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Business Documents Obtained by a Federal Regulatory Agency Pursuant to Civil Discovery: Are They Subject to Public Disclosure?

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BUSINESS DOCUMENTS OBTAINED BY A FEDERAL REGULATORY AGENCY PURSUANT TO CIVIL DISCOVERY: ARE THEY SUBJECT TO PUBLIC DISCLOSURE?

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I. INTRODUCTION

Business records and confidential information are obtained by government agencies through discovery in federal courts. What occurs with these documents from the point when the trial is over and the discovery is in the agency's possession is subject, in part, to the court's discretion assuming no court restrictions are applied. When the use of the discovery materials is not protected by the court or restricted by the parties, the materials are available to the public via a Freedom of Information Act[1] (FOIA) request or through a

[1] 5 U.S.C. § 552 (1976). The statute was originally enacted as the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) and was codified by Pub. L. No. 90-23, 81 Stat. 54 (1967) at 5 U.S.C. § 552. The FOIA was amended in the 1974 Amendments to the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974), and again in the Government in the Sunshine Act § 4, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976). For information relating to the background of the Act *see generally* Davis,

statutory right of access to discovery materials. The particular types of documents at issue and the unique roles played by the regulatory agencies that acquire the information suggest access to the information under either guise, and this Comment offers a plausible basis to support the disclosure of this business information.[2]

After a brief prelude into the types of business information at issue, sections III and IV focus on how the outcome of this issue depends on the definition given to the term "records," whether agency or court records, and presents two approaches supporting disclosure of discovered business information. Section V presents differing court-created solutions to the issue of whether business information should be made available to the public when it becomes involved with federal regulatory agencies in court. After evaluating the courts' positions, section VI incorporates the courts' concerns and suggests that a dual-nature of business documents is created whereby they become public, subject only to few limitations.[3]

II. TYPES OF DOCUMENTS AT ISSUE

Although civil discovery materials are generally subject to disclosure, federal regulatory agencies often obtain highly relevant confidential business data that unquestionably needs protection from the disclosure requirements. This business data principally falls into three categories: commercial information,[4] financial information,[5]

1247 (1976). For information relating to the background of the Act *see generally* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

[2] "The appropriateness of making court files accessible is accentuated in cases where the government is a party; in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch." Fed. Trade Coms'n v. Standard Fin. Mgmt., 830 F.2d 404, 410 (1st Cir. 1987). The same court, however, took the view that demonstrated their unwillingness to discuss the issue of availability of court records not otherwise publicly available. *See Id.* at 408, n.3.

[3] The limitations considered are protective orders and stipulated agreements.

[4] Business data falls into the category of commercial information even if it deals with another individual's commercial activity. Determining whether information is commercial in nature hinges on the immediate use from which the agency obtained the information. Board of Trade of Chicago v. CFTC, 627 F.2d 392 (D.C. Cir. 1980). Some

and trade secrets.[6]

Applicable to these three types of information are some general principles surrounding all confidential data. Such information requires a subjective analysis as to whether the matters are customarily held in confidence by the owner and others similarly situated, and an objective analysis of whether disclosure would a) significantly harm the owner's competitive position, and b) deter others from submitting this detailed information to the agency in the future.[7] The key to this definition is that the information must be *customarily* confidential, i.e., the industry as a whole generally seeks protection for this type of data.[8]

The information examined thus far reveals the concerns surrounding potential disclosure. These concerns include the potential disclosure of research to competitors, potential economic injury, and the disincentive for private industry to develop and maintain valuable confidential information. Yet, the issue remains

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DISCLOSURE, 14-32 (1st ed. 1983).

5 Although financial information overlaps at times with commercial information, case law distinguishes it and finds that financial information is protectable in its own right. Examples of this information include profit and loss data, Natl Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976), (loan application figures); Rural Housing Alliance v. US Dept of Agric., 498 F.2d 73 (D.C. Cir. 1974), (overhead and operating costs); *Kleppe*, 547 F.2d 673, (pricing data and other credit related information); Stone v. Export-Import Bank, 552 F.2d 132 (5th Cir. 1977).

6 Trade secrets are defined in the Restatement (Second) of Torts as follows:

> A trade secret may consist of any formula, pattern, device or compilation of info, used in one's business that permits him to obtain an advantage over competitors who do not know or use it . . . . A trade secret is a device or process for the continuous use in the operation of the business.

RESTATEMENT (SECOND) OF TORTS § 757, cmt. b (1938). To qualify for a trade secret, several important elements are taken into account. First, the extent of knowledge outside the business regarding this information. Second, the extent of knowledge among co-workers and employees. Third, the value of the information to a business and its competitors. Fourth, the amount of effort and money spent on development. And fifth, the ease or difficulty in duplication or other proper acquisition of the knowledge by the action of others. O'Reilly, *supra* note 4, at 14-19.

7 O'Reilly, *supra* note 4, at 14-43.

8 *Id.* at 14-44, n.8.

whether the public's interests in disclosure and free access override these private concerns. Resolution of this issue often hinges on the definition given to agency and court records.

III. ASCERTAINING THE DEFINITION OF AGENCY AND COURT RECORDS

This Comment focuses on the two potential avenues available to gain access to business records obtained through civil discovery: 1) by means of an FOIA request, and 2) through a statutory right of access. The first is dependent upon an investigation of how the Freedom of Information Act and its legislative history define agency and court records.[9] The statutory right of access primarily relies on the interpretation of "court records" and whether a record is also an agency record is secondary for purposes of disseminating the information.

A. *Records Under The Freedom of Information Act: A Definitional Approach*

The FOIA requires disclosure of records,[10] but does not define what precisely constitutes a record.[11] Therefore, courts have the task of declaring what does and what does not constitute a record for purposes of the Act. The simplicity of this statement by no means suggests that the courts chose a simplistic and uniform approach to resolve the issue. A court-constructed definition is, however, a vantage point from which discovered business materials may be

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[9] An important point to keep in mind when ascertaining the definition of agency records in the FOI Act is best summed up in Stephen D. Hall, *What is a Record? Two Approaches to the Freedom of Information Act's Threshold Inquiry*, 1978 B.Y.U. L. REV. 408 (1978), which states "[t]he [FOI] Act did not set out to describe records--only to make them available." *Id.* at 418.

[10] FOIA requires government entities covered by the Act to release "agency records" upon request. *See* 5 U.S.C. § 552(a)(2) (1976).

[11] 5 U.S.C. §§ 551 and 552 (1976), the applicable sections to FOIA, do not define the term "record."

examined to determine whether they are to be included under the FOIA.[12]

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[12] Another approach to defining "agency records" is to examine how the regulatory agencies define the term in relation to court documents. Various regulatory agencies define the term differently, and the results of these incongruent definitions are apparent. The Securities and Exchange Commission (SEC) adopted the following position regarding papers filed with the court:

> Copies of papers filed in court, and papers and documents received from courts, are primarily for the use of the Commission attorneys and other members of the staff . . . . However, in appropriate situations, with the approval of the Office of the General Counsel, examination of such material may be made or copies obtained as a matter of courtesy.

Securities and Exchange Act, 17 C.F.R. § 200.80a (1992). Thus, the SEC makes ad hoc determinations as to whether purported court documents should be released pursuant to an FOIA request.

A slightly different approach is taken by the Federal Trade Commission (FTC). The FTC, for purposes of FOI requests, categorizes public records to include adjudicative proceedings and litigated orders. FTC Act 16 C.F.R. § 4.9(b)(5) (1992). This category is further divided to include "documents received in evidence or made a part of the public record," "[o]rders and opinions in locutory matters," 16 C.F.R. § 4.9(b)(5)(iii) (1992), and

> (v) Petitions, applications, pleadings, briefs, and *other records filed by the Commission* with the courts in connection with adjudicative, injunctive, enforcement, compliance, and condemnation proceedings, and in judicial review of Commission actions, and opinions and orders of the courts in disposition thereof; (emphasis added).

16 C.F.R. § 4.9(b)(5)(v) (1992). Hence, the FTC considers materials filed through the course of all its litigation to be subject to public disclosure.

The Commodity Futures Trading Commission (CFTC) also defines public records. Regulation § 145.0(c) defines "public records" to include "those records that have been determined by the Commission to be generally available to the public . . . ", 17 C.F.R. 145.0 (1990). The CFTC limits this broad definition by defining "nonpublic records". 17 C.F.R. § 145.0(d) (1990). It is interesting to note that trade secrets and commercial or financial information falls into this definition of "nonpublic records." *See* 17 C.F.R. 145.5(d).

Nonpublic records maintained in the CFTC are generally nondisclosable, but certain nonpublic records are subject to disclosure. *See* 17 C.F.R. § 145.5. For purposes of the issues in this Comment, however, CFTC litigation documents and documents contained in reparations and enforcement cases are disclosable, unless subject to protective order. 17 C.F.R. § 145, Appendix A.

These agency definitions are integral to a realistic understanding of how federal regulatory agencies tend to treat documents in their possession and that the agencies have different agendas from the legislature and the courts. These definitions show the tremendous leeway agencies possess to determine whether a document may be made publicly available. Moreover, agencies generally tend to side with the FOIA legislative intent, that being in favor of free access.

Three seminal cases define the term "agency records" in the context of FOIA: *Kissinger v. Reporters Committee for Freedom of Press*,[13] *Forsham v. Harris*,[14] and *Department of Justice v. Tax Analysts*.[15] These cases lay out two requirements that must be met in order to qualify as "agency records":

> First, an agency must 'either create or obtain' the requested materials 'as a prerequisite to its becoming an agency record within the meaning of FOIA. . . .
>
> Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we [the Court] mean[s] that the materials have come into the agency's possession in the legitimate conduct of its official duties.[16]

Tax Analysts held that the relevant inquiry is whether an agency covered by the FOIA has created or obtained the materials sought, not whether the organization from which the documents originated is itself covered by the FOIA.[17] *Forsham* held that agency records include "all books, papers . . . regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business."[18]

These definitions are critical to whether there is a basis to disseminate business documents, albeit discovery documents, through the FOIA. Although the Court does not expressly declare that discovery materials are subject to the FOIA, this issue can be (as opposed to must be) answered in the affirmative. Since the Court is not clear in defining "records," a standard approach would require an

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[13] 445 U.S. 136 (1980)(holding that audio tapes of assistant to the president are not agency records; merely moving them to a FOIA-covered agency does not render them "agency records").

[14] 445 U.S. 169 (1980)(recognizing that records of a nonagency could become agency records as well).

[15] 492 U.S. 136 (1989).

[16] *Tax Analysts*, 492 U.S. at 144-145 (citations omitted).

[17] *Id.* at 146 (footnote and citation omitted).

[18] 445 U.S. at 183.

investigation into the FOIA legislative intent. Such an investigation, however, would prove fruitless.

B. *Legislative History of Public Access Laws*

Beyond the court imposed FOIA definitions discussed above, the legislative history of FOIA sheds little light on the meaning of "agency records." What little light is shed reveals that Congress intended to create a more open basis for the public to obtain information.[19] The legislative history of the predecessor to the FOIA,[20] however, does discuss the term "public information." This earlier legislation intended all public information to be disclosed, except where withholding of federal agency records was required "in the public interest", where the records relate "solely to the internal management of an agency", or "for good cause found."[21] Congress found these "exceptions" to be abused,[22] and rephrased the legislation to be more precise in defining the type of records to be excluded from disclosure.

The significance of this legislation is that "[t]rade secrets and commercial or financial information obtained from any person" were considered exempt from disclosure.[23] In formulating a definition of what does not constitute an agency record, Congress delineated these materials to be exempt only if "such material . . . would not customarily be made public . . ."[24] or if the information was given to an agency in confidence, i.e., with a protective order in effect.

The varied definitions and interpretations of "records" creates disparity in accurately determining what is included and what is excluded under FOIA. The courts offer a somewhat workable ad hoc

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[19] *See, e.g.*, H.R. CONF. REP. NO. 1380, 93rd Cong., 2d Sess. 6285 (1973). The Report discusses amendments to the Freedom of Information Act that disapproved certain court interpretations which limited agency distribution of investigatory records. Furthermore, the Conference Report discusses the expansion of the term "agency" to include more government controlled offices under FOIA, which is in line with the congressional intent underlying the creation of the Act in the first place.

[20] 5 U.S.C. § 1002, also known as Section 3 of the Administrative Procedure Act.

[21] *See* H.R. REP. NO. 1497, 89th Cong., 2d Sess., 2418, 2420 (1966).

[22] *Id.*

[23] *Id.* at 2427.

[24] *Id.*

approach, but the uncertainty in the Act itself leaves everyone, including the courts, with few precise interpretations. The strongest suggestions offered by Congress in its passage of two public information bills indicate a broad interpretation of the term "records." This broad interpretation can reasonably include business documents obtained through discovery.

IV. THE STATUTORY RIGHT OF ACCESS

The problem raised with respect to distributing business information obtained through discovery via an FOIA request stems from the definition given to "agency records," but this problem may be overcome by circumventing the issue and focusing on properly defining a "court record." Since court records are generally open to the public,[25] agencies may distribute confidential material classified as court records to whomever seeks it. The reasoning behind this is that once the information is made public through the court, there is no need to protect it.[26]

A. *The History of the Doctrine*

The Federal Rules of Civil Procedure, its Advisory Committee notes,[27] and the cases interpreting the Rules form and codify a

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[25] *See* Fed. Trade Comn's v. Standard Fin. Mgmt., 830 F.2d at 410.

[26] "A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal." Harris v. Amoco Prod. Co., 768 F.2d 669, 683-684 (5th Cir. 1985). In *Harris*, the EEOC, an intervenor, was limited to using the fruits of discovery to the present litigation because a showing of good cause was made. In Re Halkin, 598 F.2d 176, 188 (D.C. Cir. 1979); Essex Wire Corp. v. Eastern Elec. Sales Co., 48 F.R.D. 308, 312 (E.D. Pa. 1969); Leonia Amusement Corp. v. Loew's, Inc., 18 F.R.D. 503, 508 (S.D.N.Y. 1955) (holding that "an attorney is free to disperse discovery materials when it is relevant to another action"*Id.*). "The Federal Rules [of Civil Procedure] do not themselves limit the use of discovered documents or information." *Harris*, 768 F.2d at 684.

[27] Reliance on the advisory committee notes is not unusual. Even the Supreme Court has acknowledged their value. *See* Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 444 (1946) (holding "although the Advisory Committee's comments do not foreclose judicial consideration of the Rule's meaning, the construction given by the Committee in the Notes is of weight" *Id.*) *See also*, Schiavone v. Fortune, 477 U.S. 21,31 (1986); Hawley v. Hall, 131 F.R.D. 578 (D.Nev. 1990); 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE,

statutory right of access to discovery documents. Rule 5(d) states,

> **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions . . . interrogatories, requests for documents, requests for admissions, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.[28]

The 1980 Advisory Committee Note to this section clarifies the Rule's intent concerning the filing of discovery documents:

> [b]y the terms of this rule and Rule 30(f) discovery materials *must* be promptly filed, although it often happens that no use is made of the materials after they are filed. Because the copies required for filing are an added expense and the large volume . . . present[s] serious storage problems . . . the Committee in 1978 first proposed that discovery materials not be filed unless on order of the court or for use in the proceedings. But such materials are sometimes of interest to those of who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the *public generally*. Accordingly, this amendment and a change in Rule 30(f)(1) continue the filing requirement but make it subject to an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by parties who wish to use the materials in the proceeding.[29]

The 1980 draft amendment to Rule 5 required the filing of discovery

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Civil 2d § 1029 at 124 (1987)(noting that "In interpreting the rules, the advisory committee notes are a very important source of information and should be given considerable weight" *Id.*).

[28] FED. R. CIV. PROC. 5(d).

[29] This Advisory Committee Note is reprinted at 85 F.R.D. 521, 525 (1980) (emphasis added).

materials, and effectively eliminated a previously drafted amendment which rejected the filing requirement.[30]

B. Case Law Interpretation of the Statutory Right of Access

The Second Circuit addressed the Advisory Committee concerns in *In Re "Agent Orange" Product Liability Litigation.*[31] In allowing non-party intervenors access to sealed discovery materials, the Second Circuit announced,

> [t]he [1978] Advisory Committee Notes make clear that Rule 5(d) . . . embodies the Committee's concern that class action litigants and the *general public* be afforded access to discovery materials *whenever possible.* Moreover, we note that access is particularly appropriate when the subject matter of the litigation is of especial public interest."[32]

The court then recognized that Rules 5(d) and 26(c) provide a statutory right of access to the discovery materials in question.[33] Thus, since the 1980 Advisory notes to Rule 5(d) explicitly require filing of discovery documents, the documents should be considered part of the court record.

The Southern District of New York also addressed the right of access issue in *SEC v. Amster & Co., et al.*[34] In *Amster*, the defendants asked the court for a protective order to prohibit the SEC

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[30] In Appendix A to the 1980 Committee Notes, 85 F.R.D. 521, 540, a letter from Walter Mansfield, Chairman, Advisory Committee on Civil Rules addressed to the Committee on Rules of Practice and Procedure summarizes the criticism brought about by the 1978 draft amendment to Rule 5. The letter emphasizes that the amendment places an "unconscionable burden" on individuals in multi-party litigation to obtain court orders to secure access to depositions that they could not attend; various organizations complained about the limitation of public access; and the fear was expressed that the lack of records would impede research about discovery, that papers would be lost or destroyed, and that discovery materials' integrity would be impaired. The Chairman of the Committee in the advisory notes goes on to state that a judge would not be expected to excuse parties from filing materials in any case in which the public or the press has an interest.

[31] 821 F.2d 139, 145-147 (2d Cir.).

[32] *Id.* at 146 (emphasis added).

[33] The documents in question in *Agent Orange* were materials produced or generated during discovery that were under seal and labelled "confidential."

[34] 126 F.R.D. 28 (S.D.N.Y. 1989).

from disclosing the contents of any deposition or any document produced during discovery and during an earlier SEC investigation pursuant to a subpoena duces tecum.[35] The court refused to grant the protective order because defendants knew that certain information would be disclosed.[36] Given the notice, defendants could not reasonably believe that the SEC had agreed "forever and a day" to withhold from members of the public the testimony elicited and documents produced during the ensuing investigation.[37] In denying the protective order, the court stated:

> the thrust of recent Second Circuit authority militates against this protective order . . . [and] Rule 26(c) and Rule 5(d) give civil litigants a statutory right of access to . . . discovery material, so that if 'good cause' is not shown, the discovery materials . . . should not receive judicial protection and therefore would be opened to the public for inspection.[38]

Public Citizen v. Liggett Group, Inc.[39] raises a similar argument. Public Citizen, an intervenor, sought discovery documents from parties in a suit brought by a smoker against tobacco companies. The documents in question were company records. Public Citizen based its claim solely on the statutory language of Rule 5(d) and Rule 26(c), which create a presumption that all discovery materials will be available to the public since they will be filed with the court.[40] The district court agreed and ordered the parties to file all discovery documents in their possession. Upon affirming, the circuit court stated that Public Citizen had the right to access the discovery documents because there was no "good cause" shown by Liggett to warrant confidentiality. In its opinion the court stated, "'[d]iscovery is a legislative grace,' but Public Citizen asks for no more than compliance with the legislative scheme embodied in the federal rules [Rule 5(d)]."[41]

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35 *Id.* at 30.

36 *Id.*

37 *Id.* at 31.

38 *Id.* (quoting In re "Agent Orange" Product Liability Litigation, 821 F.2d at 144).

39 Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 779 (1st Cir. 1988).

40 *Id.* at 780.

41 *Id.* at 788 (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984)).

C. *The Trend in Filing Discovery Documents*

It is essential to bear in mind that district courts do not want discovery documents physically filed with them because of their lack of storage space and the unnecessary costs associated with the filing requirement. What is important is that courts, and the Federal Rules, are not changing the substantive classification of discovery documents from court records to non-court records by changing the filing procedures.[42]

Most district courts do not require the filing of discovery materials with the court.[43] The exceptions and limits to this "rule," in light of Rule 5(d) of the Federal Rules of Civil Procedure, support a finding that discovery materials are still part of the court record and hence available to the public. For example, local rule 33-36(f) of the District of Massachusetts provides, in part, that any party or "concerned citizen" may make an ex parte request that discovery documents be filed.[44] The District of Hawaii's local rule 230(2)(b) and District of Montana's Rule 200(3) are in accord with Massachusetts' Rule 33-36(f).[45] These rules do not address whether every "concerned citizen" must make an ex parte request for the materials. However, logic suggests that once the materials are part of the record, the public is free to inspect them. Hence, public availability of discovery materials is not limited by these local rules.

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[42] *See* Note, *Nonparty Access To Discovery Materials In The Federal Courts*, 94 HARV. L. REV. 1085 (1981):

> If the record-storage problem is of sufficient magnitude to warrant rules amendments, amended rule 5(d) is nevertheless misguided. Rule 5(d) creates storage at the expense of the most vital documents-those pertaining to current litigation. It would have been preferable to dispose of old, inactive files.
>
> Assuming that 5(d) will be the operative storage remedy for the foreseeable future, judges should be extremely reluctant to excuse parties from filing with the court, and should *never* waive filing requirements in cases of complex litigation for their potential efficient collateral use [, and] papers from government litigation for their utility in public supervision of the workings of the government. (emphasis added). *Id.*

[43] *See* Hawley v. Hall, 131 F.R.D. 578, 582, n.6 (D. Nev. 1990) (recognizing that sixty-four districts have adopted rules which provide that discovery materials need not be filed).

[44] D. MASS. R. CIV. P. 33-36(f).

[45] D. HAW. R. CIV. P. 230(2)(b).

The District of Columbia also requires the filing of discovery materials. Its local rule 107 provides, in part,

> (a) . . . . Except as otherwise provided by this rule upon request of any person or on its own motion, the court may in its discretion order that all or any portion of discovery materials in a particular civil case shall not be filed with the Clerk.

In the Advisory Committee's Comment To Rule 107, the district discusses its new rule:

> [T]he filing of discovery material is often expensive and unnecessary. Where utilized, [the rule] will reduce the cost of litigation and workload in the clerk's office. [However], the Committee recognizes that many judges desire to see the routine filing of discovery materials, and that in cases of public interest, the press or other non-parties may wish access to such materials. Accordingly, the rule provides that such filing will continue in the absence of an order in each case by the individual judge to whom the case is assigned.[46]

This Advisory Comment is dispositive of the general attitude toward discovery material.[47]

Case law also favorably interprets local rules. In *Hawley v. Hall*,[48] the court needed to harmonize the District Court of Nevada's local rule 190-1(g) with the intent of the Advisory Committee (to the Federal Rules of Civil Procedure) regarding public access to discovery materials. The court adopted a lenient policy that requires the filing of discovery documents with the clerk of the court on the

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[46] D. D.C. R. CIV. P. 107, comment.

[47] Other districts, such as the Eastern District of Missouri, require that depositions be filed with the court the day of the trial. The Rhode Island district makes it expressly clear in local rule 14(b) that depositions filed shall be open and available for inspection unless otherwise ordered by the court. New Jersey's district court abides by local rule 15(d) which states that when discovery is filed, the clerk shall place it in the open file. These rules demonstrate the district courts' desire to limit the storage space required for discovery, not limit its usefulness and availability to the public.

[48] 131 F.R.D. at 583.

request of a nonparty if disclosure is not prohibited by a protective order.[49] This policy eliminated any tension between the local rule and Rule 5(d) by allowing the underlying principle of Rule 5 to prevail.[50]

V. HOW COURTS ADDRESS THE ISSUE OF ACCESS TO DISCOVERED BUSINESS DATA

Court decisions related to the dissemination of discovered business materials are divided as to whether such access should exist, to what limit access is to be permitted, and by what avenue such disclosure should be granted. Four cases offer contrasting opinions and interpretations of this issue, and each case will be discussed in light of its facts, ruling, and pertinent dicta.

A. *Cases Permitting Disclosure*

1. *Cooper v. Commissioner*[51]

In *Cooper*, a district court decided whether the return of confidential financial documents to the IRS from the court restores the documents' "confidential" nature. The action arose pursuant to an FOIA request for various documents introduced by the Internal Revenue Service as exhibits in cases before the United States Tax Court.[52] After the tax cases ended, the court returned the confidential information to the IRS.[53] Cooper, a law school professor, sought access to the materials under the theory that since the documents were already part of the public proceedings, their confidentiality had been removed.

The court resolved the issue by considering: 1) how the law treats other confidential documents made public, and 2) the policies

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[49] The court reasoned "[i]n the absence of a protective order, discovery materials, including deposition transcripts, shall be filed with the clerk on order of the court and shall then be available for public examination and copying." *Id.* at 583.

[50] *Id.*

[51] 450 F. Supp. 752 (D. D.C. 1977).

[52] *Id.*

[53] *Id.* at 753.

embodied in FOIA.[54] In holding that the documents lost their confidential nature due to their exposure in the court proceedings, the court made clear that the actual location of the documents is not determinative of who actually controls them.[55] The court also noted "[t]he primary objective of the FOIA is to facilitate the broadest possible disclosure of information held by the government."[56]

2. *FTC v. Standard Financial Management Corp.*[57]

In a second case granting access to court documents, the First Circuit permitted sworn personal financial statements to be unsealed and made available to the public. The appellants, two owners of a closely held corporation, attempted to persuade the court that the financial documents in question played no role in the adjudicatory process and therefore lay beyond the reach of the public.[58] Appellants bad their claim to privacy on a provision in the FTC Act,[59] and that release of the documents will intrude "impermissibly upon their privacy."[60]

The court rejected both claims holding that public access attached to the documents. The statutory claim failed upon a facial reading of the FTC Act as opposed to the guessing game of legislative intent suggested by appellants.[61] The privacy claim fell as well. Significantly, the court recognized "that privacy rights of participants and third parties are among those interests which can limit the presumptive right of access to judicial records."[62] The interests sought to be protected, however, did not fall within the purview of this limit.

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54 *Id.* at 754.

55 *Id.* at 755.

56 *Id.*

57 830 F.2d 404 (1st Cir. 1987).

58 *Id.* at 408.

59 *Id.* at 411. 15 U.S.C. § 57b-2 (1987) provides in pertinent part that while in the possession of the FTC, no "documentary material" secured in the course of an official investigation "shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material." 15 U.S.C. § 57b-2.

60 830 F.2d at 411.

61 *Id.*

62 *Id.* (citations omitted).

Although *Standard Financial* involved a criminal proceeding, and the origin of the documents is distinguishable,[63] the court's general analysis of the financial statements in light of the competing interests at stake provides support for this Comment's position. One critical factor repeatedly referred to throughout *Standard Financial* is the public's "right to know the contents of the materials upon which the agency, *and* ultimately the court, relied in this endeavor."[64] This factor, as expressed in the court's reasoning, requires the public to monitor the functioning of the courts and the regulatory agencies, "thereby insuring quality, honesty, and respect for our legal system."[65] These principles are not easily overcome thus an individual's privacy concerns usually fall to the public's interest. The nature of these concerns dictate that the court's analysis be applied to discovery documents in the possession of federal regulatory agencies.

B. *Cases Denying Access*

1. *In re Consumers Power Co. Securities Litigation*[66]

In re Consumers involved a newspaper company that sought access to discovery materials by moving under Fed. R. of Civ. Proc. 24(b)[67] to challenge the legality of a protective order. The underlying action involved a securities fraud class action alleging material misrepresentations in the sale of securities of the nuclear plant built by Consumers Power. Booth Newspapers, Inc. merely requested that the protective order be lifted so that the newspaper could then bargain with the parties for access to the discovery

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[63] The financial statements were obtained pursuant to an investigation undertaken by the FTC. The documents, however, were used during the adjudicatory proceeding.

[64] 830 F.2d at 413 (emphasis added).

[65] *Id.* at 410.

[66] 109 F.R.D. 45 (E.D. Mich. 1985).

[67] Fed. R. Civ. P. 24(b) states in part,

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Id.*

materials. Booth based its claim on a common law right of access to civil pretrial discovery.[68] The defendant, Consumers Power, challenged the common law right of access arguing that parties had standing only in limited circumstances.[69]

The court held that although Booth had standing, the protective order was grounded in the requisite good cause shown because it "serves an important government purpose of fostering immediate, unrestricted access . . . and encourages cooperation among the parties . . . ."[70]

The court's decision was based on the policy underlying the discovery rules, and the standard applied by the district court. First, the court recognized that the discovery rules contain safeguards designed to protect against inefficient resistance to open access, and to foster party cooperation.[71] Secondly, the court's decision must be considered with an eye towards the limited review standard available to the court upon a challenged protective order. This standard does not mandate the strict scrutiny applicable to restrictions on traditionally public sources of information.[72] Hence, the court determined that pretrial discovery is not a "traditionally public source of information" because "[m]uch of the information that surfaces during pretrial discovery may be unrelated or only tangentially related to the underlying cause of action. Therefore, restraints placed

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68 109 F.R.D. at 52. The court rejects the common law right of access argument but considers a first amendment protection analysis based on the freedom of communication on matters relating to the functioning of government. *Id.* at 53. The court's negative conclusions based on these theories may be overcome by an analysis of the statutory right of access discussed in section V, infra. In fact, the court in *In re Consumers* advanced the notion of liberal access with respect to the Federal Rules of Civil Procedure. *See Id.* at 50.

69 *Consumers Power* cited In re Knoxville News-Sentinel, 723 F.2d 470 (6th Cir 1983) for the proposition that standing applies only to: 1) persons present in open court when their exclusion from the courtroom is being considered; and 2) to the public and press "before being denied their presumptive right of access to judicial records." Consumers Power then argued that the pretrial materials in question are not yet "judicial records", therefore, no standing may exist. The court rejected this argument based on its discussion of Fed. R. Civ. P. 5(d) which does not require discovery materials to be filed in order to make them "judicial records." 109 F.R.D. at 50.

70 109 F.R.D. at 55.

71 *Id.* at 54.

72 *Id.* at 51. The Supreme Court also rejected an exacting strict scrutiny test in determining the legitimacy of restrictions imposed under Fed. R. Civ. P. 26. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-33 (1984).

on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."[73]

The court also recognized a continuum of court positions with respect to pretrial documents not yet on file with the court.[74] These are 1) a court may prohibit disclosure by means of a protective order; 2) a court may remain neutral and permit parties to acquiesce to requests; or 3) a court may order access of the materials. *In re Consumers* involved only a review of the first position.[75] Thus, the court's position is consistent with this Comment's theory because the existence of a protective order is a recognized limit on the dissemination of discovery materials.

2. *United States v. Kentucky Utilities*[76]

The United States brought an anti-trust action against Kentucky Utilities Co. which resulted in five years of litigation and discovery.[77] Upon a mutual agreement, the Department of Justice dismissed the suit and entered into a proviso whereby the DOJ were to destroy all discovery documents.[78] The proviso also stated that the Department of Justice was not prevented from giving out the information through an FOIA request.[79] Pursuant to this proviso, a newspaper writer, Kit Wagar, filed an FOIA request to obtain certain discovery materials.

After several proceedings in the district and circuit courts,[80] the

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[73] 109 F.R.D. at 51, *citing Seattle Times Co.*, 467 U.S. at 32-33.

[74] 109 F.R.D. at 50.

[75] *Id.* at 51.

[76] 927 F.2d 252 (6th Cir. 1991).

[77] *Id.* at 253.

[78] *Id.* The proviso stated, in pertinent part:

> IT IS FURTHER ORDERED . . . Plaintiff [DOJ] shall [destroy] all copies of documents obtained through discovery procedures . . . except that: . . . (2) no document subject to an outstanding [FOIA] request . . . shall be required to be destroyed until the request and any related litigation over the request . . . is resolved. *Id.*

[79] *Id.*

[80] On July 25, 1986, the district court denied Wagar's motion to intervene, stayed the proviso, and prohibited any further destruction or disclosure of the discovery documents until a separate FOIA action could be resolved. On December 18, 1986, Wagar filed a FOIA action against the DOJ seeking release of improperly withheld agency records in the

district court granted Wagar intervenor status and ordered the DOJ to stop destroying the discovery documents. On appeal, the Sixth Circuit reversed: "[T]he question posed by Wagar's request for intervention is not all that different from the one she ultimately hopes to have answered under the FOIA -- whether she is entitled to the copies as agency records."[81] The court noted that absent discovery, the documents would remain private and were not part of the court record. Therefore, although intervenor status was granted, the parties' strong reliance upon their settlement agreement was not overcome because Wagar failed to establish the "kind of extraordinary circumstances and compelling need . . . which outweighs the original parties' interests in preserving the terms of the [original order] and the public's interest in fostering and preserving settlements."[82]

C. Comparison of the Cases

In each of these cases, though factually different, the courts were challenged to clearly define the term "record." The results often depended upon public policy and the general concern for encouraging communication between parties. The cases do not directly address 1) confidentiality concerns, or 2) whether confidential information obtained through discovery is subject to FOIA requirements,[83] the statutory right of access or any other right of access. All four cases, however, support public access to confidential materials.

Cooper and *Standard Financial* clearly support the proposition that discovery materials may be obtained by the public. *Standard Financial* rejected outright the argument that "documents which play

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district court. The court of appeals affirmed the district court's holding that the agency was merely complying with the court order. *See* Wagar v. Dep't of Justice, 846 F.2d 1040 (6th Cir. 1988). Wagar then moved to intervene in the underlying antitrust action. The district court granted her motion and rescinded the provision requiring the DOJ to destroy the discovery documents. 927 F.2d at 254.

[81] 927 F.2d at 255.

[82] *Id.*

[83] *Kentucky Utilities*, 927 F.2d at 254, recognized "whether these kinds of documents are subject to the requirements of the FOIA is a question which has dogged these proceedings from the beginning, but has yet to be decided." Circuit Judge Ralph B. Guy, Jr. took it upon himself to answer this inquiry in the negative. 927 F.2d at 255-256 (concurring opinion).

no role in the adjudicatory process, however, such as those used only in discovery, lie beyond reach."[84] The First Circuit held this as too restrictive a view of what constitutes a court record for the purpose of allowing public access, and delineated the following rule: Relevant documents submitted to and accepted by a court in the course of adjudicatory proceedings become documents to which the presumption of public access applies.[85]

In addition, *Kentucky Utilities* and *In re Consumers* do not unconditionally oppose the dissemination of discovery materials. In *Kentucky Utilities* the court was clearly uncertain whether the discovery material was an agency record for purposes of FOIA.[86] Therefore, the court acknowledged the possibility of public access to confidential documents, though it cannot be assumed the *Kentucky Utilities* court would grant access to those particular documents.[87]

In re Consumers, moreover, suggests public access should be the norm, particularly in cases involving governmental regulation.[88] The issue of access in proceedings involving federal agencies must be approached in light of what information is necessary to "allow for free and open debate of issues of great public concern."[89] Access to pretrial documents in these proceedings enhances important societal policies and goals: Adjudicatory proceedings are better evaluated by informed individuals; access increases public confidence in the

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[84] 830 F.2d at 408.

[85] *Id.* at 409. Whether discovery documents are relevant is an issue appropriately determined through a motion for a protective order to prevent irrelevant discovery from exchanging hands. Hence, when relevance is considered by the court, all discovery submitted to the court is presumed relevant absent an earlier determination to the contrary. For a discussion of the applicable standard for protective orders *see infra*, note 100.

[86] *See supra* note 83.

[87] The rationale in *Kentucky Utilities* lacks merit for several reasons. First, the court cited no authority for concluding that discovery documents are not part of the court record. Second, even though the court made sweeping statements regarding the accessibility of discovery materials, the case is resolved solely on the issue of whether an individual can intervene. Third, no court has yet to positively cite *Kentucky Utilities*, yet there is recent conflicting authority. *See* Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227 (1st Cir. 1992). Finally, this case represents another instance where the court ultimately restricted access to discovery documents where there was a court order in effect, hence a predetermined limit on the use of the discovery materials.

[88] In re Consumers, 109 F.R.D. at 54.

[89] *Id.*

judicial system;[90] and when a regulatory agency is involved, the public can inspect the workings of the particular agency and learn what information the agency deems to be significant in enforcement issues. *In re Consumers* disfavored disclosure merely because these public interests did not outweigh the functional needs of the judicial system.[91] The court determined that the goals underlying the pretrial discovery process - to maximize voluntary compliance and minimize coercive court intrusions - override an intervenor's right of access when a protective order is in effect.

The cases discussed above envision access to confidential discovery materials to be limited in certain instances. Generally, this determination is based on whether the right of access overrides the private or judicial interests at stake. The common law right of access and the first amendment argument, designed to increase public access, have failed in particular cases.[92]

VI. THE CREATION OF A "DUAL-NATURE" DOCUMENT

Sections III through V suggest that the same discovery materials can be categorized as agency records and as court records. This dichotomy between agency and court records parallels the dichotomy of regulatory agencies as government entities and as civil litigants. As government agencies, they follow their own rules and regulations, but as litigants they are bound to follow court and civil procedure rules.

The creation of a "dual-nature" document is consistent with modern trends regarding the use of confidential business information. Executive Order No. 12600[93] delineates the predisclosure notification

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[90] *Id.*

[91] *Id.* Note that the court did not determine that the parties' private interests were superior to the public interests. This distinction summarizes the court's rationale in upholding the protective order, and demonstrates that In re Consumers is not contradictory to this Comment's theory.

[92] The common law right of access is questioned and even limited. *See* In re Alexander Grant & Co. Litigation, 820 F.2d 352 (11th Cir. 1987); Anderson v. Cryovac, 805 F.2d 1 (1st Cir. 1986). Moreover, there are several problems in applying the First Amendment to a federal regulatory agency.

[93] Exec. Order 12600, 52 Fed. Reg. 23,781 (1987).

procedures for confidential commercial information. Generally, confidential commercial information given to the agency must not be given to third parties without notice to the submitter.[94] Section 8, however, provides that notice need not be given when the information has been published or has been officially made available to the public. Since court records are generally available to the public, court records held by government agencies as agency records are available to the public, and a dual-nature document is created.

Case law and the Federal Rules of Civil Procedure are in accord with Executive Order No. 12600: "A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal."[95] Furthermore, "[t]he Federal Rules [of Civil Procedure] do not themselves limit the use of discovered documents or information."[96] Thus, an agency's entitlement to disseminate discovery materials, based on the material's status as court records, must coincide with the agency's entitlement to disseminate the material as agency records once it is determined that the documents are agency records.

The dual-nature of business information is not without opposition. First, some agency regulations question the plausibility of defining business documents, or any documents, as being both agency and court records.[97] Secondly, just as the possession of documents by an agency does not transform them into agency records,[98] courts do not lose control over court records merely because another party has possession.[99]

Although the theory of a dual-nature document is somewhat troublesome, it serves as a catalyst for discussion into alternative methods to distribute confidential information absent a court order

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94 *Id.*

95 Harris v. Amoco Prod. Co., 768 F.2d 669, 683-684 (5th Cir. 1985).

96 *Harris*, 768 F.2d at 684.

97 *See, e.g.*, 17 C.F.R. 145.0(b) which expressly excludes "court records" from the definition of records.

98 *See supra* note 13.

99 *See* Valenti v. United States Dep't of Justice, 503 F. Supp. 230, 232 (E.D.La. 1980) Grand jury transcript in possession of U.S. attorney does not lose its status as a court record and the court remains in control over the document. *Id.*

restricting distribution.[100] More importantly, by recognizing a dual-nature in these discovery materials, courts create more flexibility to refuse the release of documents when it foresees potential misuse of the materials.

VII. SUGGESTED RESOLUTION OF THE ISSUE

There should be great concern over the seemingly limitless disclosure requirements put forth in this Comment. Of greatest concern should be the potential misuse of the business materials, a concern that predates the legislative histories of the public access laws guiding this discussion.[101] The legislature, being fully aware of these concerns, found the public's needs superior yet placed limits to exempt much of the commercial information from disclosure.[102] So although the Freedom of Information laws protect documents

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[100] A protective order that restricts the dissemination of discovery materials must meet certain criteria mandated by the First Amendment. Initially, it must be determined by a court whether a protective order in fact restrains expression and if so, the nature of that restraint. In Re Halkin, 598 F.2d 176 (D.C. Cir 1979). The court must then evaluate this restriction in light of three criteria: (1) the harm posed by the dissemination must be substantial and serious; (2) the protective order must be narrowly drawn; and (3) there must be no alternative means of protecting the public interests which intrudes less directly. *Id.* Each element must be considered in determining the propriety of the protective order. In sum, this standard requires the party seeking the protective order to establish "good cause", which requires a showing of particular and specific facts. *Id.*

[101] *See* S. CONF. REP. NO. 1200, 93rd Cong., 2d Sess. 6279, 6280 (1973) which states in part "Although the Act has been used successfully by public interest groups to vindicate the public's right to know, not all litigants fit that category. Instead, the plaintiff may well be a businessman using the [FOI] Act to gain information about a competitor's plans or operations." *Id.*

[102] *H.R. REP. No.* 1497, 89th Cong., 2d Sess., 2418, 2427 (1966), discusses the exemption of trade secrets and commercial or financial information currently found, in one form or another, in all public access laws. The section provides, in pertinent part,

> 4. 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 . . . [i]t exempts such material if it would not customarily be made public by the person from whom it was obtained by the 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. *Id.*

innocently and cooperatively turned over to federal agencies, the exemptions are not absolute and absent an agreement between the government and private party, disclosure may result.

Assuming a more liberal disclosure approach of business information is uniformly accepted, the issue becomes what approach will most efficiently lead the process. This discussion initially branches down two avenues. First, in the case of discovery materials available as court records, absent a protective order or other stipulated agreement which limits the dissemination of the material, the information should be absolutely available. There are no exceptions to this rule because the parties had the opportunity to prevent dissemination by obtaining a protective order or other agreement before the issue arose. The standard for obtaining a protective order contains sufficient safeguards to ensure that discovered business records will not be superfluously withheld.[103]

The more difficult avenue arises in the context of FOIA,[104] and absent any further legislative assistance on the definition of "records," courts will inevitably be bogged down in litigation relating to this area. In spite of the increase in litigation and uncertainty amongst federal agencies, an ad hoc determination is preferable as opposed to dividing the world into records and nonrecords.[105] An ad hoc approach is more suitable because a court can consider the merits of each particular case in light of the party who seeks access.[106] Although public access laws do not require the document requestor to provide a reason for requesting the documents, when discovered business materials are sought, courts should look at the requesting party to determine the worthiness of her claim since the documents in question should be looked at as agency and court

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[103] *See supra* note 100.

[104] Placing aside for a moment the argument that the availability of documents as public court records creates public availability, and no court imposed restrictions apply with respect to disseminating the information.

[105] *See* Hall, *supra* note 9, at 426.

[106] *See supra* note 100. As mentioned in the note discussing protective orders, particular criteria need to be examined. Those criteria, and the policies embodying them, are also a suitable standard for the ad hoc approach used in reviewing requests for discovery materials.

records.[107] This acts not only as a check on the otherwise "open door" policy to court records, but decreases the likelihood of an individual seeking confidential business information for her own misuse.

Where these two avenues join, a balance is struck. The unprotected court records in the hands of federal regulatory agencies must be looked at in conjunction with the limits of a FOIA request. This maintains the existing open access to government information policy without mortally wounding the goal of encouraging open and extensive discovery between the government, private business, and the court system.

VIII. CONCLUSION

The sensitive nature of business information in the hands of federal regulatory agencies must be considered in light of the public's right to obtain the information. The FOIA and the statutory right of access provide an integrated means of permitting disclosure while still protecting the information from abuses. Although the lack of precision in defining agency and court records dampens the likelihood of a clear-cut world in which documents are or are not agency or court records, the result is nevertheless favorable. The problems associated with defining the terms permit a court to consider the "dual-nature" of the documents whereby courts actually maintain more control over the materials.

In light of, or perhaps in spite of, the current issues raised by access to confidential information cases, the overriding public concerns must remain dominant, for "[j]ustice is better served in sunshine than in darkness."[108] Open access to discovered business materials permits supervision of the progress and integrity of regulatory agencies, as well as private industry. It also allows

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[107] *See supra*, Section VI for a discussion of the dual-nature of discovered business materials in the hands of regulatory agencies.

[108] Fed. Trade Coms'n v. Standard Financial Mgmt, 830 F.2d at 412.

individuals to remain informed as to what regulatory agencies deem significant in bringing law suits and enforcement actions. Finally, by permitting disclosure to be the norm, a strong tradition of public access to court and agency records will continue.

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