

must be the free expressions of those who prepare them and not something "cleared for publication." As the Supreme Court said in *Hickman v. Taylor*, *supra*, "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." This is to say nothing of the mental processes of the decisionmakers themselves. It is suggested, therefore, that this exception be broadened to read as follows: "inter-agency or intra-agency memoranda, letters, or other papers."

Subsection (c) (6) excepts "personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." While there is some ambiguity here, we construe this as providing an unqualified exception for personnel and medical files, the limiting phrase "the disclosure of which, etc.", modifying only "similar matters." There is no reason why only personnel and medical files should be generally excepted. In any event, the requirement of a "clearly unwarranted invasion of personal privacy" would appear to be unduly restrictive and to offer insufficient protection to a right highly valued in our democratic society. Consideration should be given to the deletion of the underlined phrase.

Subsection (c) (7) excepts from availability "investigatory files compiled for law enforcement purposes except to the extent they are available by law to a private party." This provision would appear to permit a Board respondent to obtain the affidavits taken from employees and other persons in the course of the preliminary investigation of an unfair labor practice case, even though those persons may never be called as witnesses in the proceeding. For, "to the extent * * * available by law to a private party," could well encompass the discovery procedures of the Federal Rules of Civil Procedure, and such affidavits would be obtainable under those procedures. To permit the disclosure of pre-trial statements of persons who may never be called as witnesses would unduly interfere with the administration of the National Labor Relations Act, for these persons, who are generally employees, would be reluctant to give statements if they knew that their statements could be revealed to a hostile employer or union in a position to take retaliatory action affecting their economic welfare, even though they may not be called to testify. In recognition of this fact, the courts have held that it is an interference with employee rights under the act for an employer to ask employees for copies of statements which they have given to Board agents, and about the matters contained in those statements. *Texas Industries v. N.L.R.B.*, 336 F. 2d 128 (C.A. 6); *Surprenant Mfg. Co. v. N.L.R.B.*, 58 LRRM 2484 (C.A. 6); *N.L.R.B. v. Winn-Dixie*, 58 LRRM 2475 (C.A. 6). Under the more limited *Jencks* rule, which is applicable to Board proceedings, pre-trial statements are made available, but only in the cases of those persons who have been called as witnesses in the Board proceeding. Accordingly, it is suggested that the exclusion in (7) be amended as follows: "(7) investigatory files, including statements of agency witnesses until such witnesses have been called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross-examination."

Finally, the proposed subsection (a) of section 161 authorizes "the head of each Department to prescribe regulations * * * for the government of his Department." This has been interpreted as not being applicable to, and thus not vesting this authority in, heads of "agencies" as distinguished from "Departments." A recent decision of the U.S. Court of Appeals for the Ninth Circuit so held; *General Engineering, Inc., and Harvey Aluminum v. National Labor Relations Board*, 58 LRRM 2432 (C.A. 9). There is something of an anomaly in using a statute which is otherwise not applicable to "agencies" to prescribe rules relating to the availability of their records. It is suggested that consideration be given to clarifying the applicability of section 161(a) to make it clear that heads of agencies are also included.

In view of the above comments, this agency would be opposed to the enactment of H.R. 5012 in its present form. We would appreciate having this report included in the record of the hearings on this bill.

The Bureau of the Budget has advised that it has no objection to the submission of this report to your committee.

Sincerely yours,

WILLIAM FELDESMAN, *Solicitor*.