

12-1-1979

Out of Reverse: Freedom of Information Act Litigation After Chrysler Corp. v. Brown

Judith A. Johnson

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>



Part of the [Administrative Law Commons](#), and the [Transportation Law Commons](#)

Recommended Citation

Judith A. Johnson, *Out of Reverse: Freedom of Information Act Litigation After Chrysler Corp. v. Brown*, 8 B.C. Envtl. Aff. L. Rev. 299 (1979), <http://lawdigitalcommons.bc.edu/ealr/vol8/iss2/4>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

OUT OF REVERSE: FREEDOM OF INFORMATION ACT LITIGATION AFTER CHRYSLER CORP. v. BROWN

Judith A. Johnson*

I. INTRODUCTION

In 1978, the Supreme Court granted certiorari¹ to *Chrysler Corp. v. Brown*,² a case raising some of the major issues in "reverse" Freedom of Information Act³ litigation. In a "reverse" Freedom of Information Act suit, the statute was used not as a means of gaining access to information, but as a mechanism for preventing disclosure of information claimed to be private or confidential. The issues involved in these suits had first appeared in the courts in 1973⁴ and had given rise to extensive litigation.⁵ A grant of certiorari was appropriate, not only to resolve a split in authority in the circuit courts,⁶ but also to resolve some of the

* Staff Member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW

¹ 435 U.S. 914 (1978).

² 441 U.S. 281 (1979).

³ The Freedom of Information Act is codified in 5 U.S.C. § 552 (1976).

⁴ COMM. ON GOVERNMENT OPERATIONS, FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA AND REVERSE-FOIA LAWSUITS, H.R. REP. No. 1382, 95th Cong., 2d Sess. 54 (1978) [hereinafter cited as 1978 HOUSE REPORT].

⁵ Citations to reverse FOIA lawsuits can be found throughout this article, in particular at notes 58 and 81. For an extensive compilation of reverse FOIA suits see Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103 (1978) [hereinafter cited as Campbell].

⁶ *Compare* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977), with *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978), vacated and remanded sub nom. *Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979); *General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), vacated and remanded, 441 U.S. 919 (1979); *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976); and *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975).

fundamental tensions underlying reverse Freedom of Information Act litigation.⁷

The purpose of this article is to analyze the major issues before the court in *Chrysler Corp. v. Brown*,⁸ tracing their development prior to the decision and evaluating the Supreme Court's response. To create a context in which to understand the issues, the article will first briefly review the background and legislative history of the Freedom of Information Act (FOIA).⁹ Next, the statutory provisions will be described, with particular emphasis on the two exemptions involved in most reverse suits involving confidential business information. The typical patterns for direct and reverse suits under the FOIA will then be explained. After this preliminary survey of the Act, the article will turn to the major issues that were presented in *Chrysler*:

- (1) the mandatory or permissive nature of the exemptions provided for in the FOIA;
- (2) the existence of a reverse cause of action under the FOIA;
- (3) the scope of Exemption Four of the FOIA;
- (4) the question of whether the Trade Secrets Act¹⁰ falls within the scope of Exemption Three of the FOIA;
- (5) the existence of an implied cause of action under the Trade Secrets Act;
- (6) the scope of information covered by the Trade Secrets Act;
- (7) the meaning of "authorization by law" under the Trade Secrets Act; and
- (8) the scope of judicial review¹¹ of agency decisions to disclose information pursuant to FOIA requests.

Having developed the major issues arising in reverse FOIA suits, the article will evaluate the impact on reverse FOIA litigation of the Supreme Court's treatment of the dispute between Chrysler and the government. After a brief summary of the facts of the dispute, and of the major conclusions reached by the lower courts,¹² the article will analyze the Supreme Court decision. In

⁷ The existence of a fundamental tension underlying the FOIA was pointed out by Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587, 592 (1977) [hereinafter cited as Clement].

⁸ 441 U.S. 281 (1979).

⁹ 5 U.S.C. § 552 (1976).

¹⁰ 18 U.S.C. § 1905 (1976). The Trade Secrets Act is commonly referred to as § 1905.

¹¹ 5 U.S.C. § 706 (1976).

¹² *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171 (D.Del. 1976), *vacated and remanded*,

the first part of the analysis, the focus will be on those major, recurring questions for which the Court supplied answers; in the second part, the emphasis will be on those important issues not resolved, and on some answers that are needed for the future.

II. THE FREEDOM OF INFORMATION ACT

A. Background

As the federal bureaucracy expanded in the mid-20th century, and federal agencies proliferated, the government found itself in possession of a vast store of information.¹³ Some of this information was generated by the government itself; much of it was acquired from individuals and groups subject to regulation by the various agencies. Some of the data was submitted voluntarily;¹⁴ other documents were submitted pursuant to regulations which conditioned the receipt of government benefits on compliance with government requests for information.¹⁵ As the amount of data held by the government grew, the need for effective legislation providing public access to the information became clear.¹⁶ Individuals and groups advanced valid reasons for desiring access to the government's store of information.¹⁷ Furthermore, public ac-

565 F.2d 1172 (3d. Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹³ Petitioner's Brief at 9-10, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹⁴ *Id.*

¹⁵ Reverse FOIA cases reveal a number of different situations in which government agencies requested documents from private businesses. In one influential case, the National Park Service required concessionaires operating in national parks to submit detailed financial information on a continuing basis. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In several cases, health care providers in Medicaid and Medicare programs were required to submit billing information to the Secretary of HEW to enable the staff to determine whether monthly payments made by Blue Cross were proper. See *Doctors Hosp. of Sarasota, Inc. v. Califano*, 455 F. Supp. 476 (M.D. Fla. 1978); *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236 (M.D. Fla. 1979). The *Chrysler* case was one of several in which employment information was submitted by businesses in order to receive government contracts. See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹⁶ Comment, "Reversing" the Freedom of Information Act: Congressional Intention or Judicial Invention, 51 ST. JOHN'S L. REV. 734, 734 (1977).

¹⁷ In one situation, access to certain pieces of information enabled contractors to discover mistakes in contract awards distributed by the General Services Administration. 1978 HOUSE REPORT, *supra* note 4, at 9-10. In another case, a trade publication used the FOIA to inform firms of agency actions involving inspection of pharmaceutical firms. *Id.* at 11. On another occasion, a non-profit corporation sought access to a film in order to inform citizens of the incidental killing of dolphins by the purse seine nets used in tuna fishing.

cess to the information was essential to avoid the dangers of a government conducted in secrecy—or a government perceived to be operating in secrecy. The vision of administrative agencies controlling large amounts of secret information was antithetical to the ideal of a democratic government.¹⁸

On the other hand, in some situations the government, or the party who had submitted the information to the government, had a vested interest in keeping the data confidential.¹⁹ Allowing public access to such information could easily undermine legitimate government interests²⁰ or produce economic and personal injury to those who had given information to their government in confidence.²¹ While it is true that most citizens consider abhorrent a government conducted in secrecy, many would also be surprised and offended by the notion that information they consider private or proprietary²² could be obtained and subsequently disseminated through the medium of a government agency.²³

Save the Dolphins v. Department of Commerce, 404 F. Supp. 407 (N.D. Cal. 1975).

¹⁸ Senator Edward Kennedy, sponsor of the 1974 Senate bill to amend the FOIA (S. 2543, 93d Cong., 2d Sess. (1974)) voiced this sentiment: "If the people of a democratic nation do not know what decisions their government is making, do not know the basis on which those decisions are being made, then their rights as a free people may gradually slip away, silently stolen when decisions which affect their lives are made under the cover of secrecy." S. REP. No. 854, 93d Cong., 2d Sess. 5 (1974), *reprinted in* Campbell, *supra* note 5, at 106.

¹⁹ A business which had developed a new product would have a significant financial interest in keeping such a development secret. O'Reilly, *Government Disclosure of Private Secrets under the Freedom of Information Act*, 30 BUS. L. 1125, 1125 (1975) [hereinafter cited as O'Reilly]. Similarly, the CIA, for example, might claim that information in its possession must be kept confidential to protect the national security. *Fonda v. CIA*, 434 F. Supp. 498, 502 (D.D.C. 1977).

²⁰ *EPA v. Mink*, 410 U.S. 73, 81-84 (1973).

²¹ Petitioner's Brief at 10, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

²² The term "proprietary" describes something which belongs, by right, to an owner; the owner, or proprietor, has an exclusive right to it. BLACK'S LAW DICTIONARY 1097 (5th ed. 1979).

²³ Submitters expressed this concept of the proprietary nature of certain confidential business information in a variety of contexts. At the 1977 Oversight Hearings on the FOIA, various business leaders and groups expressed dismay over the disclosure of private information under the FOIA. See *Business Records Exemption of the Freedom of Information Act: Hearings before a Subcomm. of the Comm. on Gov't Operations*, 95th Cong., 1st Sess. 162 (1977) [hereinafter cited as *1977 House Oversight Hearings*]. The Senate and House reports accompanying the FOIA also reflected this belief in the confidentiality of certain information. See S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965); and H.R. REP. No. 1497, 89th Cong., 2d Sess. 6 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2422-23. In its brief to the Supreme Court, Chrysler pointed to the nation's patent, copyright, and trade secret laws as support for the concept of the private, proprietary nature of business information. See Petitioner's Brief at 11, *Chrysler Corp. v. Brown*, 441

The basis for conflict thus has long been clear. However, a plan for balancing the conflicting interests has proven to be difficult to construct. One of the major pieces of legislation designed to confront the problem was the Freedom of Information Act.

The Freedom of Information Act (FOIA)²⁴ was "sweeping" legislation,²⁵ broadly framed to effectuate a major public policy: public access to information in the hands of the government.²⁶ The FOIA was enacted in 1966²⁷ to replace the rather ineffective disclosure provisions²⁸ of the Administrative Procedure Act (APA).²⁹ At that time, legislators emphasized that the FOIA was to effectuate the "fullest responsible disclosure."³⁰ It was to make available information which would enable the electorate to make well-informed and well-reasoned choices, and to insist on government accountability.³¹ On the other hand, Congress also perceived right from the beginning that the law would come into conflict with equally basic principles of privacy and confidentiality. In both houses, legislators stressed the need to balance interests favoring disclosure with those protecting confidentiality.³²

The initial results of the FOIA were disappointing, for the free flow of information that had been anticipated did not materialize.³³ When the House reported on the workings of the FOIA in 1972, reference was made to "five years of foot-dragging by the Federal bureaucracy."³⁴

U.S. 281 (1979). See generally Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 AD. L. REV. 193 (1977) [hereinafter cited as Patten & Weinstein].

²⁴ 5 U.S.C. § 552 (1976).

²⁵ *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 238 (M.D. Fla. 1979).

²⁶ *EPA v. Mink*, 410 U.S. 73, 80 (1973).

²⁷ Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966).

²⁸ *EPA v. Mink*, 410 U.S. 73, 79 (1973).

²⁹ 5 U.S.C. § 1002 (1964).

³⁰ S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

³¹ One expression of this view can be found in the *Foreword* to the [1967] ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT, reprinted in 20 AD. L. REV. 263 (1968): "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy." *Id.* at 264.

³² S. REP. NO. 813, 89th Cong. 1st Sess. 3 (1965), and H.R. REP. NO. 1497, 89th Cong. 2d Sess. 6 (1966), reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2423.

³³ Katz, *The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1262 (1970).

³⁴ H.R. REP. NO. 1419, 92d Cong., 2d Sess. 8 (1972), cited in Campbell, *supra* note 5, at 105.

In response to the lack of effectiveness of the FOIA,³⁵ Congress amended the statute in 1974.³⁶ The amendments were designed to encourage agency compliance with the FOIA³⁷ by establishing strict administrative procedures and providing for penalties for any arbitrary failure to disclose.³⁸ The congressional action "restore[d] the strength drained from the 1966 Act by seven years of agency misuse"³⁹ After the 1974 amendments, in light of the penalties for wrongful withholding, agencies became more likely to comply with information requests.⁴⁰ Further amendment of the FOIA in 1976⁴¹ was designed to encourage greater disclosure of information by limiting the amount of information which was "exempt" from the statute's disclosure provisions.⁴²

In sum, Congress enacted the FOIA to provide greater public access to information in the hands of the government, while not totally eliminating protection for confidential material. As Congress amended the FOIA, the trend toward greater disclosure continued.

B. Statutory Provisions of the Amended FOIA

The major goal of providing increased access to information is presently exemplified by the first part of the amended Freedom of Information Act.⁴³ Under this part of the statute, each agency is required to publish, in the Federal Register, a description of its organization, functioning, rules of procedure, and substantive rules of general applicability.⁴⁴ Agencies are also required to make other pieces of information available for copying, including final

³⁵ H.R. REP. NO. 876, 93d Cong., 2d Sess. 4-5 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6267, 6270-71.

³⁶ Act of Nov. 21, 1974, Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561-64 (1974).

³⁷ DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 3A.1 at 52 (1976).

³⁸ Clement, *supra* note 7 at 597.

³⁹ Comment, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951, 958 (1975).

⁴⁰ Clement, *supra* note 7, at 589 n.6.

⁴¹ Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976).

⁴² The 1976 amendment was, in part, a response to the generous interpretation afforded Exemption Three of the FOIA in *FAA v. Robertson*, 422 U.S. 255 (1975). H.R. REP. NO. 880 pt. I, 94th Cong., 2d Sess. 22-23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS, 2183, 2204-05; H. CONF. REP. NO. 1441, 94th Cong., 2d Sess. 25 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS, 2244, 2260-61. One final, minor amendment was made in 1978. Act of Oct. 13, 1978, Pub. L. No. 95-454, Title IX, § 906(a)(10), 92 Stat. 1225 (1978).

⁴³ 5 U.S.C.A. § 552(a) (West 1977 & Supp. 1979).

⁴⁴ *Id.* § 552(a)(1)(A)-(1)(D).

opinions of the agency and statements of policy.⁴⁵ Most important is the requirement that agencies comply with information requests from the public, provided that the requests reasonably describe the data being sought and are made in accordance with published rules of procedure.⁴⁶ These minimum requirements for making FOIA requests are significantly less stringent than those in the preceding disclosure provisions of the APA,⁴⁷ and are intended to simplify and expedite public access to information.⁴⁸

To further encourage prompt disclosure, the FOIA requires each agency to respond to a request for information within ten days⁴⁹ and to respond to an appeal from an agency denial of a request within twenty days.⁵⁰ Furthermore, if a requester⁵¹ is dissatisfied with an agency determination, it can seek judicial review in district court where it is entitled to *de novo* consideration by the court.⁵² The district court is empowered to enjoin the agency from withholding records and to order production of any records improperly withheld.⁵³ Finally, the FOIA directs possible sanctions against government officials who arbitrarily withhold information that should be disclosed.⁵⁴

As has been noted, the commitment to public access to information was balanced by a reluctance to abandon traditional notions of privacy and confidentiality. These privacy interests were generally embodied in the nine exemptions found in the second part of the statute.⁵⁵

The nine exemptions establish certain categories of information to which the first part of the FOIA—the disclosure section—does

⁴⁵ *Id.* § 552(a)(2)(A)-(2)(B)

⁴⁶ *Id.* § 552(a)(3)

⁴⁷ As the Supreme Court noted, the FOIA stood in "sharp relief" to § 3 of the Administrative Procedure Act (60 Stat. 238 (1946), formerly codified at 5 U.S.C. § 1002), and eliminated the requirement that requesters be properly concerned with the information sought. *EPA v. Mink*, 410 U.S. 73, 79 (1973).

⁴⁸ See H.R. REP. No. 1497, 89th Cong., 2d Sess. 1-2 (1966), reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2418-19.

⁴⁹ 5 U.S.C.A. § 552(a)(6)(A)(i) (West 1977 & Supp. 1979).

⁵⁰ *Id.* § 552(a)(6)(A)(ii).

⁵¹ The term "requester"—referring to a party that requests information from the government under the provisions of the FOIA—is part of the jargon accompanying reverse FOIA litigation. Since the term is commonly used and easily understood, it will be used throughout this article.

⁵² 5 U.S.C.A. § 552(a)(4)(B) (West 1977 & Supp. 1979).

⁵³ *Id.* § 552(a)(4)(B).

⁵⁴ 5 U.S.C.A. § 552(a)(4)(F) (West Supp. 1979).

⁵⁵ 5 U.S.C. § 552(b) (1976).

not apply;⁵⁶ that is, the information in the second part of the Act is "exempt" from the directives of the first part. These categories include, generally: (1) information ordered to be kept secret by the executive branch; (2) internal personnel matters of each agency; (3) information specifically exempted from disclosure by statute; (4) trade secrets and privileged or confidential commercial and financial information; (5) inter- or intra-agency memoranda not available to a party other than an agency in litigation with an agency; (6) private personnel and medical files; (7) certain investigatory records compiled for law enforcement purposes; (8) certain information in reports concerning financial institutions; and (9) geological and geophysical information concerning wells.⁵⁷ Two of the exemptions, numbers three and four, became particularly important to businesses which sought to protect confidential information submitted to the government.⁵⁸

Exemption Three originally provided that information would not have to be disclosed under the FOIA if such information was "specifically exempted from disclosure by statute."⁵⁹ In enacting Exemption Three, Congress seemed to be responding to concerns that the FOIA would repeal, by implication, over 100 non-disclosure statutes already in existence⁶⁰ and so eliminate existing protection for private and proprietary information. This initial version of Exemption Three could be interpreted to apply to a number of non-disclosure statutes,⁶¹ and Congress eventually be-

⁵⁶ *Id.* § 552(b).

⁵⁷ *Id.* § 552(b)(1)-(b)(9).

⁵⁸ See, e.g., the following cases involving Exemption Three and Exemption Four: *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck, & Co. v. Dahm*, 441 U.S. 918 (1979) (Exemption Three); *General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979) (both); *Sears, Roebuck & Co. v. General Services Admin.* 553 F.2d 1378 (D.C. Cir. 1977) (both); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (both); *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236 (M.D. Fla. 1979) (both); *Nationwide Mutual Ins. Co. v. Friedman*, 451 F. Supp. 736 (D. Md. 1978) (Exemption Three); *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744 (D. Md. 1976) (Exemption Three); *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976) (Exemption Three); *Pharmaceutical Mfgs. Ass'n v. Weinberger*, 401 F. Supp. 444 (D.D.C. 1975), *modified*, 411 F. Supp. 576 (D.D.C. 1976) (both).

⁵⁹ 5 U.S.C. § 552(b)(3) (1970).

⁶⁰ H.R. REP. No. 1497, 89th Cong. 2d Sess. 10 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2427.

⁶¹ See, e.g., *FAA v. Robertson*, 422 U.S. 255 (1975) (§ 1104 of the Federal Aviation Act of 1958); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (18 U.S.C. § 1905); *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied, sub nom. Prudential Ins. Co. of*

came dissatisfied with its potentially broad reach.⁶² In an attempt to circumscribe the scope of Exemption Three, Congress added, by amendment,⁶³ certain criteria which a statute must meet before it can be classified an Exemption Three statute: the statute must (A) require that matters be withheld in such a way as to leave no discretion on the issue or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld.⁶⁴ Whether or not certain statutes met these new criteria became the subject of continued controversy.⁶⁵

Exemption Four also aroused substantial controversy.⁶⁶ This provision exempts from the FOIA disclosure provisions certain information that is "trade secret" or "commercial or financial information obtained from a person and privileged or confidential."⁶⁷ Businesses relied on this exemption to provide protection for confidential business data. Interpretation of the scope of this exemption came into issue immediately⁶⁸ and continued to be of major significance in litigation involving the FOIA.⁶⁹

C. *Litigation Under the FOIA*

1. The Direct Suit

Congress anticipated that a certain kind of litigation would arise under the FOIA and established specific procedures whereby a requester could challenge an agency decision to withhold information.⁷⁰ The "model" direct suit under the FOIA would unfold according to the following pattern. First, a member of the public would request information from the agency, pursuant to valid

America v. Nat'l Org. of Women, D.C. Chapter, 431 U.S. 924 (1977) (42 U.S.C. § 2000e-8(e)(1970) & 44 U.S.C. § 3508 (1970)).

⁶² See H.R. CONF. REP. No. 1441, 94th Cong., 2d Sess. 25, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2244, 2260-61.

⁶³ Government in The Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976).

⁶⁴ 5 U.S.C. § 552(b)(3) (1976).

⁶⁵ See cases cited in note 58, *supra*.

⁶⁶ See cases cited in note 58, *supra*. Other cases dealing with Exemption Four include: National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974); General Services Admin. v. Benson, 415 F.2d 878 (9th Cir. 1969); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972).

⁶⁷ 5 U.S.C. § 552(b)(4) (1976).

⁶⁸ See, e.g., General Services Admin. v. Benson, 415 F.2d 878 (9th Cir. 1969); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972).

⁶⁹ See cases cited in note 58, *supra*, and text at notes 145-69, 322-52, *infra*.

⁷⁰ 5 U.S.C.A. § 552(a)(4)(B)-(4)(D) (West 1977 & Supp. 1979).

procedures established under the FOIA.⁷¹ The agency would respond negatively, within ten days, setting forth the reasons for its decision and the right of the requester to appeal to the head of the agency.⁷² The requester would appeal the decision to the agency head and, within twenty days, receive another unfavorable response along with notice of the right to judicial review.⁷³ The requester would then file a complaint in district court,⁷⁴ requesting expedited review.⁷⁵ Considering the matter *de novo*,⁷⁶ and perhaps examining the requested documents *in camera*,⁷⁷ the court would either uphold the agency decision, or direct the agency to disclose some or all of the records.⁷⁸ Traditional judicial procedures would then be available for appealing the district court's decision.⁷⁹

2. The Reverse Suit

Congress apparently did not anticipate⁸⁰ that another type of suit would arise under the FOIA, the so-called "reverse" FOIA suit.⁸¹ In this type of litigation, a party that had submitted information would attempt to use the FOIA "in reverse"—that is, to use it to *protect* information from disclosure. The problems raised by such a suit were complex and included, among others, issues of jurisdiction and venue,⁸² cause of action,⁸³ and scope of

⁷¹ *Id.* § 552(a)(3), (4)(A).

⁷² *Id.* § 552(a)(6)(A)(i).

⁷³ *Id.* § 552(a)(6)(A)(ii).

⁷⁴ *Id.* § 552(a)(4)(B).

⁷⁵ *Id.* § 552(a)(4)(D).

⁷⁶ *Id.* § 552(a)(4)(B).

⁷⁷ *Id.* § 552(a)(4)(B). See, e.g., *United Technologies Corp. v. Marshall*, 464 F. Supp. 845 (D. Conn. 1979).

⁷⁸ 5 U.S.C.A. § 552(a)(4)(B) (West 1977 & Supp. 1979).

⁷⁹ See, e.g., *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

⁸⁰ See 1978 HOUSE REPORT, *supra* note 4, at 54-55.

⁸¹ Numerous reverse suits were litigated between 1973 and the 1979 decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). See the text generally. Some of the most well-known reverse suits are: *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979); *General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975).

⁸² An incisive analysis of the problems of jurisdiction and venue appears in *Campbell*, *supra* note 5, at 160-191.

review.⁸⁴ However, although the problems involved were complex and the possible fact patterns numerous, a certain typical "model" also evolved for the reverse FOIA suit involving confidential business information.

First of all, the submitter⁸⁵ would become aware that certain information it had provided to the government was about to be disclosed to a third party.⁸⁶ If the submitter objected to such disclosure, it would attempt to convince the agency to turn down the request. If the submitter failed to convince the agency, or if the submitter concluded that there was not sufficient time to present its arguments to the agency within the time limits of the FOIA,⁸⁷ it would turn to the courts to prevent disclosure. Submitters would argue that the material sought by the requester was exempt from disclosure under one of the exemptions to the FOIA, frequently the fourth—trade secret—exemption.⁸⁸ Alternatively, submitters would contend that disclosure was prohibited by a statute that fell within Exemption Three of the FOIA.⁸⁹ A statute commonly relied on in this context was the Trade Secrets Act.⁹⁰ Submitters also attempted to use the Trade Secrets Act independently of the FOIA as an alternative basis for court review. They argued that the Trade Secrets Act gave them an implied right of action to challenge agency decisions to disclose trade secret information.⁹¹ Finally, submitters also used the APA as a source of

⁸³ See text at notes 136-43, 175-81, 205-10, *infra*.

⁸⁴ See text at notes 211-21, *infra*.

⁸⁵ The term "submitter" - referring to parties who have submitted to the government information which may become the subject of an FOIA request - is also part of the jargon accompanying reverse FOIA litigation. Since it is commonly used and easily understood, it will be used throughout this article.

⁸⁶ The FOIA itself does not require agencies to notify submitters of plans to release information pursuant to an FOIA request. As a result, agency practices vary. Agencies may notify submitters as a matter of informal practice or pursuant to agency regulations. Campbell, *supra* note 5, at 133-36.

⁸⁷ This problem materialized in the controversy between Chrysler and the government. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1179-80 (3d Cir. 1977), *vacated and remanded sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

⁸⁸ 5 U.S.C. § 552(b)(4) (1976).

⁸⁹ *Id.* § 552(b)(3).

⁹⁰ 18 U.S.C. § 1905 (1976).

⁹¹ Their arguments on this point met with limited success in the courts. The District Court of the District of Columbia granted a permanent injunction to plaintiffs in a reverse FOIA suit, pursuant to 18 U.S.C. § 1905. Citing Wyandotte v. United States, 389 U.S. 191, 202 (1967), the court reasoned that plaintiffs had standing to invoke the criminal statute to effectuate the congressional purpose. Charles River Park "A", Inc. v. HUD, 360 F. Supp. 212, 213 n.2 (D.D.C. 1973). However, when the court of appeals remanded the case

jurisdiction for suits challenging agency decisions to disclose.⁹²

The first reverse suit was filed in 1973;⁹³ in 1976, seventy-six cases were filed, and in 1978, when the House Committee on Government Operations issued its report on the fourth exemption of FOIA, 104 cases were pending.⁹⁴ The reasons for the growth of reverse FOIA litigation were complex.

According to one attorney who has litigated major reverse FOIA suits, the growth was due, at least in part, to "a profound change in the purposes for which FOIA requests are being made."⁹⁵ The FOIA was designed to enable the public to learn about its government, but had become "a vehicle for surveillance, at public expense, of the private affairs of commercial enterprises by their adversaries."⁹⁶ Not only had the purposes of requesters changed but, according to testimony at Congressional hearings on Exemption Four, the courts seem to have deviated from Congressional intent regarding Exemption Four.⁹⁷

In addition to criticisms asserted by interested parties, other criticisms of the treatment of confidential business information under the FOIA were articulated by legal commentators, members of Congress, and the courts. These criticisms concerned the adequacy of agency procedures for protecting private business interests. Specifically, dismay was expressed at the lack of notice of impending disclosure given to submitters,⁹⁸ the lack of time and

for further proceedings, it indicated that review should be based on the Administrative Procedure Act, and that §1905 should function simply as a check on agency discretion. *Charles River Park "A", v. HUD*, 519 F.2d 935, 941-42 (D.C. Cir. 1975). Another district court also intimated that submitters might have an implied right of action under §1905. In ordering hearings on the issue of substantial harm, the district court in *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975), did not rule out the possibility of an implied right of action under §1905. Although the court recognized that jurisdiction was proper under portions of the APA, 5 U.S.C. §§702, 706, 706(2), it also stated that, since plaintiffs sought to enjoin violation of §1905, jurisdiction existed under 28 U.S.C. §1331. *Id.* at 636. *Contra*, *General Dynamics v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979); *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978), *vacated and remanded, sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979); *Westchester Gen. Hosp. Inc. v. HEW*, 464 F. Supp. 236 (M.D. Fla. 1979).

⁹² See, e.g., *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976); *McCoy v. Weinberger*, 386 F. Supp. 504 (W.D. Ky. 1974).

⁹³ 1978 HOUSE REPORT, *supra* note 4, at 54.

⁹⁴ *Id.*

⁹⁵ Statement by Burt A. Brauerman, 1977 *House Oversight Hearings, supra* note 23, at 108.

⁹⁶ *Id.*

⁹⁷ *Id.* at 113-14.

⁹⁸ 1978 HOUSE REPORT, *supra* note 4, at 26-27.

opportunity for submitters to present fully their objections to the release of information,⁹⁹ the lack of interest on the part of the agency in protecting submitters' rights,¹⁰⁰ and the impracticality and expense of filing a reverse suit.¹⁰¹ These concerns were reinforced by a recognition of the possibility of serious financial loss on the part of both the submitter and the consuming public,¹⁰² and by a sense of unfairness at the way the Act affected legitimate business interests.¹⁰³

The growth of this reverse FOIA litigation should not have been surprising, nor was it a wholly undesirable result of the legislation. The FOIA incorporated tensions basic to society: it reflected strongly held beliefs in democratic principles and in theories of economic competitiveness. For the Act to be faithful to those competing interests, it had to strike a delicate balance. As the factors that were to be considered were given different weight by society, and as new factors entered into the balancing process, there had to be a forum for re-establishing equilibrium. Once certain problems had been exposed and debated, and the major questions crystallized, there arose a need for judicial resolution of recurring legal issues, as well as for legislative attention to recurring procedural problems within the Act itself.

III. MAJOR ISSUES IN REVERSE FOIA LITIGATION PRIOR TO THE DECISION IN CHRYSLER CORP. V. BROWN

As reverse FOIA suits involving the business records exemption¹⁰⁴ became more numerous, certain recurring issues crystallized and the arguments relating to these issues became formalized. Most of these established issues were presented by the controversy between Chrysler Corporation and the government. To appreciate the effect of the final decision in *Chrysler Corp. v. Brown*,¹⁰⁵ it is useful to examine the issues as they stood before the Supreme Court handed down its decision.

⁹⁹ Clement, *supra* note 7, at 634-35.

¹⁰⁰ Patten & Weinstein, *supra* note 23, at 202-03.

¹⁰¹ Patten & Weinstein, *supra* note 23, at 194.

¹⁰² O'Reilly, *supra* note 19, at 1146.

¹⁰³ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1210-15 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹⁰⁴ See text at notes 80-103, *supra*.

¹⁰⁵ 441 U.S. 281 (1979).

A. *The Permissive or Mandatory Nature of the FOIA Exemptions*

One of the threshold issues raised in reverse suits was whether the nine statutory exemptions to the FOIA¹⁰⁶ provided absolute protection for information within their scope, or whether they simply allowed the agencies to exercise discretion in determining whether or not to disclose such material pursuant to an FOIA request.

The significance of the determination was clear: if the exemptions were mandatory, they would provide a more potent tool for submitters to use in blocking disclosure. The main battle would be over whether requested material fell into one of the nine categories; if so, the discussion would be at an end and agencies would have to withhold the information. On the other hand, if the exemptions were permissive, the battle would take place on two fronts: (1) Did the requested information fall into an exempt category? (2) If so, should the agency, in using its discretion, decide to release the information anyway? The standards the agency applied to discretionary disclosure would then be crucial. Questions would arise as to how much weight should be given to various factors such as the public good, the particular agency's mission, and the interests of the submitting party. In attempting to resolve the dilemma over whether the exemptions were mandatory or permissive, courts and commentators considered the words of the statute,¹⁰⁷ legislative history,¹⁰⁸ the interests to be balanced¹⁰⁹ and, eventually, a growing number of court decisions.¹¹⁰

The proponents of the theory that the exemptions should be construed as mandatory found some support in statutory language.¹¹¹ Although the words of the exemption provisions are not unambiguous, an argument could be made that they point to a mandatory construction. For example, the exemption section begins with the following phrase: "This section [the disclosure pro-

¹⁰⁶ 5 U.S.C. § 552(b)(1)-(b)(9) (1976). See text at notes 56-57, *supra*.

¹⁰⁷ Campbell, *supra* note 5, at 132.

¹⁰⁸ See *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 (D.C. Cir. 1975).

¹⁰⁹ See *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1210-11 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977). See also Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1045-46 (1975).

¹¹⁰ In reaching a decision in 1979, a Florida district court cited extensively to previous judicial opinions resulting from reverse FOIA litigation. See *Westchester Gen. Hosp. Inc. v. HEW*, 464 F. Supp. 236, 239 (M.D. Fla. 1979).

¹¹¹ 5 U.S.C. § 552(b) (1976).

vision] *does not apply* to matters that are . . .”¹¹² This phrase makes it clear that the provisions of the FOIA requiring disclosure do not apply to exempt material: agencies are not *directed* to provide access to exempt material. From this language it could be inferred that exempt material should not be disclosed.¹¹³

Legislative history could also be read to favor a mandatory view of the exemptions. For example, House¹¹⁴ and Senate¹¹⁵ reports accompanying the FOIA made it clear that access to information was not the sole aim of the Act; rather, the goal was to achieve as much access as possible *while protecting* other legitimate interests.¹¹⁶ To achieve this dual goal, Congress arguably protected certain information as a matter of right and not as a matter of discretion.¹¹⁷ The Court of Appeals for the Fourth Circuit was persuaded by this argument that Congress intended to protect completely the confidentiality of certain privately submitted data.¹¹⁸ The court found that Exemption Four contained “an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests.”¹¹⁹

While not specifically relied on by the court, some of the strongest arguments advanced on behalf of the submitters who argued for mandatory exemptions were based on practical considerations.

¹¹² *Id.* (Emphasis added)

¹¹³ Further support for this view could also be found later in the statute. After listing the exceptions, the FOIA provides that “any reasonably segregable portion of a record shall be provided to any person requesting such record *after deletion of the portions which are exempt under this subsection.*” 5 U.S.C. § 552(b) (1976). (Emphasis added). This provision seemed to assume that the agency would delete, and thus withhold, exempt material.

¹¹⁴ H.R. REP. NO. 1497, 89th Cong., 2d Sess., 10 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2427.

¹¹⁵ S. REP. NO. 813, 89th Cong., 1st Sess., 3 (1965).

¹¹⁶ See *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1210-11 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹¹⁷ See *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 768-70 (D.C. Cir. 1974), discussing the *Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 199 (1964). Senate bill 1666 was the predecessor of the FOIA; the fact that it contained no exemption for trade secrets aroused substantial controversy. After the hearings, it was amended to include a trade secrets exemption similar to the one finally enacted as part of the FOIA. *Id.*

¹¹⁸ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1211 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹¹⁹ *Id.* (emphasis in original).

First, businesses contended that agencies sometimes lacked the expertise called for in determining whether or not to release business information.¹²⁰ Agencies could not be knowledgeable about every kind of business that sought to protect its data and could not be expected to make sound decisions about the consequences of releasing complex commercial and financial information.¹²¹ Second, agencies were criticized for lacking commitment to the submitter's point of view.¹²² Threatened with sanctions if they unlawfully withheld information, agencies allegedly had little incentive to argue for the submitter's cause.¹²³ Third, business interests argued that they would be more likely to submit information to the government if they could depend on an assurance of confidentiality.¹²⁴ While it was true that businesses were often required to submit data, it was argued that more and better information would be provided if the exemptions were mandatory.¹²⁵ Fourth, there was evidence that the FOIA was being used by some businesses to gain information about their competitors.¹²⁶ The amount of economic harm caused was disputable, but perhaps both private businesses and their customers were paying a price for public access to information.¹²⁷

Despite these practical concerns which favored a mandatory construction of the exemptions, and which should be addressed in any proposed solutions to FOIA problems, the arguments raised in favor of interpreting the exemptions as permissive were persuasive. The language of the FOIA did not direct agencies to withhold information.¹²⁸ The exemptions simply set out categories of information to which the disclosure regulations did not apply. The exemptions authorized withholding, but did not mandate it.

The Act's legislative history offered support for holding the exemptions to be permissive.¹²⁹ Furthermore, even if the original

¹²⁰ Patten & Weinstein, *supra* note 23, at 203.

¹²¹ Petitioner's Brief at 76-77, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹²² Patten & Weinstein, *supra* note 23, at 202-03.

¹²³ *Id.*

¹²⁴ Petitioner's Brief at 32, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹²⁵ *Id.* at 29.

¹²⁶ *Id.* at 21-22.

¹²⁷ 1978 HOUSE REPORT, *supra* note 4, at 5-11.

¹²⁸ 5 U.S.C. § 552(b) (1976).

¹²⁹ The House and Senate reports cited by proponents of a mandatory interpretation of the amendments could also be interpreted as lending support to the opposite point of

congressional intent was not unambiguous, subsequent actions by Congress clarified legislative perceptions of the FOIA. In 1972, the House Committee on Government Operations held oversight hearings on agency compliance with the FOIA. Noting a lack of compliance on the part of agencies, the committee stated emphatically that the "withholding of information by government under the Act is permissive, not mandatory."¹³⁰ The legislative history of the 1974 amendments¹³¹ clarified the legislative preference for the permissive view.¹³²

Outside of the Fourth Circuit,¹³³ judicial interpretation of the FOIA exemptions favored a permissive construction.¹³⁴ Some courts reached the point of simply stating the conclusion that the exemptions were permissive, without exploring the issue in detail.¹³⁵ It remained for the Supreme Court in *Chrysler* to finally determine whether arguments for a permissive interpretation completely outweighed the not unreasonable claims of submitters for guaranteed protection of exempt information.

B. The "Reverse" Suit: the Existence of a Right of Action for Submitters Under the FOIA

A Supreme Court decision on whether or not the FOIA exemptions were mandatory would help resolve another contested issue: could submitters "reverse" the Act and use it to seek an injunction *against* disclosure? Although the FOIA itself set out specific procedures for court review of an agency's refusal to disclose information sought by a third party,¹³⁶ no corresponding rights were delineated for a submitter who wished to block disclosure of exempt material. A decision that the exemptions were mandatory would help the submitters in arguing for an implied right of ac-

view. S. REP. No. 813, *supra* note 23, at 3, and H.R. REP. No. 1497, *supra* note 23, at 10, both contained language which could be construed as supporting the permissive view.

¹³⁰ H.R. REP. No. 1419, 92d Cong., 2d Sess. 3 (1972), *cited in* Clement, *supra* note 7 at 599.

¹³¹ Act of Nov. 21, 1974, Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561-64 (1974).

¹³² Campbell, *supra* note 5, at 133.

¹³³ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹³⁴ Clement, *supra* note 7, at 600.

¹³⁵ *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 239 (M.D. Fla. 1979).

¹³⁶ 5 U.S.C.A. § 552(a)(4)(B)-(4)(G) (West 1977 & Supp. 1979). See text at notes 70-77, *supra*.

tion.¹³⁷ If the FOIA prohibited disclosure of exempt material, any release of such information by the agency would constitute a statutory violation.¹³⁸ The existence of a potential violation could arguably give rise to a right of action to enjoin agency disclosure. According to this view, congressional intent to protect submitters' interests supported the finding of an implied right of action.¹³⁹

The Court of Appeals for the Fourth Circuit enthusiastically endorsed finding this implied right of action in the FOIA.¹⁴⁰ Perhaps influenced more by what it perceived to be the reality of the FOIA than by its perception of the intent of Congress, the court found that the FOIA protected private parties from disclosure and thus carried with it an implied right to invoke the equity power of the court.¹⁴¹ "The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. . . . But is not the same right to be implied, when the supplier . . . seeks what may be regarded as correlative relief?"¹⁴² Although the Fourth Circuit answered the question affirmatively, a larger number of courts did not,¹⁴³ and submitters remained uncertain about whether a "reverse" suit could be brought under the FOIA. The issue was ready for a decision by the Supreme Court.

¹³⁷ The FOIA sets up certain standards of conduct; it also provides that if these standards are violated, certain parties, namely requesters, may seek to remedy such violations by bringing suit in federal court. No such right of action is specified for submitters. However, courts had been willing, in certain circumstances, to imply a right of action under statutes which did not expressly provide one. See, e.g., *Superintendent of Ins. of New York v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967). At least one court was willing to accept the argument that since the FOIA was partially designed to protect submitters' interests, and since it specifically exempted some information from disclosure, the courts should imply a right of action for submitters to go to federal court and enjoin disclosure of exempt material. See *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1210-12 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹³⁸ See *Westinghouse Elec. Corp. v. Brown*, 443 F. Supp. 1225, 1230-31 (E.D. Va. 1977), following the decision in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1209-10 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹³⁹ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1210-14 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

¹⁴⁰ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924, 1210 (1977).

¹⁴¹ *Id.* at 1211.

¹⁴² *Id.* at 1213.

¹⁴³ *Clement*, *supra* note 7 at 600.

C. *The Scope of Exemption Four*

Since the main ground on which to contest disclosure of information was that such information was "exempt,"¹⁴⁴ it was necessary to determine the scope of the individual exemptions. An issue with which the courts grappled early in reverse FOIA litigation involving business records was the scope of Exemption Four.¹⁴⁵ As was true of the whole FOIA itself, the exemption relating to business records gained meaning as it was interpreted by the executive branch, Congress, and the courts.

The interpretive process began when the Attorney General expressed doubts about the grammatical structure of the exemption and consequently about its coverage.¹⁴⁶ This doubt was quickly resolved in favor of an interpretation which held that the exemption covered two kinds of information: (1) trade secrets and (2) information which is commercial or financial, is obtained from a person, and is privileged or confidential.¹⁴⁷

The first category did not arouse much controversy, perhaps because definitions of "trade secret" were already available and could be modified as courts gained experience with the FOIA.¹⁴⁸ Several cases involving the Freedom of Information Act discussed the meaning of "trade secret," and trade secret protection was provided in several instances under the FOIA.¹⁴⁹

Establishing the parameters of the second category of Exemption Four data—commercial and financial information, privileged or confidential—was more difficult. One of the first approaches used to delineate the outlines of this category was the "promise of

¹⁴⁴ See text at note 88, *supra*.

¹⁴⁵ "This section does not apply to matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . ." 5 U.S.C. § 552(b) (1976).

¹⁴⁶ [1967] *Attorney General's Memorandum on the Public Information Section of the Administration Procedure Act*, reprinted in 20 AD. L. REV. 263, 300 (1968).

¹⁴⁷ *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

¹⁴⁸ See Note, *Would Macy's Tell Gimbel's: Government-Controlled Business Information and the Freedom Information Act, Forwards and Backwards*, 6 LOY. CHI. L.J. 594, 598-99 (1975). The initial choice seemed to be the definition set forth in RESTATEMENT OF TORTS § 757, comment b (1939); however, the Restatement definition was broad enough to encompass information in the second category, and a more limited definition seemed appropriate. 1978 HOUSE REPORT, *supra* note 4, at 15-16.

¹⁴⁹ For example, one plaintiff argued that detailed information about natural gas reserves, obtained at great cost and released at economic peril, qualified as a trade secret. *Union Oil Co. v. FPC*, 542 F.2d 1036, 1044-45 (9th Cir. 1976). For a similar trade secrets claim made by a plaintiff, see also *Continental Oil v. FPC*, 519 F.2d 31 (5th Cir. 1975).

confidentiality" test.¹⁵⁰ This test took the rather simple view that if a person had submitted commercial or financial information to the government because an agency had offered an express or implied promise of confidentiality, such information should be considered confidential under Exemption Four.¹⁵¹ Closely related to the "promise of confidentiality" test was the "expectation of confidentiality" test,¹⁵² under this formulation, information that would not ordinarily be disclosed by a reasonable business enterprise would be protected under Exemption Four.¹⁵³

The drawbacks of these early tests were clear. Under the subjective "promise of confidentiality" test, discretion regarding disclosure was left in the hands of the individual agencies and no standards were provided for deciding when a promise should be made.¹⁵⁴ Excessive withholding was likely to be the result.¹⁵⁵ Furthermore, the test did not take into account situations in which the issue of confidentiality had not even been initially considered.¹⁵⁶ Of the two versions, the more objective "expectation of confidentiality" test was better,¹⁵⁷ since courts could at least determine whether the information in question was the kind of data a *reasonable* business would ordinarily reveal to the public. However, even this test allowed the criteria for disclosure to be set largely by business practice rather than by any test related to the public good.¹⁵⁸

As courts continued to apply Exemption Four, it became clear that a more objective test was needed to determine the scope of the exemption. The Court of Appeals for the District of Columbia responded to this need in the influential case of *National Parks &*

¹⁵⁰ This approach was suggested by language in a House Report on the FOIA.

"[Exemption Four] would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."

H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS, 2418, 2427. An early case utilizing this approach was *General Services Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969).

¹⁵¹ 1978 HOUSE REPORT, *supra* note 4, at 16-17.

¹⁵² *Id.* at 17.

¹⁵³ *Id.* at 17-18.

¹⁵⁴ *Id.* at 17.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 18.

Conservation Association v. Morton.¹⁵⁹ Appellants had brought suit when officials of the Department of the Interior had refused to make public certain financial information about concessions which were operated in the national parks. In attempting to resolve the issue of whether such information was confidential, and protected by Exemption Four, the court reasoned that it was not sufficient that information would not customarily be released by the submitter; "[a] court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption."¹⁶⁰ According to the court, the exemptions generally served two purposes: the government's interest in maintaining efficient operations and the submitter's interest in supplying information in confidence.¹⁶¹ Supporting this view with numerous quotations from legislative history, the court noted that Exemption Four, in particular, was justified by the need to encourage voluntary cooperation with the government and by the need to protect the rights of those who were compelled to provide data.¹⁶² In summing up the rationale for its decision, the court created the *National Parks* test—commercial or financial information was confidential for purposes of Exemption Four if disclosure was likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained.¹⁶³

In applying the *National Parks* test, the courts clarified the scope of Exemption Four and grappled with difficult issues of proof.¹⁶⁴ One court refused a submitter's request for Exemption

¹⁵⁹ 498 F.2d 765 (D.C. Cir. 1974).

¹⁶⁰ *Id.* at 767.

¹⁶¹ *Id.*

¹⁶² *Id.* at 769.

¹⁶³ *Id.* at 770.

¹⁶⁴ Proof of competitive harm need not reach the level of proof required in elaborate anti-trust proceedings. *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 681 (D.C. Cir. 1976). In fact, once the plaintiffs showed the existence of competition, "No actual adverse effect on competition need be shown, nor could it be, for the requested documents have not been released." *Id.* at 683. Instead, the court would determine whether substantial competitive harm was threatened by looking at the nature of the material sought and the competitive circumstances of the business, relying to some extent on opinion testimony. *Id.* In reverse FOIA cases arising under Exemption Four, submitters frequently relied on expert testimony to show exactly how the information could be used by competitors to the disadvantage of the submitting corporation. See, e.g., *Westinghouse Elec. Corp. v. Brown*, 443 F. Supp. 1225, 1229 (E.D. Va. 1977).

Four protection where it believed the submitter was worried more about potential embarrassment than about potential competitive harm.¹⁶⁵ It also found that the fact that the submitter corporation had made its information available to others worked against a finding of harm under Exemption Four.¹⁶⁶ In another case, the disclosure of summary data which only conveyed a vague idea of the composition of a company's work force was found not to offer material aid to a competitor.¹⁶⁷ Further, although the courts considered whether or not information was submitted in confidence, this factor in itself was held not to bar disclosure unless the information was also likely to cause competitive harm under the *National Parks* test.¹⁶⁸

At the time of the *Chrysler* controversy, the *National Parks* test seemed firmly established as a method of determining the scope of Exemption Four. However, the test had been criticized as being too narrow to adequately protect submitters' interest.¹⁶⁹ A decision to return to earlier tests, or to extend the parameters of Exemption Four, would significantly alter the outcome of reverse FOIA litigation involving business records.

D. *The Trade Secrets Act and the FOIA*

One other possible source of protection for businesses that submitted confidential information to the government was the Trade Secrets Act.¹⁷⁰ This was a broadly worded criminal statute forbidding government employees and agencies from disclosing certain categories of material unless otherwise authorized by law.¹⁷¹ Material protected by the Trade Secrets Act included information relating to trade secrets, confidential statistical data, and financial material¹⁷²—information similar to that covered by Exemption Four of the FOIA. Businesses turned to the Trade Secrets Act for reinforcement of Exemption Four protection under the FOIA, as well as for the protection it offered as an independent prohibition against disclosure. Since the Trade Secrets

¹⁶⁵ *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 297 (C.D. Cal. 1974).

¹⁶⁶ *Id.*

¹⁶⁷ *United Technologies Corp. v. Marshall*, 464 F. Supp. 845, 853 (D. Conn. 1979).

¹⁶⁸ *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633, 637 (E.D. Va. 1975).

¹⁶⁹ *Patten & Weinstein*, *supra* note 23, at 198.

¹⁷⁰ 18 U.S.C. § 1905 (1976). The Trade Secrets Act is commonly referred to as § 1905.

¹⁷¹ *Id.*

¹⁷² *Id.*

Act and the FOIA could apply to the same material, it was necessary to determine the relationship between the two statutes.

1. The Trade Secrets Act as an Exemption Three Statute

One possible relationship was that the Trade Secrets Act was one of the non-disclosure statutes referred to in Exemption Three of the FOIA.¹⁷³ If the Trade Secrets Act did qualify as an Exemption Three statute, it would significantly reduce disclosure of business records which had been obtained by the government. It would operate on both exempt and non-exempt material— independently of Exemption Four—and block disclosure of any information within its purview unless such disclosures were authorized by another law. Both sides of this issue were vigorously presented,¹⁷⁴ with reference made to the legislative history and the amended language of Exemption Three. However, up until the time of the *Chrysler* decision, the relationship between the Trade Secrets Act and Exemption Three of the FOIA had not been clearly defined in the lower federal courts.

2. The Possibility of an Implied Right of Action for Submitters under the Trade Secrets Act

Even if the Trade Secrets Act did not qualify as an Exemption Three statute, it arguably operated as an independent restraint on agency disclosure of information. The statute imposed penalties on government employees who disclosed protected information unless they could point to another law authorizing disclosure.¹⁷⁵ The statute thus had the potential to provide a vehicle for

¹⁷³ "This section does not apply to matters that are . . . (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. . . ."

5 U.S.C. § 552(b)(3)(1976). See text at notes 58-65, *supra*.

¹⁷⁴ In a decision that appeared shortly after the 1976 amendment of Exemption Three, and which made no reference to the changes wrought by the amendment, the court in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977), determined that § 1905 was an Exemption Three statute. *Id.* at 1203. The opposite conclusion was reached in the Eighth Circuit in *General Dynamics Corp. v. Marshall*, 572 F.2d 1211, 1217 n.7 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979). See also *United Technologies Corp. v. Marshall*, 464 F. Supp. 845, 851 (D.Conn. 1979); *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744, 752-53 (D.Md.1976).

¹⁷⁵ 18 U.S.C. § 1905 (1976).

submitters to challenge many agency decisions to disclose.¹⁷⁶

Establishing a private right of action under the Trade Secrets Act proved difficult,¹⁷⁷ however, since the Supreme Court had set up rigorous tests that had to be met before an implied right of action would be found.¹⁷⁸ It could be argued that neither the language nor the legislative history of the Trade Secrets Act revealed congressional intent that a private right of action be implied.¹⁷⁹ Further support for this view could be adduced from the fact that the scope of the prohibitions of the Trade Secrets Act were broad and the penalties were adequate to achieve congressional objectives.¹⁸⁰ Finally, an implied right of action might not be necessary since alternate remedies were available if the statute were violated.¹⁸¹ With uncertainty existing over whether the Trade Secrets Act was an Exemption Three statute, and whether a private right of action could be implied from the statute, submitters remained uncertain as to the best method of utilizing the Trade Secrets Act to block disclosure of confidential business information.

¹⁷⁶ For examples of the application of § 1905, see *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975); *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744 (D.Md. 1976); *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976).

¹⁷⁷ Cases in which a private right of action under 18 U.S.C. § 1905 was not recognized include *General Dynamics v. Marshall*, 572 F.2d 1211, 1215 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979); *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197, 1202-03 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979); *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 244 (M.D. Fla. 1979). A decision from which one could infer an implied right of action under § 1905 is *Westinghouse Elec. Corp. v. Brown*, 443 F. Supp. 1225 (E.D. Va. 1977).

¹⁷⁸ In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court set out four criteria for determining whether an implied right of action will be found in a statute: (1) Is the plaintiff one of the class for whose special benefit the statute was enacted? (2) Is there any indication of legislative intent to create or deny such a private remedy? (3) Is such a remedy consistent with the underlying legislative purposes or the legislative scheme? (4) Is the cause of action traditionally one relegated to state law, in an area basically handled by the states, so as to render a federal remedy inappropriate? 422 U.S. at 78. Recent Supreme Court cases have emphasized the importance of legislative intent, raising doubts about the exact significance of the other three factors of the *Cort* test. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 100 S. Ct. 242 (1979).

¹⁷⁹ See *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 244 (M.D. Fla. 1979).

¹⁸⁰ *Id.* at 244.

¹⁸¹ *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1188 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). See Clement, *supra* note 7, at 624-25, for a discussion of congressional views on the adequacy of the remedies under the Trade Secrets Act.

3. The Scope of the Trade Secrets Act

Since it was possible for the Trade Secrets Act to interact with the FOIA in a number of ways,¹⁸² it was important to determine precisely what information was encompassed by the prohibitions of the criminal statute. Unfortunately, the scope of the Trade Secrets Act was unclear, due to the fact that the law was an amalgam of three earlier statutes.¹⁸³ Each of the original statutes had been directed toward a particular agency and had attempted, in a slightly different way, to protect information which businesses might consider private.¹⁸⁴ In the 1948 codification of Title XVIII, the three statutes were combined into one provision directed toward all government agencies. The new statute was more expansive than the previous statutes and applied to any officer or employee of the United States and to any information which "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person [or] firm. . ."¹⁸⁵

Read literally, the Trade Secrets Act seemed to prohibit the disclosure of any information about a business, including its very identity.¹⁸⁶ Such an interpretation would favor submitters who wished to use the non-disclosure statute to bar release of any business information they submitted to the government.¹⁸⁷ The gov-

¹⁸² See text at notes 170-81, *supra*.

¹⁸³ Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, 238 (codified at 18 U.S.C. § 216 (1940)); Revenue Act of 1916, ch. 463, § 708, 39 Stat. 756, 798 (codified at 19 U.S.C. § 1335 (1940)); Act of Jan. 27, 1938, ch. 11, 52 Stat. 8 (codified at 15 U.S.C. § 176(b) (1940)).

¹⁸⁴ Clement, *supra* note 7, at 607-13, presents a thorough discussion of the three statutes that preceded the Trade Secrets Act. One was a revenue act which forbade government employees (in particular, revenue agents and collectors) from making unauthorized disclosures of two types of information: (1) information which an agent obtained because of on-site visits; and (2) the amount or source of income, profits, losses and expenditures set forth in an income tax return. Another was a Tariff Commission statute that prohibited government employees from disclosing trade secrets or processes uncovered during investigations conducted by the Commission. The third statute, originally entitled "Confidential Nature of Information Furnished Bureau," provided that information submitted in confidence to the Bureau of Foreign and Domestic Commerce by individual firms was to be held in confidence by the bureau, and to be used for statistical purposes only, in a way which protected the individual identities of the companies involved. The three statutes were combined as part of a general revision of the Criminal Code (Title XVIII).

¹⁸⁵ 18 U.S.C. §1905 (1976).

¹⁸⁶ *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1186 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹⁸⁷ Supplemental Brief for the Appellants at 3-4, *General Dynamics v. Marshall*, No. 77-

ernment, on the other hand, argued that such an interpretation was inconsistent with the original three statutes and with the principles behind the 1948 recodification of Title XVIII.¹⁸⁸ Further, such a broad interpretation would undermine the goals of the FOIA.¹⁸⁹ The views of the two sides were widely divergent, and a decision concerning the scope of the Trade Secrets Act seemed crucial to an understanding of the effect of the statute on the FOIA.

4. The Meaning of Disclosures "Authorized by Law" under the Trade Secrets Act

If the Trade Secrets Act were found to apply to material contested in a reverse FOIA suit, either through Exemption Three or through the application of the statute as an independent prohibition on disclosure, one further inquiry remained. When could the information covered by the Trade Secrets Act be lawfully disclosed by an agency on the grounds that such disclosure was "authorized by law?" Prior to the Supreme Court decision in *Chrysler*, several potential sources for such authorization were postulated.¹⁹⁰ One of the most obvious sources was the FOIA itself.¹⁹¹ The reasoning in support of this position was based on the underlying purpose of the FOIA. According to this view, since the goal of the FOIA was full public access to information, the FOIA not only mandated disclosure of non-exempt material but also authorized the discretionary release of exempt material.¹⁹² Thus, Congress must have intended the statute to authorize agency regulations governing disclosure of exempt information.¹⁹³ Such regulations, backed by the authority of the FOIA, would be "law" and would validate disclosure of information even if it were cov-

1192 (8th Cir. Sept. 1979) (on remand).

¹⁸⁸ *Id.* at 4-5.

¹⁸⁹ See text at note 171, *supra*.

¹⁹⁰ In *General Dynamics v. Marshall*, 572 F.2d 1211, 1217 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979), and in *Sears Roebuck & Co. v. Eckerd*, 575 F.2d 1197, 1200 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979), the courts found that regulations promulgated pursuant to 5 U.S.C. § 301 — a general statute providing for the promulgation of internal agency regulations — constituted "authorization by law." Validly enacted agency regulations, reasonably related to the Atomic Energy Act were held to provide "authorization by law" in *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Commission*, 555 F.2d 82, 89, 94 (3d Cir. 1977).

¹⁹¹ *Campbell*, *supra* note 5, at 145.

¹⁹² *Id.* at 150-51.

¹⁹³ *Id.*

ered by the Trade Secrets Act.¹⁹⁴

This reasoning was rejected in an early and influential case in the Court of Appeals for the District of Columbia.¹⁹⁵ The court noted that the legislative history of the FOIA indicated that the Act was simply not to apply to exempt material.¹⁹⁶ As a result, reasoned the court, the FOIA could not be relied on to authorize regulations governing disclosure of exempt material.¹⁹⁷ This holding was conceptually sound and seemed to be a correct interpretation of the FOIA. Logically, it was difficult to accept the view that the silence of the FOIA regarding exempt material could authorize disclosure under the Trade Secrets Act.¹⁹⁸ It was difficult to see "how regulations could validly authorize more than was intended by the statute itself."¹⁹⁹

Another possible source of authority, accepted by several courts, was 5 U.S.C. §301, a provision authorizing agencies to promulgate regulations for "the custody, use and preservation of [their] records, papers, and property."²⁰⁰ Both the Seventh and Eighth Circuits reasoned that since validly promulgated regulations have the force of law, regulations valid under 5 U.S.C. §301 must satisfy the "authorized by law" requirement of the Trade Secrets Act.²⁰¹ But to other courts this section clearly applied only to basic housekeeping functions, not to disclosure of information that might be protected under another statute.²⁰² To interpret 5 U.S.C. §301 as authorizing disclosure of such confidential material would be inconsistent with legislative history, stated the Court of Appeals for the District of Columbia.²⁰³ In addition, such an interpretation would allow the agencies a great deal of

¹⁹⁴ *Id.*

¹⁹⁵ *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975).

¹⁹⁶ *Id.* at 942.

¹⁹⁷ *Id.* See also *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 170 (D.D.C. 1976), *cert. before judgment denied sub nom. Prudential Ins. Co. of America v. Nat'l Org. of Women*, D.C. Chapter, 431 U.S. 924 (1977).

¹⁹⁸ *Campbell*, *supra* note 5, at 151.

¹⁹⁹ *Id.*

²⁰⁰ 5 U.S.C. § 301 (1976).

²⁰¹ See *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197, 1200-02 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979); *General Dynamics Corp. v. Marshall*, 572 F.2d 1211, 1217 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979).

²⁰² See, e.g., *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 942-43 (D.C. Cir. 1975); *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595, 601 (N.D. Ohio 1976).

²⁰³ *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 942 (D.C. Cir. 1975).

discretion regarding compliance with the Trade Secrets Act, since the agencies could, in effect, relieve themselves of legal liability for violation of a criminal statute simply by issuing valid house-keeping regulations under 5 U.S.C. §301.²⁰⁴ A determination by the Supreme Court that agency regulations—promulgated under the FOIA, 5 U.S.C. §301, or agency enabling acts—could be considered “authorization by law” for purposes of the Trade Secrets Act would greatly enhance the effect of the FOIA disclosure provisions and undermine the protection of confidential business information provided by the Trade Secrets Act.

E. Cause of Action for Submitters under the Administrative Procedure Act

Although substantial controversy raged over whether a cause of action for submitters could be based on the FOIA or on the Trade Secrets Act,²⁰⁵ more unanimity was found on the question of whether submitters could sue under the Administrative Procedure Act (APA).²⁰⁶ Section 10 of the APA establishes that a person adversely affected by agency action is entitled to judicial review.²⁰⁷ Assuming the submitter to be adversely affected by an agency decision to disclose information pursuant to an FOIA request, redress should be available in the courts. However, even though many courts agreed that a cause of action could be based on the APA, they disagreed, at least in practice, on the standard of review to be applied when the courts reviewed agency decisions under the APA.²⁰⁸ Some courts afforded the submitters *de novo* consideration, while others confined their review to the agency record.²⁰⁹

²⁰⁴ Petitioner's Brief at 43, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

²⁰⁵ See text at notes 136-43, & 175-81, *supra*.

²⁰⁶ Clement, *supra* note 7, at 626.

²⁰⁷ 5 U.S.C. § 702 (1976).

²⁰⁸ Campbell, *supra* note 5, at 135.

²⁰⁹ Courts applying *de novo* review, at least in part, included: *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171 (D.Del. 1976), *vacated and remanded*, 565 F.2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Charles River Park "A", Inc. v. HUD*, 360 F. Supp. 212 (D.D.C. 1973), *rev'd*, 519 F.2d 935, 940 n.4 (D.C.Cir. 1975). Courts reviewing submitters' claims on the record, applying an abuse of discretion standard, included: *General Dynamics Corp. v. Marshall*, 572 F.2d 1211, 1217 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979) (However, although the court states that *de novo* review is not appropriate, they seem to imply that a reviewing court will determine for itself whether information falls within one of the nine exemptions. *Id.*); *Pennzoil Co. v. FPC*, 534 F.2d 627, 631 (5th Cir. 1976); *GTE Sylvania, Inc. v.*

Since submitters might be limited to review under the APA, as opposed to being granted implied private rights of action under the FOIA or the Trade Secrets Act, the issue of scope of review was very important. *De novo* review, in effect, gave submitters a second chance. They could introduce additional evidence and attempt to convince the court that the information should not be disclosed. In contrast, if review was based on the agency record, submitters could not marshal new evidence, including expert testimony, before the court. Furthermore, when review was based on the agency record, the standard of review applied would probably be a narrow one, and the courts would not substitute their judgment for that agency.²¹⁰ Thus, the Supreme Court's decision on the applicability of the APA and the appropriate scope of judicial review would make a substantial difference in the outcome of reverse FOIA suits.

F. Reverse FOIA Suits: Scope of Review of Agency Decisions to Disclose

The question of scope of review was not confined to suits brought under the APA, but was an important consideration as well in suits based on the FOIA and on the Trade Secrets Act. Several arguments were raised in favor of *de novo* review of agency action in reverse FOIA suits. The simplest argument was that *de novo* review was available in direct suits, when requesters contested agency decisions to withhold information; in fairness, such review should also be available to disgruntled submitters.²¹¹ Even more emphatically, some argued that review on the agency record was "virtually meaningless,"²¹² and, certainly insufficient to protect the interests of parties who submitted information in confidence to the government.²¹³ Logically, *de novo* review also made sense since at least one of the issues decided in both direct and reverse suits was the same—namely whether the material qualified as exempt under the FOIA.²¹⁴ In support of *de novo* re-

Consumer Product Safety Comm., 404 F. Supp. 352, 367 (D.Del. 1975).

²¹⁰ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

²¹¹ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1215 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977).

²¹² Patten & Weinstein, *supra* note 23, at 206.

²¹³ *Id.*

²¹⁴ Several courts applied *de novo* review to this initial question in both direct and reverse suits, while refusing to extend *de novo* review in a reverse suit to the agency's discretionary decision to disclose exempt material. In one case, the court noted that since the

view submitters also raised the familiar argument that agency fact-finding procedures were inadequate, thus necessitating the more stringent court review to protect legitimate business interests.²¹⁵

De novo review in reverse cases was opposed on several grounds. First, while the FOIA specifically provided *de novo* review to requesters, it did not include similar provisions for submitters.²¹⁶ This omission was consistent with the fact that the disclosure provisions of the APA had been replaced by the stronger disclosure provisions of the FOIA in order to combat agency resistance to disclosure.²¹⁷ Second, *de novo* review was available only in limited circumstances; in general, courts applied it only: (1) if the action was adjudicatory and agency fact-finding procedures were inadequate, or (2) if issues that were not before the agency were raised in a proceeding to enforce non-adjudicatory agency action.²¹⁸ Arguably, FOIA suits did not meet these requirements. They did not involve formal adjudicatory hearings, the agency procedures were not necessarily inadequate, and all issues were raised before the agencies.²¹⁹ According to this view, submitters' arguments that the time was too short for adequate fact finding were not convincing.²²⁰ Although agencies had to determine whether to comply with an FOIA request within ten days, this time period had been viewed by Congress as sufficient. It was further argued that the courts had no greater expertise in evaluating FOIA claims than did the agencies. In fact, the agencies were generally more familiar with the industries they regulated and with the type of information usually requested from them.²²¹

A Supreme Court decision that submitters could obtain *de novo* consideration in federal court of agency decisions to disclose would serve as a check on the growth of the FOIA as access legis-

first question was whether the information would have been exempt, the district court should hold a hearing "just as it would if a suit had been brought under the FOIA to compel disclosure." *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 940 n.4 (D.C. Cir. 1975).

²¹⁵ Patten & Weinstein, *supra* note 23, at 203.

²¹⁶ 5 U.S.C. § 552 (1976).

²¹⁷ Campbell, *supra* note 5, at 139.

²¹⁸ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971).

²¹⁹ Campbell, *supra* note 5, at 137.

²²⁰ Supplemental Reply Brief for the Appellants at 9-10, *General Dynamics Corp. v. Marshall*, No. 77-1192 (8th Cir. Sept. 1979) (on remand).

²²¹ *Id.* at 11.

lation. *De novo* review certainly would involve longer delays in the release of information and might well reduce the total amount of information released. On the other hand, *de novo* review would reaffirm Congress' original commitment to the protection of privately submitted information. The proper resolution of these conflicting interests awaited the Supreme Court.

IV. CHRYSLER CORP. v. BROWN

The litigation between Chrysler and the government embodied most of the major issues in reverse FOIA litigation involving Exemption Four information.²²² The case had the potential to resolve some of the recurring issues in this type of litigation.

A. *The controversy*

The Chrysler Corporation, as a party to numerous government contracts,²²³ was required by Executive Order 11246²²⁴ and by Department of Labor regulations promulgated thereunder²²⁵ to comply with the Department of Labor's policy of providing both equal employment opportunities and an affirmative action program to eliminate discrimination in employment.²²⁶ To monitor Chrysler's compliance with these policies, the government required Chrysler to submit information about the composition of its work force.²²⁷ In addition, Chrysler's compliance agency,²²⁸ the Defense Logistics Agency,²²⁹ on occasion initiated reviews of

²²² See text at notes 104-221, *supra*.

²²³ Chrysler Corp. v. Brown, 441 U.S. 281, 286 (1979).

²²⁴ Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965) *as amended by* Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967).

²²⁵ Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1176 (3d Cir. 1977), *citing* 41 C.F.R. pt. 60.

²²⁶ Chrysler Corp. v. Brown, 441 U.S. 281, 286 (1979).

²²⁷ *Id.*

²²⁸ The Secretary of Labor delegated administrative responsibility for enforcing the executive order to the Office of Federal Contract Compliance (OFCC). 41 C.F.R. 60-1.2 (1979). The Director of OFCC delegated primary responsibility for monitoring adherence to the executive order to various federal agencies. The Defense Logistics Agency (formerly the Defense Supply Agency) was assigned to monitor Chrysler's compliance with the Labor Department policies. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1176 (3d Cir. 1977).

²²⁹ The Defense Logistics Agency is an agency of the Department of Defense, under the control of an Assistant Secretary of Defense. Its mission is to provide effective and economical support to the military services, other Department of Defense components, federal civil agencies, foreign governments and others, as authorized, for assigned material commodities and items of supply, logistics services directly associated with the supply management function, contract administration services and other support services. OFFICE

Chrysler's employment policies, requiring Chrysler to submit affirmative action documents which included details on past and projected employment of women and minorities, occupational levels of minority personnel, staffing patterns, pay scales, actual and expected shifts in employment, promotions, seniority, and related job matters.²³⁰

As part of its overall policy of combatting employment discrimination, the Department of Labor promulgated regulations providing for public access to most of the information collected pursuant to its compliance programs.²³¹ In fact, the regulations provided that such information would ordinarily be released even if it were exempt from mandatory disclosure under the FOIA.²³² The major exception was for information, the disclosure of which was prohibited by law.²³³

In May, 1975, the Defense Logistics Agency, which was following Department of Labor regulations covering disclosure of information by compliance agencies, informed Chrysler that it had received an FOIA request for affirmative action data and for a complaint investigation report involving Chrysler's Newark, Delaware assembly plant.²³⁴ Despite Chrysler's objection to disclosure, the agency decided to release the data.²³⁵ Chrysler immediately brought suit in the federal district court for Delaware to enjoin the release of the information.²³⁶ Chrysler was able to obtain a temporary restraining order barring disclosure; when additional FOIA requests were received for data from Chrysler's Hamtramck, Michigan plant, Chrysler was able to get the order extended to cover this additional data.²³⁷ These temporary restraints were extended until the case was heard in district court.²³⁸

Chrysler's complaint in the district court raised some of the

OF THE FEDERAL REGISTER, NAT'L ARCHIVES & RECORDS SERVICE, GENERAL SERVICES ADMIN. U.S. GOV'T MANUAL 236-39 (1979-80).

²³⁰ Chrysler Corp. v. Brown, 441 U.S. 281, 286 (1979).

²³¹ Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1176-78 (3d Cir. 1977), citing 41 C.F.R. 60-40.1-40.4.

²³² *Id.* at 1177, citing 41 C.F.R. 60-40.2(a).

²³³ *Id.*, citing 41 C.F.R. 60-40.2(b).

²³⁴ Chrysler Corp. v. Brown, 441 U.S. 281, 287 (1979).

²³⁵ *Id.*

²³⁶ *Id.* at 287-88.

²³⁷ *Id.* at 288.

²³⁸ Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1181 (3d Cir. 1977), *vacated and remanded sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

major reverse FOIA issues discussed above. For example, Chrysler claimed that disclosure of the data would violate the FOIA, citing Exemptions Three, Four, Five and Seven.²³⁹ Chrysler also alleged that disclosure would violate the Trade Secrets Act.²⁴⁰ Another contention was that the agency, in determining what to disclose, had abused its discretion since it had acted in violation of its own regulations, some of which were almost identical to the Trade Secrets Act.²⁴¹

B. *The District Court Decision*

The first important decision made by the district court was to afford Chrysler a trial *de novo*.²⁴² The second decision was to classify some of the requested information as falling within the scope of Exemption Four.²⁴³ The court applied the *National Parks* test²⁴⁴ and concluded that some of the requested data was (1) confidential, in that it was not voluntarily released to anyone and was unavailable elsewhere, and (2) that its release was likely to cause substantial competitive harm.²⁴⁵ Expert testimony had been adduced to support the contention of competitive harm, and had proved to the court's satisfaction that release of the information would (a) aid competitors in employee-raiding, (b) aid competitors in determining the use of Chrysler's labor force and the technology being applied, and (c) over time, allow Chrysler's competitors to reduce their own risk-taking.²⁴⁶ Such information was therefore covered by Exemption Four and disclosure was not required under the FOIA.²⁴⁷

Since disclosure was not mandated by the FOIA, the court looked to the agency's own disclosure regulations²⁴⁸ to see if the compliance agency (here the Defense Logistics Agency) could

²³⁹ *Id.* at 1180.

²⁴⁰ *Id.* For a discussion of the Trade Secrets Act, 18 U.S.C. § 1905 (1976), see text at notes 170-205, *supra*.

²⁴¹ *Id.* at 1180-81.

²⁴² *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 174-75 (D.Del.1976), *vacated and remanded*, 565 F.2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

²⁴³ *Id.* at 176.

²⁴⁴ See text at notes 159-68, *supra*.

²⁴⁵ 412 F. Supp. 171, 176 (D.Del. 1976).

²⁴⁶ *Id.* at 175-76.

²⁴⁷ *Id.* at 176.

²⁴⁸ *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1176-78 (3d Cir. 1977), *citing* 41 C.F.R. 60-40.1-60-40.4.

utilize its discretion to disclose. One of these regulations served to extend the prohibitions of the Trade Secrets Act to the agency.²⁴⁹ The court then assumed, without argument, that since some of the information met the *National Parks* test for Exemption Four material, the information would also be covered by the Trade Secrets Act.²⁵⁰ The court concluded that agency disclosure of this data violated its own regulations.²⁵¹ Having found that the agency's decision to disclose certain information was contrary to law, the court issued a permanent injunction against disclosure of the relevant data.²⁵²

C. *The Court of Appeals Decision*

The Third Circuit Court of Appeals reversed the district court on the question of standard of review, finding that *de novo* review was not necessary.²⁵³ The court arrived at this decision by concluding that submitters had no private right of action under either the FOIA²⁵⁴ or the Trade Secrets Act.²⁵⁵ They buttressed their finding of no private right of action under the FOIA by also determining that the exemptions were permissive, not mandatory.²⁵⁶ Thus, since the action arose under the APA,²⁵⁷ the district court should simply have determined first, whether the agency's discretionary decision to disclose was based on the proper legal standards for the applicability of the FOIA exemptions, and second, whether the decision was based on a consideration of the factors set forth in the agency's disclosure regulations.²⁵⁸ Since the court decided that in this case the agency record provided an inadequate basis on which to conduct such a review, the case was ordered remanded to the agency.²⁵⁹

The court of appeals found not only that the Trade Secrets Act

²⁴⁹ *Id.* at 1177, citing 41 C.F.R. 60-40.2(a).

²⁵⁰ *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 177 (D. Del. 1976), *vacated and remanded*, *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

²⁵¹ *Id.*

²⁵² *Id.* at 179.

²⁵³ *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1192 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

²⁵⁴ *Id.* at 1185.

²⁵⁵ *Id.* at 1188.

²⁵⁶ *Id.* at 1185.

²⁵⁷ See text at notes 205-09, *supra*.

²⁵⁸ 565 F.2d at 1192.

²⁵⁹ *Id.*

did not provide a cause of action, but also that the Trade Secrets Act could not be cited as a limit to agency discretion to release, since release was authorized by agency regulations.²⁶⁰ These regulations, promulgated under 5 U.S.C. § 301, were held by the court to satisfy the provision in the Trade Secrets Act allowing disclosure which is authorized by law.²⁶¹ Having found such authorization in agency regulations under 5 U.S.C. § 301, it was unnecessary for the court to decide whether the FOIA could also function as authorization for the promulgation of regulations which would satisfy the Trade Secrets Act requirement.²⁶²

D. *The Supreme Court and the Issues*

The Supreme Court had before it, when it deliberated on the *Chrysler* case, some of the major questions which frequently arose in reverse FOIA litigation. In fact, the Court even had to consider the basic issue of whether a "reverse" suit could actually be brought under the FOIA by submitters. Some of the issues were resolved and their resolution should serve to simplify reverse FOIA litigation. Other questions remain open and will give rise to continued controversy until they are resolved by judicial or legislative action.

Of the major issues presented, the Court dealt most conclusively with those involving the FOIA itself. This emphasis was not surprising, since these were the issues most fully analyzed in the lower courts and debated in Congress in the years prior to *Chrysler*. Nor were the specific holdings on the FOIA issues surprising; they reflected the sounder legal views on these problems. The Court dealt less decisively with the problems posed by the Trade Secrets Act, leaving unresolved questions relating to the scope of the Trade Secrets Act and to its status as an Exemption Three statute.²⁶³ On the other hand, the Court provided specific guidelines for evaluating whether agency regulations can authorize disclosure under the Trade Secrets Act, and laid to rest the possibility of judicial recognition of an implied private right of action under the Trade Secrets Act. The Supreme Court seemed to settle the question of scope of judicial review in future cases

²⁶⁰ *Id.* at 1186.

²⁶¹ *Id.* at 1187-88. See discussion in text at notes 189-205, *supra*.

²⁶² *Id.*

²⁶³ In remanding the case for a consideration of whether the requested information was affected by the Trade Secrets Act, the court presented the agency with a formidable task.

brought by submitters under the APA, but may not have done so decisively enough to avoid future litigation of the issue.

1. Issues Resolved

a. The FOIA Exemptions are Permissive

The Supreme Court resolved the issue of whether the nine exemptions to the FOIA²⁶⁴ were permissive or mandatory by holding that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure."²⁶⁵ There was nothing surprising in the Court's conclusion or in its reasoning. The Court based its decision on the purpose of the FOIA, its language, its logic and its legislative history.²⁶⁶ The Court stated, as it had in previous cases,²⁶⁷ that the basic purpose of the FOIA was disclosure of a broad range of information;²⁶⁸ this objective was exemplified by the organization of the FOIA.²⁶⁹ The first section of the Act²⁷⁰ established the basic duty to disclose; the second section²⁷¹ merely set forth that material which was not subject to the requirements of the first section. The second part of the Act simply "demarcates the agency's obligation to disclose; it does not foreclose disclosure."²⁷² The Court found it significant that the FOIA very specifically grants jurisdiction to federal courts to enjoin the withholding of information, while it does not give similar authority to bar disclosure.²⁷³ Finally, the Court apparently found more compelling those parts of the legislative history supporting the interpretation that the exemptions were only intended to be permissive.²⁷⁴

The Court's reasoning on the question of mandatory versus permissive exemptions was set forth briefly. The Court did not attempt to explore the issue in detail, as several lower courts had

²⁶⁴ See text at notes 55-69, *supra*.

²⁶⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

²⁶⁶ *Id.* at 291.

²⁶⁷ *EPA v. Mink*, 410 U.S. 73, 74 (1973); *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976).

²⁶⁸ 441 U.S. 281, 290 (1979).

²⁶⁹ *Id.* at 291-93.

²⁷⁰ 5 U.S.C.A. § 552 (a) (West 1977 & Supp. 1979).

²⁷¹ 5 U.S.C. § 552 (b) (1976).

²⁷² *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979).

²⁷³ *Id.*

²⁷⁴ *Id.* at 293-94.

done,²⁷⁵ nor did it choose to grapple with the conflicting interpretations which these courts had given to the legislative history of the FOIA. Perhaps at the time when the Supreme Court considered the issue, the appropriate step was simply for the Court to acknowledge concisely the viewpoint it found most convincing.

Although most of this part of the Court's opinion merely concluded a past controversy, the Court did raise two points which will deserve more attention in the future. First, the Court noted that although Congress was admittedly sensitive to the privacy interests of individuals and non-governmental entities, in essence "the congressional concern was with the *agency's* need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."²⁷⁶ Although the importance of agency concerns had been expressed before,²⁷⁷ this statement is particularly strong and seemingly exclusive of all other interests. It seems to suggest that not only does the agency have discretion in choosing whether or not to disclose exempt material, but also that the only test to be used in determining disclosure is the agency's need. This suggestion may have ramifications for the interpretation of the scope of the nine exemptions, especially the scope of Exemption Four.²⁷⁸

The second interesting question raised in this part of the Court's opinion was whether the Court felt that some further action was necessary to resolve the tensions which helped to produce the controversy over the permissive or mandatory nature of the exemptions. The Court acknowledged that "Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable."²⁷⁹ The Court did not indicate precisely what kind of balancing or in what form or forum. One possibility is that the Court accepted the fact that it was time for the re-balancing to take

²⁷⁵ Compare *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir. 1974), with *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977).

²⁷⁶ *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-93 (1979).

²⁷⁷ See, e.g., *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C.Cir. 1975); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-69 (D.C.Cir. 1974); *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 245 (M.D. Fla. 1979).

²⁷⁸ See text at notes 144-69, *supra*.

²⁷⁹ *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

place in the legislature. It does seem to be time for Congress to clarify the amount of protection to be afforded private business interests by Exemption Four.

b. No "Reverse" Right of Action under the FOIA

Once the exemptions were found to be permissive, "It necessarily follows," said the Court, that the FOIA does not provide the basis for a right of action to enjoin disclosure of information requested under the statute.²⁸⁰ The loss to submitters of the protection offered by a right of action under the FOIA is significant. An independent right of action gave submitters a chance for *de novo* review of their claims. Furthermore, a right of action under the FOIA reaffirmed their belief that the FOIA was a balancing statute, to which they could look for some protection of their interests. Even its name — the "reverse" FOIA suit — emphasized the dual nature of the Act. However, after *Chrysler*, in name at least, the "reverse" FOIA suit no longer exists. Nonetheless, although the statute can no longer be reversed to protect submitters' claims, some of the basic issues involved in "reverse" suits will continue to be litigated in other forms.

c. No Private Right of Action under the Trade Secrets Act

Having rejected Chrysler's argument that it was entitled to court review under the FOIA, the Supreme Court addressed Chrysler's alternative ground for a right of action—the Trade Secrets Act. The Court briefly confirmed the more widely accepted view that the Trade Secrets Act did not provide a private right of action.²⁸¹ Measuring the Trade Secrets Act against the tests set out in *Cort v. Ash*,²⁸² the Court found no statutory basis for inferring a civil cause of action, no legislative intent to create one and, most importantly, no need for such a remedy to achieve the purpose of the Act since, according to the Court, Chrysler could obtain review of the agency decision to disclose under the APA.²⁸³ The reasoning on this final point was too abbreviated to be fully satisfactory. Critics had claimed that the APA did not

²⁸⁰ *Id.* at 294.

²⁸¹ *Id.* at 316.

²⁸² 422 U.S. 66 (1975).

²⁸³ *Chrysler Corp. v. Brown*, 441 U.S. 281, 316-17 (1979).

provide an adequate remedy;²⁸⁴ it certainly does not offer the same degree of protection as that provided by an implied right of action under the Trade Secrets Act. In addition, the penalties provided under the Trade Secrets Act²⁸⁵ are minimal compared to the competitive harm that might be engendered by violation of the statute. According to submitters, minimal monetary damages did not compare in effectiveness to injunctive relief preventing disclosure.²⁸⁶

d. Right to Review under the Administrative Procedure Act

Although submitters were not afforded implied rights of action under the FOIA²⁸⁷ or under the Trade Secrets Act,²⁸⁸ the Court found that they were entitled to judicial review of agency action under section 10 of the APA.²⁸⁹ Unfortunately, the scope of review to be afforded under the APA was not set forth clearly enough to qualify it as an issue "resolved" by the Court.

e. Only Certain Agency Regulations Constitute Authorization by Law under the Trade Secrets Act

The viewpoints expressed prior to *Chrysler* on the issue of authorization by law under the Trade Secrets Act²⁹⁰ fell short of one basic goal of the FOIA—a balancing of interests. As has been noted repeatedly, the FOIA is not susceptible of interpretation simply as an access statute;²⁹¹ it also contains provisions for protecting certain confidential information, particularly trade secrets and confidential business information.²⁹² It is doubtful that Congress intended the FOIA to give agencies complete discretion to adopt regulations allowing them to ignore similar protections embodied in the Trade Secrets Act. It is stretching the FOIA beyond its limits to interpret it as authorization for full disclosure in contravention of the Trade Secrets Act. Similarly, regulations promulgated under the APA or the agency enabling statute

²⁸⁴ Patten & Weinstein, *supra* note 23, at 206.

²⁸⁵ 18 U.S.C. § 1905 (1976).

²⁸⁶ Petitioner's Brief at 66, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

²⁸⁷ *Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979).

²⁸⁸ *Id.* at 316.

²⁸⁹ 5 U.S.C. § 702 (1976). See text at notes 205-21, *supra*.

²⁹⁰ 18 U.S.C. § 1905 (1976). See text at notes 189-205, *supra*.

²⁹¹ See text at notes 30-55, *supra*.

²⁹² 5 U.S.C. § 552(b)(4)(1976).

should not be interpreted automatically as authorizing disclosure of information protected under the Trade Secrets Act.

Yet it also seems inconsistent with the trend toward greater access to government-held information to allow the Trade Secrets Act to block completely any disclosure of FOIA-exempt material falling within its ambit. The “authorized by law” provision would be very limited in scope if *no* agency regulations were found to be valid under it. If this were the case, Congress would have to enact a separate statute every time it wished to authorize disclosure of information protected by the Trade Secrets Act.²⁹³ A compromise position was needed, one which would accommodate the two laws, the FOIA and the Trade Secrets Act, into a statutory pattern consistent with the logic and legislative intent of each.

The decision in *Chrysler* seems to be a reasonable attempt at such a solution. The Court set out the three basic requirements which any agency regulations must meet if they are to constitute “authorization by law” under the Trade Secrets Act.²⁹⁴ First, they must be substantive regulations²⁹⁵— regulations affecting individual rights and obligations.²⁹⁶ One test for substantive regulations is whether they have been treated as such by the promulgating agency;²⁹⁷ if the agency wishes them to be treated as substantive, it must promulgate them accordingly.²⁹⁸ This test thus leads to the second criterion the regulations must meet: they must comply with the procedural requirements of the APA for substantive rulemaking.²⁹⁹ The final criterion for substantive regulations is that they be issued pursuant to a statutory grant of authority and, in fact, implement that statute.³⁰⁰ There must be a “nexus between the regulations and some delegation of the requisite legislative authority by Congress.”³⁰¹ The test will be “that the reviewing court reasonably be able to conclude that the grant of

²⁹³ *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197, 1201 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979).

²⁹⁴ *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979).

²⁹⁵ *Id.* at 301.

²⁹⁶ *Id.* at 302.

²⁹⁷ *Id.* at 315.

²⁹⁸ *Id.* The procedural requirements for substantive rulemaking are set out in 5 U.S.C. § 553(b)(1976).

²⁹⁹ *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979).

³⁰⁰ *Id.* at 302-03.

³⁰¹ *Id.* at 304.

authority contemplates the regulations issued.”³⁰²

The *Chrysler* decision demonstrated an application of the three tests. The regulations on which the government relied in *Chrysler*³⁰³ clearly affected individual rights and obligations.³⁰⁴ They were thus substantive rules. But the Labor Department itself had failed to treat them as such—the regulations had not been promulgated in conformity with APA procedural requirements for substantive rulemaking.³⁰⁵ In light of the agency’s failure to comply with these requirements, the regulations could not be afforded the force and effect of law.³⁰⁶

Procedural defects could quite possibly be cured without difficulty. However, the second deficiency in the regulations relied on in *Chrysler* was more serious. According to the Supreme Court, the regulations were not clearly the product of an adequate grant of congressional authority.³⁰⁷ Those grants of authority which the government offered—the FOIA, Executive Order 11246³⁰⁸ and 5 U.S.C. §301—were not tied closely enough to the disclosure regulations to bestow upon them the force and effect of law under the Trade Secrets Act.³⁰⁹

First, the court rejected the FOIA as statutory authority for promulgating regulations to disclose exempt material.³¹⁰ Materials exempt from the FOIA are “outside the ambit of that Act . . .”³¹¹ Second, Executive Order 11246, which was designed to help end discrimination in employment, was also found to be an

³⁰² *Id.* at 308.

³⁰³ The regulations on which the government primarily relied, 41 C.F.R. 60-40.1-40.4 (1977), provided for disclosure of information in the records of the Office of Federal Contract Compliance regardless of whether the information was exempt under the FOIA. The major qualification was that disclosure not impede the functions of the Office of Federal Contract Compliance and the compliance agencies, and not be prohibited by law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 287 (1979).

³⁰⁴ *Id.* at 303.

³⁰⁵ *Id.* at 312.

³⁰⁶ *Id.* at 313.

³⁰⁷ *Id.* at 303-04, 307-08, 309.

³⁰⁸ Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), *as amended* by Exec. Order No. 11375, 32 Fed. Reg. 14304 (1967). These executive orders are designed to help eliminate discrimination in employment by the federal government and government contractors. They require the Secretary of Labor to ensure that government contractors provide equal employment opportunities regardless of race, creed, color, national origin and sex, and to promulgate regulations necessary to achieve these goals.

³⁰⁹ *Chrysler Corp. v. Brown*, 441 U.S. 281, 307-08, 309 (1979).

³¹⁰ *Id.* at 303-04.

³¹¹ *Id.* at 303.

insufficient statutory basis for the regulations.³¹² The Court was not deterred by the fact that the origins of congressional authority for the order were unclear; the regulations would not reasonably be within the contemplation of *any* of the potential statutory grants of authority offered for the executive order.³¹³ Furthermore, the Court felt that the disclosure regulations relied on were not tightly tied to the purposes of the executive order.³¹⁴ The order was designed to deal with employment discrimination, while the regulations dealt with access to information.³¹⁵ Finally, the Supreme Court similarly found that 5 U.S.C. §301 could not function as an adequate grant of statutory authority,³¹⁶ since this provision was simply a housekeeping provision and not intended to provide authority for limiting the scope of the Trade Secrets Act.³¹⁷

The nexus test elucidated by the Court preserved the vitality of the Trade Secrets Act and ensured that its prohibitions will continue to affect disclosures under the FOIA.³¹⁸ While a decision that any valid agency regulations constitute sufficient authorization would have simplified the area of reverse FOIA suits and promoted greater disclosure, it would have rendered oddly ineffective a statute designed to influence agency action. The better way to simplify this area of litigation is to have Congress clarify, by legislation, the relationship between the FOIA and the Trade Secrets Act.

In its disposition of the *Chrysler* case, the Supreme Court resolved several major issues. The Court conclusively established that the exemptions to the FOIA are permissive. After *Chrysler*, when an agency receives an FOIA request for business information, it must make two preliminary determinations; (1) Is the information exempt from mandatory disclosure under Exemption Four? (2) If the information is exempt, should the agency, after

³¹² *Id.* at 307-08.

³¹³ *Id.* at 306.

³¹⁴ *Id.* at 307.

³¹⁵ *Id.*

³¹⁶ *Id.* at 309.

³¹⁷ *Id.*

³¹⁸ However, the test enunciated by the Supreme Court was flexible enough for two courts to find, pursuant to the decision in *Chrysler*, that certain agency regulations could authorize disclosure of information encompassed by the Trade Secrets Act. See *Cedars Nursing & Convalescent Center, Inc. v. Aetna Life & Cas. Ins. Co.*, 472 F. Supp. 296 (E.D. Pa. 1979); *Brookwood Medical Center, Inc. v. Califano*, 470 F. Supp. 1247 (N.D. Ga. 1979).

weighing competing interests, exercise its discretion to disclose? According to the *Chrysler* decision, once these initial determinations are made, the agency must also consider whether the Exemption Four material is covered by the Trade Secrets Act. If it is, agency discretion is limited. The information cannot be disclosed unless the agency can find sufficient "authorization by law". According to the Supreme Court, agency regulations will not constitute such authorization unless they meet the criteria set out in *Chrysler*: (1) that they are substantive regulations, (2) that they have been promulgated according to APA procedures for substantive rulemaking, and (3) that they have been issued pursuant to a satisfactory statutory grant of authority. Regulations promulgated under the FOIA, Executive Order 11246 and 5 U.S.C. §301, will not suffice. The Court also determined that the agency's decision to disclose can be challenged by submitters, but only under the provisions of the APA. Submitters have no implied right of action under the FOIA or under the Trade Secrets Act. As a result of this finding, the scope of review of agency action will probably be limited to the agency record, and the standard applied by the reviewing court will probably be narrow.

The Supreme Court vacated the appellate court decision and remanded the case so that "the Court of Appeals may consider whether the contemplated disclosures would violate the prohibitions of § 1905."³¹⁹ After receiving briefs from both parties on these issues, the court of appeals remanded the case to the district court, directing the lower court to order the relevant agencies to make new determinations of whether § 1905 applied to the information and whether the Trade Secrets Act qualified as an Exemption Three statute.³²⁰ Chrysler's petition for rehearing in the court of appeals was denied, and the case is currently at the agency level.³²¹

2. Issues Remaining after *Chrysler*

a. The Scope of Exemption Four

The *Chrysler* decision left unanswered two related questions

³¹⁹ *Chrysler Corp. v. Brown*, 441 U.S. 281, 318-19 (1979).

³²⁰ *Chrysler Corp. v. Brown*, Nos. 76-1970 & 76-2238 (3d Cir. Aug. 31, 1979) (judgment on remand).

³²¹ *Chrysler Corp. v. Brown*, Nos. 76-1970 & 76-2238 (3d Cir. Oct. 1, 1979) (petition for rehearing denied).

concerning the business records exemption: the narrow question of its applicability to the data requested from Chrysler, and the broader question of the scope of the exemption.

The district court, by applying the *National Parks* test,³²² found some of the contested information to be within Exemption Four.³²³ Chrysler showed, to the court's satisfaction, that certain data was confidential and that release of the data could cause substantial competitive harm.³²⁴ This finding was not altered on appeal; the court of appeals simply assumed for purposes of argument that the material in question was exempt, and did not expressly decide the issue.³²⁵ The Supreme Court did not "attempt to determine the relative ambits of Exemption 4 and § 1905 . . ."³²⁶ Since the case has been remanded to the agency,³²⁷ an initial decision will most likely be whether the material sought is indeed covered by Exemption Four. Presumably the *National Parks* criteria will be applied. Although this test for exempt material poses problems for both submitters and agencies, it should continue to form the basis for determining the scope of Exemption Four.

Before *Chrysler*, the *National Parks* test was subjected to strenuous criticism by submitters. These criticisms were ably summarized by two attorneys³²⁸ active in reverse FOIA litigation. According to these attorneys, "the D.C. Circuit's interpretation effectively nullifie[d] the protection for private business records that Congress intended."³²⁹ The common meaning of "confidential," these critics said, was information "subjectively intended to be imparted in confidence . . ." not just information that would

³²² See text at notes 159-69, *supra*.

³²³ *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 176 (D.Del. 1976), *vacated and remanded*, 565 F. 2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

³²⁴ Chrysler successfully argued that access to the information would enable competitors to raid minority employees, to determine Chrysler's use of its labor force and its technology at the plants, and to reduce their own risk-taking over a number of years. *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 176 (D.Del. 1976), *vacated and remanded*, 565 F. 2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

³²⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 319 n.49 (1979).

³²⁶ *Id.* at 319.

³²⁷ *Chrysler Corp. v. Brown*, Nos. 76-1970 & 76-2238 (3d Cir. Aug. 31, 1979) (judgment on remand).

³²⁸ Thomas Patten and Kenneth Weinstein, members of the District of Columbia bar.

³²⁹ Patten & Weinstein, *supra* note 23, at 195.

necessarily cause competitive harm.³³⁰ They also pointed out that Congress did not necessarily equate the disadvantages that follow from disclosure of business information with probable harm to a corporation's competitive position.³³¹ Another criticism voiced was that the process of protecting business records from disclosure, including proof of competitive harm, was difficult and costly.³³² Furthermore, the submitter might not be familiar with all facets of its competitor's business and might not in fact know whether some information would be useful or not.³³³ Finally, criticism was based on equitable grounds. According to this view, it was basically unfair for one company to utilize techniques or approaches which another had developed through the expenditure of time and money, regardless of whether it redounded to the competitor's benefit at the expense of the submitter.³³⁴

Just as businesses found flaws in the *National Parks* test, so agencies may not wholeheartedly look forward to applying such a test at the agency level. The test will result in practical problems. Establishing the likelihood of substantial harm will take time, and may require written documentation and perhaps even expert testimony.³³⁵ Difficult questions of proof may arise, since without access to the information sought, requesters may be unable to refute the arguments of the submitters.³³⁶

Despite these criticisms and anticipated problems, the *National Parks* test should continue to be applied unless Congress re-defines the scope of Exemption Four³³⁷ and its relationship

³³⁰ *Id.* at 196 (footnote omitted).

³³¹ *Id.* at 198.

³³² *Id.* at 194.

³³³ *Id.* at 199.

³³⁴ *Id.* To correct these problems, a modification of the *National Parks* text was recommended. First, business records would be evaluated as to whether or not they were the kind of information usually held in confidence; if so, they were covered by Exemption Four. However, if the exemptions were permissive, the agency would still be able to decide whether or not to disclose the information by weighing the public interest in such records against the confidential interest of the corporation. *Id.* at 201-02. In contrast, *National Parks* "precludes an effective balancing of interests by setting the Exemption 4 standards so high that most data [would] never reach the interest-balancing stage." *Id.* at 202.

³³⁵ See note 164, *supra*.

³³⁶ Campbell, *supra* note 5, at 197.

³³⁷ Senator Dole has recently introduced a bill which, in amending the FOIA, would significantly extend the scope of Exemption Four. S. 2397, 96th Cong., 2d Sess., 126 CONG. REC. 2317 (1980). The proposed amendment is reminiscent of the expectation of confidentiality test (*supra* note 152); it would protect proprietary information not customarily disclosed to the public by the party from whom it was obtained. The same criticism can be

with the Trade Secrets Act. First, although the *National Parks* test may not always operate to protect fully the interests claimed by businesses which submit data, it is the best test which has been articulated so far and is an improvement over the earlier formulations.³³⁸ The earlier tests, which allowed businesses to determine the standards for nondisclosure by a subjective or reasonable business practice test,³³⁹ eliminated the balancing that is necessary in FOIA matters: the public interest in access to information was not represented.³⁴⁰ Efforts to return to these earlier formulations should be resisted. Second, the *National Parks* test reflects the competing interests which Congress originally attempted to balance. It reflects congressional concern that, in providing access to information, the FOIA might cause private businesses to suffer competitive harm.³⁴¹ Third, the test has gained acceptance in many courts,³⁴² and perhaps even in Congress.³⁴³ In gaining fairly widespread acceptance, it seems to represent the current view of the equitable approach to a balance of interests under Exemption Four.

Since the test is the best version to date of the balancing principle involved in Exemption Four controversies, the protection the test offers for submitters should not be cut back by agencies. The temptation to give agencies blanket authority to disclose at their discretion should be resisted. Just as the business community should not set its own standards for disclosure, so the agencies should not be allowed to consider only their mission. Agency

raised against the amendment as was raised against the expectation of confidentiality test. The submitting party would, in large measure, control the release of information. "Custom" would be the measure of disclosure rather than identifiable harm to a party's competitive position.

³³⁸ 1978 HOUSE REPORT, *supra* note 4, at 21.

³³⁹ See text at notes 150-58, *supra*.

³⁴⁰ Supplemental Reply Brief for the Appellants at 16, *General Dynamics Corp. v. Marshall*, No. 77-1192 (8th Cir. Sept. 1979) (on remand).

³⁴¹ The legislative history dealing with the trade secret exemption and with concern for competitive harm is discussed in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766-70 (D.C. Cir. 1974).

³⁴² See *American Airlines Inc. v. National Mediation Board*, 588 F.2d 863, 871 (2d Cir. 1978); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1211 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Continental Oil Co. v. FPC*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *Westchester Gen. Hosp. Inc. v. HEW*, 464 F. Supp. 236, 245 (M.D. Fla. 1979); *Save the Dolphins v. Department of Commerce*, 404 F. Supp. 407, 412 (N.D. Cal. 1975).

³⁴³ See H.R. REP. NO. 880, pt. I, 94th Cong., 2d Sess. 10 (1976); S. REP. NO. 1178, 94th Cong., 2d Sess. 15 (1976).

mission is one interest to be advanced,³⁴⁴ but business interests must also be respected. If not, one of the two interests which were considered when the FOIA was passed, and which currently co-exist, albeit uneasily, within the statute, will cease to be adequately represented.

Although the *National Parks* test should be retained, certain modifications in agency procedures can be adopted to facilitate its application at the agency level. For example, agencies should be allowed more time for initial consideration of requests for information.³⁴⁵ Although this may require amendment of the FOIA³⁴⁶ and may be a step backwards in terms of eliminating time delays in receiving material,³⁴⁷ it should avoid the even longer delays which attend extensive litigation.³⁴⁸ Agencies should also be encouraged to set up procedures for notifying submitters of pending requests³⁴⁹ and for requesting initial classification of material

³⁴⁴ U.S. Dep't of Justice, Statement concerning the Supreme Court's Decision in *Chrysler v. Brown*, 441 U.S. 281 (1979), at 6 (June 15, 1979).

³⁴⁵ Agencies are currently required to respond to an FOIA request within ten days. An extension of the time limit is available if: (1) the records are not at the office processing the request; (2) a voluminous number of records are requested; or (3) it is necessary to consult with another agency that has a substantial interest in the documents. 5 U.S.C. § 552(a)(6)(B)(1976). These justifications are not designed to accommodate the kind of investigations required when Exemption Four interests are involved. One other possibility remains: the government might be given an extension if it can show "exceptional circumstances" and "due diligence" on the part of the agency. 5 U.S.C. § 552(a)(6)(C) (1976).

³⁴⁶ The government notes that the ten day time limit does not apply to material that is exempt from mandatory disclosure under the FOIA. Supplemental Reply Brief for the Appellants at 10, *General Dynamics Corp. v. Marshall*, no. 77-1192 (8th Cir. Sept. 1979) (on remand).

³⁴⁷ The House committee studying the business records exemption and reverse suits did not consider it advisable to amend the FOIA time limit. However, the committee acknowledged that if the procedures they recommended proved inadequate to eliminate the recurring problems in this area, it would reconsider extending or restructuring the time limits in cases involving business records. 1978 HOUSE REPORT, *supra* note 4, at 53.

³⁴⁸ The documents originally requested in the Chrysler controversy were a 1974 affirmative action plan and the report of a 1974 complaint investigation. Disclosure of the documents was scheduled for June, 1975. The Supreme Court handed down its decision in the case in 1979, and in 1980, the case is on remand to the agency. See text at notes 319-21, *supra*. Similarly, requests for employment data from several major insurance companies were made in 1975, and the ensuing dispute was brought into district court. *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied sub nom. Prudential Ins. Co. of America v. National Org. for Women*, D.C. Chapter, 431 U.S. 924 (1977). After denial of certiorari, the case was appealed to the circuit court but oral argument stayed pending the Supreme Court's decision in *Chrysler*. Campbell, *supra* note 5, at 110-13. As these examples demonstrate, the length of time between an FOIA request and final receipt of the documents can be considerable.

³⁴⁹ 1978 HOUSE REPORT, *supra* note 4, at 31.

from submitters.³⁵⁰ In appropriate circumstances, agencies should be allowed to make categorical decisions about some kinds of information, with appeal available.³⁵¹ Agencies should also be required to institute realistic administrative appeal procedures for submitters.³⁵² To have any practical impact, these appeals should be decided before release of the contested information.

b. The Trade Secrets Act and Exemption Three

The Supreme Court did not determine whether the Trade Secrets Act qualified as an Exemption Three statute.³⁵³ Subsequent to *Chrysler*, the District Court for the District of Columbia seemed to assume that Exemption Three did apply in a case involving the Trade Secrets Act.³⁵⁴ However, no opinion was issued elucidating the reasons for that court's decision. A similar conclusion was reached by the District Court for the Eastern District of Virginia which concluded that the Trade Secrets Act qualified as an Exemption Three statute.³⁵⁵ The court found that § 1905 meets both tests set out in Exemption Three: first, it is non-discretionary in that it is a criminal statute, and second, it refers to specific matters to be withheld.³⁵⁶ These cases should probably be appealed, and the issue litigated further. Based on an analysis of its legislative history, language and the total legislative scheme of which it is a part, the sounder result seems to be a determination that the Trade Secrets Act is not an Exemption Three statute.

In the early years of the FOIA, questions arose as to which laws were intended to be covered by Exemption Three.³⁵⁷ Although decisive answers were unavailable, the Trade Secrets Act was cited by both the executive³⁵⁸ and judicial³⁵⁹ branches as the type of

³⁵⁰ *Id.* at 34.

³⁵¹ *Id.* at 40-46. The committee reviewed the experiences of several agencies in utilizing disclosure rules and class determinations and concluded that, in limited circumstances, such methods facilitated the handling of claims. However, the use of such procedures should not be viewed as a panacea.

³⁵² Clement, *supra* note 7, at 637.

³⁵³ *Chrysler Corp. v. Brown*, 441 U.S. 281, 319 n.49 (1979).

³⁵⁴ *Gulf Oil Corp. v. Marshall*, No. 75-1491 (D.D.C., Nov. 29, 1979 and Dec. 11, 1979) (orders granting plaintiff's motion for summary judgment and injunction).

³⁵⁵ *Burroughs Corp. v. Brown*, 21 FAIR EMP. PRAC. (BNA) 1455 (E.D. Va. 1980).

³⁵⁶ *Id.* at 1461.

³⁵⁷ See, e.g., *FAA v. Robertson*, 422 U.S. 255 (1975); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976). *cert. denied*, 431 U.S. 924 (1977). See text at notes 59-65, *supra*.

³⁵⁸ [1967] *Attorney General's Memorandum on the Public Information Section of the*

statute covered by the exemption. The first Supreme Court discussion of Exemption Three gave the provision a broad reach.³⁶⁰ Finding the parameters of the exemption to be unclear, the Court looked to legislative history.³⁶¹ Although Exemption Three referred to information "specifically exempted . . . by statute . . ."³⁶² the Court did not place too much emphasis on the word "specific." According to the Court, Congress was aware that existing confidentiality statutes varied in the specificity with which they directed information to be withheld.³⁶³ To demand that Exemption Three statutes name specific documents or describe particular categories would unrealistically assume that Congress had reassessed all previous statutes.³⁶⁴ Furthermore, reasoned the Court, Congress had continued to oversee the FOIA and had amended the Act in 1974 without changing Exemption Three.³⁶⁵

As if in response to the Court's argument, Congress, in 1976, changed the wording of the exemption.³⁶⁶ The legislative history of this amendment reveals an intention to overrule the Supreme Court decision construing Exemption Three;³⁶⁷ unfortunately, the history did not clearly reveal whether the amended exemption was intended to apply to the Trade Secrets Act.³⁶⁸ Although reference was made in the House to the fact that the Trade Secrets Act was not intended to be an Exemption Three statute,³⁶⁹ the final congressional intention is difficult to ascertain.³⁷⁰ However, the stronger historical arguments favor the view that the Trade Secrets Act is not within the scope of Exemption Three.

Administrative Procedure Act, reprinted in 20 AD. L. REV. 263, 300 (1968).

³⁶⁰ *Consumers Union of the United States, Inc. v. Veteran's Administration*, 301 F. Supp. 796, 801-02 (S.D.N.Y. 1969). Although the district court found the contested information not to be within the Trade Secrets Act, it seemed to assume that the Trade Secrets Act was an Exemption Three Statute. *Id.*

³⁶⁰ *FAA v. Robertson*, 422 U.S. 255 (1975).

³⁶¹ *Id.* at 262.

³⁶² 5 U.S.C. § 552(b)(3)(1970).

³⁶³ *FAA v. Robertson*, 422 U.S. 255, 265 (1975).

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 267.

³⁶⁶ Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247(1976) (codified in 5 U.S.C. § 552(b)(3)(1976)).

³⁶⁷ H.R. CONF. REP. NO. 1441, 94th Cong., 2d Sess. 14 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2244, 2250.

³⁶⁸ Campbell, *supra* note 5, at 146-47.

³⁶⁹ H.R. REP. NO. 880, pt. I, 94th Cong., 2d Sess. 23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205.

³⁷⁰ Campbell, *supra* note 5, at 148.

Consequently, subsequent to the 1976 amendments, judicial interpretations tended to exclude the Trade Secrets Act from Exemption Three coverage.³⁷¹ For example, a district court in Florida stated conclusively that "As a direct result of the 1976 amendment of Exemption 3, . . . general, discretionary nondisclosure statutes, like 18 U.S.C. § 1905 [the Trade Secrets Act], no longer qualify as the kind of statute to withhold information in disregard of the liberal disclosure requirements of the FOIA."³⁷²

The language of the amended exemption places more emphasis on specificity, and demands that an Exemption Three statute either (1) require that matters be withheld from the public in such a manner as to leave no discretion on the issue or (2) establish particular criteria for withholding or refer to particular types of matters to be withheld.³⁷³ Arguments can be made, albeit with some difficulty, that the Trade Secrets Act meets these two criteria. One way to fit the Trade Secrets Act under the amended language is to argue that the statute on its face allows the agency no discretion.³⁷⁴ The Trade Secrets Act prohibits disclosure of a long list of information—unless such disclosure is authorized by law. The agency's task under the statute is simple: if protected information were requested, it would have to be withheld unless the agency located another statute authorizing disclosure. Agency discretion is not involved. In fact, one could argue that since the Trade Secrets Act is a criminal statute, "it can have no discretionary element."³⁷⁵ A second way to fit the Trade Secrets Act under the Exemption Three language is to argue that the law established a list of particular matters to be withheld.³⁷⁶

Once again, however, the stronger arguments seem to fall on the side of excluding the Trade Secrets Act from Exemption Three status. The Trade Secrets Act's broad sweep seems to be incompatible with congressional intent to narrow the scope of ex-

³⁷¹ See, e.g., *General Dynamics Corp. v. Marshall*, 572 F.2d 1211, 1217 n.7 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979); *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 242-43 (M.D. Fla. 1979); *Nationwide Mutual Ins. Co. v. Friedman*, 451 F. Supp. 736, 742-43 (D.Md. 1978); *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744, 752 (D.Md. 1976).

³⁷² *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 242 (M.D. Fla. 1979).

³⁷³ 5 U.S.C. § 552(b)(3) (1976).

³⁷⁴ Clement, *supra* note 7, at 605.

³⁷⁵ Petitioner's Brief at 58, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

³⁷⁶ *Id.*

empt material.³⁷⁷ Most important, the effects of construing Exemption Three to include the Trade Secrets Act are inconsistent with the policy embodied in the FOIA. The goal of increasing the flow of information between the government and the people should not be curtailed so drastically by imposing restrictions on both FOIA-exempt and non-exempt information falling under the Trade Secrets Act. Adequate protection can be given to private interests by considering the Trade Secrets Act in conjunction with information protected by Exemption Four. Although the legislative history relating to the scope of the Trade Secrets Act is ambiguous, if interpreted reasonably, its goals can be effectuated through application of the Exemption Four *National Parks* test.

c. The Scope of the Trade Secrets Act

The Supreme Court did not determine the scope of the Trade Secrets Act in the *Chrysler* decision.³⁷⁸ This issue will continue to play an important role in FOIA litigation, operating in the following way. If requested information falls into Exemption Four, the agency will have to decide whether or not to release the data.³⁷⁹ Its discretion will be circumscribed by the Trade Secrets Act, a law which may apply independently to Exemption Four information and prohibit its disclosure.³⁸⁰ Therefore, the agency will have to determine whether the information is covered by the Trade Secrets Act.³⁸¹ If the scope of the Trade Secrets Act is broad, it will arguably prohibit disclosure of any information within Exemption Four unless disclosure is authorized by law.³⁸² Submitters will, in effect, have achieved a mandatory interpretation of Exemption Four,³⁸³ subject of course to the Trade Secrets Act loophole of "authorization by law." On the other hand, if the

³⁷⁷ Campbell, *supra* note 5, at 154.

³⁷⁸ *Chrysler Corp. v. Brown*, 441 U.S. 281, 319 n.49 (1979).

³⁷⁹ Letter from Assistant Attorney General Babcock to Agency General Counsels on Current and Future Litigation under *Chrysler Corp. v. Brown*, 441 U.S. 281(1979), at 5 (June 21, 1979).

³⁸⁰ *Id.* at 7.

³⁸¹ *Id.* at 6.

³⁸² See text at notes 189-205, *supra*.

³⁸³ A truly mandatory construction of Exemption Four would be achieved by the passage of the proposed amendment to the FOIA. Under S. 2397, Exemption Four material would be released only if the submitter consented or failed to object, or if the agency could demonstrate by clear and convincing evidence that withholding would "seriously injure an overriding public interest." S. 2397, 96th Cong., 2d Sess., 126 CONG. REC. 2317 (1980). The likelihood of an agency attempting to meet, and meeting such a burden, seems slight.

scope of the Trade Secrets Act is limited to that information covered by its three predecessor statutes,³⁸⁴ an agency holding requested information will be able to use its discretion in releasing Exemption Four data which does not deal with (1) trade secrets, (2) highly private information normally found on income tax returns, or (3) commercial information submitted in confidence and likely to cause competitive harm.³⁸⁵

Unfortunately, an analysis of the language and legislative history of the Trade Secrets Act is not conclusive in determining which interpretation has more merit. The language of the present statute, as noted above,³⁸⁶ is very broad and could, on its face, prevent the government from releasing most of the business information it receives. On the one hand, it seems unlikely that in combining the three statutes in 1948, Congress intended a more sweeping prohibition on disclosure of business data submitted to the government than had existed previously.³⁸⁷ On the other hand, it is not clear that the logical way to determine the current scope of the Trade Secrets Act is to limit it precisely to the information covered in the nineteenth century Revenue, Tariff and Commerce Acts.

The three original statutes were directed toward three particular agencies;³⁸⁸ thus, the information they were designed to protect would naturally be limited to information pertinent to these agencies. In contrast, the Trade Secrets Act was intended to apply to all agencies of the federal government,³⁸⁹ and the scope of the material intended to be covered might well have been larger than that covered by the three original statutes. The rationales behind the three statutes were the familiar ones of protecting confidential business information required to be submitted to the government and of protecting information so that companies would voluntarily submit such information.³⁹⁰ These rationales

³⁸⁴ See footnote 183, *supra*.

³⁸⁵ Supplementary Brief for Appellants at 2, *General Dynamics Corp. v. Marshall*, No. 77-1192 (8th Cir. Sept. 1979) (on remand).

³⁸⁶ See text at notes 185-87, *supra*.

³⁸⁷ Supplementary Brief for Appellants at 3-7, *General Dynamics Corp. v. Marshall*, No. 77-1192 (8th Cir. Sept. 1979) (on remand).

³⁸⁸ See note 183, *supra*.

³⁸⁹ *Id.*

³⁹⁰ When the Revenue Act was re-enacted in the Tariff Act of 1894, ch. 349, § 34, 28 Stat. 509, 557-58, the Senate debates anticipated a theme heard later in debates over the FOIA—the tension between the government's need for information and the privacy rights

can also support a broad reading of the Trade Secrets Act. Finally, the effect of the codification of these three statutes can also be interpreted in two ways. The Supreme Court has pointed out that in interpreting the 1948 codification, the original intent of Congress is to be preserved.³⁹¹ Unless there was a clear indication to the contrary, the codification was not intended to make substantive changes in the law.³⁹² Thus it can be argued that the coverage of the Trade Secrets Act should be limited to the scope of the three predecessor statutes.³⁹³ On the other hand, it can be contended that the original intention of the statutes—the protection of confidential business information—is retained if the Trade Secrets Act is given a broad interpretation. The number of federal agencies, together with the complexity and sheer bulk of the information they acquire, arguably makes such a broad reading necessary.

An analysis of the legislative history of the Trade Secrets Act seems inconclusive in terms of the scope of protected material. This is not surprising, of course, since the Trade Secrets Act was not enacted by a Congress which was aware of any potential conflicts with the FOIA. A more direct and useful approach to interpreting the statute seems to be an analysis of the Trade Secrets Act in light of the subsequent passage of the FOIA. This approach seems legitimate since both statutes operate in the same conceptual area of law. They need to be interpreted in reference to each other in order to effectuate a uniform national policy regarding access to business information in the hands of the government.

The FOIA, as previously noted, was designed to balance interests—to disclose as much information as possible without causing substantial harm to those who submit information to the government. Inherent in the Act were the limits imposed by the nine exemptions. The Trade Secrets Act can be read as anticipating

of individuals and corporations. Clement, *supra* note 3, at 609-10. Similarly, the Senate debates over an amendment to the Tariff Commission statute (Tariff Act of 1930, ch. 497, § 335 46 Stat. 590, 701) expressed concern over: (1) whether manufacturers would disclose information willingly, and in detail, if there were no safeguards against disclosure by the Commission; and (2) whether the government would be able to honor its promises of confidentiality. 71 CONG. REC. 4561-70 (1929).

³⁹¹ *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975).

³⁹² *Id.* at 474. See also *U.S. v. Cook*, 384 U.S. 257, 262 (1966).

³⁹³ Supplemental Brief for the Defendants-Appellees at 5, *Chrysler Corp. v. Brown*, Nos. 76-1970 and 76-2238 (3d Cir. Aug. 1979) (on remand).

one of these limits—Exemption Four. The scope of the Trade Secrets Act clearly should not go beyond that of Exemption Four, as such an expansive reading would undermine the strong congressional commitment to freedom of information. However, the scope of the Trade Secrets Act should not be interpreted as being significantly narrower. The limits of Exemption Four have been carefully set in the courts.³⁹⁴ To meet the criteria of the *National Parks* test, the release of “confidential” information must pose a threat of substantial competitive harm.³⁹⁵ If this test is applied stringently, the information protected would seem to be the type Congress envisioned protecting when it enacted the Trade Secrets Act.³⁹⁶ It should also be noted that equating the reaches of Exemption Four and the Trade Secrets Act will not prohibit the disclosure of all Exemption Four material. Such material can be disclosed if “authorized by law,” as that term is interpreted in *Chrysler Corp. v. Brown*.³⁹⁷

The *Chrysler* decision effectively cuts back on protection for private business interests in three substantial ways: in determining that the FOIA exemptions are permissive; in denying a cause of action under the FOIA and under the Trade Secrets Act; and in denying *de novo* review in most reverse FOIA cases. Protection will be cut back even further if the Trade Secrets Act is determined not to be an Exemption Three statute. To avoid completely upsetting the balance of interests, the Trade Secrets Act should be interpreted as being coextensive with Exemption Four. If the protection offered by the Trade Secrets Act and Exemption Four is to be further reduced, it should be done pursuant to congressional re-evaluation of the competing interest involved.

d. Judicial Review of Agency Decisions to Disclose

The Supreme Court seemed to conclude that court review for submitters challenging disclosure of business records was available only through the APA and based on only the agency record.³⁹⁸ The Court stated simply: “*De novo* review by the District Court is ordinarily not necessary to decide whether a contemplated disclo-

³⁹⁴ *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974). See text at notes 144-69, *supra*.

³⁹⁵ *Id.*

³⁹⁶ See text at notes 389-93, *supra*.

³⁹⁷ *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-316 (1979).

³⁹⁸ *Id.* at 317-19.

sure runs afoul of § 1905 [the Trade Secrets Act]."³⁹⁹ As the Third Circuit Court of Appeals interpreted the decision, *Chrysler* "left undisturbed our holding that review of decisions by Federal agencies to comply with Freedom of Information Act requests was available only under the Administrative Procedure Act, 5 U.S.C. § 702 (1976) and *on the agency record*."⁴⁰⁰ Although to some extent the issue of scope of review may seem to be resolved, certain questions remain,⁴⁰¹ and certain developments in agency procedures and court review are to be expected.

The Agency decision-making procedures will probably become more time consuming and extensive, with written, if not oral, testimony from both parties.⁴⁰² There will be an increased emphasis by the agencies on compiling adequate records. Following the *Chrysler* decision, with its finding that the Trade Secrets Act places substantive limits on agency action,⁴⁰³ The Department of Justice sought remand of pending reverse FOIA cases to create new administrative records: "Only through the careful re-creation of the administrative process for these pending cases can [the agencies] maximize our future ability to defend all such 'reverse' cases successfully in the wake of *Chrysler*."⁴⁰⁴ The record contemplated by the Department of Justice includes evidence from the requester, "detailed written objections" from the submitter, and a "full explanation and documentation of all reasons" which led to the agency decision.⁴⁰⁵ This explanation will presumably contain:

³⁹⁹ *Id.* at 318.

⁴⁰⁰ *Chrysler Corp. v. Brown*, Nos. 76-1970 & 76-2238 (3d Cir. Aug. 31, 1979) (opinion on remand) (emphasis added and footnote omitted).

⁴⁰¹ For example, though the Supreme Court's decision seems to reserve *de novo* review for extraordinary cases, such review seemed to be routinely afforded plaintiffs in a reverse FOIA suit appearing after *Chrysler Corp. v. Brown*. A district court in Virginia concluded as a matter of law that the Court's determination of the applicability of § 1905 and of Exemptions Three and Four should be made *de novo*. *Burroughs Corp. v. Brown*, 21 *FAIR EMP. PRAC. (BNA)* 1455, 1460 (E.D. Va. 1980). Further clarification of the appropriate scope of review is necessary either through amendment (as in the proposed amendment to the FOIA, S. 2397, 96th Cong., 2d Sess., 126 Cong. Rec. 2317 (1980), or through judicial interpretation.

⁴⁰² Letter from Assistant Attorney General Babcock to Agency General Counsels on Current and Future Litigation under *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), at 3-8 (June 21, 1979).

⁴⁰³ *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979).

⁴⁰⁴ Letter from Assistant Attorney General Babcock to Agency General Counsels on Current and Future Litigation under *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), at 2-3 (June 21, 1979).

⁴⁰⁵ *Id.* at 3.

first, documentation of the use of the *National Parks* test to determine whether Exemption 4 applies; second, reference to the factors weighed in determining whether to disclose Exemption Four material; third, a discussion of whether the agency felt constrained by the Trade Secrets Act;⁴⁰⁶ and fourth, identification of the source of any "authorization by law" used by the agency to justify disclosure of information covered by the Trade Secrets Act.⁴⁰⁷ In their efforts to compile a thorough record, agencies may undertake proceedings which have the accoutrements of formal adjudicatory hearings. As a result, the courts may subject the process to the substantial evidence test.⁴⁰⁸ Furthermore, where the proceedings take on the character of an adjudication, and where fact-finding procedures are arguably inadequate, submitters may again seek *de novo* review under section 706(2)(F) of the APA.⁴⁰⁹

Although the Supreme Court did not foreclose the possibility of *de novo* review, in limited circumstances, of an agency determination about the applicability of the Trade Secrets Act,⁴¹⁰ most courts will probably base their review on the agency record. The basic standard of review will be the abuse of discretion standard outlined in the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*.⁴¹¹ Thus, in trying to see if agency action was "arbitrary and capricious," a court will first determine whether the agency was acting within the scope of its authority.⁴¹² Second, it will determine whether the agency action was "arbitrary or capricious" by considering whether the decision was based on relevant factors and whether there was a clear error of judgment.⁴¹³ Finally, it will ascertain whether the agency conformed to procedural requirements.⁴¹⁴ Although the inquiry into the facts will be "searching and careful,"⁴¹⁵ presumably the court

⁴⁰⁶ *Id.* at 5.

⁴⁰⁷ *Id.* at 6.

⁴⁰⁸ Under the substantial evidence standard of review, the court looks at both sides of the evidence in the agency record. The court then determines whether a reasonable mind would find this evidence adequate to support the agency conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

⁴⁰⁹ 5 U.S.C. § 706(2)(F)(1976).

⁴¹⁰ *Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979).

⁴¹¹ 401 U.S. 402 (1971).

⁴¹² *Id.* at 415.

⁴¹³ *Id.* at 416.

⁴¹⁴ *Id.* at 417.

⁴¹⁵ *Id.* at 416.

will not substitute its own judgment for that of the agency.⁴¹⁶

V. CONCLUSION

In *Chrysler Corp. v. Brown*, the Supreme Court faced some of the major issues presented in "reverse" suits filed under the Freedom of Information Act (FOIA). These issues reflected the basic tensions underlying the FOIA: the desire to increase public access to documents held by the government and the desire to maintain some form of protection for confidential information. The Supreme Court resolved the main problems involving interpretation of the FOIA. The Court determined (1) that the FOIA exemptions are permissive, not mandatory, (2) that the FOIA does not supply submitters with a "reverse" cause of action, and (3) that submitters can seek review of agency disclosure decisions under the Administrative Procedure Act (APA). The Court also found that the Trade Secrets Act does not provide submitters with an implied right of action. One other issue involving the Trade Secrets Act which the Court resolved was the type of agency regulations needed to constitute "authorization by law" under the Trade Secrets Act. To have the force and effect of law in this particular context, agency regulations must be substantive, must be promulgated according to APA requirements for substantive regulations, and must have the requisite "nexus" with a statutory grant of authority.

The Supreme Court did not comment on the scope of Exemption Four, apparently leaving intact for the present the *National Parks* test. The Court also did not answer a number of crucial questions regarding the Trade Secrets Act. The scope of the Trade Secrets Act remains unclear, as does its status as an Exemption Three statute. These issues will be crucial in subsequent litigation. However, according to the Court, the scope of review in future litigation will ordinarily be limited to review based on the agency record.

In sum, although the answers to some questions were given, some of the most troublesome problems remain. "Reverse" FOIA litigation, eliminated in name only, will continue to cause excessive expenditures of time and money and will continue to leave submitters dissatisfied with the uncertainty surrounding protection of confidential business records. Absent congressional action,

⁴¹⁶ *Id.*

another Supreme Court decision is needed to supply the missing answers.