

# Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard

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## NOTE

### PUBLIC DISCLOSURE OF CONFIDENTIAL BUSINESS INFORMATION UNDER THE FREEDOM OF INFORMATION ACT: TOWARD A MORE OBJECTIVE STANDARD

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.<sup>1</sup>

#### I

#### INTRODUCTION

It is a fundamental premise of American democracy that the quality of government is intimately related to the political awareness and sophistication of the citizenry.<sup>2</sup> The Freedom of Information Act<sup>3</sup> was enacted in 1966 in the hope of increasing such awareness and sophistication by providing the public with more complete access to the records of federal agencies.<sup>4</sup> To carry out that purpose, the Act directed all federal agencies upon request to make available to "any person"<sup>5</sup> any "identifiable"<sup>6</sup> agency records. Emphasizing its policy of furthering broad public disclosure, the Act conferred *de novo* jurisdiction upon federal district courts to review an agency's decision to withhold its records from disclosure and placed the burden of proof in such an action upon the government.<sup>7</sup> At the same time, the Act attempted to accommodate

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<sup>1</sup> James Madison, as Chairman of the committee drafting the first amendment, *quoted in* S. REP. NO. 813, 89th Cong., 1st Sess. 2-3 (1965) [hereinafter cited as S. REP.].

<sup>2</sup> Indeed, the first amendment derived its guarantee of free expression from the assumption by the framers of the Constitution that only a well-informed electorate could effectively oversee the machinery of government. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Note, *The Constitutionality of Financial Disclosure Laws*, 59 CORNELL L. REV. 345 n.3 (1973).

<sup>3</sup> 5 U.S.C. § 552 (1970).

<sup>4</sup> *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

<sup>5</sup> 5 U.S.C. § 552(a) (3) (Supp. II, 1972).

<sup>6</sup> *Id.*

<sup>7</sup> On complaint, the district court of the United States in the district in which the

legitimate needs for governmental and individual privacy by delineating nine specific instances in which information in agencies' hands would be exempted from disclosure.<sup>8</sup> One such exemption covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>9</sup> The purpose of this Note is to examine that exemption with a critical eye suggesting a possible judicial resolution of its inherent ambiguities in a manner consistent with the public's interest in disclosure and the individual's right of privacy.

## II

### THE GENERAL SCHEME OF THE ACT

The specific disclosure requirements of the Freedom of Information Act were inspired by congressional dissatisfaction with the rather vague disclosure provisions of the old Administrative Procedure Act.<sup>10</sup> The latter had allowed agencies to withhold information on the grounds of "public interest," "good cause found," or the lack of a party "properly and directly concerned"

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complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its actions. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee . . . .

*Id.*

<sup>8</sup> 5 U.S.C. § 552(b) (1970) exempts from the disclosure requirements of the Act any matters that are

- (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, concerning wells.

*Id.*

<sup>9</sup> 5 U.S.C. § 552(b) (4) (1970).

<sup>10</sup> See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

with the revelation of the sought-after information.<sup>11</sup> Such broad, discretionary standards too frequently supplied government agencies with an easy rationale for withholding information to which the public was arguably entitled.<sup>12</sup>

It was the design of the Freedom of Information Act to promote greater public access to government information. To fulfill that design the vaguely-defined loopholes of the old Administrative Procedure Act were replaced by a general disclosure requirement subject to nine limited exemptions.<sup>13</sup> Under the Act's new disclosure requirements a citizen could no longer be denied access to government information by an agency's mere assertion that the "public interest" or "good cause" demanded that such information remain confidential. Furthermore, "any person"—not only one "properly and directly concerned" with the information in question—could now demand the disclosure of government records.

Both legislative history and the wording of the statute itself emphasize that the nine exceptions to full disclosure were designed to be specifically and narrowly construed. The Senate Report on the Freedom of Information Act emphasizes that the intent of the law is to "establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."<sup>14</sup> The Act itself reinforces this "strict constructionist" view in section (c), where the withholding of information from the public is said to be unauthorized "except as *specifically* stated" in the Act.<sup>15</sup> Such statutory language suggests that only information which falls squarely within the rather limited exemptions found in section (b) should be considered exempt from the Act's general requirement of full public disclosure.<sup>16</sup> By thus replacing the Administrative Procedure Act's vague tests with a general disclosure requirement limited only by specific exceptions, the Freedom of Information Act was intended to provide a more objective and

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<sup>11</sup> Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

<sup>12</sup> See 1971 U. ILL. L. FORUM 329, 335 (1971).

<sup>13</sup> See note 8 *supra*; Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); American Mail Line, Ltd. v. Gulick, 411 F.2d 696, 699 (D.C. Cir. 1969); S. REP. 3.

<sup>14</sup> S. REP. 3.

<sup>15</sup> 5 U.S.C. § 552(c) (1970) (emphasis added).

<sup>16</sup> One commentator has stressed the significance of the "specificity" requirement of subsection (c): "The pull of the word 'specifically' is toward emphasis on statutory language and away from all else—away from implied meanings, away from reliance on legislative history, away from needed judicial legislation." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 783 (1967) [hereinafter cited as Davis].

predictable resolution of the tension between disclosure and confidentiality that is inherent in government information policies.

### III

#### THE SCOPE OF EXEMPTION (4)

Subsection (b) (4) of the Freedom of Information Act exempts from the statute's disclosure requirements "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>17</sup> Thus, by the terms of the statute, to qualify for the exemption, the agency information in question must (1) have been obtained from some "person" outside of the government<sup>18</sup> and (2) have originally consisted of trade secrets, or commercial or financial information that is either privileged or "confidential."<sup>19</sup> It is relatively easy to determine whether the information given by a person to the government constitutes a "trade secret" or is "privileged" within the sweep of subsection (b) (4).<sup>20</sup> But when a government agency argues that information

<sup>17</sup> 5 U.S.C. § 552(b) (4) (1970).

<sup>18</sup> See *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *Consumers' Union v. Veterans Admin.*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (1971). *Grumman Aircraft* emphasized that although agencies could not make information confidential by merely passing it around among themselves, information in the hands of one agency which was deemed "confidential" would not lose its immunity from disclosure merely because it had been put into the hands of another agency. 425 F.2d at 582.

The Attorney General of the United States has stated that subsection (b) (4) should apply to information coming from the public at large, from a particular person, or from within a government agency. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 34 (June 1967) [hereinafter cited as MEMORANDUM]. But the *Attorney General's Memorandum* generally reflects the government agencies' bias toward nondisclosure. See Davis 761. The Attorney General's broad interpretation has been rejected by the courts. See *Consumers' Union* and *Grumman Aircraft*, *supra*.

<sup>19</sup> Some courts and commentators asserted during the first few years of the Act's operation that this last category of exempted information should include as well noncommercial or nonfinancial information that is privileged or confidential. See, e.g., *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D. Puerto Rico 1967) (investigatory file on unfair labor practices held within sweep of (b) (4)); MEMORANDUM 34; Note, *Freedom of Information*, 56 Geo. L. J. 18, 35 (1967). However, at present the consensus of judicial opinion is that exemption (4) applies only to (1) trade secrets or (2) information which is (a) commercial or financial, and (b) privileged or confidential. See *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971); *National Parks & Conservation Ass'n v. Morton*, 351 F. Supp. 404, 406 (D.D.C. 1972); Davis 787; *Steward & Ward, F.T.C. Discovery: Depositions, The Freedom of Information Act and Confidential Informants*, 37 ANTITRUST L.J. 248, 254 (1967).

<sup>20</sup> A "trade secret" has been defined in fairly precise judicial terms as "an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are

which it has obtained should be deemed "confidential," the analysis becomes more delicate. "Confidentiality" is a broad term, subject to varying interpretations.<sup>21</sup> Therefore, in construing that term in the context of exemption (4), it is important that the courts restrict its meaning in a manner consistent with the broad disclosure purposes of the Freedom of Information Act as a whole.<sup>22</sup>

#### IV

#### THE JUDICIAL SEARCH FOR A DEFINITION OF "CONFIDENTIALITY"

As has been previously noted, the overriding purpose of the Freedom of Information Act was to substitute for existing vague disclosure provisions, a general disclosure requirement for all government records, subject only to certain limited exceptions.<sup>23</sup> In light of both legislative intent<sup>24</sup> and statutory language,<sup>25</sup> it is clear that the nine exceptions to the Act's mandate of general disclosure should be construed as narrowly as is consistent with their purpose.<sup>26</sup> The purpose of exemption (4) is to protect from dis-

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trade commodities." *United States ex rel. Norwegian Nitrogen Products Co. v. United States Tariff Comm.*, 6 F.2d 491, 495 (D.C. Cir. 1925), *rev'd on other grounds*, 274 U.S. 106 (1927). See generally *RESTATEMENT OF TORTS* § 757, Comment *b* at 5 (1939). Whether particular information constitutes a "trade secret" within the meaning of subsection (b) (4), therefore, should not be a difficult judicial determination. For an example of a court's determination that certain information constituted "trade secrets" within the meaning of exemption (4) because it involved "explanations of the intricacies of production or testing" see *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1176 (D.D.C. 1973). It should be no less difficult for the courts to determine whether certain commercial or financial information is "privileged" so as to be subject to the (b) (4) exemption. The House and Senate reports on the Freedom of Information Act make it clear that information subject to such traditional evidentiary privileges as that of lawyer-client were intended to be covered by that subsection. See S. REP. 9; H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966) [hereinafter cited as H.R. REP.].

<sup>21</sup> "'Privileged' is the clearer and narrower of the two [terms] being generally used to cover judicially recognized evidentiary privileges. . . . 'Confidentiality,' not being a term of art, presents almost the other extreme." Note, *Freedom of Information*, 56 GEO. L. J. 18, 35-36 (1967).

<sup>22</sup> For a summary of the broad disclosure policies that underlie the Act see notes 10-13 and accompanying text *supra*.

<sup>23</sup> See notes 13-16 and accompanying text *supra*.

<sup>24</sup> See note 14 and accompanying text *supra*.

<sup>25</sup> See 5 U.S.C. § 552(c) (1970); note 13 and accompanying text *supra*.

<sup>26</sup> The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

*Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

closure certain types of private commercial information which, if revealed, might subject an individual to financial or personal embarrassment.<sup>27</sup> By offering protection to such information it was hoped that the exemption would "encourage individuals to provide [these] . . . kinds of confidential information to the Government."<sup>28</sup> Thus, the Congressional purposes underlying both the general disclosure provisions of the Act and this protective exemption can only be carried out, it is suggested, by a narrow interpretation of the exemption.<sup>29</sup>

Unfortunately, many courts have adopted a subjective definition of confidentiality which potentially could allow broader immunity of government materials from disclosure than is warranted by the purpose of exemption (4). This subjective definition, adopted by a majority of courts, was at first characterized by emphasis upon the expressed intent of the communicant—*i.e.*, the person initially providing the government with the information. If he had requested that his information not be disclosed, the court would consider this conclusive on the question of confidentiality.<sup>30</sup> A later variation of this test focused, perhaps somewhat more objectively, upon certain presumptions of what the communicant's intent concerning the confidentiality of his information ought to have been.<sup>31</sup> Both the principal test and its variation, however, are essentially subjective and carry a similar potential for allowing exemption (4) to overreach its boundaries and swallow some of the important disclosure policies of the Freedom of Information Act.

#### A. *The Initial Subjective Definition of Confidentiality*

Under the initial judicial approach to exemption (4), any commercial or financial information which might conceivably have been given to the government by an individual asking that the information not be disclosed to the public was deemed "confidential."<sup>32</sup> This broad definition of confidentiality apparently

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<sup>27</sup> See S. REP. 9; H.R. REP. 10. In the words of one court, the purpose of exemption (4) is "to prevent the unwarranted invasions of personal privacy which might be caused by the Government's indiscriminate release of confidential information." *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 (D.C. Cir. 1970).

<sup>28</sup> *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

<sup>29</sup> "This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose." *Id.*

<sup>30</sup> See notes 32-45 and accompanying text *infra*.

<sup>31</sup> See notes 46-54 and accompanying text *infra*.

<sup>32</sup> See *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D. Puerto Rico 1967); *Davis* 787-92.

received its impetus from the following language of the House Report on the Freedom of Information Act:

The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. . . . *It would 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>33</sup>

In the first years of the Act's operation a few courts and commentators seized upon this language of the House Report to justify exempting from disclosure any material given to the government with the understanding that it would be kept confidential.<sup>34</sup> The rationale for such a construction of exemption (4) was found not only in the abstract need of the government to honor its obligations but also in a more practical need to encourage individuals to reveal personal financial information to federal agencies. Such, for example, was the argument of the court in *Barceloneta Shoe Corp. v. Compton*,<sup>35</sup> where statements of persons "given in confidence"<sup>36</sup> to agents of the National Labor Relations Board investigating unfair labor practices were exempted from disclosure.<sup>37</sup> Also, in *The Tobacco Institute v. FTC*,<sup>38</sup> a demand for the disclosure of the names

<sup>33</sup> H.R. REP. 10 (emphasis added).

<sup>34</sup> See, e.g., *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D. Puerto Rico 1967). In *Benson v. General Services Admin.*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969), an appraisal report concerning certain property involved in a tax dispute was deemed not subject to exemption (4). The court then added as dictum: "[T]he exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential." 289 F. Supp. at 594. In affirming the decision a year later, the Court of Appeals for the Ninth Circuit approved this dictum. 415 F.2d at 881.

<sup>35</sup> 271 F. Supp. 591 (D. Puerto Rico 1967).

<sup>36</sup> *Id.* at 594.

<sup>37</sup> After emphasizing that the persons from whom the information had been obtained had asked the government investigators that it be kept confidential, the court said:

The reasons urged by the Plaintiffs to support their request for the production of these documents prior to the Board hearing are outweighed by the reasons urged by the Defendant for withholding the documents at this time. It cannot be denied that if disclosure . . . is allowed, persons interviewed by Board agents in future investigations will not be as cooperative as they are now if they know that the information they give to the Board agents would be subject to public disclosure. . . . The hampering effect which this would have upon the Board's investigations is obvious.

*Id.*

<sup>38</sup> Civ. No. 3035-67 (D.D.C., Apr. 11, 1968).



and addresses of persons who had received questionnaires concerning the Federal Cigarette Labeling and Advertising Act was met by an opinion from the bench exempting from disclosure any questionnaires returned with the proviso that they not be made public.<sup>39</sup>

Courts construing exemption (4) to cover any information whose communication to the government was accompanied by an assertion of confidentiality reached a result both insufficiently supported by legislative history<sup>40</sup> and contrary to the plain wording and purpose of the Freedom of Information Act.<sup>41</sup> Under this initial construction of exemption (4) an agency's mere assertion of its promise of confidentiality was considered sufficient to justify withholding the information in question from the public.<sup>42</sup> This broad construction gave government agencies, rather than the courts, discretion to decide what information should be exempted from disclosure under the Act.<sup>43</sup> As a result of using the communicant's subjective intent as the benchmark of "confidentiality," the courts expanded the exemption's reach to an extent beyond that intended by Congress.<sup>44</sup> As a consequence, the broad disclosure policy of the Act was circumvented.<sup>45</sup>

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<sup>39</sup> This case is interesting not only for its broad construction of confidentiality but also for its possible interpretation of exemption (4) as applying to noncommercial or nonfinancial information. Such an interpretation has now been almost universally discredited. See note 19 and accompanying text *supra*.

<sup>40</sup> Although the House Report on the Freedom of Information Act lends support to this broad construction of exemption (4), the Report is considered misleading in light of the statutory language. See Davis 763.

<sup>41</sup> The broad purpose of the Act is to establish a general requirement for the disclosure of all government records that do not fall within certain limited exempt categories. See note 8 *supra*. The "specificity" requirement for exemption expressed in section (c) reinforces this purpose. See notes 14-16 and accompanying text *supra*.

<sup>42</sup> As one commentator viewed the broad construction of exemption (4) initially adopted by some courts,

[T]he agency, within the indeterminate limits of good faith, can withhold anything it desires by simply alleging a promise of or reason for confidentiality. As such, this is one of the greatest loopholes in the bill. . . . [I]ndiscriminate withholding of all commercial and financial information would not only frustrate the reason for the Act but would clothe some of the largest and most important agencies in almost total secrecy.

Note, *Freedom of Information*, 56 GEO. L.J. 18, 37 (1967).

<sup>43</sup> One of the purposes of the Freedom of Information Act was to allow the courts, rather than the agencies, to exercise such discretion. See note 7 and accompanying text *supra*.

<sup>44</sup> The purposes of exemption (4) are to protect from disclosure certain types of private commercial or financial information whose revelation might prove harmful to the individual from whom it was obtained, thereby encouraging citizens to voluntarily supply such information to the federal government. See notes 27-29 and accompanying text *supra*. These purposes can be realized by a more objective and limited definition of "confidential information" which places greater emphasis upon the general public interest in disclosure. See notes 102-05 and accompanying text *infra*.

<sup>45</sup> The Freedom of Information Act was designed to promote greater disclosure of

### B. *Variations on the Theme*

Judicial recognition of the inadequacy of the initial construction of exemption (4) was not long in coming. As the courts became more experienced in balancing the interests of confidentiality and disclosure under the Freedom of Information Act, they became aware of the need to adopt a more objective interpretation of the exemption.<sup>46</sup> This awareness sparked the adoption by most courts of a new test of confidentiality which relied less upon the expressed intent of the communicant. Confidential information, under this "new" test, was deemed to include any matters which a communicant, in the ordinary course of events, would not be *expected* to make public.<sup>47</sup> As did the earlier construction of the exemption, this new approach to subsection (b) (4) found support in legislative history—this time in the Senate Report on the Freedom of Information Act:

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>48</sup>

In equating confidential information with matters which an individual would not normally disclose, the courts ostensibly took an important step toward a more objective interpretation of exemption (4). This new judicial approach at least focused upon the nature of the information which the communicant had revealed to an agency. It thus forced the courts to consider the substance of that information before deciding whether it was of the type which a communicant would not want to have disclosed to the public. In *Sterling Drug, Inc. v. FTC*,<sup>49</sup> for example, data on costs of production, amounts of sales of certain products, profits made in particular markets, and the exact amounts of bids submitted to a corporation on a closed basis were all exempted from disclosure. In *National Parks & Conservation Association v. Morton*,<sup>50</sup> exemption (4) was held to cover similar business information including statistics

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government information by transferring from federal agencies to the federal judiciary the discretion to determine, in borderline cases, what information ought to be revealed to, or concealed from, the public. See S. REP. 5.

<sup>46</sup> Compare *Benson v. General Services Admin.*, 289 F. Supp. 590 (W.D. Wash. 1968) with *General Services Admin. v. Benson*, 415 F.2d 878 (9th Cir. 1969) (same case on appeal).

<sup>47</sup> See, e.g., *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971).

<sup>48</sup> S. REP. 9 (emphasis added).

<sup>49</sup> 450 F.2d 698 (D.C. Cir. 1971).

<sup>50</sup> 351 F. Supp. 404 (D.D.C. 1972).

on sales, inventory, and salary and security liabilities. Although both decisions could have been justified on the ground that such statistics could be used by competitors to a businessman's detriment, each court held that the information should have been exempted from disclosure because it "would customarily not be released to the public by the person from whom it was obtained."<sup>51</sup> Such vague rationales leave open the question of whether the information was being saved by the courts from disclosure merely because of a communicant's subjective wish that it remain confidential or on the broader basis that the revelation of the information would bring to the communicant objective business harm.

This "new" test of confidentiality possesses defects similar to those which encumbered the original judicial construction of exemption (4), for it carries with it the same potential for defining "confidential information" in terms of a communicant's subjective intent.<sup>52</sup> Under this standard matters which arguably ought to be revealed to the public may be too easily shielded from revelation. It is difficult to imagine borderline questions of disclosure where a court would find a communicant more likely than not to reveal his private business information to the public.<sup>53</sup> By so allowing a communicant's own perception—or presumed perception—of the confidential nature of his information to be determinative of the government's disclosure policy toward that information, the courts are not only abdicating their responsibility to lay down objective guidelines for a federal information policy; they are also allowing exemption (4) to subvert the broad purpose of the Freedom of Information Act to promote full disclosure of all appropriate government information.<sup>54</sup>

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<sup>51</sup> 351 F. Supp. at 406; 450 F.2d at 709.

<sup>52</sup> While this [new] standard is more objective than a blanket exemption for anything labelled "confidential" by the Board, the test nevertheless does require that the judge decide whether the [communicant] would reveal the information to the public. The answer to that subjective inquiry may depend, *inter alia*, upon whether the [communicant] is . . . a corporation, proprietorship, or partnership. Alternatively, a court could apply some variation of the "reasonable man" standard—that is, would a reasonable person or enterprise reveal this information to the public.

Note, *Developments Under the Freedom of Information Act*, 1973 DUKE L.J. 178, 195 n. 123.

<sup>53</sup> It can quite naturally be assumed that when in doubt about the adverse effect which the revelation of financial information will have upon their business, most communicants would not customarily reveal such information to the public. It would be easy for courts or government agencies biased against a liberal disclosure policy to defeat it by employing such a standard. For a description of how the courts have done so see notes 32-52 and accompanying text *supra*. For a description of how some agencies have done so see notes 57-59 and accompanying text *infra*.

<sup>54</sup> See notes 4-16 and accompanying text *supra*.

Missing from this second judicial construction of "confidentiality" is a consideration of the *reasonableness* of a source's desire to withhold information from the public. There may be good reasons for compelling the revelation of certain manufacturing or sales statistics if their disclosure would not substantially prejudice a businessman's competitive position.<sup>55</sup> Any court, however, which confined itself to the determination of whether a communicant would customarily reveal such matters to the public might completely miss this consideration and mechanically exempt such information from disclosure.

The dangers of a simplistic and subjective construction of exemption (4) are emphasized by the actual disclosure practices of some government agencies. The Attorney General's Memorandum on the Freedom of Information Act, for example, advises federal agencies that the exemption covers any material not likely to be disclosed by a communicant. The agencies, the Memorandum continues, may therefore "find it appropriate to consult with the person who provided the information before deciding whether the exemption applies."<sup>56</sup> Such a procedure provides government agencies with obvious encouragement to circumvent the broad disclosure policies of the Act by merely alleging their sources' desires for confidentiality. Further, it may be assumed that agencies are not shy about implying their "constituents'" desires for confidentiality.<sup>57</sup> If permitted to use such implied desires as a rationale in support of nondisclosure, government agencies would, in effect, be reverting to the original and most subjective judicial construction of exemption (4)—a construction which allowed the

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<sup>55</sup> The revelation of sales, inventory, market, and customer statistics may not always prejudice a businessman in a significant way. Such information may already be available to his competitors as a result of their own investigations or because such information is general knowledge within the industry. Also, such statistical information may not always be of the kind which can be effectively utilized by a businessman's competitors. Thus, the degree to which a businessman will actually be prejudiced by the revelation of private sales and market information should be open to judicial examination before any determination is made that such matters should be exempted from disclosure under subsection (b) (4). This type of examination is avoided when the courts assume that certain types of business statistics should be exempted from disclosure merely because communicants would not customarily wish to reveal such information to their competitors.

<sup>56</sup> MEMORANDUM 34.

<sup>57</sup> [T]he agencies are willing to accept or even imply a desire for confidentiality without considering the countervailing interest which the public has in disclosure. When documents have been made available to an agency, but are not of public knowledge, it is difficult to imagine a situation in which the communicant would want the documents made public.

Note, *The 1966 Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 641, 682 (1969).

withholding of any information allegedly given to the government with the understanding that it be kept confidential.<sup>58</sup>

In recently promulgated regulations, various government agencies have set forth disclosure policies which use this broad definition of confidentiality to justify withholding from the public information to which it is arguably entitled. The Department of the Air Force, for example, exempts from disclosure any information it has received under the express or implied understanding that it will remain confidential.<sup>59</sup> The Commission on Civil Rights exempts from public revelation not only any data for which a communicant has requested confidential status but also any information which may support allegations of wrongdoing "by certain persons or entities."<sup>60</sup> That such a broad discretion to withhold information is presently being exercised by government agencies is but one indication of the dangers of the subjective approach to exemption (4) now followed by a majority of courts.<sup>61</sup>

### C. *Judicial Inclination Toward a New Definition of Confidentiality*

Aware of the dangers of a completely subjective construction of exemption (4), some courts have applied a "reasonable man" standard to the exemption.<sup>62</sup> Under this test, the courts consider whether a "reasonable man," rather than the particular communicant whose information is being sought, would reveal the material in question to the public. It is presumed that a "reasonable man" would only withhold that commercial or financial information which would significantly prejudice his business interests.

Thus, in *Bristol-Myers Co. v. FTC*,<sup>63</sup> the Court of Appeals for

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<sup>58</sup> See notes 32-39 and accompanying text *supra*.

<sup>59</sup> 32 C.F.R. § 806.5(d) (1973).

<sup>60</sup> 45 C.F.R. § 704.1 (f) (2) (1973). Information is deemed to be confidential under these regulations when it is "reasonable to conclude that the communicant would not wish . . . the substance of the communication disclosed to the public." *Id.* And such a conclusion is deemed to be reasonable merely when there is involved "a communication alleging, or supporting, an allegation of, the commission of wrongs by certain persons or entities." *Id.* The Regulations of the Department of Health, Education and Welfare exhibit somewhat more refinement. They recognize an objective test of confidentiality in addition to the subjective approach traditionally followed by the courts. Subjectively, the regulations exempt from disclosure any information obtained by the Department "in reliance upon a provision for confidentiality authorized by applicable statute." 45 C.F.R. § 5.71 (c) (1973). But the regulations also include, as a more objective test of confidentiality, a determination of "the type and degree of risk of financial injury to be expected if disclosure occurs." 45 C.F.R. § 5.71 (b) (3) (1973).

<sup>61</sup> See, e.g., *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *National Parks & Conservation Ass'n v. Morton*, 351 F. Supp. 404 (D.D.C. 1972); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D. Puerto Rico 1967).

<sup>62</sup> See cases cited in notes 63-68 *infra*.

<sup>63</sup> 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

the District of Columbia was dissatisfied with a district court determination that FTC records concerning the characteristics of certain pain relieving drugs should be exempted from disclosure merely because those records contained information that particular drug manufacturers "[did] not wish to have disclosed to their competitors."<sup>64</sup> In remanding for a more detailed explanation of why exemption (4) should be applied to the FTC records, the Court of Appeals emphasized the district court's responsibility to determine the reasonableness, in light of all surrounding circumstances, of the assertion of confidentiality.<sup>65</sup> In *M. A. Schapiro & Co. v. SEC*,<sup>66</sup> a district court concluded that various communicants' interests in the confidentiality of an SEC staff study of national security exchanges were not strong enough to bring the study within exemption (4), and added:

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>67</sup>

Finally, in *Fisher v. Renegotiation Board*,<sup>68</sup> a district court applied the "reasonable man" standard in concluding that certain production, pricing, and sales statistics should be deemed "confidential" under exemption (4). Not content to hold simply that the communicant would not have revealed such information to the public, the court engaged in a detailed analysis of the reasonableness of the communicant's claim of confidentiality in light of the competitive business disadvantages he might suffer if the information in question were ever disclosed.<sup>69</sup>

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<sup>64</sup> *Bristol-Myers Co. v. FTC*, 284 F. Supp. 745, 747 (1968).

<sup>65</sup> [Exemption (4)] serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers. Nevertheless, the statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny. The District Court in the first instance has the responsibility of determining the validity and extent of the claim, and insuring that the exemption is strictly construed in light of the legislative intent. . . . These judgments are possible only after careful consideration of the particular documents in question, and it is for this detailed analysis that we remand.  
424 F.2d at 938-39.

<sup>66</sup> 339 F. Supp. 467 (D.D.C. 1972).

<sup>67</sup> 339 F. Supp. at 471 (emphasis added).

<sup>68</sup> 355 F. Supp. 1171 (D.D.C. 1973).

<sup>69</sup> The forms contain financial information from a person (the corporation) which the contractor would not reveal to the public and which is, therefore, confidential. The contractor's claim of confidentiality is reasonable because knowledge of production, overhead and operating costs, levels of profit, sales and pricing data, as well as other facts included in the Forms would greatly assist those companies in competition with the contractor. In addition, defense contractors would be put at a competitive disadvantage in purely commercial markets where they compete with contractors not required to disclose. Furthermore, public availability of the Stan-

The *Fisher* court's objective analysis is a sound approach to exemption (4) cases and may anticipate the future direction of judicial thinking in this area. A court concerned with the reasonableness of an assertion of confidentiality should consider the actual consequences of disclosure upon a communicant, rather than merely his subjective intent to keep certain information secret. Information then would be exempted from disclosure not merely because a communicant fears its revelation or because it includes private business statistics,<sup>70</sup> but because its revelation would carry consequences so harmful to the communicant that they would outweigh the potential benefits of full disclosure.<sup>71</sup> Only such an objective definition of confidentiality can guarantee that the disclosure requirements of the Act will not be swallowed up by one of its exceptions.

#### D. *The Need for a New Approach*

If the policies of the Freedom of Information Act are to be adequately fulfilled, a majority of courts must recognize the need for an objective approach to exemption (4). The many courts still adhering to the original subjective construction of exemption (4),<sup>72</sup> or to its later variation,<sup>73</sup> must switch the focus of their considera-

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standard Forms of Contractor's Report may reduce the number of contractors willing to compete for defense contracts, especially those primarily or even partially in commercial markets; these contractors would have to choose between not competing for a contract covered by the Renegotiation Act and filing forms publicly revealing confidential business information.

355 F. Supp. at 1175.

<sup>70</sup> Both the Senate and House Reports on the Freedom of Information Act mention that profit, sales, and marketing statistics are covered by exemption (4) (*see* notes 33 & 48 and accompanying text *supra*), and the courts have almost universally viewed such information as justifying a *per se* application of the exemption. *See* notes 49-51 and accompanying text *supra*.

<sup>71</sup> Not all of the refinements of the "reasonable man" approach to exemption (4) are immediately apparent. As an outgrowth of that approach, several courts, after initially determining that information was "independently confidential" by reason of the business harm which its revelation would bring to a communicant, have nevertheless ordered disclosure. To avoid the "breach of confidentiality" which full disclosure might have entailed, the courts have directed that the information be made public without any "identifying details" that would indicate which communicant's business statistics were being disclosed. *See, e.g., Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970) (striking "identifying details" connecting contractors to cost and profit data solves confidentiality problem). *But see Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D.D.C. 1973) (striking "identifying details" would not solve confidentiality problem).

This practice of striking identifying details supplements the "reasonable man" approach by allowing disclosure of information which otherwise would be withheld from public scrutiny because of potential prejudice to a communicant.

<sup>72</sup> *See* notes 32-45 and accompanying text *supra*.

<sup>73</sup> *See* notes 46-54 and accompanying text *supra*.

tion from the communicant's intent to the more objective question of what harmful business consequences may befall a communicant as a result of disclosure. Indeed, even those courts which have recognized the need for greater objectivity through their adoption of the "reasonable man" approach to exemption (4)<sup>74</sup> must be more explicit about their view of confidentiality in order to make it clear that only information which could reasonably be expected to *substantially* harm a communicant's business interests should be covered by the exemption.

It may be argued that such a revision of judicial theory is not necessary because even under the current subjective tests of confidentiality the courts have generally exempted from disclosure only those special types of private statistics whose revelation would cause substantial business harm to the communicant.<sup>75</sup> However, it is by no means apparent from the cases using the older tests that other less prejudicial types of information were not also shielded by the courts from disclosure.<sup>76</sup> Even had the courts confined themselves to shielding these special types of business statistics from scrutiny, a revision in judicial theory would be appropriate, for keeping a businessman's sales, profit, cost, and production data from the public may not always accord with the policies of the Freedom of Information Act.<sup>77</sup>

Moreover, regardless of the results in prior cases arising under exemption (4), serious potential for abuse does exist under the present judicial constructions of that exemption. Those constructions give federal agencies too broad a license to independently decide, in arguable cases, to what information the public is, or is not, entitled.<sup>78</sup> In allowing certain business data to be exempted from disclosure merely because a communicant would not customarily reveal it to the public, the courts have in effect created a wider arena for government secrecy than existed under the old disclosure provisions of the Administrative Procedure Act.<sup>79</sup> Under the Administrative Procedure Act federal agencies at least had to justify their withholding of such data by showing some "good

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<sup>74</sup> See notes 63-69 and accompanying text *supra*.

<sup>75</sup> See note 70 *supra*.

<sup>76</sup> See, e.g., *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D. Puerto Rico 1967) (statements given in confidence to NLRB during unfair labor practices investigation exempted from disclosure).

<sup>77</sup> There may be situations in which such data could be released to the public without a communicant suffering appreciable harm: for example, when the data is commonly known within the industry. See note 55 and accompanying text *supra*.

<sup>78</sup> See notes 57-61 and accompanying text *supra*.

<sup>79</sup> Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.



cause" for their decision.<sup>80</sup> Thus, the present ambiguous judicial interpretations of exemption (4), although at times properly resolving the conflict between disclosure and confidentiality, carry with them a potential for abuse great enough to require a significant change in judicial construction of the statute.

## V

### SUGGESTIONS FOR A MORE EFFECTIVE JUDICIAL CONSTRUCTION OF EXEMPTION (4)

The few courts that have applied the more strict "reasonable man" approach to exemption (4)<sup>81</sup> have recognized that the crucial element in any effective definition of "confidentiality" under the Freedom of Information Act is the objective determination that substantial injury in fact would flow from the disclosure of certain types of business information.<sup>82</sup> A federal agency attempting to withhold from the public any commercial or financial information on the grounds that it is confidential should have the burden of proving that such information, if revealed, would substantially prejudice specific business interests of the communicant.<sup>83</sup> Placing

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<sup>80</sup> See, e.g., *Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D.D.C. 1963), where confidential status was given to certain business data under the old Administrative Procedure Act only after the court had assured itself that the plaintiff had shown "good cause" for the continued secrecy of the data:

[A]ccurate information as to a competitor's success or failure with a particular product, or in a particular market area may save untold dollars in research, development, and marketing, and allow a direct benefit from the expense and experience of the competitor. Information as to a competitor's declining sales or financial strength, or the number of service and repair personnel in an area, is a potent weapon in diverting customers to one's own product or service.

*Id.* at 1022. The court then concluded that such financial data should be exempted from disclosure under the Administrative Procedure Act because the plaintiff had shown that its revelation would cause "clearly defined and serious injury to his business." *Id.* at 1023. The public disclosure policies of the Freedom of Information Act are supposedly broader than under the Administrative Procedure Act. Accordingly, the burden in proving confidentiality should be at least as onerous under the new Act as it was under the former statute.

<sup>81</sup> See notes 63-69 and accompanying text *supra*.

<sup>82</sup> See *id.*

<sup>83</sup> Exemption (4), unlike other sections of the Freedom of Information Act, balances an individual's interest in privacy, rather than the government's interest in secrecy, against the public's interest in disclosure. It can thus be argued that since rights of individual citizens hang in the balance, greater weight should be accorded the privacy interests recognized by exemption (4). It is the thesis of this Note, however, that the general disclosure policies of the Freedom of Information Act justify placing the burden of proving confidentiality upon the party defending a communicant's right of privacy—*i.e.*, the relevant federal agency. The agency's opportunity to convince a court of the adverse business consequences which may flow from disclosure should sufficiently protect a communicant's right of privacy, especially

the burden of proof upon the agencies is mandated by the specific wording of the Act.<sup>84</sup> That such a burden should include the proof of substantial business detriment is necessitated by the policies of the Freedom of Information Act, under which all government information not within certain limited exceptions must be fully disclosed to the public.<sup>85</sup>

If the disclosure policies of the Act are not to be circumscribed, federal agencies must be denied the discretion to decide in borderline cases what types of business information should be deemed "confidential."<sup>86</sup> Their discretion in this regard can only be appropriately limited by requiring them to show objectively that *significant* harmful consequences would be likely to result from the disclosure of certain commercial or financial information.<sup>87</sup> Otherwise, the agencies will be free to continue their present expansion of exemption (4) in a manner destructive of the disclosure policies of the Freedom of Information Act. For a definition of confidentiality requiring only a showing of the likelihood of *some* harm allows an agency's mere allegation of a communicant's potential business detriment to defeat any demands for disclosure.

The Freedom of Information Act was drafted to allow the judiciary, rather than individual communicants or agency heads, to determine federal information disclosure policies.<sup>88</sup> The new ob-

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under an objective construction of exemption (4). See notes 102-05 and accompanying text *infra*.

<sup>84</sup> 5 U.S.C. § 552(a) (3) (Supp. II, 1972). See note 7 and accompanying text *supra*.

Moreover, the general scheme of the Freedom of Information Act not only suggests the need for placing the burden of proving substantial harm upon federal agencies; it makes such a requirement imperative. The provision that information may be withheld from the public only as "specifically stated" in the Act (5 U.S.C. § 552(c) (1970)) was intended to guarantee that only the narrowest exceptions would be made to the general disclosure requirements of the Act. This specificity requirement, although denying to the courts the power to expand the scope of the Act's nine exceptions by judicial construction (*see* Getman v. NLRB, 450 F.2d 670, 679 (D.C. Cir. 1971)), was designed to encourage the courts to "follow their accustomed habits in *narrowing* the ascertainable meaning of the words of an exemption." Davis 783-84. Exemption (4) can only remain as narrow and as specific as was contemplated by the general scheme of the Freedom of Information Act if the courts faithfully adhere to the "substantial harm" test.

<sup>85</sup> See notes 14-16 and accompanying text *supra*.

<sup>86</sup> Granting federal agencies such discretion under the present subjective construction of exemption (4) has resulted in significant encroachments upon the disclosure policies of the Act. See notes 57-61 and accompanying text *supra*.

<sup>87</sup> Such a showing of the likelihood of harmful consequences was a prerequisite to exempting information from disclosure even under the generally more restrictive Administrative Procedure Act. See notes 79 & 80 and accompanying text *supra*. No less a showing should be required to support exemption under the supposedly more liberal Freedom of Information Act.

<sup>88</sup> This intent is revealed by the Act's specific provision directing federal district courts

jective construction of exemption (4) will vest such authority in the courts. It will be their task to draw the line between disclosure likely to cause "permissible harm," in which case revelation of a communicant's business information would be appropriate, and disclosure likely to cause "substantial harm," in which case such information should remain confidential. A complete review by the courts of the appropriateness of exempting certain information from disclosure will ensure the type of objectivity in federal information policy that was contemplated by the Freedom of Information Act.<sup>89</sup> The question of whether certain business data ought to be disclosed will be determined not by a communicant's or an agency's subjective intent, but by an objective judicial decision. As the contours of federal information policies are made more definite by judicial decisions consistently finding certain types of business information to be either "confidential" or "disclosable," both communicants and federal agencies will have clearer guidelines by which to plan their conduct.<sup>90</sup>

The judiciary's task of drawing lines between "substantial" and "permissible" harm will not be an easy one. It is the very function of courts, however, to draw such distinctions. Routinely, courts resolve questions of law that pose equally delicate problems of what priorities should be given to competing rights.<sup>91</sup> The courts that grapple with such problems daily should be able to resolve the tension inherent in exemption (4) in an objective, fair, and predictable manner.

It is not difficult to imagine the form which such a judicial resolution might take. Any data which tends to reveal a company's distinctive, hitherto unpublicized manufacturing processes or methods of operation should be deemed "confidential" by the courts. The pairing of "trade secrets" with "commercial or financial information . . . [which is] confidential" within exemption (4) was not coincidental. Through this correspondence the Congress

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to determine "de novo" any disputed questions of disclosure by federal agencies. 5 U.S.C. § 552(a) (3) (Supp. II, 1972).

<sup>89</sup> "[O]n balance it seems that the courts should make the ultimate decision, since they can make a relatively objective determination . . ." 80 HARV. L. REV. 909, 914 (1967).

<sup>90</sup> The Senate Report on the Freedom of Information Act emphasized the importance of providing agency personnel with "definitive guidelines in setting information policies." S. REP. 3.

<sup>91</sup> See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972) (balancing right of free press against society's right to pursue and convict criminals); *United States v. O'Brien*, 391 U.S. 367 (1968) (balancing right of free speech against need for efficient government operation); *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (balancing teachers' associational rights against state's right to investigate integrity of its public servants).

hoped to save from disclosure not only that business data which met the technical definition of trade secrets, but all commercial information whose revelation would give competitors a helpful glimpse of the distinctive inner workings of their "adversaries' " businesses.<sup>92</sup> The continued secrecy of such information is justified by the inequity of allowing a competitor to gain an undeserved advantage through free access to special business processes developed by the communicant.

Certain business data frequently deemed by the courts to fall within exemption (4)—although placed there by a potentially abusive construction of the exemption<sup>93</sup>—have included details of competitors' unpublicized business information and processes, made distinctive—and therefore confidential—by the long period during which they were developed. Customer lists, business sales statistics, inventory details, and manufacturing processes thus have been declared exempt from disclosure not only in the Senate and House Reports on the Freedom of Information Act<sup>94</sup> but also in several judicial decisions.<sup>95</sup> Pricing statistics,<sup>96</sup> product designs,<sup>97</sup> intricacies of testing,<sup>98</sup> and costs of production, overhead and general operation,<sup>99</sup> although not specifically mentioned in either the Senate or House Reports, have also been considered confidential in decisions which have recognized the need to guard certain areas of inner corporate life from public scrutiny. Such data should be considered confidential under the new construction of exemption (4), for "substantial harm" could befall a businessman if his competitors were to learn of the specific techniques which he uses in his business.<sup>100</sup>

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<sup>92</sup> A "trade secret" is an unpatented, but nevertheless secret, process or device whose confidentiality is crucial to a businessman for the advantage it gives him over his competitors. See note 20 *supra*. In exemption (4) the pairing of confidential "commercial or financial information" with "trade secrets" strongly suggests the congressional purpose to save from disclosure commercial information whose strategic importance is similar to that of trade secrets.

<sup>93</sup> See notes 32-54 and accompanying text *supra*.

<sup>94</sup> See H.R. REP. 10; S. REP. 9.

<sup>95</sup> See, e.g., *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971) (exempting customer lists and sales statistics); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D.D.C. 1973) (manufacturing processes); *National Parks & Conservation Ass'n v. Morton*, 351 F. Supp. 404 (D.D.C. 1972) (inventory, sales, and profit details).

<sup>96</sup> See *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971).

<sup>97</sup> See *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*. 400 U.S. 824 (1970).

<sup>98</sup> See *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D.D.C. 1973).

<sup>99</sup> See *id.*

<sup>100</sup> A competitor's access to information describing a communicant's business methods may prove detrimental to the communicant in a number of ways. For example, gaining such

Some business information, however, carries significantly less potential for harm than the data mentioned above. A company's assets and liabilities, its net profits and receipts, and the salaries and bonuses it pays to its personnel are examples of information whose revelation should not, under ordinary circumstances, substantially prejudice a businessman's competitive interests. Any harm resulting from disclosure of such information is likely, under the new objective definition of confidentiality, to be considered "permissible" at worst. Moreover, this information is similar to that routinely released from corporate files for inclusion in year-end balance sheets or for use in labor-management negotiations.<sup>101</sup> Such information can be publicized when, as in most cases, it does not reveal the special manufacturing processes, business techniques, or sales and cost statistics which are unique to a business and which, as a consequence, are especially useful to competitors.

Not all of the business information mentioned above lends itself to neat categorization under the labels "substantial" or "permissible" harm. Records of a company's net receipts, for example, disclosure of which would not normally be considered prejudicial, may, in certain situations, reveal details of sales operations which could prove to be substantially prejudicial in the hands of particular competitors. Under an objective construction of exemption (4), however, the courts will not be straitjacketed by any strict categorization of what information should be "exempt" and what information should be "disclosable"; instead, they will be able to fashion a federal information policy tailored to the actual harm which a communicant would be likely to suffer in a given fact situation.

Under an objective construction of exemption (4) communicants need not fear the uncertainties of judicial balancing of the public interest in disclosure against their assertions of confidentiality.<sup>102</sup> Regardless of any alleged public interest in disclos-

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knowledge may enable a competitor to copy special manufacturing processes or techniques which had previously given the communicant an advantage. Or, a competitor might use descriptive statistics of the communicant's business (*e.g.*, sales, costs, pricing, inventory, customer, and profit data) to attack the communicant's weak spots. Knowledge of another's cost statistics, for example, might enable a competitor to gain advantage by anticipating changes and adjusting his own output or prices accordingly.

<sup>101</sup> *See, e.g.*, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (company not bargaining in good faith when it refused to disclose to union certain financial data).

<sup>102</sup> Indeed, the Freedom of Information Act was designed to preclude case-by-case balancing of interests in disclosure against interests in confidentiality. Under the old Administrative Procedure Act it had been discovered that such balancing provided a wide statutory loophole for the continued secrecy of government information. *See* notes 10-12 and accompanying text *supra*. A government agency could assert, in opposition to a demand for the disclosure of information in its hands, that the "public interest," "good cause found,"

ure, business information in the hands of government agencies will remain confidential if its revelation would cause substantial harm to a communicant's business interests.<sup>103</sup> Only if no such appreciable harm appears probable will a communicant's commercial or financial information be released to the public.

Exemption (4) was designed to protect communicants' interests in privacy—more particularly, their interest in maintaining the competitive position of their businesses.<sup>104</sup> By so protecting communicants, it was hoped that the exemption would encourage businessmen to more freely communicate financial information to the government to assist federal agencies in making policy decisions.<sup>105</sup> Such goals will be furthered by the opportunity given to communicants under the new construction of the exemption to make known to a court any disadvantages they might suffer through the disclosure of certain commercial or financial information. Thus, a more objective definition of confidentiality can adequately protect the interests of communicants in privacy while furthering the disclosure policies in the Freedom of Information Act.

As the courts become more practiced in applying the new objective construction of exemption (4), communicants should become more confident in the equity of the new test and more aware of what types of information will be considered confidential and what types will be considered disclosable. They should be more willing, therefore, to release private commercial or financial infor-

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or the absence of any party "properly and directly concerned" required that the information in question not be disclosed. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238. Such rationales often allowed agencies to withhold arguably public information from disclosure when their interest in confidentiality appeared relatively slight. See H.R. REP. 4-6.

The Freedom of Information Act was designed to replace the balancing test of the old Administrative Procedure Act with a general disclosure requirement subject to nine specifically limited exemptions. See note 13 and accompanying text *supra*. By providing that any agency information not falling squarely within those nine exemptions be made available to "any person," the new Act made clear its purpose to insure that federal bureaus would no longer rationalize withholding information from the public by assertions that their own policies favoring confidentiality outweighed the public interest in disclosure. See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

Nevertheless, a few commentators have maintained that the meaning of ambiguous terms in the Act's nine exemptions (e.g., exemption (4)'s "confidentiality") should be determined by balancing the public's interest in disclosure against communicants' varying interests in privacy. See, e.g., Davis 783-84; Note, *Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 641, 665 n. 107 (1969); 80 HARV. L. REV. 909, 911 n.11 (1967).

<sup>103</sup> In the alternative, if such information can be released without "identifying details" in a manner that would prevent disclosure of the communicant's identity, it will be released. See note 71 *supra*.

<sup>104</sup> See *M. A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 470 (D.D.C. 1972).

<sup>105</sup> *Id.*

mation to the government. In this way, the communicants' interests in privacy will be reconciled with the Freedom of Information Act's dual policies of increased government access to private information and increased public access to government information.

### CONCLUSION

In exempting from disclosure "trade secrets and commercial or financial information . . . [that is] privileged or confidential"<sup>106</sup> subsection (b) (4) of the Freedom of Information Act raises special problems of interpretation. It is relatively easy for courts to determine whether certain information ought to be exempted from disclosure under that subsection as "trade secrets" or "privileged" information. It is more difficult to define the sweep of the term "confidential information" within the meaning of the exemption. Exemption (4)'s confidentiality requirement was designed to encourage the courts to objectively consider all relevant circumstances before concluding that certain commercial or financial information should or should not be exempted from disclosure. Unfortunately, in adopting a subjective test of confidentiality, the courts have surrendered to the agencies the judicial responsibility to objectively determine the appropriateness of disclosure in disputes arising under the Freedom of Information Act. In providing a loophole through which arguably public information could be exempted from disclosure by a mere assertion of a communicant's intent, the courts have contravened the Act's purpose of guaranteeing the fullest possible revelation of information in the hands of federal agencies.

Only a test of confidentiality which takes into account the real economic harm which disclosure may bring to a communicant can adequately guarantee objectivity, consistency, and a fair consideration of all relevant circumstances in judicial decisions under the Freedom of Information Act. Under such a test the general disclosure policies of the Act will receive the consideration they deserve, while the individual rights of privacy protected by the Act's exemptions will suffer no greater infringement than is justified by such overriding policies. Judicial decisions based upon this solid, objective test will give substance to the mandate of the Freedom of Information Act that only genuinely confidential commercial or financial information should be shielded from public scrutiny.

*Thomas A. Piraino, Jr.*

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<sup>106</sup> 5 U.S.C. § 552(b) (4) (1970).