L. REV. 323, 325 (1970). Although Congress may have been considering a limited meaning of the term in the Veterans' Preference

the term, "corrective action," has been given a meaning requiring an agency to take the action which the Commission recommends in regard to disciplinary actions.[36] Moreover, it seems that the basis for placing the sanctioning function in the Civil Service Commission rather than another department was the Commission's particular expertise in imposing discipline rather than its expertise in Freedom of Information provisions. For this reason the selection of the Commission would suggest a definition of corrective action limited to agency implementation of disciplinary action.

C. The Standard for Disciplinary Action

What standard is the Commission to apply in determining whether disciplinary action is warranted against the officer or employee who is primarily responsible for the withholding? The court will refer a case to the Commission if the circumstances raise a question as to whether agency personnel have acted arbitrarily or capriciously with respect to the withholding. The Civil Service Commission, in turn, is to follow a similar standard — whether the acts were in fact arbitrary or capricious — in determining whether the employee who was principally responsible should be disciplined. This standard is one of the central issues running through the legislative debate upon the sanctions provisions.[37] The standard "arbitrarily or capriciously" links the employee's behavior to a general body of law interpreting the appropriateness of administrative action.[38] This same body of law should guide the Commission in deciding whether or not disciplinary action is warranted.

However, in applying and interpreting the phrase "arbitrarily or

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Act, "corrective action" appears in other Commission regulations and has been given a broader meaning. 5 C.F.R. § 5.4(b) (1975) requires an agency head to take corrective action whenever the Commission finds that any officer or employee has failed to adhere to personnel policies or regulations subject to the jurisdiction of the Commission. Here corrective action includes more than disciplinary power and allows modification of the personnel practices. In Equal Employment Opportunity discrimination complaints the Commission has also given corrective action a meaning well beyond disciplinary action and includes changes in personnel procedures. *See* M. BREWER, BEHIND THE PROMISES: EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT (draft report issued June, 1972).

36. Fischer v. Haeberle, 80 F. Supp. 652 (E.D.N.Y. 1948); 41 OP. ATT'Y GEN. 44 (1949).

37. *See* 120 CONG. REC. H 10,001 (daily ed. Oct. 7, 1974); SENATE REPORT, *supra* note 5, at 21. *See* notes 10-17 & accompanying text *supra*.

38. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.01-.14 (1958).

capriciously" the Commission should rely not only upon general definitions of administrative law but also upon the legislative history of the provision. The legislative history indicates that the provision was intended to respond to the more egregious abuses of authority in refusing an FOIA request.[39] The Commission may be justified in giving a broader interpretation to the term than might be the case where a court reviews the actions of an administrative agency.[40] As an administrative agency the Commission has detailed knowledge and expertise concerning the operation and procedures of federal agencies augmented by extensive investigatory powers. Therefore, many of the limitations constraining courts to adopt a limited and restricted view of arbitrary or capricious conduct when reviewing the actions of federal administrative agencies are not applicable to the Commission.

Given the concern which the House conferees expressed regarding the administrative protections for civil servants, it is interesting that the provision does not specify the administrative procedure to be followed by the Civil Service Commission either in determining the responsibility of or in charging an officer or an employee.[41] The proposed regulations of the Commission[42] implementing this provision are clearly designed to protect the due process rights of charged employees. Under the regulations, the Commission conducts an initial investigation to determine whether disciplinary action is warranted against the officer or employee primarily responsible for the withholding.[43] The General Counsel of the Commission reviews the evidence from the investigation and either issues a letter of charges on the employee setting forth the substance of the violation and the nature of the proposed disciplinary action, or furnishes a written statement of his findings and reasons for his decision not to press

39. *See* SENATE REPORT, *supra* note 5, at 21.

40. At the Freedom of Information Conference, Anthony Mondello, General Counsel of the Civil Service Commission, indicated that the arbitrary and capricious standard was fairly clear in judging the activities of an individual in a specific case. FREEDOM OF INFORMATION CLEARINGHOUSE, CONFERENCE ON AMENDMENT TO THE FREEDOM OF INFORMATION ACT AND FEDERAL ADVISORY COMMITTEE ACT 144 (Washington, D.C., Feb. 6, 1975). Copies of the transcript are on file at the Freedom of Information Clearinghouse, Washington, D.C. [hereinafter cited as CONFERENCE TRANSCRIPT].

41. This point was made in the House debate on the conference report. 120 CONG. REC. H 10,006 (daily ed. Oct. 7, 1974) (remarks of Congressman Erlenborn).

42. Proposed Civil Service Reg. §§ 294.1201-07, 40 Fed. Reg. 38144-45 (1975).

43. *Id.* § 294.1202, 40 Fed. Reg. 38144 (1975).

charges to the agency concerned and to the court.[44] The employee may answer the charges and may be represented by counsel.[45] The General Counsel will then notify the employee of his decision, and if disciplinary action is to be taken, will inform him that he may obtain a hearing before an administrative law judge.[46] If the employee elects not to seek a hearing, the General Counsel's decision is final and the employee's agency is directed to take the specified corrective action.[47] If the employee elects to seek a hearing, the administrative law judge's decision similarly is final, and exhausts the employee's nonjudicial remedies.[48] However, the Commissioners may on their own motion reopen and reconsider any decision reached.[49] These provisions seem consistent with the legislative history of the provision which stresses that proceedings be conducted in accordance with regular civil service procedures.[50] Likewise, the emphasis upon civil service procedures shows that the Commission has available a wide range of disciplinary sanctions, including dismissal, suspension or reprimand.[51]

D. Attorneys' Fees and Other Costs

As previously suggested, before Civil Service Commission procedures may be invoked, a court must order the production of the document, assess reasonable attorneys' fees and issue a finding. The requirement that the court assess reasonable attorneys' fees and other litigation costs may create a situation where it may be more difficult for corporate than for individual complainants to invoke the sanctions provision. This result may not have been intended by the conferees.

It is clear that attorneys' fees are intended as enabling rather than punitive.[52] The legislative history of the sanctions provision suggests that such attorneys' fees and costs were provided as a means of encouraging citizens to appeal agency decisions regarding the FOIA.

44. *Id.* § 294.1203(a)-(c)(1).

45. *Id.* § 294.1203(c)(2)-(3).

46. *Id.* § 294.1204(a), 40 Fed. Reg. 38145 (1975).

47. *Id.* § 294.1204(b).

48. *Id.* § 294.1206.

49. *Id.* § 294.1207.

50. *See* notes 10, 19-20 & accompanying text *supra*. For an example of procedures under the Hatch Act see 5 C.F.R. §§ 733.131-37 (1975).

51. Under civil service procedures these are sanctions available to an agency manager. 5 C.F.R. §§ 752.201-430 (1975).

52. SENATE REPORT, *supra* note 5, at 17-18.

manager. 5 C.F.R. §§ 752.201-.304 (1975).

While the legislative history is clear that the grant of such attorneys' fees is discretionary, it is replete with references to the 1964 Civil Rights Act,[53] the Clean Air Act of 1970,[54] the Fair Housing Act of 1968,[55] the Truth in Lending Act[56] and the Emergency School Aid Act,[57] all of which encourage individual actions by reimbursing costs and attorneys' fees as a method of effectuating congressional policy. To the extent that corporate complainants may have more difficulty in illustrating that the award of attorneys' fees is necessary to encourage suit, they will be less able to invoke the sanctions provision. Nevertheless, corporations may be able to invoke the sanctions provision when a court could appropriately find that they were accomplishing some public purpose beyond satisfying their own private interest. The Senate report noted that one of the criteria contained in the Senate bill for awarding attorneys' fees is whether the agency acted without reasonable basis in law and suggests that a corporation may be able to recover attorneys' fees on this basis.[58] It should also be noted that attorneys' fees for either corporate or individual plaintiffs can be awarded if the plaintiff only substantially prevails. Thus, if a complainant requests three documents and receives only one, reimbursement may still be appropriate.

A related question concerns the costs which would be imposed on an employee in defending himself in the administrative proceedings. Would it be appropriate for an agency to provide counsel or to reimburse an employee for attorneys' fees in the subsequent civil service proceeding? Neither the language of the provision nor the legislative history suggests the answer. Normally an employee who is charged in a disciplinary action by either the agency or the Commission has the obligation to obtain independent representation. Independent counsel may also be in the employee's best interests.

53. 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1970).

54. 42 U.S.C. § 1857h-2(d) (1970).

55. 42 U.S.C. § 3612(c) (1970).

56. 15 U.S.C. § 1640(a)(2) (1970).

57. 20 U.S.C. § 1617 (Supp. II, 1972).

58. SENATE REPORT, *supra* note 5, at 19, *discussing* S. 2543, 93d Cong., 2d Sess. (1974) (as amended and enacted). Other criteria were: 1) the benefit to the public, if any, deriving from the case, 2) the commercial benefit to the complainant, 3) the nature of the complainants' interest in the records sought. These criteria suggest that a corporation might have more difficulty in obtaining attorneys' fees. The enacted amendments did not contain these criteria, but the Senate report offers some guidance as to the factors which should be considered in review of a request for attorneys' fees. *Id.* at 19-20.

When an individual employee is charged he may defend by denying primary responsibility. Different officials within the agency may have different interests in determining which employee or official bears that responsibility. The agency's own position may to some degree conflict with that of any individual employee. Therefore, an employee would be well advised to obtain his own counsel.

E. Determination of Primary Responsibility

At first glance the selection of the individual officer or employee primarily responsible would seem to be a difficult task. However, the Commission has broad investigative powers in the implementation of its legal authority.[59] This investigative authority combined with access to agency information should provide an adequate basis for the Commission to make its determination.[60]

The Commission's investigation should go beyond formal organization charts and seek to inquire into the actual conduct of affairs which led to the arbitrary and capricious acts. In determining whether an employee has acted arbitrarily or capriciously, questions will arise regarding the effect to be given to the advice of counsel; for example, an agency official faced with an FOIA request might seek advice from an attorney in the General Counsel's office of the agency as to whether or not the information sought must be released under the Act. Does such a request for advice, and action based upon that advice, insulate an employee from subsequent disciplinary action under the provision? The answer would depend upon the circumstances, but advice of counsel should not automatically insulate an agency employee from subsequent disciplinary action. Certainly the seeking of advice and the reliance upon such advice would be an important factor to be considered in determining

59. Civil Service rule 5 provides:

> All officers and employees in the executive branch, and applicants or eligibles for positions therein, shall give to the Commission or its authorized representatives all information and testimony in regard to matters inquired of arising under the laws, rules, and regulations administered by the Commission. Whenever required by the Commission, such persons shall subscribe such testimony and make oath or affirmation thereto before an officer authorized by law to administer oaths.

5 C.F.R. § 5.3 (1975).

60. At the Freedom of Information Conference, Mr. Mondello noted that the freedom of information function was now within the Commission's jurisdiction and its broad investigative powers would be available. CONFERENCE TRANSCRIPT, *supra* note 40, at 162.

whether or not the employee had acted arbitrarily or capriciously and in determining the nature of the disciplinary action which was warranted against the officer or employee.[61]

However, even in criminal prosecutions, reliance upon advice of counsel is not always sufficient.[62] Neither should it be in an FOIA request.

F. The Role of the Court

The sanctions provision of the Act establishes a unique relationship between the courts and the administrative process. Under the provision a court acts to determine if the circumstances surrounding the withholding raise questions as to whether agency personnel acted arbitrarily or capriciously. The question is then referred to the Civil Service Commission to determine whether a particular employee has so acted. This unique arrangement raises at least two questions as to the appropriate function of the court and of the Civil Service Commission.[63] First, may the court make a determination that the withholding was arbitrary and capricious, and if it does so, is the Civil Service Commission bound by this determination? Second, what methods of judicial control exist for review of subsequent Civil Service Commission actions?

Normally, the determination of an issue by a court is res judicata as to a subsequent administrative determination[64] if the court has jurisdiction to consider the issue. The sanctions provision may be

61. *See also* SENATE REPORT, *supra* note 5, at 21. The bill reported by the Senate Judiciary Committee provided that the court was to determine if the employee's action in withholding the information was "without reasonable basis in law." S. 2543, 93d Cong., 2d Sess. (1974). The Senate report noted that "the committee does not intend this standard to imply that a responsible government employee will be held liable . . . where . . . advice of counsel is sought and followed and where there may be a reasonable difference of opinion . . . ." *Id.*

62. W. LAFAVE & A. SCOTT, CRIMINAL LAW 368 (1972).

63. In some ways the arrangement is not particularly unusual. In a number of circumstances courts have directed the Civil Service Commission to undertake administrative proceedings. Often this direction has come even when the Commission had initially refused to conduct the proceedings. When the additional procedures adjudicated the rights of a party, the relationship between courts and the Civil Service Commission was essentially the same as that established by the sanctions provision. In such cases the court may retain supervisory jurisdiction over the remanded matter. Holden v. Finch, 446 F.2d 1311 (D.C. Cir. 1971); Goodman v. United States, 358 F.2d 532 (D.C. Cir. 1966); Dabney v. Freeman, 358 F.2d 533 (D.C. Cir. 1966); Paroczay v. Hodges, 297 F.2d 439 (D.C. Cir. 1961).

64. F. JAMES, CIVIL PROCEDURE 1124 (1965).

interpreted as giving a court jurisdiction to decide the issue of whether personnel within the agency have in fact acted arbitrarily or capriciously. The language of the statute states that before the Civil Service Commission is required to commence proceedings the court must issue a written finding that "the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously." This language may be interpreted as the minimum finding which the court must make to invoke the process and would not prevent the court from deciding that the circumstances show that agency personnel in fact acted arbitrarily or capriciously.

Certainly, a finding by the court that agency personnel acted arbitrarily or capriciously is within the court's competence and should be binding on an employee charged in a subsequent civil service proceeding. The court has expertise in determining whether agency actions are arbitrary or capricious.[65] The parties before it in an FOIA suit will be adequate to ensure a thorough adjudication of the issue. When the question is whether the personnel of the agency have acted arbitrarily or capriciously, the agency which has an interest in that question identical to that of an employee in a subsequent proceeding will adequately protect the interest of an employee subsequently charged.[66]

The subsequent civil service proceedings must determine which employee was primarily responsible for the withholding and select the appropriate sanction to be applied. These are questions which the Civil Service Commission is particularly capable of resolving. This significant role left to the Commission would allay the concerns of the House conferees regarding the use of civil service remedies in the normal administrative setting of disciplinary actions.[67]

An interpretation of the provision that grants to courts the power to determine whether agency personnel acted arbitrarily or capri-

65. That courts are competent to decide this issue is illustrated by the Senate report which suggests one standard to be applied in determining whether or not attorneys' fees should be allowed is whether the agency acted without reasonable basis in law. SENATE REPORT, *supra* note 5, at 19. The standard "without reasonable basis in law" is at least as broad as the arbitrary and capricious standard.

66. It should be noted that the court would not be finding against a particular employee, but rather that agency personnel in general had acted arbitrarily or capriciously. Thus, any intra-agency dispute as to the appropriate party to charge would remain an open question, and the eventual defendant would not be prejudiced by the court's general finding.

67. *See* notes 18-20 & accompanying text *supra*.

ciously would allocate to courts and to the Civil Service Commission responsibilities within the areas of their particular competence. Moreover, when a court is able to decide on the evidence before it that agency personnel have acted arbitrarily or capriciously, an additional problem would be alleviated. The discretion of the Civil Service Commission not to issue charges in a matter referred by a court would be appropriately curtailed in those situations in which it was possible for the court to determine whether the agency personnel had acted arbitrarily or capriciously.

In cases in which a court finds only that questions exist regarding whether agency personnel have acted arbitrarily or capriciously, judicial review may take two forms. First, the provision mandates the Commission to promptly initiate proceedings. The duty may be enforced through mandamus. Second, the court refers the determination of the matter to the Commission, which in turn makes recommendations to an administrative agency. If the agency should arbitrarily or capriciously refuse to commence disciplinary actions, the court should be empowered to review the abuse of a power based upon the initial finding by the court and its continuing jurisdiction over the matter.[68]

G. Role of the Plaintiff

Closely related to the problems of a court's role in reviewing subsequent Commission actions is the role of the original FOIA plaintiff which remains ambiguous under the sanctions provision. Under the Senate version, where a court determined and applied the sanction, the FOIA plaintiff would have played an important role in that determination. Under the enacted provision, what role should the FOIA plaintiff play in the administrative proceedings conducted by the Civil Service Commission? The provision would seem to authorize the Commission to promulgate regulations giving the original FOIA plaintiff some formalized role such as intervention in the subsequent hearings. Since the plaintiff is the individual who originally brought the potentially arbitrary and capricious acts of federal personnel to the attention of the court and of the Commission, a formal role for such a plaintiff in the administrative proceedings would seem appropriate. Nothing would seem to prohibit the Commission from providing for citizen intervention in a subsequent disciplinary proceeding. Although the Commission has no regulations

68. *See* note 63 *supra*.

providing for such third party intervention in civil service proceedings,[69] the background and purposes of the sanctions provision would seem to authorize such a regulation. While an original FOIA plaintiff may be a necessary witness in a subsequent disciplinary action, his role should be formalized by appropriate regulation.

Even if a plaintiff is not granted a specific role in the administrative proceedings, a question remains as to plaintiff's standing to seek review of Commission decisions not to recommend disciplinary action, impose modified penalties or acquit an employee. Although the provision does not specifically refer to the interests of a plaintiff, the legislative history of the Act suggests that an FOIA plaintiff has such standing.[70] The plaintiff has a significant role in triggering the sanctions provision. The fact that the plaintiff will already have received the documents requested and reasonable attorneys' fees and costs does not necessarily vindicate *in toto* his injury resulting from the improper actions of the government officials. The legislative history of the sanctions provision recognizes the importance of sanctions to the fair administration of the FOIA and relies upon the plaintiff to vindicate those interests. Without the plaintiff's involvement no means exist to review the operation and performance of the Civil Service Commission in its refusal to proceed with actions under this important provision. As an injured party the plaintiff has an interest that just penalties be imposed. The legislative history suggests that this interest of the plaintiff furthers the public interest to be served by the imposition of such sanctions — the prevention of abuse.[71] Judicial review of subsequent administrative action would, of course, conform to the accepted standards of administrative review which give appropriate weight to the expertise of the administrative agency.[72]

69. The regulations do, however, provide for a type of third-party involvement in cases involving general allegations of agency discrimination in personnel matters which do not relate to an individual complaint. *See* 5 C.F.R. § 713.251 (1975). Under this regulation a third party who is dissatisfied with an agency's action on his complaint may request the Commission to review the action. *Id.* § 713.251(c).

70. The emphasis in the Senate report upon encouraging private individuals to vindicate the public's right to know is an example of the importance attached to an FOIA plaintiff. HOUSE REPORT, *supra* note 4, at 70-74; SENATE REPORT, *supra* note 5, at 18-19.

71. HOUSE REPORT, *supra* note 4, at 70-74; SENATE REPORT, *supra* note 5, at 18-19.

72. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.01, at 191-92 (1958). *See generally id.* § 30.01-.14.

CONCLUSION

The FOIA sanctions provision is important as a congressional recognition of personal accountability and as a means of controlling administrative abuse. The provision has acted in part to protect the relationship between government employee and citizen in the important area of public access to information. The sanctions provision illustrates one way in which an accountability process can be designed. Considerable work remains and experimentation of alternative schemes should be encouraged. Personal accountability is a concept embedded in our law and the task is to make it operative in an administrative setting. In a complex administrative bureaucracy personal accountability is a means of ensuring that government decisions are controlled by law and that those affected by government wrongdoing have a mechanism to impose personal accountability upon public employees. Our bitter national experience of the last few years shows that government decisions must be controlled by law rather than personal loyalty, individual will or avarice. Personal accountability is a method of accomplishing that purpose. With the development of new tort remedies[73] and the FOIA sanctions provision, the wind is blowing in the direction of such accountability.[74]

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73. For extended discussion of these new remedies and a reassessment of personal accountability in general see Vaughn, *The Personal Accountability of Public Employees*, *infra* at 85.

74. For example, the Senate Subcommittee on Federal Spending Practices, Efficiency and Open Government adopted, as part of the Government in the Sunshine Act, a provision which would allow costs to be assessed against an individual agency member who had intentionally and repeatedly violated the provisions of the Act. S. 5, 94th Cong., 1st Sess. § 201(i) (1975).