

# REGAINING A CONFIDENCE: PROTECTION OF BUSINESS CONFIDENTIAL DATA THROUGH REFORM OF THE FREEDOM OF INFORMATION ACT

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## I. INTRODUCTION

**A**mong current administrative law problems, the subject which is perhaps least understood is the matter of procedural and substantive rights for the private person who submits confidential proprietary information to a federal agency and later learns of the agency's intent to disclose that information. This corner of the Freedom of Information Act (FOIA) seems arcane, even tiny, if one measures administrative law problems by law review pages; many more trees have been pressed into discussions of separation of functions, and much more ink has been expended on termination of federal beneficiaries' payments.

The submitter-disclosure question is fully proper for administrative study, involving property rights, legislative omission, ambiguous statutory text, and great political controversy. In our innovation-based national economy which faces a declining world market position, our society cannot afford administrative systems problems which have real, cash consequences on international balances of trade. Suzuki Motor Company has been an effective collector of Toyota's submissions to the U.S. government in 1981, though neither firm would enjoy access to the other's data in Japan. A food processor which saves tens of

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thousands of dollars of its filtration costs because of its innovations may never enjoy the licensing or cost-savings advantages, because its blueprints were photocopied last week at a regional office of the Environmental Protection Agency (EPA) and mailed to its larger competitor for ten cents per copy. And the small inventor with the archetypal better mousetrap finds that contracting or proposing to contract with the government opens detailed design data to larger competitors, who can enter the market more quickly, and dispose of both mice and the innovator.

The FOIA was meant by all its sponsors to keep agencies accountable for their workings and official conduct. By 1982, the quarter of a billion dollar cost of the Act was subsidizing Swedish ball bearing makers in their searches at Federal Trade Commission (FTC), French aviation firms at U.S. Department of Transportation (DOT), and competitive searches throughout the government. This article addresses the pressing need for changes.

## II. IN SEARCH OF A PREDICTABLE STANDARD

The protection or lack of protection of confidential business data which is submitted to government agencies should be subject to a predictable standard. Congress does not have time for the futile, but bureaucratically noble, measure of half-correcting the flaws in the FOIA's business data provisions. A set of revised procedures would be attractive, but without better definition of the protection of the exemption those procedures are as useful as directional signs on an abandoned highway. Movement in procedural terms is not constructive movement in the total solution to the problems of this segment of the FOIA. Procedural changes, like road signs, carry the beneficial appearance of progress without the repair of barriers which must be done to effect real progress.

The changes to the exemption (b)(4)<sup>1</sup> standard are addressed not to the original Act but to the way in which judicially legislated changes, in case law, have altered the exemption. A submitter cannot predict whether a 1982 submission will be able to be protected in 1984, since the courts in 1984 would under current standards demand proof of substantial harm to the submitter's 1984 competitive position in its marketplace as of that time.<sup>2</sup> A *Federal Register* inquiry found (albeit

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<sup>1</sup> 5 U.S.C. § 552(b)(4); this exemption covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

<sup>2</sup> Current case law requires that the harm be measured as of the time of the actual disclosure order from the court, so no legal conclusion may be drawn as of the date of

with no assurance of representative national sampling) that the fifty organizations who responded strongly favored changes to the exemption, over a minority who voted for the status quo.<sup>3</sup> As this article goes to press, the Senate Constitution Subcommittee has voted to change the substantive exemption,<sup>4</sup> and the American Bar Association's 1982 Midyear Meeting will be asked by two ABA Sections to endorse a change.<sup>5</sup> The Committee on Regulation of Business of the Administrative Conference also has endorsed a change, and its recommendations will come to a vote at the Conference's June 1982 Plenary Session.<sup>6</sup>

In its study of the issue, the Administrative Conference Committee on Regulation of Business examined six alternatives, including no changes, maximum disclosure and maximum withholding. After extensive discussion, it reached a recommendation on the (b)(4) exemption. The recommendation favored change to the substantive standard, replacing "confidential" commercial or financial information, and the judicial requirement of "substantial competitive harm" proof, with a new standard which looks to the legitimate private commercial, financial, business or research interests of a person which would be impaired by disclosure. The text adopted by a three-to-one margin in the Committee is similar to the Senate Constitution Subcommittee bill, the recommendation which is pending before the American Bar Association, and the administration's proposed legislative changes to exemption (b)(4).<sup>7</sup>

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submission to the agency. Instances of disclosure and nondisclosure under current law are catalogued in 1 J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW*, §§ 14.07-14.08 (1977, 1981 Supp.) [hereinafter referred to as *FEDERAL INFORMATION DISCLOSURE*].

<sup>3</sup>The Administrative Conference Committee on Regulation of Business issued a call for public comments. 46 Fed. Reg. 43221 (1981). There were 52 responses from the public and from agencies. Copies of the Draft Report which addressed those comments, entitled *Regaining a Confidence*, and of all public comments are available upon request from the Administrative Conference, 2120 L St. N.W. Washington D.C. 20037.

<sup>4</sup>S. 1730, 97th Cong. 1st Sess., (1981) [hereinafter referred to as S. 1730].

<sup>5</sup>REPORT AND RECOMMENDATION TO THE MIDYEAR MEETING OF THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION, COSPONSORED BY SECTION OF CORPORATION BANKING AND BUSINESS LAW AND SECTION OF ADMINISTRATIVE LAW [hereinafter referred to as ABA RECOMMENDATIONS].

<sup>6</sup>Copies of the December 1981 proposed recommendation, and of a minority dissent, may be obtained from the Administrative Conference. The recommendation will be considered in June 1982 after completion of an ongoing study of the effect of de novo review upon federal district courts.

<sup>7</sup>S. 1730, note 4 *supra*, will amend exemption (b)(4) to read: "(4) trade secrets, and commercial, research, financial, or business information obtained from any person which is privileged or the disclosure of which could impair the legitimate private competitive, research, financial or business interests of any person or the government's ability to obtain such information in the future." The ACUS Committee recommended, without using explicit statutory language, that the exemption apply to "confidential

### A Historical Perspective

Exemptions themselves did not exist in the earliest drafts of the Freedom of Information bills in 1960–62. The strange history of craftsmanship, or its lack, which marked the exemptions, can be described as the discovery of omissions and the patching of omission “holes” with hastily crafted “plaster” in the form of legislative language. Exemption (b)(4) was no exception. No witness spoke against it; each of the agencies mentioning the issue favored such protection;<sup>8</sup> liberals such as Senator Humphrey wanted to expand its coverage.<sup>9</sup> The legislative history is better in the *Senate Report* than in the *House Report*, as has frequently been noted, because the earlier *Senate Report* escaped some of the plastering which the Johnson administration had to do at the eleventh hour of the legislative process to make the bill acceptable to all sides.

The *Senate Report's* standard was most consistent with the Judiciary Committee hearings in which the exemption was framed; it would cover information “which would customarily not be released to the public by the person from whom it was obtained.”<sup>10</sup> The *House Report* was similar and somewhat broader.<sup>11</sup>

Exemption (b)(4) was not where the early action was; the FOIA started out as a confrontation of the press and public advocacy groups against agencies, with privately submitted data a distant minority of the requests. The agencies argued military secrecy issues, environmental issues, internal agency memos, and comparable matters.<sup>12</sup> The commercial exemption has little utility and little use, with the sole exception being appraiser reports and government-performed laboratory test results, which are not the type of private documents which spark today's controversy over the exemption.<sup>13</sup>

The sage who remarked that the U.S. Supreme Court watched the election returns might also note that the D.C. Circuit watches the *Congressional Record*. That Circuit took a great deal of criticism for its

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information submitted to the government by a person and for which disclosure may impair the legitimate commercial, financial, business or research interests of that person.”

<sup>8</sup>Interview with Prof. Sam Archibald, U. of Colo. School of Journalism, Sept. 1981.

<sup>9</sup>Humphrey wished to draw the bill back after floor approval and amend (b)(4) to exempt any information which came to the government “in confidence,” 114 CONG. REC. 17667 (1964).

<sup>10</sup>S. REP. NO. 813, 89th Cong. 1st Sess. 9 (1965).

<sup>11</sup>H. REP. NO. 1497, 89th Cong. 2d Sess. 10 (1966).

<sup>12</sup>1 FEDERAL INFORMATION DISCLOSURE, note 2 *supra* at Ch. 3.

<sup>13</sup>General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969); Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D. N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

position on law enforcement and related withholding matters. The critics used the D.C. Circuit's broad reading of the exemptions as a premise of the 1974 FOIA amendments, even expressing by colloquy the specific intent to override that Circuit's precedents.<sup>14</sup> So watchers of the FOIA were not surprised when, shortly before passage of those amendments, a panel of the D.C. Circuit began to take a narrower view of the exemptions. What was surprising was that the narrower view began with little-used exemption (b)(4).

In *National Parks v. Morton*,<sup>15</sup> financial reports filed with the Interior Department were protected by the Department, and ultimately by the Circuit's two opinions<sup>16</sup> in the controversial case. But in its 1974 opinion the court ruled that the agency (and through it, the submitter) must establish that disclosure would cause "substantial harm to the competitive position" of the submitter. Had it stopped at a commercial harm requirement it would have been consistent with Congress. But it found competitive position references in parts of the hearings, and then with no explanation and no citations it added the requirement of "substantial" harm.<sup>17</sup> It is unfortunate that so few other courts have considered the standard, and none have reexamined the legislative history in sufficient detail to overturn the quantity-based *Morton* standard.<sup>18</sup>

What is substantial competitive harm? When is harm enough to be substantial? Who must be competing, at what level? Can a 1982 submitter predict its own competitive vulnerability in May 1984? How many economists with what credentials must testify for the agency, submitter, and requester? That same Circuit with different panels has produced eccentric variations on its theme.<sup>19</sup> Other courts have added

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<sup>14</sup>See HOUSE COMM. ON GOV'T OPERATIONS AND JUDICIARY COMM. 94TH CONG., 1ST SESS. FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974: SOURCE BOOK 349 (1975) [hereinafter referred to as SOURCE BOOK].

<sup>15</sup>National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

<sup>16</sup>*Id.* and see a later iteration of the same case, National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

<sup>17</sup>*Id.* 498 F.2d at 770.

<sup>18</sup>For other cases which have chosen not to look back into the legislative history beyond acceptance of the *Morton* decision, see *Pennzoil Co. v. F.P.C.* 534 F.2d 627 (5th Cir. 1976); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse*, 431 U.S. 924 (1977), and *Glacier Park Foundation v. Andrus*, 506 F. Supp. 637 (D. Mont. 1981). The critical appraisals of the decision are Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act*, 29 AD. L. REV. 193 (1977); Note, *Administrative Disclosure of Private Business Records Under the Freedom of Information Act*, 28 SYRACUSE L. REV. 923 (1977), and see also an economic criticism, Note, *The Freedom of Non-Free Information*, 32 STAN. L. REV. 339 (1980).

<sup>19</sup>The eccentricities are inevitable with a factor like "substantial," which lacked both statutory text and legislative history when the panel invented it in 1974. Difficulties have arisen because the D.C. Circuit has tried to reconcile the *Morton* decision's quantity-of-harm standard to varying factual circumstances, instead of retreating from its pursuit of

nothing more than anecdotal examples of information which fell under the substantial harm test in particular settings.<sup>20</sup> More cases have fallen within the test than outside it, on a brief review of the case decisions, but many more disclosure decisions are made annually than are litigated, so the terms of the exemption can vary with both the folklore of the case law and the internal practices of divergent federal agencies.

### The Systemic Problem

The principal argument raised against reform of the (b)(4) exemption is the political challenge that legislation is not needed until incidents of actual harm are documented in sufficient numbers to justify a change. If counting such tales makes any sense as a premise for statutes, the original FOIA had the best record of "horror stories" of abusive withholding; the Privacy Act of 1974 had fewer, but sufficient incidents; and the 1974 FOI Act amendments had a mixed group of incidents and systemic criticisms.<sup>21</sup> Changes to the FOIA which were made in 1976 with the Sunshine Act had relatively little in the way of an evidentiary record other than distaste for a particular Supreme Court decision.<sup>22</sup> Should a reform of the exemption await a listing of "horror story" incidents of bankrupt companies and benefited foreign com-

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quantification. That court is not unaware of the ambiguities of the Act, *see, e.g.*, *Worthington Compressors Inc. v. Gorsuch*, No. 80-1010 (D.C. Cir. Nov. 1981) but it has chosen to struggle rather than back away from quantifications. The Circuit's cases taken together show the difficulty of counting relative positional harms as a prerequisite to confidential treatment. Once quantification is required, the myriad of factual situations of harm in successive cases have to be forced into that limited measure of protectability. *Worthington Compressors Inc. v. Costle*, 662 F.2d 45, (D.C. Cir. 1981); *Board of Trade of the City of Chicago v. Commodity Futures Trading Comm'n.*, 627 F.2d 392 (D.C. Cir. 1980); *Gulf & Western Indus. Inc. v. U.S.*, 615 F.2d 527 (D.C. Cir. 1979); and *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976). Numerous lower court decisions in that Circuit are listed in 1 FEDERAL INFORMATION DISCLOSURE, note 2 *supra* at § 14.08.

<sup>20</sup>For a complete review of the cases making factual and legal determinations, *see* FEDERAL INFORMATION DISCLOSURE note 2 *supra* at § 14.08.

<sup>21</sup>The original Act benefited from a generally excellent compilation of agency abuses by the journalism societies, *see* FEDERAL INFORMATION DISCLOSURE, *supra* note 2 at ch. 2. But the number of substantiated cases of abuse supporting enactment of the Privacy Act probably would not have been sufficient to pass that statute, had there not been a post-Watergate mood in support of governmental file limitations. *See* 2 FEDERAL INFORMATION DISCLOSURE, note 2 *supra* at § 20.02.

<sup>22</sup>The amendment to 5 U.S.C. § 552(b)(3) was added as a rider to the Government in the Sunshine Act, but with little factual impetus other than the desire to reverse the philosophical bent of the Supreme Court's decision in *Administrator of F.A.A. v. Robertson*, 422 U.S. 255, 95 S. Ct. 2140, 45 L.Ed. 2d 164 (1975). By the criteria of critics of FOIA reform in 1982, the Sunshine Act might never have carried that (b)(3) exemption amendment as a rider.

petitors? Three considerations suggest that change should not depend on such a list.

First, the Administrative Procedure Act (APA) is the product of a desire for systemic solutions to systemic problems. The commercial data *submission* part of government's information processes—the part of the process in which information is requested or subpoenaed—is suffering from the reasonable fear of submitters that agencies will not or cannot protect confidential business data. The system of acquiring informational input to the agency decisional process is being stalled by the system's inability to protect against unconsented outflow of valuable private data.<sup>23</sup> Unlike the Corps of Engineers, which can await a count of floods before building a dam, the legislative committees with administrative law oversight have a legitimate concern that the system's obstructions should be corrected as soon as possible.

Secondly, both the *Stevenson Report*<sup>24</sup> and all other studies of exemption (b)(4) which have considered the matter have found a strong perception that agencies cannot protect sensitive private data. A perception motivates or unmotivates; it cannot always be pinned down into causal connection of disclosure A leading to refusal of document B. But contractors like Sikorsky do withdraw from contracting or provide less technical data than they otherwise would provide.<sup>25</sup> A

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<sup>23</sup>One of the tangible indicia of the inflow problem is that where special statutory provisions permit avoidance of disclosure through Civil Investigative Demands (CID), those CID procedures will become more attractive for submitters. CIDs are being used with increasing frequency even though the person requesting one bears a greater submission burden with a CID and thus must perceive a real benefit to offset the procedure's extra burdens. The Antitrust Division of the Justice Department increased its load of CID issuances from 50 per year prior to the FOIA to more than 950 in the last reporting year. (Interview with Antitrust Division FOI Officer, Sept. 1981).

<sup>24</sup>R. STEVENSON, PROTECTING BUSINESS SECRETS UNDER THE FREEDOM OF INFORMATION ACT: MANAGING EXEMPTION 4, REPORT FOR THE ADMINISTRATIVE CONFERENCE (August 6, 1981).

<sup>25</sup>Sikorsky's helicopter was considered by its owner to be a likely winner of the Coast Guard rescue helicopter contract, but the cost of winning would be Transportation Department exposure of the commercial model helicopter's technical details to other bidders. Sikorsky asked for protective treatment from the Department. It was refused with the statement that Sikorsky's data would be subject to normal FOI procedures. Sikorsky then withdrew from the contracting offer, and a French firm won. Stevenson doubts that the firm's withdrawal is related to the FOIA problem (REPORT, *id.* at 27). I interviewed both the contracting officer and the firm's officials, and believe that the firm accurately reflected its significant concern about loss of confidential data absent better FOIA protections. Stevenson later stated that Sikorsky "was reacting to a perception and not to its own experience". As with any firm, experience in loss of trade secrets is painfully gained. So, whether grounded in expectation or in painful experience, the result of withdrawal was the same: the French won the U.S. government's helicopter business. It seems little comfort to Connecticut's economy that the public was saved from reliance on reactions to perceptions. See *Freedom of Information Act Oversight Hearings*

subpoena which could have been settled is fought in court so that judicial protection will attach, in place of unpredictable agency means of protection.<sup>26</sup> The perception is aided by agency pronouncements like the Carter Justice Department's suspension of Trade Secret Act enforcement,<sup>27</sup> and publicity about FOI search services working for foreign and domestic competitors. The perception should be attacked by dealing with the confusion and concern through clarification of the law's true exemptive coverage.

Thirdly, there *have* been actual decisions favoring disclosure of private business information. The Food and Drug Administration (FDA) official responsible for disclosure decisions in Los Angeles recently decided that since all blood valve makers use formaldehyde, process information about one maker could be revealed to another. The data showed time, temperature and quantity—the only real secrets which differentiate the manufacturers from one another in that product line.<sup>28</sup> The Federal Communications Commission (FCC) recently decided to disclose a television station's confidential financial reports, as a matter of discretion, even though the records could be very helpful to an opposing license applicant.<sup>29</sup> The former decision was made *ad hoc* with no understanding of the market; the latter was made cautiously, after a Commission decision. Several of the other cases such as the Mitsubishi access to chemical process data at NIOSH<sup>30</sup>

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*Before House Comm. on Gov't Operations, 97th Cong., 1st Sess. 636 (1981) (Stevenson testimony).*

<sup>26</sup>Many subpoena cases have been fought against the F.T.C. for precisely this purpose. See *Wearly v. F.T.C.* 462 F. Supp. 589 (D. N.J. 1978), *rev'd on other grounds*, 616 F.2d 662 (3d Cir. 1979); *Exxon Corp. v. F.T.C.*, 589 F.2d 582 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *F.T.C. v. Texaco Inc.*, 555 F.2d 862 (D.C. Cir. 1977), and *Ashland Oil Inc. v. F.T.C.* 548 F.2d 977 (D.C. Cir. 1976).

<sup>27</sup>Order amending § 9-2.025, U.S. ATTORNEYS' MANUAL, DEPARTMENT OF JUSTICE, CRIMINAL DIVISION (May 1979). This order forbade federal prosecutions under the Trade Secrets Act against government employees who disclose confidential business information, without the prior permission of the main Justice Department in Washington.

<sup>28</sup>Taylor, *Businesses Lobby to Reduce Public Access to Data They Disclose to Federal Agencies*, Wall St. J. Dec. 15 1981 at 31. A followup interview by the author with the recipient firm disclosed that all such firms use the same raw materials but "cure" the raw valves at different times and temperatures. Thus, a revelation of the specific process would disclose the main difference between the competitors, a difference they uniformly keep as a trade secret. The FDA obtained the competitor's data during an inspection. Shortly after release brought this information to the competing firm (Shiley), the recipient firm was visited by the very same inspector who had done the reporting on the first plant. Shiley refused to provide that specific detail, and pointed out to FDA the value of the disclosed information about Shiley's competitor. FDA did not press the issue.

<sup>29</sup>*Northern Television Inc. v. F.C.C.*, No. 79-3468 (D.C. 1980).

<sup>30</sup>*Dow Chemical Co.*, comments to ACUS file, Sept. 26, 1981, and *see Hearings*, note 25 *supra*, at 553.



and the disclosure of aircraft life raft information by FAA<sup>31</sup> are related in other sources. But one must appreciate that *reported* instances are necessarily few and exceptional. Managers who learn of the disclosure are in the minority, and practice a type of "damage control" to avoid broadcasting the fact of their single competitor's access feat to all of the marketplace at large.<sup>32</sup> Some do not know that they have lost exclusive possession of their secrets; others must live with that agency daily and will not assail the agency's errors in public. Most incentives point to *not* reporting leaks, so that more extensive damage is not caused by the public dispute.

So the systemic problem exists. There have been cases, but no well-publicized list of horrible abuses will surface with so many practical disincentives to reporting of disclosure instances. And overriding all is the perception which undercuts the agency's ability to get information on the next, or subsequent, requests for similar information to that which had been released.

### The Recommendation

The Committee on Regulation of Business recommended that the (b)(4) exemption should apply "to confidential information submitted to the government by a person and for which disclosure may impair the legitimate commercial, financial, business or research interests of that person."<sup>33</sup> That recommendation is virtually identical to the FOIA amendment which passed the Senate Constitution Subcommittee on December 14, 1981.<sup>34</sup> It is also reasonably close to a proposal which will be co-sponsored at the American Bar Association Midyear Meetings by the Sections of Corporation Banking and Business Law and Administrative Law.<sup>35</sup>

The elements needed to establish confidential status for that set of

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<sup>31</sup>The competitor who got the information after making an FOI request by telex won a large contract with that design data, and was quoted as saying "It's amazing what a \$2 telex message will do." Schorr, *How Law Is Being Used to Pry Business Secrets From Uncle Sam's Files*, May 9, 1977 at 1.

<sup>32</sup>For example, disclosure that one competing firm has obtained the pioneer's process data, will likely induce quiet, not loud, objections. Benefit to the other competitive firms beyond the first recipient does not occur, unless and until the owner of the data or the first firm which received it from the government makes the other competitors aware of its availability. To shield the knowledge that the information of value would now be freely available, requires silence by the submitting firm, often accompanied by resistance to the agency's next such request. Given these incentives, a firm's reluctance to report those disclosure stories of which it learns is quite understandable.

<sup>33</sup>Recommendation to the Administrative Conference from the Committee on Regulation of Business, December 1981.

<sup>34</sup>S. 1730, note 4 *supra*.

<sup>35</sup>ABA RECOMMENDATIONS, note 5 *supra*.

private information which is currently called “confidential commercial information” would be the following:

1. The information is not publicly available;
2. The information fits a certain defined interest of a submitter or other private person, e.g., where the actual submitter was an agent for owner of a document;<sup>36</sup>
3. The interest defined lies within the four categories, of commercial, financial, business or research interests;
4. The interest is legitimate; and
5. The submitter would reasonably be expected to be impaired in that interest by the disclosure.

The first element of the recommendation is that information which is already publicly available at the time of the FOI request cannot be withheld. A scientific discovery remains a trade secret until the discovery is published in an issued patent.<sup>37</sup> Publication of a new test method in a medical journal removes the confidential status of the method. And a general distribution of the information by its owner to all consumers or all retailers or all telephone inquirers, is a sufficient basis for agency disclosure. If information is obviously observable, such as the color of a factory visible from the street, it cannot be kept secret in government-disclosure terms. As the *Worthington* decision noted, obviously available information is not confidential.<sup>38</sup>

Secondly, the information must fit some identified purpose of the submitter. “I’d rather not disclose” is not sufficient. “Disclosure gives competing laboratories a map of my current research plans and tips on what technology not to bother with in their own parallel work” identifies research as the purpose (or commercial purposes, if the laboratory is commercial).<sup>39</sup> A submitter must state what the purpose of the information was or is and he or she cannot merely state a custom of

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<sup>36</sup>The recommendation will not limit the interests to solely those of the submitter. If the agency inspector got the secret information from an agent, a commercial supplier, or other third party, the agency would still have the primary relationship of trust with the real party in interest who owned that data. Since the courts would grant standing to the owner as well as to the actual submitting person, it makes no sense to artificially limit prediscovery rights to the actual transmitter of the owner’s data.

<sup>37</sup>Information in an issued patent is public. But commonly a patent is employed with nonpublished know-how revealing only to licensees the means by which the patented invention can best be utilized. It is correct to say that some portions of all patented inventions are public, but not every feature of an invention necessary to exploit a patent is public. Also, before patent issuance, the information can be a trade secret. 1 R. MILGRIM, *TRADE SECRETS* (1967, 1981 Supp.).

<sup>38</sup>*Worthington Compressors Inc. v. Costle*, 662 F.2d 45, (D.C. Cir. 1981).

<sup>39</sup>Current law excludes a noncommercial laboratory from the (b)(4) exemption, see *Washington Research Project Inc. v. Department of HEW*, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974).

nondisclosure, or a desire to avoid intangible effects of embarrassment which would have no commercial or business adverse impacts.

Thirdly, the interest must be one of four identified: commercial, financial, business or research. The first two, commercial and financial, have been covered in approximately sixty decided cases. Their case law is well settled.<sup>40</sup> The "business" category responds to the extensive ACUS comments of the economics scholars at Babson College. Professors Casey, Marthinsen and Moss defined "circumstantially relevant business information" as those pieces of valuable knowledge of time and place which aid the entrepreneur or business entity to gain advantages:<sup>41</sup>

CRBI consists of knowledge of where bargains can be found, . . . knowledge of the true risks as compared to the perceived risks of an innovation; . . . knowledge of where resources are believed to be undervalued and where resources are believed to be overvalued. This knowledge, while innocuous and mundane to federal executives, may be of immense importance to competitors of information submitters. . . . Frequently, it is fragmented and its economic value difficult to assess. The loss of any one piece of this information may not cause significant and statistically quantifiable harm to society or perhaps this firm. Yet, this information is essential to the impersonal decisionmaking processes of a free society. . . . It is the underlying current which provides direction and a broad-based foundation for the application of scientific discoveries.

Though this present author claims no economic credentials, there have been in my experience many instances of valuable information produced by clients which, while not immediately "commercial," had the potential to serve as a foundation for commercial developments in technology or business development in the future. Proof of commercial status might be quite difficult, for example, for an entrepreneur with an unpatented system which others may be able to duplicate with effort but which for the present time provides a marginal benefit to the entrepreneur's research. "Commerce" in that information may be years away, but its business value is current. The surgeon who finds a better way to perform a complex surgical operation may wish on some future date to host a profitable seminar for other surgeons, or just to gain more referrals from physicians with his success on patients. Surgeons do not "compete" in the colloquial sense but they do have a business interest in enjoying the fruits of their innovative labors.<sup>42</sup> So expansion from the commercial to the business category is justifiable.

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<sup>40</sup>See for illustrations of cases explaining these terms, 1 FEDERAL INFORMATION DISCLOSURE, note 2 *supra* at § 14.07.

<sup>41</sup>Hearings, note 25 *supra* at 642.

<sup>42</sup>Florida Medical Ass'n v. Department of HEW, 479 F. Supp. 1291 (M.D. Fla. 1979).

Exemption of noncommercial "research" comes to the recommendation with a very strong constituency—academic researchers, medical schools, and the government's principal health promotion agency, the U.S. Department of Health and Human Services (HHS). Commercial "research" will already be covered under past case law, but the narrow interpretation which the D.C. Circuit has placed on exemption (b)(4) has put into jeopardy the ability of government to obtain private-sector academic and nonprofit research information.<sup>43</sup> Of course, the incentives in noncommercial research are most often to publicly disclose the information in a published article, or in a patent which when finally issued produces license fees to aid the research institution's work. But those protective purposes are barred by at least one Circuit from protection, and Senators Dole and Kennedy agreed in 1974 that the exemption should be re-examined to consider its coverage of these noncommercial researchers' efforts.<sup>44</sup> The American Association of Medical Colleges and other institutions support the change and the Department of HHS strongly favors the recommended change to reach such noncommercial "research".<sup>45</sup> Since virtually all of noncommercial research comes into the public realm after a brief delay for publication or licensing, the interim period is deserving of protection.

A fourth characteristic of this recommendation is that the interest sought to be protected must be legitimate. If the firm claims commercial protection for bribery records showing corruption of a federal agency contracting officer, for example, it may suffer some embarrassment but the public has a clear right to knowledge of the illegitimate activities. A legitimacy standard could be attacked as too judgmental, but it or a comparable concept is needed. The FOIA allows public oversight and detection of agency misfeasance, and illegitimate transactions between contracting agencies and their contractors would be the kind of misconduct for which the FOIA was intended.

A fifth criterion is that this identified, private and legitimate interest may be impaired if the information is disclosed. A reservation of reasonableness is implied. When impairment is too remote to be credibly claimed, the agency (and if asked, a court) will dismiss the claim. The Senate Constitution Subcommittee bill makes the test "could impair",<sup>46</sup> and that seems marginally better to those who seek a more definite showing by the submitter of potential adversity. Because the

<sup>43</sup>Washington Research Project Inc. v. Department of HEW, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974).

<sup>44</sup>SOURCE BOOK, note 14 *supra* at 353.

<sup>45</sup>Hearings note 25 *supra* at 307 (Testimony of Dr. Stuart Bondurant). ACUS comments of Rand Corp., Battelle Memorial Institute, and Department of HHS.

<sup>46</sup>S. 1730, note 4 *supra*, at § 9.

purpose of the reform is to avoid quantitative economic displacement arguments, a shift to "would impair" is avoided in the recommendation, to avoid the appearance of a probabilistic analysis of market displacement like "substantial" competitive harm.<sup>47</sup>

Embarrassment for officials of a private firm is not a sufficient reason for withholding. Because the exemption is tied to interests of the institution, entrepreneur or researcher, many of the mundane embarrassing details which one might wish not to reveal fall outside the exemption. What is intended to be covered are disclosures of confidential data which damage commercial position, sacrifice marketing lead time for new products, or the like. The agency and the court are capable of weeding out inconsequential grounds from deserving ones.

Legitimacy is to be shown by the submitter, when an allegation of wrongdoing is made, so that bribery or fraud can be exposed. Bribe givers' business "interests" will never receive commercial confidential status. The actual cases in which the new exemption will be overextended into bribery, corruption or other illegitimate activities are likely to be few. The agency will bear costs of suit, attorneys fees, risks of personal punishment, and the opprobrium of publicity if it uses the FOIA exemption to cover up illicit activities.<sup>48</sup>

#### The Effect on Discretionary Disclosure

The Committee on Regulation of Business also recommended that agencies not have statutory disclosure discretion for information which fits within the recommended exemption.<sup>49</sup> Discretion would operate only if the agency made a finding of an overriding public interest warranting the disclosure. The Senate Constitution Subcommittee passed a comparable provision in its bill in December 1981.<sup>50</sup>

Privately generated information is different from agency-generated manuals or memos, in that private funds were spent with some expectation of value in return, and the generated document is only incidentally in the custody of the agency rather than of its owner. So the private information situation should properly give an agency *less* disclosure discretion than is permitted for agency documents.

The 1974 Privacy Act takes this same approach to personal privacy. In the exemption (b)(6) context, under the FOIA, discretion to waive exemption (b)(6) and disclose private data is functionally limited by the

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<sup>47</sup>"Would" impair is a legal quantification standard, which would lead the courts toward the same swamp of probability analysis into which the courts fell into with the *National Parks v. Morton* "substantial" harm test. The potentiality in "could" impair is better than the projection of likely outcomes in a release setting which "would" requires.

<sup>48</sup>5 U.C.S. § 552(a)(4)(E-F).

<sup>49</sup>Recommendations to the Administrative Conference, December 1981.

<sup>50</sup>S. 1730, note 4 *supra*, at § 4.

restraints of the Privacy Act, where that statute applies.<sup>51</sup> This recommendation will have discretion limited for (b)(4) information. Since exemption (b)(6) covers some financial and entrepreneurial data for individuals, as does the Privacy Act, this provision is not unprecedented.<sup>52</sup>

*Limited* discretion is not *removed* discretion. The agency *can* disclose the information, but it must find a public interest; it must consider the competing interests of privacy and public access; and it must find that the public interest overrides the private rights, before it can exercise that disclosure discretion.<sup>53</sup> By the time the agency makes its ten-day disclosure decision under current law, it has had virtually no time to consider whether private owners' loss of valuable licensing rights is overridden by the public need for that technical data. This recommendation would compel agencies to sift the competing interests and make an informed decision.

The Administrative Conference received favorable comments on the matter of mandatory withholding from both the largest processor of commercial data requests, the Department of HHS,<sup>54</sup> and the largest defender of FOIA cases, the Justice Department,<sup>55</sup> and also from associations, small business firms, foreign commentators, and larger businesses.<sup>56</sup> There were dissenting views which objected strongly to removal of the opportunity to waive discretionary exemptions.<sup>57</sup>

The agency could benefit from a shift to a public interest disclosure standard. First, it would extinguish many of the unidentified blind search services which now populate the Washington area and make FOIA requests with essentially a governmental subsidy.<sup>58</sup> Second, iden-

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<sup>51</sup>Compare 5 U.S.C. § 552a(b) with 5 U.S.C. § 552(b)(6). There can be no discretionary disclosure of individually identifiable information in a system of records covered by the Privacy Act. That withdrawal of discretion is comparable to the withdrawal of discretion here, in that once the definition of coverage is met the discretion is removed.

<sup>52</sup>Florida Medical Ass'n v. Department of HEW, 479 F. Supp. 1291 (M.D. Fl. 1979).

<sup>53</sup>There must be a determination in writing by the agency. This disciplines the agency to avoid flippantly discarding private protections whenever mere convenience suits the agency, and better suits the norm of sound agency practices for such informal adjudications of irremediable private rights. S. 1730, note 4 *supra*, at § 4.

<sup>54</sup>ACUS file comments by Dept. of HHS (Russell M. Roberts).

<sup>55</sup>The administration position was expressed to the Committee by a member, Asst. Atty. Gen. Jonathan Rose.

<sup>56</sup>The Committee received written submissions from groups as small as the Public Citizen Litigation Group and the Westport, Conn. Chamber of Commerce, and as large as Exxon and Dow.

<sup>57</sup>Committee member William Butler filed a written dissent on Dec. 10, 1981 at the ACUS Plenary Session, which is available in the ACUS file.

<sup>58</sup>The text of S. 1730 contains a requirement that requesters must identify themselves and the party for whom the request is made. One of the co-owners of FOI Services Inc. advised the author, on the day after adoption of S. 1730, that the provision was unenforceable and did not present any problem as he saw it.

tified competing firms rarely will have a "public" interest for their access to competitors' filings. Third, a requester identifying a public interest tells the agency what it believes to be a useful rationale for disclosure of that type of document . . . a bit of information which the agency may not have recognized.<sup>59</sup> Fourth, the agency will have at least somewhat of a "record" to be reviewed. Requesters have their existing rights not to disclose their purpose or motivation if they choose not to do so; that remains their right.<sup>60</sup> But for the limited class of business confidential information, such silence about who is requesting the information and for what public purpose will continue to suggest an absence of real public benefit to the disclosure. A group of surgeons seeking FDA information about a surgical product will likely have no trouble in obtaining information, while a Geneva-based Swiss distributor of a competing product is unlikely to maintain the request when asked about any "public" benefit aspects. Since the discussion is limited to exemption (b)(4) commercial data, the vast majority of requests for which are from competing firms (often through intermediaries), the agency will also get the benefit of more time to focus upon those truly public requests from identified representatives of some noncompeting request organization.

So the limits on discretionary disclosure alleviate many of the agencies' problems, do not eliminate request opportunities for real public representatives, and assure the owner who submits the information that a thoughtful and principled consideration of its private interest will occur, beyond that casual consideration which agencies may choose to give under present law.

### The Legislative Direction

Two amendments to exemption (b)(4) were considered before the current Ninety-Seventh Congress. In the course of floor debate in the 1974 Senate consideration of FOIA amendments, Senator Dole of Kansas proposed an expansion to cover noncommercial research. The expansion was sidetracked to permit the other amendment matters to go through, with the promise of Senator Kennedy that noncommercial research would be considered separately.<sup>61</sup> In 1979, Dole again considered amendments, with his introduction of S. 2397, a comprehensive statutory change to both the FOIA procedures and substance of ex-

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<sup>59</sup>For example, if the requester seeks to police the agency's statute against a violator by checking up on the agency action against the violator, the statement concerning such purpose may be the first time the agency has heard of the violation.

<sup>60</sup>A requester who chooses not to identify itself or its principal party is free to take its chances with an insufficiency finding and rejection of the request by the agency.

<sup>61</sup>SOURCE BOOK, note 14 *supra* at 353.

emption (b)(4).<sup>62</sup> That ambitious change had the endorsement of a number of business groups, particularly those commenting on the Administrative Conference study in 1981.

An amendment to change the procedures of submitter information-handling but not the exemption itself was offered by Representative Richardson Preyer in 1979, and by his successor Representative Glenn English in 1981, and both made fewer changes to the Act than any of the Senate bills.<sup>63</sup> Senator Hatch introduced S. 1730 with business confidentiality exemption changes in 1981.<sup>64</sup> The administration bill, when introduced in late 1981, went with the Hatch definition and made the discretionary withholding into a mandatory public interest type of test, as the original Dole bill had favored.<sup>65</sup>

The S. 1730 which passed the Senate Judiciary Committee's Subcommittee on the Constitution contains portions of the Dole bill, a large amount of Senator Hatch's bill, pieces of the Administration bill, and significant amendments proposed at the staff level by public interest groups, agencies and submitters. The bill as passed also incorporated amendments offered by Senator DeConcini, but these did not alter the substance of exemption (b)(4). As this article goes to press, Senate Judiciary Committee consideration is expected in early February 1982.<sup>66</sup>

#### A Note on Operational Changes

"Substantial competitive harm" is the measure by which commercial property rights have been tested.<sup>67</sup> Like pornography, some judges and some agencies prefer to "know it when they see it" instead of defining it more particularly. A few examples of current law and the ACUS Committee recommendation may be useful.

University professor *A* wishes to import a special machine for rare

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<sup>62</sup>S. 2397, 96th Cong. 1st Sess. (1979) was a landmark bill. It would have required clear and convincing evidence before the agency could make a disclosure of a confidential business document. S. 1730 was a compromise which reduced that threshold requirement.

<sup>63</sup>These bills were essentially operational changes to disclosure procedures, with some beneficial provisions but with others making changes opposed by the business community, such as automatic transfer of venue and submitter-paid legal fees for requesters. H.R. 5861, 96th Cong. 1st Sess. (1979); H.R. 2021, 97th Cong. 1st Sess. (1981).

<sup>64</sup>S. 1730, 97th Cong. 1st Sess. (1981).

<sup>65</sup>S. 1751, 97th Cong. 1st Sess. (1981).

<sup>66</sup>Amendments on the (b)(4) exemption will be offered in the Senate Judiciary Committee by Sen. Patrick Leahy. For a very comprehensive discussion critical of the proposed S. 1730 changes, see Adler, Halperin & Hitchcock, Joint Statement on Proposed Amendments to the Freedom of Information Act, filed with Senate Judiciary Committee record of FOIA hearings, Nov. 12, 1981 (hearings record to be printed 1982).

<sup>67</sup>National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).



and extremely important work in catalysts for shale oil, to be done at the university in anticipation of future publication of the chemical discovery (or perhaps licensing by the university to energy firms). Her research is noncommercial, so she cannot qualify for (b)(4) exempt status<sup>68</sup> and Customs Service filings would be accessible under current law. Her work is "research" and the incoming machine's identity tells commercial scientists that this type of catalyst work can be done in practice for the first time. They would not be able to obtain that information under the proposal for her legitimate research interests would be impaired by losing the innovative lead time over commercial catalyst scientists.<sup>69</sup>

A small business firm negotiating with a prospective purchaser learns that the purchaser has requested disclosure of the firm's last three Occupational Health and Safety Administration (OSHA) inspections, a NIOSH study of its specialized manufacturing process, and Labor Department files of its work force analysis by job title and pay rate. Usually, detailed information would be available in the negotiation process but would require the purchaser to take normal commercial risks in the purchase. Disclosure would in this case not be to a competitor, and no loss of market position would flow from the disclosure, so it would be problematic to predict whether (b)(4) exempt status will be accorded to the small business. The recommended bill protects the legitimate commercial interest of the weaker party in those negotiations. (In the Mitsubishi licensing case, discussions broke off after the Japanese firm obtained four U.S. firms' process data from NIOSH and decided not to license one of the firms' technical data.)<sup>70</sup>

A more important operational change would be the message to submitting firms that the agency can be expected to protect the private information. The agency's discretion is narrower; the scope of protection is better defined; the rights of procedural due process are improved. There was a remarkable diversity of size and business fields among the commentators who filed views in response to the Administrative Conference.<sup>71</sup> The operational effects for them would probably

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<sup>68</sup>Washington Research Project Inc. v. Department of HEW, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974).

<sup>69</sup>"Impairment" in the research context will most frequently be loss of advantage in time of public announcement, since academic publication is often barred where premature disclosure occurs. Publication priority would be the individual interest protected; while publications aid tenure and academic competition currently is extremely difficult, it is not "commercial."

<sup>70</sup>Hearings, note 25 *supra* at 553.

<sup>71</sup>Small business associations, an individual patent lawyer, Exxon, Mobil and Gulf, all filed comments, which are available as part of the Committee file at the Administrative Conference.

be universally to strengthen the incentives for the firms to submit confidential data to federal agencies. Even the Government of Canada, an unusual but helpful commentator, expressed support for such incentives.<sup>72</sup>

Operational changes will be felt by the agencies. Fewer requests will come in and none will be "blinded" for intermediaries.<sup>73</sup> Economists will not be needed for market share assessments in anticipation of litigation. The process of assembling defenses for suits by submitters will be unnecessary. Although agencies often choose to give notice today, some refuse,<sup>74</sup> and these recalcitrant few will find that notice-related correspondence on the subject of the impairment will increase as compared to the silence which accompanies disclosure without notice to the submitter.

Courts will likely have the typical first year's load of new cases,<sup>75</sup> settling back thereafter to a lower volume of pending cases as fewer submitters need to litigate and the universe of requester (b)(4) suits shrinks with the shrinkage of the universe of commercial requests. Since courts routinely adjudicate commercial reasonableness questions in equity and contract matters, the substantive change to the exemption brings little that is new to the courts. A trial court which heard a contract dispute Monday, a trade secret theft injunction on Wednesday, and a submitter's FOI disclosure injunction action on Friday, is better equipped to handle matters of reasonable impairment of commercial interests than is an official who deals with licensing of canoe franchises or grading of sows. It is unfortunate, but true, that disclo-

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<sup>72</sup>ACUS file, comments of the Embassy of Canada.

<sup>73</sup>Fewer requests will come in because the disclosure of the private data within the classes will depend on a showing of public interest or a rebuttal of confidential interest status. These will require, in virtually all cases, that the true public dissemination intention of the requester be known. For example, if a public interest group began a subscription service selling its FOI documents along with other documents for \$280 per year plus copying costs, the intended resale to private attorneys of documents received in the "public" interest would be a material fact which the public interest group would have to reveal to the agency. See Health Research Group/Public Citizen Intraocular Lens Clearinghouse, subscription service for IOL plaintiffs, documents in S. Const. Subcomm. FOIA file (1981).

<sup>74</sup>E.g., the FDA and the Equal Employment Opportunity Commission, see ACUS file of public comments to the Committee on Regulation of Business inquiry.

<sup>75</sup>Opponents of change argue that courts will now have to interpret new terms and that this will produce more litigation than "substantial competitive harm" has produced. See Adler paper, note 66 *supra*. Definitional clarity can be added by Congress in text or legislative history. A federal court, not Congress, created the "substantial competitive harm" test. Courts will have much less leeway interpreting what Congress has defined than they will with a phrase of their own creation. The fear of new things is universal but it rarely stops Congress from making needed changes, particularly where words like *commercial*, *financial*, and *business* are so commonplace in legal lexicons.

sure authority has often been delegated to program officials, with a bare minimum of guidance and little or no budget/financial support for the costs of making intelligent disclosure decisions on private documents.<sup>76</sup> Limitations of discretion at that level make logical sense, and the federal court is a far better forum for presentation of commercial confidentiality's peculiarly complex rationales.

The submitter, of course, pays a price for greater predictability of the outcome of the agency action. The burden is on the submitter to claim and then to demonstrate the existence of an interest. If the requester asserts that the private interest is an illegitimate one, the burden is on the submitter to respond. If the agency by rule requires premarking of confidential status for all submissions, then the burden is on the submitter to do that marking.<sup>77</sup> Although the submitter still bears litigation costs in defense of the data, all of the sides—government, requester and submitter—are spared the current, considerable expense of economic testimony<sup>78</sup> to establish predictions of relative market displacement under the “substantial” harm test.<sup>79</sup>

#### Review of the Substantive Exemption Issue

We face a problem which was not anticipated, fifteen years or more ago, when exemption (b)(4) was instituted. Its unpredictability, as judicially defined, impairs agency access to private data. Its variations puzzle the student and scholar as well as the next judge to interpret the standard. The perception of real trouble really exists. The actual cases exist but with the unusual factor of strong disincentives to reporting of “live” controversies. The perceptions and the incidents of abuse underscore our systemic problem, which has to be addressed by a systemic solution of changes to the legal standard by which the agencies in the first instance, and ultimately the courts, make their informal adjudicative decisions on contested matters of disclosure of private information.

The consequence of not making a change would be to confirm a mistake, and to leave even more of the business-agency interaction up

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<sup>76</sup>See *Hearings*, note 25 *supra* at 778 (testimony of Bruce Moyer for American Society of Access Professionals).

<sup>77</sup>I do not endorse mandatory marking requirements, as discussed below, since so much information is observed and recorded by inspectors without formal submission, and since past confidential submissions would be jeopardized by such a practice.

<sup>78</sup>Most submitter cases have included extensive economic expert witness affidavits supporting the claimed displacement in competitive position. See, e.g., *Hearings*, note 25 *supra*, at 620–25, for such an example.

<sup>79</sup>The submitter normally will not receive fee awards and the submitter should not be forced to pay the expenses of the requester in obtaining the submitter's private documents.

to expensive litigation that will divert agency, submitter and requester resources. Since the FOIA is already quite costly, the optimal solution would be one which emphasizes public interests in access to particular private documents, while allowing for easier transmission of private data to federal agencies through reasonable assurances of protection. The flaws in the 1966 Act have caused an erosion of confidence in the government's ability to properly conduct its own and the general public's business, and correction of the business-data flaws should merit a high legislative priority.

### III. THE RIGHT TO NOTICE PRIOR TO AGENCY DISCLOSURE

Mobil Oil Corporation and the Public Citizen Litigation Group tend to have rather divergent views. It was a mark of the consensus favoring change to the FOIA that both agreed, in their respective comments to the Administrative Conference, that submitters of private information should receive notice before the agency discloses private information.<sup>80</sup> Notice is part of the procedural reforms which the ACUS Committee on Regulation of Business recommended. The study of this corner of administrative due process must begin with those basic questions, what process is "due" and to what extent can an administrative agency accommodate procedurally the differing interests of competing private persons.

When a FOIA requester seeks agency documents, the process is two-dimensional, with agency rights and privileges at stake. But when the documents are private commercial files, formulas, processes, or strategic plans which the agency happens to hold at the time of the request, then the process takes on a third dimension in which the real party in interest is the submitter, not the agency. Our 1966 FOIA assumed erroneously that disputes would be two-dimensional, so it omitted a submitter procedure for involvement in the agency disclosure decision. Though some agencies have evolved *ad hoc* procedures for the provision of oral or written notice, others adamantly refuse.<sup>81</sup> The omission of notice has drawn virtually universal suggestions for a statutory reform, and the statutory change should uniformly apply to all agencies.

The "due" process in APA terms for informal adjudications of property rights is basically a notice, to the holder of the rights, of their

<sup>80</sup>These comments are available in the Administrative Conference files.

<sup>81</sup>The FDA and EEOC refused to provide such notice and so informed the ACUS Committee, *id.*

anticipated termination, and some opportunity for the affected person to communicate objections for the agency's consideration.<sup>82</sup> Information-possession rights are essentially rights to exclusive possession, which can be traded for statutory exclusivity by patents or other special licensing protections, or can be sold for license fees.<sup>83</sup> Government's largest volume of private information is not purchased by the acquiring agency but comes in through a multitude of reporting and inspection systems. Except where the government has purchased the information itself and is thereafter free to disseminate it, the owner does not routinely waive any possessory rights in relation to other private persons, merely by submission to an agency.<sup>84</sup> The sausage manufacturer who invents a new machine must show it to Agriculture Department inspectors, but does not waive licensing rights or the right to patent the machine merely by sharing the knowledge with government agents.

Notice that government intends to disclose private information is the bedrock of all other procedural rights. The procedural rights take some time and effort on the agency's part, with notice requirements adding marginally to agency processing costs for FOIA operations. But the provisions of the notice and objection opportunities is not inconsistent with the FOIA. As Judge Harry Edwards wrote in December 1981 in the *en banc Crooker* decision in the D.C. Circuit:<sup>85</sup>

FOIA was primarily envisioned as a workable disclosure statute. . . . But our recognition of this explicit purpose should not obscure a secondary, but nevertheless fundamental, aspect of the bill—i.e., to exempt certain limited categories of documents from mandatory disclosure in order to protect individual rights and to permit the effective operation of the Government.

It would make little sense to argue that notice which protects those exemption rights is inconsistent with the FOIA; without notice in the

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<sup>82</sup>The landmark case on this point, *Goldberg v. Kelly*, 397 U.S. 254 (1970), addressed a financial benefit. But the property rights protected "extend well beyond actual ownership of real estate, chattels, or money," *Board of Regents v. Roth*, 408 U.S. 564 (1972). Objections to federal agency dissemination of proprietary data do raise constitutional issues, but these have to date been addressed only obliquely as courts have devoted their primary attention to special statutory disclosure schemes. *Chevron Chemical Co. v. Costle*, 641 F.2d 104 (3d Cir. 1981).

<sup>83</sup>Licensing is a sale of part of the exclusive possession in return for either a flat fee or a royalty fee. See 2 R. MILGRIM, *TRADE SECRETS* (1967, 1981 Supp.).

<sup>84</sup>In rare instances, the government may take such rights and provide a compensation amount in return for the demise of the exclusive possession. Federal Insecticide Fungicide & Rodenticide Act, 7 U.S.C. § 136a(c), and see *Chevron Chemical Co. v. Costle*, 641 F.2d 104 (3d Cir. 1981).

<sup>85</sup>*Crooker v. Bureau of Alcohol Tobacco & Firearms*, No. 80-1278 slip op. at 31-32 (Dec. 8, 1981).

(b)(4) context there would be little incentive for implementation of the commercial exemption, for private firms would not know when or if agencies waived the permissive exemption. The notice provision is even more consistent with the FOIA as it may be after substantive amendments are made, for notice allows the identification of the precise interests which the submitter will have to assert, and it triggers the objections upon which the "public interest override" standard will be applied.<sup>86</sup>

Notice is fully consistent, also, with the Administrative Procedure Act. In the 1979 *Chrysler* decision,<sup>87</sup> the Supreme Court vacated a Labor Department decision that was premised on rules which failed to follow APA promulgation procedures for substantive rulemaking. When Congress adopted the APA, the Court said, it "made a judgment that notions of fairness and informed administrative decision making require that agency decisions be made only after affording interested persons notice and an opportunity for comment."<sup>88</sup> Had the Department taken procedural steps to consider the "concerns about personal privacy and business confidentiality" it might have reached a "different accommodation" of these interests with the public access interests asserted in disclosure requests.<sup>89</sup> Like the APA rulemaking provisions, which give notice so as to "fairly apprise interested parties . . . so that they may present responsive data or argument relating" to rulemaking issues,<sup>90</sup> notice to submitters calls on the submitter to present responsive substantiation of interests and of legal argumentation.

#### Developments on Notice Procedures

The mood of Congress toward notice to submitters is evidenced by 1980 and 1981 legislation which specifically mandated nondisclosure of business information, and required notice if the agency disagreed with the submitter's assertion that the information should be withheld from FOIA requesters. That legislation applied to the FTC<sup>91</sup> and the Consumer Product Safety Commission (CPSC).<sup>92</sup> But a large agency which handles many competitive requests for commercial data, the FDA, has refused to give notice.<sup>93</sup> When that refusal was first tested in

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<sup>86</sup>That is, the submitter will detail how the information reflects a private right and the requester will speak to the public right. See S. 1730, note 4 *supra*, at § 4.

<sup>87</sup>*Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

<sup>88</sup>*Id.* at 316.

<sup>89</sup>*Id.*

<sup>90</sup>S. Rep. 752, 79th Cong. 1st Sess. 15 (1945).

<sup>91</sup>Pub. L. No. 96-252, 94 Stat. 385, adding 15 U.S.C. § 57b-2 (1980).

<sup>92</sup>Pub. L. No. 97-35, 95 Stat. 713, amending 15 U.S.C. § 2055 (a) (1981).

<sup>93</sup>ACUS file, comments of Department of HHS.

the abstract, upon the agency's issuance of final rules, the district court held that FDA would not be required to give notice because "any time the issue of confidentiality reasonably arises under a request for FOIA information," FDA would give notice, and the court observed that FDA rules on notice would be "generously and liberally interpreted" by the agency.<sup>94</sup> Six years later, middle-level supervisors in district and headquarters offices are routinely disseminating competitively sensitive information with no notice to the submitter and with results which are quite unsatisfactory to those submitters responding to the ACUS inquiries. Congress told the FDA in 1976 to be more careful with commercial data in the field of medical devices, and Congress may again overhaul the agency's procedures in future food or drug legislation.

Apart from that single FDA court case, the right to advance notification has been rarely contested as a straightforward issue. More frequently the submitter merely refused to supply documents to the agency. The subpoena process led to court and the court ordered the agency to provide notice.<sup>95</sup> Where the agency lacked subpoena power the agency often received no documents or agreed to a visual check without agency possession of the "records." Professor Stevenson's report to the Administrative Conference Committee explained these game techniques for submitters to avoid agency possession, in great detail.<sup>96</sup> Courts can no longer invent a creative remedy to force advance notice upon a vigorously opposed agency, however, and as Judge McGowan told the Congress in 1981, federal courts which formerly used procedural remedies to expand upon the APA "are out of the procedural expansion business completely, by the provisions of the *Vermont Yankee* case."<sup>97</sup> So, apart from subpoena-resistance cases with judicially imposed notification, agency notice procedures are merely a matter of the indulgence or self-initiated practices of the individual agency.

The quandary, then, is that without notice there are no other procedural rights. There is no post-release remedy under the Federal Torts Claims Act.<sup>98</sup> When Congress has recently considered the matter

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<sup>94</sup>*Pharmaceutical Mfrs. Ass'n v. Weinberger*, 401 F. Supp. 444, 411 F. Supp. 576 (D.C. 1976).

<sup>95</sup>*Exxon Corp. v. F.T.C.*, 589 F.2d 582 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

<sup>96</sup>STEVENSON REPORT, note 24 *supra* at 44, *et seq.*

<sup>97</sup>*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Hearings, Regulatory Reform Act, Before the House Judiciary Comm.*, 97th Cong. 1st Sess. (Sept. 10, 1981) (testimony of Carl McGowan for the Judicial Conf.); see also Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

<sup>98</sup>28 U.S.C. § 2680(h).

it has used advance notice as an explicit mandate for the FTC and the Consumer Product Safety Commission (CPSC). And it is likely to make notice a general requirement soon.

The 1981–82 Congress has seen procedural rights to notice included in every one of the major FOIA bills,<sup>99</sup> most prominently in S. 1730, which passed the Senate Constitution Subcommittee in December 1981 and is awaiting Senate Judiciary Committee action as this issue goes to press.<sup>100</sup>

### Do Benefits of Notice Exceed Its Costs?

The transaction costs of notice are first, the promulgation of rules relating to notice, and second, the mailing of letters or making of phone calls informing the submitter's designated contact person about the pending disclosure. (Since agencies will not give notice when they have decided not to disclose, or where the information is already public, the number of letters to be sent is much less than the number of incoming FOIA requests.)<sup>101</sup>

Notice has not proven to be exceptionally burdensome for several of the agencies which use the procedure, such as the Antitrust Division of Justice, the SEC, the National Highway Traffic Safety Administration, and the CPSC.<sup>102</sup> Fear of the burden is expressed by other agencies.<sup>103</sup> But a concern for fairness is felt by agency lawyers, one of whom called for notification of submitters, to avoid "disclosure by ambush".<sup>104</sup>

One intangible benefit of notice is a reduction in friction at the incoming-data stages. There is no need for resistance to requests if the agency can and will promise advance notice and adequate protections. If objections are entertained and considered, the motivation for suing the agency to block disclosure is lessened. But as one commentator noted: "Without the participation of the submitter, the agency's determination of the competitive consequences of disclosure can be given

<sup>99</sup>S. 1247, S. 1730, S. 1751, H.R. 4805, H.R. 3928, H.R. 2021, all 97th Cong. 1st Sess. (1981).

<sup>100</sup>S. 1730, note 4 *supra*.

<sup>101</sup>S. 1730, note 4 *supra*, § 4 excludes from notice matters that are public, matters that are required to be made public by a specific statute, matters which have not been designated according to an agency's designation rules, or (most significantly, in terms of decreasing the number of notices) matters which the agency has decided to withhold from disclosure.

<sup>102</sup>Interviews with Justice Department, Antitrust Division, and SEC FOI officers; and ACUS comments filed by CPSC and NHTSA.

<sup>103</sup>FDA/Dept. of HHS comments, and EEOC comments in ACUS file.

<sup>104</sup>This was the view of Navy Department counsel, *see* English, *Protecting the Stakeholder*, 31 *Ad. L. Rev.* 151 (1979).



little credibility.”<sup>105</sup> Credibility in the decision to disclose lessens the motivation for reverse-disclosure lawsuits. The disputes avoided by notice may be illustrated by a case of intent and a case of mistake, both involving an agency which has refused notice. In the first case, the agency supervisor assumed that since all firms used formaldehyde treatments for valves, agency inspectors’ information about a firm’s formaldehyde treatment process was already known to its competitors. In fact, the time, concentration and temperature vary considerably among competitors, each of whom safeguard those trade secret process details.<sup>106</sup> In the second case, an agency lawyer took a submission which contained the name of a trade secret chemical, and the second copy submitted with that name removed, and mailed them both to the larger competitor of the firm which used that trade secret chemical. The agency apologized for the mistake.<sup>107</sup> In each case, a notice letter would have triggered submitter input that would have saved the agency from the criticism it received for the disclosures.

A tangible benefit of notice would be the lessening of those reverse-disclosure lawsuits which are started in anger by a firm which learns accidentally, or by screening the agency’s FOIA log, about the pending disclosure. If litigation is the only way to get relief, as it would be if no notice were given, then the agency would bear the litigation costs each time it was discovered to be about to release a private document. Use of an administrative recourse cuts down on litigation by encouraging compromises and by putting the submitter to its proof at an early stage, before the position of the submitter hardens into a lawsuit.<sup>108</sup>

If a lawsuit results, notice has given the agency facts about the information and its submitter which the agency otherwise would not have had. Economists who filed comments in the ACUS record favored notice to submitters, as a means of communicating to the agency the importance of the piece of circumstantially relevant business informa-

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<sup>105</sup>Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act*, 29 AD. L. REV. 193, 204 (1977).

<sup>106</sup>Taylor, *Businesses Lobby to Reduce Public Access to Data They Disclose to Federal Agencies*, Wall St. J. Dec. 15, 1981 at 31.

<sup>107</sup>Letter from Gerald Deighton, FDA, to the author, December 1980, submitted to and filed in the ACUS 1980 file of this project. This disclosure incident benefited a medical device firm four times larger than the author’s client in obtaining access to what may have been the first FDA-approved chemical for use in this specialized application.

<sup>108</sup>The submitter faces a “put up or shut up” choice. The information is objectively defensible or it is not. When the owner gets no notice but finds out before disclosure occurs, then the subjective feeling that the agency has unfairly threatened a piece of the submitter’s commercial property adds a certain emotional aspect which leads to unnecessary litigation and retards settlements.

tion in the particular setting of that submitter.<sup>109</sup> For example, an FOI official of the FTC's Bureau of Competition may appreciate baked salmon for lunch, but may be unable to appreciate the facts which aid determinations of competitors' strengths and weaknesses in the salmon fishing industry in the Pacific Northwest.<sup>110</sup> No administrator can be expert enough to summarily identify the knowns and unknowns of an unfamiliar industry. The agency benefits from the factual input of the submitter, when it seeks that input, even if eventually it comes to an opposite legal conclusion upon those same facts. An agency which guesses wrong without notice is making an error which it could easily avoid through notice at slight cost to the agency.

The commentators generally note that all other rights are mooted if disclosure occurs without notice. They have strongly agreed with notification of the submitter.<sup>111</sup> An excellent analysis by one commentator found that due process required notice in advance.<sup>112</sup> Although the Supreme Court has often permitted agencies to hold hearings after deprivation of an economic nature has already occurred, "such a course is meaningless with regard to FOIA disclosures, which do not temporarily disrupt interests in submitted data, but destroy them altogether."<sup>113</sup> And commentators from the consumer movement have also endorsed the concept of notice.<sup>114</sup> The letters and submissions

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<sup>109</sup>ACUS file comments of Casey, Marthinsen and Moss, Babson College; see also *Hearings*, note 25 *supra* at 639.

<sup>110</sup>The FTC disclosed 3,000 pages of a fishing firm's competitively sensitive financial documents, including profit and loss reports, to other firms which were in direct competition with Wards Cove Packing Company, after a confidentiality claim had been validly made and accepted at the regional FTC office. The FTC headquarters disclosure came without notice. The Wards Cove case was one of the incidents leading to the 1980 FTC Improvements Act changes which became 15 U.S.C. § 57b-2. The ACUS file contains *Wards Cove's* strong denunciation of the FTC's "cryptic and cavalier" handling of admittedly sensitive private data. Letters of D. M. Fryer, in ACUS 1981 file, and in ACUS comment file on Stevenson paper, 1980.

<sup>111</sup>Note, *A Procedural Framework for the Disclosure of Business Records Under the Freedom of Information Act*, 90 YALE L.J. 400, 427 (1980); Pitt, *Government Information-Gathering: The Government Viewpoint*, 34 BUS. LAW. 1032, 1034 (1979); Koch & Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 50 (1979); Note *Chrysler Corp. v. Brown*, 29 CATH. U. L. REV. 159 (1979); Patten & Weinstein, *Disclosure of Business Secrets under the Freedom of Information Act*, 29 AD. L. REV. 193 (1977); Connolly & Fox, *Employer Rights and Access to Documents Under the Freedom of Information Act*, 46 FORD. L. REV. 203 (1977); Note, *Would Macy's Tell Gimbel's*, 6 LOYOLA U.L. REV. 564, 611 (1975).

<sup>112</sup>Note, *Protecting Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109 (1980).

<sup>113</sup>*Id.* at 127.

<sup>114</sup>ACUS comment of Public Citizen Litigation Group and Freedom of Information Clearinghouse.

received in support of the ACUS inquiry likewise added support to the notice provisions in the Committee recommendation.<sup>115</sup>

### When Should Notice Be Given?

An omnibus procedural reform should provide a uniform set of conditions for notice, with details of the implementation to be decided by the agencies. Principles of the recommended statutory reform would be that the agency first should make a determination on the face of the request whether the information will or will not be disclosed, taking into account the type of information, the designation (markings, correspondence, or nature of the information) as confidential, and the terms of the request. If the request can be answered with agency-generated information or publicly available data, that set of documents should be sent with a statement that private information also existed.<sup>116</sup> Notice should be given when the agency makes its initial decision that it will disclose the private information, or later if the agency decides favorably on the request after a requester's administrative appeal.

It is unwise for agencies to condition notice upon the filing of a formal confidentiality claim. Perhaps, after some date twelve to twenty-four months after enactment of the reform legislation, agencies could begin modifying their collection forms to provide space for making of confidential status. But so very much data is either acquired by inspectors without letter submissions,<sup>117</sup> or contained in agency files already submitted, that conditioning notice upon formality of submitted claims makes little practical sense. Agencies lived through the problem of Privacy Act implementation and the pains of Paperwork Reduction Act forms clearance,<sup>118</sup> so agencies are unlikely to welcome a directive that

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<sup>115</sup>The ACUS inquiry brought letters from all shades of political coloration, in favor of notification before disclosure. The exceptions were only the FDA and the EEOC.

<sup>116</sup>The FDA currently deletes what it considers secret and discloses the rest with advice that the request may make a second request for deleted portions. Few do, in practice. Under this recommendation, the agency would grant the request as to readily disclosable agency files, copies of publicly available data from private persons, and the like. The requester then can take the notice of existence of private documents, send in a second-level request with a statement of the public interest being presented to override any private interest, and the agency then can treat this special request with care. Such a strategy avoids a confrontation on each request.

<sup>117</sup>OSHA and FDA collect most trade secret materials on walk-around inspections of facilities which are not open to the public. It is vital that these and other agencies not condition confidentiality upon premarking. Such a condition would be manifestly unfair where the agency doing the disclosing has within its sole control the recordation and listing of the secret information.

<sup>118</sup>The forms for each statute were cleared through the Office of Management & Budget, Privacy Act forms in 1975 and Paperwork Reduction Act forms in 1980. If

they revise all submission processes and educate all submitters to the claiming system.

Professor Stevenson's excellent report to the ACUS Committee recommended that agencies should determine by rule what classes of data would or would not be disclosed, so that advance decisions by rule would guide submitters. The EPA has not been satisfied with its experience of such class disclosability determinations, and has used the asserted power only five or six times in 1976–1982.<sup>119</sup> A student commentator remarked that such determinations “will not enable submitters to protect the interests threatened by a particular disclosure and thus (such a policy) fails to serve the essential purpose of notice.”<sup>120</sup> Whether a blanket denial of protectable status could be enjoined as an abuse of discretion is speculative, but inevitably such an action will stir up submitter resistance to the agency.

An instance of class determination in the *Worthington* case<sup>121</sup> shows the shortcomings of the system. The usual theory of class determinations is that they will be made by rule after notice and comment. The EPA program official in *Worthington* made an adjudicative decision that a class of testing data could never be confidential. A competitor made a request within that class, and EPA decided to disclose. The court rejected both the decisional process used and the merits of the EPA's case. The agency official failed to consider the difficulty of duplicating that costly testing data; failed to consider the difficulty of getting reproducible results; and failed to consider potential misuse of misleading data by a competing manufacturer. Sometimes class determinations have been upheld, like the FDA class determination that new drug testing data are protectable under exemption (b)(4) because of the competitive utility of the data.<sup>122</sup> But, as the Committee recommendation for ACUS noted, any class treatment must provide for waivers

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agencies had to see a pre-marking as a precondition to confidential treatment, they would need to revise their forms again to provide the equivalent of the Privacy Act notice on those forms, warning the submitter of potential loss of valuable rights. Compare the absence of such clearance today with § 552a(e)(3) of the Privacy Act, § 8 of Pub. L. No. 93-579, 88 Stat. 1910 (1974), and 44 U.S.C. § 3504, the PRA.

<sup>119</sup>Interview with James C. Nelson, EPA September 1981.

<sup>120</sup>Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109, 134 n.157 (1980).

<sup>121</sup>*Worthington Compressors Inc. v. Costle*, 662 F.2d 45, (D.C. Cir. 1981). That was an instance of the class determination made by an agency program official who granted FOI requests within the class and refused protective requests. The EPA legal staff is careful to point out that the class determination made there, which the court rejected, did not go through the formal class determination processes required of EPA staff offices under 40 C.F.R. Part 2.

<sup>122</sup>*Johnson v. Dept. of HEW*, 462 F. Supp. 336 (D.C. 1978), Civ.No.77-2013 (D.C. 1979).

and exceptions which allow for different conditions of confidential treatment.<sup>123</sup> The decision should be made by the agency whether to invest the time and effort to create a general class determination rulemaking and exceptions system; such a system would likely provide both for disclosure and for withholding, if the agency got into classification at all.

Finally, the means of giving notice when notice is provided should include reasonably efficient contacts to a submitter-designated contact office or person. A phone call by an agency FOI office to the contact person<sup>124</sup> provides the maximum time for response, and may weed out some cases at the outset, e.g., if the once-confidential information has been published or no longer has any competitive value. The phone call then would be followed by a form letter and attachments as appropriate. The Congress has been sensitive to the correlation between useful notice and useful input; so time deadlines should be in working days, and the clock should run from the date of the submitter's receipt of the certified mail notice of intended disclosure. That maximum notice within FOI time limits will maximize the utility and clarity of the submitter's reply.

#### IV. AIRING THE SUBMITTER'S OBJECTIONS

Once the procedural right to notice before disclosure of private information is provided by an agency, the agency can expect that in a large proportion of the cases it *will* receive objections. The agency makes a conscious choice to seek out product formulas, marketing plans, export projections, and the like, and its receipt of objections to their disclosure should be a routinely expected part of the regulatory process, unless the agency has a policy of customarily protecting confidential private submissions.

The procedure Congress will select for handling such objections depends on what Congress wants to achieve. Four characteristics of a sound procedure would be fast decisions, cost efficiency for the agency, a perception of fair adjudication, and the reaching of defensible conclusions. Speed and efficiency suggest an informal process. The perception of fairness suggests that the person who considers the objections should make an independent reexamination of the legal

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<sup>123</sup>ACUS Committee recommendations, note 6 *supra* (December, 1981).

<sup>124</sup>The submitter who wants to have prompt notice should designate a notice recipient, as EPA encourages submitters to do in 40 CFR Part 2. In the absence of such a designee, cover letter signatories or other identified officials should be contacted by the agency by fastest available means, with written confirmation.

status of the documents.<sup>125</sup> The defensibility of the agency's conclusions requires that the agency get its factual questions answered, so that the risk of making the wrong assumption for or against exempt status is minimized.

The unique legal *res* which is the subject of the adjudication makes the administrative proceedings more difficult.<sup>126</sup> The proceedings cannot reveal the content of the private information to the parties. To do so would obviate the whole procedure; if a Pennsylvania toy manufacturer had to explain the true significance of its export plans during a Commerce Department hearing<sup>127</sup> on a Hong Kong toy firm's FOIA request, then the request would be essentially granted and the proceeding mooted because the requester will get sufficiently helpful insights from the contents of the administrative defense. So these special administrative proceedings must proceed under seal, or with closed hearings in which the submitter and requester sequentially rather than simultaneously explain their position on the legal issue. To do otherwise would make the price of defense and the loss of the item being defended, an absurd result. So proceedings need special procedural safeguards.

The ACUS Committee recommended that written objections be filed by the submitter.<sup>128</sup> The choice between written and oral presentations is a difficult one. A review of the aspects of each is appropriate.

### Benefits of Written Procedures

Two major advantages of written procedures are that hearing time is saved, at a net time savings for the agency, and the agency expends less money and resources on the handling of the objections. The amount of time needed for oral presentations varies, but it can be assumed that it is at least twice or more the time needed for consideration of affidavits and written argument. The agency can funnel all written arguments

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<sup>125</sup>The concept of an independent decisional official on appeal of an initial decision is present both in general administrative law concepts, *see, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L.Ed. 2d 712 (1975), and in the FOIA's administrative appeal process. 5 U.S.C. § 552(a)(6)(A)(ii), and *see* 1 Federal Information Disclosure, note 2, at § 7.04.

<sup>126</sup>The entire issue is mooted if disclosure occurs. The agency must carefully evaluate the legitimate concerns, because once the agency allows disclosure, "that record is available to all the world for all time". *General Motors Corp. v. Marshall*, 654 F.2d 294, 300 (4th Cir. 1981).

<sup>127</sup>Assuming the Department insisted the hearing would be open, the agents of the requester would undoubtedly learn much of the substance by the method and content of the defense. Market displacement occurs from commercial factors which when explained reveal the value and utility of the information along with its content.

<sup>128</sup>Recommendation to ACUS by the Committee on Regulation of Business, note 6 *supra*.

through one or more lawyers or FOI processing officials, producing relatively consistent decisional principles.

Those who have recommended written presentations have acted to preserve the opportunity to request oral hearings. The text of S. 1730, which passed the Senate Subcommittee on the Constitution on December 14, allows either the submitter or requester to ask for an oral presentation, but keeps these at a minimum by giving the agency discretion on whether to deny the request.<sup>129</sup> None of those who advocate written objections rather than oral hearings would cut off the agency's opportunity to orally contact the submitter with follow-up questions seeking clarification of a written position.<sup>130</sup>

A natural adjudicative tendency to share the pleadings with the adversary party has to be resisted in the peculiar situation of written objections to disclosure. The effectiveness of the advocacy depends on detailed showing of why a competitive interest would be harmed substantially<sup>131</sup> (or, under the proposed test in S. 1730, why a legitimate commercial interest would be impaired). Candor and completeness are important. Particularly in view of the tight deadlines of the FOIA, which permit little time for screening out and glossing over the detailed facts, the submitter must be able to give complete information about the competitor's likely use of that information. Release to the public of that fully informative pleading would be devastating, like a road map to the financially valuable secret information and how it can be used against the submitter. A court would recognize that sensitivity and arrange an enforceable protective order; most agencies cannot effectively use agency-written protective orders to forestall the FOIA disclosure of their records.<sup>132</sup> So a statutory power to seal the written submissions is important to the viability of a written objections procedure.

In terms of decision content, written submissions and the oral option should provide the agency enough information for the average case. The context of the document's creation, the difficulty of duplication, the secrecy practice of the submitter, and other information will be

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<sup>129</sup>S. 1730, note 4 *supra*, at § 4.

<sup>130</sup>The only statutory proposal which suggested an absence of oral contact between agency and submitter was H.R. 2120, but even that proposal could be read to allow agencies to make inquiries when they choose to do so.

<sup>131</sup>See Part II of this article for a discussion of the comparative tests.

<sup>132</sup>Unless the protective order is backed by a specific exemption (b)(3) statute, such as the FTC Civil Investigative Demand powers which are like protective orders, 15 U.S.C. § 57c, it cannot override a disclosure demand made under the FOIA except to the extent that the agency might persuade a court that disclosure would harm future collection ability, *see* National Parks & Conservation Ass'n v. Morton, 498 F.2d. 765, 770 (D.C. Cir. 1974).

included. Summary decisions at the agency level will usually not create an administrative "record" of decision other than a denial letter from the agency to the submitter.<sup>133</sup> Thus, written objection procedures should be tied to *de novo* review in which time and adversarial energies can be put to the task of creating a record in an impartial forum.

Frankly, the major disadvantage of written objections is the perception of unfairness, but the disadvantage can be offset by a strong judicial review opportunity. I personally lost faith in written objection processes several years ago. The same exemption (b)(4) issue arose with eight plant locations. I filed specific facts, affidavits, and legal arguments tailored to each case. I received the identical initial denial, and the identical rejection of my different objections to each situation of disclosure. I learned about a year after the first rejection that the agency's attorney who handled these FOIA matters had been transferred to a West Coast office and not replaced; the staff group was merely filing my objections and taking the identical rejection letters off a word processor, without the knowledge of the agency's legal office. Though many agencies would perform better, no element in the written objections process assures a submitter that indeed there will be a consideration of the objections.

#### Benefits of Oral Procedures

If administrative adjudication is a search for truth, blunt questions should be asked and blunt answers received. Asking tough questions orally to a submitter forces the submitter to defend or withdraw the confidentiality claim. It focuses the agency's attention and educates the agency about little-understood aspects of that market. The submitter might expect a more complete oral record, and more of the feeling of due process. There will almost certainly be questions to be answered that get answered early; the agency will have a better record and fewer judicial remands. The submitter might do better to take the minimal procedures at the agency level and seek full *de novo* review of the inadequate record before a court, since a court is much better equipped, in time and powers to be used for the consideration of the merits, than is an agency.<sup>134</sup>

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<sup>133</sup>This denial letter usually is one or two pages, denying the confidentiality claim, though the Labor Department/Office of Federal Contract Compliance Programs form letter which was used to deny confidential treatment claims under 41 C.F.R. Part 60-40 had been at one time a perfunctory three paragraph statement that an insufficient showing of confidential status had been made.

<sup>134</sup>The court has subpoena power, opportunities for interrogatories, live witnesses for cross-examination where needed, and no 10-days time limit for decision. Compare the agency's limits at 5 U.S.C. § 552(a)(3-6).



Many submitters at agencies such as the EPA have chosen not to take the opportunity for oral presentations.<sup>135</sup> Submitters make decisions about expense which the agency need not consider; if defending costs more than waiving rights, most submitters will waive the opportunity. The agency is likely to fault the submitter later for a weak defense or for obstructive conduct in an FOIA proceeding. And a request must be made to obtain the hearing and the request cannot be for reasons which are clearly frivolous and dilatory.<sup>136</sup>

The benefits of an oral presentation are that the agency can probe the validity of the submitter's case, stimulating doubts or assurances on both sides. Complex facts are often seen in exemption (b)(4) material, and witnesses would come to the hearing prepared to explain the value of that information. Often these subtleties would be submerged in paper affidavits (or omitted entirely if no sealed affidavits were permitted, as discussed above). For example, a GS-13 official at the Commerce Department may believe that all chemical mixtures can be broken down by "reverse engineering" so that none of the ingredients are truly secret. Chemists who consult for the submitter could show that perhaps 80 percent of the complex ingredients can be detected at a research cost of \$7,000, and the next 10 percent at a cost of \$90,000, but that three or four expert researchers operating in a fully-equipped laboratory—an expensive and time-consuming proposition—still could not expect to find the last ten percent, where engineering techniques mask the raw materials which are precursors of the detected reaction products. Note that oral questions and explanations will be needed at trial if either sues. The agency will get a better record with an oral presentation on the contested issues (that all chemicals are detectable, and that all can be detected with relative ease for purposes of the *Worthington* case criteria for test data confidentiality).<sup>137</sup>

An agency which anticipates being sued by one or another party should seriously consider taking the oral presentation when the submitter offers it. A categorical decision by EPA about noise testing rejected, without airing, the positions of all compressor makers. They sued EPA to stop its disclosure of test data to a rival manufacturer. In *Worthington*, the court ordered EPA to consider the ease or difficulty of reproducing the data as a key factor in its disclosure or confidentiality

<sup>135</sup>Interview with James C. Nelson, EPA, September 1981.

<sup>136</sup>S. 1730, note 4 *supra*, adding new 5 U.S.C. § 552(a)(7)(A)(iv).

<sup>137</sup>This question is a live subject of discussions between various chemical trade associations and OSHA. The case of *Worthington Compressors Inc. v. Costle*, 662 F.2d 45, (D.C. Cir. 1981); put the burden on the agency to support a contention that items which could be discovered by product analysis could be so detected with relatively modest cost, relative to the costs of FOIA access to the same information.

decisions.<sup>138</sup> So an oral presentation's desirability will increase as the factual issues stray farther from the agency's own routine factual knowledge. Those agencies which speed the process with suppositions, at the cost of factual adequacy, may be quick on the draw but may also shoot themselves in the foot with their haste.

### Legislative Approaches

The Senate Subcommittee on the Constitution voted for written objections, but with "opportunity to request an oral conference which the agency may in its discretion grant where necessary to serve the ends of fairness and a complete record."<sup>139</sup> This seems a sound compromise between the two options. A House bill had used written objections with no provision for requesting oral appearances.<sup>140</sup> The majority of the House and Senate bills had included oral hearings for the informal determination of submitter objections.<sup>141</sup> These hearing provisions drew criticism from one requester who called them "Star Chamber" proceedings "alien to our entire jurisprudence".<sup>142</sup> But a supporter cited federal pretrial practice in criminal cases as a parallel *ex parte* provision for determination of confidential information issues.<sup>143</sup>

It is significant that none of the legislative proposals require agencies to allow the requester to attend the oral presentation. These informal adjudications are not subject to an APA requirement for attendance by the requester,<sup>144</sup> and presumably the opportunity for sequential argumentation in separate meetings, on reasonable request, will satisfy the requester's due process claims.

If the Senate and later the House adopt the formulation of written objections with an opportunity to request an oral presentation, then presumably the agencies will reserve hearings for situations in which the agency has factual doubts about an assertion, or where the agency admits it has a knowledge gap about the situation of that particular information. More submitters will ask for hearings than will receive

<sup>138</sup>*Id.*; and this new variation on "substantial competitive harm" introduces yet another twist, of comparative value quantifications, to the judicially legislated version of exemption (b)(4).

<sup>139</sup>S. 1730, note 4 *supra*, adding new 5 U.S.C. § 552(a)(7)(A)(iv).

<sup>140</sup>H.R. 2021, 97th Cong. 1st Sess. (1981).

<sup>141</sup>S. 1247, S. 1730, H.R. 3928, 97th Cong. 1st Sess. (1981).

<sup>142</sup>D. Vladeck, in ACUS file, comments of Public Citizen Litigation Group.

<sup>143</sup>M. Lampert, in ACUS file, comments of Paul Weiss Rifkind Wharton & Garrison.

<sup>144</sup>The adjudication is of the right of the agency vs. the right of the owner, and the requester is not a party to that determination though she or he is a party to a separate statutory adjudication, 5 U.S.C. § 552(a)(6)(A)(ii), when the agency decides not to grant the request and then must provide an administrative appeal step for the requester under 5 U.S.C. § 552(a)(6)(A)(ii).

them. The agency's discretionary decision will be upheld unless it is arbitrary or capricious in deciding that a hearing is not "necessary to serve the ends of fairness and a complete record."<sup>145</sup> That may be so judgmental a test that the routine denials are routinely upheld.

However, few submitters will want to litigate a denial of an agency hearing if the Senate language is enacted. The prospect of *de novo* review is far superior to the administrative adjudication. It would make little sense to fight the agency over its procedural weakness where the impartial and superior fact-finding ability of the federal courts is available to the submitter.

### Experience with the Options

Three litigated cases have dealt with disclosure reviews. In *Planning Research Corp. v. Federal Power Comm'n*,<sup>146</sup> the agency used an administrative law judge and a hearing record to recommend a decision which the Commissioners then adopted. In *St. Paul's*,<sup>147</sup> the agency sent an attorney from another branch of the agency (and from another city) to make specific findings, which the district court accepted *in toto*, against the "commercial" status of a church-related group which claimed commercial confidentiality. And in *Northern Television v. F.C.C.*,<sup>148</sup> confidential status was part of an ongoing proceeding, and the record on the issue was decided by the Commissioners of the FCC after extensive staff work.

These cases illustrate how elaborate the agency *could* be, if it gave formal hearings to submitters. None of the legislation would recommend such formality, but the informal determination in *St. Paul's* appears to be prompt and reasonable.<sup>149</sup>

The conscious decision not to go with an oral hearing, but rather to expedite the agency process so that *de novo* judicial review can begin, is a resources decision. Those three cases were each relatively expensive for the agency. A rapid paper disposition is much less expensive; if it is followed by a court case in which the agency is a stakeholder between private requester and private submitter, then the agency's expenditure's are kept to a minimum. While the agency can demonstrate commitment to public access to its own information, it really cannot

<sup>145</sup>S. 1730, note 4 *supra* at § 4, adding 5 U.S.C. § 552(a)(7)(A)(iv).

<sup>146</sup>555 F.2d 970 (D.C. Cir. 1977).

<sup>147</sup>*St. Paul's Benevolent etc. Institute v. U.S.*, 506 F. Supp. 822 (ND Ga. 1980).

<sup>148</sup>*Northern Television Inc. v. FCC*, Civ. No. 79-3468 (D.C. 1980).

<sup>149</sup>The agency sent an impartial hearing officer from Washington to Atlanta, who heard the arguments of the parties and decided in favor of the agency. The potential for accommodating submitter needs for local rather than Washington hearings was recognized in the hearings system of S. 1247, 97th Cong. 1st Sess. (1981).

effectively defend a submitter's private data as well as the submitter, or argue public benefits of disclosure as well as an ardent activist seeking to acquire that private data to investigate asserted wrongdoing. So the "stakeholder" role is least expensive and diverts less of the agency's resources to the nonprogram-operating costs of the FOIA function.

A review of the cases since 1977 suggests that none have given as elaborate a trial-type hearing as *Planning Research*, though necessarily a hearing-settled case would not produce a reported case at the appellate level. If there is a hearing, successive presentations rather than simultaneous presence of the requester and submitter serves the unusual public purpose of such a hearing. Candor about true significance of the disputed documents is essential. The agency as hearing body will have to decide delicate questions. For example, a new machine revealed in an OSHA inspection report can produce a much improved device at a faster rate, which the owner plans to market in ten months from the date of the hearing. The candid expression of future plans, machine capability, and even the state of the owner's knowledge about its competitors' comparable machines, would be of great value to the competing firm, as much or more so as the document itself. The agency needs those candid, uninhibited explanations so that it can make the most accurate determination.<sup>150</sup>

These are very unusual circumstances, and in these submitter-requested hearings the submitter should be heard separate from the requester's presence. The requester is not denied due process because it has a complete existing remedy in the current FOIA's requester appeal and *de novo* review provisions. But the requester without access to the document or a detailed explanation of its utility could contribute little, and would be naturally frustrated as agency and submitter counsel argue about vague surrogate terms instead of getting down to the merits.<sup>151</sup> A procedurally optimal solution would be *seriatim* presentations to the agency by requester and submitter.

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<sup>150</sup>Note 146 *supra*. That was a full hearing before an administrative law judge. While that device has its advantages, on balance the *de novo* review of paper "records" is superior and significantly more cost-efficient. One of the judges interviewed for the ACUS report expressed a desire that the agency not be barred from conducting such a hearing when the need is present, and that the agency not be compelled to have such a hearing where it finds it unnecessary. Interview with Judge E. Liebman, FERC, December 1981.

<sup>151</sup>The requester can "contribute little to the proceeding" absent knowledge of the contents, Note, *Protecting Confidential Business Information From Federal Agency Disclosure After Chrysler Corp. v Brown*, 80 COL. L. REV. 109, 135, n.158 (1980). The solution is not to make the requester a better contributor by giving away the whole purpose of the hearing, but to provide the requester an indication of the nature of the materials (after agency-submitter agreement to such a summary) and then allow separate opportunities for the requester to be heard.

### Review of the Hearings Issue

Congress should provide both a mandatory opportunity to file written objections, and an opportunity in the agency's discretion for informal meetings. Objections in writing will usually be sufficient to make the quick decision which leads to settlement, abandonment of the requester's or submitter's demand, or *de novo* review. To avoid premature disclosure, oral informal presentations should be separated so that submitters and requesters do not have to argue in each other's presence.

## V. THE MOST IMPORTANT QUESTION

The single most important decisional question regarding procedures for the handling of confidential business information is the question of whether the court to which a dispute between submitter and agency is brought must be confined to the letters which pass from agency to submitter and back, usually totalling three or four written documents. The agency's decision on exempt status for commercial information begins with a set of objections from the owner, an agency response, perhaps a letter from the requesting person, and ultimately an agency letter denying confidential status or perhaps acceding to confidentiality exemption status but announcing a policy decision to disclose the documents. If the court halts its review at that point and does not take additional factual evidence, the great majority of agency decisions will be rapidly affirmed. Agencies typically have a prudent sense of review-proof phrasing which will remove any decision from "arbitrary and capricious" extremes. Applying that facial soundness and enjoying considerable deference, the agency will probably prevail.

But courts have more often than not accepted submitters' requests to move beyond a weak record, with *de novo* review on the merits.<sup>152</sup> In the 1979 *Chrysler*<sup>153</sup> decision, the Supreme Court left open for later decision

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<sup>152</sup>*De novo* review won its most recent endorsement from the D.C. Circuit. In November 1981, that court rejected the government's direct assertion that *de novo* review is impermissible after the Supreme Court decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and remanded for such review, perhaps *de novo*, as the district court elected on the merits. *Worthington Compressors Inc. v. Gorsuch*, No. 80-1010 (D.C. Cir. Nov. 20, 1981). For earlier cases favoring *de novo* review, see, e.g., *General Motors Corp. v. Marshall*, 654 F.2d 294, 300 (4th Cir. 1981); *Westinghouse Elec. Co. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* *Brown v. Westinghouse*, 431 U.S. 924, 97 S.Ct. 2199, 53 L.Ed. 2d 239 (1977); *Charles River Park A Inc. v. Dep't of HUD*, 519 F.2d 935 (D.C. Cir. 1975). A complete retrospective study of the *de novo* cases was undertaken in December 1981 by the author, with the concurrence of the Judicial Conference, as a supplementary report to the author's final report on behalf of the Committee on Regulation of Business, note 6 *supra*.

<sup>153</sup>*Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

the issue of whether a reverse-disclosure case brought by a submitter would be reviewable *de novo*, though it doubted that *de novo* review would be necessary in the clearcut cases where disclosure would violate a prohibitory statute. As interpreted by later appellate decisions,<sup>154</sup> that *Chrysler* directive is no barrier to *de novo* review in the typical submitter-initiated lawsuit.

### The APA and the FOIA

The APA normally reserved *de novo* review for those situations in which specific laws required such review. While there are about thirty-five such laws,<sup>155</sup> only three or four have seen much activity, including the pro-disclosure provisions of the FOIA and review provisions relating to Equal Employment Opportunity Commission (EEOC) decisions.<sup>156</sup> Most are somnolent statutes like authority for road easements on Indian reservations.<sup>157</sup> Under the APA, an agency decision could be found "unwarranted" upon a new review of the facts by the district court, where such a statute required *de novo* review.<sup>158</sup>

In 1971, the Supreme Court defined a narrow set of situations in which *de novo* review of agency decisions would be used. It held in the *Overton-Park* decision<sup>159</sup> that an abuse of discretion test was normally sufficient. But *de novo* review applied where fact-finding procedures in an agency adjudication were inadequate, or where the agency has a proceeding to enforce some nonadjudicatory agency action and issues not raised before the agency arise during the enforcement case.<sup>160</sup> That view was taken in the context of the 1946 APA, and it was confirmed and tightened by the 1978 *Vermont Yankee* decision,<sup>161</sup> which limited the courts' ability to construct remedies not provided for in the APA. Remanding the matter to the agency would be the likely outcome

<sup>154</sup>General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981).

<sup>155</sup>No central index of *de novo* statutes exists at the Library of Congress, the Administrative Office of U.S. Courts, or the Administrative Conference. With the aid of the JURIS computer, the Justice Department provided the author with a list of about 45 statutes using *de novo* review in the agency context. Upon examining each, about 35 contain *de novo* review provisions. Of these, perhaps 20 have never produced a single annotated case decision, in U.S. Code Annotated, and about 7 have a single case discussing *de novo* review.

<sup>156</sup>5 U.S.C. § 552, 42 U.S.C. § 2000e.

<sup>157</sup>Act of Feb. 28, 1902, 25 U.S.C. § 314.

<sup>158</sup>"Unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." 5 U.S.C. 702(2)(F). For background, see Nathanson, *Probing the Mind of the Administrator*, 75 COLUM. L. REV. 721, 755 (1975).

<sup>159</sup>Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

<sup>160</sup>*Id.* at 415.

<sup>161</sup>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

under the APA,<sup>162</sup> it remains to be seen whether remands will continue to be the primary solution to inadequate agency records after the anticipated 1982 revision of the APA's judicial review provisions.<sup>163</sup>

One may legitimately assert that the APA needs reform of its judicial review provisions, after the buffeting of years of creative remedial efforts and the capping of that creativity in *Vermont Yankee*. That reform could not and should not require that all agency decisions be reviewed *de novo*, for such a drastic change would cut away much of the relief which the modern administrative agency system provides to federal courts. But there were cases before *Overton Park* in which Congress used *de novo* review as a special remedy<sup>164</sup> and it is fully consistent with APA reform that the judicial review provisions of an FOIA remedy likewise provide for submitters to join requesters within a small group of federal litigants entitled to *de novo* review.<sup>165</sup>

*De novo* review could be applied to submitter suits, and has been, under the *Overton Park* rationale, but legislative endorsement would clarify the uncertainties. A disclosure decision is document-specific action affecting the rights of an identified private submitter. It is the type of informal adjudication<sup>166</sup> for which agency fact-finding procedures are exceedingly sparse. Some agencies have lower-level supervisors making decisions without notice, such as the Los Angeles FDA official who decided that since all blood valve firms used a formalde-

<sup>162</sup>This is the general rule following *Camp v. Pitts*, 411 U.S. 138, 143 (1973). In the year after *Camp*, Congress amended the FOI Act and left *de novo* review intact, strengthening it with in camera review provisions for the trial court. Had the Congress wanted to change the prior law during its intense reexamination of the FOIA, Congress could of course have eliminated *de novo* review and left all FOIA litigants with arbitrariness standards of review. It was and is more likely to achieve symmetry of remedies by legislative addition than by subtraction, however.

<sup>163</sup>S. 1080, 97th Cong. 1st Sess. (1981) is pending for a Senate floor vote as this article goes to press. Adoption of its Bumpers Amendment changes to 5 U.S.C. 706 would not directly affect *de novo* review, but they would increase the fairness of the arbitrariness test for judicial review of agency decisions, see O'Reilly, *Deference Makes A Difference: The Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980).

<sup>164</sup>The FOI Act is the example of a selection of a *de novo* review to avoid problems which the Congress foresaw as militating against success for one part to the adjudication, the requester. The *de novo* provisions concerning antidiscrimination cases following an EEOC decision, were intended to provide a second complete hearing of the antidiscrimination complaint in federal court. 5 U.S.C. § 552(a)(6); 42 U.S.C. § 2000e.

<sup>165</sup>Symmetry of remedy would allow all litigants with FOI claims to have those claims heard on the merits in court, without in either case deferring to agency judgments about the issue of exempt status. The Senate Constitution Subcommittee adopted this approach in S. 1730, note 4 *supra* in December 1981.

<sup>166</sup>FOI disclosure decisions are adjudications, see 5 U.S.C. § 551(7), and not "rules," § 551(4), because they lack general applicability and other indicia of rulemaking. The Act does not require, and S. 1730, note 4 *supra*, will not require, that they be formal adjudications, see 5 U.S.C. § 554(a).

hyde process, that process could not be confidential. His disclosure of specific time, temperature and concentration information about Hancock Laboratories to its inquisitive competitor delivered what the competitor considered "the only real secret" Hancock had, where both firms used identical raw materials.<sup>167</sup> It was the decision-making procedure of the Labor Department which was rejected in the 1979 *Chrysler* case,<sup>168</sup> and the CPSC disclosure process which was rejected in the 1980 *GTE Sylvania* decision.<sup>169</sup> So inadequacies in fact-finding can lead to *de novo* review. Inadequacies in expertise of the agency to make these commercial decisions undercut the commonplace argument against *de novo* review, which holds that the agency's expertise must be preserved and enhanced, by deferential treatment.<sup>170</sup>

### *De Novo* and the FOIA

In opting for *de novo* review, the 1966 Congress took the road less traveled by administrative agency review provisions. One reason was the FOIA's expedited procedure, with little or no administrative record assembled during speedy disclosure processes. Another was expressed in the predominant *Senate Report*:<sup>171</sup>

That the proceeding must be *de novo* is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.

The dissatisfaction which led Congress down the little-used road of *de novo* review was a perception that agencies would institutionally oppose disclosure. Thus the administrative appeal step would reinforce the lower decision on disclosure issues, against the requester.

<sup>167</sup>Interview with Shiley Inc., November 1981; and see Taylor, *Businesses Lobby to Reduce Public Access to Data They Disclose to Federal Agencies*, Wall St. J. at 31 (Dec. 15 1981).

<sup>168</sup>The Department made what was essentially an adjudicative decision about each incoming submission to decide whether confidential treatment would be provided. The procedures for that decision were vacated as insufficient. The decision rests today with the Labor Department, on remand from the courts. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

<sup>169</sup>*Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 100 S. Ct. 2051 (1980).

<sup>170</sup>*De novo* review is ordinarily not appropriate in the situation where the question can be obviously disposed of as a matter of legal interpretation, e.g., where 18 U.S.C. 1905 applies, *Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979), or where the matter is susceptible of disposition with ordinary review procedures, *Camp v. Pitts*, 411 U.S. 138 (1973), citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), but it had been intended for a wider usage. Nathanson, *Probing the Mind of the Administrator*, 75 COLUM. L. REV. 721, 755 (1975).

<sup>171</sup>S. REP. NO. 813, 89th Cong. 1st Sess. 8 (1965).



This is still a sound rationale for exemptions (b)(5) and (b)(7), the exemptions for internal memoranda and law enforcement records, for which agency decisionmakers have incentives to withhold and for which *de novo* review is an important counterbalancing force.<sup>172</sup>

Fifteen years of experience with agency discretion have taught the business submitters of information that the agencies' institutional incentives in (b)(4) cases often lie with disclosure. An agency which decides to disclose loses nothing of its own creation, in a (b)(4) case, unlike the internal memoranda cases. Penalties, attorneys' fee awards,<sup>173</sup> and the like encourage the agency to tip the balance in FOIA cases toward withholding of only those items which the agency itself needs to defend—and private documents are more likely to be given up by the agency to avoid prolonged litigation by requesters. Institutional incentives to affirm the working-level *nondisclosure* decision were the reason for *de novo* review in the original FOIA; comparable incentives to affirm the working-level willingness to give out the private documents are present in submitter suits against agencies. The symmetry of incentives suggests a symmetry of remedies, where the remedy provides a corrective check upon agency actions.

#### Practical Advantages to *De Novo* Review

The Committee's Recommendation combined a rapid agency process of informal decisions upon written objections, with *de novo* review to permit assembly of a record in the impartial forum, the district court. This has the practical advantages of its procedural twin, the pro-disclosure FOIA case.<sup>174</sup> First, the agency is not spending money for extensive adjudicative procedures. Second, time is cut short so that the process does not detract from the FOIA's intent to expeditiously process disclosure decisions. Third, the court can ask questions about motive and background which an agency should not or simply does not care to ask.<sup>175</sup> Fourth, most administrative steps in both requester and submitter situations are done without benefit of private counsel. In a

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<sup>172</sup>*De novo* review in these cases disciplines the agency not to cover up records about its own operations, where such internal matters can be disclosed without egregious harm to the agency's public tasks of internal deliberation on policies or law enforcement. The disciplinary effect in these instances is very differentiable from the (b)(4) context in which the document was not generated internally by the agency.

<sup>173</sup>5 U.S.C. § 552(a)(4)(E-F).

<sup>174</sup>The Committee's recommended expedited submitter procedures, discussed herein, are quite comparable to the expedited requester processes provided for in 5 U.S.C. § 552(a)(6). The full text of the Committee recommendation and preamble are available from the Administrative Conference.

<sup>175</sup>An agency cannot now ask about the reason for the request or the intended disposition of the information if it is released.

typical submitter case, a working group of the firm submits the record to the working group of the agency. If the agency chooses to give notice it comes to this working group, which states its objections. The total of the "record" can be created within a week or two without private or agency lawyers becoming aware of the dispute until decision, in many cases, has already been reached by the administrative decisionmaker.

The normal advantages of deference to an expert administrative agency do not apply in submitter cases. The agency's expertise in grading peaches, regulating nuclear waste, determining tire defects, etc., builds no deference in marketplace consequences of competitive intelligence-gathering. The economists who made a presentation to the Administrative Conference explained that circumstantially relevant information may not be apparent to an outsider unfamiliar with daily trade conditions.<sup>176</sup> One could speculate that federal district judges gain more expertise in commercial sensitivities from large litigated cases of antitrust, contract, and commercial tort disputes than the average agency Secretary or field compliance official making a variety of decisions, few of them having to do with (b)(4) exemption issues. In FOIA cases generally, agencies properly have been refused deference for expertise.<sup>177</sup>

Adjudicating an abstract potential harm issue is difficult for an adjudicator, whether agency head or district judge. The presentation of the facts in the court setting is far better than it could be in the haste of an agency informal, written-objections situation. The court has the relative luxury of a statutory directive to give prompt attention to the decision rather than the harsh mandate to get the decision out within ten, or at most twenty, working days.<sup>178</sup> So the perception that factual matters will be better explored in the course of responsive pleadings than in agency decisional processes appears to be well founded.

*De novo* review is no panacea, of course. It does not assure an oral hearing to the witnesses presented, for like the great majority of FOIA cases it can be decided on summary judgment motions.<sup>179</sup> It does not

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<sup>176</sup>"Circumstantially relevant business information" normally would include pieces of a subtle competitive-intelligence picture which those outside of the competitive situation would not appreciate. See comments of Profs. Casey, Marthinsen and Moss, Babson College, in ACUS file and in *Hearings*, note 25 *supra* at 639.

<sup>177</sup>*Consumers Union v. Veterans Administration*, 301 F. Supp. 796, 801 (S.D. N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

<sup>178</sup>5 U.S.C. § 552(a)(6). In court, the submitter gets "the first complete presentation of all of the issues because the district court is not operating under the same time constraints" as the agency. Koch & Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 51 (1979).

<sup>179</sup>No statistics are available, but the great majority of FOI cases are disposed of without a live trial. 1 FEDERAL INFORMATION DISCLOSURE, note 2 *supra*, ch. 8.

assure the submitter's victory over the agency; in one of the few cases to have oral witness testimony, the submitter's witness on cross-examination admitted exchange of the purportedly secret information with its competition, and lost the case.<sup>180</sup>

### Roles and Perceptions

The earlier study for the Committee on Regulation of Business, by Professor Russell Stevenson, found a strong perception that those who are asked to submit private data believe government cannot or will not protect that data.<sup>181</sup> Of the thirty to fifty reverse-disclosure cases filed to date, perhaps as many as two-thirds have been brought hastily to restrain a suddenly announced disclosure intention.<sup>182</sup> The submitter sued rather than negotiated because of the perception that the agency would too readily disclose, and the perception that a court would give a more reasonable hearing on the merits.

In a disclosure controversy, the regulated person sees the agency in a new role, an agency role which is uncomfortable for the submitter. That person had never seen the agency acting as adjudicator, perhaps, and even the administrator whose normal fare is statistical analysis or rulemaking may feel uncomfortable making close calls about unfamiliar legal status questions. The role taken on in court is different; an agency would feel more comfortable in court as stakeholder between requester and submitter. If the plaintiff is one of the great majority of requesters, a commercial firm, it is familiar with litigation; if the plaintiff is a noncommercial advocacy group based in Washington—the second category of frequent FOI litigants, albeit a distant minority in numbers of total requests—then the advocacy group's litigation is a normal part of its operations.<sup>183</sup>

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<sup>180</sup>Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (CD Ca. 1974).

<sup>181</sup>STEVENSON REPORT, note 24 *supra*, at 1: "the perception . . . is so strong that some action is necessary to rationalize present procedures and to provide more complete assurance to submitters that their confidential business secrets will not be released under the FOIA."

<sup>182</sup>Only Planning Research, St. Paul's, and Northern Television, notes 146–48 *supra*, were reverse-disclosure cases brought after agency hearings. As with most reverse-disclosure suits, the first case ever filed against an agency was brought quickly under an imminent threat of immediate disclosure of the company's financial data by the agency. Charles River Park A Inc. v. Dept. of HUD, 360 F. Supp. 212 (D.C. 1973), *remanded* 519 F.2d 935 (D.C. Cir. 1975), and *see* discussion of the case in O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law. 1125 (1975).

<sup>183</sup>The largest number of (b)(4) cases have been cases seeking disclosure for some private purpose. However, the Washington district court has seen virtually all of the public advocacy group of the FOIA, so it is not surprising that a majority of Washington D.C. exemption (b)(4) cases have involved advocacy groups. For the agency, the best situation would be that of an impartial stakeholder awaiting guidance from the courts on whether the requesting party should have access.

The role of adjudicating case-by-case in detail is an expensive additional chore for the agencies. An OMB Office of Management and Budget official estimated the cost of the FOIA at about \$250 million, and warned that additional costs of administration would threaten more of the program budgets of the agencies.<sup>184</sup> It is an unfortunate reality of the FOIA that Congress spoke from the heart, not from the wallet, about openness. Funding for FOIA has been badly neglected, and submitters would suffer from perfunctory consideration by overworked officials if the determinations had to be made in great detail by the agency. Putting the proof process in court shifts the substantiation and rebuttal costs to active litigating parties and to the Department of Justice, and off of the agency.

What role does the FOI decisionmaker now play? Most often, the role is that of adversary against the submitter. Though some agencies use an access professional, more have a program person making FOI decisions. That person's success and rewards depend on program success.<sup>185</sup> An adversary relationship may already exist against the submitter. Or the requesting firm may be favorable to the agency view while the submitting firm is not; incentives there favor the requester, if the agency makes factual decisions internally which can only be reviewed with great difficulty for "arbitrariness".

Given the relative roles of submitter and agency decisionmaker, *de novo* review by an impartial judge is essential. The initial decision is made by an operating staff person in the agency. He or she has no institutional incentive to aid the submitter, in most cases. Then the submitter's objections against disclosure will be heard by a person who deals every day with the operating staff. There is a mutual trust of sorts between agency operating staff and management; reversal of the operating staff has repercussions for productivity and the agency's overall performance. By contrast, the decisionmaker may never have heard of this submitter, its product or even its city. The submitter has no claim to

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<sup>184</sup>Michael Horowitz, Counsel to the Director of OMB, remarks to the Administrative Conference, Dec. 10, 1981.

<sup>185</sup>Executive compensation systems under the Civil Service Reform Act reward a program official for the completion of tasks, some of which would be frustrated by disclosure and some of which would be enhanced if the individual could selectively disclose private documents. Because private documents can be a tool of more easily accomplishing an individual program bureaucrat's goals, the private submitter should be aware that the agency decision-making person may have financial as well as personal reasons for a particular disclosure decision. A relevant interrogatory for reverse-disclosure plaintiffs would be the executive bonus system ramifications of disclosure in a particular program context to which the document relates. Submitters should ask for SES goals and expectations documents for the decisional officials, to establish a possible basis for impeachment of the impartiality of a disclosure decision made by a program official rather than an agency FOI officer.

the deference or respect of the decisionmaker. If the operating staff is good, it has persuaded the same decisionmaker on many past occasions to agree with the FOIA decision of the staff. Perhaps the requesting party is an organization with some affiliation, past or present, with the decisionmaker and/or the operating staff.

So many institutional incentives favor the agency view, that the submitter can realistically expect to have less than a fifty-fifty chance of success. Indeed, the higher the percentage of submitters who win, the more likely it is that the agency will change personnel at the operating staff level to correct the pattern of "losses."

*De novo* review asserts the independence of the judiciary even though in practice many of the judiciary's *de novo* decisions are reached after summary judgment motions without an actual trial.<sup>186</sup> The trial court could hear the witnesses and decide on the merits of the "confidential" status or on some other aspect of the case. By doing so the submitter would perceive that an independent judiciary stood between the submitter and the agency. The agency decisionmaker would perceive that his or her choice will be reexamined closely by the court. This will discipline the decision process against institutional pressures to uphold every disclosure decision reached by lower levels of the agency. If there were a "meaningless sanctioning" of the lower staff's discretion by the agency decisionmaker, and then the same sanctioning by a court under an "abuse of discretion" standard, there would be the same situation which led the 1966 Congress to adopt *de novo* review procedures.<sup>187</sup>

Finally, *de novo* review is a superior way of evolving case law in the FOIA area, and will continue to be so when it is legislatively extended to submitter cases also. The FOIA case law is better documented and better articulated as precedent than is the average case law of another subset of administrative law.<sup>188</sup> Agency withholding is reexamined and the facts are measured against the law's exemptions. In a case challenging disclosure, with an "abuse of discretion" standard the agency decision is very likely to be upheld with little or no articulation needed. Findings of fact are not made and findings of law can be perfunctory if the agency was careful to say the "right" things in its written decision letter.

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<sup>186</sup>The court reaches an independent judgment on the motion papers, without deference, in most cases. Trials in (b)(4) disclosure suits have been relatively rare, though statistics are very difficult to find.

<sup>187</sup>See, S. REP. NO. 813, 89TH CONG. 1ST SESS. 8 (1965).

<sup>188</sup>A great many administrative matters appear to be disposed of without written opinions, see 1981 ANNUAL REPORT OF THE DIRECTOR, Ad Office of U.S. COURTS (1981). But very few FOIA cases are disposed of without a memorandum opinion and findings, and it may be error for a trial court to do so. *Schwartz v. IRS*, 511 F.2d 1303 (D.C. Cir. 1975).

### Advantages of Abuse of Discretion Review

Review on an "abuse of discretion" test is faster than *de novo* review in disposing of the submitter's argument, and thus it speeds disclosure of the documents.<sup>189</sup> It is more sparing of the time of the courts, which need hear much less. It saves expense for the requester, who usually will not need to participate in this action though the requester may choose to be active in a *de novo* proceeding to assure that its needs are protected.

The abuse of discretion test serves the 1946 APA's direction which heavily favors the expertise of the agency on questions as to which judicial deference can be given. The agency acts on the case with a presumption of validity for its actions. The challenger has a heavy burden, in light of this deference and presumption. Under the *Overton Park* criteria, the submitter will rarely be able to get more than this abuse of discretion test, for it is the agency articulation that may be weak but the "factfinding procedures" themselves are not defective, so *Overton Park* tests for the use of *de novo* review are not met.<sup>190</sup>

As a commentator from a public interest background has written, this abuse of discretion test is "clearly less vigorous than *de novo*" review and it therefore is relatively "lenient" on the agencies.<sup>191</sup>

Commentators from an academic perspective offer the concept that abuses of discretion may be found more readily in FOIA cases than the requesters expect. If a factor in the confidentiality test is summarily dismissed by the agency, with the conclusion that the submitter did not meet that part of the test, the agency may be reversed for failing to consider a relevant factor where such failure rose to the status of an abuse of discretion.<sup>192</sup> It is established by the *Chrysler* decision that violation of a law or regulation would be an abuse of discretion,<sup>193</sup> and arguably an abuse of discretion would occur if an agency departed from past precedents without explanation or made a promise of con-

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<sup>189</sup>Since review of the letters or other submissions is summarily done, the agency wins the great majority of these review cases.

<sup>190</sup>*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

<sup>191</sup>Mr. Clement's views are controversial, but on the weight of the abuse of discretion test, he is correct. He was counsel for the intervening side which unsuccessfully sought disclosure in *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.*, *Brown v. Westinghouse*, 431 U.S. 924 (1977), and later he unsuccessfully tried to tax submitter for costs after the submitter lost a reverse-disclosure case, *Union Oil Co. v. Andrus*, Civ. 77-2077-LTL (CD Ca. 1978). See, Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information*, 55 TEX. L. REV. 587, 629-630 (1977).

<sup>192</sup>*General Motors Co. v. Marshall*, 654 F.2d 294, 300 (4th Cir. 1981). See also, Note, *Administrative Disclosure of Private Business Records*, 28 SYR. L. REV. 923, 961 (1977).

<sup>193</sup>*Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979).

fidential treatment and then dishonored its commitments at a later time.<sup>194</sup>

### The Case Law

The case law is split, with some courts giving *de novo* review and others not giving it but instead holding to an abuse of discretion standard. The *Chrysler* decision addressed the mandatory withholding segment of the criminal Trade Secrets Act, and held that *de novo* review “is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of section 1905.”<sup>195</sup> The Supreme Court refused to explicitly decide the *de novo* review question.

Had the Supreme Court stopped at the words “ordinarily not necessary” one would have a directive against *de novo* review. But section 1905 lists a set of classes of prohibited disclosures and the type of document will be shown in the pleadings as well as in the agency record, whatever its length. A contemplated disclosure would “run afoul” of section 1905 (whether or not it would be barred by that section) if the face of the document indicated that it was a formula, or a report of income, or some other item listed in section 1905. So the “ordinarily” clause could be intended to attach to the section 1905 situations only. Or did the court signal that the administrative record was so often clear that ordinarily the record could be reviewed without additional data (which apparently could not have been the case with the *Chrysler* litigation’s file)?<sup>196</sup>

Post-*Chrysler* cases have more often than not chosen to look at the strength of the administrative decision record and then have applied an abuse of discretion test.<sup>197</sup> The Fourth Circuit, which favored *de novo* review before *Chrysler* has given the best post-*Chrysler* articulation of the *de novo* matter. In its view the Supreme Court recognized that in the circumstance of commercial harm:

<sup>194</sup>General Motors, note 192 *supra* at 300; Note, SYR. L. REV., note 192 *supra* at 978. This would be a fairness grounds for equitable relief in the TRO action, as well, when the submitter first seeks to halt the release of its property.

<sup>195</sup>*Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979).

<sup>196</sup>The record was so sparse on the agency’s side in *Chrysler* that the agency record of explanation could not have been reviewed deferentially since so little was included in the explanation for the agency action. The Labor Department still has not issued its final decision in the case, after the 1979 remand by the courts, as this article goes to press.

<sup>197</sup>This may be explained by the fact that most have involved pure questions of law, including the Medicare payments issue in a multitude of district courts, which can be based on stipulated facts and involve pure interpretations of the adequacy of a disclosure-authorizing agency rule, *see, e.g.*, *St. Mary’s Hospital v. Harris*, 604 F.2d 407 (5th Cir. 1979).

... there could be circumstances such as suggested in (5 U.S.C. section 552) (2)(F) in which the district court might decide that "trial *de novo* by the reviewing court" was necessary and the Court did not wish to preclude the district court from exercising this right.<sup>198</sup>

That view of the Supreme Court's "ordinarily" leaves the door open for agency decisions to be reviewed *de novo* but the Fourth Circuit cautioned that a decision to do a *de novo* review "should await the issuance of the agency's decision and should only be made by the district court after a careful review of the administrative decision and record."<sup>199</sup>

The whole sentence from the Supreme Court opinion was read together by the Fourth Circuit's panel, so that section 1905 may be violated in a case; if so the matter is one of law rather than of much fact; if so the review standard is one of "accordance with law" and factual *de novo* review would not be necessary. In reaching this decision in its *General Motors* case the appellate panel remanded to the agency for "a reasoned analysis of the record justifying its conclusion" that there should be disclosure.<sup>200</sup>

District courts in other settings have not given *de novo* review because of the quality of the record generated by the agency. In one case the court noted that the Department of HHS sent a hearing officer from another agency in a distant city, who heard witnesses and rendered an independent, extensive written report. That official's findings were adopted totally by the reviewing court.<sup>201</sup> And the FCC's thoughtful consideration of all aspects of the *Northern Television* decision left *de novo* review quite unnecessary, for only policy discretion issues remained in that case.<sup>202</sup> But if the pending legislation, other proposed bills, the draft recommendations of the American Bar Association, and the Committee recommendations of ACUS are a barometer, these extensive agency proceedings are likely to be replaced by rapid disposition and *de novo* review.

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<sup>198</sup>*General Motors Corp. v. Marshall*, 654 F.2d 294, 298 (4th Cir. 1981). And this view of the Supreme Court statement is in accord with Braverman, *Chrysler Corp. v. Brown: Protecting Business Secrets in the '80s*, 4 CORP. L. REV. 23 (1981) and Note, *Protecting Confidential Business Information*, 80 COLUM. L. REV. 109 (1980).

<sup>199</sup>*General Motors, id.* The identical approach was later taken by a second appellate court, which also rejected the government's view. It now appears to be accepted law that a trial court may in its discretion use *de novo* review of an agency's disclosure decision, *Worthington Compressors Inc. v. Gorsuch*, No. 80-1010 (Nov. 20, 1981). Legislative action on S. 1730 will most effectively preclude another split among the Circuits, and these appellate decisions do not obviate the need for legislative change. It is possible also that the Justice Department may drop its earlier abhorrence for *de novo* review in light of its support for such review in S. 1751, note 99 *supra*.

<sup>200</sup>*General Motors, id.*

<sup>201</sup>*St. Paul's Benevolent, etc. Instit. v. U.S.*, 506 F. Supp. 822 (N.D. Ga. 1980).

<sup>202</sup>*Northern Television Inc. v. F.C.C.*, Civ. No. 79-3468 (D.C. 1980).



### The Legal Literature

The 1979 *Chrysler* decision swept away much of the academic debate over *de novo* review and the *Overton Park* APA criteria.<sup>203</sup> After *Chrysler*, two commentaries seek reconstruction of the system;<sup>204</sup> two assume that abuse of discretion is the sole remaining review option;<sup>205</sup> one favors abuse of discretion review but confesses that it will probably be circumvented until some legislative action on the *de novo* standard is taken;<sup>206</sup> one supports *de novo* review expressly;<sup>207</sup> and one equates the abuse of discretion test with “the standard for appellate review of jury findings”.<sup>208</sup> If a rapid and routine disclosure decision by a mid-level agency manager is as worthy of deference as the considered opinion of twelve impartial peers, then the jury system suffers by association. Very few challenges by submitters against agency decisions would be won under that latter view of the abuse of discretion test. And in an amicus brief in the *Francis Ford* case,<sup>209</sup> ten independent agencies argued that abuse of discretion meant severe hardship or oppression. Though that case presented a different issue, there are few submitter cases which could ever prevail if “abuse of discretion” carries such a difficult gloss for the challenging party.

### The Recommendation

Agency decisions to disclose private information which the private person asserts to be exempt from disclosure should be expedited informal decisions. They will produce virtually none of the reasoned “record” which district courts see in rulemaking or adjudicative decisions. Congress should endorse the better view of the appellate and district courts, and should provide uniformly for *de novo* review of both requester-initiated and submitter-initiated FOIA cases.

The court should have before it three issues, if the Congress adopts the “interests” standard which is now pending in the Senate Judiciary Committee. The existence of a commercial, financial, research or busi-

<sup>203</sup>*Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

<sup>204</sup>Note, *A Procedural Framework for the Disclosure of Business Records Under the Freedom of Information Act*, 90 YALE L.J. 400 (1980); Note, *The Freedom of Non-Free Information*, 32 STAN. L. REV. 339 (1980).

<sup>205</sup>Riley & Simchak, *The Lingering Issues of Reverse-FOIA Litigation*, 11 PUB. CONT. L.J. 426 (1980); Note, *Reverse FOIA Suits After Chrysler*, 48 FORD. L. REV. 185 (1979).

<sup>206</sup>Note, *The Reverse-FOIA Lawsuit*, 46 BROOKLYN L. REV. 269, 293 (1980).

<sup>207</sup>Braverman, *Chrysler Corp. v. Brown: Protecting Business Secrets in the '80s*, 4 CORP. L. REV. 23 (1981).

<sup>208</sup>Note, *Protecting Confidential Business Information from Agency Disclosure*, 80 COLUM. L. REV. 109, 122 n.82 (1980).

<sup>209</sup>Brief of federal independent agency general counsels as amicus curiae on petition for rehearing *en banc*, in *Ford Motor Co. v. FTC*, 654 F.2d 599, 50 U.S.L.W. 2155 (9th Cir. 1981).

ness interest should be examined *de novo*.<sup>210</sup> Many of the courts reviewing a denial of “confidential commercial information” status under current law have used that *de novo* process.<sup>211</sup> Next, the court should review *de novo* the existence of a public interest in the particular disclosure, which the requester and agency will assert to exist.<sup>212</sup>

Once there is both exempt status and some public interest, the judicial review becomes more complex if the Act permits an agency to disclose upon a written finding of an “overriding” public interest. Whether two competing interests are equal or whether one overrides the other may be such a value judgment that courts will look only at the arbitrariness, or only at the substantial evidence supporting the agency’s choice between the two options.

Congress has known of a comparable problem with the (b)(6) personal privacy exemption; an agency may determine that disclosure would be a “clearly” unwarranted invasion of privacy.<sup>213</sup> Review has been *de novo* and courts have been able to substitute judgment on what invasions are “clearly” unwarranted and which are not.<sup>214</sup> The Senate Constitution Subcommittee bill adopted December 14, 1981 defined *clearly unwarranted* in exemption (b)(6) to be satisfied “if the detriments of the disclosure are not outweighed by its benefits to the public interest”.<sup>215</sup> Courts will continue to do *de novo* reviews, but with a little more precision, perhaps.

Should corrective legislation make an exception for exemption (b)(4)’s *de novo* review for that part of the agency decision which is judgmental about the “override”? Such an exception was not made for

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<sup>210</sup>The evidence before the reviewing court can include the same assertions by the agency as were used in the denial letter. But more likely the agency will leave the submitter with the burden of proof of its status and remain passive, unless the agency has some tangible evidence contrary to the submitter’s assertions.

<sup>211</sup>*See, e.g.,* Worthington Compressors Inc. v. Gorsuch, *directions to trial court on remand*, No. 80–1010 (D.C. Cir. Nov. 20, 1981). This has been the case since the very first reverse disclosure cases, *see* note 182 *supra*, but the trend has slackened as a result of the confusing outcome of Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Personal observation over a variety of agencies in the years since Chrysler does not suggest to this author that agencies have improved their review processes by very much, if at all. For example, FDA rules were last changed in 1974 and 1977, and EPA’s rules have been procedurally the same since September 1976. Thus, the relative merits of judicial as opposed to administrative fact finding remain heavily favorable to judicial *de novo* review:

<sup>212</sup>Assume that the agency believes that it can get by without asserting a public benefit, relying instead on the requester’s assertions. The court will look to the requester’s pleadings for an identification of this public rights position, and for endorsement of this position by the “surrogate” of the public, the agency.

<sup>213</sup>5 U.S.C. § 552(b)(6), and *see* cases reviewed in 2 FEDERAL INFORMATION DISCLOSURE, note 2 *supra* at 16.06.

<sup>214</sup>*See, e.g.,* Carson v. Dep’t of Justice, 631 F.2d 1008 (D.C. Cir. 1980); and Harbolt v. Dep’t of State, 16 F.2d 772 (5th Cir. 1980).

<sup>215</sup>S. 1730, note 4 *supra* at § 10.

(b)(6) issues, and substitution of the court's judgment has not been oppressive there. The (b)(6) cases show that *de novo* review can include judgment calls by the courts, notwithstanding the customary assumption that agencies can best decide the "public interest" considerations.

The question is a close one. On balance, the better view is that *de novo* review should include the matter of "overriding" because the agency will be able to fully articulate its view of the public interest when it presents its position to the court. In specific laws regulating public health and safety issues, Congress has either made judgments about public disclosure or expressly delegated the decision to the agencies.<sup>216</sup> Having *de novo* review (in the absence of such an explicit expression of congressional intent), the court should be able to hear both the agency and the submitter and make its independent determination of the public interest. Courts already make such determinations in the APA-related submitter litigation seeking injunctive relief against an agency's disclosure. One of the criteria for those injunctions is the presence of a public interest overriding private desires.<sup>217</sup> Deference to the agency's decision, for example, that the car purchaser's interest in economically buying American cars justifies disclosure of Ford's discounting strategy for 1983, would be an abandonment by the courts of the protective role which the submitter seeks, on a matter which is as well within the purview of a car-owning judge as it is of a car-owning bureaucrat.

One of the determining factors is that agencies' expertise in the protection of the public interest often falls short of the disclosure consequences for particular documents, which consequences are the real issue in a submitter's lawsuit. The agency should be required to articulate its theory against that of the submitter on an equal footing. Whether or not Congress proceeds with the judicial review reforms which are under consideration in the Regulatory Reform Act,<sup>218</sup> the clear trend in legislation and the courts is to lessen the deference accorded agencies on their selection of competing interests. In the very small category of reverse-disclosure cases, that erosion of deference is well deserved. The courts, therefore, should have complete *de novo* authority.

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<sup>216</sup>For example, questions of disclosure of testing data and health and safety studies disclosure have been answered expressly by Congress. 7 U.S.C. § 136h; 15 U.S.C. § 2613(b). These balancing decisions have already been made, and are little or not affected by this change in the residual, general statute.

<sup>217</sup>See the leading case on such relief, *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>218</sup>S. 1080, 97th Cong. 1st Sess. (1981).