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Richard L. Kuersteiner

Etta G. Herbach

THE FREEDOM OF INFORMATION ACT: AN EXAMINATION OF THE COMMERCIAL OR FINANCIAL EXEMPTION

Richard L. Kuersteiner* and Etta G. Herbach**

The Federal Freedom of Information Act went into effect July 4, 1967, and was amended on November 21, 1974.[1] Its far-reaching purpose was to revise and thereby reform section 3 of the Administrative Procedure Act. That section originally directed every executive agency to provide access to or publish its methods of operation, public rules, procedures, precedents and policies, as well as to make available official records to any individual directly and properly concerned with them. As such, section 3 of the Administrative Procedure Act did not function as a general public records law because it did not provide the public at large with access to official records.[2] In fact, although the section was entitled "Public Information," it had been used primarily to withhold rather than to disclose information which the public desired.[3]

In enacting the Freedom of Information Act, Congress intended that disclosure be the general rule, and courts in almost every circuit have accepted this interpretation of the legislation.[4] Consistent with this general policy of disclosure, many decisions support the position that the nine exemptions included in the Act and designed to enable an agency to with-

* Counsel, Western Division, Naval Facilities Engineering Command; B.A., 1961, Washington and Lee University; J.D., 1964, University of Florida; Member, Florida Bar.

** Law Clerk, Western Division, Naval Facilities Engineering Command; B.A., 1971, City University of New York at Brooklyn College; J.D., 1976, University of Santa Clara.

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1. 5 U.S.C. § 552 (1970), *as amended*, 5 U.S.C.A. § 552(1) (1974). *See* notes 85-89 and accompanying text *infra* for a discussion of some of the effects of the 1974 amendments on exemption 4.

2. *See* H.R. REP. No. 1497, 89th Cong., 2d Sess. 1 (1966) [hereinafter cited as H.R. REP. No. 1497].

3. *See* H.R. REP. No. 1497 at 4.

4. Theriault v. United States, 503 F.2d 390 (9th Cir. 1974); Stretch v. Weinberger, 495 F.2d 639 (3d Cir. 1974); Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973); Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973); Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657 (6th Cir. 1972); Nichols v. United States, 460 F.2d 671 (10th Cir. 1972); Wells v. Hardin, 444 F.2d 21 (4th Cir. 1971); Sears, Roebuck & Co. v. General Servs. Admin., 384 F. Supp. 996 (D.D.C. 1974); Brockway v. Department of the Air

hold information under certain circumstances should be construed narrowly.[5]

However, the Freedom of Information Act was not intended to apply to all branches of the government. In *Verrazzano Trading Corporation v. United States*,[6] the court stated that "the Freedom of Information Act was enacted to provide the public with the right to obtain information from *administrative agencies* and *agencies in the executive branch* of the government . . . ."[7] Thus, neither the Congress nor the judiciary falls within the purview of this legislation.

I. EXEMPTION 4

Subdivision (b) of the Act sets out nine "exemptions" which enables the government to prevent disclosure under the Act.[8] Exemption 4 provides:

> (b) 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 . . . .[9]

This exemption is frequently invoked by the government and vigorously contested by litigants.[10] While the statutory language is ambiguous, the legislative history and the cases sketch the scope of the exemption.

Legislative History

In 1964, the Senate Judiciary Committee issued a report to accompany Senate Bill 1666, the 1964 version of the Public Information section of the Administrative Procedure Act. Because the House of Representatives failed to act upon that version, the proposed legislation did not reach fruition until the

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Force, 370 F. Supp. 738 (N.D. Iowa 1974); Washington Research Project, Inc. v. HEW, 366 F. Supp. 929 (D.D.C. 1973); Charles River Park "A" Inc. v. HUD, 360 F. Supp. 212 (D.D.C. 1973); Consumers Union of the United States, Inc. v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969); Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401 (Cust. Ct. 1972).

5. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970); Sears, Roebuck & Co. v. General Servs. Admin., 384 F. Supp. 996 (D.D.C. Cir. 1974); Kreindler v. Department of the Navy, 372 F. Supp. 333 (S.D.N.Y. 1974); Washington Research Project, Inc. v. HEW, 366 F. Supp. 929 (D.D.C. 1973).

6. 349 F. Supp. 1401 (Cust. Ct. 1972).

7. *Id.* at 1403 (emphasis added).

8. *See* Note, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L. J. 177 (1973) [hereinafter cited as Note, *Parameters*].

9. Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1970).

10. *See* Note, *Parameters, supra* note 8, at 186.

89th Congress. One should be aware, however, that the language of exemption 4 in the 1964 Senate Bill is not the same as the enacted version. While the 1964 version had designated for exemption "trade secrets and other information obtained from the public and customarily privileged or confidential," the enacted version included the words "commercial or financial" to modify "information," substituted the word "person" for the word "public," and deleted the word "customarily." Despite these changes, it appears that the Senate Report on the enacted section[11] is substantially the same as the report on the earlier, unmodified draft,[12] and contains no discussion of the language variations. Furthermore, the House Report does not explain the significance of the changes either.[13] As will be seen, the failure of Congress to explain these changes and their in-

11. S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965):

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

12. S. REP. No. 1219, 88th Cong., 2d Sess. 6 (1964):

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges.

13. H.R. REP. No. 1497, *supra* note 2, at 10 (emphasis added):

> Trade secrets and commercial or financial information obtained from any person and privileged or confidential: This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. *It 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.*

tended impact has presented the judiciary with some difficult questions, most of which have been resolved in favor of disclosure.

Interpretation of Legislative Intent

Although both the House and Senate Reports are conspicuously silent about the reasons for the language modifications, there are some significant differences between the two reports. At the outset of his 1967 article on the Freedom of Information Act, Professor Kenneth Culp Davis states, "The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure."[14] Although both legislative bodies indicate that the disclosable or nondisclosable character of the information depends on whether the person from whom the information was obtained would customarily have released it himself,[15] the House Report enlarges the applicability of this exemption: it provides for nondisclosure based upon the importance of one's being "able to confide in his Government," or upon the government's obligation to honor a commitment not to disclose.[16]

Recently, a federal district court found material exempt, relying in part on this language in the House Report.[17] On the other hand, in *Consumers Union of the United States, Inc. v. Veterans Administration*,[18] the court chose to be guided by the express language of the statute rather than the expansive interpretation contained in the accompanying reports: "Although the congressional reports on S. 1160 say that information not commercial or financial in nature is exempted, this court is required to follow the words of Congress."[19] When courts look to legislative reports in order to construe the statute in ques-

14. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 763 (1967) [hereinafter cited as Davis].

15. It should be noted that both the House and Senate Reports use the word "customarily," even though this word was deleted from the exemption as finally enacted; many of the earlier court decisions also rely on the word "customarily." Apparently, neither the legislative committees nor the judiciary attached much significance to the deletion of this word. The rationale seems to be that the test of confidentiality is identical to a determination of whether the person supplying the information would customarily release it. *See* text accompanying notes 60-72 *infra*.

16. *See* note 13 *supra*.

17. Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 380 F. Supp. 630, 636 (N.D. Ind. 1974).

18. 301 F. Supp. 796 (S.D.N.Y. 1969).

19. *Id.* at 802.

tion, and those reports are based upon a draft which was not adopted, the results of the various cases will depend upon how much weight the reports are given. In any event, the courts continue to seek guidance from the legislative reports.

The Purpose of Exemption 4

A leading case, *National Parks and Conservation Association v. Morton*,[20] declared that it is the obligation of the court to "be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption."[21] The court continued: "In general, the various exemptions included in the statute serve two interests—that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy."[22] The court indicated specifically that exemption 4 is designed to further both these interests. The dual-interest interpretation has been adopted in other cases, including *Bristol-Myers Co. v. FTC*,[23] where Chief Judge Bazelon indicated that exemption 4 was intended to serve "the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers."[24]

Another description of the purpose of this exemption is found in *Soucie v. David*,[25] which involved a suit by two citizens who sought to compel the Director of the Office of Science and Technology to furnish them with an evaluation of the United States Government's program for the development of a supersonic transport aircraft. The opinion noted, "This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government and it must be read narrowly in accordance with the purpose."[26] It is

20. 498 F.2d 765 (D.C. Cir. 1974).

21. *Id.* at 767.

22. *Id.*

23. 424 F.2d 935 (D.C. Cir. 1970).

24. *Id.* at 938; *see* Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974).

Chief Judge Bazelon's contributions to the judicial interpretation of the Freedom of Information Act are discussed in Kramer & Weinberg, *The Freedom of Information Act*, 63 GEO. L.J. 49 (1974). Many of the Freedom of Information suits are brought in the District of Columbia courts because venue always lies there, under 5 U.S.C.A. § 552(a)(4)(B), and because many of the agencies' records are located there. *See* text accompanying note 85 *infra*.

25. 448 F.2d 1067 (D.C. Cir. 1971).

26. *Id.* at 1078.

significant that the *Soucie* court accompanied its interpretation of the general purpose of the exemption with a reiteration of the rule of narrow construction, thus emphasizing, by implication, the two interests at stake.

But despite general agreement that the disclosure exemptions are to be narrowly interpreted, there are a number of cases in which the courts have found the exemption applicable, thereby rendering the material in question nondisclosable. Materials found not subject to disclosure include: (1) a United States Department of Agriculture report containing information on governmental housing discrimination in Florida;[27] (2) a cost report filed by a nursing home with the Department of Health, Education and Welfare;[28] (3) custom forms completed by individuals who entered the United States by air from Asia and Australia;[29] (4) an aircraft accident report;[30] (5) portions of an application submitted to the Atomic Energy Commission for a permit to construct a nuclear plant;[31] (6) contractors' reports for renegotiation and statements of non-applicability regarding corporations holding national defense contracts;[32] and (7) documents possessed by the Federal Trade Commission containing sales and profit data on corporations involved in an antitrust suit.[33] As this list suggests, the factors which confer exemption from the general disclosure obligation are not entirely clear.

II. Scope of Exemption 4

The exact scope of the exemption is clouded by the syntax of section (b)(4). Courts have been forced to determine whether "privileged or confidential" status alone is sufficient to exempt material from disclosure, or whether the exemption applies only to commercial or financial information that is *also* privileged or confidential. Former Attorney General Ramsey Clark acknowledged in a memorandum that the scope of exemption 4 is "particularly difficult to determine. The terms used are

27. Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974).

28. McCoy v. Weinberg, 386 F. Supp. 504 (W.D. Ky. 1974).

29. Ditlow v. Shultz, 379 F. Supp. 326 (D.D.C. 1974).

30. Brockway v. Department of the Air Force, 370 F. Supp. 738 (N.D. Iowa 1974).

31. Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 380 F. Supp. 630 (N.D. Ind. 1974).

32. Fisher v. Renegotiation Bd., 355 F. Supp. 1171 (D.D.C. 1973).

33. Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971).

general and undefined. Moreover, the sentence structure makes it susceptible of several readings, none of which is entirely satisfactory."[34] His opinion is shared by Professor Davis, who has noted that "[t]he Act is difficult to interpret and in some respects . . . is badly drafted."[35]

An early case, *Barceloneta Shoe Corp. v. Compton*,[36] took the position that three classes of documents were nondisclosable under the exemption: (1) trade secrets, (2) commercial or financial information, and (3) information which is either privileged or confidential. It appears, however, that no other court has adopted this interpretation; the majority have found only two classes of documents covered by the exemption. One class involves trade secrets; the other covers information which is (a) *either* commercial or financial, *and* (b) obtained from a person, *and* (c) privileged or confidential.[37] Professor Davis concluded that with respect to non-commercial and non-financial information which is privileged or confidential,

> [t]he requirements of common sense directly collide with the clear statutory language. Obviously, the good faith understanding that the information will be kept confidential should be honored [whether or not the material is "commercial or financial"]. But the statutory words clearly limit the exemption to "commercial or financial information." The word "information" is modified by "commercial or financial" and it is also modified by "privileged or confidential." The words plainly limit the exemption to information which is commercial or financial and which is privileged or confidential. Indeed, I think the meaning of the statutory words is not merely reasonably clear but entirely clear.[38]

The only *Attorney General's Memorandum* which examines exemption 4 in depth argues that information need not be commercial or financial in nature to qualify for protection under the exemption. After examining the legislative history of exemption 4, the Attorney General concluded:

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34. R. CLARK, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 32 (U.S. Government Printing Office, 1967) [hereinafter cited as R. CLARK].

35. Davis, *supra* note 14, at 761.

36. 271 F. Supp. 591 (D.P.R. 1967).

37. *See, e.g.*, Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Rabbitt v. Department of the Air Force, 383 F. Supp. 1065 (S.D.N.Y. 1974); Consumers Union of the United States, Inc. v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969).

38. Davis, *supra* note 14, at 787.

> It seems obvious from these committee reports that Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other. Agencies should seek to follow the congressional intention as expressed in the committee reports.[39]

In spite of this memorandum, the courts have used a three-pronged test to determine when material not classifiable as a "trade secret" is covered by the fourth exemption. The elements of the test are that the information (1) must be commercial or financial, (2) must be obtained from a person, and (3) must be confidential or privileged.

Is the Information Commercial or Financial?

There have not been many cases interpreting the meaning of "commercial or financial information." One of the few in which the question was considered was *Brockway v. Department of the Air Force*.[40] In that case, the Department of the Air Force possessed certain information regarding the death of the plaintiff's son in an airplane crash. The plaintiff sought the disclosure of a Cessna aircraft accident investigation report, arguing that exemption 4 was inapplicable because the Cessna report did not deal with commercial or financial information. The Air Force claimed that the Cessna report "was provided by a private commercial contractor under a guarantee of confidentiality, thus being exempt under 5 U.S.C. § 552(b)(4)."[41] The court held that

> [a]lthough the legislative history of the phrase "commercial . . . information" contained in 5 U.S.C. § 552(b)(4) is of little assistance. . . . Cessna Aircraft Company, being a private defense contractor, is unquestionably a commercial enterprise and the reports it generates must generally be considered commercial information which in many instances it may be unwilling to share with competitors.[42]

Thus, according to this opinion, a report by a "commercial enterprise" must generally be considered to contain "commercial information."

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39. R. CLARK, *supra* note 34, at 34.
40. 370 F. Supp. 738 (N.D. Iowa 1974).
41. *Id.* at 740.
42. *Id.*

Another case which examines the meaning of "commercial or financial information" is *Washington Research Project, Inc. v. HEW.*[43] The case concerned the applicability of exemption 4 to research designs submitted in applications to the National Institute of Mental Health for projects involving research on the effects of various drugs on the behavior of children with learning disabilities. The opinion stated:

> The essence of the argument that the research designs submitted in the expectation of confidentiality are trade secrets or commercial information is that "ideas are a researcher's 'stock-in-trade'." Their misappropriation, which, it is claimed, would be facilitated by premature disclosure, deprives him of the career advancement and attendant material rewards in which the academic and scientific market deals, in much the same way that misappropriation of trade information in the commercial world deprives one of a competitive advantage. . . . [T]he reach of the exemption for "trade secrets or commercial or financial information" is not necessarily coextensive with the existence of competition in any form.
>
> It is clear enough that a non-commercial scientist's research design is not literally a trade secret or item of commercial information for it defies common sense to pretend that the scientist is engaged in trade or commerce . . . . To the extent that his interest is founded on professional recognition and reward, it is surely more the interest of an employee than of an enterprise, and we are far from persuaded that Congress intended in Exemption 4 to apply terms drawn from the business context to the employment market.[44]

Under this analysis, information is not "commercial or financial" unless the documents were prepared as part of a commercial enterprise.

Taken together, these two cases hold that information will be "commercial or financial" *only* if it came from a commercial establishment, but *any* information from such a source satisfies the test.

Was the Material Obtained from a Person?

The second element required for exemption 4 is that the

43. 504 F.2d 238 (D.C. Cir. 1974).
44. *Id.* at 244-45.

material have been "obtained from a person." The primary question is whether information may be obtained from a government employee and still be exempt.

Several cases have adopted the position that information must be obtained from outside the government in order to fall within the scope of the fourth exemption.[45] For example, in *Consumers Union of the United States, Inc. v. Veterans Administration*, the Court stated:

> The words "obtained from a person" were changed from "obtained from the public" by the Senate Judiciary Committee. The suggestion that this change was intended to exempt information obtained from another person within the government was first made in the Attorney General's memorandum. This interpretation entirely disregards the reason given by the Committee for the change.[46]

Quoting from the 1965 Senate Report, the court noted that the language was changed to convey the idea that the information sought may be of a "highly personal" nature. The court then concluded:

> The committee clearly had no intention of including information obtained from other government sources in the exemption. To include it would pervert the purpose of the Act for then commercial and financial information could be made secret simply by transferring records from one agency to another with the promise of confidentiality. We accordingly follow the only reported decision on this point and hold that the information must be obtained from outside the government to be exempt.[47]

The Circuit Court for the District of Columbia adopted the same position in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*,[48] stating:

> This provision has been interpreted to encompass only information received from persons outside the Government.

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45. *See, e.g.*, Soucie v. David, 448 F.2d 1067, 1079 n.47 (D.C. Cir. 1971); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970); General Servs. Admin. v. Benson, 415 F.2d 878, 881 (9th Cir. 1969); Brockway v. Department of the Air Force, 370 F. Supp. 738, 740 (N.D. Iowa 1974); Fisher v. Renegotiation Bd., 355 F. Supp. 1171, 1174 (D.D.C. 1973); Consumer's Union of the United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 802-03 (S.D.N.Y. 1969).

46. 301 F. Supp. 796, 802-03 (S.D.N.Y. 1969).

47. *Id.* at 803. The case referred to by the court is Benson v. General Servs. Admin., 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969).

48. 425 F.2d 578 (D.C. Cir. 1970).

> We concur in this reading of the statute. The plain language of the exemption—it applies only to "information obtained from any *person*"—is reinforced by the statutory history, which indicates that the exemption was not meant to allow agencies to render documents "confidential" by passing them back and forth among themselves.[49]

There is, however, some authority for the proposition that information may be obtained from a government employee and still be exempt. It is not surprising that the *Attorney General's Memorandum* presents the following analysis:

> It seems clear that applicability of this exemption should not depend upon whether the agency obtains the information from the public at large, from a particular person, or from within the agency. The Treasury Department, for instance, must be able to withhold the secret formulas developed by its personnel for inks and paper used in making currency.
>
> An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in hands of the United States should be covered under exemption [b](4).[50]

There is also case law support for this interpretation of the exemption. *Rabbitt v. Department of the Air Force*[51] involved a request for access to an Aircraft Accident Investigation Report. In analyzing whether information from a government source was covered by exemption 4, the court stated:

> It is true that some courts in construing Exemption 4 have distinguished between statements given by Government personnel and those furnished by civilian witnesses.

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49. *Id.* at 582. *See also* Soucie v. David, 448 F.2d 1067, 1079 n.47 (D.C. Cir. 1971); Brockway v. Department of the Air Force, 370 F. Supp. 738, 740 (N.D. Iowa 1974); Fisher v. Renegotiation Bd., 355 F. Supp. 1171, 1174 (D.D.C. 1973).

50. R. CLARK, *supra* note 34, at 34; *see* Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974).

51. 383 F. Supp. 1065 (S.D.N.Y. 1974).

> In holding information obtained from witnesses outside the government exempt from disclosure, these courts have stressed that in a governmental investigation a civilian may have a greater or more justifiable expectation of privacy than a government employee, and that there is a risk that, absent such confidentiality, further cooperation with government investigations would cease. We agree, however, with Judge Weinfeld's ruling in *Kreindler v. Department of the Navy* that the statutory language of Exemption 4 supports no such distinction. The Freedom of Information Act "conveys no discretionary power to vary the standards established in the law itself."[52]

The meaning of the words "obtained from a person" has not been finally resolved. Generally, the District of Columbia and Ninth Circuits have construed the language to include only material obtained from sources outside of government, while recent district court decisions in the Second Circuit have adopted the interpretation that a person is a person, whether he works for the government or not.[53]

Is the Information Confidential or Privileged?

The third and final element of the fourth exemption is that the information be either "privileged or confidential." Most of the cases involve material which is claimed to be confidential, rather than privileged.

It seems clear that an unsupported claim of confidentiality by the agency will not meet the requirements for classifying information as "confidential." Cases have held that the following types of information are not "automatically" confidential: (1) a United States Department of Agriculture Report which contained information on government housing discrimination in Florida;[54] (2) documents which describe contingency plans for reduction of airline services if available fuel supply is reduced;[55] (3) various records of the National Highway Traffic

52. *Id.* at 1069 (citations omitted). *See* Kreindler v. Department of the Navy, 372 F. Supp. 333, 334 (S.D.N.Y. 1974).

53. However, Consumers Union of the United States, Inc. v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969) (*see* note 46 and accompanying text *supra*), also from a district court in the Second Circuit, held that the word "person" *excluded* anyone working for the government. This case was decided in 1969. The more recent cases discussed in the text accompanying notes 51-52 *supra* reach a contrary result.

54. *See* Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974).

55. *See* Cutler v. Civil Aeronautics Bd., 375 F. Supp. 722 (D.D.C. 1974).

Safety Administration examining safety defects in new automobiles;[56] (4) a renegotiation agreement which contained sales and profit statistics;[57] (5) documents and transcripts compiled by the staff of the Securities and Exchange Commission during the course of an investigation;[58] and (6) documents relevant to a rule-making proceeding by the Federal Trade Commission.[59]

What must be shown in order for material to be classified as "confidential"? When the courts first began examining the question of confidentiality, the test generally applied was whether the individual supplying the information would want it available for public perusal. If that question was answered negatively, the material would be considered confidential. Cases from both the District of Columbia[60] and the Ninth Circuits[61] have used this standard.

In *National Parks and Conservation Association v. Morton*,[62] however, the District of Columbia Circuit developed a new test for confidentiality. The Park Service had refused to furnish plaintiffs with the results of audits and financial statements filed by several companies operating concessions in the national park. In determining whether the information was confidential, the court stated: "Whether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether that information is 'confidential' for purposes of section 552(b)(4)."[63]

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[64]

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56. *See* Ditlow v. Volpe, 362 F. Supp. 1321 (D.D.C. 1973).
57. *See* Fisher v. Renegotiation Bd., 355 F. Supp. 1171 (D.D.C. 1973).
58. *See* M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972).
59. *See* Bristol-Myers, Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970).
60. *See* Fisher v. Renegotiation Bd., 473 F.2d 109 (D.C. Cir. 1972); Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Bristol-Meyers, Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970); Washington Research Project, Inc. v. HEW, 366 F. Supp. 929 (D.D.C. 1973); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972).
61. General Servs. Admin. v. Benson, 415 F.2d 878 (9th Cir. 1969).
62. 498 F.2d 765 (D.C. Cir. 1974), *noted in* 88 HARV. L. REV. 470 (1974).
63. *Id.* at 767.
64. *Id.* at 770.

Several other District of Columbia cases have adopted the test set out in the *National Parks* case,[65] as well as district courts in the Sixth, Seventh, Eighth and Ninth Circuits.[66]

There are, however, a few recent District of Columbia opinions which do not employ the *National Parks* test. One case, *Ditlow v. Shultz*,[67] cites *National Parks*, but the test it employs contains broader language which might make it still easier to establish confidentiality:

> With respect to Exemption (4), it appears to this Court that much of the information required by the Government and recorded on the Customs Declaration form is confidential information that would not customarily be disclosed to the public by the person from whom it was obtained and also that public disclosure of the information poses the likelihood of harm to *legitimate private interests*. Disclosure of such information is excluded by Exemption (4).[68]

The *Ditlow* test differs from that in *National Parks* to the extent that the *Ditlow* court considered the "likelihood of harm to legitimate private interests," while the *National Parks* criterion was "substantial harm to the competitive position." *Ditlow*, however, does not provide for a showing of confidentiality by proof that disclosure will impair the government's ability to acquire necessary information in the future. If the "efficiency of government operation" argument is not available to the government, it becomes correspondingly more difficult to gain the benefit of the exemption; but the *Ditlow* court's silence on the impairment point is certainly not conclusive, since that aspect of confidentiality was not at issue in the case.

In *Rural Housing Alliance v. United States Department of Agriculture*,[69] the Circuit Court for the District of Columbia cited the twofold purpose of exemption (b)(4) as stated in the *National Parks* decision.[70] However, when the court actually

65. Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd., 505 F.2d 383 (D.C. Cir. 1974); Petkas v. Staats, 501 F.2d 887 (D.C. Cir. 1974); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974); Sears, Roebuck and Co. v. General Servs. Admin., 384 F. Supp. 996 (D.D.C. 1974).

66. McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974); Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 380 F. Supp. 630 (N.D. Ind. 1974); Brockway v. Department of the Air Force, 370 F. Supp. 738 (N.D. Iowa 1974).

67. 379 F. Supp. 326 (D.D.C. 1974).

68. *Id.* at 329 (emphasis added).

69. 498 F.2d 73 (D.C. Cir. 1974).

70. *See* text accompanying note 62 *supra*.

decided whether the information in question was confidential, it relied exclusively on the "customarily released to the public" test criticized in *National Parks*.[71]

Although there is still some conflict over what standard should be used to determine confidentiality, the trend is to adopt the *National Parks* test and to abandon the earlier "customarily released" test.[72]

Trade Secrets

Any information which is classified as a trade secret is protected from disclosure under the Freedom of Information Act by exemption 4. A trade secret is generally defined as a "plan or process, tool, mechanism, or compound known only to its owner and those of his employees to whom it is necessary to confide it."[73]

There appears to be only one case which has even considered trade secrets under the Freedom of Information Act. *M.A. Schapiro & Co., Inc. v. SEC*[74] involved an attempt to force the Securities and Exchange Commission to release documents and transcripts compiled by its staff during the course of an investigation. In considering whether the material could be classified as a trade secret, the court stated:

> It should be noted here that the information divulged in the volumes of transcripts and documents does not relate to "trade secrets." Upon viewing them, one may candidly state that their sole concern was the practice and procedure for off-board trading. As among competitors and the basic public that is involved in off-board trading, nothing in the documents or transcripts could be classified as a "trade secret." Moreover, none of the information given

71. The following is the court's entire discussion of the confidentiality element of exemption 4:

> Of course a bare claim by an interested government agency of confidentiality is not sufficient. However, the listing of information obtained strongly suggests the accuracy of the USDA's conclusion that the information is implicitly and unquestionably not the kind of information that would customarily be released to the public by the person from whom it was obtained.

Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 79 (D.C. Cir. 1974) (citations omitted).

72. *See* note 15 *supra*.

73. BLACK'S LAW DICTIONARY 1666 (4th rev. ed. 1968).

74. 339 F. Supp. 467 (D.D.C. 1972).

> could objectively be said to be of the type that one would mind revealing it to the public.[75]

Because of the decision in the case, the *Schapiro* court did not have to make an affirmative determination as to what does constitute a trade secret within the meaning of the Freedom of Information Act. In the absence of any indication to the contrary, it seems reasonable to assume that the courts will follow the generally accepted definition of trade secrets when applying the exemption.

III. Procedural Aspects of Exemption 4

Having examined the elements of section (b)(4), we will now examine procedural aspects affecting the applicability of the nine exemptions. Most of these considerations apply equally to all of the exemptions in the Act, but we will limit our discussion to the fourth exemption.

Proof Necessary to Establish the Exemption

The Freedom of Information Act places the burden of proving an exemption on the agency resisting disclosure.[76] The question of what actually must be demonstrated by the agency has arisen. The House Report on the Freedom of Information Act states that judicial review of an agency's claim of exemption is intended to deter wrongful refusal to disclose and not to impose an additional burden on the courts.[77] To minimize the potential burden, two recent cases, *Vaughn v. Rosen*[78] and *Cuneo v. Schlesinger*,[79] have required that the government provide the court with particularized and specific justification for a claim of exemption.[80]

Although these two cases did not involve exemption 4, their requirements have been applied to the fourth exemption

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75. *Id.* at 471.
76. 5 U.S.C.A. § 552(a)(4)(B) (1974).
77. H.R. Rep. No. 1497, *supra* note 2, at 9.
78. 484 F.2d 820 (D.C. Cir. 1973).
79. 484 F.2d 1086 (D.C. Cir. 1973).
80. [W]e believe that the [burden on the courts] will be substantially ameliorated if the Government is required to provide particularized and specific justification for exempting information from disclosure.

Id. at 1092. The *Cuneo* court suggested also that the district court might "appoint a special master to examine [the documents at issue and] the Government's justification . . . . [in order to] relieve much of the burden of evaluating voluminous documents that currently falls on the trial judge." *Id.*

by other cases. In *Pacific Architects & Engineers, Inc. v. Renegotiation Board*,[81] the court declared:

> The specific procedures mandated by *Vaughn* and *Cuneo* contemplated a detailed indexing of the allegedly exempt material. . . . But the *Vaughn* and *Cuneo* decisions mandate more than mere indexing of allegedly exempt documents. They contemplated a procedure whereby the agency resisting disclosure must present a "detailed justification" for application of the exemption to the specific documents in dispute.[82]

Furthermore, the court said, the "detailed justification" should include the following, if the agency is to meet its burden of proof:

> (a) the extent to which data of the sort in dispute is customarily disclosed to the public, with specific factual or evidentiary material to support the conclusion reached; (b) the extent to which disclosure of this information will impair the government's ability to obtain necessary information of this type in the future, with specific factual or evidentiary material to support the conclusion reached; (c) the extent to which disclosure of the information will cause substantial harm to the competitive position of the person from whom the information is obtained, with specific factual or evidentiary material to support the conclusion reached; and (d) the extent to which any harms of the type mentioned in (b) and (c) could be reduced or eliminated by nondisclosure of the identity of the person submitting the information in dispute.[83]

In Camera Review of the Documents

A second question involves the procedure a judge should use to verify a governmental agency's claim that the information sought falls within an exception to the Freedom of Information Act. Many cases have determined that an *in camera* proceeding is the appropriate method to use.[84] This

81. 505 F.2d 383 (D.C. Cir. 1974).

82. *Id.* at 385.

83. *Id.*

84. *See* Tax Analysts & Advocates v. IRS, 505 F.2d 350 (D.C. Cir. 1974); Theriault v. United States, 503 F.2d 390 (9th Cir. 1974); National Cable Television Ass'n v. FCC, 479 F.2d 183 (D.C. Cir. 1973); Fisher v. Renegotiation Bd., 473 F.2d 109 (D.C. Cir. 1972); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974); Cutler v. CAB, 375 F. Supp. 722 (D.D.C. 1974); Kreindler v. Dep't of the Navy, 363

position has been ratified by action on the part of Congress. The 1974 amendment to the Freedom of Information Act provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and *may examine the contents of such agency records in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.[85]

An Exemption Which Applies to Part of a Document

Several cases have involved the problem of a document which is covered in part by an exemption. The question is whether the remainder of the document must be released. One approach, supported by case law, is to make deletions of identifying information and/or information clearly within the relevant exemptions, while disclosing the remaining information.[86] Congress has adopted this approach. The 1974 amendment to the act requires the release of a document after deletion of exempt portions.[87]

A Seventh Circuit case, *Secretary of Labor v. Farino*,[88]

F. Supp. 611 (S.D.N.Y. 1973); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972); Frankel v. United States, 336 F. Supp. 675 (S.D.N.Y. 1971); Wecksler v. Schultz, 324 F. Supp. 1084 (D.D.C. 1971). For a discussion of *in camera* examination of documents *see* Levin, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557, 572 -75 (1974).

85. 5 U.S.C.A. § 552(a)(4)(B) (1974), *amending* 5 U.S.C. § 552 (1970) (emphasis added). For legislative history of this provision, *see* H.R. REP. No. 12471, 93d Cong., 2d Sess. 6267, 6272-73 (1974).

86. *See* National Cable Television Ass'n v. FCC, 479 F.2d 183 (D.C. Cir. 1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Bristol-Myers, Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970); Exxon Corp. v. FTC, 384 F. Supp. 755 (D.D.C. 1974); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972); *cf.* Irons v. Schuyler, 321 F. Supp. 628 (D.D.C. 1970).

87. 5 U.S.C.A. § 552(b) (1974). This section provides, in relevant part: "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."

88. 490 F.2d 885 (7th Cir. 1973).

demonstrates another approach to the problem. In *Farino*, decided before the 1974 part-disclosure amendment, the court noted that while the Department of Labor is not required under the Freedom of Information Act to disclose material found to fall within an exemption, the Department's disclosure policy, as set forth in the Code of Federal Regulations, states that certain records of the Department of Labor which fall within exemption 4 may be made available. Disclosure is limited to the situation where the officer having authority to release the information has made a determination that disclosure will be in the public interest and will not be disadvantageous to the functions of the Department of Labor.[89]

"Reverse" Freedom of Information Suits

Occasionally, an agency is willing to release the desired information, but the individual who provided that information initiates an action to prevent disclosure. The person who requested the information is usually not a party to the suit. An early case held that the Freedom of Information Act should not be applied in such a suit.[90] More recent cases from the District of Columbia have stated that while the Freedom of Information Act does not necessarily confer *jurisdiction* in these "reverse Freedom of Information Act" suits, it most assuredly does have *application* in such a suit.[91] Cases from district courts in the Sixth and Ninth Circuits have adopted the position espoused in District of Columbia cases.[92]

A Balancing Test?

There apparently are only two reported opinions which even consider whether a court, in determining the applicability of an exemption, should attempt to balance or weigh the reasons for disclosure against the agency's interest in nondisclosure. Dissenting in *Sterling Drug, Inc. v. Federal Trade Commission*,[93] Chief Judge Bazelon indicated that a balancing test should not be applied to exemption 4. Bazelon noted that

89. 29 C.F.R. § 70.11 (1976).

90. Charles River Park "A", Inc. v. HUD, 360 F. Supp. (D.D.C. 1973).

91. *See* Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974); Sears, Roebuck & Co. v. General Servs. Admin., 384 F. Supp. 996 (D.D.C. 1974).

92. *Cf.* McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974).

93. 450 F.2d 698 (D.C. Cir. 1971).

while other language in the statute—specifically, the wording of section (a)(2)—appeared to require courts "to balance the interests affected by disclosure," section (b)(4) contains no such directive.[94]

In the second case, *Rural Housing Alliance v. United States Department of Agriculture*,[95] the court examined the applicability of exemption 4 and remanded the case "to the District Court for reconsideration of exemption 4 for reasons similar to those discussed regarding exemption 6."[96] An examination of the court's analysis of exemption 6, which dealt primarily with the balancing test to be used in determining its applicability, indicates the appellate court's belief that a balancing test was also appropriate for exemption 4.

IV. Conclusion

The Freedom of Information Act, as the legislative history indicates, was enacted with the realization that

> [a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. . . . The needs of the electorate have outpaced the laws which guarantee public access to the facts in Government. . . .
>
> S. 1160 will correct this situation. It provides the necessary machinery to assure the availability of Government information necessary to an informed electorate.[97]

The complicated legislative history of exemption 4 presents problems in determining the intended scope of the exemption. In general, courts have determined that there is a twofold purpose behind this exemption: first, preventing disclosure of information where disclosure would place the person or entity that supplied the information at a competitive disadvantage; and second, promoting governmental efficiency by assuring continued access to sources of information. The exemption is narrowly construed; nevertheless, as this article has indicated, it has been applied in a wide variety of cases.

The exact scope of exemption 4 is uncertain and it will probably remain so until there is a definitive opinion by the Supreme Court setting out with some precision the parameters

94. *Id.* at 715 (dissenting opinion).
95. 498 F.2d 73 (D.C. Cir. 1974).
96. *Id.* at 79.
97. H.R. Rep. No. 1497, *supra* note 2, at 12.

of the exemption. No case defines "trade secret" as used in the exemption, but the usual definition would appear to be appropriate. If the information is not a trade secret, most courts require a showing of three elements before the exemption will apply. The first element is that the information be "commercial or financial" in nature. The general rule is that it must be from a commercial entity; any information of this type is commercial within the meaning of the statute.

The second element is that the information must be "obtained from a person." A majority of the cases have held that this excludes information from a governmental source, but there is some authority for the contrary position. Finally, the information must be "privileged or confidential." This requirement is satisfied if disclosure would impair the ability of the government to obtain needed information in the future, or if release would substantially harm the competitive position of the person who supplied the information.

The Freedom of Information Act has increased public access to information in the government's possession, and therefore has made our society more open. But, as always, privilege exacts its price. Many government officials argue that one of the costs is an inordinate amount of paper work. A recent periodical has cited figures from the Federal Bureau of Investigation, which initially had a staff of eight to process Freedom of Information Act requests, but now has 191 employees handling these requests.[98] There is obviously a significant economic price being paid by the citizens of the United States in order to have increased access to information held by the government.

Nevertheless, we believe that our democratic processes can function most effectively with a well informed electorate. The goal of increased disclosure of governmental information embodied in the Freedom of Information Act represents an important step toward making information available to the American public. Although this law has generated many troublesome legal and administrative problems, we feel that the game is worth the candle.

98. NEWSWEEK, Feb. 2, 1976, at 50.