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Would Macy's Tell Gimbel's: Government-Controlled Business Information and the Freedom of Information Act, Forwards & (and) Backwards

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Would Macy’s Tell Gimbel’s: Government-Controlled Business Information and the Freedom of Information Act, Forwards & Backwards

The federal government has become the repository for business information. Through its power and purpose, it has amassed general and specific information concerning perhaps every type and division of corporate life in the country. Its status as a repository is incident to its functioning; the government must plan, regulate, investigate, license, tax and contract with the business world. Government file cabinets abound with various accounts of private business, including sales statistics, manufacturing costs, employment plans, formulas, technical designs, financial forecasts, and loan applications.\(^1\) Public access to this government library is controlled by laws predicated upon service to varying interests. In some areas, information remains undisclosed by specific statutory mandate.\(^2\) In others, its very purpose of collection is disclosure, by an equally explicit mandate.\(^3\) In the absence of such directive statutes, popular availability of information collected by the government presents a problem.

Government controlled data is subject to a general policy of public disclosure in the public interest under the Freedom of Information Act.\(^4\) Yet, as privately generated proprietary information, its value to the supplier is based upon secrecy. In the hands of the government a detailed analysis of employee dispersal, salary ranges, job categories

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and recruitment and training plans may insure equal opportunities for minorities. In the hands of a competitor, such data may provide the needed edge in a highly contested market. For security and efficiency reasons, the government, as holder and collector of these records, may derive a benefit from maintenance of a confidential situation.

In the Freedom of Information Act, Congress endeavored to deal with these competing interests through the construction of its generalized scheme regulating the release of information. New amendments to the FOIA and recent judicial constructions thereof have effectuated major re-adjustments in the balance of this mechanism. This article focuses on the consequences of these revisions in the status of privately produced data, including an examination of the basis and extent of protections afforded by the FOIA, and the manner in which a supplier of such information can insure confidentiality.

THE OPERATION OF THE FREEDOM OF INFORMATION ACT

The foundation of the Freedom of Information Act is the concept of popular government: "[A]n informed electorate is vital to the operation of a democracy." The FOIA is a vehicle for the enforcement of the basic right of access to governmental information, and is concerned with maintaining an uninhibited flow of information as a means of governmental accountability. To this end the statute's provisions circumscribe agency control of data and accelerate its release. The FOIA was enacted in response to criticism of the former public information law, which dispersed information following an evaluation of the need of the requester. The present version presumes the availability of all records to any person without regard to his stated interest in the matter. Any agency denial of a request is reviewable in federal district court in an expedited de novo hearing, with the burden on

5. Id.
7. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. REP. No. 813].
8. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238, which provided in part:
   (C) Public Records.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found [emphasis added].
   For a detailed comparison between the old public information law and the FOIA see Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761 (1967) [hereinafter cited as Davis].
10. Id.
11. Id. § (a)(4)(D).
the agency to justify its decision.\textsuperscript{12}

Access was extended by the 1974 procedural amendments which further restrict an agency's dominion over compiled information.\textsuperscript{13} In these supplements, Congress constructed definitive schedules limiting the time for agency evaluation of initial requests for information, determination of internal appeals\textsuperscript{14} and agency response to complaints filed in the district court following a final denial.\textsuperscript{15} Significantly, these time limits may be extended only in well-defined "exceptional circumstances."\textsuperscript{16} Further, the revision fortifies the judicial role by increasing authority for \textit{in camera} inspections\textsuperscript{17} and providing for the award of costs and fees when the complainant has "substantially" prevailed.\textsuperscript{18} Finally, the new provisions discourage agency delay and misdirections by disciplining unjustifiably recalcitrant holders of information before the Civil Service Commission.\textsuperscript{19}

Contrasted with this strong disclosure policy is the concept of "ex-

\textsuperscript{12} Id. § (a)(4)(B).

In addition to the modifications later described in the text, these amendments required publication of: current indices to agency information, 5 U.S.C.A. § 552(a)(2)(C); publication of internal agency procedures for handling a FOIA request, 5 U.S.C.A. § 552(a)(3); and specific fee schedules, 5 U.S.C.A. § 552(4)(A). Several substantive alterations were also included and are not considered herein. The new provisions also require annual agency reports to Congress covering administration of the FOIA during the prior year, 5 U.S.C.A. § 552(d).

\textsuperscript{14} 5 U.S.C.A. § 552(a)(6)(A). The statute provides a 10-day period from the receipt of the request to initial response thereto. If the response is denied, final internal determination of an appeal therefrom must be made within 20 days of initial receipt. The amendment mandates that if the agency fails to adhere to the schedule the requester "shall be deemed to have exhausted his administrative remedies" and may thereafter institute a suit for injunctive relief. \textit{Id.} § 552(a)(6)(C).

\textsuperscript{15} \textit{Id.} § 552(a)(4)(C). Under the general provisions of Fed. R. Civ. P. 12(a), the government has 60 days in which to answer a complaint; under the FOIA, the government must answer within 30 days, "unless the court otherwise directs for good cause shown." \textit{Id.}

\textsuperscript{16} \textit{Id.} § 552(a)(6)(B). At the agency level, the exceptional circumstances are:
(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

The law permits only one 10-day extension per request. \textit{Id.} § 552(a)(6)(A). At the litigation stage, a district court level extension may be granted upon a showing of exceptional circumstances and due diligence on the part of the agency. \textit{Id.} § 552(a)(6)(C).

\textsuperscript{18} \textit{Id.} § 552(a)(4)(E).
\textsuperscript{19} \textit{Id.} § 552(a)(4)(F).
emptible" material. However, these exempted categories are exclusive and agency authority to withhold information must be located in these exemptions. While this sort of classification permits each exemption to serve several protectible interests, permitting a somewhat greater exercise of agency discretion than the rest of the Act, this discretion has generally been seen to run toward disclosure.

Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or justify automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate . . . that the information should be withheld.

Although the thrust of the FOIA is to obviate the balancing of the

20. Id. § 552(b) exempts from disclosure matters that are:
   (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
   (2) related solely to the internal personnel rules and practices of an agency;
   (3) specifically exempted from disclosure by statute;
   (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
   (5) inter-agency or intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency;
   (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
   (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
   (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
   (9) geological and geophysical information and data, including maps, concerning wells. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletions of the portions which are exempt under this subsection.

21. Id. § 552(c). Not all commentators agree that the classifications of section 552(b) limit the scope of exemptible material. Some argue that since a reviewing court sits in equity, it retains powers of equitable discretion. In the absence of an unequivocal congressional statement to the contrary it is suggested, judicial construction of similar laws indicates the application of traditional equity practice. Under this analysis, a court could withhold material not specifically exempted by section 552(b). See generally Note, The Freedom of Information Act: A Seven Year Assessment, 74 COLUM. L. REV. 895, 911-20 (1974).


requester's need against the need for confidentiality, the exemptions invite the substitution of a balancing test between a source's need for secrecy and the policy in favor of disclosure.

Exemption (b)(4): The Congress, Commentators and Courts

Categorically, proprietary information supplied to the government by private concerns falls within the ambit of exemption (b)(4), which excepts matters that are "... trade secrets and commercial or financial information obtained from a person and privileged or confidential." This exemption has been criticized by commentators and courts alike for its ambiguity which allows an agency broad discretion in its application. The initial Attorney General Memorandum examining the scope of the Act outlined four different meanings and courts have found several variations. Presently, to be withheld, material must be (1) a trade secret or (2)(a) commercial or financial information and (b) obtained from a person and (c) privileged or confidential.

The trade secret inclusion has not created much difficulty and there is no case law on point. A trade secret is not a definite concept and there is no case law on point. A trade secret is a phenomenon of the law of torts, contracts and property; a few states and fewer federal laws codify the protection given to a trade secret. There is no adequate description of the circumference

29. See generally Davis, supra note 8; Katz, supra note 25; Koch, supra note 25.
32. See Callman, supra note 31, § 51. n.1. This state phenomenon has been acknowledged in several federal statutes, which forbid release of a trade secret by a federal employee under criminal penalty. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 494 (1974) (Marshall, J., concurring).
of the concept. Each case, depending upon its approach (contract, torts or property) is determined by its own parameters, as a question of fact.\(^3\)

Several definitions of the term “trade secret” are available.\(^3\) Although popular thought customarily assigns that status to tangible items, formulas, designs and the like, it has been extended to non-technological concepts such as compilations of information, marketing, sales statistics, the projected plans, and organizational and operational methods.\(^3\) Some commentators indicate that protection of information under the trade secret concept requires a finding that secrecy be of continuing value, beyond a single occurrence.\(^3\) Others, however, differ as to this requirement,\(^3\) and, in fact, internal business affairs—those of the secret sphere of business such as plans to lease property or bid information—have been safeguarded under the trade secret law.\(^3\)

Although lacking the precise confines of many other legal doctrines, trade secrets have definite limitations. Unlike its cousin the patent, a trade secret does not have to be novel. However it must be secret and undiscoverable by legal means, reverse process or substantial effort.\(^3\) Disclosure is not prohibited, but it must be accompanied by confidentiality implied or express.\(^3\) A finding of a trade secret is not

33. Milgrim, supra note 31, § 2.03. The heavy emphasis on the independent factual circumstances in every case, said one court, produces distinctions “shaded into each other by lines so fine that it is doubtful whether anything but a nice sense of honor can keep them distinguished.” E.I. DuPont de Nemours Powder Co. v. Masland, 216 F. 271, 272 (E.D. Pa. 1914).

34. The most popular definition is in Restatement of Torts § 757, comment b at 5 (1939):

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


37. See Callman, supra note 31, § 52.2; Milgrim, supra note 31, § 2.09(8).


40. Id. at 475. See generally Callman, supra note 31, § 53.1.
affected by the character of the parties in a case,\footnote{State Farm Mutual Auto Ins. Co. v. Dempster, 174 Cal. App. 2d 418, 344 P.2d 821 (1959).} although the theory of the case may color the result.\footnote{For example, an intangible concept such as a business method will rarely be accorded protection from conversion. It might, however, be protectible under a theory of breach of trust. Similarly a broad and over-inclusive contractual provision for confidentiality will not be given effect in contravention of the societal interest of the efficient use of manpower or the public policy encouraging unrestricted competition. See Note, \textit{Trade Secret Protection of Non-Technical Competitive Information}, 54 IOWA L. REV. 1164 (1969).} A trade secret is a conclusion and while no category of business information is excluded from protection as a trade secret because of its inherent qualities,\footnote{\textit{Cf.} Clark v. Bunker, 453 F.2d 1006 (9th Cir. 1972).} there must be found the common denominators of secrecy and competitive value.

Both the Senate and House Reports indicate strong reliance on the trade secret tradition in interpreting the (b)(4) exemption. In describing the area safeguarded from disclosure, both houses include examples not only of the conventionally accepted tangible trade secrets, but also of the periphery of the concept of intangible, competitive business information. The Senate Report provides: "This [exemption] would include business sales, statistics, inventories, customer lists, and manufacturing processes. . . ."\footnote{S. REP. No. 813, at 9 (emphasis added).} The House Report, reads more broadly, also including "scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations."\footnote{H.R. REP. No. 1497, 89th Cong. 2d Sess. 10 (1966) [hereinafter cited as H.R. REP. No. 1497].}

Apparently the (b)(4) exemption provides protection to more than trade secrets; it also excepts that information which is "privileged" or "confidential."\footnote{5 U.S.C.A. § 552(b)(4) (1975).} The Senate Report ascribed necessary protection to:

\begin{center}
information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. . . . It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.
\end{center}

Again, the House version amplifies the interpretation to include:

\begin{center}
information which is given to an agency in confidence, since a citi-
\end{center}
zen must be able to confide in his Government. Moreover, where
the Government has obligated itself in good faith not to disclose
documents or information which it receives, it should be able to
honor such obligations. 48

The explanatory wording manifests the independent significance of
the separate concepts of "trade secret," "privilege" and "confiden-
tial." Meager concern has been expressed over the term "privilege;" 49
little attention has been paid to the term "trade secrets." 50 On the oth-
er hand, the exact outlines of what is "confidential" within the context
of the (b)(4) exception has produced a plethora of cases and com-
mentaries.

Early appraisal of congressional reports highlighted all possible im-
lications of the word "confidential." The first Attorney General
Memorandum on the matter, which examines the statute in conjunc-
tion with the reports, supports the theory of expanded coverage. It
views "confidential" as an all-purpose umbrella, beyond any com-
mercial or financial limits:

[both reports] . . . underline the protection afforded by this ex-
emption to information given to the Government in confidence,
whether or not involving commerce or finance. 51

Other commentators, although critical of this analysis, also give cred-
ence to a spacious definition. 52

However, the circumstances surrounding the issuance of these re-
ports deprecates reliance on them. The House Report, written several
months after the bill was introduced, was not considered by both
houses. 53 The Senate Report's definition of "confidential" as that
"customarily not released" has been criticized as a superficial appen-
dage, an inadvertent carry-over from an examination of a previous
version of the exemption which protected "customarily privileged or
confidential information." 54 Additionally, both reports were seen as
inapposite to the thrust of the rest of the FOIA, giving breadth to the
exception and encouraging subjective agency evaluations of data, and

49. No litigation has occurred over the concept of "privileged" material. Early app-
raisals are contradictory on its possible implications. Compare Note, Freedom of In-
formation, 56 GEO. L.J. 18, 35-36 (1967) with Davis, supra note 8, at 792-93.
50. See note 29 supra.
51. 1967 ATTY GEN. MEMORANDUM at 34.
52. See Davis, supra note 8, at 789.
53. Getman v. NLRB, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971).
54. Davis, supra note 8, at 789-90; see S. REP. NO. 1219, 88th Cong., 2d Sess. 2
(1964).
this is reminiscent of the prior public information law's imperfections.\textsuperscript{55}

The courts handled the variegations in the statutory wording and congressional reports by attempting combination of the two into a single formula. They divided the exemption into two components—trade secrets and confidential information\textsuperscript{56}—and employed the language of the Congressional Report to interpret the latter part. Although the wording in the House Report was quickly discredited,\textsuperscript{57} the Senate Report "customs" test developed as the main judicial yardstick for evaluation of information claimed by an agency to be confidential.\textsuperscript{58}

The "customs" test, which has been characterized as a somewhat objective test,\textsuperscript{59} evolved into a two step process: (1) a judicial estimation of the material itself, and (2) after such an account, a decision thereafter as to whether the material would ordinarily be released by a business.

This latter step still introduces a subjective criterion into the balance because it is partially predicated upon the behavior of the informant. At times, business custom was measured by the vigor which the business entity exerted in seeking confidentiality.\textsuperscript{60} Coupled with the agencies' inclination to acquiesce in requests for confidentiality,\textsuperscript{61} such a weighing process could effectively condone blanket and conclusionary protection claims contrary to the developed procedural and statutory requirements of specificity. The de novo review of the FOIA mandates an independent court scrutiny. The customs test, on the other hand, produces a classification analysis which weakens the benefits of unbiased judicial examination which the Act seeks to provide.

\textit{National Parks: The Legislative Purpose of the Exemption}

The District of Columbia Circuit recently attempted to clarify the
meaning of the term "confidential" for the purpose of applying the (b)(4) exemption. In *National Parks and Conservation Association v. Morton*\(^{62}\) the court fashioned a new test, founded not upon the test of the congressional reports, but, rather upon the legislative purposes which underlie the exemption.\(^{63}\) The court held that confidentiality would be preserved:

if disclosure is likely . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.\(^{64}\)

This test is unquestionably objective, more than meeting the criticisms leveled at prior interpretations. It directs the inquiry away from the generalizations encouraged by the Congressional formulas and focuses judicial investigation in each case into the material itself and the effect of disclosure. Utilization compels scrutiny of the data rather than a mere cognizance of the customs of its environment. This objectivity narrows the exemption, lessening the weight of considerations formerly given to the claims of both agencies and suppliers of information.

**The Governmental Interest: Means of Acquisition**

Under the first part of the *National Parks* test, agency invocation of the (b)(4) exemption is designed to support a purpose of governmental efficiency. In examining the facts, the court found no governmental interest in preserving confidentiality where the informant business was required to provide the information in order to obtain a monopoly concession in a national park.\(^{65}\) Under that rationale, protection, therefore, is possible only when the government receives information on a non-compulsory basis. Cases subsequent to *National Parks* have generally adhered to this analysis: the mere existence of means to compel a business to forward data negates a government concern in protecting the material from disclosure.\(^{66}\)

The difficulty with the compulsory/non-compulsory approach is

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62. 498 F.2d 765 (D.C. Cir. 1974).
63. *Id.* at 767.
64. *Id.* at 770.
65. *Id.*
66. *See, e.g.*, Consumers Union of United States, Inc. v. Saxbe, 34 Ad. L2d 992 (D.D.C. 1974), where no governmental interest in protection was found for voluntarily supplied merger plans since other compulsory alternatives for collection were available. It should be noted that under the same type of analysis, proposed merger materials were protected under the (b)(7) exemption for investigatory files in *Green v. Klee-dienst*, 378 F. Supp. 1397 (D.D.C. 1974).
that it fails to distinguish between the subtleties of government acquisition. While clearly encompassing the situation where the government must promise confidentiality in order to receive necessary information,\textsuperscript{67} it neglects the practical consideration of agency functioning. There are sundry circumstances in which the government may require information. Some business reports are normally collected pursuant to statute or regulation; in these instances, disclosure will little affect agency access.\textsuperscript{68} In other situations, although power exists to compel reporting, the government depends upon a cooperative, voluntary relationship which may increase not only the quantity, but also the quality of the information supplied.\textsuperscript{69} Threat of disclosure may render industry reluctant to maintain this cooperative attitude, avoiding government contact except under subpoena. Resort to mandatory means can disrupt the relationship, burdening the agency by further complicating collection and damaging efficient operation.\textsuperscript{70} On the other hand, the possibility of disclosure, even under subpoena, may result in a company's acquiescence to any agency action because defense may be more damaging than the entry of a consent decree.\textsuperscript{71}

Beyond the existence of investigatory mandates, the government receives certain data as the result of industry contracts or through industry participation in various federal programs.\textsuperscript{72} Failure to provide the information required renders unavailable the opportunity to participate in such programs or contracts with the government. Obviously, diminishing an agency's power to provide confidential treatment can upset negotiations, and perhaps, force a business to discontinue

\textsuperscript{67} See, e.g., \textit{Hearings on the Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations}, 92d Cong., 2d Sess. 1619 (1972) [hereinafter cited as 1972 Hearings] where the Labor Department expressed concern over the effect of public disclosure on the collection process of the Bureau of Labor Statistics since that agency has no specific statutory authority to gather such information.

\textsuperscript{68} See, e.g., \textit{CLEAN AIR ACT}, 42 U.S.C. §§ 1857(f)-5a(e) (1974) entitling the Environmental Pollution Agency to information concerning emission data.


\textsuperscript{70} Disclosing information from the Commission files [on a lesser standard than need] . . . would necessarily engender resistance on the part of companies and individuals cooperating in Commission industry investigations. It would be likely to seriously retard voluntary compliance with the Commission's efforts to obtain data which it needs in industry inquiries. Obviously, the cooperation which the Commission has received in the past from business depends in large part on the confidence of industry that confidential data submitted to this agency will not be released . . . unless [need has been shown].

\textit{Seeburg Corp.}, No. 8682, at 5-6 (FTC Interlocutory Order Oct. 25, 1966).


its dealings with the government.\textsuperscript{73}

\textit{The Private Interest: Competitive Harm Test}

The second part of the \textit{National Parks} test generates the greatest difficulties. It, too, has a narrowing effect; the shelter of the exemption is reduced by the introduction of the measure of "substantial competitive harm."\textsuperscript{74} The language suggests a factual finding of detriment rather than a balancing of the probability and actuality of harm as some courts have done.\textsuperscript{75} A finding of substantial competitive harm is qualified by a limitation to "legitimate" private interests.\textsuperscript{76} The term "legitimate" intimates that the exemption applies only to information which would be of positive value to a supplier's competitor. Thus information which would only embarrass the company in some way or have a detrimental effect on its public image is not accorded the same protection.\textsuperscript{77} The definition of confidential in terms of competitive harm relegates the totality of the (b)(4) exemption to the parameters of trade secrets, i.e. secret business information which gives the business an advantage over competitors.\textsuperscript{78} Arguably, Congress intended the exemption's vista to be somewhat enlarged;\textsuperscript{79} this wholesale reduction leaves a wide area of material exposed, making its protection the industry's domain and rendering the wording of the exemption a redundancy.

In employing the competitive harm test, the courts might well consider analogues in the trade secret area, using the classification of materials protected there to materials under dispute before them. While in theory this practice provides a helpful basis of comparison and may, to that extent, alleviate the uncertainty and burden of the \textit{National Parks} test, caution must be exercised in the application of such precedents. The initial finding, independent secrecy and competitive harm\textsuperscript{80} is the same, but the trade secret cases are heavily influenced

\textsuperscript{74} National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).
\textsuperscript{76} National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).
\textsuperscript{77} See, e.g., Sears, Roebuck & Co. v. GSA, 384 F. Supp. 996, 1007 (D.D.C. 1974) (holding that possible loss of "good will" by a company through disclosure of government-held information was not actionable under \textit{National Parks} standards).
\textsuperscript{78} See text accompanying notes 30 through 43 supra. In fact, the trade secret analogy was used in Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974).
\textsuperscript{79} See text accompanying notes 46 through 50 supra.
\textsuperscript{80} See text accompanying notes 30 through 43 supra.
by factors that do not belong in the context of an FOIA case. In the substantive law of trade secrets, the question is whether the person who released the information, or misused it, should be held accountable. In the discovery area, where protection for a trade secret is sought, the question involves consideration of the need of the requester and the adequacy of a variety of protective orders intended to mitigate the harm from the release. In FOIA litigation, the propriety of sanctions and the question of need for information are irrelevant; the sole issue is whether any person has a right to the government controlled records. Protection under the (b)(4) exemption which is premised upon the competitive harm rationale devoid of the attendant elements in other trade secret cases, may arguably be extended to a wider class of material.

The FOIA encourages the use of in camera inspections in determining the applicability of an exemption to the material in dispute. This intensive examination of documents entails great consumption of time, effort and considerable expense. Much of this strain is placed upon the agencies contesting disclosure by virtue of procedural arrangements requiring not only the supplying of disputed materials but, also, the submission of a "relatively detailed analysis" indexing each claimed exemption to specific portions of the record. This process, which mitigates some of the court's burden, still taxes judicial economy by necessitating individual rulings on each contention. A stringent objective test for confidentiality, as proposed in National Parks has been seen by at least one court as a device which lessens the use of the burdening in camera inspection. It is suggested therein that common application of the test will produce classes of material

83. But see Charles River Park "A," Inc. v. HUD, No. 73-1930, at 10 (D.C. Cir., Mar. 10, 1975), where it was held that material that is protected by the (b)(4) exemption may be released under discovery-like protective orders.
84. See text accompanying note 10 supra.
85. See text accompanying note 17 supra.
86. These procedural arrangements were developed in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).
typed as inherently exempt or non-exempt, and free the courts from a case by case determination.

However, no such assurance is produced by utilization of a pure trade secrets test within the procedural framework of the FOIA. The use of the strict competitive harm standard necessitates an individualized and highly complex inquiry.89 As decisions following the National Parks theory demonstrate, a court must not only evaluate the data to determine whether it falls within the wording of the protection, but must also hear evidence on the economics and peculiarities of the industry in question in order to assure that the interest sought to be protected is legitimate.90 As in all trade secrets litigation, the specific findings of secrecy and competitive harm must be made; but these findings will vary with the business. Information which may be readily available in one area—unimportant to the competitive context—may be a vital asset deserving of protection in another.91 These sorts of questions lead increasingly to the necessity of in camera perusal in a determination of the merits.

National Parks entrusts the agency with the burden not only of defending the governmental interest but, also, that of the private business involved. The burden in the latter situation is perceptibly greater than that of the former. An agency, perhaps ill-equipped92 or unwilling to handle the intricate business factors involved, might agree to disclose rather than face litigation. Although in many instances, this result will probably fulfill the strong disclosure policies of the FOIA, in many others it will abdicate protection of a private interest Congress sought to safeguard. This danger becomes quite possible with consideration of the timetables imposed for administrative action on a request for information and the added sanctions on an administrator who offends procedures.93

Whether or not the courts will continue adherence to the rigid standards is questionable. Recent decisions in the District of Columbia Cir-

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91. Compare Westinghouse Elec. Corp. v. Schlesinger, Civil No. 118-74-A (E.D. Va. Apr. 2, 1974) (holding the affirmative action plans submitted to the government exempt because they contained clearly confidential material) with Hughes Aircraft Corp. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974) (holding, in part, since information contained in affirmative action plan was the same sort that had been released in an industry-wide survey, it was not exemptible).
92. See 1972 Hearings, supra note 67, at 2114, where a Defense Department official testified that the agency did not have the capability to independently evaluate the value of some of the privately supplied data.
93. See text accompanying notes 13 through 19 supra.
cuit indicate a relaxation of the confidential-competitive harm rationale. Nevertheless, a business concerned with safeguarding its proprietary information in the hands of the government naturally may insist on a surer foundation for protection.

In the past, this insurance apparently took the form of a pledge of confidentiality by the agency to the business. In some cases the pledge may still influence a court decision. For example, following the National Parks test, the governmental acquisition of the information is voluntary, and a disclosure of the collected data would result in the evaporation of the private source. Generally, however, a mere promise is not enough to assure protection if the classification of the information as exemptible is questioned in court.

Another form of protection is sometimes found within the (b)(3) exemption of the FOIA which provides confidential treatment to those matters “specifically exempted from disclosure by statute.” Recently in FAA v. Robertson, the Supreme Court gave new vitality to this provision by re-asserting its applicability to “generalized statutes which empower an agency to withhold information in the public interest.”

The decision, premised on a detailed examination of legislative history, rejected constructions which had limited the exemption to only those

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94. In National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), the court construed the word “confidential” as applicable only when a governmental interest in access to information or a private interest threatened with competitive harm is found. However, the same court recently resorted to the Senate Report to interpret the exemption in reference to protection to an individual’s loan application. See Rural Housing Alliance v. United States Dept. of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). In overruling a district court decision that the (b)(4) exemption protected only a competitive position and, therefore, was inapplicable to a loan application, the court of appeals noted that the Senate Report explicitly protected loan information. Id. at 79 n.30. The court further held that such personal financial information might be of the sort “not customarily released to the public by persons from whom it was obtained.” Id. at 79. Cf. Pacific Architects and Engineers, Inc. v. Renegotiation Bd., 505 F.2d 383 (D.C. Cir. 1974).

This reversion to the wording of the congressional reports and the use of the “customs test” to determine confidentiality of information may indicate dissatisfaction with the stringent competitive harm rationale which limits the (b)(4) exemption to the protection of business information alone.


96. See note 67 supra.

97. See, e.g., M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972), which held express or implied condition of confidentiality not sufficient in itself to afford protection.


100. E.g., 49 U.S.C. § 1504 section 1104 (1970) which provides, in part:

   . . . the Board or Administrator shall order such information withheld from public disclosure when in their judgment, a disclosure of such information would adversely affect the interest of such person and is not required in the interests of such person and is not required in the interest of the public . . . .
laws which clearly detailed the type of data protected. The Court's holding, expanding the scope of exception (b)(3) to embrace discretionary statutes within its purview, may lead to a re-evaluation of other lower court decisions which had denied the inclusion of similar less itemized and broadly drafted statutes.\(^{101}\)

The use of exemption (b)(3), however, still depends upon several contingencies: the presence of a law that arguably exhibits a Congressional intent to provide for confidential treatment, and more importantly, if the law is written in discretionary terms, the application of the law by any agency. This, then, may evolve into a precarious sort of reliance premised on an immediate administrative determination of the public interest without any guarantee of continued confidential status. Therefore, protection given to proprietary information grounded on a factual evaluation under exemption (b)(4) may be, in reality, a more valuable and lasting form of assurance to a private interest.

**AGENCY LEVEL DETERMINATIONS**

The base line for protection of this information is at an agency level. Notwithstanding the impetus for judicial settlement of the new amendments, litigation is costly to all participants. Agency resolution of the dispute may profit the courts, agencies, seekers and suppliers of information.

Implementation of the FOIA by the executive departments varies. A few agencies have closely mirrored judicial interpretation of the exemption with regulations imposing strict qualifications for exempt

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Noteworthy is the saga of 18 U.S.C. § 1905 (1970), which reads, in part:

> 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 . . . 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; . . . 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.

Although never criminally enforced, several agencies prominently list it in their regulations as a warning to their employees as to the consequences of release of information within its coverage. See, e.g., 14 C.F.R. § 1206.300(d)(1) (1974) (NASA public information regulations).

Section 1905 has been held to be outside the ambit of the (b)(3) exemption since it is a redundancy of the (b)(4) exception. See, e.g., M.A. Schapiro v. SEC, 339 F. Supp. 467, 470 (D.D.C. 1972). However, in several suits by private parties to prevent disclosure under the FOIA of information they supplied to the government, it has been accepted as a jurisdictional predicate. See, e.g., Charles River Park "A," Inc. v. HUD, 360 F. Supp. 21 (D.D.C. 1973), rev'd on other grounds, No. 73-1930 (D.C. Cir. Mar. 10, 1975).
status.\textsuperscript{102} Most agency regulations, however, do not meet such exacting standards.\textsuperscript{103} Some, in fact, follow the broad language of the initial Attorney General's Memorandum.\textsuperscript{104} It appears that a conciliatory process has developed, whereby an agency contacts the supplier of the data when confronted with a request for information categorized as confidential. This, at a minimum, allows the supplier of the information some voice in the final decision.\textsuperscript{105} The notification procedure has been codified by some agencies in regulations;\textsuperscript{106} but in the majority of the situations, notification remains an informal courtesy.\textsuperscript{107} It is this very process which is the stopgap against protracted litigation and the only real assurance to a supplier of information that his interests are being considered.

Unfortunately, contacting a supplier whenever a request is made for his government controlled information can entail a great deal of time,\textsuperscript{108} and directly contravenes the FOIA mandate of promptness. Deviation from the statutory timetables is strictly regulated by congressionally imposed standards which do not directly encompass consideration of notification or negotiation with third parties outside the government.\textsuperscript{109} Only an express extension by an agreement with the requester of the information is available to provide the needed time to inform the private party of possible release of his documents.\textsuperscript{110} Great

\textsuperscript{102} See, e.g., 40 C.F.R. § 2.107(b) (1974) (EPA public information regulations); 41 C.F.R. § 60.40.3 (1974) (Office of Federal Contract Compliance public information regulations). Both sets of regulations require notification to a supplier of information whenever a request is made for such data. Additionally, any information withheld is closely scrutinized along court developed standards.

\textsuperscript{103} See, e.g., 7 C.F.R. § 1.4(c) (1974) (Department of Agriculture public information regulations), which merely lists the exemption as written in the Act and refers officials applying the exemptions to the \textit{1967 ATT Wy GEN. MEMORANDUM} for guidelines in interpretation.

\textsuperscript{104} Id.

\textsuperscript{105} Direct notification to a party that a request for information submitted by him is sometimes part of an informal procedure. See, e.g., 1972 \textit{Hearings, supra} note 67, at 2113-14. This process is not codified. See generally 32 C.F.R. § 286a (1974).

\textsuperscript{106} See, e.g., 40 C.F.R. § 2.107(b) (1974) (EPA public information regulations).

\textsuperscript{107} See note 105 supra.

\textsuperscript{108} See 1972 \textit{Hearings, supra} note 67, at 179I, indicating that the greatest delay in answering a FOIA request arises from the time needed to notify the suppliers of the information.


\textsuperscript{110} Time extension by permission of the party requesting information is not codified. THE ATTORNEY GENERAL MEMORANDUM ON GUIDELINES FOR COMPLYING WITH 1974 \textit{FREEDOM OF INFORMATION ACT AMENDMENTS} of 1974, at B-2, suggests: [{\textquoteleft}The second provision for time extension in the 1974 Amendments [§ 552(a) (6)(C)] authorizes a court to allow an agency "additional time to complete its review of the records" if the government can show exceptional circumstances and that the agency is exercising due diligence in responding to the request. In cases where an agency believes that this provision would probably lead to a judicial extension of its time if the agency were to be sued immediately, the agency may in the interest of avoiding unnecessary litigation and exploring fully the scope of a possible administrative grant of access, wish to suggest to the requester the possibility of agreeing with the agency upon a specific extension of time.\textquoteright}
pressure is also placed upon the agency to immediately disclose the materials in the form of an attorney's fee provision permitting assessment of an agency when the complainant has substantially prevailed\textsuperscript{111} and in the form of a threat of the imposition of sanction.\textsuperscript{112} In the absence of regulations in some way assuring evaluation of the informant's desires, plus the greater evidentiary burden imposed by the narrowing scope of the exemption, deadlines may invite an overworked agency to avoid the bothersome notice to the suppliers.

**Evaluation at Intake**

Notice to a supplier is essential. Without it, a business may forfeit valuable claims without any opportunity to present a defense. Government possession of information does not totally eradicate its private character; to suggest that disclosure, which may mean destruction of the interest, may occur without owner participation in that decision is to disregard the plain meaning of the (b)(4) exemption and other statutes which give protection to the private interests. A court, in discussing such an idea, stated:

> [W]hen it is remembered that Congress in express words recognized the property right in trade secrets and in information which is not in the public interest to reveal and prohibited their disclosure, it is difficult to follow an argument based on the theory that the protection of this property right is subject to the unfettered decision of the Commission . . . [to disclose].\textsuperscript{113}

The court in that case held that due process requires the fundamental guarantee of notice in the area of disclosure of what may be valuable business information.\textsuperscript{114}

In the light of the difficulties an agency confronts with regard to statutory and judicial commands concerning proprietary information, notice must be read in a flexible manner. In blanket de-classification situations, whereby certain compiled information is made available to the public through regulations, publication in the *Federal Register* may be sufficient.\textsuperscript{115} However, in some circumstances this is not practical, as when dealing with a specific FOIA request for specific material never so declassified. Personal notification, although satisfactory, may be inconvenient under the new schedules.\textsuperscript{116} It is evident, there-

\begin{footnotesize}
\textsuperscript{112} Id.
\textsuperscript{113} Am. Sumatra Tobacco Corp. v. SEC, 93 F.2d 236, 239 (D.C. Cir. 1937).
\textsuperscript{114} Id.
\textsuperscript{116} E.g., a report by the FCC to Congress indicated that such notification under the schedule enforced by the 1974 amendments "would be unobtainable." 1972 *Hearings, supra* note 67, at 1797.
\end{footnotesize}
fore, that procedures must be developed through which information is evaluated and classified as confidential at the time of intake by the government.  

Undoubtedly, this will increase the burden on the submitting industry by forcing an initial substantiation of the claim for protection. But an emphasis upon initial evaluation under controlled standards grants a business a more trustworthy assurance that its information will be treated in a confidential manner than the promises and statutory guarantees of the past. In addition, it gives an agency evidence of the business' claim, if an agency denial of a request is later litigated. With documents in hand validating the claim of harm of disclosure, the pressure of the new filing time also decreases. A court, too, may be relieved of the tedious in camera inspection that increasingly accompanies FOIA suits, since the court may be more willing to accept an agency assertion that records are properly filed as confidential if a demonstration is made of the precaution of appropriate review. Finally, a process which categorizes information in such a manner permits release of unexempted records expeditiously, within the spirit of the Act. If litigation occurs, it will arise at the point the agency determines the status of the information and at the instigation of the supplier. Hopefully, the question of protection will be settled at the time of agency request.

**INDEPENDENT LITIGATION—THE “REVERSE FOIA” SUITS**

Notification of the informant permits him to take part in any action which may affect his interests. This participation can take the form of assisting the agency in its defense of the company's interest in a subsequent FOIA suit, actively cooperating in the defense as an inter-

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117. Several agencies already employ an analogous process for pre-determining the status of technical information submitted by private parties in government procurement contracts. Standards are applied at a negotiating stage to evaluate the competitive value of the material and assign rights to its use. See Haughey, Trade Secrets and Proprietary Data, in RISKS AND REMEDIES IN GOVERNMENT CONTRACTING (1974).

118. This burden is already imposed upon industries dealing with the Office of Federal Contract Compliance. See 41 C.F.R. § 60.40.3(a)(1) (1974): A determination by an agency to withhold this type of [business] information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

119. See text accompanying notes 92 through 93 supra.

120. See Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 380 F. Supp. 630, 637 (N.D. Ind. 1974), where the court, employing a competitive harm test, noted: Applying these criteria, the Government's deletions in this case pursuant to exemption 4 were clearly appropriate . . . . Indeed, the AEC took special efforts to assure that private claims that information is "proprietary" were properly justified and reviewed.

or, if necessary, instigating a collateral action against an agency which has decided to release private information.\textsuperscript{128}

Direct intervention in an FOIA suit would be the clearest method of asserting an owner's concern in safeguarding his interest and assuring that the defense of this interest is adequate. Entrance to the court in this manner should not be difficult. In the trade secret area, precedent exists establishing an owner's right of intervention.\textsuperscript{124}

Collateral action, on the other hand, may produce greater difficulties. Several suits of this type have been litigated in district courts.\textsuperscript{125}

In each case, suppliers of information sought to enjoin agency release of information that had, up to that time, been treated confidentially. Each of the suits dealt with protection of financial or commercial data which was reported to the government by authority of statute\textsuperscript{126} or regulation.\textsuperscript{127} This was all "required" material which negates a government interest in secrecy under \textit{National Parks} criteria. In each case, the businesses were notified of the precipitous release of the material.\textsuperscript{128} The companies involved predicated their claims for protection upon numerous FOIA exemptions. In the absence of specific statutory protection, the (b)(4) exemption, in whole or in part, proved the most effective deterrent.\textsuperscript{129} Therefore from the supplier's point of view, this "reverse FOIA" tactic was a moderate success.

\textsuperscript{122} \textit{E.g.}, Consumers Union of United States, Inc. v. Saxbe, 34 Ad. L.2d 992 (D.D.C. 1974).


\textsuperscript{124} \textit{See, e.g.}, Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir. 1960).


\textsuperscript{127} \textit{E.g.}, the affirmative action plans were all reported pursuant to 41 C.F.R. § 60-2.1 (1974) (Office of Federal Contract Compliance regulations).

\textsuperscript{128} \textit{Ass'n of Am. R.R.'s v. United States, 371 F. Supp. 114 (D.D.C. 1974) (notice by publication of change of ICC rules in Federal Register); in all other cases each party was contacted individually, e.g., Sears, Roebuck & Co. v. GSA, 384 F. Supp. 996 (D.D.C. 1974), \textit{aff'd} 509 F.2d 527 (D.C. Cir. 1974).

\textsuperscript{129} Claims of the companies were generally predicated upon exemption (b)(3), trades secrets exemption (b)(4), or the investigatory files exemption (b)(7). In cases dealing with claims under the (b)(3) exception the more specific statutes were upheld as protective. \textit{E.g.}, Ass'n of Am. R.R.'s v. United States, 371 F. Supp. 114
Jurisdictional Approach

The litigation indicates that the preliminary question of jurisdiction may prove to be the most decisive factor controlling the course of litigation. Without an explicit statute assuring review, this initial inquiry presents two basic problems: (1) the existence of federal subject matter jurisdiction, and (2) if jurisdiction exists, which statute so empowers a court to hear the case. While all the courts uniformly rejected government contentions of lack of jurisdiction on the grounds of sovereign immunity or preclusion of review because "the agency action is committed to agency discretion by law," not all chose the same jurisdictional predicates upon which to decide the dispute.

Four of the courts found power to hear the case in statutes independent of the Administrative Procedure Act's judicial review section. Arguments that the action entailed a federal question under 28 U.S.C. § 1331, or that a criminal statute forbidding disclosure of private trade secrets by federal employees could be invoked civilly were accepted. Some courts have found jurisdiction to be available.


In all the cases in which the question arose, it was found that private parties have no standing to assert protection for data based upon the (b)(7) exemption. See Sears, Roebuck & Co. v. GSA, supra; Westinghouse Elec. Corp. v. Schlesinger, supra.


under the FOIA itself. As was stated in *Westinghouse Elec. Corp. v. Schlesinger*:

The FOIA cannot permit agency discretion to the extent that such discretion precludes *de novo* determination by a court of entitlement to an exemption under the FOIA.\(^{136}\)

Based upon these jurisdictional findings, the courts scrutinized the material, took evidence and made the final decision to release or exempt the matters in question. The scope of a court's review was unlimited as to the questions of whether the controverted information fell within the trade secrets exemption and, whether the interests of the plaintiff business should be protected with confidential treatment.

However, in *Sears, Roebuck & Co. v. GSA*\(^{137}\) and *Charles River Park "A," Inc. v. HUD,*\(^{138}\) the District of Columbia Circuit denied judicial review power arising from the FOIA itself.\(^{139}\) Viewing the statute solely for the purpose of disclosure, the courts refused to assign any correlative right under its auspices to maintain an injunctive action. Instead, the cases were accepted under the general "party aggrieved" section of the Administrative Procedure Act.\(^{140}\)

The district court in *Sears*\(^{141}\) had declared that since the FOIA could not be the predicate of the suit, a plaintiff-supplier could not utilize the de novo hearing provisions thereunder.\(^{142}\) Rather, the court viewed its reviewing power restrictively:

[The determination should be] whether release of the documents in question would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\(^{143}\)

Significantly, although this jurisdictional holding provides review, it is limited to the most exiguous scope. Under the standard given, questions of law are to be considered by the court, exercising its fullest


\(^{142}\) Id. at 1000.

\(^{143}\) Id. at 1001.
judgment. However, in evaluating agency application of the law, the examining power of a court "... is a narrow one. The court is not empowered to substitute its judgment for that of the agency." In Sears, the court, as a matter of law, ruled on the (b)(3) and (b)(7) exemptions placed in issue by the plaintiff and found them inapplicable. Thereafter the case was remanded to the agency for further investigation of any claim of competitive harm.

In Charles River Park, the appellate court completely avoided consideration of the Sears rationale using a distinctly different approach. Employing both the APA general review § 702 and 18 U.S.C. § 1905 as the jurisdictional basis, the court remanded the case to the district court, not the agency, for a full factual hearing under both statutes.

The appellate decision suggested a three part test. First, the court should consider whether the disputed information is protected from release by 18 U.S.C. § 1905. Although the court held the provision could not be incorporated into the FOIA (b)(3) exemption, it found that the statute itself generated a valid claim for non-disclosure when invoked in a civil action. If § 1905 applies, disclosure is absolutely forbidden; no agency release action pursuant to the FOIA is cognizable. Second, the court must decide whether the information falls within the (b)(4) exemption. This determination is to be made by the district court under the National Parks competitive harm standard. If the data does not meet the specifications, the FOIA operates to mandate release. However, if there is an affirmative finding of protection under (b)(4), one further step is necessary.

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144. The role of the courts should, in particular, be viewed hospitably where the question sought to be reviewed does not significantly engage the agency's expertise. [This may be]... denominated a "question of law"... on which courts, and not the Authority, are relatively more expert.


147. ld. at 1006.


149. Id.

150. Id. at 9. The appellate court held that no consideration should be given to competitive harm in evaluating the applicability of this statute. Rather "[t]he trial court must look at the information sought here and determine how it relates, if at all, to the [wording of the statute]." ld. at 9-10.

151. Id. at 8 n.5.

152. Id. at 9.

153. Id. at 6.

154. Id.

155. Id.
The agency involved argued that disclosure of the data was allowed pursuant to its regulations developed under the FOIA. Since disclosure of information covered by an exemption was not forbidden, these regulations controlled. The appellate court rejected this contention:

If . . . this information falls within the fourth exemption . . . the FOIA does not apply because the language of the FOIA clearly provides that the Act “does not apply to matters” that fall within an exception . . . . Hence, the FOIA could not by regulation provide for the release of this information.

Rather, the agency, empowered by the general housekeeping section of the APA could issue regulations concerning disclosure of the material.

Thus if § 1905 and the FOIA are inapplicable, the district court's third evaluation is whether release of the data under the general housekeeping regulations would be an abuse of discretion. The lower court is encouraged to employ equity considerations such as the need of the requester for the material vis-a-vis the interest of the supplier in maintaining total secrecy. It is only at this point that the district court must restrict its judgment to the standard of abuse. In all other matters, the scope of review is unlimited.

The decisions in Sears and Charles River Park create a confusing precedent. The Sears rationale redirects the real decision-making power away from independent judicial scrutiny to an agency determination capable of reversal only in cases of extreme discrepancy. As the agencies develop procedures for evaluating material under judicially accepted factors of competitive harm, one can expect a lessening of the need for in camera treatment of the data. This potential advantage of the decision makes it quite attractive, and the trend may be toward its adoption. However, it raises serious questions of due process. If this privately supplied proprietary information does in fact constitute a right akin to a property right as herein suggested, due process requires greater procedural protections than an informal

156. Id. at 9.
157. Id.
160. Id.
161. Id. at 10-11.
163. See Am. Sumatra Tobacco Co. v. SEC, 93 F.2d 236, 239 (D.C. Cir. 1937).
agency determination judicially reviewable in a limited manner.\textsuperscript{164}

The competitive harm test employed to adjudge the applicability of exemption (b)(4), heavily laden with the trade secret tradition, forces an individualized inquiry into each situation, not a blanket approach.\textsuperscript{165} This sort of inquiry indicates adjudicative facts, defined as "facts about the parties and their activities, businesses and properties," as distinguished from "general facts which help the tribunal decide questions of law and policy and discretion."\textsuperscript{166} Generally, when governmental action encompasses these adjudicative facts, due process necessitates adequate notice, hearing and a decision on the record at some level.\textsuperscript{167} Therefore, although adjudicatory proceedings under the \textit{Sears} court rationale is not required by statute, it may be so required by the Constitution.\textsuperscript{168}

\textit{Charles River Park},\textsuperscript{169} on the other hand, provides for examination of (b)(4) claims of a supplier by the district court. Following this rationale, a supplier's challenge to an agency's impending disclosure will be heard in a full evidentiary hearing. While this approach certainly satisfies due process considerations, it places the main responsibility for resolution of a dispute on the courts and fosters considerable delay in dissemination of material which may be disclosed if, in fact, the exemption does not apply.\textsuperscript{170}

The conflict resulting from these divergent approaches may, however, be avoided. If an adequate agency forum evolves at the initial stage of intake, a court in review of the record of this proceeding will be able to rely upon the agency determination. This, in turn, satisfies the supplier's right to a hearing, expedites the release of the non-exemptible information and, at the same time, relieves the judicial system.

\textit{The Temporary Injunction Problem}

Whether courts will be able to hear such cases in the future is another question. The instigation of an injunctive suit against an agency

\textsuperscript{164} "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." Wolff \textit{v. McDonnell}, 418 U.S. 539, 559 (1974).

\textsuperscript{165} See notes 89 through 91 \textit{supra} and accompanying text.

\textsuperscript{166} \textit{Davis, Administrative Law Treatise} 413 (1958).


\textsuperscript{169} No. 73-1930, at 6 (D.C. Cir. Mar. 10, 1975).

\textsuperscript{170} The temporary injunction forbidding release of the contested information in \textit{Charles River Park "A," Inc. v. HUD}, at the time of the appellate decision remanding the case had been in effect for 21 months. \textit{Id.} at 11.
does not automatically forestall the release of that information. In most of the cases thus far decided, the participating agencies agreed to withhold the material until judicial resolution of the dispute.\footnote{171} However, \textit{Neal-Cooper Grain Co. v. Kissinger}\footnote{172} indicates that agencies may not be so accommodating in the future. Following a course suggested in \textit{Sears},\footnote{173} the District of Columbia district court denied a plaintiff-supplier’s initial motion for a preliminary injunction halting release of the data.\footnote{174} This permitted the agency to disclose the information, thereby mooting any further litigation.\footnote{175}

It is difficult to obtain a restraining order in this type of situation.\footnote{176} Again, this practice must envision the existence of agency procedures for handling the suppliers’ claims. In the absence of adequate procedures, the stringent temporary injunction standards would produce a harsh result indeed. The owner of the proprietary information, without any preventive remedy, would be forced to attempt a damage action for compensation.

\textbf{Remedial Action}

Once privately supplied government-controlled information is released under the FOIA, it enters the public domain. The FOIA does not create any authority for control of the information’s use: once given to any person, any other person may obtain it.\footnote{177} If the information held any value to its owner, this value is destroyed by publication.\footnote{178}

\begin{flushright}
\footnotesize
\textit{175.} Cf. Consumers Union of United States, Inc. v. Saxbe, 34 Ad. L.2d 992 (D.D.C. 1974), where the court, in a declaratory judgment action, first noted that the prior release of the information by the agency had mooted the suit, yet entered judgment notwithstanding, holding that the requesters of the information were entitled to such material in the future.
\textit{176.} The standards generally used to determine the propriety of such extraordinary relief are those found in Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958): (1) whether the petitioner has made a strong showing that it is likely to prevail on the merits; (2) whether the petitioner has shown irreparable harm would follow; (3) whether the issuance of an injunction would substantially harm other parties interested in the proceedings; (4) where lies the public interest. These factors were employed by the district court in Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 774 (D.D.C. 1974), and the appellate court to vacate a stay pending disposition of an appeal in Sears, Roebuck & Co. v. GSA, 509 F.2d 527 (D.C. Cir. 1974). The likelihood of success for a supplier on such a motion is not strong. See Gellhorn, \textit{The Treatment of Confidential Information by the Federal Trade Commission: The Hearing}, 116 U. Pa. L. Rev. 401, 434 & n.178 (1968).
\textit{177.} See text accompanying notes 9 through 12 supra.
\textit{178.} See, e.g., Dollac Corp. v. Margon Corp., 164 F. Supp. 41 (D.N.J. 1958), which held that after public disclosure, the owner of a trade secret cannot recall it to privacy and claim it as secret.
\end{flushright}
However, as recognized under the concepts of trade secret law, if proprietary information which is secret and contains certain competitive benefits to its owner is used or appropriated without the owner's consent, an action may lie for damages.179

Any damage action against the government for unauthorized disclosure of proprietary information would have to be brought under the Federal Tort Claims Act180 or the Tucker Act,181 statutes waiving sovereign immunity under specified circumstances. Theories of recovery available are suggested by general trade secret law: tortious conversion of private information; breach of confidence claims; or damage action premised upon breach of an express or implied contractual condition of confidence.182 Disclosure of data to the government, under any express or tacit confidentiality, does not render that information public.183 Even under the most narrow construction, exemption (b)(4) protects material from release, acknowledging a protectible private interest.184 It is a necessary corollary therefore, that when the government makes protectible information public without prior notification to or consent by the owner, the government should be held accountable for damage experienced by the owner by virtue of the disclosure.

At least two cases provide authority for this type of sanction.185 Both involved technical material received by agencies under contract. Although neither contract contained an express clause limiting governmental use of the information, both courts held that disclosure of information acquired by the government beyond the express terms of the agreement constituted a breach of contract for which the government would be held liable.186

179. See generally Callman, supra note 31, § 59.3.
   The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damage in cases not sounding in tort.
182. See generally Milgrim, supra note 31, §§ 3.02-4.03.
183. This necessary element of secrecy is not lost, however, if the holder of the secret reveals the secret to another in confidence and under an implied obligation not to use or disclose it. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).
186. The Padbloc Co. v. United States, 161 Ct. Cl. 369 (1963), which held that there was a breach of an implied contract that the government would not disclose plaintiff's secrets except in accordance with the terms of agreement being negotiated at the time of the government release; Aktiebolaget Bofors v. United States, 194 F.2d 145
Discussion of these remedial actions should not suggest that a simple contract clause, limiting the government's power to disclose any information, gives adequate protection. It is clear that a court considering the agreement will evaluate the data so protected and refuse to enforce any part of such an accord which attempts to eviscerate the public policy commands of the FOIA. It does suggest, however, that such contract protection may operate to reduce the possibility of hasty disclosure of protectible information without the notification or consent of its owner.

CONCLUSION

Presently, the status of proprietary information within government possession is uncertain. Prior agreements between the recipient agencies and the supplying businesses, whether formal or informal, statutorily premised or discretionally given, no longer serve as a valid assurance that business interests will be considered. Confidential treatment, determined under the more exacting standards of trade secret law, depends upon an intricate and individual evaluation of data not now covered by existing agency guidelines. A business concerned with safeguarding valuable information has little alternative but to resort to litigation for a judicial determination of the matter. As has been shown, even this avenue may be of limited value. It is apparent, therefore, agencies must develop adequate evaluative procedures which encompass fairness for all interests involved, and give due regard to the property interests protected by due process.

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(D.C. Cir. 1951), which disallowed recovery under Tort Claims Act when the Government had a contract right to use a trade secret, implying that if the Government had used data beyond terms of the contract, recovery would lie.