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# A Review of the Fourth Exemption of the Freedom of Information Act

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## A REVIEW OF THE FOURTH EXEMPTION OF THE FREEDOM OF INFORMATION ACT

### INTRODUCTION

THE FREEDOM of Information Act<sup>1</sup> was enacted<sup>2</sup> in 1966 as a revision of Section 3 of the Administrative Procedure Act.<sup>3</sup> The purpose of the Act was "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope and procedure of federal governmental activities."<sup>4</sup> The Freedom of Information Act was intended to expand the citizen's access to government records<sup>5</sup> and to require federal agencies to make available to all persons, upon a request for identifiable records, those documents which are not specifically exempt.<sup>6</sup>

The United States Supreme Court, in *Environmental Protection Agency v. Mink*<sup>7</sup> stated:

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.<sup>8</sup>

In short, the policy of the Freedom of Information Act is to encourage disclosure by government agencies.<sup>9</sup>

The creation and proliferation of government agencies is considered by some to be akin to the establishment of a fourth branch of the federal government. The total manpower and money required of corporations throughout the United States to satisfy government requests for information and comply with government regulations is enormous.<sup>10</sup> Amidst the multi-

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<sup>1</sup> 5 U.S.C. §552 (1970).

<sup>2</sup> The Act was amended in 1967 by Pub. L. 90-23, 81 Stat. 54.

<sup>3</sup> 5 U.S.C. §1002 (1964).

<sup>4</sup> *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir. 1972) (footnote omitted), *cert. denied*, 409 U.S. 889 (1972). See S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

<sup>5</sup> *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 469 (D.D.C. 1972).

<sup>6</sup> *Brockway v. Dep't of Air Force*, 370 F. Supp. 738, 740 (N.D. Iowa 1974); *rev'd on other grounds*, 518 F.2d 1184 (8th Cir. 1975); 5 U.S.C. §552(a)(3) (1970).

<sup>7</sup> 410 U.S. 73 (1973).

<sup>8</sup> *Id.* at 80.

<sup>9</sup> *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 775 (D.D.C. 1974); See S. REP. NO. 813, 89 Cong., 1st Sess. 5 (1965) ("not a withholding statute but a disclosure statute . . .").

<sup>10</sup> See RUBBER & PLASTICS NEWS, Dec. 15, 1975, at 3, wherein it is stated:

One example of the inquisition by Federal inspectors is a two-year review [that a major corporation] has been undergoing with the office of Contract Compliance, of the Depart-

tude of concerns that corporations have over this continuous outflow of information, much of which is proprietary, is the concern that confidential information will fall into the hands of a competitor.

This concern was recognized by the fourth of nine exemptions<sup>11</sup> under the Freedom of Information Act. Section 552(b)(4) of the Act states:

(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.<sup>12</sup>

The Senate Report on the Act describes the purpose of exemption 4, as follows:

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.<sup>13</sup>

The House Report contains a broader description of the purpose of Exemption 4:

It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The

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ment of Labor and of the Department of the Interior. The inspectors first formal request for data after visiting... facilities would have required a one-by-one search of 13,000 personnel records at a cost... of \$62,000....

A major corporation "spent more than \$30 million... in complying with government regulations... [T]ranslated to the entire country... the compliance cost nationwide figures out to some \$16 billion." WALL STREET JOURNAL, Nov. 17, 1975, at 14, col. 1. "The White House has placed the cost to consumers of what it calls unnecessary and wasteful regulations at \$130 billion—or \$2,000 for every family in the United States." WARD'S AUTO WORLD, Nov. 1975, at 15.

<sup>11</sup> The emphasis of the Freedom of Information Act is on disclosure, limited only by specific exemptions which are to be narrowly construed. *See, e.g.*, *Petkas v. Staats*, 501 F.2d 887, 888 (D.C. Cir. 1974); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied sub. nom.*, *Rosen v. Vaughn*, 415 U.S. 977 (1974); *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir. 1971); *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1001 (D.D.C. 1974), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974); *Kriendler v. Dep't of Navy*, 363 F. Supp. 611, 613 (S.D. N.Y. 1973); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1304 (D.D.C. 1973), *modified*, 505 F.2d 350 (D.C. Cir. 1974); *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 936 (D.D.C. 1973), *aff'd as modified*, 504 F.2d 283 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). *See also* *Bristol-Myers v. FTC*, 424, F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 469 (D.D.C. 1972). Ambiguities are to be resolved in favor of disclosure. *See* *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1001 (D.D.C. 1974).

<sup>12</sup> 5 U.S.C. §552(b)(4) (1970). A corporation comes within the definition of a "person" under the FOIA. 5 U.S.C. §551(2).

<sup>13</sup> S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). The fourth exemption "would also 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." *Id.*

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 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.<sup>14</sup>

The most extensive analysis of the purpose of Exemption 4 was made by the Circuit Court of Appeals for the District of Columbia in *National Parks and Conservation Association v. Morton*,<sup>15</sup> which involved the disclosure of financial information submitted to the National Park Service by companies operating concessions in the national parks. After examining prior case authority and Congressional intent as expressed in the legislative history of the Freedom of Information Act, the court concluded that Exemption 4 had a dual purpose:<sup>16</sup> (1) to encourage "cooperation with the Government by persons having information useful to officials;" and, (2) to protect "persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication."<sup>17</sup> The court of appeals noted that these two distinct purposes, the protection of legitimate government and private interests, were equally important. The Court stated that:

[t]he "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired. This concern finds expression in the legislative history as well as the case law.<sup>18</sup>

The circuit court pointed out in *National Parks* that the need for

<sup>14</sup> H. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966). See note 74 *infra*.

<sup>15</sup> 498 F.2d 765 (D.C. Cir. 1974).

<sup>16</sup> Other courts have variously expressed the purpose of Exemption 4. See *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 78 (D.C. Cir. 1974); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) ("protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers"); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 775 (D.D.C. 1974) protecting "the rights of suppliers of information"; *Westinghouse Electric Corp. v. Schlesinger*, 392 F. Supp. 1246, 1250 (E.D. Va. 1974); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 470 (D.D.C. 1972).

<sup>17</sup> 498 F.2d at 768. See also *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 295-96 (C.D. Cal. 1974); *Porter County Chapter of the Izaak Walton League of America, Inc. v. United States Atomic Energy Comm'n*, 380 F. Supp. 630, 636 (N.D. Ind. 1974).

<sup>18</sup> 498 F.2d at 767.

protecting persons who submit financial or commercial data to the government from the competitive disadvantage which would result from its disclosure had been raised several times during hearings<sup>19</sup> on the predecessor of the bill which became law, and that in each of these instances it was suggested that a "trade secrets" exemption would avert the danger that agencies which had obtained information pursuant to a statute or regulation would disclose it.<sup>20</sup>

#### JURISDICTION

The Freedom of Information Act "grants subject matter jurisdiction to and empowers the District Court 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld' " from the person seeking their disclosure.<sup>21</sup> When the government refuses to disclose a desired document and a claim for disclosure under the Act is presented, the burden is on the agency involved to prove *de novo* in the trial court that the sought after information is shielded by one of the exemptions to the Freedom of Information Act.<sup>22</sup>

[T]he mandate of the Act . . . requires the injunctive relief from a withholding of a given record under the claim of exemption to be predicated upon the District Court's finding of fact and conclusion of law as to the merits following a full "de novo" hearing.<sup>23</sup>

While the Freedom of Information Act provides a right to *de novo* court review for persons who are denied information by a government agency, it does not confer jurisdiction upon district courts in cases<sup>24</sup> where private parties are seeking to prevent disclosure.<sup>25</sup> In *Sears Roebuck & Co. v. General Services Administration*,<sup>26</sup> the United States District Court for the District of

<sup>19</sup> *Hearings on S.1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 1-2 (1964) [hereinafter cited as *Hearings on S.1666*].

<sup>20</sup> 498 F.2d at 768, citing *Hearings on S.1666*, *supra* note 19, at 91, 102, 187.

<sup>21</sup> *Theriault v. United States*, 503 F.2d 390, 392, (9th Cir. 1974).

<sup>22</sup> *Petkas v. Staats*, 501 F.2d 887, 888-89 (D.C. Cir. 1974); *Cuneo v. Schlesinger*, 484 F.2d 1086, 1091 (D.C. Cir. 1973); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied sub. nom.*, *Rosen v. Vaughn*, 415 U.S. 977 (1974); *Getman v. NLRB* 450 F.2d 670, 672 (D.C. Cir. 1971); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 703 (D.C. Cir. 1971); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1301 (D.D.C. 1973), *modified*, 505 F.2d 350 (D.C. Cir. 1974); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 800 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971); 5 U.S.C. §552(a)(3) (1970).

<sup>23</sup> *Theriault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974).

<sup>24</sup> *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1000-01 (D.D.C. 1974), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974).

<sup>25</sup> The Freedom of Information Act does apply to a suit seeking to prevent disclosure, so-called reverse-FOIA suits. *See Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 775 (D.D.C. 1974); *Westinghouse Electric Corp. v. Schlesinger*, 392 F. Supp. 1246, 1250 (E.D. Va. 1974). *Contra*, *Charles River Park "A," Inc. v. HUD*, 360 F. Supp. 212 (D.D.C. 1973).

<sup>26</sup> 384 F. Supp. 996, 1000 (D.D.C. 1974), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974).

Columbia held that a corporation seeking to prevent disclosure of information which it has submitted to the government is "not within the class of intended beneficiaries of the Act" and, furthermore, that there is no implied private right of action by persons seeking to prevent disclosure. The district court decided, however, that jurisdiction to consider the claim of a corporation seeking to prevent disclosure is conferred by the Administrative Procedure Act<sup>27</sup> in that a decision by a government agency to release data submitted to the agency by a private party is an "agency action" that adversely affects that private party and thus entitles that party to judicial review.<sup>28</sup> The *Sears* court qualified its decision by pointing out that such judicial review extends only to information supplied by private parties and extends only up to the time that disclosure moots the action.<sup>29</sup>

### COVERAGE

Exemption 4 exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person<sup>30</sup> and (c) privileged<sup>31</sup> or confidential.<sup>32</sup> Exemption 4 has been construed to require that all of these

<sup>27</sup> 5 U.S.C. §701 *et. seq.* (1970).

<sup>28</sup> 384 F. Supp. at 1001.

<sup>29</sup> *Id.* at 1001n.7.

<sup>30</sup> The courts have generally held that Exemption 4 applies only where the information is obtained from a person "outside" the government agency with that person expressing a desire that the information remain confidential. See *Benson v. GSA*, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969). See also *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970), *rev'd on other grounds*, 421 U.S. 168 (1975); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971). *Contra*, *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975).

<sup>31</sup> K. DAVIS, ADMINISTRATIVE LAW TREATISE §3A.20 (1970 Supp.) provides: [The Senate and House] committee reports . . . say the fourth exemption "would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges," and the Senate Committee adds "and other such privileges" . . . The Act's word "privileged" can hardly be interpreted to exclude what is "privileged" under the doctrine of executive privilege, even though the committees failed to mention it. (footnote omitted)

See *Ditlow v. Volpe*, 362 F. Supp. 1321, 1326 (D.D.C. 1973). See generally *Communist Party of the United States v. Subversive Activities Control Bd.*, 254 F.2d 314, 321 (D.C. Cir. 1958) (the contents of a communication are privileged if they are of such character that the law protects them against disclosure as a matter of public policy).

<sup>32</sup> See, e.g., *Brockway v. Dep't of Air Force* 518 F.2d 1184, 1188 (8th Cir. 1975); *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974); *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Brockway v. Dep't of the Air Force*, 370 F. Supp. 738, 740 (N.D. Iowa 1974), *rev'd on other grounds*, 518 F.2d 1184 (8th Cir. 1975); *Izaak Walton League of America, Inc. v. United States Atomic Energy Comm'n*, 380 F. Supp. 630, 636 (N.D. Ind. 1974); *Rabbit v. Dep't of Air Force*, 383 F. Supp. 1065, 1069 (S.D.N.Y. 1974); *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1005 (D.D.C. 1974), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974); *Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 (D.D.C. 1973); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1307 (D.D.C. 1973), *modified*, 505 F.2d 350 (D.C. Cir. 1974); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971); K. DAVIS, ADMINISTRATIVE LAW TREATISE §3A.19 (1970 Supp.). *But see* *Barceloneta Shoe Corp. v. Compton*,

prescribed elements be present: *i.e.*, the exemption does not apply to information which does not satisfy the three requirements in the statute.<sup>33</sup> Information which is not commercial or financial in nature is not exempted; and, as pointed out in *Washington Research Project, Inc. v. Department of Health, Education, and Welfare*,<sup>34</sup> "the reach of the exemption for 'trade secrets or commercial or financial information' is not necessarily coextensive with the existence of competition in any form." In *Washington Research Project*, the Circuit Court of Appeals for the District of Columbia held that research designs submitted by non-profit educational or medical institutions in grant applications to the National Institute of Mental Health for studies on the drug treatment of children with learning difficulties or behavioral disorders were not exempt from disclosure under Exemption 4 of the Freedom of Information Act. Under the *Washington Research Project* decision, one may conclude that the coverage of Exemption 4 is limited to the commercial or industrial sector and more specifically to profit-making enterprises or persons involved in the production or marketing of a product or service.<sup>35</sup>

#### THE ELEMENTS OF EXEMPTION FOUR

A "trade secret" is generally defined as

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.<sup>36</sup>

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271 F. Supp. 591 (D.P.R. 1967) (Statements of persons given in confidence to the NLRB in connection with an investigation of unfair labor practices were held to be within the scope of the exemption.).

<sup>33</sup> *E.g.*, *Getman, v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 (D.D.C. 1973); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1307 (D.D.C. 1973), *modified*, 505 F.2d 350 (D.C. Cir. 1974) *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971). *See Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975), wherein it is stated:

... the phrase "privileged or confidential" is intended to modify ... the phrase "commercial or financial information" so as to limit the class of commercial or financial information which is immune from disclosure to that which is privileged or confidential.

<sup>34</sup> 504 F.2d 238, 244 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

<sup>35</sup> *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 936 (D.D.C. 1973), *aff'd as modified*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). *But see* ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 34 (1967).

<sup>36</sup> RESTATEMENT OF TORTS §757, comment b (1939). *See Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1293 (5th Cir. 1970); *Hulsenbusch v. Davidson Rubber Co.*, 344 F.2d 730, 734 (8th Cir. 1965); *Sinclair v. Aquarius Electronics, Inc.*, 42 Cal. App. 3d 216, 221-22, 116 Cal. Rptr. 654, 658 (1974). *See also Central Specialties Co. v. Schaefer*, 318 F. Supp. 855, 859 (N.D. Ill. 1970) (A trade secret consists of confidential information related to a particular

While an invention may be placed in public use or sold without losing its secret character, a trade secret is something which has not been placed in the public domain.<sup>37</sup> Matters which are readily and completely disclosed by the product itself normally cannot constitute a trade secret.<sup>38</sup> A trade secret may be a process or a device which is patentable; however, novelty and invention are not essential, and patentability is not a condition precedent to classifying something as a trade secret.<sup>39</sup>

In *Brockway v. Department of the Air Force*,<sup>40</sup> the District Court for the Northern District of Iowa commented on the intended meaning of the phrase "commercial . . . information" under Exemption 4. The district court determined that the phrase should be given

a common-sense interpretation consistent with the purpose of the exemption which is to protect the privacy and competitive position of persons who provide information to assist government decision making under assurances of confidentiality.<sup>41</sup>

In *National Parks and Conservation Association v. Morton*<sup>42</sup> the District of Columbia Circuit Court of Appeals set forth a definition of "confidential" as follows:

[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.<sup>43</sup>

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trade or business. Misuse of trade secrets or confidential information constitutes unfair competition.).

<sup>37</sup> *Sinclair v. Aquarius Electronics, Inc.*, 42 Cal. App. 3d 216, 226, 116 Cal. Rptr. 654, 661 (1974).

<sup>38</sup> *Filter Dynamics International, Inc. v. Astron Battery, Inc.*, 19 Ill. App. 3d 299, 317, 311 N.E.2d 386, 401 (1974).

<sup>39</sup> *See Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1293-94 (5th Cir. 1970); *Sinclair v. Aquarius Electronics, Inc.*, 42 Cal. App. 3d 216, 222, 116 Cal. Rptr. 654, 658 (1974).

<sup>40</sup> 370 F. Supp. 738, (N.D. Iowa 1974), *rev'd on other grounds*, 518 F.2d 1184 (8th Cir. 1975).

<sup>41</sup> *Id.* at 740. "Commercial" is defined by WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1968) as "related to or dealing with commerce . . . having profit as the primary aim . . ." *See Anchorage v. Berry*, 145 F. Supp. 868, 871 (D.C. Alaska 1956) ("commercial" defined as: "of or pertaining to commerce; mercantile; . . . Having financial profit as the primary aim"). Affirmative Action Programs and EEO-1's have been held to be commercial information obtained from a person. *See Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1005 (D.D.C. 1974), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974).

<sup>42</sup> 498 F.2d 765 (D.C. Cir. 1974). *See Brockway v. Dep't of the Air Force*, 370 F. Supp. 738, 740-41 (N.D. Iowa 1974), *rev'd on other grounds*, 518 F.2d 1184 (8th Cir. 1975) (The court, in a pre-National Parks decision, discusses the possible impairment of the Air Force's ability to obtain necessary information in the future if disclosure were allowed in that case.).

<sup>43</sup> 498 F.2d at 770 (footnotes omitted) (emphasis added).



APPLICATION OF THE *National Parks* TEST

The *National Parks* test was relied upon by the District of Columbia Circuit Court of Appeals in *Petkas v. Staats*.<sup>44</sup> The *Petkas* decision involved the disclosure, sought by an attorney associated with the Corporate Accountability Research Group, of disclosure statements<sup>45</sup> filed with the Cost Accounting Standards Board by three corporations: Lockheed Aircraft Corporation, International Telephone and Telegraph Corporation, and General Motors Corporation. The circuit court pointed out, as it did in *National Parks*, that a finding that the information sought was of the kind "that would not generally be made available for public perusal"<sup>46</sup> is not by itself, sufficient to support application of the financial information exemption. The court concluded that the "district court must also inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy."<sup>47</sup> Private and governmental interests are of equal importance under the *National Parks* test. Disclosure may be prevented under the exemption even if the government, itself, has no interest in preventing disclosure:

[S]ection 552(b)(4) may be applicable even though the Government itself has no interest in keeping the information secret. The exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position.<sup>48</sup>

The District of Columbia Circuit Court of Appeals summarized and clarified the tests for confidential information under Exemption 4 in *Pacific Architects and Engineers Incorporated v. Renegotiation Board*,<sup>49</sup> a case involving the disclosure of documents containing business sales statistics and business tax data:

The established tests for determining whether documents are "confidential" business statistics within the meaning of Exemption 4 are that the statistics must be the sort not customarily disclosed to the public and that disclosure of the statistics must not be likely to either impair the government's ability to obtain necessary information in the future

<sup>44</sup> 501 F.2d 887 (D.C. Cir. 1974).

<sup>45</sup> The disclosure statements contained cost-accounting principles, methods of distinguishing direct from indirect costs, and the basis used to allocate costs.

<sup>46</sup> 501 F.2d 887, 889 (D.C. Cir. 1974), quoting *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). See *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *M.A. Schapiro & Co., Inc. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972).

<sup>47</sup> 501 F.2d at 889, quoting *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>48</sup> 498 F.2d at 770.

<sup>49</sup> 505 F.2d 383 (D.C. Cir. 1974). See *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 940 (D.C. Cir. 1975).

or cause *substantial harm* to the competitive position of the person from whom the information is obtained.<sup>50</sup>

The *National Parks* test was applied in *Hughes Aircraft Company v. Schlesinger*<sup>51</sup> to the disclosure of Hughes' Affirmative Action Program (AAP). The Los Angeles Chapter of the National Organization for Women had requested a copy of Hughes' AAP<sup>52</sup> which Hughes, like other defense contractors, was required to submit to the Labor Department's Office of Federal Contract Compliance.<sup>53</sup> Hughes instituted an action under the Freedom of Information Act to prevent disclosure.

The governmental interests element of the *National Parks* test did not prevent disclosure under the facts of *Hughes*. The District Court for the Central Division of California pointed out that the government's ability to gather such information in the future did not appear to be impaired since Hughes and other defense contractors are under statutory and regulatory duties to file specific information in their AAPs.<sup>54</sup> The court also pointed out that the government, the intended beneficiary of the policy acknowledged under the first element of the *National Parks* test, had not objected to disclosure in *Hughes*.

With regard to the private interests element, the court, in addition to studying the Hughes AAP *in camera* and requesting that the parties submit affidavits of experts, looked to *Therault v. United States*,<sup>55</sup> a decision by the Ninth Circuit Court of Appeals, for guidance in resolving the question of whether disclosure of the Hughes AAP would likely cause substantial harm to Hughes' competitive position. After noting that the general rule under the Freedom of Information Act is to allow disclosure unless the agency involved carries the burden of showing that one of the exemptions is applicable, the court quoted *Therault*:

In exercising the equity jurisdiction conferred by the Freedom of

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<sup>50</sup> 505 F.2d at 384 (footnotes omitted) (emphasis added).

<sup>51</sup> 384 F. Supp. 292 (C.D. Cal. 1974).

<sup>52</sup> The AAP had to discuss the minority hiring, firing, and promotion policies of the company and provide statistical data on previous practices as well as future projections and goals for minority employment policies. The discussion in the AAP had to be openly self-critical and fully cover problem areas. 384 F. Supp. at 294.

<sup>53</sup> The Code of Federal Regulations required the submission of the AAP. 41 C.F.R. §60-1.40 (1975).

<sup>54</sup> See *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 776-77 (D.D.C. 1974): "Since the information in question, or most of it, is required by law to be furnished to the Government, there is little danger that disclosure will impair the Government's ability to obtain this data in the future." *Neal-Cooper* involved the disclosure by the Customs Service of certain information to the Mexican Government. The information had been filed with the Customs Service in order to obtain permission to import fertilizer.

<sup>55</sup> 503 F.2d 390 (9th Cir. 1974).

Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles, and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration.<sup>56</sup>

The *Therault* court recognized that “[t]he main spring of the proceedings under the Act is a judicious weighing of the complainant’s need for and entitlement to production as against the government’s or another’s right to protection,”<sup>57</sup> and accepted the above quoted language from *General Services Administration v. Benson*,<sup>58</sup> a prior decision by the Ninth Circuit, as a guideline for such a judicious weighing.<sup>59</sup>

The *Hughes* court considered the experts’ affidavits submitted by Hughes to “lack particularity,” pointing out that the factual basis for the conclusion that the company would be hurt competitively by disclosure was not strong and that “[v]ery little in their affidavits specifically points out the connection between the information contained in the AAP and the alleged harm that would result from disclosure.”<sup>60</sup> The central issue was whether Hughes’ labor costs could be uncovered by a competitor in view of the fact that the AAP revealed the number of employees at Hughes’ Culver City facility.

The District Court for the Eastern District of Virginia dealt with this same problem in *Westinghouse Electric Corporation v. Schlesinger*.<sup>61</sup> While *Westinghouse* was decided before *National Parks*, the first element of the *National Parks* test would appear to be of no consequence since both Hughes and Westinghouse were under statutory and regulatory duties to file specific information in their respective AAPs and, therefore, the ability of the government to gather such information in the future would not appear to be impaired in either case.

The two courts reached different conclusions, however, concerning the effect that disclosure of the respective AAPs would likely have on the competitive position of the respective companies. Professor Rutenberg, who testified in both *Hughes* and *Westinghouse*, concluded that a competitor could deduce the labor costs of the companies with the assistance of the information

<sup>56</sup> 384 F. Supp. at 296, quoting *Therault v. United States*, 503, F.2d 390, 392 (9th Cir. 1974), quoting *General Services Admin. v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969).

<sup>57</sup> 503 F.2d at 392.

<sup>58</sup> 415 F.2d 878, 880 (9th Cir. 1969).

<sup>59</sup> There are conflicting views as to whether or not the Freedom of Information Act permits a court to balance the equities before ordering the disclosure of information. See notes 110-21 and accompanying text *infra*.

<sup>60</sup> 384 F. Supp. at 296.

<sup>61</sup> 392 F. Supp. 1246 (E.D. Va. 1974).

contained in the AAP as well as with the Employer Information Report (EEO-1) in *Westinghouse*. In *Westinghouse*, Professor Rutenberg was also of the opinion that, upon deducing labor costs from the information contained in the AAP and EEO-1, a competitor could extrapolate a company's profit margin and resulting vulnerability to price change. Rutenberg's argument against disclosure was persuasive in *Westinghouse*, but was rejected in *Hughes*.

The District Court for the Eastern District of Virginia confirmed Professor Rutenberg's conclusion in *Westinghouse* after comparing his testimony with the EEO-1 and the AAP in question. The District Court for the Central Division of California, on the other hand, relied in *Hughes* on the testimony of government experts to find that the Hughes' AAP was of "marginal utility . . . to a competitor."<sup>62</sup> The government experts had concluded in *Hughes* that labor costs could only be "imperfectly estimated" from the information contained in the AAP and would be subject to "considerable error."<sup>63</sup> In *Westinghouse*, such expert testimony was not presented.

While there were undoubtedly significant factual differences,<sup>64</sup> and the *Therault* equitable balancing principle was an overriding factor in *Hughes*, a comment is deemed to be in order regarding the debate between Professor Rutenberg and the government experts. Although there may be instances in our highly regulated economic system when basic economic principles no longer effectively operate, the industrial sector is still highly competitive. Corporations have varying numbers of market and financial specialists who continually search out fragments of information about competitors and markets from any available source: published government statistics and information, various legislative documents, analyses and surveys performed by consultants, field surveys performed by corporate specialists, information continually obtained and reported by sales personnel, or disclosures by government agencies. Since government-derived information is often submitted according to statutory or regulatory requirement, it is usually more credible than information from other sources; the latter usually depends on what a company decides, for its own carefully considered reasons, to make available. An additional reliable "fragment" of information may be enough to bring the whole picture into much clearer focus and could conceivably mean the difference between success or failure in certain contract bidding situations.

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<sup>62</sup> 384 F. Supp. at 298.

<sup>63</sup> *Id.* at 296-97.

<sup>64</sup> The *Westinghouse* court carefully pointed out that its decision did not prohibit the disclosure of "any" of Westinghouse's EEO-1 reports or AAPs, but only encompassed those portions of the specific documents that the court had the opportunity to examine and had concluded were shielded by Exemption 4.

The importance of a court's decision on disclosure in any given case is magnified by the fact that a number of jobs and possibly the future of a business may hinge on obtaining a given contract, depending on the industry involved and a number of other factors.

Of course, where it can be shown that a company voluntarily releases certain information so that competitors can gain access to it, this consideration is no longer applicable and the *Theriault* equitable balancing rationale applied by the *Hughes* court would appear to be clearly warranted.

The *Hughes* opinion sets forth a caveat for corporations with regard to participation in private, industry-wide wage and salary or similar surveys which involve "an exchange of information with a select sample of companies in the industry."<sup>65</sup> Namely, a court may consider such a voluntary involvement in a cooperative survey as "apparent collusion"<sup>66</sup> between the company and its alleged competitors. Such a finding will discredit the company's claim that its competitive position will be substantially harmed by disclosure, and will be most persuasive toward the application of the *Theriault* equitable balancing practiced in the Ninth Circuit.

Examples of the kinds of factors that might lead to the "substantial harm to the competitive position" envisioned by *National Parks* were set forth in *Sears, Roebuck & Co. v. General Services Administration*<sup>67</sup> with regard to information that may be contained in Affirmative Action Programs, viz., statistical employee breakdowns, plans involving "expansions, reductions, [and] mergers" and planned "major shifts or changes in . . . personnel requirements."<sup>68</sup> From the *Sears* opinion, one may conclude that the substance of the burden to be carried by a corporation seeking to prevent disclosure under Exemption 4 is to prove that disclosure will allow a company's competitors to compete more effectively by attaining access to "inside information." The *Sears* court pointed out that the fear that disclosure would adversely affect the goodwill of a corporation was not actionable under the standards of *National Parks*.

#### OBJECTIVE TEST FOR CONFIDENTIALITY

"[T]he test for confidentiality is an objective one."<sup>69</sup> In their determination of the existence of confidentiality, the courts rely on the nature of

<sup>65</sup> 384 F. Supp. at 297. The cooperative survey in *Hughes* involved data on actual salary ranges and averages by job classification.

<sup>66</sup> *Id.* at 297-98.

<sup>67</sup> 384 F. Supp. 996 (D.D.C. 1974).

<sup>68</sup> *Id.* at 1007 (footnotes omitted).

<sup>69</sup> *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). See *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972).

the material and on the testimony of experts, not on the bare claim of a corporation seeking to prevent disclosure.<sup>70</sup> The fact that the information was supplied upon the condition that it remain confidential does not compel the court to find confidentiality:

Regardless of whether the information was submitted on the express or implied condition that it be kept confidential, a court should determine, on an objective basis, that this is not the type of information one would reveal to its public.<sup>71</sup>

In *Tax Analysts & Advocates v. Internal Revenue Service*,<sup>72</sup> the District Court for the District of Columbia stated that “[a] bare claim or promise of confidentiality”<sup>73</sup> by an agency cannot defeat the right of disclosure; “[t]o allow a promise of confidentiality by the agency to control would enable the agency to render meaningless the statutory scheme”<sup>74</sup> of the Freedom of Information Act. The District Court for the Northern District of California, in addressing this issue in *Legal Aid Society of Alameda County v. Shultz*,<sup>75</sup> stated:

[A]dministrative promises of confidentiality cannot extend the command of the Freedom of Information Act that only matters “specifically exempted from disclosure by statute” are protected under §552(b)(3).<sup>76</sup>

The document involved must be “independently confidential”<sup>77</sup> based on

<sup>70</sup> *Westinghouse Electric Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D. Va. 1974).

<sup>71</sup> *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. (1972)).

<sup>72</sup> 362 F. Supp. 1298 (D.D.C. 1973), *modified in part and remanded*, 505 F.2d 350 (D.C. Cir. 1974).

<sup>73</sup> 362 F. Supp. at 1307. *See also* *Charles River Park “A,” Inc. v. HUD*, 519 F.2d 935, 940 (D.C. Cir. 1975); *Petkas v. Staats*, 501 F.2d 887, 889 (D.C. Cir. 1974), *reversing* *Petkas v. Staats*, 364 F. Supp. 680 (D.D.C. 1973); *Rural Housing Alliance v. United States Dep’t of Agriculture*, 498 F.2d 73, 79 (D.C. Cir. 1974); *Bristol Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972). *Cf.* *Benson v. GSA*, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff’d*, 415 F.2d 878 (9th Cir. 1969). The House Report on the Freedom of Information Act provides that “where the Government has obligated itself in good faith not to disclose documentations or information which it receives it should be able to honor such obligations,” H.R. REP. NO. 1497, 89th Cong., 2d Sess (1966). It has been recognized that the House Report “is characteristically broader and goes beyond the express terms of the statute . . . . The Senate report is to be preferred over the House Report as a reliable indication of legislative intent . . . .” *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1304 (D.D.C. 1973), *quoting* *Getman v. NLRB*, 450 F.2d 670, 673 n. 8 (D.C. Cir. 1971), In addition, the district court in the *Tax Analysts* decision pointed out that legislative history should not outweigh the statutory language when the former is contradictory or ambiguous. *Tax Analysts & Advocates v. IRS*, *supra* at 1304.

<sup>74</sup> 362 F. Supp. at 1307n.50.

<sup>75</sup> 349 F. Supp. (N.D. Cal. 1972).

<sup>76</sup> *Id.* at 776; *cf.* *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961).

<sup>77</sup> *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1307 (D.D.C. 1973), *quoting* *Fisher v. Renegotiation Bd.*, 473 F.2d 109, 113 (D.C. Cir. 1972); *see* *Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 (D.D.C. 1973).

its contents. In *Tax Analysts*, the District Court for the District of Columbia defined "independently confidential" to mean that the information is "not otherwise subject to public disclosure and entitled to a reasonable expectation of privacy".<sup>78</sup> In order for a document or a portion of a document to be brought within the protection of Exemption 4, it "must be shown to be independently confidential *and* not susceptible to being rendered anonymous"<sup>79</sup> by suitable deletions.

### DELETION

An entire document is not exempt merely because an isolated portion of the document is shielded by an exemption.<sup>80</sup> Deletion of a portion of the document before disclosure may be deemed sufficient protection under the statutory exemption. "[T]he exemption . . . protect[s] . . . only that information which cannot be rendered sufficiently anonymous by deletion of the filing party's name and other identifying information."<sup>81</sup> In *Grumman Aircraft Engineering Corp. v. Renegotiation Board*,<sup>82</sup> the Circuit Court for the District of Columbia stated:

Congress did not intend to exempt an entire document simply because it contained confidential information . . . . [T]he proper procedure where exempted data is contained in the requested document is to accommodate the Freedom of Information Act's dual policy of promoting public awareness and administrative fairness, on the one hand, and the need for justifiable secrecy on the other, by striking identifying details from the documents prior to release.<sup>83</sup>

It should be noted that the Freedom of Information Act specifically provides for deletion:

To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing.<sup>84</sup>

<sup>78</sup> 362 F. Supp. at 1307 (footnotes omitted). See *Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 (D.D.C. 1973).

<sup>79</sup> 362 F. Supp. at 1308.

<sup>80</sup> *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), cert. denied sub. nom., *Rosen v. Vaughn*, 415 U.S. 977 (1974). See *EPA v. Mink*, 410 U.S. 73, 85-94 (1973); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 704 (D.C. Cir. 1971).

<sup>81</sup> *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1307 (D.D.C. 1973), quoting *National Cable Television Ass'n, Inc. v. FCC*, 479 F.2d 183, 195 (D.C. Cir. 1973).

<sup>82</sup> 482 F.2d 710 (D.C. Cir. 1973).

<sup>83</sup> *Id.* at 711-12. See *Legal Aid Soc'y v. Shultz*, 349 F. Supp. 771, 777 (N.D. Cal. 1972); *Wellford v. Hardin*, 315 F. Supp. 768, 770 (D.D.C. 1970).

<sup>84</sup> 5 U.S.C. §552(a)(2) (1970).

While several cases favor the deletion of certain protected matter to permit disclosure of the remainder of the document in question,<sup>85</sup> some courts have wisely recognized that deletions may, in certain instances, be ineffective to protect privacy and confidentiality.<sup>86</sup> In some cases, "the party that filed the statement is so large or unique that disclosure of the data itself would destroy the confidentiality of that party . . ."<sup>87</sup> Deletion may not ensure anonymity or change the basic confidential nature of the document;<sup>88</sup> furthermore, individuals with knowledge of a particular area may be able to determine the identity of the persons involved due to inadequate deletion.<sup>89</sup>

#### DETAILED JUSTIFICATION PROCEDURE

In order to hold material exempt from disclosure under the Freedom of Information Act, the court must both examine the documents *in camera* to determine whether the documents, or portions of them, fall within one of the exemptions and explain the specific statutory justification for withholding particular information.<sup>90</sup>

In *Vaughn v. Rosen*<sup>91</sup> and *Cuneo v. Schlesinger*,<sup>92</sup> the Circuit Court for the District of Columbia set forth procedures which will produce the information necessary to resolve conflicting claims concerning the applicability of an exemption. The circuit court found such procedures necessary on two grounds:

[to] (1) assure that a party's right to information is not submerged, beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of the disputed information . . .<sup>93</sup>

<sup>85</sup> See *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 771 (D.C. Cir. 1974); *Grumman v. Renegotiation Bd.*, 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

<sup>86</sup> *E.g.*, *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 79 (D.C. Cir. 1974); *National Cable Television Ass'n, Inc. v. FCC*, 479 F.2d 183, 195 (D.C. Cir. 1973).

<sup>87</sup> See *National Cable Television Ass'n, Inc. v. FCC*, 479 F.2d 183, 195 (D.C. Cir. 1973).

<sup>88</sup> See *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 581 (D.C. Cir. 1970), wherein it is stated:

A request for the orders and opinions concerning a single contractor would clearly create a problem of confidentiality. In the present case this problem does not exist because appellant has requested orders and opinions relating to fourteen contractors, and their release en masse without identifying details will preserve anonymity.

<sup>89</sup> See *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 78, 79 (D.C. Cir. 1974).

<sup>90</sup> *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 469 (D.D.C. 1972). See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970). *But see EPA v. Mink*, 410 U.S. 73 (1973) (pointing out that an *in camera* examination is not always necessary with regard to Exemptions 1 and 5).

<sup>91</sup> 484 F.2d 820 (D.C. Cir. 1973).

<sup>92</sup> 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

<sup>93</sup> *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).



The circuit court formulated "detailed justification" procedures to prevent an agency from frustrating the intent of the Freedom of Information Act by making "conclusory and generalized allegations of exemptions."<sup>94</sup>

*Vaughn* suggested a "relatively detailed analysis in manageable segments";<sup>95</sup> however, the particularized and specific justification for exempting information from disclosure need not contain factual descriptions that, if made public, would compromise the secret nature of the information. With regard to Exemption 4, *Pacific Architects* elaborated the "detailed justification" procedure contemplated by *Vaughn* as follows:

[T]he agency resisting disclosure must present a "detailed justification" . . . for application of the exemption to the specific documents in dispute. Such a "detailed justification" (under the facts of *Pacific Architects*) should include

- (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 non-disclosure of the identity of the person submitting the information in dispute.

If it is claimed that the information itself discloses to knowledgeable people the identity of the person who supplied it, some factual basis for that conclusion must be advanced to support the (agency's) nondisclosure.<sup>96</sup>

In short, the court requires a detailed statement from the agency stating the factual and legal basis for the agency's claim of exemption.

The *Vaughn* procedure also requires the agency to specify in detail both those portions of the document which may be disclosed and those which are allegedly exempt. This is to be done through a system of itemizing and indexing that correlates statements made in the government's justification for re-

<sup>94</sup> 484 F.2d at 826.

<sup>95</sup> *Id.*

<sup>96</sup> 505 F.2d at 385.

fusal with the actual portions of the document in question; *i.e.*, an itemized explanation by the government is required.

However, as pointed out in *Exxon Corporation v. Federal Trade Commission*<sup>97</sup> by the District Court for the District of Columbia, utilization of the *Vaughn* procedure is not mandatory in every case.

*Vaughn* did not lay down a *per se* rule to be applied to every Freedom of Information case. It rather suggested a technique to assist the court when needed. When there is a "factual dispute regarding whether the documents actually fit" the description by the government, and when the government claims multiple exemptions which may apply "to all or only a part of the information," in documents consisting of "hundreds or even thousands of pages," then the government must provide more than mere conclusory allegations with its *in camera* submission.<sup>98</sup>

#### DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT AND THE QUESTION OF DISCRETION

The general view is that the exemptions of the Freedom of Information Act authorize nondisclosure but do not require it.<sup>99</sup> Although the Freedom of Information Act, via its nine exemptions, delineates categories of information which the government is not required to disclose, the Act, by its own terms, does not bar voluntary disclosure by the government of information in those categories.<sup>100</sup> This view is reinforced by the following statement from the introduction to a committee print on the Freedom of Information Act prepared by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary:

It should be emphasized that the exemptions in the FOIA were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they merely mark the outer limits of information that *may* be withheld where the agency makes an affirmative determination that the public interest and the specific circumstances presented dictate that the information *should* be withheld. Agencies have been slow to adopt this

<sup>97</sup> 384 F. Supp. 755 (D.D.C. 1974).

<sup>98</sup> *Id.* at 761. The *Vaughn* procedure was ordered to be used in *Cutler v. CAB*, 375 F. Supp. 722, 724 (D.D.C. 1974), in order to determine which portions of the documents involved were privileged under the fourth exemption.

<sup>99</sup> See *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974).

<sup>100</sup> See *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1000 (D.D.C. 1974), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974); K. DAVIS ADMINISTRATIVE LAW TREATISE §3A.5 (1970 Supp.). See also *Charles River Park "A," Inc. v. HUD*, 519 F.2d 935, 941 (D.C. Cir. 1975), wherein the court concluded that, the argument that the Act contains no provision forbidding disclosure "is supported by legislative history of the recently enacted amendments to the FOIA which make it clear that the Act is not to be interpreted in any way as a restriction on government disclosure. S. REP. NO. 93-854, 93d Cong., 2d Sess. 6 (1974). . . ."

attitude, but enlightened judicial decisions reflect this approach to interpreting the force of the FOIA exemptions.<sup>101</sup>

While the exemptions do not make nondisclosure mandatory, the District Court for the District of Columbia noted, in *Sears*, that the "policies behind those exemptions provide a sound basis for determining whether release of the documents in question would be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"<sup>102</sup>

In *Westinghouse Electric* the District Court for the Eastern District of Virginia rejected the general view that the exemptions represent categories of information which "may", as a matter of agency discretion, be exempt, stating that such a view "flies in the face of the protective purpose of the exemption."<sup>103</sup> The court concluded that "[t]he FOIA cannot permit agency discretion to the extent that such discretion precludes *de novo* determination by a court of the entitlement to an exemption under FOIA."<sup>104</sup>

The Senate Report on the Act arguably supports both views. In explaining what S.1160 would do, the report states:

It sets up workable standards for what records should and *should* not be open to public inspection . . . . [It] replaces [vague phrases] with specific and limited types of information that *may* be withheld.<sup>105</sup>

In addition to describing the protective purpose of Exemption 4,<sup>106</sup> the Senate Report, in setting forth the purpose of S.1160, states:

It is not an easy task to balance opposing interests . . . . It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest *responsible disclosure*.<sup>107</sup>

The position adopted in *Sears* appears to be in accord with legislative intent.<sup>108</sup>

<sup>101</sup> SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (Comm. Print 1974).

<sup>102</sup> 384 F. Supp. at 1001; see notes 26-29 and accompanying text *supra*.

<sup>103</sup> 392 F. Supp. at 1250 (the court based its conclusion on the "protective purpose of the exemption as enunciated in the Senate and House Reports" and upon the *Bristol-Myers* decision. *Id.*)

<sup>104</sup> *Id.*

<sup>105</sup> S. REP. NO. 813, 89th Cong., 2d Sess. 5 (1965) (emphasis added).

<sup>106</sup> See text (quote from Senate Report) accompanying note 13 *supra*.

<sup>107</sup> S. REP. NO. 813, 89th Cong., 2d Sess. 3 (1965) (emphasis added).

<sup>108</sup> See also *Continental Oil Co. v FPC*, 519 F.2d 31, 35 (5th Cir. 1975) (Relying on *National Parks*, the court rejected the FPC's contention that the FOIA does not command withholding

There is also disagreement as to whether or not the Freedom of Information Act permits a court to balance the equities before ordering disclosure. As previously noted, the Ninth Circuit has adopted the position that the Act does permit such a balancing.<sup>109</sup> The general view, however, maintains that Congress intended both to limit the equitable powers of the court under the Act and to deny the power to refuse disclosure for any reason other than specifically covered by the exemptions.<sup>110</sup>

The general view is based on two grounds: first, on Congress' rejection of need as a standard for disclosure;<sup>111</sup> and, secondly, on its command that all documents be disclosed except those covered by specific exemptions.<sup>112</sup>

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of confidential information under Exemption 4. The court thus avoided a determination of the plaintiff's argument that disclosure would be a taking of proprietary interests in violation of the fifth amendment.).

<sup>109</sup> *E.g.*, *Therault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974); *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 296 (C.D. Cal. 1974). See *Continental Oil Co. v. FPC*, 519 F.2d 31, 36 (5th Cir. 1975) ("necessity of balancing public and private interests in interpreting the FOIA"). See generally K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §3A.19 (1970 Supp.).

<sup>110</sup> See *Tax Analysts & Advocates v. IRS*, 505, F.2d 350, 355 (D.C. Cir. 1974); *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 662 (6th Cir. 1972); *Hawkes v. IRS*, 467 F.2d 787, 792n.6 (6th Cir. 1972); *Getman v. NLRB*, 450 F.2d 670, 678 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971); *Rabbit v. Dep't of Air Force*, 383 F. Supp. 1065, 1069 (S.D.N.Y. 1974); *Legal Aid Soc'y v. Shultz*, 349 F.Supp. 771, 776 (N.D.Cal. 1972). See also *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 353 (D.C. Cir. 1972), *reversed on other grounds*, 415 U.S. 1 (1974); S. REP. No. 813, 89th Cong., 2d Sess. 3 (1965 ("It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies."). *Contra*, *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971). (The district court held that the court has equitable jurisdiction to deny disclosure even where none of the exemptions of the Freedom of Information Act are applicable.) However, in *Getman v. NLRB*, *supra* at 678n.25, the District of Columbia Circuit pointed out that the equitable discretion issue was not briefed or argued before the district court in *Consumers Union*, and the appeal was dismissed as moot. The court also indicated that it believed the Ninth Circuit is in agreement with the District of Columbia Circuit and the Fourth Circuit in that a court has no equitable discretion when none of the exemptions of the FOIA are applicable. The *Getman* court cited 5 U.S.C. §552(c) ("this section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.") in concluding that the court has no equitable discretion. The *Getman* court also declined to follow Professor Davis' suggestion that the courts might act to redraft the statute by invoking the equitable discretion doctrine, K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§3A.6, 3A.19 (1970 Supp.), for the reason that invocation of equitable powers to permit nondisclosure beyond the specific exemptions of the Freedom of Information Act would seriously undermine the overriding purpose of the Act.

<sup>111</sup> *E.g.*, *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 353 (D.C. Cir. 1972), *reversed on other grounds*, 415 U.S. 1 (1974); *Hawkes v. IRS*, 467 F.2d 787, 792n.6 (6th Cir. 1972); S. REP. No. 813, 89th Cong., 2d Sess. 5 (1965) ("eliminates the test of who shall have the right to different information... the public as a whole has a right to know what its Government is doing").

<sup>112</sup> *Id.* The Senate Report speaks directly to the question of statutory purpose: "The purpose... is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public... unless explicitly allowed to be kept secret by one of the exemptions...." S. REP. No. 813, 89th Cong., 2d Sess. 10 (1965).

While the Ninth Circuit's opinions can be read to hold that the court has equitable discretion to refuse disclosure for reasons other than specifically covered by the exemptions, it appears that the Ninth Circuit made a more limited holding; *viz.*, in determining whether an exemption under the FOIA is applicable, the court must weigh the effects of disclosure and nondisclosure on the public interest in accordance with traditional equity principles.<sup>113</sup>

The Ninth Circuit's view<sup>114</sup> is arguably supported by certain language in the Senate Report.<sup>115</sup> The FOIA gave the courts definitive guidelines in setting information policies, and these "guidelines"<sup>116</sup> or "workable standards"<sup>117</sup> for what records should and should not be open to public inspection were delineated in terms of specific and limited types of information that may be withheld. However, Congress recognized the necessity of protecting equally important rights and that these opposing interests must be balanced. In delineating the exemptions, Congress attempted to provide "a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest *responsible disclosure*."<sup>118</sup>

Exercise of equity powers in the context of the Ninth Circuit's limited holding would appear to be necessary to achieve "responsible" disclosure. It is not in the public interest to undermine competition by disclosing information that companies have traditionally attempted to keep from the sight and knowledge of either competitors<sup>119</sup> or the public. Loss of goodwill can be

<sup>113</sup> See *Getman v. NLRB*, 450 F.2d 670, 678n.25 (D.C. Cir. 1971); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974). See also *Hecht v. Bowles*, 321 U.S. 321, 328 (1944).

<sup>114</sup> Support for the Ninth Circuit's view might also be inferred from the absence of clear Congressional intent regarding equitable powers: "[I]f Congress had intended to make . . . a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). See also *Renegotiation Bd. v. Bannercoft Clothing Co., Inc.*, 415 U.S. 1, 20 (1974), where it is provided that:

With the express vesting of equitable jurisdiction in the district court by §552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

<sup>115</sup> In addition, the House stated: "The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H. REP. No. 1497, 89th Cong., 2d Sess. 9 (1966).

<sup>116</sup> S. REP. No. 813, 89th Cong., 2d Sess. 3 (1965).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (emphasis added)

<sup>119</sup> The *National Parks* opinion quoted the following significant language from the *Hearings on S.1666*:

[N]ot only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors, 498 F.2d at 769, citing *Hearings on S.1666 supra* note 19, at 199.

just as detrimental to the competitive position of a business as disclosure of financial data. Goodwill is a term that conveys different meanings to different individuals. To the accountant, it is an intangible asset, *viz.*, the capitalized value of expected future excess profits.<sup>120</sup> To the layman it is that intangible ingredient that means the difference between mediocrity and success and implies a well-known corporate name, popular acceptance of products, and outstanding customer relations.<sup>121</sup> Disclosure of any information that can potentially destroy this intangible ingredient, information that corporations would customarily not release to the public, would appear to be capable of causing "substantial harm" to the competitive position of businesses.<sup>122</sup>

Interference beyond that necessary to protect the public interest would needlessly jeopardize the efficiency and effectiveness of the free market system. The Senate Report's statement of the purpose of Exemption 4 in which the phrase "but which would customarily not be released to the public by the person from whom it was obtained" was used, would appear to mirror this concern. In addition, the Senate Report stated in conclusion:

The committee feels this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality.<sup>123</sup>

### CONCLUSION

The Ninth Circuit's view on equitable balancing does not appear to be incompatible with the fact that the Act makes information available to "any person"<sup>124</sup> and the fact that the exemptions are based on the nature of the information sought, not the status, identity, or need of the particular seeker.

To the extent that "balancing the equities" is construed to encompass the "need" of the particular seeker, it is misleading terminology in the context of deciding whether or not to disclose information claimed to be confidential under Exemption 4. "Balancing the equities" is better viewed as a balancing of the potential effect on the public interest of nondisclosure as opposed to disclosure; that is, whether the public interest requires disclosure

*See* Graber Mfg. Co. v. Dixon, 223 F. Supp. 1020, 1023 (D.D.C. 1963) ("Business secrets should be kept from the sight and knowledge of . . . competitors so far as is practicable to do so in the discharge of the [agency's] responsibilities under the law.").

<sup>120</sup> *See, e.g.*, Spheeris v. Spheeris, 37 Wis. 2d 497, 155 N.W. 2d 130, 135 (1967); Securities Realization Co. v. Peabody & Co., 300 Ill. App. 156, 20 N.E.2d 874, 881 (1939).

<sup>121</sup> *See, e.g.*, Barran v. Comm'r, 334 F.2d 58, 61 (5th Cir. 1964); *In re Glant's Estate*, 57 Wash. 2d 309, 356 P.2d 707, 709 (1960).

<sup>122</sup> "Goodwill" is property that may be damaged. *See, e.g.*, Avery v. Lyons, 183 Kan. 611, 331 P.2d 906, 914 (1958).

<sup>123</sup> S. REP. NO. 813, 89th Cong., 1st Sess. 10 (1965).

<sup>124</sup> 5 U.S.C. §552(a)(3) (1970)

or public policy requires nondisclosure. There is a presumption under the Freedom of Information Act that disclosure is in the public interest; however, where disclosure will harm legitimate private or governmental interests in secrecy, nondisclosure is clearly warranted not only as a matter of right, but also as a matter of public policy as expressed in the legislative history of the Freedom of Information Act and specifically in Exemption 4. It is a question of the basic inequity of placing before competitors and the public, on the basis of legislative intent susceptible to conflicting interpretations, the types of information that corporations traditionally have attempted to keep from the sight and knowledge of competitors and the public.

Persuasive arguments can be made both for<sup>125</sup> and against<sup>126</sup> the contention that Exemption 4 protects any information which is privileged or confidential, not just commercial or financial information which is privileged or confidential.

One factor which seems to have received little attention in analyzing the purpose of Exemption 4 is that the mischief which Congress was attempting to remedy was the arbitrary and self-serving withholding, by agencies which are not directly responsible to the people, of official information on how the government is operating through the use of vague phraseology in Section 3 of the Administrative Procedure Act. The purpose of the Freedom of Information Act was to protect the people's right to obtain information about their government, to know what their government is doing, and to obtain information about government activities and policies.<sup>127</sup> The Freedom of Information Act was not enacted for the purpose of enabling the public to obtain information about individuals and corporations, about what those individuals and corporations are doing, or about what their activities and policies are.

Disclosure of any information which corporations have traditionally kept secret for valid competitive reasons strikes at the heart of the free enterprise system and was undoubtedly what Congress intended to guard against when, in expressing the purpose of Exemption 4, it stated:

This exception is necessary to protect the confidentiality of information . . . which would customarily not be released to the public by the person from whom it was obtained.<sup>128</sup>

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<sup>125</sup> See ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT, at 32-34 (1967).

<sup>126</sup> See, e.g., Brockway v. Department of Air Force, 518 F.2d 1184, 1188-89 (8th Cir. 1975).

<sup>127</sup> See generally S. REP. No. 813, 89th Cong., 1st Sess. 1 (1966). H. REP. No. 1497, 89th Cong., 2d Sess. 1 (1966).

<sup>128</sup> S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).