REPORT IN SUPPORT OF RECOMMENDATION 82-1
(as published in Ad. L. Rev., Vol. 34, No. 2, Spring, 1982)

PROTECTING BUSINESS SECRETS UNDER THE FREEDOM OF INFORMATION ACT: MANAGING EXEMPTION 4

Russell B. Stevenson, Jr.*

I. INTRODUCTION

Since the 1974 amendments to the Freedom of Information Act (FOIA)[1] the use of the statute by private individuals and organizations to obtain information in the hands of federal agencies has grown rapidly.[2] One of the components of the increase in the number of FOIA requests has been a dramatic rise in the use of the Act by business to obtain information from the government submitted to it by other businesses. Indeed, the Act has spawned a mini-industry of firms whose business is the acquisition of information from the government, often information furnished to the government by business.[3] As one commentator put it, "It is widely admitted that the statute has become a lawful tool of industrial espionage."[4] Although the pejorative implica-

*Professor of Law, National Law Center, George Washington University. This article is based on a study for the Administrative Conference of the United States.

[1]Pub. L. No. 93–502, 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552 (1976)).

[2]It is difficult to determine from the readily available statistics how great this growth is. The agency reports to Congress that are required by the Act, 5 U.S.C. § 552(d) (1976), often do not include the total number of requests received by an agency. The experience of the FDA, however, might be taken as representative. It received 13,000 FOIA requests in 1975 and 32,000 in 1979. FDA ANN. REP. FREEDOM OF INFORMATION ACT (1976); FDA ANN. REP. FREEDOM OF INFORMATION ACT (1980). The GAO estimated in 1979 that there were about 154,000 FOIA requests filed in 1975, 156,000 in 1976, and 177,000 in 1977. REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, AN INFORMED PUBLIC ASSURES THAT FEDERAL AGENCIES WILL BETTER COMPLY WITH FREEDOM OF INFORMATION/PRIVACY LAWS 22 (1979).

[3]*See* DUN'S REV., Oct. 1976, at 70.

[4]Note, *Protecting Confidential Business Information from Federal Agency Disclosure After* Chrysler Corp. v. Brown, 80 COLUM. L. REV. 109, 113 (1980).

tions of this statement are unwarranted—"industrial intelligence" would be a better term—it is certainly clear that business has made growing use of the Act.

As the use of the FOIA by business to obtain information submitted to government agencies by other businesses has grown, there has been, not surprisingly, a parallel increase in the concern of businesses that information that they furnish to the government will ultimately find its way into the hands of competitors. One manifestation of this concern is the growing number of so-called reverse-FOIA suits, actions brought against a government agency (in which an FOIA requester is often joined) to enjoin the release pursuant to an FOIA request of the submitter's information.[5] Of course the FOIA does not require that government agencies disclose business secrets that come into their possession. Among the exceptions to the general disclosure mandate of the Act is exemption 4,[6] which exempts most competitively sensitive business records from the Act's requirements. But there has been a great deal of criticism of the performance of federal agencies in protecting confidential business information, in particular of the manner in which they apply exemption 4. One of the major concerns of the critics seems to be that information submitted to the government in confidence is too often released pursuant to an FOIA request through inadvertence, because of a misapplication of the relevant legal standards, or because of a failure of the agency to provide the submitter an adequate opportunity to make its views on disclosure known or to protect its interest in some other way.

The purpose of this article is to explore possible changes in the practices and procedures used by federal agencies to resolve issues arising under exemption 4 of the FOIA that may facilitate the protection of private interests while maintaining the public purposes that Act seeks to implement.[7] It should be emphasized that the article is directed only at procedural questions and does not purport to examine in any detail the substance of exemption 4.

---

[5]*See generally* HOUSE COMM. ON GOVERNMENT OPERATIONS, FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA AND REVERSE-FOIA LAWSUITS, H.R. REP. NO. 95–1382, 95th Cong., 2d Sess. (1978) [hereinafter cited as HOUSE REPORT]; Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103 (1978); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587 (1977); Note, *supra* note 4.

[6]*See* 5 U.S.C. § 552(b) (1976).

[7]This was essentially the charge of the contract under which this study was performed.

Government agencies come into possession of private business information in a variety of ways. The governmental functions that seem to bring the largest amount of business information into the hands of federal agencies can be divided roughly into three categories: investigation and law enforcement, licensing, and procurement. As it would have been impossible in an article of the scope of this one to consider every agency that receives a substantial number of private business records, it was decided to select two or three agencies from each of these three areas and to focus on their practices and procedures. The agencies on which the study has principally focussed are, in the area of investigation and law enforcement, the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC); in the area of licensing, the Environmental Protection Agency (EPA) and the Food and Drug Administration (FDA); in the area of procurement, the Department of Defense (which has been broken down into the Departments of the Army, Navy, and Air Force) and the General Services Administration (GSA). The Consumer Product Safety Commission (CPSC) and the U.S. Department of Energy (DOE), neither of which falls neatly into the three categories described, have also been studied.

For each of these agencies, the author conducted interviews with several persons who have responsibilities under the FOIA. To the extent possible these persons included individuals at all of the relevant levels of the process. In many of the agencies studied, initial determinations under the Act, and sometimes even final determinations, are made in a large number of field or regional offices as well as in the central office of the agency. In such cases, the author attempted to interview one or two individuals in regional offices as well as talking to the relevant personnel in the central office of the agency. In addition to conducting interviews, the author studied internal instructions or directives relevant to exemption 4. Finally, in an effort to gather additional information about the manner in which exemption 4 presently functions in practice, the author caused a notice to be published in the *Federal Register* seeking information about instances in which it appeared that a business had suffered competitive harm as a result of the release of information under the Act.[8] In conjunction with that effort, the author also published a short article in the *Legal Times of Washington* in which the invitation in the *Federal Register* was repeated.[9]

[8]45 Fed. Reg. 70033 (Oct. 22, 1980).

[9]Stevenson, *FOIA Trade Secret Exemption: Are Problems Real?*, LEGAL TIMES OF WASHINGTON, Nov. 10, 1980, at 16.

The report that resulted from this study is divided into four parts. The first consists of a brief summary of the substantive law that has developed by way of interpretation of the standards of exemption 4. The second part is an effort, based on limited empirical evidence, to evaluate the extent to which the FOIA has resulted in competitive injury to business. The third part of the report is devoted to a critical discussion of the practices and procedures used by agencies to deal with requests that might implicate exemption 4. Finally, the last part considers the problems of administrative law raised by reverse-FOIA litigation.

II. AN OVERVIEW OF THE LAW GOVERNING THE RELEASE OF BUSINESS INFORMATION

A. The Fourth Exemption of the FOIA

The FOIA[10] was enacted in 1966 to increase public access to government documents, so as to promote a more informed electorate. It amended the public information section of the Administrative Procedure Act (APA), which, rather than being treated by federal agencies as a mandate to disclose information to the public, had often been relied upon as authorizing the withholding of records.[11] The rule of the FOIA is disclosure; nondisclosure is the exception, codified in the nine exemptions to the basic disclosure requirement.[12] These exemptions reflect Congress's concern for the need to balance the public's right to be informed of the workings of government with the need of government to maintain certain records in confidence.[13]

The fourth exemption excludes from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[14] In an analysis of the FOIA written shortly after its passage,[15] Professor Davis suggested that "[t]he fourth exemption is probably the most troublesome provision in the Act."[16] It is

[10]5 U.S.C. § 552 (1976).

[11]S. REP. No. 813, 89th Cong., 1st Sess. 4–6 (1965); H.R. REP. No. 1497, 89th Cong., 2d Sess. 3–5 (1966).

[12]5 U.S.C. § 552(b) (1976).

[13]S. REP. No. 813, *supra* note 11, at 5–6.

[14]5 U.S.C. § 552(b)(4) (1976).

[15]*See* Westchester Gen. Hosp., Inc. v. Department of Health, Educ. & Welfare, 464 F. Supp. 236, 245 (M.D. Fla. 1979), and cases cited therein.

[16]Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787 (1967), *reprinted in* SUBCOMM. ON ADMIN. PRACTICE AND PROC. OF THE SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCEBOOK, at 240, 266 (1974) [hereinafter cited as 1974 SOURCEBOOK].

ambiguous in both its wording and its grammar. As the Attorney General's Memorandum of 1967 said, the section is "susceptible of several readings, none of which is entirely satisfactory."[17] The courts have, nevertheless, managed over the course of fourteen years of wrestling with the interpretation of the exemption to evolve a more or less manageable means of dealing with it.

The exemption from disclosure of "trade secrets" has, notwithstanding the absence of any clear definition of what constitutes a trade secret,[18] not posed too much difficulty. Most exemption 4 litigation has centered around the second half of the exemption, which pertains to confidential commercial or financial information. In order to fall within this category, information that is not a trade secret must be:

1. commercial or financial;
2. obtained from a person; *and*
3. privileged or confidential.

Any information not meeting all three criteria must be disclosed.

As the term *privileged* is of narrow and somewhat ambiguous scope,[19] the courts have relied more on the term *confidential.* A number of the early decisions that addressed the question used a subjective test to determine whether information was "confidential" within the meaning of exemption 4. They looked to the submitter's expectations or customary practices in dealing with the information, asking whether the submitter supplied the information with the expectation that it would not be disclosed,[20] or whether the submitter would ordinarily disclose the information to the public.[21]

Had this interpretation of the exemption prevailed, much of the complaints about the effects of the FOIA on business secrets might have been avoided. On the other hand, a subjective test has the effect of giving the submitter very nearly complete control over which of its documents are exempt from required disclosure under the FOIA; all it need do is assert that a document would not normally be disclosed to the public, and, unless it can be shown that the submitter has actually

[17]U.S. Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 32 (1967) *reprinted in* 1974 SOURCEBOOK, *supra* note 16, at 194, 231 [hereinafter cited as Attorney General's Memorandum].

[18]*See* HOUSE REPORT, *supra* note 5, at 15–16. *See also* Martin Marietta Corp. v. FTC, 475 F. Supp. 338, 343 (D.D.C. 1979).

[19]*See* Attorney General's Memorandum, *supra* note 17, at 32–33; Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 792–93 (1967).

[20]*See, e.g.*, GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

[21]*See, e.g.*, Sterling Drug Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971).

released similar documents in the past, an agency or a reviewing court would be bound to find the exemption applicable.

In any event, the subjective test was not to endure. In *National Parks and Conservation Ass'n v. Morton*,[22] the District of Columbia Circuit, reviewing the legislative history to ascertain "the legislative purpose which underlies the exemption,"[23] developed a two-pronged "competitive harm" test to replace the subjective test. The Court noted that the exemptions to the general disclosure mandate of the FOIA serve two principal interests: the governmental interest in obtaining cooperation from private parties who are asked to provide information to the government and the interests of the submitters, themselves.[24] The competitive harm test was fashioned to protect those two interests. First, information is exempt from mandatory disclosure if its release is likely "to impair the government's ability to obtain necessary information in the future."[25] This branch of the test does not apply to information whose submission an agency has the power to compel.[26] Second, commercial or financial information is considered "confidential" if its disclosure is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained."[27] The court noted that, while a determination that the submitter of information would not generally make the information available for public perusal might have some relevance in determining whether the information fell within the competitive harm test, that determination in and of itself was not conclusive. The test set forth in *National Parks* has been almost universally adopted as the test for determining confidentiality.[28]

B. "Reverse-FOIA" Lawsuits

Because of the sensitive nature of a great deal of the information furnished by private parties to the government, the submitters of such information have as strong an interest in the law governing its disclosure as do those who seek access to it under the FOIA. The efforts of submitters to protect the secrecy of their information once it has come into the hands of the government has given rise to what has become

[22]498 F.2d 765 (D.C. Cir. 1974).
[23]*Id.* at 767.
[24]*Id.* at 770.
[25]*Id.*
[26]*Id.*
[27]*Id.*
[28]*See* HOUSE REPORT, *supra* note 5, at 20; Florida Medical Ass'n v. Department of Health, Educ. & Welfare, 479 F. Supp. 1291, 1302–1303 (M.D. Fla. 1979) and cases cited therein.

known as the "reverse-FOIA" lawsuit. While the FOIA furnished requesters of information an express right to *de novo* review in a district court of an agency's decision to deny their request,[29] the Act provides no complementary remedy to submitters who seek to protect the confidentiality of their information.

In this state of affairs, submitters, for the most part businesses, instituted a large number of reverse-FOIA lawsuits seeking injunctions against the disclosure of information they had previously submitted to the government.[30] The plaintiffs in these actions based their claims on a variety of statutes, including the FOIA itself. Under compulsion of the obvious equitable appeal of a request for protection against what was always alleged to be a threat of serious competitive injury as a result of the disclosure of information to the government, the courts did not hesitate to find some basis on which to award submitters relief in many of these cases. But, in the absence of an express statutory remedy, the law of the reverse-FOIA action grew very quickly into a state of confusion.

The Supreme Court finally addressed the problem of the reverse-FOIA action and resolved at least some of the confusion in *Chrysler Corp. v. Brown*.[31] Addressing the dispute about the source of the substantive right of a submitter to obtain judicial protection against an unwarranted release of its information, the Court held that the FOIA itself does not confer such a right.[32] Reviewing the structure of the FOIA and its legislative history, the Court held that the FOIA is exclusively a disclosure statute.[33] While recognizing that Congress was concerned that government agencies should, in certain circumstances, be able to accommodate the confidentiality concerns of submitters, the Court found that ". . . the congressional concern was with the *agency's* need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."[34] The FOIA, therefore, does not limit an agency's discretion to disclose information, even if that information falls within exemption 4.[35]

The second principal source of authority to enjoin disclosure on which the lower courts had relied is the Trade Secrets Act, 18 U.S.C.

---

[29]5 U.S.C. § 552(a)(6)(A)(i) (1976).
[30]*See generally* sources cited at note 5, *supra*.
[31]441 U.S. 281 (1979).
[32]*Id.* at 290–94.
[33]*Id.*
[34]441 U.S. at 292–93.
[35]441 U.S. at 293–94.

section 1905,[36] which makes it a crime for a federal employee to disclose trade secrets or other confidential business information. *Chrysler* held that, although section 1905 does constitute a restriction on an agency's discretion to release business secrets,[37] it does not support the implication of a private right of action.[38]

The submitter's cause of action in a reverse-FOIA action is, instead, furnished by the APA.[39] Although the FOIA does not deprive an agency of the discretion to disclose material that is exempt from mandatory disclosure, it would normally be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[40] for an agency to make public information whose disclosure is prohibited by section 1905,[41] and the submitter is entitled under the APA to seek judicial review of the agency determination.[42]

---

[36]18 U.S.C. § 1905 (1976). The statute provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[37]441 U.S. 317–18. One of the questions left unresolved by *Chrysler* was the precise scope of § 1905. It has been argued from its legislative history that, notwithstanding its broad language, its prohibition is narrow, applying essentially only to a very limited class of information. Clement, *supra* note 5, at 607–17. *See also* Note, *supra* note 4, at 118–19. Although the U.S. Supreme Court discussed the legislative history of § 1905 at some length, 441 U.S. at 296–301, there is no suggestion in its opinion that the section should be read otherwise than according to the literal import of its language.

[38]441 U.S. at 316–17.

[39]441 U.S. at 317–18.

[40]Administrative Procedure Act § 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (1976).

[41]441 U.S. at 318. There are also a number of other statutes, usually confined to specific agencies, that restrict the disclosure of certain types of information. *E.g.*, 2 U.S.C. § 437g(a)(3)(B) (1976); 15 U.S.C. § 2055 (1976); 42 U.S.C. § 1306 (1976), 44 U.S.C. § 3508 (1976).

[42]441 U.S. at 317–18. Since the prohibition of § 1905 does not extend to disclosures that are "authorized by law," the Court was also required to consider when an agency regulation permitting the release of business secrets could constitute the necessary authorization. The Court ruled that to be valid such a regulation must be a substantive rule, must have been promulgated in accordance with the procedural requirements of the APA, and must have a nexus with some delegation of legislative authority granted by Congress to the agency. 441 U.S. at 301–16.

Although *Chrysler* did resolve a number of the questions raised by reverse-FOIA litigation, it left others open. It did not, for example, pronounce definitively on the appropriate scope of review of agency decisions by the courts, suggesting only that "[*d*]*e novo* review by the District Court is ordinarily not necessary."[43] The decision also left unresolved the scope of section 1905 and its relation to the FOIA. It is possible that the prohibition of section 1905 is coterminous with the exemption of section 552(b)(4).[44] In that case it is not necessary to ask whether the FOIA furnishes the necessary "authorization by law" to supersede section 1905's prohibition against the disclosure. Nor, conversely, is it necessary to ask whether section 1905 is one of the statutes referred to in the third exemption of the FOIA—which nullifies the disclosure requirement for matters that are "specifically exempted from disclosure by statute,"[45]—and therefore supersedes the FOIA's mandate in favor of disclosure.[46] It is at least theoretically possible, however, either that section 1905 and exemption 4 overlap or that there is a gap between them. *Chrysler* leaves a decision as to their respective coverages for another day.[47]

III. PROTECTING PRIVATE INFORMATION IN THE HANDS OF THE GOVERNMENT: THE NATURE OF THE PROBLEM

A. Introduction

Government acquires information from private parties in a variety of roles and by a variety of means. As a purchaser of goods and services, it is the recipient of technical information and cost data from the large number of firms with which it does business. As a regulator of a wide variety of commercial activity, it receives reports from regulated companies. Finally, as a licensor of various private activities, the government is provided with commercial and financial information by firms wishing to engage in those activities. Much of the information that comes into the hands of government agencies by one or another of

[43] 441 U.S. at 318.

[44] Indeed, the Court notes the "similarity of language" between the two provisions. 441 U.S. at 319 n.49.

[45] 5 U.S.C. § 552(b) (3) (1976).

[46] Most of the courts of appeal that have addressed this problem have held that § 1905 is not an "exemption 3" statute. *See* Note, *Reverse FOIA Suits After* Chrysler*: A New Direction*, 48 FORDHAM L. REV. 185, 195 n.71 (1979).

[47] Some of the issues relevant to this question are discussed *infra* at notes 173–84 and accompanying text.

these means could arguably fall into the category of confidential business information, the public disclosure of which would either cause substantial competitive harm to the supplier of the information or would jeopardize the future ability of the agency concerned to obtain the information it needs to carry out its mission.[48]

Critics of the FOIA claim that agencies often disclose confidential business information improperly in responding to requests filed under the Act.[49] Complaints come from both the submitter community, which is principally concerned about the problem of competitive injury, and from government agencies, whose officials are primarily concerned about the impact of the FOIA on their abilities to function effectively.

Although those who complain about the release of business secrets seldom articulate the distinction, there are two quite different sources of potential concern. First, to the extent that *Chrysler* left agencies with any discretion to release information that they have decided falls within the fourth exemption, some submitters seem to believe there is a substantial possibility that agencies will choose to exercise that discretion in more than just the rare instance in which disclosure would serve some major public interest of overriding importance. The findings of this study suggest that that fear is largely groundless. But not one of the agency personnel interviewed knew of a case in which an agency had determined that requested records *were* exempt but decided to release them anyway. Indeed the unanimous view of those interviewed was that, while a case *might* arise in which the public interest served by disclosure was of such enormous importance that it clearly outweighed the interest of the submitter, such a case would be extremely rare. Nor did anyone outside the government report a case in which an agency had exercised its discretion to release exempt information.

The second type of problem has nothing to do with the conscious exercise of discretion but is the consequence instead of an unconscious error leading to the inadvertent release of exempt information. Such an error could be merely clerical; it could stem from the failure of the persons responsible for screening records to remove exempt information to recognize the significance of particular items; or it is possible that those who perform the screening function may err in applying the applicable legal standard. As it is these unintended errors, and not the

[48]*See* notes 24–27, *supra* and accompanying text.

[49]*See, e.g., Business Record Exemption of the Freedom of Information Act: Hearings Before the Government Information and Individual Rights Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. 98, 280 (1977) [hereinafter cited as *House Hearings*]; Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 AD. L. REV. 193, 194, 202–203 (1977).

exercise of discretion, that seem to be the source of whatever real problems there are in the administration of exemption 4, it is such errors—and means of reducing their incidence—that this study will principally address.

The practices agencies use in coping with the administrative problems that arise under exemption 4 vary substantially. This variation can be accounted for in part by differences in the principal missions of the agency and in the nature of the business information that becomes part of their records. Agencies such as the GSA and various branches of the Defense Department that acquire business information principally in their procurement role obtain a great deal of technical information and cost data in the course of soliciting bids and administering contracts. They quite frequently receive FOIA requests for the proposals submitted by winning contractors in competitive acquisitions. Procurement agencies tend to be quite sensitive to the wishes of the companies with which they deal regarding release of this sort of information since their future ability to obtain proposals depends greatly on the trust of the companies with which they deal that important commercial secrets will not be compromised when they are given to the government in contract proposals. Moreover, government personnel at the contracting officer level deal directly and on a regular basis with their counterparts in industry and, for human reasons, appear to be quite sensitive to reasonable requests by contractors that their commercial secrets not be disclosed.

The picture is somewhat different in agencies that come into possession of business information in their capacities as regulators. Whether they receive it in the form of required reports, obtain it in the course of inspections of business facilities, are given it by applicants for a federal permit or license, or acquire it in the course of an enforcement proceeding, these agencies can compel businesses to submit the information in question, even over the objection of the company involved.[50] Moreover, the nature of business records obtained by government during the regulatory process is often quite different from that of records obtained in the procurement process. Whereas the submitting firm usually maintains at least some control over the form and substance of the information it gives to a procurement agency in a contract proposal, it has very little control over what might be subpoenaed by an

[50]This may not be entirely true with respect to licensing procedures, as a company has the theoretical option of not seeking a license. But since in many cases this would mean foregoing the sale of the product altogether, the compulsion may be greater than that involved in government contracting, since many contractors have a realistic alternative of avoiding problems with the FOIA by foregoing efforts to sell to the government.

agency in the course of an investigation or over the notes taken by a field inspector during a visit to one of its plants. Finally, as will appear later, the agency personnel who make initial decisions under the FOIA are usually those in the closest communication with the submitter. The relationship between the personnel of a regulatory agency and the companies it regulates is at least somewhat more likely to be adversary in quality than that of the relationship between contracting officers and contractors.

Another reason for the variation in agency procedures is the lack of communication among agency personnel responsible for the FOIA activities of their agencies and of any meaningful effort to establish a more or less common pattern of dealing with FOIA problems. The absence of coordination has allowed agency procedures and practices to evolve into patterns that vary widely, and often enough differ unnecessarily. These differences can be a source of confusion to submitters and requesters that deal with more than one agency.

B. How Serious Is the Problem?

The logical point of departure for a study of the protection of private information in the hands of the government is an understanding of the extent to which the existing practices and procedures are inadequate to that task. Before we set about "reforming" the present system by erecting an elaborate, and expensive, procedural structure, it seems in order to determine just how often competitively sensitive business information is actually disclosed under the FOIA as it now operates.

Unfortunately that determination proves extremely difficult to make. Notwithstanding the vociferousness of the criticism of the FOIA by representatives of business, there are to be found in the public record very few documented instances of the improper disclosure of competitively significant information as a result of the operation of the Act. This may be due in part, at least, to the operation of the principle of damage-limitation according to which it is better to remain silent about lost information than to draw attention to it by complaining publicly. It may also be due to a fear on the part of business executives that announcing to the world that the government has disclosed a valuable commercial secret furnished to it by their company will make them look foolish or incompetent in the eyes of their shareholders and the public. It may also result from companies' being unaware that their secrets have been disclosed (although this would hardly account for the intensity of the criticism of the Act by the business community).

Another possibility is that the FOIA does not function as badly in this area as its critics charge. There is, in fact, some evidence that that is the case. In interviews conducted in the preparation of this article the author asked a large number of people who deal with the FOIA, both within and without the government, if they could provide clear examples of cases in which an agency had made unwarranted disclosures of exemption 4 materials to the detriment of the submitter. Although a few of those interviewed did recall particular instances, their number was surprisingly small given the public hubbub that has surrounded the problem. Even among those cases that were mentioned, many were of dubious accuracy or turned out to involve disclosures that had no relationship to the FOIA. The Sikorsky Aircraft Division of United Technologies, for example, announced on March 26, 1979 that it had notified the U.S. Coast Guard that Sikorsky was withdrawing from the competition to produce a new helicopter.[51] One of the reasons for this decision, according to the company's press release, was that the Coast Guard's requirements included "the submittal of proprietary data on the commercial Sikorsky S-76 Spirit™ helicopter, . . . with the resultant potential that such data could be relinquished . . . under the FOIA."[52] But the release also cited certain other business reasons that lay behind the decision. Coast Guard's contracting officer for the project is of the opinion that Sikorsky's alleged concern for the effect of the FOIA was a "smokescreen."[53] In fact, an FOIA request was filed for the information contained in the successful proposal for the helicopter. In accordance with the Coast Guard's usual procedures,[54] the winning contractor was notified of the request and given an opportunity to express its views as to which parts of its submission were of competitive significance. The contractor raised no objections to the release that was ultimately made in response to the request. The contracting officer stated that Sikorsky's real reasons for its withdrawal were that the company already had a great deal of work and that it had become aware that its price would be substantially higher than those proposed by other offerors.[55] A spokesman for Sikorsky insisted that the concern over the potential for the release of its confidential technical information was genuine, but said that the company had not ever actually experienced any loss of valuable information under the FOIA.[56]

[51]Sikorsky Aircraft, Press Release (Mar. 26, 1979); *See* New York Times, Apr. 2, 1979 at B2.

[52]Sikorsky Aircraft, Press Release (Mar. 26, 1979).

[53]Interview with John Winger, July 9, 1979.

[54]*See* notes 114–17 *infra* and accompanying text.

[55]Interview with John Winger, July 9, 1979.

[56]Interview with Donald Fertin, July 9, 1979.

Several of those interviewed in connection with this study cited a brief submitted by the plaintiffs in a suit against the FTC for protection against a subpoena *duces tecum*.[57] The brief was said to contain a list of cases in which the FTC had erroneously released confidential business information under the FOIA. The brief does contain a list of some twelve instances in which business information held by the FTC and purported to be competitively sensitive somehow became public.[58] In only seven of these cases, however, was the FOIA involved. And upon further examination of these seven it appears that in all or nearly all of them the FTC gave the submitter the standard ten-day notice of the proposed release of the information in order to permit the submitter to seek judicial relief.[59] The issue in these instances seems merely to have been a good faith dispute between the agency and the submitter over whether the material in question fell within exemption 4. In other words, the procedures established to deal with the exemption functioned as intended.

Because the public record contained so few documented cases of the improper release under the FOIA of information that should have been treated as exempt from disclosure under exemption 4, the Administrative Conference published a notice in the *Federal Register* inviting commentators to describe other cases.[60] Although nineteen responses to this request were submitted, together they described only five cases in which it is reasonably clear that information that clearly fell within exemption 4 was disclosed in response to an FOIA request.[61] Many of the other responses merely repeated the general allegation that competitively sensitive information is often released under the FOIA.[62] Several described instances in which a submitter believed that

[57]Brief of Plaintiffs-Appellees in Wearly v. FTC, 616 F.2d 662 (3d Cir. 1980).

[58]*Id.* at 31–37.

[59]Interview with J. Schwartz, July 25, 1980; Interview with B. Rubin, July 28, 1980. *See* Wearly v. FTC, Joint Appendix at 564–642, No. 78–1586 (D.C. Cir.).

[60]45 Fed. Reg. 70033 (Oct. 22, 1980).

[61]*See* Letter from Douglas M. Fryer, Nov. 19, 1980 (release by FTC of information about Wards Cove Packing Company); Letter from B. D. Egley, CF&I Steel Corp., November 12, 1980 (disclosure of pollution control data by EPA); Letter from John W. Eagan, A. T. Kearney, Inc., Nov. 3, 1980 (release of contract proposal by Army Corps of Engineers without notice); Letter from Gerald W. Boston, Ford Motor Company, Nov. 26, 1980 (improper releases by the FTC). In three of these five incidents the FTC was the agency at fault. That agency appears to be the most frequent target of criticism about sloppy information-handling practices. It was in large measure these criticisms that prompted Congress to impose strict limitations on the FTC's management of information in the FTC Improvements Act of 1980.

[62]*See, e.g.*, Letter from V. J. Adduci, Motor Vehicle Mfrs. Ass'n, Nov. 17, 1980; Letter from Charles I. Derr, Machinery and Allied Products Institute, Nov. 19, 1980. Letter from Jack I. Pulley, Dow Corning Corp., Nov. 20, 1980.

the documents in question should not have been disclosed notwithstanding that a court had held they did *not* fall within any exemption and therefore were required to be released.[63] Significantly, one of the largest groups of complaints involved instances in which allegedly confidential information had been disclosed through means unrelated to the FOIA, in most cases simply by inadvertence. While these cases certainly suggest that more attention is required to the government's information-handling practices,[64] they are hardly evidence of problems with the functioning of the FOIA.

The government personnel interviewed were nearly unanimous in the opinion that inadvertent release of privately submitted information that falls within exemption 4 occurs rarely, if ever. None could recall any instance in which serious competitive harm resulted from such a disclosure. Indeed, those who dealt with FOIA problems as employees of procurement agencies, such as the General Services Administration or various branches of the Defense Department, were uniform in their view that they and their colleagues tended to be quite cautious in making decisions to release business information. While the government personnel who make decisions under exemption 4 are as prone as anyone to human error, the picture often painted by critics of the FOIA of the uninterested bureaucrat cavalierly handing out industrial secrets without concern for the private interests at stake is entirely at odds with the picture that emerges from these interviews.

One problem that complicates any effort to determine the truth underlying charges that information that falls within exemption 4 is frequently released when it should not be is the uncertainty of the substance of the exemption. Although there seems to be general

[63] *See, e.g.*, Letter from Leighton, Conklin, Lemov, & Jacobs, Nov. 20, 1980. This letter and its attachments complain of allegedly improper releases of information about intraocular lenses threatened by the FDA. In fact the requester seeking the information had filed suit against the FDA and various lens manufacturers and the corporate defendants had cross-claimed against the FDA seeking an injunction against release. Public Citizen Health Research Group v. FDA, Civil Action No. 79-1710 (D.D.C. filed July 2, 1979). The District Court judge thought so little of the claim that the information was exempt, he not only denied the lens manufacturers' Motion for Summary Judgment (Order filed Sept. 24, 1980), but he denied their Motion for an Injunction Pending Appeal (Order filed Oct. 7, 1980). The Court of Appeals subsequently denied an emergency Motion for an Injunction Pending Appeal. Public Citizen Health Research Group v. FDA, Civil Action No. 79–01710 (D.C. Cir., Order filed Nov. 4, 1980). For further examples of instances in which the dispute seems to have been over the applicability of exemption 4 and not the manner in which the agency decided its applicability *see* Letter from Lewis M. Popper, Nov. 18, 1980 (information submitted to FTC by Association of Independent Colleges and Schools released after ten-days' notice to Association) and cases discussed in Brief of Plaintiffs-Appellees in Wearly v. FTC, *supra* notes 57–59.

[64] *See* text accompanying notes 71–73 *infra*.

acceptance[65] of the *National Parks* "substantial competitive harm" formula,[66] the actual application of that test to particular documents is often quite difficult in practice. It is made more so when, as is often the case, there are strong reasons for a business to resist disclosure unrelated to the competitive effect—at least in the narrow sense of an advantage in the marketplace—that disclosure might have.

C. The Perception As the Problem

In the end the truth or falsity of the charges levied against the process by which agencies presently make determinations under exemption 4 is perhaps not as important to the necessity to revise that process as is the clear perception that the process is defective.[67] To the extent that the critics are correct, it is certainly highly desirable to remedy the problems to which they point. However great the undoubted benefits of the FOIA, it is unfair for businesses to suffer the loss of valuable commercial secrets because the Act functions imperfectly. It is at least equally important, however, that the procedures now in use lead to results that are *perceived* as being too often improper. Even if, as appears from the admittedly less than comprehensive survey performed in the course of this study, the instances of disclosure of business secrets through the operation of the FOIA are relatively rare and insignificant, the perceptual problem *is* real and appears to be generating unnecessary friction in the relations between government and business. At the least, it nurtures an already too great mistrust of government; it may in some cases make the performance of those functions of government that require access to business information much more difficult. There is, therefore, a need to improve the procedures used by agencies in handling FOIA requests for business information in order to alter the perception prevailing in the private sector that business secrets are not safe from disclosure once they come into the hands of the federal government.

IV. ORGANIZATIONAL FACTORS

To the extent that the disclosure of business secrets does result from inadequacies in administrative practices and procedures, a major por-

[65] *See* note 28 *supra*.

[66] *See* note 27 *supra*.

[67] A letter to the author from a representative of the Dow Chemical Company is typical: "While we worry a lot about confidential business information being exposed through FOIA requests, cases where we have actual knowledge of this having occurred with respect to Dow's information have been rare." Letter from L. E. Hessenaur, Aug. 7, 1980.

tion of the blame can be laid at the door of a problem that plagues every aspect of the administration of the FOIA: compliance. To a great extent, the FOIA is still seen as an unwanted stepchild imposed on an agency by the Congress—an onerous obligation, of no intrinsic importance in itself, that only diverts resources from an agency's real mission. This has a number of unfortunate consequences.

The most obvious is that the individuals who have direct responsibility for responding to FOIA requests often treat that responsibility as incidental to their principal tasks.[68] This attitude is not only understandable, it is almost inevitable unless agency personnel are made to feel that compliance with the FOIA *is* part of the agency's mission and they are given adequate incentives to behave accordingly.

Perhaps the most important consequence of the status typically assigned FOIA problems is that agencies often do not organize themselves to manage these problems effectively. There is usually an "FOI Office" which often performs functions under the Privacy Act as well. It is frequently to be found on the organization chart as part of the Public Information Office,[69] almost certainly for lack of a better place to put it than because of any coherence of functions. It has been suggested by at least one critic of the agencies' performance under exemption 4 that a public affairs office is an inappropriate place to locate the authority to release documents that may contain confidential business information.[70] Most public affairs officers are journalists by training and, according to this critic, are likely to be biased in favor of disclosure. Whatever the validity of this criticism, the functions performed by FOI officers differ significantly from those traditionally carried on in a public affairs office. Their relations with the news media, rather than being their primary occupation, are incidential. The nature of the information they deal with and its interest to those who seek it are quite different.

A further consequence of the assignment of a relatively low priority to FOI matters is the personnel policies that result. Working with the

---

[68]While this was the attitude expressed by many of the government personnel interviewed in connection with this study, it appears not to be a universal attitude. A 1978 report by the General Accounting Office concluded that, "Overall, Federal agencies' attitudes toward the concept of open government, and especially the FOIA, have apparently become more positive. Agency personnel generally seemed to have a positive attitude toward the act's intent." REPORT BY THE COMPTROLLER GENERAL OF THE U.S., GOVERNMENT FIELD OFFICES SHOULD BETTER IMPLEMENT THE FREEDOM OF INFORMATION ACT 8 (1978). This conclusion did not hold for all agencies, however. The report went on, "Investigative or regulatory agencies, however, still tend to have somewhat negative attitudes toward the Act." *Id.*

[69]This is true at the Departments of Defense, the Army and the Navy, at the FDA and at GSA.

[70]Interview with B. Braverman, July 10, 1980.

FOIA is often perceived as a dead end job with little opportunity for advancement. Since they are "information specialists," rather than press or public relations specialists, information officers located in press offices are unlikely to be promoted to a higher position in the public affairs office, or so it must seem to them. Nor does their training or experience suit them particularly well for promotions into a higher level of "administrative" work when the FOI office is located in that part of the agency. There is generally little professional training available for FOI personnel. Individuals from different agencies who work in this area and who often have common problems have little opportunity to communicate with each other, with the consequence that each agency develops its own program without the benefit of the experience of other agencies.

It may be that no more than modest steps need to be taken to remedy these problems. Perhaps improved training, better interagency coordination, and steps to correct the impression that assignment to FOIA work is not the equivalent of exile would be enough. There is another possibility, however. We live, it might be said, in an "age of information."[71] "Information management" has begun to be perceived as an important and necessary function in large organizations. Large corporations are increasingly appointing "information specialists," some even at the level of top management.[72] It seems about time the federal government got on the bandwagon. The FOIA, the Privacy Act, and the Government in the Sunshine Act[73] appear to be here to stay. All of them require agency resources and organization. More importantly, perhaps, it seems likely that many agencies might benefit in the performance of their principal missions were they to take a leaf from the book of private industry and establish not "FOIA/Privacy Act offices" but information management offices. It is nearly certain that agency performance of FOIA functions (including dealing with exemption 4) would improve, and it is quite possible that other agency functions (including the protection of business secrets) might benefit as well. It is strongly recommended, therefore, that agencies examine the desira-

[71] *See* R. STEVENSON, CORPORATIONS AND INFORMATION: SECRECY, ACCESS AND DISCLOSURE 5 (1980).

[72] *See, e.g.*, R. BRIGHTMAN, INFORMATION SYSTEMS FOR MODERN MANAGEMENT (1971); F. HORTON, HOW TO HARNESS INFORMATION RESOURCES; A SYSTEMS APPROACH (1974); T. WALTON, COMMUNICATIONS AND DATA MANAGEMENT (1976); Doebler, *Information Management: A Major New Discipline Comes of Age*, 216 PUBLISHERS WEEKLY 39 (August 20, 1979); GLUCKMAN, *Educating the Information Manager*, THE INFORMATION MANAGER 3 (Aug. 1978). There is now a professional association, Associated Information Managers, and a journal, THE INFORMATION MANAGER, sure signs that the new area of professional specialization is here to stay.

[73] 5 U.S.C. § 552b (1976).

bility of establishing information management offices that would be charged with improving all aspects of the management of information, including, but hardly limited to, the response to FOIA requests.

Indeed, the Paperwork Reduction Act of 1980[74] appears to require such an undertaking. This statute requires that the Director of the Office of Management and Budget "develop and implement Federal information policies, principles, standards, and guidelines" regarding "records management activities," and "developing and implementing uniform and consistent information resources management policies."[75] It also requires each agency to designate "a senior official . . . to carry out the responsibilities of the agency" under the Act.[76] Although the statute avoids any mention of the FOIA as one of the "responsibilities" referred to, the legislative history suggests that "information resources management" includes the "dissemination of information" by federal agencies.[77] And coordination of FOIA compliance is listed as a "possible added function" of the Office of Federal Information Policy established by the Act.[78]

The term *information resources management* refers to what the Congressional Research Service has called "a concept in the making."[79] It may best be thought of as "a technique to assist in the coordination of information gathering and dissemination responsibilities within an organization."[80] Whatever the definition, it is obvious that a function as important to the information functions of the federal government as compliance with the FOIA should be considered in the establishment of any system for the management of information resources.[81]

V. AGENCY PRACTICES AND PROCEDURES

We now turn to a detailed scrutiny of the way in which agencies presently go about resolving exemption 4 questions and a consideration of the way in which the existing practices and procedures might be improved. The recommendations that grow out of this study are intended to provide greater protection (or at the least the appearance

[74]Pub. L. No. 96–511, 96th Cong., 2d Sess. (1980), codified at 44 U.S.C. chapter 35.
[75]*Id.* § 3504.
[76]*Id.* § 3506.
[77]S. REP. No. 96–930, 96th Cong., 2d Sess. at 8 (1980); H.R. REP. No. 96–835, 96th Cong., 2d Sess. at 3 (1980).
[78]H.R. REP. No. 96–835, 96th Cong., 2d Sess. at 14 (1980).
[79]BECKER, FEDERAL INFORMATION MANAGEMENT POLICY: CRITICAL DIRECTIONS 125 (Congressional Research Service Report No. 80–143 SPR, 1980).
[80]*Id.* at 127.
[81]*Id.* at 128.

of better protection) for the interests of submitters without imposing an undue burden on the agencies or infringing on the rights of information requesters. The discussion will be divided into two parts: first, techniques or procedural devices designed to operate before an FOIA request is made for business records, and second, procedural steps in the processing of FOIA requests.

A. Prior to the Receipt of a Request

1. *Informal Promises of Confidentiality*

Prior to the passage of the FOIA it was possible for agencies to promise businesses that records submitted in confidence would not be disclosed, and to honor such promises.[82] The general consensus is that under the FOIA, promises of confidentiality are no longer binding.[83]

There is, however, still some potential role for promises of confidentiality. The *Chrysler* decision[84] established that exemption 4 is permissive and not mandatory, and therefore unless disclosure is prohibited by some other provision of law, an agency retains the discretion to release information that falls within the exemption when it is in the public interest to do so.[85] Presumably, a promise made at the time information was received that the agency would not release the information would be a relevant factor in evaluating a subsequent decision by the agency to exercise its discretion to release the information. It could, in fact, be argued that a decision to release the information contrary to such a promise would be so inequitable as to amount to an abuse of discretion that could be enjoined under the APA.[86]

---

[82]Under the APA of 1946, Pub. L. No. 79–404, § 3(c), 60 Stat. 237, an agency could withhold information "held confidential for good cause found."

[83]*See, e.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 399 (2d ed. 1978); Clement, *supra* note 5, at 53; Note, *supra* note 4, at 113.

[84]Chrysler Corp. v. Brown, 441 U.S. 281 (1980).

[85]The scope of this discretion depends in large measure on the ultimate resolution of a question left unanswered by the Court in *Chrysler*: the interaction of exemption 4 with 18 U.S.C. § 1905 (1976). *See* notes 172–84 *infra* and accompanying text.

For at least one agency, however, Congress has resolved the question definitively by, in effect, making exemption 4 mandatory. The FTC Improvements Act of 1980, Pub. L. No. 96–252, 96th Cong., 2d Sess. (1980) amended § 6(f) of the FTC Act to provide that "the Commission shall not have the authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . ." *Id.* § 3(a).

[86]*See* 5 U.S.C. §§ 702, 706(2) (1976). *Cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 317–18 (1980). Whatever its effect under these circumstances, such a promise is still of limited significance since it can have no force for information that does not fall within exemption 4.

2. *Determinations Under Exemption 4 Prior to Submission*

A few agencies have established procedures allowing for a presubmission review of documents to determine whether they are exempt from disclosure.[87] Regulations established by the FDA,[88] for example, provide that "any person who is considering submission of data or information voluntarily to the FDA may seek a presubmission determination as to whether the agency "will or will not make part or all of them available for public disclosure upon request if they are submitted."[89] When asked in writing the FDA determines whether the information falls within an exemption and, if it does, whether it is "relevant to and important for agency activity." If both determinations are positive, the regulation provides that the submitter may then supply the documents to the FDA and the agency "will not make the data or information involved available for public disclosure unless ordered to do so by a court."

Since as we have seen (and as the regulation recognizes), the agency cannot bind itself to withhold information that is not exempt from disclosure under the FOIA, the regulation is technically no more than a formal procedure by which the FDA can bind itself not to release exempt information. As a practical matter, however, the regulation goes beyond that, because it implies that the agency will deny any requests for the information and will actively defend a suit by the requester to force its disclosure.

In any case, the procedure is invoked by a submitter no more than once or twice a month, which is relatively infrequent considering the volume of sensitive commercial information the agency receives.[90]

Presubmission determinations have other, more practical drawbacks. First, the resources of both the submitter and the agency will be expended for naught if the records in question are never requested.[91] A more serious problem is related to the time-dependency of the competitive sensitivity of most confidential business information. With

[87]The EPA and the FDA were the only agencies studied that have such a procedure. *See* 21 C.F.R. § 20.44 (1980) (FDA); 40 C.F.R. §§ 2.201(i), 2.206 (1980) (EPA).

[88]21 C.F.R. § 20.44 (1980).

[89]*Id.*

[90]Interview with Gerald Deighton, June 20, 1980. *See* HOUSE REPORT, *supra* note 5, at 37 n.114. The EPA's similar provision for advance determinations is also little-used in practice.

[91]To the extent that a submitter is induced to furnish records the agency might otherwise not be able to acquire, or might not acquire without the use of compulsory process, the technique might still have some net value.

the rare exception of an occasional trade secret—in the narrow sense of the term—embodying a formula or production technique whose uniqueness and commercial value endure longer, most business secrets become either known or stale within a few years or even a few months. Information that is of genuine competitive significance at the time it is submitted to a government agency would frequently, therefore, be no longer within exemption 4 at the time a request is made for it. This is all the more reason that a determination that documents are exempt prior to the time they are submitted should not be treated as precluding disclosure pursuant to a FOIA request for the documents some time later.

The same is true with respect to what appears to be the only real consequence of a presubmission determination: the undertaking by an agency not to exercise its discretion to release exempt material. Whether such a release appears to be in the public interest is just as likely to change over time as whether the documents fall within the exemption.

In light of these considerations, the value of presubmission determinations of confidentiality seems slight at best. While their occasional use probably does no harm, the technique should not be encouraged.[92]

3. *Marking of Documents by the Submitter*

It is common practice for businesses that supply documents to federal agencies to mark those documents considered to fall within exemption 4 by stamping them or attaching a cover sheet indicating that they contain confidential information and requesting that they be treated appropriately.[93] Some submitters apparently abuse their "Confidential" stamps, marking documents indiscriminately with little regard to whether a claim that they fall within exemption 4 is supportable. They are, however, apparently in the minority.[94] Agency personnel interviewed in the course of this study indicated that they found the marking of documents by submitters at least marginally helpful when

[92]The House Government Operations Committee, while not recognizing that a presubmission determination of confidential treatment probably has the effect only of limiting the agency's discretion to release otherwise exempt documents, reaches much the same conclusion. Its basic recommendation is "that advance determinations of confidentiality not be used." HOUSE REPORT, *supra* note 5, at 39. Agencies that wish to experiment with the procedure anyway should, according to the Committee, make advance determinations "only for documents submitted voluntarily to an agency or for documents that would automatically become public on filing." *Id.* Advance determinations should be made "only if there is a positive reason for believing that the procedure will be advantageous." And they should "automatically expire on a fixed date. . . ." *Id.*

[93]*See* HOUSE REPORT *supra* note 5, at 33.

[94]*Id.*

they were called on to make a determination on the release of documents that might arguably fall within the exemption.

Some agencies sanction the practice of marking for confidentiality by regulation.[95] In other agencies it is merely encouraged, or at least not discouraged, by the personnel who deal with FOIA matters. At least one agency appears implicitly to discourage marking, stating specifically in its regulations that marking records as confidential "raises no obligation" on the part of the agency.[96]

The effect of marking a document with a claim of confidentiality varies considerably from one agency to another. To begin with, the absence of such a claim does not necessarily relieve the agency from the responsibility of making a determination. The proscriptions against release of a trade secret or other item of confidential commercial or financial information found in the Trade Secrets Act[97] or one of the agency-specific statutes prohibiting the release of certain kinds of information obtained from private parties[98] are generally independent of any assertion of a claim of confidentiality by the submitter. Moreover, to the extent that an agency has discretion to release information that falls within exemption 4,[99] it must presumably exercise that discretion consciously. At least absent a rule requiring submitters to flag any documents they considered confidential, it would seem an abuse of discretion to release a document simply because no claim of confidentiality was asserted.

The major question regarding the assertion of claims of confidentiality is what effect they should be given. At one extreme, they could be treated as of no formal significance, their utility, if any, depending on the practical assistance they might provide to agency personnel charged with reviewing documents to ascertain whether they are exempt from disclosure under the FOIA or some other statute.[100] At the other extreme, the absence of a claim of confidentiality attached to a

[95]*See, e.g.*, 16 C.F.R. § 1015.18 (1980) (Consumer Product Safety Commission); 40 C.F.R. § 2.203(b) (1980) (EPA).

[96]21 C.F.R. § 20.27 (1980) (Food and Drug Administration).

[97]18 U.S.C. § 1905 (1976).

[98]*See, e.g.*, note 41 *supra*.

[99]*See* notes 173–84 *infra* and accompanying text.

[100]Many of the agency personnel interviewed said that they did occasionally find stamps or other markings to assist them in their work. This is particularly true where the presence of a stamp on only some pages of a lengthy document indicates that the submitter has directed its attention to the problem of confidentiality and has concluded that there would be no objection to the release of those pages that are unmarked. At least one agency official has suggested, however, that the marking of documents by submitters is of little use. *See* Letter from Donald Kennedy, Commissioner of the FDA in *House Hearings*, *supra* note 49, at 218.

document could conceivably be treated as giving rise to a conclusive presumption that the document contained no material exempt under section (b)(4).[101] Such a result would, however, not only seem unwise as a matter of administrative policy, but the release of a trade secret or other competitively sensitive information simply because no request for confidential treatment was made when the information was given to the government might well violate 18 U.S.C. section 1905[102] or other similar statutes.

What seems the best approach is to link requests for confidential treatment with a notice requirement. According to this plan, which has been in effect at EPA for some time with relatively good results,[103] an agency must notify a submitter of any proposed release of its documents under the FOIA unless the submitter has been informed that it will not receive such notice if it fails to assert a claim of confidentiality and has failed to do so.[104] Thus, by attaching some consequence, but not a determinative one, to a failure to make a claim of confidentiality, the procedure provides an incentive for submitters to make such claims where they are warranted.

The principal weakness of such a procedure is that it will assist agencies by reducing the amount of effort necessary to make (b)(4) determinations only if submitters wield the "confidential" stamp with discretion and do not follow the tempting path of simply marking everything, either out of excessive caution or an unwillingness to expend the resources necessary to do a thoughtful job. Since firms that do the latter are likely to find their claims of confidentiality ignored (except for the purpose of entitling them to notice), the incentives are not all one way. EPA's experience with its procedure was that initially assertions were overly broad, but as companies acquired experience with the procedure, they tended to be more reasonable in their claims.[105]

---

[101]EPA's rules could be read to have nearly this effect in some cases. Where EPA's original request for information from a private person includes a notice that a claim of confidentiality may be asserted with the submission of the information, and no such claim is asserted, the rules require no notice to the submitter before the information is released. 40 C.F.R. § 2.204(c)(2)(i)(A) (1980). Moreover, where no claim is asserted the rules state that "the information shall be treated as not entitled to confidential treatment." *Id.* at § 2.204(c)(3).

The rules of the CPSC provide, "The failure to make a request [for confidential treatment] within the prescribed time limit will be considered an acknowledgement that the submitter does not wish to claim exempt status." 16 C.F.R. § 1015.18(a) (1980).

[102]18 U.S.C. § 1905 (1976).

[103]Interview with Charles Breece, July 21, 1980. *See also House Hearings, supra* note 49, at 7–8 (testimony of Michael James, Deputy General Counsel of EPA).

[104]*Cf.* 40 C.F.R. § 2 (1980) (EPA).

[105]*Supra* note 103.

4. *Class Determinations*

There is obviously great utility in limiting the extent to which agencies must make individual determinations whether particular information meets the "substantial competitive harm" test of exemption 4. Not only does this reduce the agency resources required to process FOIA requests but it establishes greater certainty and uniformity in the application of a test that is subject to widely varying applications. One way to achieve these ends is for agencies to identify categories of information routinely submitted to them with respect to which it can be said that exemption 4 is never, or only extraordinarily applicable. They may then publish a rule announcing that documents containing such information will be routinely released when requested under the FOIA. In order to conserve administrative resources even further, such a rule could also provide that any notice to which a submitter would otherwise be entitled before the release of its documents would be dispensed with for documents falling within one of the categories previously determined not be exempt.[106] Another advantage of this procedure is that, if submitters disagree with an agency's interpretation of the substantive standards of exemption 4 as it applies to a particular class of records, the challenge to the interpretation may often be resolved in one lawsuit testing the validity of a rule rather than in a potentially endless series of actions involving individual determinations to disclose particular documents.[107]

There is always the chance that information that would normally not pose problems under exemption 4 would, for a particular firm under particular circumstances, have competitive significance. It is desirable, therefore, to allow companies to claim special treatment for certain documents that would otherwise routinely be released. The submitter could do this by asserting at the time it supplied a document a claim of confidentiality justified in some detail with reasons why the information is considered of competitive significance. Since the need for such justifications would arise only rarely, they should not pose an unreasonable burden.

There would be two consequences of the filing of a claim of confidentiality with respect to information within a normally releasable category. First, of course, the document would not automatically be released upon request, but the agency would be required to make an independent determination under exemption 4. And second, the submitter would be entitled to notice before the document was disclosed.

[106]*See* text accompanying notes 135–37, *infra*.
[107]*See House Hearings supra* note 49, at 76–77.

The agency that has probably had the most extensive experience with categorical substantive determinations under exemption 4 is the FDA.[108] It appears that the FDA has issued rules governing more than half of its records.[109] In addition to the rules contained in the Code of Federal Regulations,[110] FDA has published extensive commentary on those rules in the "preambles" written at the time of their adoption.[111] Agency personnel who make determinations under the FOIA rely heavily on those preambles.[112] This procedure seems to have reduced the great expense of agency resources which would otherwise have been devoted to making case-by-case determinations.

5. *"Second Hand" Documents*

Representatives of the submitter community often express concern about the fate under the FOIA of documents orginally submitted to a first federal agency which subsequently come into the possession of a second. An FOIA request for these documents filed with the second agency might, according to submitters, raise two types of problems. First, the second agency might lack the technical expertise to know that the documents contain valuable commercial information. Second, the submitter may have relied on safeguards afforded by the first agency—such as a notice requirement or an understanding that the agency would not exercise its discretion to release the records—that may not be available from the second agency.

The problem may be more imagined than real; this study uncovered not a single complaint about the loss of information under such a situation. To the extent, however, that the perception can easily be remedied at no significant cost to the policies of the FOIA, it is desirable to do so.

Fortunately, there is a simple and obvious solution. When an agency receives a request for files it has received from another agency, it should immediately redirect the request to that other agency, which should be responsible for complying. The only cost of such a requirement would be a minor delay in responding to the original request. Since the statute may be read to *require* an agency to respond to a request directly if it holds the documents, it is recommended that

[108]*See* HOUSE REPORT, *supra* note 5, at 40–43.

[109]*House Hearings, supra* note 49, at 92 (statement of FDA Commissioner Donald Kennedy).

[110]*See* 21 C.F.R. §§ 20.100–20.119 (1980).

[111]39 Fed. Reg. 44602 (Dec. 24, 1974); 42 Fed. Reg. 3094 (Jan. 14, 1977).

[112]Interview with Gerald Deighton, June 20, 1980.

Congress amend the FOIA to permit the forwarding of requests as suggested above.[113]

B. Processing FOIA Requests that Implicate Exemption 4

1. *Introduction*

Considering the similarity of the basic task to be performed, the differences in the way agencies have structured their FOIA decision-making processes, particularly as they relate to confidential business information, are quite remarkable. While such variety may allow a degree of useful flexibility and experimentation, there are limits to acceptable diversity, limits that may be exceeded by the uncoordinated and often dissimilar patterns of agency practice that obtain at present.

To provide a background for the analysis of the critical elements of the decision-making process under the FOIA, it may be useful to describe briefly the process followed by one agency. For this purpose the Naval Sea Systems Command (NAVSEA) of the Department of the Navy is fairly typical of the various components of the Department of Defense that deal regularly with procurement matters.

The most common type of FOIA request received by NAVSEA that involve business records is a request by a losing offeror for the contract proposal submitted by the winning offeror. Such a request may be sent to NAVSEA's headquarters office or to a local field activity having custody of the records in question. If the headquarters office has the records, the request is handled there by the command's Freedom of Information Officer. If the records are held by a local field activity, the request is forwarded to that activity where it is handled by that activity's FOI coordinator in much the same manner as a request handled by the headquarters office. The local FOI coordinator (who usually has responsibilities other than FOI matters) often obtains assistance from NAVSEA's FOI Officer in processing the request. The FOI Officer telephones the submitter to notify it of the request (following up with a letter) and asks that the submitter review the documents, assert any claim of confidentiality it wishes to make, and substantiate that claim in writing. The FOI Officer may consult with the General Counsel's office and with the cognizant contracting officer or with other Navy person-

[113]The Paperwork Reduction Act of 1980 includes a provision that if one agency transfers information to a second, "all the provisions of law" applicable to the first agency with respect to that information are also applicable to the transferee agency. 44 U.S.C. § 3510 (1980).

nel qualified to give advice on the technical questions raised by the request. If it appears that the information requested is not exempt under the FOIA, the FOI Officer will then notify the submitter that the documents are to be released. If the decision is to release information that the submitter claims falls under exemption 4, the submitter is allowed ten days to two weeks to initiate a "reverse-FOIA suit" to enjoin the disclosure before any information is actually released.[114] If some or all of the information appears to fall under an exemption (which is frequently the case for requests of contract proposals) the FOI Officer makes a recommendation as to what parts of the documents, if any, should be disclosed, and the recommendation is forwarded to the Commander, Naval Sea Systems Command, who is, under the Navy's regulations, ultimately responsible for making any decision involving the denial of an FOIA request.[115] If it is decided to deny the request in whole or in part, the requester is notified of the decision and is afforded the opportunity to take the administrative appeal required by the statute,[116] which in this case is handled by the General Counsel of the Department of the Navy.[117]

It should be emphasized that the procedures followed by other agencies often depart substantially from this model, but the model does embody in some form the relevant elements of the practices of most agencies and can therefore serve as a starting point for discussion.

2. *Locus of the Initial Decision*

It may be seen from the description of the NAVSEA decisionmaking process that a number of individuals in a variety of positions within the agency may play a role in formulating the ultimate decision to release information requested under the FOIA. These individuals may include operating personnel (who may or may not be specifically charged with FOIA responsibilities), staff of the central FOIA office or its regional or divisional affiliates, attorneys in the general counsel's office, and senior agency officials. It is obvious that the qualifications and the training of the individuals involved in FOIA decisions as well as the nature of their organizational responsibilities may well influence—or at least be seen to influence—the decisions.

---

[114]Interview with J. Wise, July 22, 1980. These procedures are, for the most part, not dictated by formal regulation but are the product of informal practice evolved within the agency. In part, however, they are designed to comply with the regulations found in *Department of Defense Directive* 5400.7 (Mar. 24, 1980) (encl. 4 "Release Procedures").

[115]*See* 32 C.F.R. § 701.7(b)(2) (1980).

[116]5 U.S.C. § 552(a)(6)(A)(i) (1976).

[117]32 C.F.R. § 701.9 (1980).

Of particular importance are the qualities of the person charged with making the *initial* decision. In the NAVSEA example, this is either the FOI Officer at NAVSEA headquarters or the FOI coordinator in a local field activity. The NAVSEA FOI Officer is a member of the staff of NAVSEA's Congressional Relations and Public Affairs Office. Although there is some variation from one field activity to another, the FOI coordinators in the field offices are usually individuals charged with furnishing administrative support, rather than participating directly in the procurement activities that are NAVSEA's principal function. In this respect, the NAVSEA practices are fairly typical of most of the agencies studied. Virtually all have a Freedom of Information Office, often located administratively within the public relations office of the agency. And almost all designate one person within each agency subdivision that maintains its own files to be principally responsible for the management of FOIA requests received by that subdivision.

The decisional authority granted to the designated FOI Officer or coordinator does, however, vary among the agencies. In the Consumer Product Safety Commission, for example, the FOI officer, who is located in the office of the Secretary to the Commission, makes *all* determinations under exemption 4. The personnel in the operating divisions of the agency do not have the authority to do so.[118]

The EPA releases no documents with respect to which the submitter has asserted a claim of confidentiality on the authority of the operating division having custody of the documents. Under EPA's practice the operating division routinely denies any such request (unless the claim of confidentiality is clearly frivolous) and forwards the request together with the documents to the General Counsel's office, where the actual determination is made.[119] The same is generally true—as a result of informal practice rather than formal rule—at the FTC, where the secretary has responsibility for making an initial determination[120] but in practice relies heavily on the General Counsel's office.[121]

In many agencies the locus of authority to *release* documents in response to an FOIA request, even over the objection of a submitter, is, in practice at a level on the organization chart well below the authority to *deny* a request.[122] At FDA, for example, denials must be made by the

[118]Interview with A. Schoem, June 17, 1980.

[119]40 C.F.R. § 2.204 (1980); Interview with Charles Breece, July 21, 1980. *See House Hearings, supra* note 49, at 4.

[120]16 C.F.R. § 4.11 (1980).

[121]Interview with Alexandra Buek, July 21, 1980.

[122]The final decision with respect to the denial of an FOIA request must be made by "the head of the agency" if a requester exercises the right to an administrative appeal

Assistant Commissioner for Public Affairs.[123] The FOI officer at FDA is his subordinate and is authorized to release documents without clearance from above. Moreover, most release decisions are made by personnel in the operating divisions of the agency. This is not true in all agencies, however. Most denials at the Consumer Products Safety Commission are made by the FOI Officer,[124] who also makes decisions that exemption 4 is applicable.[125] The same is largely true of the procedure used by the SEC.[126]

This difference in treatment of decisions favoring requesters from those favoring submitters is amplified by the statutory availability to a requester of an administrative appeal to "the head of the agency" if a request is denied,[127] a recourse that is not normally available to a submitter, seeking to protect its interests in confidential information given to the government.

While in passing the FOIA Congress clearly intended to favor disclosure,[128] it is legitimate to ask whether the interests served by this preference are so much more important than the potential harm to private submitters from the compromise of valuable business secrets that this disparity between the administrative treatment of submitters and requesters is warranted. It would seem that if a decision to deny the disclosure of material that arguably falls under exemption 4 warrants the attention of a highly placed official, the same might also be said for a decision to disclose such material.

On the other hand, several considerations suggest that there is no real need to raise the level at which initial decisions to release are made simply for the sake of symmetry. A number of the agencies studied presently allow such decisions to be made at a relatively low level, without results that are obviously unsatisfactory. Moreover, requiring that higher-level officials devote time to release decisions would entail additional administrative costs. Finally, the appropriate resolution of this issue depends in part on the recourse available to the submitter to question an adverse initial decision. If an administrative appeal is permitted, as is suggested below,[129] the level at which the initial decision

granted by the statute. 5 U.S.C. § 552(a)(6)(A)(i) (1976). There is no similar statutory requirement for a decision to release information over the protest of a submitter.

[123]21 C.F.R. § 20.47 (1980).

[124]CONSUMER PRODUCT SAFETY COMMISSION, ANNUAL REPORT ON THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, 6 (1980).

[125]Interview with A. Schoem, June 17, 1980.

[126]17 C.F.R § 200.80(d)(5) (1980).

[127]5 U.S.C. § 552(a)(6)(A)(i) (1976).

[128]*See* Clement, *supra* note 5, at 594–97.

[129]Text accompanying notes 150–53, *infra*.

is made takes on less significance. Thus, notwithstanding the appeal of the argument for symmetry between decisions to release and decisions to withhold information, there seems to be no substantial basis for requiring that all agencies raise the level at which initial decisions to release information are made to the same level at which initial denial decisions are made. The one exception to this observation is that it is probably appropriate to require the approval of a senior agency official for a decision to exercise the agency's discretion to release information that has been determined to fall within exemption 4.

3. *Notice to the Submitter*

Of all the suggestions for reform of agency procedures relating to exemption 4, the one that enjoys the most support is that notice be given to the submitter of the information at some point before it is released.[130] The competitive sensitivity of business information may not always be apparent to the agency personnel charged with making FOIA determinations. Moreover the *National Parks* standard cannot be applied like a micrometer; it often calls for difficult judgments—about which reasonable people might differ. Even though the Due Process Clause may not mandate notice before privately submitted business records are made public,[131] basic notions of fairness suggest that when the government exposes private interests of great value to substantial risks of destruction, it has an obligation to afford the owner of those interests some opportunity to evaluate those risks and to take steps to protect against them when that is perceived as necessary. In fact, although not required by the statute, such notice is part of the procedures, either formal or informal, of most of the agencies studied.

There are at least three points in the process of making a determination to release business information at which the agency might give notice to the submitter:

1. at the time a request is made;
2. after an initial decision to release a document has been made; and
3. after a final decision to release has been made, but prior to release.

Obviously the functions served by notice at these three points differ. Notice at the time a request is filed allows the submitter to present its views as to whether the requested documents (or parts of them) fall

[130]*See, e.g.*, *House Hearings*, *supra* note 49, at 134, 164, 270–71, 277, 286, 331–32, 348; HOUSE REPORT, *supra* note 5, at 31; H.R. 5861, 96th Cong., 1st Sess. (1979); S. 2397, 96th Cong., 2d Sess. (1980).

[131]*See* Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976).

within exemption 4. Notice could await a preliminary determination that some records should be released, allowing the submitter to present arguments limited to those records either informally or in some sort of administrative appeal. Finally, notice prior to release allows the requester to seek judicial relief.

It appears that the agencies that deal with contract proposals—almost all of which can be expected to contain at least some competitively sensitive information and which routinely call for difficult judgments in the application of the substantive standards of exemption 4—tend to give notice to the submitter and solicit its views on the appropriate response to the FOIA request in almost every case.

With the exception of the procurement agencies, whose exemption 4 decisions are undoubtedly facilitated substantially by interaction with the submitter, notice to the submitter *as soon as a request is made* appears not to be an obvious necessity but a convenient device for facilitating determinations in difficult cases in which the submitter's views may be helpful. Moreover, there are many cases in which such notice would be superfluous, because the agency would ultimately decide not to release the business records or because they so clearly fall outside exemption 4, that even when notified, the submitter would raise no objection to their disclosure. It would appear, therefore, that the increase in administrative costs that would result from a requirement to give notice in every case as soon as a document containing business information is requested, is not warranted by the benefits of such a requirement.

A more reasonable requirement would provide for notice after the agency has made a preliminary determination to release a document (or parts of it).[132] This would of course eliminate the need to give any notice if it is decided that the requested documents are exempt. Moreover, notice at this point can usually provide the submitter with more useful information about the agency's actual intentions. Since the FOIA requires the release not only of an entire document but of "[a]ny reasonably segregable portion"[133] of a document that contains both exempt and nonexempt information, agencies must, in response to a request for records, only parts of which are exempt, delete those portions that are exempt and release the remainder. It is not until that task has been performed that the agency can notify a submitter precisely what portions of that submitter's records the agency proposes to disclose.[134]

---

[132]The submitter could, of course, still be notified earlier if it appears that its views would facilitate the agency's determination.

[133]5 U.S.C. § 552(b) (1976).

[134]Giving notice in this form, which is the way in which it is most useful, imposes a greater burden on the agency than merely sending a postcard stating that a particular document has been requested, or is proposed to be released.

But must notice be given in *every* case in which it is proposed to release a business document? The practices in several of the agencies studied suggest two techniques that probably afford adequate protection to the private interests at stake without imposing the potentially large burdens on the agencies that this would in many cases entail. First, a *requirement* that notice be given could be limited to those cases in which a submitter has asserted that particular information falls within exemption 4 at the time the information was given to the agency.[135] The difficulty with such a requirement is that it leaves open the possibility that some firms may, without justification, request confidential treatment (and therefore notice before any release) for all of their submissions. While it is not a complete solution, agencies whose files contain information that falls into categories having common characteristics could, as the FDA has done, establish by rulemaking that all or designated portions of the information in those files will routinely be released without notice in response to FOIA requests.[136] To allow some flexibility, the rule should permit submitters to demand notice in those exceptional cases in which they can show at the time they submit a document, that notwithstanding the general rule the release of the document would, because of special circumstances, cause competitive harm. In any case, when notice is *not* required, agencies should err on the side of caution by giving notice whenever there is any reasonable doubt about the commercial sensitivity of requested documents.

There remains the question: What is the function of notice? In many cases, as with most of the procurement agencies, it serves as an invitation to discuss with the agency what should and what should not be released. In other instances, the establishment of a dialogue at such an early point in the process may be neither necessary nor desirable; it may be more efficient for both sides for the agency to make at least a preliminary determination of what information should be deleted before a document is released. If this determination is, in fact, treated as preliminary, the function of notice is still to invite the submitter to present its views to the individual charged with making the initial determination, merely at a more advanced stage of that individual's deliberations. In still other instances, especially in dealing with relatively routine determinations, the agency may feel sufficiently confident of its ability to make an initial decision without involving the submitter that the first notice to the submitter will be of a decision that

[135] *See* notes 101–5, *supra*. This would not, of course, preclude an agency from notifying a submitter and inviting its views when it appears that a requested document may contain sensitive information even though the submitter has not so indicated, but it would avoid the costly burden of routine notice in instances in which exemption 4 is clearly not applicable.

[136] *See* notes 106–13, *supra* and accompanying text.

is "final" in the sense that any objections to it should be addressed to some higher authority in the agency by means of an administrative appeal mechanism.[137] Finally, the requirement may be structured to provide notice to the submitter only after the agency has reached its final decision, in which case the sole function of notice is to allow the submitter an opportunity to seek judicial relief before the information in question is disclosed.[138]

While such a requirement does equip the submitter with at least a minimal ability to protect its interests, it would seem to conform with neither sound practice nor with the implications of the *Chrysler* decision. For an agency to arrive at an informed decision on the often complex question of whether the release of particular information would damage a submitter's competitive position, it is desirable that at a minimum there be what one court characterized as an opportunity for a "reasonably focused dialogue"[139] between the agency and the submitter.[140] This desideratum approaches a requirement if, as *Chrysler* suggests, judicial review of an agency decision to release is normally not to be *de novo*, but is merely to be a review of the administrative record;[141] for unless the submitter is given an opportunity to present its views on disclosure to the agency at some point prior to the decision to release, the administrative record will, in most cases, be insufficient to permit adequate judicial review. Under these circumstances it could even be argued that, at least where there are some questions about the applicability of 18 U.S.C. section 1905 or some other statute giving affirmative protection to business secrets, a failure to ask the submitter for its views is, itself "arbitrary and capricious."[142]

In sum, in most cases[143] agencies should notify the submitter early enough that the submitter can have adequate opportunity to present its views to the agency prior to the formulation of its final decision. Since

---

[137]Footnote omitted.

[138]The FTC Improvement Act of 1980, *supra* note 85, adopts this approach, requiring notice only after a determination has been made to release documents. In practice, however, the FTC continues to notify submitters and invite the expression of their views before making a determination whenever it appears that the documents contain confidential information. Interview with J. Schwartz, July 25, 1980.

[139]Zotos Int'l, Inc. v. Kennedy, 460 F. Supp. 268, 279 (D.D.C. 1978).

[140]An exception to this general rule could reasonably be made for information falling within categories previously determined by rulemaking not to be covered by exemption 4. *See* notes 106–13 *supra* and accompanying text.

[141]441 U.S. at 318–19.

[142]*Id.*

[143]There could be cases in which the information in question is so obviously not within exemption 4 that the development of an administrative record in which the submitter has an opportunity to participate is not warranted. Obviously, however, such cases would not normally be taken to the courts.

the nature of both the decision-making process and the appropriate role of the submitter vary from one agency to another, each agency should establish its own requirement for this sort of notice by regulation—a legislated notice requirement is not necessary and would probably be unduly inflexible.

The submitter ought also to be notified of the final decision—if it includes the release of information the submitter has maintained should be withheld—in sufficient time to seek judicial relief.[144] Since notice between a final determination and actual release constitutes the bare minimum required by notions of fairness, if not by constitutional due process,[145] it is recommended that Congress amend the FOIA to mandate it for all agencies, as it has already done for the FTC.[146]

4. *Nature of the Process of Decision*

One of the major issues in determinations under exemption 4 is the extent of the involvement of the interested parties—the submitter and the requester—in the process that leads up to a final agency decision. This involvement is of particular significance to the submitter, which may stand to suffer substantial economic loss from an erroneous decision. This issue may be divided into three separate questions. First, what involvement in the initial decision should be permitted the submitter? Second, should some sort of administrative appeal be allowed a submitter? And, finally, what role, if any, should be allowed the requester in this process?

As we have already seen, most agencies tend to be quite flexible and informal in their approach to making decisions under exemption 4. It is standard practice in many of them for the FOI Officer or the staff member responsible for the initial determination to notify the submitter by telephone (usually with a follow-up letter for the record) of the nature of the request and to inquire what portions of the requested documents the submitter considers confidential. Without resort to formal rules of procedure, agency personnel generally afford the submitter the opportunity to make its views known in almost any convenient manner (taking into account the constraints imposed by the short time period within which the decision must be made).

This informality is to be encouraged. While it is desirable—in order to insure that significant facts and arguments come to the attention of

[144]If the recommendations of this report are adopted, a period of five days would seem to be adequate. *See* notes 164–67, *infra*, and accompanying text.

[145]*Cf.* Pharmaceutical Mfrs. Ass'n v. Weinberger, *supra* note 131; Note, *supra* note 4, at 126–27.

[146]*See* FTC Improvements Act of 1980, *supra* note 85.

the decisionmaker, and at the same time to establish an adequate administrative record—for the submitter to provide the agency with affidavits and written pleadings, in many cases the written word may be insufficient to convey adequately the business executive's concern that particular information would be of great use to his competitors. Agencies should, therefore, permit businesses to present arguments against release of their information in an informal conference whenever there is any reason to believe this would be useful.

Many representatives of the submitter community feel that this sort of procedure is inadequate. What is necessary they insist is a more formal administrative hearing, with an opportunity to present oral testimony, perhaps even before an administrative law judge.[147]

There seems, however, to be little to be said in favor of a formalized procedure. The only apparent advantages of a more formal hearing are that it might permit the development of a fuller administrative record for review by the courts and that a hearing examiner might be a more capable decisionmaker.[148] Experience suggests, however, that the administrative record necessary to a proper review by the courts can usually be provided by a proceeding limited to the submission of affidavits, documentary evidence, and written argument.[149] And if, as is recommended below, an administrative appeal is allowed a submitter disappointed by the initial decision, the identity of the person responsible for that decision is less crucial.

On the negative side, granting the submitter a right to an oral hearing would unquestionably add substantially to the cost and delay of the proceeding. It can be expected that submitters would request such a hearing whenever the outcome seemed in doubt, those so inclined would also find in a hearing an effective technique for delaying the ultimate release of the information in question—which would in many cases be nearly as satisfactory a result from the submitter's point of view as blocking disclosure altogether.

A formal administrative hearing prior to an initial decision to release information should not, therefore, normally be required. Instead,

---

[147]Interview with James O'Reilly, June 11, 1980; Interview with Burt Braverman, June 12, 1980. *See House Hearings*, *supra* note 49, at 71, 134–36, 270–71.

[148]In some respects, in fact, the existing, less formal procedure would seem to be more advantageous for the submitter in that it is difficult for the agency decisionmaker to cross-examine affidavits and documentary evidence presented by the submitter in support of its arguments, something one would expect a hearing examiner to do more of were the same evidence to be introduced at a formal hearing.

[149]*See* Campbell, *supra* note 5, at 137–39; HOUSE REPORT, *supra* note 5, at 61–63. If the agency record is insufficient, a reviewing court can remand the case for further proceedings in the agency. Camp v. Pitts, 411 U.S. 138, 143 (1973) (*per curiam*).

those agencies that do not already formally provide for a written presentation of the submitter's views should amend their regulations to make it clear that this sort of participation by the submitter is not only permissible but highly desirable. Where necessary, agencies should also amend their regulations to make it clear that written presentations by the submitter may also be supplemented, to the extent useful, by informal discussion, either by telephone or in person between representatives of the submitter and the agency official responsible for the initial decision.

The second question, whether an administrative appeal should be available to submitters, as it is to requesters,[150] should be considered in light of the desirability of eliminating unnecessary expenditure of resources in the making of the initial decision. A submitter whose only opportunity to develop the factual record on which all further proceedings are based (assuming that there will be no *de novo* judicial review of a decision adverse to the submitter) is likely to err on the side of overinclusiveness in preparing the initial presentation.[151] It would help to avoid this were the submitter not only allowed an administrative appeal but were assured the opportunity to develop a fuller record in the process. It may, in fact, be sensible for the appellate authority to refer the matter to an administrative law judge for a formal hearing when it appears that the factual problems presented are of sufficient complexity to warrant it.[152]

Giving the submitter a right to an administrative appeal does demand more resources and consume more time. Nevertheless, the availability of an administrative appeal together with the possibility of amplifying the administrative record where that appears necessary would seem sufficiently likely to reduce the time and effort spent on the initial decision that it is probably justified. It is recommended, therefore, that the submitter be allowed an administrative appeal to the same level, "the head of the agency,"[153] as the statute provides for an appeal by the requester. In the discretion of the appellate authority, the case may be assigned to an administrative law judge for the development of a further record. The prosecution of an appeal should be considered an administrative remedy whose "exhaustion" is a prerequisite for filing "reverse-FOIA" suit.

---

[150]5 U.S.C. § 552(a)(6)(A) (1976).

[151]Given the short time period in which the initial decision must be made, there is likely to be little opportunity to supplement this presentation if informal discussion with the decisionmaker indicates a preliminary inclination not to follow the submitter's wishes.

[152]*Cf. House Hearings*, *supra* note 49, at 270–71 (Letter from James O'Reilly).

[153]5 U.S.C. § 552(a)(6)(A) (1976).

The final question, whether the requester should be entitled to participate in the administrative proceedings, is ultimately of less importance than the preceding ones. To begin with, the requester is entitled to an expedited *de novo* review by the courts of an administrative decision denying release of any of the information requested.[154] In this proceeding the requester may demand an index of the documents covered by the request in order that the requester have a reasonable opportunity to make intelligent argument about why they should be released.[155] In theory, therefore, the requester is provided an ample means of vindicating the substantive rights granted by the FOIA.

In practice, however, judicial review of the agency decision is often less than an ideal remedy for the requester. The resources available to the requester to pursue this remedy are often far more limited than those of either the agency or the submitter (which often intervenes in the court proceedings). Moreover, the judicial proceedings inevitably delay the ultimate release of whatever information is to be released, in many cases by months or even years. In practice, it may well, therefore, serve the requester's interests to permit the requester to participate to the extent feasible in the administrative proceedings. It may well also lead to a better result at the agency level by providing some opportunity for the testing of the presentations made by submitter in an adversarial context.

As a practical matter, most of the agencies studied indicated that they would entertain the submission of views by the requester if offered, even though their rules made no provision for it. They also indicated, however, that requesters seem by and large to have very little interest in participating.

The only substantial disadvantage of permitting the requester to participate in some fashion would seem to be that this might delay the ultimate determination. But this disadvantages only the requester, who ought to be permitted to waive the speedy determination called for by the FOIA if participation in the administrative decision seems more important. It is recommended, therefore, that the submitter be furnished an opportunity to participate as meaningfully as possible in the agency proceedings at both the level of the initial decision and the appeal.

5. *The Problem of Time*

The FOIA presently requires that agencies decide within ten business days whether to release requested information, with one ten-day

[154]5 U.S.C. § 552(a)(4) (1976).

[155]Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

extension of this period allowed "in unusual circumstances."[156] The agency must decide an appeal by the requester from a decision to withhold documents within twenty working days from the date of notice of appeal is received.[157] Difficult enough to meet for ordinary FOIA requests, these deadlines are often entirely unrealistic in cases involving business records, in which it is often not only necessary to review bulky documents page by page, but to notify the submitter, await a written presentation of its views, and consider those views in light of complex technical and legal questions before arriving at an initial determination that can be communicated to the requester.[158] One study of the cases in which "reverse-FOIA suits" had been filed concluded that the agency had failed to meet the statutory deadlines in virtually every one.[159] Agencies are even less likely to be able to make timely determinations under the Act if they are, as recommended above, also required to entertain the views of requesters and to hear administrative appeals by submitters.

In practice requesters are generally understanding about the situation faced by an agency caught between a statutory requirement that it act within a specified time and the practical impossibility of doing so while still giving adequate consideration to the views of the submitter. And the courts have not appeared anxious to enforce the statutory time limits.[160] Nevertheless it is hardly sound legislative policy to continue an unworkable mandate. It is recommended, therefore, that for requests involving information that may fall within exemption 4 the time limits for an initial determination be extended from ten to twenty business days.[161] The current availability of extensions of time "in unusual circumstances" and for administrative appeals should probably remain unchanged.

There is often a further delay once an agency has determined to release a document before it is actually given to the requester. Many

---

[156]5 U.S.C. § 552(a)(6) (1976).

[157]*Id.*

[158]For those agencies that notify the submitter and allow it a specified time to seek judicial relief before the documents are released, there is an additional delay. The action that tolls the statutory time limit, however, is the *determination* whether to comply with the request, not the actual delivery of the documents. *Id.*

[159]Campbell, *supra* note 5, at 198.

[160]*See id.* at 126–28.

[161]This particular length of time is, obviously, arbitrary, and is not critical. The recommendation accords with that made by Professor Campbell. *Id.* at 198. Her suggestion was, however, that the twenty-day period allowed for administrative appeals be halved. The House Committee on Government Operations decided after its study of the matter, to defer any action on extending the time limits. HOUSE REPORT, *supra* note 5, at 53.

agencies, either as a matter of informal practice,[162] or by rule,[163] or, for the FTC, at least, by statute,[164] provide the submitter some period after it has been notified of a determination to release within which to seek injunctive relief against disclosure. This period varies from an informally determined "several days" to the more formal ten business days of the FTC Improvements Act[165] or the regulations of the EPA.[166] If the total allowable time between the filing of a request and a final agency decision is increased from thirty or (in "unusual circumstances") forty business days to forty or fifty business days, and if an administrative appeal is afforded the submitter as a matter of course, it would seem that the period allowed for filing a lawsuit might appropriately be reduced. During the pendency of an appeal, the submitter would have ample opportunity to make preliminary arrangements against the possibility of having to file a lawsuit, should the appeal be unsuccessful. It is recommended that Congress amend the FOIA to prohibit the actual release of a document submitted by a private party over the objection of that party prior to five business days after actual notice has been given to the submitter of the determination to release. This would mean that an agency would be required to release information it determines not to be exempt no later than forty-five business days (fifty-five where there are "unusual circumstances") after the request is filed. This would lengthen the present time limits by only five business days overall.[167]

VI. "REVERSE-FOIA" LITIGATION

The *Chrysler* decision[168] resolved many, but not all of the questions surrounding the so-called reverse-FOIA lawsuit, but it left matters in a state that can only be described as untidy.

It is now clear that:

1. a submitter has no cause of action arising out of exemption 4 itself, or out of the Trade Secrets Act[169] to enjoin release of documents alleged to fall within the exemption or the Act; but

---

[162]*E.g.*, Naval Sea Systems Command. *See* note 114, *supra*, and accompanying text.
[163]*E.g.*, 40 C.F.R. § 2.205(f) (1980) (EPA).
[164]FTC Improvements Act of 1980, *supra* note 85.
[165]*Id.*
[166]*Supra* note 163.
[167]At least for those agencies that presently give the submitter ten days notice before actually releasing the documents.
[168]Chrysler Corp. v. Brown, 441 U.S. 281 (1979).
[169]18 U.S.C. § 1905 (1976).

2. a submitter may sue under the Administrative Procedure Act to enjoin a disclosure that is alleged to be "not in accordance with law" under APA section 10(e)(2)(A).[170]

The principal difficulties left by *Chrysler* are the uncertainty of the meaning of the Trade Secrets Act—in which most reverse-FOIA suits find the "law" that would be violated by a proposed release of information pursuant to a FOIA request[171]—and the lack of guidance with respect to the scope of judicial review of an agency action challenged under the APA. There are also some unresolved questions with respect to the proper venue for such an action, particularly if both the submitter and the requester bring suit to overturn the agency's decision. While it is possible that the courts will eventually work these problems out satisfactorily without the assistance of Congress, it would be far more efficient and more likely to lead to a rational and comprehensive treatment of the problems if Congress would address them directly.

A. Source of the Substantive Right to Enjoin Disclosure

The law of reverse-FOIA actions following *Chrysler* permits an agency to release information that falls within exemption 4 in three situations:

1. the release is independently authorized by statute;
2. the release is made pursuant to an agency regulation adopted under a statutory delegation of authority (normally to be found in the agency's organic legislation);[172] or
3. the information, although within exemption 4, is not within the category of information described in the Trade Secrets Act and the agency chooses to exercise its discretion to disclose the information.

Neither of the first two situations pose any particular difficulties of administration. But the scope of discretion created by the gap, if indeed there is any, between the universe of information described by exemption 4 and that described by the Trade Secrets Act, was left in doubt by *Chrysler*.

There are, it would appear, at least four possible interpretations of 18 U.S.C. section 1905. The first, and perhaps most appealing, is that it

[170] 5 U.S.C. § 706(2)(A) (1976).

[171] There are also particular provisions restricting the release of private information in other statutes that might be implicated in such an action. *See* note 41, *supra*.

[172] 441 U.S. at 295–96, 302–3. *See* Note, *supra* note 4, at 115–17.

describes a class of business information that is precisely coextensive with that described by exemption 4 of the FOIA.[173] This view not only has the virtue of simplicity, but it recognizes the similar, if not identical policy considerations—i.e., the protection of the secrecy interests of private business against unwarranted invasion and the protection of the ability of government to obtain the commercial and financial information it needs to govern—that underlie the two statutes. Reading exemption 4 and section 1905 to be coextensive is also supported by the similarity of their language (which was observed, perhaps more than just in passing, by the Court in *Chrysler*[174]).

Another interpretation, which finds substantial support in the legislative history of section 1905, is that it only prohibits the disclosure of the three very limited classes of information covered by the three statutes that were its predecessors.[175] This interpretation would leave a relatively broad area of information that falls within exemption 4 and is therefore exempt from mandatory disclosure but could still be released in the agency's discretion because its release is not prohibited by section 1905.

A third interpretation is that §1905 is narrower, but only slightly narrower than exemption 4.[176] This would leave some room, although considerably less, for agency discretion.

Finally, it is conceivable, though unlikely, that section 1905 might be read to be broader than exemption 4, with the result that information required to be released if requested under the FOIA would fall within the prohibition against disclosure of section 1905. The way out of that conflict, as the *Chrysler* court indicates in a footnote, is to treat the disclosure as "authorized by law" because of the FOIA,[177] and therefore permissible under section 1905.

Simply stated, the issue posed by these varying possibilities is the latitude of the discretion allowed to agencies to release information that, because it falls within exemption 4 is not required to be disclosed.

---

[173]This is the view taken by most of the courts that have considered the question. Note, *supra* note 4, at 115 n.44. *But see* the discussion in Westchester Gen. Hospital, Inc. v. Department of Health, Educ. & Welfare, 464 F. Supp. 236, 246–48 (M.D. Fla. 1979).

[174]441 U.S. at 319 n.49.

[175]The first person to draw attention to this argument was Clement. *Supra* note 5, at 607–17. This is the view of § 1905 taken by the Justice Department in a post-*Chrysler* memorandum to agency general counsels. *Memorandum from Barbara Allen Babcock to All Agency General Counsels*, 6–7 (June 21, 1979). It is perhaps significant that the Supreme Court did not cite the Clement article in *Chrysler*.

[176]This was apparently the view of the House report on the 1976 amendment to exemption 3. *See* H.R. REP. No. 94–880, 94th Cong., 2d Sess., pt. 1, at 23 (1976). *See also* Clement, *supra* note 5, at 605–6.

[177]441 U.S. at 319 n.49.

If section 1905 were interpreted according to either the first or the last of the possibilities described, there would be no discretion; disclosure would either be required under the FOIA or would be prohibited by section 1905.[178] If either of the remaining interpretations were adopted, on the other hand, agencies would be allowed some leeway between their obligation to disclose under the FOIA and the prohibition against disclosure of section 1905. Within this latitude, whether greater or lesser, agencies would be free to exercise their discretion to release information when justified by the public interest.

While on first impression it would appear that, given the language and the policy of the two statutes, it would be most sensible for section 1905 to be read as precisely congruent with exemption 4, there are substantial drawbacks to that construction. By removing the possibility of discretionary disclosure, it would remove the margin for error that agencies would otherwise enjoy. In every decision in which exemption 4 is invoked, an agency would either be required to disclose the information because it does not fall within the exemption or prohibited from disclosing it because it does (and, by hypothesis, is subject to section 1905, a *criminal* statute). This construction would deprive agencies of the comfort of responding to claims for confidential treatment, by saying, in effect, "We believe the documents requested are not within exemption 4 and we must therefore disclose them, but even if we are wrong, we have decided to exercise our discretion to release them."

The negative consequences of eliminating this leeway for error would, moreover, go beyond merely letting agency personnel charged with making these decisions sleep better at night. First, it would presumably require that many decisions be scrutinized more carefully and that counsel be consulted more often in order to be sure that the legal standard is properly applied; and this would presumably increase the costs of administering the FOIA. Second, it would tend to inhibit disclosure as agencies erred on the side of a cautious avoidance of the criminal sanctions of section 1905.

The elimination of a role for agency discretion may also affect the nature of judicial review of decisions to release business information. *Chrysler* clearly established[179] that APA review of agency decisions to

[178]As the *Chrysler* court suggested, the FOIA could provide the necessary "authoriz-[ation] by law" to neutralize the general prohibition of § 1905 if that section were construed to be broader than exemption 4. It is conceivable that the FOIA could even be read to authorize an agency to exercise its discretion to release material that is within both § 1905 and exemption 4. Although *Chrysler* does not appear to rule out this interpretation, such a reading would hardly be consistent with the spirit of the opinion.

[179]441 U.S. at 318.

disclose information pursuant to the FOIA is governed by section 10(e) of the APA, which provides for the setting aside of agency action that is:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[180]

In a somewhat obscure pronouncement, the Court also indicated that "the decision regarding . . . the scope of section 1905 . . . will necessarily have some effect on the proper form of judicial review . . ."[181] The only readily apparent explanation for this statement is that the Court contemplates that judicial review of a discretionary decision to release information falling within exemption 4 but not within section 1905 would be less searching than review of a decision that a document did not fall within section 1905.[182] The former would involve only a determination that the decision was not "arbitrary, capricious, [or] an abuse of discretion," whereas the latter would call for the reviewing court to decide whether the agency's decision was "in accordance with law"—that is, whether the agency had properly applied the legal standard of section 1905 to the facts before it. If this analysis is correct, construing section 1905 to be narrower than exemption 4 would facilitate judicial review in many instances since the reviewing court would be called on only to decide whether the agency had abused its discretion. On the other hand, if information falls within exemption 4, its release would, by definition, be likely to "cause substantial harm to the competitive position" of the submitter.[183]

A submitter should have the right to enjoin such a disclosure except when the disclosure is made in service of some overriding public interest.[184] The need to afford protection to the legitimate interests of submitters would seem to outweigh whatever savings in administrative judicial costs might be achieved by a more restrictive interpretation of section 1905.

Unless Congress intervenes, the scope of section 1905 will eventually be settled by the courts, although not, it is certain, without some

---

[180]5 U.S.C. § 706 (1976).

[181]441 U.S. at 319.

[182]*See* Note, *supra* note 4, at 122–23.

[183]*See* notes 23–28, *supra* and accompanying text.

[184]Even in this sort of case it can be argued that the submitter would be entitled under the due process clause of the Constitution to be compensated for the value of the information. *See* Note, *supra* note 4, at 124–32.

difficulty. In an ideal world, it could be wished that Congress might step in and clarify the matter. Unless, Congress chooses to conduct a comprehensive review of the FOIA, however, this seems an unlikely eventuality. Under those circumstances, this report offers no specific recommendation on the issue beyond the above comments.

B. Scope of Review

As mentioned above, *Chrysler* left "the proper form of judicial review"[185] for later definition, although pointing out that, under the APA, "[d]e novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of §1905."[186] The Court thus avoided giving a definitive answer to one of the most controversial of the questions associated with the FOIA, whether a court called upon to review an agency decision to release information pursuant to an FOIA request should conduct a *de novo* investigation of the facts or should limit its deliberations to a consideration of the administrative record.

One of the principal arguments favoring a departure from the normal form of review under the APA in reverse-FOIA proceedings is that it is required by justice and symmetry. The FOIA provides for *de novo* review of a decision to deny a request.[187] Since the interests of a submitter claiming that it might lose valuable commercial secrets are at least as strong as those of a requester, it is argued, it is only fair to give the submitter equal procedural rights. As the Court of Appeals for the Fourth Circuit put it:

> Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right to protection from disclosure assured him under exemption 4, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him "not only as a matter of fairness but as a matter of right," seeks what may be regarded as correlative relief?[188]

It has also been argued that the expertise of an agency in its primary field of operations does not necessarily imply the expertise necessary to

---

[185]441 U.S. at 319.

[186]441 U.S. at 318. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[187]5 U.S.C. § 552(a)(4)(B) (1976).

[188]Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1213 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

determine whether the release of particular information may result in competitive harm to the submitter.[189] A number of individuals associated with the submitter community who were interviewed in connection with this study claimed also that the asserted lack of agency expertise in evaluating the potential of information to cause competitive harm is aggravated by a pro-disclosure bias on the part of agency personnel.[190]

On balance, *de novo* review seems unwarranted in most reverse-FOIA cases. Although prior to *Chrysler*, most of the courts that addressed the question held that the appropriate scope of review in reverse-FOIA cases was *de novo*.[191] Many of the academic commentators favor a more limited review based exclusively on the agency record.[192] Such a review comports with the rule established in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[193] which held that, in reviewing agency action challenged as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[194] the courts are limited to considering the agency record.[195] If the administrative record is too scanty to permit adequate review, as has been argued is often the case,[196] the court may remand to the agency for the development of a fuller record.[197] The lack of symmetry in the remedies afforded requesters and submitters is not irrational considering the strong anti-disclosure bias that Congress sought to alter by enacting the FOIA and its 1974 amendments.[198] As to the claims that the pendulum has now swung and that some agencies now demonstrate a clear pro-disclosure bias,[199] the House Committee on Government Operations found, after lengthy hearings on reverse-FOIA lawsuits, that "evidence to substantiate allegations of the agency bias in favor of disclosure of business information has not been presented."[200] The evidence derived from the

[189]*See House Hearings*, *supra* note 49, at 143–44 (testimony of Burt Braverman).

[190]Interview with Burt Braverman, June 12, 1980; Interview with James O'Reilly, June 11, 1980. *See also House Hearings*, *supra* note 49, at 145.

[191]*See* Clement, *supra* note 5, at 631 n.205.

[192]*See, e.g.*, Campbell, *supra* note 5, at 136–43; Clement, *supra* note 5, at 628–33; Note, *supra* note 4, at 123. *But see* Patten & Weinstein, *Disclosure of Business Secrets Under the FOIA*, 46 AD. L. REV. 193 (1977).

[193]*Supra* note 186.

[194]Administrative Procedure Act § 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (1976).

[195]401 U.S. at 415.

[196]*See* HOUSE REPORT, *supra* note 5, at 60.

[197]Camp v. Pitts, 411 U.S. 138 (1973) (*per curiam*). This is what the Court did in *Chrysler*, 441 U.S. at 318–19.

[198]*See* Campbell, *supra* note 5, at 138–39; Clement, *supra* note 5, at 630–31; HOUSE REPORT, *supra* note 5, at 61.

[199]*See, e.g.*, *House Hearings*, *supra* note 49; Patten & Weinstein, *supra* note 49, at 204.

[200]HOUSE REPORT, *supra* note 5, at 61.

interviews conducted in the course of this study points in the same direction.[201]

There are, moreover, substantial drawbacks to *de novo* review. The costs to the agency, the submitter, the courts, and, if it chooses to intervene, the requester, increase markedly. Moreover, the delay entailed in the development in court of a full factual record vitiates the speed of response on which Congress laid so much stress in enacting the FOIA. Since the useful life of information is often short, the submitter may often be able to achieve its essential purpose by delaying disclosure, even though it may ultimately be determined that the information requested was not exempt. Under these circumstances, the temptation will be overwhelming for the submitter to interpose lengthy judicial proceedings as a delaying tactic whether or not there is a meaningful chance of ultimately prevailing on the merits.

In sum, although the matter is not entirely free from doubt, until it is more convincingly demonstrated that *de novo* review is necessary to protect the interests of submitters, it is recommended that the courts, applying the usual rules of administrative law, limit their oversight of administrative decisions to disclose business information to a review of the administrative record. Since this appears to be the teaching of *Chrysler*, no legislative action is called for.

C. Jurisdiction

Although there may have been at one time a question about the jurisdictional basis of reverse-FOIA lawsuits,[202] *Chrysler* resolved any doubts that may have remained, holding squarely that jurisdiction depended exclusively on the "federal question" jurisdiction provision of 28 U.S.C. section 1331,[203] the federal substantive right being furnished by the APA.[204] Since the elimination of the $10,000 amount-in-controversy limit for actions founded on that section against the United States, its agencies, officers and employees,[205] section 1331 provides a fully adequate basis of jurisdiction.

D. Venue

The question of where reverse-FOIA actions might be brought is somewhat more difficult. In actions brought by requesters under the FOIA, venue is proper where the plaintiff resides, where the agency

[201]Footnote omitted.
[202]*See* Campbell, *supra* note 5, at 160–88 for a lengthy discussion of the question.
[203]28 U.S.C. § 1331 (1976).
[204]441 U.S. at 317.
[205]Pub. L. No. 94-574, 90 Stat. 2721.

records are located, or in the District of Columbia.[206] But, *Chrysler* having eliminated the FOIA as the source of a submitter's substantive rights in an action to block release of documents, it follows that the venue provisions of the FOIA would not apply to such an action. A submitter would, therefore, have to rely on the venue provisions of 28 U.S.C. section 1391[207] which defines venue for federal question cases. If the submitter sues only the agency with custody of the documents in question, it may sue in the district in which the agency or an official named as a defendant resides, where the cause of action arose, or where the plaintiff resides.[208] If, as is normally the case, the plaintiff is a corporation, venue will often be available in only two places: where the agency resides[209] (which in many cases will also be where the cause of action arises) and in the plaintiff's state of incorporation.[210] These venue provisions are probably adequate in most situations.

A different problem is presented, however, where the plaintiff wishes to join the requester in the same action.[211] In such a suit an independent ground of venue must be found as to the requester, which, under 28 U.S.C. section 1391(b),[212] is where the requester resides or where the claim arose. Unless the requester resides either where the federal defendants reside or in the plaintiff's state of incorporation, it may be impossible to join the requester and the federal

[206]5 U.S.C. § 552 (a) (4) (B) (1976).

[207]28 U.S.C. § 1391 (1976).

[208]28 U.S.C. § 1391(e) (1976).

[209]The agency resides where its headquarters are located, and not where it may have regional offices. Reuben H. Donnelley Corp. v. FTC, 580 F. 2d 264 (7th Cir. 1978). If the records in question are held in a regional office, it is possible that venue could be located there on the grounds that the cause of action arises there or because the plaintiff chooses to sue the federal officials with custody over the records rather than naming the agency as the defendant.

[210]Although the Supreme Court has not definitively ruled on the question (*see* Abbott Laboratories v. Gardner, 387 U.S., 156 n. 20 (1967)), it appears that the "residence" of a *plaintiff* corporation for venue purposes is only its state of incorporation and not where it is doing business. *See* Reuben H. Donnelley Corp. v. FTC, *supra* note 209, at 268–70; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 176 (3d ed. 1976).

[211]Until recently it might have been considered highly desirable to do so in order to forestall the possibility that the requester would commence its own separate action under the FOIA in a different court and perhaps win a judgment that it was entitled to disclosure of the documents in question notwithstanding the pendency of the submitter's action, or even the fact that another court had enjoined release of the documents. *See* Consumers Union of the U.S. v. Consumer Product Safety Commission, 561 F.2d 349 (D.C. Cir. 1977). The Supreme Court eliminated the possibility of such a conflict, however, in GTE Sylvania, Inc. v. Consumers Union of the U.S., 100 S. Ct. 1194 (1980), in which it held that a requester is not entitled to disclosure of documents the release of which has been enjoined by another federal court. A submitter may nevertheless find it desirable for tactical reasons to join the requester in a reverse-FOIA suit.

[212]28 U.S.C. § 1391(b) (1976).

defendants in one lawsuit.[213] The difference between the venue available to the requester and that available to the submitter may give rise to an additional problem. Some district courts (including the District Court for the District of Columbia) have acquired a reputation as being inclined to favor requesters in FOIA litigation, and others have acquired a reputation as being sympathetic to submitters.[214] The requester would often, therefore, prefer to have the applicability of exemption 4 decided in one forum, and the submitter in another. As a result of the Supreme Court's recent holding[215] that one district court could not order the release of documents whose release had previously been enjoined by another district court, there materializes a possibility of a race to the courthouse in cases in which exemption 4 is likely to be an issue.[216]

This is a race, however, that the submitter will almost always be able to win: the requester may not file suit until it has exhausted its administrative remedies, which at the very least would seem to require waiting out the ten-day period allowed for an initial decision[217] and may require pursuing an administrative appeal. The submitter, on the other hand, can sue to block release of the documents as soon as it learns that they have been requested. The result may often be to frustrate the Congressional intent, embodied in the liberal venue provisions of the FOIA, that the requester be able to litigate in a forum convenient to it. If the submitter does file first, the requester may find it necessary, in order to assert its views on the applicability of exemption 4 where they can be effective, to intervene in the submitter's action. The requester may thus be forced into a court that is both less convenient and less sympathetic than that it might otherwise have chosen.[218] A congressional intent to favor requesters in the matter of venue should not, however, be overemphasized in this context. It is unlikely that, in enacting the venue provisions of the FOIA, Congress focused on the conflict that might arise between the interests of requesters and submitters. Had it

[213]This would be true, for example, in a case in which the requester is a resident of New York, the plaintiff is a Delaware corporation, and the federal agency holding the records in located in Washington, D.C.

[214]*See* Huffman, *Parties Change Strategies in Reverse FOIA Cases*, LEGAL TIMES OF WASHINGTON, May 19, 1980, at 6.

[215]GTE Sylvania, Inc. v. Consumer Prod. Safety Comm. *supra* note 211.

[216]*See* Huffman, *supra* note 214.

[217]*See* 5 U.S.C. § 552 (a) (6) (A) (i) (1976).

[218]The requester may, in some instances, find it necessary to intervene in actions in more than one district court. The litigation that gave rise to *GTE Sylvania* (*supra* note 211), for example, involved documents furnished by several submitters. Twelve different reverse-FOIA suits were filed in Delaware, New York, and Pennsylvania. 100 S. Ct. at 1197 n.1. *See* HOUSE REPORT, *supra* note 5, at 64.

done so, it would almost certainly have also considered the interests of submitters not to be forced to sue to protect their valuable secrets in a court remote from their principal place of business. The balance of equities in such cases will depend on a variety of factors, including the size, character, and principal place of business of the respective private parties, the nature of the factual dispute, and the location of the documents. Under these conditions, it seems only sensible that, where both the requester and one or more submitters have filed lawsuits in different jurisdictions and neither side has chosen to intervene in the other's action, some means be found to consolidate all of the actions in one court. It may be possible for the courts, using such devices as joinder of parties,[219] intervention,[220] consolidation,[221] and change of venue,[222] to work out solutions that will bring all the interested parties together in one action in many instances.[223] But there will be many cases in which they are insufficient.

It may be possible, for example, under the change of venue statute, 28 U.S.C. section 1404(a), for the submitter's suit to be transferred to the court in which the requester's suit is pending—or vice versa—and the two actions to be consolidated there under Rule 42.[224] But section 1404(a) permits transfer of a case only to another court "where it might have been brought"; and thus may not be effective to arrange consolidation in all instances. Moreover, unless the agency defendant seeks the change of venue, which it may not have any incentive to do, the other private party will have to intervene in the distant forum to accomplish the transfer. And there is, of course, no way for the intervenor to be sure in advance that its motion will be granted. Even when some combination of procedural techniques can accomplish the joining of all the relevant parties in one lawsuit, the maneuvering necessary to do so will almost certainly entail the expenditure of unnecessary resources of both litigants and courts. It would be preferable, therefore, for Congress to amend the FOIA to furnish a simpler solution to the venue problem.[225]

---

[219]*See* FED. R. CIV. P. 19.

[220]*See* FED. R. CIV. P. 24.

[221]*See* FED. R. CIV. P. 42.

[222]*See* 28 U.S.C. § 1404(a) (1976).

[223]*See* HOUSE REPORT, *supra* note 5, at 65.

[224]FED. R. CIV. P. 42.

[225]Two means of accomplishing this end were suggested during the 1977 House Hearings. *See* HOUSE REPORT, *supra* note 5, at 65. One witness urged that submitters be required to join the requesters in any reverse-FOIA action and that the requester then be permitted to remove the action to any district court in which the requester could have brought suit under the Act to compel disclosure. *House Hearings*, *supra* note 49, at 155 (statement of Diane B. Cohn). This suggestion would entail the resolution of problems of

One possible solution would be to provide that, if the requester and the submitter sued in different courts, either could file a motion with the judicial panel on multidistrict litigation for consolidation of the suits in one district. The panel would apply the standards set forth in 28 U.S.C. section 1407[226] ("the convenience of parties and witnesses and [the promotion of] the just and efficient conduct of such actions") in deciding whether and where the actions should be combined. Unlike the procedure established by that statute, however, the cases would be consolidated for all purposes and not just for pretrial proceedings. It would also be necessary, were this suggestion to be adopted, to provide for the transfer of one case or the other without regard to whether it could originally have been brought in the court to which it is transferred.[227]

E. Exhaustion of Remedies

Requesters are, under present law, required to exhaust their administrative remedies before filing suit under the FOIA.[228] As formal administrative remedies are not generally afforded submitters, they may usually sue to enjoin release of their documents at any time after the documents are requested.[229] Indeed, even where some form of administrative appeal is permitted the submitter, the FOIA's requirement that a decision to release be implemented "promptly"[230] has been interpreted to mandate giving the documents to the requester before the submitter's appeal has been processed.[231]

If the recommendation of this report that submitters be afforded an administrative appeal were to be adopted, it would be desirable to provide also that no reverse-FOIA suit could be filed before the sub-

---

obtaining personal jurisdiction over both the requester and the agency in a court in which venue would be proper under the general venue statute. *See* notes 207–13, *supra*, and accompanying text. The proposal also ignores the possibility of cases in which considerations of justice might lead to the conclusion that the suit ought not to be removable at the requester's option, for example where the requester is a large corporation (or a representative thereof) and the submitter is a small business.

Another suggestion is that both requester and submitter be required to exhaust their administrative remedies before suing. *House Hearings, supra* note 5 at 60–63. The loser could then sue and the winner intervene in the suit, seeking a change of venue. The preference would be for the requester's choice of forum. This suggestion entails similar problems.

[226]28U.S.C. § 1407 (1976).

[227]*Cf.* 28 U.S.C. § 1404(a) (1976). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, 188–89 (1976).

[228]*See* 5 U.S.C. § 552(a)(6)(C) (1976).

[229]*See* Campbell, *supra* note 5, at 129.

[230]5 U.S.C. § 552(a)(3) (1976).

[231]*See* Campbell, *supra* note 5, at 129.

mitter had exhausted its administrative remedies. The obvious corollary of this is that the agency must not release the documents until a sufficient time after the conclusion of the administrative appeal for the submitter to have time to seek judicial review. This will, of course, create the possibility that the submitter can use an administrative appeal to delay the ultimate release of the documents.[232] But if the time limits recommended by this report were adhered to,[233] the additional delay would be, at a maximum, only five business days.

F. Attorney's Fees

Although the FOIA authorizes the courts to award attorney's fees to requesters who have "substantially prevailed" in a suit against a recalcitrant agency,[234] Congress' failure to anticipate the reverse-FOIA lawsuit leaves several problems relating to the award of litigation costs in an unsatisfactory state.[235] First, if a submitter brings a reverse-FOIA action to block the effectuation of an agency decision favorable to the requester, the requester may be forced to intervene in that suit to protect its interests. As the attorneys' fees provision is worded, however, it does not authorize an award to such an intervenor, even if it is successful. The statute provides that, "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section *in which the complainant has substantially prevailed.*"[236] At one level this result seems just. If the agency has sided with the requester, fairness does not seem to require an award of fees against the agency. On the other hand, had the dispute been cast in a different form—with the requester suing the agency and the submitter as defendants in an action under the Act, an award of attorney's fees under the Act would be allowed. And, from the requester's point of view, it matters little whether the objecting party is the agency or the submitter; the requester has still been forced to go to court to enforce its statutory right of access to the documents. In such cases the court should be given discretion to require the submitter to pay the requester's attorney's fees. Whether an award is made in a particular case should depend on the character of the two private parties to the litigation, the nature of the requester's interest in

---

[232] *See* HOUSE REPORT, *supra* note 5, at 63.

[233] *See* notes 156–67, *supra*, and accompanying text.

[234] 5 U.S.C. § 552(a)(4)(E) (1976). The statute calls for the award of fees to "complainants" who prevail. But since, under *Chrysler* submitters have no cause of action under the FOIA (441 U.S. at 294), the attorneys' fees provision is not available to them.

[235] *See generally* Campbell, *supra* note 5, at 192–95.

[236] 5 U.S.C. § 552(a)(4)(E)(1976)(emphasis added).

the documents, and the reasonableness of the position taken by the submitter in the suit.

Second, where the unjustified persistence of the requester or the improper failure of the agency to resist disclosure forces the submitter to go to court to protect its interests, justice seems to require that the court be authorized to award costs and attorneys' fees to the submitter. When the agency has wrongly decided to release the documents it is the agency that ought to be required to pay. In cases in which the agency has correctly resisted disclosure but the requester has brought suit for release of the documents in which the submitter has been forced to intervene, the facts may occasionally warrant assessing the costs and fees against the requester. In deciding whether to award attorneys' fees to a submitter that has been successful in enjoining release of its documents, the court should give due regard to the four factors listed by the Senate Judiciary Committee in its report on the 1974 amendments to the FOIA: public benefit, commercial benefit to the complainant, nature of the complainant's interest, and reasonableness of the asserted legal basis for denying disclosure.[237] The Committee gave examples of the way these factors should be applied:

> Under the first criterion a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public, but it would *not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government.*
>
> Under the second criterion a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group versus [sic] *but would not if it was a large corporate interest* (or representative of such an interest). For the purposes of applying this criterion, news interests should not be considered commercial interests.
>
> Under the third criterion a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, *but would not do so if his interest was of a frivolous or purely commercial nature.*
>
> Finally, under the fourth criterion a court would not award fees where the government's withholding has a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester.[238]

According to these criteria, the Committee said,

[237] S. REP. No. 854, 93d Cong. 2d Sess. 19 (1974), *reprinted in* SUBCOMM. ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS OF THE COMM. ON GOVERNMENT OPERATIONS, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 at 153.

[238] *Id.*

> [T]here will seldom be an award of attorneys' fees when the suit is to advance the private commercial interests of the complainant. In these cases there is usually no need to award attorneys' fees to insure that the action will be brought. The private self-interest motive of, and often pecuniary benefit to, the complainant will be sufficient to insure the vindication of the rights given in the FOIA.
>
> The court should not ordinarily award fees under this situation unless the government officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior.[239]

A court applying these factors would, then, not award attorneys' fees in favor of a large corporate submitter against an individual or a non-profit public interest organization unless the requester had persisted "obdurately" to litigate an unjustified claim. On the other hand, if the requester is itself "a large corporate interest," the court should be more ready to assess litigation costs against it. In sum, it is recommended that Congress amend the attorneys' fees provision of the FOIA to allow fees to be assessed in favor of a private party, whether requester or submitter, that substantially prevails, and to allow fees to be assessed against a losing private party rather than against the government in appropriate cases.

G. Expedited Treatment

The FOIA provides that suits by requesters under the Act be given priority over all other cases on the docket of the federal court with the exception of those "the court considers of greater importance."[240] FOIA cases "take precedence on the docket" and "shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."[241] This unusual mandate of expeditious treatment is necessary because of the critical time-dependence of most information. Judicial relief delayed is often quite literally judicial relief denied since too great a delay in access to requested information may render the information useless to the requester. It is anomalous that the absence of any equivalent direction to the courts that reverse-FOIA cases be treated expeditiously may lead to the same frustration of the clear congressional policy as if a court were to delay in awarding relief to a requester suing under the Act. Indeed, a cursory survey of some of the reported reverse-FOIA cases indicates that in many of them the time between the filing of a request and the ultimate resolution of the

---

[239] *Id.*

[240] 5 U.S.C. § 552(a)(4)(D) (1976).

[241] *Id.*

issue by the courts has been measured in years.[242] It is recommended, therefore, that, in establishing a clearer statutory pattern for reverse-FOIA litigation, Congress direct the courts to give reverse-FOIA suits the same priority as suits by requesters under the Act.

VII. CONCLUSION

The administration of exemption 4 of the FOIA probably achieves more satisfactory results in practice than the vociferous criticism emanating from business would seem to indicate. That criticism, however, evidences a great deal of suspicion and uncertainty that is, itself, quite real. And the perception that business secrets are not safe in the hands of the government is itself reason enough to attempt to rationalize agency procedures in order to provide greater guarantees that competitively sensitive information will not improperly be disclosed pursuant to FOIA requests. Moreover, there appears to be at least equal cause for concern that business information escapes to competitors through means other than the FOIA, often simply as a result of sloppy administrative practices.

The best way for agencies to attack both sets of problems is to assign information management a higher priority and to make the necessary organizational changes to reflect that priority. There are, in addition, a number of regulatory and statutory changes that should be made to rationalize the way in which FOIA requests that implicate exemption 4 are handled within an agency and to provide submitters with procedural rights better adapted to the protection of their interests than the present law affords.

[242] *E.g.*, In Sears Roebuck & Co. v. Eckerd, 575 F.2d 1197 (7th Cir. 1975) the original request was filed in Feb., 1976. A preliminary injunction was granted in August, 1976. On April 25, 1978, the court of appeals ordered the dismissal of the complaint. A year later the Supreme Court vacated the judgment and remanded the case. Sears Roebuck & Co. v. Dahm, 441 U.S. 918 (1979). The court of appeals them remanded the case to the trial court on June 28, 1979 with directions for the trial court to order that new administrative determinations be made in accordance with *Chrysler*. 600 F.2d 1237 (7th Cir. 1979).

In Planning Research Corp. v. FPG, 555 F.2d 970 (D.C. Cir. 1977), the request was filed on Nov. 5, 1974. On March 10, 1977, the court of appeals reversed the trial court's dismissal for lack of jurisdiction and remanded for further proceedings.