

# The Burger Court Opinion Writing Database

## *Forsham v. Harris*

445 U.S. 169 (1980)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 1, 1980

RE: No. 78-1118 - Forsham v. Harris

Dear Bill:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WR', written over the word 'Regards,'.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 14, 1980

RE: No. 78-1118 Forsham v. Harris

Dear Bill:

I am planning to write separately in the above.  
I'll do my best not to hold you up too long.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Brennan  
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: JAN 25 1980

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1118

Peter H. Forsham et al.,  
Petitioners,  
v.  
Patricia Roberts Harris, Secretary  
Department of Health, Edu-  
cation, and Welfare, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Dis-  
trict of Columbia Cir-  
cuit.

[February —, 1980]

MR. JUSTICE BRENNAN, dissenting.

I agree with the Court that "[r]ecords of a nonagency certainly could become records of an agency as well." *Ante*, at 11. But the Court does not explain why such a conversion does not occur in this case.<sup>1</sup> Because I believe we should articulate standards under which to analyze such cases and because I believe that under a proper test UGDP's data should be treated as "agency records," I dissent.

### I

The Court argues at length that UGDP is not an agency. But whether or not UGDP is an "agency" is simply not at issue in this case. Rather, the only question is whether data generated in the course of this UGDP study are "agency records."

<sup>1</sup> The Court suggests that if a federal grant created a partnership or joint venture between the agency and the grantee, the grantee might become an agency and, thus, its records might become agency records. *Ante*, at 10. Likewise, the Court might reach a different result where the agency has chosen to buy data through a procurement contract instead of a grant. *Ibid*. But neither of these is an instance involving records of a nonagency. In the first the grantee becomes an agency, and in the second the records do not belong to the nonagency.

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

No. 78-1118

circulated: JAN 29 1980

Peter H. Forsham et al.,  
Petitioners,  
v.  
Patricia Roberts Harris, Secretary  
Department of Health, Edu-  
cation, and Welfare, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Dis-  
trict of Columbia Cir-  
cuit.

[February —, 1980]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL  
joins, dissenting.

I agree with the Court that "[r]ecords of a nonagency cer-  
tainly could become records of an agency as well." *Ante*, at  
11. But the Court does not explain why such a conversion  
does not occur in this case.<sup>1</sup> Because I believe we should  
articulate standards under which to analyze such cases and  
because I believe that under a proper test UGDP's data should  
be treated as "agency records," I dissent.

I

The Court argues at length that UGDP is not an agency.  
But whether or not UGDP is an "agency" is simply not at  
issue in this case. Rather, the only question is whether data  
generated in the course of this UGDP study are "agency  
records."

<sup>1</sup> The Court suggests that if a federal grant created a partnership or joint  
venture between the agency and the grantee, the grantee might become an  
agency and, thus, its records might become agency records. *Ante*, at 10.  
Likewise, the Court might reach a different result where the agency has  
chosen to buy data through a procurement contract instead of a grant.  
*Ibid*. But neither of these is an instance involving records of a nonagency.  
In the first the grantee becomes an agency, and in the second the records  
do not belong to the nonagency.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 14, 1980

Re: No. 78-1118, Forsham v. Harris

Dear Bill,

I am glad to join your opinion  
for the Court in this case.

Sincerely yours,

P.S.  
/

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 14, 1980

Re: No. 78-1118 - Forsham v. Harris

---

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

cmc

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 17, 1980

Re: No. 78-1118 - Forsham v. Harris

Dear Bill:

I await further writing in this case.

Sincerely,

  
T.M.

Mr. Justice Rehnquist

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 28, 1980

Re: No. 78-1118 - Forsham v. Harris

Dear Bill:

Please join me in your dissent.

Sincerely,

*JM*  
T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 14, 1980

Re: No. 78-1118 - Forsham v. Harris

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

January 15, 1980

78-1118 Forsham v. Harris

Dear Bill:

Please join me.

Sincerely,

*L. Lewis*

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 10 JAN 1980

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1118

Peter H. Forsham et al.,  
Petitioners,  
v.  
Patricia Roberts Harris, Secretary  
Department of Health, Edu-  
cation, and Welfare, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Dis-  
trict of Columbia Cir-  
cuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act, 5 U. S. C. § 552 empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. § 552 (a)(4)(B). We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of that data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from HEW does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which is a federal "agency" under the terms of the Act.

### I

In 1959, a group of private physicians and scientists specializing in the treatment of diabetes formed the University Group Diabetes Program (UGDP). The UGDP conducted a

15-8, 10-13, 16

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: 5 JAN 1980

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1118

Peter H. Forsham et al.,  
Petitioners,  
v.  
Patricia Roberts Harris, Secretary  
Department of Health, Edu-  
cation, and Welfare, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the Dis-  
trict of Columbia Cir-  
cuit.

[January —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act, 5 U. S. C. § 552 empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. § 552 (a)(4)(B). We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from HEW does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which is a federal "agency" under the terms of the Act.

I

In 1959, a group of private physicians and scientists specializing in the treatment of diabetes formed the University Group Diabetes Program (UGDP). The UGDP conducted a

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 15, 1980

Re: 78-1118 - Forsham v. Harris

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Rehnquist

Copies to the Conference