IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PETITIONER CHRYSLER CORPORATION

BURT A. BRAVERMAN
FRANCES CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner Chrysler Corporation

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-42a) is reported at 565 F.2d 1172. The opinion of the district court (Pet. App. B, pp. 43a-57a) is reported at 412 F.Supp. 171.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, pp. 58a-59a) was entered on September 26, 1977. The petition for writ of certiorari was filed on December 27, 1977, and was granted on March 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), mandates that confidential commercial information which falls within that exemption not be publicly disclosed by federal agencies.

2. Whether agency disclosure regulations promulgated pursuant to 5 U.S.C. § 301, 5 U.S.C. § 552, or Executive Order 11246 constitute "authorization by law", within the meaning of 18 U.S.C. § 1905, for disclosure of confidential commercial information.

3. Whether 18 U.S.C. § 1905 is a specific statutory exemption from disclosure within the meaning of Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3).

4. Whether a person who has submitted to a government agency, confidential commercial information which assertedly is exempt from disclosure under Exemption 4 of the Freedom of Information Act, or whose disclosure assertedly would violate 18 U.S.C. § 1905, is entitled to a trial *de novo* in a suit to prevent disclosure of that information by the Government.

5. Whether a private, civil cause of action to enjoin the disclosure of information whose release would violate 5 U.S.C. § 552(b)(4) or 18 U.S.C. § 1905 should be implied under those statutes.

STATUTES AND REGULATIONS

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552, 18 U.S.C. § 1905, 5 U.S.C. § 301, and the pertinent regulations of the Office of Federal Contract Compliance Programs, 41 C.F.R. Part 60-40, are set forth at Pet. App. D, pp. 60a-65a.

STATEMENT OF THE CASE

1. As a government contractor, Chrysler Corporation ("Petitioner") is required to comply with Executive Orders 11246 and 11375[1] ("Executive Orders") and with various implementing regulations[2] which have been promulgated thereunder by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). These orders and regulations require Petitioner and other government contractors to, *inter alia,* prepare and submit to Respondents[3] a variety of reports and information, including written affirmative action programs ("AAP's") and equal employment opportunity reports ("EEO-1's"), for its entire corporate domestic operations and separately for each of its individual domestic facilities. A. 132-34.

Petitioner is required to include in every one of the nearly one hundred AAP's which it prepares annually, *inter alia,* highly detailed information of both a statistical and narrative nature concerning its staffing of each department and subdepartment at the particular facility and, within each such subdepartment, of each job classification; pay-scales; actual and expected

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[1] 30 Fed. Reg. 12319 (1965), 32 Fed. Reg. 14303 (1967), 3 C.F.R. 169-177 (1974).

[2] 41 C.F.R. Parts 60-1, 60-2 and 60-60.

[3] Respondents are various government officials who are responsible for administering the equal employment opportunity program established by the Executive Orders. The Secretary of Labor, who has ultimate responsibility for the program, discharges his duties through OFCCP and has designated the Defense Logistics Agency (formerly, the Defense Supply Agency) ("DLA") as one of the several "compliance agencies" responsible for enforcing the Executive Orders. See Executive Order 11246, Subpart C; 41 C.F.R. §§ 60-1.2, 60-1.6; OFCCP Compliance Manual, § 2-202.

shifts in employment; and critical self-analyses where Petitioner believes it has not met its obligations under the Orders and regulations. 41 C.F.R. §§ 60-1.40, 2.11 and 2.12; A. 134. The AAP's specifically at issue below were, respectively, 175 and 257 pages in length.

The EEO-1 reports which Petitioner is required to furnish annually to Respondents for each of Petitioner's approximately one hundred facilities contain statistical information with respect to the total number, and the number of minority and female, persons employed by Petitioner in nine specified job categories. A. 133-34.

To enforce the Executive Orders, Respondents conduct "compliance reviews" and "complaint investigations." At the conclusion of these, Respondents prepare either a "compliance review report" ("CRR") or "complaint investigation report" ("CIR") which describes and discusses the documents and information submitted to Respondents by the contractor, analyzes the contractor in light of the Orders and regulations, and recommends corrective measures which the contractor should be required to implement. The reports may incorporate, in whole or in part, AAP's, EEO-1's or supporting documents. A. 134-36.

The Secretary of Labor has promulgated regulations providing for public disclosure of information from records of OFCCP and its compliance agencies. 41 C.F.R. Part 60-40; Pet. App. D, pp. 62a-65a. The regulations provide generally that "[u]pon the request of any person * * * records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure [under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552], if it is determined that the requested

inspection and copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." 41 C.F.R. § 60-40.2(a). In addition, the regulations specifically provide that, upon request, EEO-1 reports "shall be disclosed" (41 C.F.R. § 60-40.4) and that AAP's, subject to limited exceptions (41 C.F.R. § 60-40.3), "must be disclosed." 41 C.F.R. § 60-40.2(b)(1).

2. This action arose when DLA notified Petitioner that DLA had received requests under the FOIA for disclosure of AAP's, EEO-1's, CRR's and CIR's [4] for two of Petitioner's facilities. To the extent possible within the brief ten day period allowed by Respondents, Petitioner objected to the proposed disclosure of the documents asserting, *inter alia,* that they were exempt from disclosure under the FOIA and OFCCP's rules, and that disclosure would violate 18 U.S.C. § 1905.[5] A. 138-40.

Thereafter, DLA notified Petitioner that Respondents had determined that the documents at issue were subject to disclosure virtually in their entirety; and that Petitioner would not be furnished with a copy of the CIR or CRR prior to disclosure. In addition, Respondents stated that because they were required by

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[4] The CIR and CRR were prepared in part on the basis of, and incorporated substantial amounts of information from, Petitioner's AAP's and EEO-1's. A. 136.

[5] Petitioner also requested that Respondents furnish Petitioner with copies of the CRR and CIR—which Petitioner had never seen—so that Petitioner might be able to determine what parts of the reports were confidential and to present intelligently its claim of confidentiality. A. 140.

the FOIA to make a substantive decision on release of the documents within ten working days of receipt of the request, they would not await the result of any administrative appeal by Petitioner of Respondents' disclosure decision under 41 C.F.R. § 60-60.4(d). A. 62, 140.

Petitioner commenced this action to enjoin Respondents from publicly disclosing the documents and to obtain a declaratory judgment that the public disclosure by Respondents of such documents was contrary to, *inter alia,* Exemptions 3 and 4 of the FOIA, 5 U.S.C. § 552(b)(3) and (4), and 18 U.S.C. § 1905. The district court conducted a trial *de novo* during which both Petitioner and Respondents presented the testimony of expert witnesses and others relating to the nature of information contained in the contested documents, the uses to which such information could be put by competitors of Petitioner, and the injury which Petitioner would suffer as a result of disclosure. Pet. App. A, p. 36a.

On April 20, 1976, the district court issued its opinion. Pet. App. B, pp. 43a-57a. The district court held that it had subject matter jurisdiction under 28 U.S.C. § 1331(a); that portions of the documents consisted of confidential commercial information whose disclosure would cause substantial competitive injury to Petitioner;[6] that such information is exempt from manda-

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[6] The district court found that "the testimony clearly shows that *the manning tables are confidential* * * * [and that] the *release of the manning tables would cause Plaintiff substantial competitive harm* in several ways. First, the possession of such a document could aid another corporation in its practice of employee raiding * * * Second, the possession of a manning table would permit a competitor to determine the exact use of Plaintiff's labor force,

tory disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4); that disclosure of that information would violate 18 U.S.C. § 1905 and 29 C.F.R. § 70.21(a); and that disclosure of those portions of the AAP's was contrary to law and should be enjoined pursuant to 5 U.S.C. § 706(2)(A). A supplemental memorandum and final order were filed on June 17, 1976. Pet. App. E, pp. 66a-67a.

On cross-appeals by the parties the court of appeals reversed. Pet. App. A, pp. 1a-42a. The court held, *inter alia,* that government agencies have discretion to disclose confidential, private documents notwithstanding the fact that they fall within an FOIA exemption; that disclosure of the type of confidential business information described in 18 U.S.C. § 1905 pursuant to agency regulations promulgated under 5 U.S.C. § 301 is "authorized by law" within the meaning of, and therefore not prohibited by, § 1905; that a cause of action to enjoin disclosure of documents which assertedly will violate FOIA Exemption 4 and 18 U.S.C. § 1905 exists only under 5 U.S.C. § 706, and that none can be implied under Exemption 4 or § 1905; and that an action to enjoin disclosure of documents was not to be conducted on a *de novo* basis but rather that review should be limited to only a determination on the basis of the agency record of whether the agency's decision to disclose was arbitrary, capricious or an abuse of

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and thus the technology being applied by Plaintiff * * * [which information] would be useful in comparative analysis and would alert competitors to areas worth their managerial time. * * * Third, the possession of manning tables . . . would allow Plaintiff's competitors to reduce their risktaking." Pet. App. B, p. 51a (emphasis added). This finding was not challenged by Respondents on appeal or overturned by the court of appeals as clearly erroneous.

discretion. Finding that the agency record was inadequate, the court remanded the case with instructions that further proceedings be conducted before the agency.

SUMMARY OF ARGUMENT

The decision of the court of appeals contravenes the congressional intent underlying Exemption 4 of the Freedom of Information Act and the confidentiality provisions of 18 U.S.C. § 1905. Those statutes were enacted to ensure that private persons such as Petitioner who furnish confidential commercial information to federal agencies would be protected against the injury which public disclosure of such information by the Government would be likely to cause; without that protection, such persons would be discouraged from continuing to provide necessary information to federal agencies for use in government programs.

The decision below, however, invests broad discretion to disclose such confidential information in the very agencies and officers which the confidentiality laws were intended to restrain. By construing FOIA Exemption 4 as permissive, and by holding that agencies may legitimize disclosure of confidential information which otherwise would violate § 1905 merely by promulgating agency regulations providing for such disclosure, the lower court has emasculated two of the Nation's most important confidentiality laws. Moreover, by holding that persons aggrieved by improper disclosure are not entitled to a trial *de novo,* the court has insulated the agency's *ipse dixit* from meaningful judicial review.

In this brief, Petitioner shows that Congress intended that federal agencies should not have discre-

tion to disclose private, confidential commercial information which falls within Exemption 4 or 18 U.S.C. § 1905; that agency disclosure regulations do not authorize the release of confidential information the disclosure of which would otherwise violate § 1905; that information whose disclosure is prohibited by § 1905 is also exempt from disclosure under Exemption 3 of the Freedom of Information Act; and that a person suing to enjoin agency disclosure of confidential commercial information which assertedly falls within § 1905 and Exemption 4 has a right to a trial *de novo*.

ARGUMENT

As our nation has grown, so has the size of our government and the amount of business regulation. Today, there are literally thousands of federal departments, commissions, boards, task forces, etc., which administer a complex network of federal statutes and regulations cutting across all industries.

These federal agencies secure a constant flow of information from the private sector. While much of this information is submitted in response to statutory and regulatory filing requirements, a substantial amount is voluntarily submitted in a spirit of cooperation both in response to surveys and reporting programs conducted by the Government and in response to frequent informal requests for such data from agency officials and employees.

The information submitted by the private sector is staggering both in amount and in diversity.[7] Major

[7] In 1975, there were more than 5,000 federal government report forms in use. It was estimated that, in 1976, these report forms and the corresponding federal reporting requirements generated ap-

corporations each submit thousands of reports and documents every year to the federal government, and even small businesses supply the Government with a surprisingly large quantity and variety of data. These reports contain information concerning sales, manufacturing costs, technical designs, employment practices, salaries and identities of key personnel, financial forecasts, descriptions of manufacturing processes, and an endless array of other business matters. Because such reports are often submitted on a recurring basis, annually and even monthly, they provide extremely current and accurate data concerning these varied aspects of the reporting companies' operations.

In the hands of the Government, the information enables federal agencies to monitor the economy and to develop, enforce and monitor the impact of regulatory programs and policies. Indiscriminately released, the same information can reveal intimate aspects of a company's operations and can result in severe competitive or other injury to the business.[8] Consequently, many, if not most, businesses take careful precautions designed to guard against the release of such information and, apart from submission to the Government for limited regulatory purposes, generally do not pub-

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proximately ten *billion* pieces of paper. *Report of the Surveys and Investigations Staff to the House Comm. on Appropriations, "Federal Energy Data Collection Activities and Systems"*, at 15, *reprinted in Dep't. of Interior Hearings Before the House Comm. on Appropriations,* Part 8, 341-453 (1977).

[8] "In the hands of a competitor, such data may provide the needed edge in a highly contested market." Note, *Would Macy's Tell Gimbel's: Government Controlled Business Information and the Freedom of Information Act, Forwards & Backwards,* 6 Loyola L.J. 594-95 (1975) (hereinafter *Would Macy's Tell Gimbel's*).

licly disclose much of the information which they furnish to federal agencies.[9]

Traditionally, the confidentiality of such private business information has been respected by the Government; the maintenance of such data in confidence was firmly rooted in the notion that protection of proprietary information from confiscatory disclosure is necessary not only to prevent an arbitrary taking of property, but also to stimulate creative efforts in science, technology and industry.[10] However, under some recent interpretations of the Freedom of Information Act and 18 U.S.C. § 1905—including the decision of the court below [11]—the tables of business privacy have turned to the point where, today, businesses which submit confidential information to government agencies no longer have any assurance that the confidentiality of that information will be respected.[12] Competitors,

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[9] For example, Petitioner's written corporate policies specifically recognize that its "[i]nvestments in . . . valuable information and records represent a substantial portion of Chrysler Corporation's total worth", characterize the precise type of information at issue in this case as "sensitive" in nature, and prescribe detailed procedures to be employed in order to safeguard such information from improper disclosure. A. 30-42.

[10] Article I, Section 8, Clause 8 of the Constitution directs Congress "to promote the Progress of Science and the useful Arts." This same notion is at the heart of the Nation's patent, copyright and trade secret laws.

[11] See also *General Dynamics Corp.* v. *Marshall*, 572 F.2d 1211 (8th Cir. 1978); *Sears, Roebuck and Co.* v. *Eckerd*, —— F.2d ——, No. 77-1417 (7th Cir., April 25, 1978).

[12] "Commission studies and reports substantiate complaints of onerous, and sometimes unnecessary, Federal demands on business entities, particularly on small businesses, which can ill afford these burdens. These complaints are exacerbated by the fear that information given 'in confidence' to a Federal agency may be . . . dis-

business analysts, disgruntled employees, potential and existing adverse litigants, foreign businesses and governments and a wide variety of others are now able, virtually for the price of a postage stamp, to obtain from federal agencies confidential commercial information which, but for the lower court's construction of the FOIA and 18 U.S.C. § 1905, would not be available to them. And, further exacerbating this situation, some courts, as in the decision below, have substantially curtailed the right of a business aggrieved by threatened disclosure of its documents to obtain *meaningful* judicial relief from such conduct. The use of the FOIA for such surveillance of private affairs neither was intended nor is appropriate under the Act.

I. Federal Agencies May Not Disclose *Private* Information Which Falls Within Exemption 4 of the FOIA

The court below held that Respondents had discretion to disclose Petitioner's documents notwithstanding the fact that, as found by the district court, the documents fell within Exemption 4 of the FOIA [13] because they were confidential and commercial in nature and would cause substantial competitive injury to Pe-

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closed to a business competitor under the public disclosure requirements of the Freedom of Information Act. In view of the current state of the law and the growing tendency of the business community to use the FOIA to obtain commercial information, *such apprehension appears justified.*" Commission on Federal Paperwork, *Confidentiality and Privacy* 97 (1977) (hereinafter *Paperwork Report*) (emphasis added).

[13] Exemption 4 provides that the disclosure mandate of the FOIA "does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential . . ." 5 U.S.C. § 552(b)(4); see Pet. App. D, p. 60a-61a.

tioner if disclosed. Although it recognized that, in enacting the FOIA, Congress was clearly concerned that "disclosure of certain information might injure interests in privacy and confidentiality which may be as important as the public's right to general access to agency information", the court nonetheless rejected the notion that "Congress in the FOIA intended . . . that the exemptions make nondisclosure mandatory . . ." and held that government agencies have broad discretion to disclose exempt information. Pet. App. A, pp. 23a-25a.

As the court below observed (Pet. App. A, p. 23a), its holding is contrary to that of the court of appeals in *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir.), *cert. denied,* 431 U.S. 924 (1977). There, the Fourth Circuit concluded that Exemption 4 confers upon a supplier of private, confidential commercial information the *right* to prevent the disclosure of information which falls within the exemption. *See also Continental Oil Co.* v. *FPC,* 519 F.2d 31, 35 (5th Cir.), *cert. denied,* 425 U.S. 971 (1976); *McCoy* v. *Weinberger,* 386 F.Supp. 504 (W.D.Ky 1974); *Neal-Cooper Grain Company* v. *Kissinger,* 385 F.Supp. 769 (D.D.C. 1974).

In resolving the conflict which exists among the circuits on this question, Petitioner submits that this Court should embrace the principles articulated by the Fourth Circuit in *Westinghouse.* For, as shown below, that decision more closely accords with the purposes, as reflected in the legislative history, which the FOIA and its fourth exemption were intended to serve.

A. Congress Enacted Exemption 4 In Order To "Assure" The Protection Of Confidential Commercial Information Which Is Submitted To The Government By Private Parties

The Freedom of Information Act was intended to facilitate "the right of persons to know about the business of their *government*" [14] by "elucidat[ing] the availability of *government* records and actions to the American citizen." *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696, 699 (D.C. Cir. 1968) (emphasis added). *See also Wellford* v. *Hardin*, 444 F.2d 21 (4th Cir. 1971); *Epstein* v. *Resor*, 421 F.2d 930 (9th Cir. 1970). By opening the processes of government to public scrutiny, thereby government would be made more accountable to the public.[15] However, Congress sought to balance the Act's disclosure philosophy with the "equally important rights of privacy with respect to certain information in government files." S.Rep.No. 813, *supra* n. 15, at 3. This was to be accomplished by including in the Act "workable standards for what records should and *should not* be open to public inspection." *Id.* at 5 (emphasis added). The standards

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[14] H.R.Rep.No. 93-876, 93d Cong., 2d Sess. 5 (1974), *reprinted in* [1974] U.S. Code Cong. & Adm. News 6267, 6269 (emphasis added). *See also* Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Adm. News 6285, 6286; H.R.Rep.No. 1497, 89th Cong., 2d Sess. 1-2 (1966), *reprinted in* [1966] U.S. Code Cong. & Adm. News 2418; 112 Cong. Rec. 13641 13642 (1966).

[15] S.Rep.No. 813, 89th Cong., 1st Sess. 3 (1965). *See also* H.Rep. No. 1497, *supra* n. 14, at 12; *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935, 938 (D.D.Cir.), *cert. denied*, 400 U.S. 824 (1970).

for what "*should not* be open to public inspection" were to be embodied in the exemptions.

This concern over rights of privacy was of particular significance to Congress in fashioning Exemption 4. That exemption was enacted for the purpose of "protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers." *Bristol-Myers Company* v. *F.T.C.*, 424 F.2d at 938. *See also* S.Rep.No. 813, *supra* n. 15, at 3, 9; H.R.Rep.No. 1497, *supra* n. 14, at 10. The exemption was added to the FOIA in response to the nearly unanimously expressed fear that, absent the exemption, the Act would require disclosure of large amounts of trade secrets and confidential commercial information which had been furnished to the Government by private parties and whose disclosure could cause substantial injury to the persons and companies to whom the information belonged. *National Parks and Conservation Assn.* v. *Morton,* 498 F.2d 765, 768 (D.C.Cir. 1974); *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1210-11. Interestingly, among the most vocal proponents of including Exemption 4 to prevent such injury were the federal government agencies. For example, a representative of the Department of Justice testified in the Senate hearings:

> "A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. * * *" [16]

[16] *Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary,* 88th Cong., 1st Sess. 199 (1963) (hereinafter *1963 Senate Hearings*).

Similarly, a witness for the Department of the Treasury stated:

> "We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor." *1963 Senate Hearings, supra* n. 16, at 174.

Congress reacted to this legitimate need for protection of business information by enacting as an exemption to the FOIA a provision which would "assure" that trade secrets and confidential commercial information would not be subject to the disclosure provisions of the Act:

> "This exemption *would assure the confidentiality* of information obtained by the Government . . . It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. * * * It would also include the information which is given to an agency in confidence, since a citizen must be able to confide in his government." H.R.Rep.No. 1497, *supra* n. 14, at 10 (footnote omitted) (emphasis added); *see also* S. Rep.No. 813, *supra* n. 15, at 9.

Significantly, the exemption was intended to afford protection to confidential business information "not only as a matter of fairness, but *as a matter of right* . . ." *1963 Senate Hearings, supra* note 16, at 199 (emphasis added). As stated during debate by Congressman Fascell, one of the House sponsors of the bill which was enacted as the FOIA and an authoritative

voice on the intended meaning of the Act, Congress "recognize[d] that some information *must be withheld* from public scrutiny. * * * These include . . . trade secrets [and] commercial and financial data . . ." 112 Cong. Rec. 13,649 (1966) (emphasis added).[17]

Indeed, the imperative nature of the protection which Congress intended to afford through Exemption 4 is even confirmed by the interpretation of the Act given by the Attorney General in 1967. In his Foreword to the authoritative *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967), then-Attorney General Ramsey Clark noted that, notwithstanding the disclosure provisions of the Act,

> "this law gives *assurance* to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets *must remain outside the zone of accessibility.*" *Id.* at IV (emphasis added)

As to any such material which "comes within specific categories of matters which are exempt from public

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[17] *See also National Parks and Conservation Assn.* v. *Morton*, 498 F.2d at 769: "During hearings on this bill, the question was again raised whether businessmen would be protected against disclosure of commercial or financial information obtained by the Government pursuant to administrative regulation. * * * In reply, a member of the [S]ubcommittee [on Administrative Practice and Procedure of the Senate Judiciary Committee] stated: 'Well, there is a specific exemption in here to cover that point, and *I do not think anybody has any intention that this material be made public.*' " (Footnotes omitted) (emphasis added).

disclosure", the Attorney General stated that the Act

> "recognizes that records which cannot be disclosed without impairing rights of privacy or important operations of the Government *must be protected from disclosure.*" *Id.* at 1 (emphasis added).

The legislative history, even as interpreted by the Attorney General at the time the FOIA was enacted, thus reflects a distinct congressional intent to "assure" the confidentiality of private trade secrets and confidential commercial information which have been furnished to the Government. By enacting Exemption 4, Congress

> "declared [that such] private information acquired by the government 'should *not* be open to public disclosure.' * * * This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest." *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1211.

There is no indication in the legislative history which preceded enactment of the FOIA [18] that Congress in-

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[18] Several isolated statements contained in the legislative history of the 1974 amendments to the FOIA which express a view that agencies have discretion to disclose exempt information are entitled to little if any weight, at least insofar as Exemption 4 is concerned. Those remarks were made some seven years after passage of the Act, by individual legislators and not by the Congress itself, in a wholly changed and highly charged political climate, and in the course of hearings which neither contemplated nor resulted in amendment of Exemption 4. See H.R. 5425, S. 1142, 93d Cong., 1st Sess. (1973). Consequently, those remarks constitute neither legislative history of Exemption 4 nor an accurate barometer of con-

tended agencies to have the power to restrict the reach and protection of Exemption 4 by engaging in discretionary disclosure of information which clearly falls within the terms of the exemption.

B. The Lower Court's Decision Undermines The Protection Of Confidential Business Information Which Congress Intended Exemption 4 To Provide

Despite the clear purpose of Exemption 4 to "assure" the protection of confidential business information, many agencies, such as Respondents', have promulgated regulations either requiring, or allowing discretionary, disclosure of such materials even when they are exempt from release under Exemption 4 of the FOIA. See, *e.g.*, 41 C.F.R. § 60-40.2; 16 C.F.R. § 4.11 (a)(1)(iv)(A). Even assuming that these agencies were properly interpreting the breadth of Exemption 4,[19] the decision below vitiates any protection which

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gressional intent *at the time the exemption was enacted,* and do not rebut the fact, as reflected in the original House and Senate reports, that Exemption 4 was designed to guarantee the protection of confidential commercial information. *See Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 733 n. 14 (1977); *U.S.* v. *Price,* 361 U.S. 304, 313 (1960); *Jondora Music Pub. Co.* v. *Melody Recordings, Inc.,* 506 F.2d 392 (3d Cir. 1974).

[19] Unfortunately, the agencies and courts have interpreted the exemption in a manner which is far more restrictive than Congress intended. Exemption 4 was specifically designed to "assure the confidentiality" (H.R.Rep.No. 1497, *supra* n. 14, at 10) of commercial information obtained by the Government which would "customarily not be released to the public by the person from whom it was obtained" (S.Rep.No. 813, *supra* n. 15, at 9) or where such disclosure might be harmful to the private interests of the party who supplied the information to the Government. *See, e.g., Sterling Drug, Inc.* v. *F.T.C.,* 450 F.2d 698, 709 (D.C.Cir. 1971); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 425

could be expected under the exemption because it invests the agencies with virtually complete discretion to disclose private information notwithstanding the fact

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F.2d 578 (D.C.Cir. 1970), *rev'd on other grds*, 421 U.S. 168 (1975); *M. A. Schapiro & Co.* v. *S.E.C.*, 339 F.Supp. 467, 471 (D.D.C. 1972); *Ditlow* v. *Shultz*, 379 F.Supp. 326 (D.D.C. 1974). However, in *National Parks and Conservation Assn.* v. *Morton*, the U.S. Court of Appeals for the D.C. Circuit articulated a new and considerably different interpretation of Exemption 4 which had the effect of emasculating the exemption and eviscerating the protection for business records which the Act was intended to afford:

> "commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to [*inter alia*] cause *substantial* harm to the *competitive* position of the person from whom the information was obtained." 498 F.2d at 770 (footnote omitted) (emphasis added).

The standard adopted in *National Parks* is contrary to both the express terms and the legislative history of the exemption. *See* Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad.L.Rev. 193, 195-202 (1977) (hereinafter *Patten*). Nothing in the FOIA or the Act's legislative history reflects any intent by Congress that Exemption 4 should not apply to information which is inherently confidential in nature, which has been customarily and reasonably treated as confidential, and which would adversely affect a business' interests if disclosed, *unless* it can be concretely shown that disclosure of such information would cause *substantial competitive* injury; indeed, proof of competitive injury as a test of confidentiality simply was not considered in the legislative deliberations on Exemption 4. *See Washington Research Project, Inc.* v. *HEW*, 504 F.2d 238, 244 (D.C.Cir.), *cert. denied*, 421 U.S. 963 (1975) ("the reach of the exemption . . . is not necessarily coextensive with the existence of competition in any form"); *Patten*, 29 Ad.L.Rev. at 197-98.

The *National Parks* test has little to recommend it. *First*, since the FOIA makes documents available to "any person", the submitter and the court may be entirely unaware of the person to whom the information is to be disclosed, how it will be used, or with what other information the data will be used in conjunction, thus making the substantial competitive injury test highly speculative and difficult to apply. *Second*, the *National Parks* test focuses

that it falls within Exemption 4 and its disclosure might substantially injure the submitter of the data.

The actions of such agencies, as approved by the court below and several others, have had the effect of turning the FOIA into a *private* disclosure statute, rather than one which increases the public's awarenesss of its *government*. Thus, it has been widely acknowledged that the Act is now used largely by private parties to obtain *private* information. *See, e.g., Paperwork Report, supra* n. 12, at 99. For example, the Food and Drug Administration estimates that of nearly 25,000 FOIA requests to FDA alone, more than "80 percent . . . are from business entities, private attorneys, and FOI service companies requesting records on behalf of

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only on competitive injury but ignores other kinds of commercial injury which disclosure of confidential business information might cause and which Exemption 4 was designed to prevent. *See* Davis, *Administrative Law Treatise of the Seventies* 91 (1976). *Finally,* due to the extreme burden of proof imposed by *National Parks* and the resulting need to undertake extensive economic analysis and to employ expert witnesses, most companies and individuals will be unable to shoulder the expense of challenging disclosure even though faced with the threatened release of valuable confidential commercial data. See *Patten,* 29 Ad.L.Rev. at 199-200. Congress could not have intended to trigger such a costly and eomplex inquiry each time a request was made for business records under the FOIA. And, that would not be the case if Exemption 4 were construed in the manner which Congress originally intended.

Although this question was argued before the court below, it is not addressed by the lower court's decision. However, beeause it is so basic to and interrelated with all of the questions presented by this case regarding Exemption 4 and 18 U.S.C. § 1905, Petitioner submits that the Court should undertake to review this issue as well. *See Blonder-Tongue Labs.* v. *University Foundation,* 402 U.S. 313, 321 n. 6 (1971).

corporate clients."[20] Other agencies report similar experiences.[21] While the Act has been employed to obtain private information of all kinds, its use as a private disclosure statute has been concentrated in two particular areas, both of which are at the least irrelevant, and more likely antithetical, to the purposes of the FOIA: (1) industrial espionage; and (2) circumvention of the Federal Rules of Civil Procedure.

(1) As the Fourth Circuit observed in *Westinghouse Electric Corp.* v. *Schlesinger*,

> "the industrial sector is still highly competitive. *Corporations have varying numbers of market and financial specialists who continually search out fragments of information about competitors and markets from any available source;* published government statistics and information, various legislative documents, analyses and surveys performed by consultants, field services performed by corporate specialists, information continually obtained and reported by sales personnel, or disclosures by government agencies. Since government derived information is often submitted according to statutory or regulatory requirement, it is usually more credible than information from other sources; the latter usually depends on what a company decides, for its own carefully considered reasons, to make available. *An additional reliable 'fragment' of information may be enough to bring the whole picture into much clearer focus and*

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[20] *Business Record Exemption of the Freedom of Information Act, Hearings Before the Subcomm. on Gov't. Information and Individual Rights of the House Comm. on Gov't. Operations,* 95th Cong., 1st Sess. 93 (1977) (hereinafter *1977 House Hearings*) (Statement by Donald Kennedy, Commissioner, Food and Drug Admin.).

[21] *Id.* at 8 (Statement of Michael A. James, Deputy General Counsel, Environmental Protection Agency).

> *could conceivably mean the difference between success or failure in certain contract bidding situations.*" 542 F.2d at 1213 n. 74 (emphasis added), quoting Note, *A Review of the Fourth Exemption of the Freedom of Information Act,* 9 Akron L. Rev. 673, 683-84 (1976).

While there previously have been few sources from which data relating to a particular company could be obtained lawfully, the FOIA, as interpreted by federal agencies and by the court below, has markedly changed this. Indeed, it is now almost universally conceded, even by the Government itself,[22] that the Act is in large measure being employed as a leading tool of "industrial espionage"[23] and "corporate intelligence gathering."[24]

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[22] "The most publicized 'abuse' of the Act's processes has been its use by business entities to obtain the release of commercial information relating to their competitors. * * * Business entities also use the FOIA to obtain the results of Government research which can then be utilized for proprietary purposes. * * * [T]axpayers may be 'subsidizing the information-gathering activities of corporations.' " *Paperwork Report, supra* n. 12, at 99 (footnote omitted).

[23] Food and Drug Administration, "Public Information", 42 Fed. Reg. 3094 (1977). See, *e.g., Honeywell Information Systems, Inc.* v. *NASA,* No. 76-353 (D.D.C., July 28, 1976) (Memorandum granting plaintiff's motion for summary judgment).

[24] *Freedom of Information Act Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. 4 (1977) (hereinafter *1977 Senate Hearings*) (Statement of Sherwin Gardner, Deputy Commissioner, Food and Drug Admin.). See also Burt Schoor, "Telling Tales: How a Law Is Being Used to Pry Business Secrets from Uncle Sam's Files", *The Wall Street Journal,* May 9, 1977; Mark Arnold, "Who's Going Fishing In Government Files?", *Juris Doctor,* April 1976; *Washington Post,* July 27, 1976, at A-4; "Firms big customers for 'free information' ", *Industry Week,* Nov. 1976, at 34.

The use of the Act in this fashion holds in store adverse consequences not only for the companies whose information is disclosed but also for the Nation as well. Clearly, the loss of confidential commercial information by a business will often result in significant injury. Sales may be lost, the exclusivity of processes may be impaired, market shares may be reduced. In enacting the FOIA, Congress recognized these dangers and sought to disarm them by providing *dependable* protection against the occurrence of such injury. Yet, the position taken by the court below and by federal agencies is that, notwithstanding the possibility, the likelihood, or even the certainty of such injury and the fact that documents are exempt from disclosure under the FOIA, agencies still have discretion to disclose trade secrets or confidential commercial information and, under existing regulations and directives,[25] should ordinarily do so.[26]

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[25] *See* Attorney General Griffin Bell's May 5, 1977 memorandum to heads of all agencies directing the disclosure of information, including private documents, even where the data falls within an FOIA exemption such as Exemption 4, unless disclosure will be "demonstrably harmful." *Reprinted in* 123 Cong. Rec. S7763 (daily ed. May 17, 1977) (remarks of Senator Kennedy).

[26] Disclosure of such confidential commercial data to a person or business who seeks to obtain the information for its own private use may well violate the constitutional principle that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937). Moreover, even if some "public purpose" could be ascribed to disclosure of private data under such circumstances, disclosure would still contravene the mandate of the Fifth Amendment that private property not be taken for public use without just compensation. *Almota Farmers E. & W. Co.* v. *United States*, 409 U.S. 470, 473 (1973). Consideration of these principles at this time is not premature, as the court below suggested (Pet. App. A,

The Nation itself will also be adversely affected by the disclosure of trade secrets and confidential commercial information. Congress has frequently expressed its concern over the loss of U.S. technology to foreign nations.[27] Numbering among those who have used the FOIA to obtain private data for private purposes are foreign governments, corporations and state owned industries who seek to obtain for free American technology which they could otherwise acquire, if at all, only under a licensing agreement,[28] and to use such information to more effectively compete against American businesses here and abroad. Use of the Act in this fashion contributes to a worsening of the competitive posture of American industry, declining production, and consequently reduced employment. *See Commerce Comm. Hearings, supra* n. 27, at 395-400. Moreover, it deprives American businesses of licensing revenues which they would otherwise receive and may impair the rights of those businesses under foreign patent systems. Finally, use of the FOIA in this manner may reveal to foreign governments valuable insights into the products, manufacturing processes, and productive capacities of American defense contractors, thereby adversely affecting not only the economic, but also the

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p. 41a), because the decision below clearly recognizes agency discretion to disclose Exemption 4 data notwithstanding these constitutional limitations, and because this Court's construction of Exemption 4 in the instant case must clearly accommodate these important constitutional interests.

[27] See, *e.g., Hearings on Corporate Rights and Responsibilities—Multinational Enterprises, Before the Senate Commerce Comm.*, 94th Cong., 2d Sess. (1976) (hereinafter *Commerce Comm. Hearings*).

[28] See, *e.g., 1977 House Hearings, supra* n. 20, at 283, where one company's loss of its technology to a foreign competitor under the FOIA is described.

military, security of the Nation.[29] The FOIA was not intended by Congress, and should not be construed by the courts in such a way as, to have these effects.

(2) The Act also has been increasingly used by both existing and potential litigants to obtain discovery of *private* information relating to *private* parties which is not discoverable under judicial or administrative discovery rules. See, *e.g., Gifford-Hill, Inc.* v. *FTC,* 1975-2 Trade Cases ¶ 60674 (D.D.C. 1976). For example, one of the FOIA requests which gave rise to this case was filed by a person who was engaged in other litigation against Petitioner (A. 92) and who sought access under the FOIA to documents which had been denied to him by court order in discovery proceedings in that litigation.

Congress foresaw the use of the Act by private parties to obtain *government* information from government files for use in litigation against the Government, and included Exemption 5, 5 U.S.C. § 552(b)(5), which "withholds from a member of the public documents which a private party could not discover in litigation with the agency." *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 148 (1975). Exemption 7 of the FOIA, 5

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[29] See, *e.g., Siemens Corp.* v. *United States,* Civ. No. 78-0385 (D.D.C.), where the FOIA requester seeks disclosure of "all information referring to . . . the military applications of devices which may be provided by electron beam lithography technologies, including . . . [*inter alia*] electronic warfare wideband receivers . . . ; ballistic missile defense systems; . . . electronic warfare jammers . . .", and to "the companies which manufactured electron beam lithography equipment . . . and the capabilities, limitations or applications of any such equipment . . ." Complaint, Exhibit 1, p. 3.

U.S.C. § 552(b)(7), was included for a similar purpose. *See* 120 Cong. Rec. 17,033 (1974) (remarks of Senator Hart, sponsor of the 1974 amendment to Exemption 7). On the basis of these provisions, courts have widely condemned the use of the FOIA as a substitute for discovery of *government* documents. *See, e.g., Columbia Packing Co., Inc.* v. *U.S. Dept. of Agric.*, 563 F.2d 495, 499 (1st Cir. 1977); *Climax Molybdenum Co.* v. *NLRB*, 407 F.Supp. 208 (D.D.C. 1975).

However, Congress did not expressly provide similar protection from surreptitious discovery for confidential commercial information which has been obtained by the Government from *private* parties. Presumably, it felt no need to do so since the purpose of the Act was to make available to the public only government, not private, records. Yet, today, the FOIA has become a major vehicle for discovery by private parties of *private* information which they cannot obtain through traditional discovery procedures for use in litigation against *private* parties.[30] The use of the Act in such a fashion circumvents the Federal Rules of Civil Procedure and the supervisory powers of the federal courts [31]

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[30] *See* letter dated March 25, 1977, from Benjamin R. Civiletti, Acting Deputy Attorney General, to Hon. Walter F. Mondale, accompanying the *U.S. Department of Justice Freedom of Information Act Annual Report to Congress (1976)* ("Private counsel seem to believe that the FOIA should function as a discovery device * * * when they could not gain access to documents and records using discovery methods provided by tbe Federal Rules . . .").

[31] See, *e.g., Title Guarantee Co.* v. *NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976); and *see 1977 Senate Hearings, supra* n. 24, at 6 (Statement of Gerald P. Norton, Deputy General Counsel, Federal Trade Commission). The Federal Rules provide a litigant with a broad right of access to information from its adversary's files which is neeessary for preparation of its case. When,

and is impossible to reconcile with the underlying purpose of the FOIA since "[t]he Act is fundamentally designed to inform the public about *agency* action and *not to benefit private litigants.*" *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 143 n. 10 (emphasis added). *See also Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1973); *EPA* v. *Mink*, 410 U.S. 73, 79 (1973). Moreover, even if use of the FOIA to obtain data relating to *agency* action for use against an *agency* in litigation could be justified,[32] use of the Act by parties in litigation to obtain *private* information relating to, and for use against, *private* parties does not comport with the purpose of the FOIA and should be condemned.

In both of the foregoing respects, the FOIA is being used—or more accurately, *abused*—for purposes which are entirely inconsistent with the congressional intent underlying the Act. Because the Act makes information available to "any person" (5 U.S.C. § 552(a)(3)) and thereby renders the requester's identity and purpose for seeking disclosure irrelevant and often unknown, it is only by affording confidential business records which fall within Exemption 4 the kind of broad protection from disclosure which Congress intended that these improper uses of the FOIA can be substantially curtailed.

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notwithstanding this liberal access, a litigant who has been denied discovery of such data by order of a court seeks to circumvent that ruling by attempting to obtain such information under the FOIA, Petitioner submits that such disclosure is not merely contrary to the purposes underlying the Act itself but is also repugnant to the Federal Rules of Civil Procedure.

[32] See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. at 30-33 (Douglas, J., dissenting).

C. The Lower Court's Construction of Exemption 4 To Permit Discretionary Agency Disclosure Of Confidential Commercial Information Will Discourage The Future Submission Of Such Information To The Government

In providing protection under Exemption 4 to confidential commercial information, Congress recognized that "[u]nless persons having necessary [commercial and financial] information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." *National Parks and Conservation Assn.* v. *Morton,* 498 F.2d at 767. *See also Soucie* v. *David,* 449 F.2d 1067, 1078 (D.C.Cir. 1971); *Would Macy's Tell Gimbel's supra* n. 8, 6 Loyola L.J. at 603-5.

Most regulatory programs administered by government agencies rely heavily upon cooperation of the regulated companies in reporting as well as in compliance. Cooperation in reporting is significant not only where information is furnished voluntarily [33] for, as demonstrated by the record in this case, even where the Government possesses the power to require the submission of information, cooperation by the submitter may improve both the quality and quantity of information which is supplied.[34] Disclosure of private documents,

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[33] A partial listing of the information which Petitioner supplies voluntarily to federal agencies on a recurring basis was recently submitted by Petitioner to a subcommittee of the House Committee on Government Operations during hearings on Exemption 4. See *1977 House Hearings, supra* n. 20, at 251-54.

[34] In the instant case, the record recites that disclosure of the documents at issue would discourage Petitioner from continuing to

including confidential proprietary information, would disperse a crucial source of industry information and would inhibit compliance, and thereby the success of a number of government programs would be imperiled.[35]

A number of agencies have formally recognized this proposition, both at the time the FOIA was enacted and in recent months. For example, the Department of Justice stated in 1963 that

> "disclosure of private information would impede or wholly obstruct the proper performance of necessary governmental functions . . . [V]oluntary reporting programs . . . will suddenly terminate . . . [W]here the reporting is mandatory, businessmen confronted with the risk of making this information available to their competitors might be tempted to find a moral justification for misrepre-

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provide information in excess of that which is required by Respondents and from freely and candidly making voluntary admissions where it has failed to comply either with Respondents' regulations or with self-imposed goals. A. 27-29.

[35] *See* "Summary of Meeting of Representative John E. Moss with Representative Goldwater, Jr., on the Freedom of Information Act, Nov. 10, 1975", 121 Cong. Rec. H12,379 (daily ed., Dec. 11, 1975). There, Congressman Goldwater observed that "any lack of predictable protection of the private sector's proprietary information under the existing Freedom of Information Act exemption . . . (5 U.S.C. § 552(b)(4)) could seriously inhibit private sector cooperation and participation."

In the instant case, the record reveals that, notwithstanding Respondents' power to compel Petitioner's submission of information and compliance with regulatory requirements, the agencies still found Petitioner's cooperation an essential ingredient to fulfillment of their regulatory functions. As they stated during the course of a review of one of Petitioner's plants: "Without the *full cooperation* that [Petitioner] exhibited, this investigation would have been extremely difficult." A. 43 (emphasis added).

senting it." *1963 Senate Hearings, supra* n. 16, at 200.

See also Hearings on S. 1160 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 436-37 (1965); *Hearings on Administration and Operation of the Freedom of Information Act, Part 5, Before the Subcomm. on Foreign Operations and Gov't Information,* 92d Cong., 2d Sess. 1619, 1679 (1972).

More than a decade later, having gained considerable experience under the FOIA, federal agencies again uniformly noted the inhibiting effect which disclosure of confidential commercial information and trade secrets would have on industry's reporting and compliance. Typical of the views presented to the Congress by federal agencies during FOIA oversight hearings in 1977 were those of the Department of Justice that disclosure of confidential information by government agencies would have "a definite restraining effect" on the flow of information to federal agencies and that, as a result, "substantial detriment to the effective performance of some governmental functions can be anticipated." *1977 House Hearings, supra* n. 20, at 232. *See also id.* at 6; Office of Management and Budget Policy Letter No. 78-3, Subject: Requests for Disclosure of Contractor Supplied Information Obtained in the Course of a Procurement, March 20, 1978, at 1; *Paperwork Report, supra* n. 12, at 2, 100.

This Court has also noted that disclosure of private documents under the FOIA will impair the Government's ability to obtain such information in the future. In *FAA Administrator* v. *Robertson,* 422 U.S. 255 (1977), the Court recognized that, even though the

FAA required that the information at issue be submitted to the agency and provided sanctions for noncooperation, disclosure would have adversely affected airline cooperation and, as a result, the regulatory program would have been seriously impaired. 422 U.S. at 266-67. Similarly, in *NLRB* v. *Sears, Roebuck & Co.*, the Court observed:

> " 'Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the *detriment of the decision making process*' . . . (emphasis added)." 421 U.S. at 150-51 (citation omitted).

Indeed, a number of courts have found, with specific reference to the same kinds of documents, submitted to the same government agencies, pursuant to the same reporting requirements as are involved in the instant case, that disclosure of such private documents will impair agencies' ability to collect such data from government contractors such as Petitioner in the future and will discourage reporting companies from making candid self-evaluations in such reports. *See, e.g., United States Steel Corp.* v. *Schlesinger,* 8 FEP Cases 923 (E.D.Va. 1974); *Dickerson* v. *United States Steel Corp.,* 12 E.P.D. § 11095 (E.D.Pa. 1976); and *Sanday* v. *Carnegie-Mellon University,* 12 FEP Cases 101 (W.D.Pa. 1975). Implicit in the latter finding was the recognition that disclosure of these confidential documents would discourage voluntary compliance by government contractors with the Executive Orders, upon which the affirmative action program substantially relies.

Despite all of the foregoing, Respondents asserted below that their discretionary disclosure of confidential

commercial information which falls within Exemption 4 would not disrupt the flow of data to them or impair the performance of their regulatory programs. A. 25. Petitioner submits that they are plainly wrong and that, as observed by courts, agencies and Congress itself, disclosure of such information by federal agencies will interfere with the second of Congress' two principal purposes in enacting Exemption 4—to ensure that private persons continue to furnish confidential commercial data to the Government for use in important regulatory programs.[36] To prevent this result, Petitioner submits that the Court should, in fashioning its decision in this case, consider the adverse effect which disclosure of trade secrets and confidential commercial information must have on the future submission of such information to government agencies.

D. This Court Should Declare That Federal Agencies Do Not Have Discretion To Disclose Trade Secrets And Confidential Commercial Information Which Fall Within Exemption 4

The Freedom of Information Act was conceived as a means of remedying rampant government secrecy regarding matters which Congress believed should be subject to public scrutiny. The Act was designed to

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[36] The fact that some federal agencies, in order to acquire confidential information which would not otherwise be furnished to them, are making special arrangements to avoid the reach of the FOIA, is itself damning testimony of the frustration of government programs which is caused by the disclosure of confidential commercial information under the FOIA. See, *e.g.*, 43 Fed. Reg. 3572 (Jan. 26, 1978); *CIBA GEIGY Corp.* v. *Mathews*, 428 F. Supp. 523 (S.D.N.Y. 1977).

bring these matters within public reach, view and criticism, and thereby to make government more responsive to the citizenry.

The Freedom of Information Act was not intended, however, to undermine long standing and well founded practices of business privacy, or to expose those who, either voluntarily or in compliance with regulatory requirements, share valuable private information with government agencies to the types of injury and prejudice described above. As the Senate noted in its principal report, "[i]t is not necessary to conclude that to protect one of the interests [i.e., disclosure] the other [i.e., confidentiality] must, of necessity, either be abrogated or substantially subordinated." S.Rep.No. 813, *supra* n. 15, at 3. Yet, as construed by federal agencies and the court below, the FOIA has had precisely that effect by exposing to competitors, foreign interests, litigants or, indeed, anyone else private, confidential business records which those persons would otherwise have no right, reason or opportunity to inspect.

This development is neither required by, nor justifiable under, the FOIA. As reflected by the clear terms of the Act itself, there is a basic and inherent difference between those FOIA exemptions which obviously were intended to protect *agencies* from mandatory disclosure of *agency* information (e.g., Exemptions 1, 2, 5 and 7) and those exemptions which clearly were fashioned to protect *private,* nongovernmental interests (*e.g.,* Exemptions 4 and 6).[37] Although Congress

[37] In contrast to Exemption 4, Exemption 6 arguably does indicate an intention by Congress to invest agencies with some discretion in deciding whether to disclose information relating to private persons. By making nondisclosure dependent, at least in

may have intended that disclosure of *agency* documents which fall within the first category of FOIA exemptions would ordinarily be within the agency's discretion, it intended to accord much greater protection to *private* confidential information which *private* individuals and businesses furnish to the Government, the disclosure of which would be harmful to *private* interests.[38] This is because the FOIA

> "was *not* enacted for the purpose of enabling the public to obtain information about *individuals* and *corporations,* about what those individuals or corporations are doing, or about what their activities and policies are * * *; [rather, t]he purpose of the Freedom of Information Act was to protect the people's right to obtain information about their *government,* to know what their government is doing, and to obtain information about govern-

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part, on whether release would amount to a "clearly unwarranted invasion of personal privacy", the Act suggests that agencies and courts were expected to engage in some balancing of the competing interests in disclosure and privacy. *See Dept. of Air Force* v. *Rose,* 425 U.S. 352, 372-73 (1976). No such intent is apparent in Exemption 4, whose protection is not dependent upon any such subjective determination of whether the interest in disclosure warrants the harm which release might cause but, rather, requires only a determination of whether the documents consist of trade secrets or confidential commercial information.

[38] This Court's statement in *EPA* v. *Mink* that the exemptions "represent the congressional determination of the types of information that the Executive Branch must have the option to keep confidential" was made with specific reference to the applicability of Exemptions 1 and 5 to "*official information* [which had been] long shielded unnecessarily from public view . . ." 410 U.S. at 80 (emphasis added). The Court was not addressing the discretion of agencies to disclose *private* documents which fall within Exemption 4. *See In Camera Inspections Under the Freedom of Information Act,* 41 U.Chi.L.Rev. 557, 564 n. 52 (1974) ("[T]he public's interest in confining the breadth of the exemptions is not equally strong for all nine provisions.")

ment activities and policies." *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1210 n. 64 (emphasis added).[39]

In enacting Exemption 4, Congress struck the balance between these competing public and private interests[40] and "opted for the right to privacy in favor of the private interest." *Id.* at 1211. As to confidential commercial information, *Congress made the judgment* in enacting the FOIA and by including Exemption 4 in the Act that the public interest would be served by such matters not being disclosed. As one court has observed:

> "A national policy exists which protects confidential business information. *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470 (1974). This policy is reflected in significant statutory and regulatory provisions which *proscribe* the disclosure of trade secrets and confidential commercial information. See for example, 5 U.S.C. § 552(b)(4) or, 41 C.F.R. § 1-3.103 (1976). These provisions recognize and provide for the nondisclosure of confidential business information compiled through an owner's efforts, skills, and resources, and, thus, *there is a public interest in favor of judicial protection of such data." USS-OCF-W&M* v. *Eckerd,* No. 76-1933 (D.D.C., Dec. 9, 1976) (emphasis added).

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[39] "The Act is fundamentally designed to inform the public about *agency action*" (*NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. at 143 n. 10 (emphasis added)), not to serve as a vehicle for the "envious competitor or the curious busybody . . . [to obtain] access to . . . private information . . ." *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1213.

[40] *See FAA Administrator* v. *Robertson,* 422 U.S. at 262; *EPA* v. *Mink,* 410 U.S. at 80.

Congress did not intend, and did not provide in the Act, that the protection to be afforded under Exemption 4 should depend on the interpretations given to the "public interest" by countless federal agencies and employees.

Indeed, recognizing that the underlying purpose of the FOIA was to enable the electorate to inform itself on the manner in which its government was functioning, it is questionable whether members of the public should be entitled to obtain *private* documents at all.[41] While federal statutes defining "government records" are quite broad, confidential private documents and information do not lose their basic *private* character merely by virtue of the fact that those documents have been submitted to an agency either pursuant to a mandatory filing requirement or voluntarily in an effort to comply with a regulatory program.[42] As one com-

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[41] "At a time when most of the information being requested is of interest to no one except the party requesting it and when the large majority of requests are being submitted by private industry, one may question whether the information being released is of 'public interest.' On the other hand, if the Act is to operate as it was intended—to enable citizens to deal effectively and knowledgeably with the Federal agencies—all government-held information *except that of a truly 'private' nature—such as that protected by the (b)(6) and (b)(4) exemptions*—must be viewed as of 'public interest.'" *Paperwork Report, supra* n. 12, at 100 (emphasis added).

[42] *See Would Macy's Tell Gimbel's, supra* n. 8, 6 Loyola L.J. at 611. This Court has apparently recognized this distinction by noting that the FOIA is applicable to "document[s] generated by an agency . . ." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 136. *See also SDC Development Corp.* v. *Mathews*, 542 F.2d 1116, 1118-19 (9th Cir. 1976), where the court of appeals held that information compiled by an agency which did not deal with the "structure,

mentator has stated, there is a

> "philosophical distinction between exemption (4) and Government information generally; the general public has no claim to a business' secret or a financial ledger, as it might to a Government-generated highway map or agency interpretative bulletin . . . [T]here is a significant policy justification for not 'giving away for free' what private industry, *not Government*, has paid for. Government's duty to reveal *its* inner workings provides no similar justification for the disclosure of private parties' operations."[43]

Petitioner submits that only by recognizing the distinction drawn by Congress between *private* and *agency* records can the FOIA's basic disclosure policy *and* the equally important congressional policy underlying Exemption 4 *both* be given their intended effect. The Fourth Circuit, in contrast to the decision of the court below, correctly drew this distinction by holding that, regardless of the Government's discretion to disclose exempt *agency* documents, Exemption 4 mandates that *private* documents which fall within the exemption not be disclosed.[44]

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operation and decision-making procedure" of the agency was not intended by Congress to be considered an "agency record" subject to disclosure under the FOIA.

[43] O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125, 1134 (1975) (hereinafter "O'Reilly").

[44] Some federal agencies such as the Department of the Census and the Department of Labor's Bureau of Labor Statistics, in routinely collecting private information from businesses across the nation, guarantee that the confidentiality of those data will be maintained and that disclosure will not occur unless the data is aggregated with data from other companies in a form in which the submitter cannot be identified. See 13 U.S.C. § 8(b). To the extent

II. Respondents' Disclosure Regulations Do Not Constitute Authorization by Law, Within the Meaning of 18 U.S.C. § 1905, for Disclosure of Confidential Business Information

Section 1905 of Title 18 of the U.S. Code prohibits any government official or employee [45] from disclosing, "to any extent not authorized by law", a number of specifically identified types of business information including, *inter alia,* confidential statistical data and information relating to a corporation's trade secrets, processes, operations and style of work. See Pet. App. D, p. 61a. Although the court of appeals did not dispute the district court's finding that substantial portions of Petitioner's documents fell within § 1905, the court held that Petitioner's documents could nevertheless be disclosed because (1) "disclosures pursuant to validly adopted agency regulations are not subject to the strictures of § 1905" because such disclosures are

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that information relating to private activities which falls within Exemption 4 must, *arguendo,* be disclosed in order to inform the public about how the Government is operating, such data should likewise be disclosed only on an aggregate basis in which data cannot be identified by company. This approach is expressly provided for, although not frequently utilized, under some agencies' disclosure regulations. See, *e.g.,* 21 C.F.R. § 20.111(c)(3)(V); 40 C.F.R. § 2.202(f). In following this approach, public access to information concerning government activities could be ensured without impairing "the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public." S.Rep.No. 813, *supra* n. 15, at 7.

[45] Section 1905 is applicable both to "heads of agencies" and to "the official action of a department or agency of the United States acting through its head." 41 Op. Att'y. Gen. 166, 168 (1953); 41 Op. Att'y. Gen. 221, 223 (1955).

"authorized by law"; (2) 5 U.S.C. § 301 "is a separate source of agency authority for the promulgation of disclosure regulations"; and (3) "[s]ince the OFCC[P] disclosure regulations are valid under § 301, all disclosures pursuant to those regulations are authorized by law and therefore not subject to § 1905." Pet. App. A, pp. 28a-29a.

The decision of the court of appeals should be reversed. The court's holding is both incompatible with the broad protective purpose of 18 U.S.C. § 1905 and contrary to the specific legislative history of § 1905 dealing with the term "authorized by law." Moreover, even if some agency regulations could limit the applicability of § 1905, regulations promulgated pursuant to 5 U.S.C. § 301, the FOIA, or Executive Order 11246 cannot have that effect. Finally, because 18 U.S.C. § 1905 is a statute which specifically exempts matters from disclosure within the meaning of FOIA Exemption 3, 5 U.S.C. § 552(b)(3), documents whose disclosure is barred by § 1905 are therefore also exempt from disclosure under the FOIA.

A. Agency Disclosure Regulations Do Not Constitute Authorization By Law Within The Meaning Of 18 U.S.C. § 1905

1. The court of appeals' holding that agency disclosure regulations constitute "authorization by law" for disclosure of confidential business information and thereby render inapplicable the restraints imposed by § 1905 on agency disclosure of such materials is contrary to the broad protective purpose of that statute.

Section 1905 is a codification [46] of three preexisting statutes [47] whose purpose, in prohibiting public disclosure by government officials and employees of certain types of confidential business information obtained from private parties, was to prevent the "annoyance, embarrassment, or injury" which might be caused to private persons by disclosure of such information.[48] The legislative histories of these predecessor statutes reflect that they, and subsequently § 1905, were intended to provide *maximum* protection for confidential business information against agency action which would impair the sanctity of such data, not to authorize unfettered agency discretion to disclose pursuant to agency regulations.

The original predecessor of § 1905 was contained in the Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223. During the debates over its incorporation into the Tariff Act of 1864, ch. 349, § 34, 28 Stat. 509—one section of which would have authorized tax collectors and inspectors to examine the books, records and accounts of corporations—a number of Senators expressed outrage that this proposal would allow the invasion by agency personnel of the corporate taxpayer's right to protect his confidential records and business secrets from competitors. *See, e.g.,* 26 Cong. Rec. 3784 (1894) (remarks of Senator McLauren). Responding to this concern, Senator Aldrich pointed to the fact that "another section [now § 1905] *forbids* revenue agents to

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[46] Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683.

[47] 18 U.S.C. § 216 (1940); 19 U.S.C. § 1335 (1940); 15 U.S.C. § 176a (1940).

[48] *See* 39 Op. Att'y. Gen. 1, 2 (1937); S.Rep.No. 1165, 75th Cong., 1st Sess. (1937).

disclose business secrets . . .'' 26 Cong. Rec. 3784 (1894) (emphasis added).

The prior Commerce Department nondisclosure statute, Act of Jan. 27, 1938, ch. 11, 52 Stat. 8, was intended to provide equally broad and reliable protection to certain types of confidential data. That statute provided that all confidential statisical information submitted to the Bureau of Foreign and Domestic Commerce "shall be used only for the statistical purposes for which it is supplied", and precluded publication of any such statistics in a manner that would "reveal the identity of the person, corporation or firm furnishing such data." The House report accompanying the original act stated that the purpose of the legislation was to provide "legal assurance" to submitters that confidential data "will not" be divulged. H.R.Rep.No. 8014, 75th Cong., 2d Sess. 1-2 (1938); *see also* S.Rep.No. 1165, *supra* n.48.

The predecessor statutes reflect that Congress, in enacting these nondisclosure laws and in codifying them in the broadly stated terms of § 1905, intended to provide *complete* assurance to businesses which furnish confidential information to the Government that the confidentiality of such data would not be compromised by the government officials or agencies to which such data was submitted. No mention was made at any point in the legislative histories of the predecessor statutes or of § 1905 of an intent to allow agencies to promulgate regulations authorizing release of materials the disclosure of which would otherwise be barred by § 1905 or its predecessors; nor is this surprising, since these nondisclosure statutes were enacted for the express purpose of *limiting* agency discretion to disclose

such data, not of investing agencies with such discretion. The lower court's recognition of a right on the part of agencies to promulgate such regulations will defeat the purposes of § 1905 by rendering the protection which the statute was intended to afford subject to constant change and therefore unreliable, and by withdrawing the assurance of confidentiality without which businesses will be reluctant to continue to furnish confidential information to the Government.

The court of appeals' interpretation of § 1905 as allowing agencies to limit the applicability of § 1905 to them contravenes the intent of the statute in another important respect. Section 1905 is a criminal provision aimed at preventing government officials and employees from improperly disclosing certain kinds of confidential information. The potential defendants in criminal actions to be brought under § 1905 are thus government officials. Affirmance of the decision of the court of appeals would have the untenable consequence of allowing government officials who are potential defendants, such as Respondents, to define or redefine the scope of illegal conduct under § 1905 merely by amending or promulgating agency regulations and, thereby, to relieve themselves of criminal liability for acts which, absent the slender thread of their own agency regulations, would violate 18 U.S.C. § 1905. Such a result not only violates the clear congressional intent of § 1905 but also contravenes public policy by allowing government officials who violate 18 U.S.C. § 1905 to exculpate themselves merely by promulgating

broad agency disclosure regulations in justification of their conduct.[49]

2. In addition, the specific evolution of the "authorized by law" proviso of § 1905 demonstrates that agency regulations were not intended to constitute such authority. The Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, a precursor of § 1905, prohibited disclosure by government officials of confidential information "in any manner other than is provided *in this act.*" (Emphasis added) The law thus intended that disclosure of confidential business information would be permitted only where supported by statutory authorization, not merely by agency regulation. In the course of revising this and related statutes in 1873, this language was replaced, without explanation, by the phrase "in any other manner than may be provided *by law.*" Revised Statutes of the United States § 3167 (1st Ed. 1873-1874). That language was subsequently revised, again without explanation, to its present form to read "to any extent not authorized by law." There is no indication that Congress, in making these changes, intended to alter the meaning that the proviso had since 1864.

In contrast to these cosmetic changes, Congress did at the same time substantively amend the "authorization by law" language of another revenue provision. Section 3165 of the Revised Statutes of 1873 provided for the giving of oaths by revenue agents and em-

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[49] "It would be an incredible rule that a legislative prohibition such as § 1905, fixing limits on executive action . . ., is to be construed and applied by the executive . . . This would be tantamount to committing the execution of such law to 'the self-restraint of the executive branch' itself and making the executive's *ipse dixit* final." *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1215 (citations omitted).

ployees where such oaths were "authorized by law to be taken." In the course of revising this statute in 1878, Congress decided that the existing language was too narrow because it permitted only those oaths which were administered pursuant to a statutory authorization, but not those pursuant to an agency regulation. Consequently, Congress replaced the "authorized by law" language of § 3165 with the provision that oaths could be administered as "authorized by law *or regulation authorized by law.*" 7 Cong. Rec. 4005-6 (1878) (emphasis added). If the inclusion of the terminology "or regulation authorized by law" is to be treated as more than a mere superfluous or redundant exercise, then "authorized by law" must be construed as referring only to statutory authorization.

The legislative history of § 1905 thus specifically reveals that the term "authorized by law" refers only to authorization by statute, not by regulation. Although the instances in which the "authorized by law" language of § 1905 has been construed are relatively few, those cases confirm that agency regulations do not constitute authorization by law within the meaning of § 1905. For example, in 41 Op. Att'y. Gen. 221 (1955), the Attorney General, in advising the Federal Communications Commission whether § 1905 prevented disclosure of certain documents requested by Congress, noted that the agency's own regulations purported to allow full disclosure of documents at the agency's discretion. However, the Attorney General declined to rely on these regulations as "authority" for disclosure of the type of information delineated in § 1905 and, instead, advised that "the Commission should satisfy itself . . . [that disclosure is] authorized under . . . the

Legislative Reorganization Act." 41 Op. Att'y. Gen. at 228; *see also* 41 Op. Att'y. Gen. 166 (1953).

Other cases have similarly found statutes to constitute authorization by law for disclosure of confidential information which would otherwise violate § 1905. *See, e.g., United States* v. *Dickey,* 268 U.S. 378 (1925); *Consumers Union, Inc.* v. *Cost of Living Council,* 491 F.2d 1396 (T.E.C.A.), *cert. denied,* 416 U.S. 984 (1974).[50] In addition, several courts have found judicial or quasijudicial orders to constitute authorization by law within the meaning of 18 U.S.C. § 1905. *Blair* v. *Oersterlein Co.,* 275 U.S. 220, 227 (1927); *Pleasant Hill Bank* v. *United States,* 58 F.R.D. 97 (W.D.Mo. 1973); *Exchange National Bank* v. *Abramson,* 295 F.Supp. 87 (D.Minn. 1969). However, in *no* case, apart from the decisions of the court below here and in *Westinghouse Electric Corp.* v. *Nuclear Regulatory Comm.,* 555 F.2d 82 (3d Cir. 1977), has an agency regulation been construed to constitute authorization by law for disclosure of confidential documents within the meaning of 18 U.S.C. § 1905.

Accordingly, Petitioner submits that this Court should conclude that agency disclosure regulations such as Respondents' cannot constitute "authorization by

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[50] Indeed, in *Consumers Union,* the defendant government officials took the position that promulgation of agency rules authorizing disclosure of otherwise nondisclosable information would not insulate them from the penalties of 18 U.S.C. § 1905. The court held that, because there actually was adequate statutory authority for disclosure, the defendants did not need to be concerned about possible liability under § 1905. Implicit in the court's discussion is the assumption that, if the statutory authority had not authorized disclosure, then the agency's regulations alone would not have constituted "authorization" for disclosure under § 1905. 491 F.2d at 1403-4.

law" for disclosure of information whose release would otherwise be prohibited by 18 U.S.C. § 1905.[51]

B. Congress Did Not Intend 5 U.S.C. § 301, The FOIA, Or Executive Order 11246 To Provide Authority For The Adoption Of Agency Regulations Which Would Limit The Applicability Of § 1905

Should this Court be of the view that agency disclosure regulations may constitute authorization by law under 18 U.S.C. § 1905, Petitioner submits that the disclosure regulations at issue in this case still would not have that effect because none of the possible legislative or Executive bases for those rules provides authority for the promulgation of disclosure regulations which would immunize agency action from the prohibition of § 1905.

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[51] Even if *arguendo* an agency's regulations could serve as authority for disclosure of documents within the meaning of 18 U.S.C. § 1905, Respondents' regulations would not provide that authority in this case. For, *Respondents' regulations provide that documents whose disclosure is prohibited by § 1905 may not be disclosed.* Thus, § 70.21 of the Department of Labor's disclosure regulations prohibits any employee of the agency from disclosing any document whose disclosure would be prohibited by 18 U.S.C. § 1905. 29 C.F.R. § 70.21; see also 32 C.F.R. § 1285.3(d)(2)(iii)(c). Under 29 C.F.R. § 70.71, any supplementary disclosure provision promulgated by any division or office or the Department of Labor—including OFCCP and its compliance agencies—must be "not inconsistent with" the Department of Labor's regulations and, therefore, not inconsistent with § 1905. Accordingly, Respondents' disclosure regulations, rather than authorizing the disclosure of information which would otherwise be nondisclosable under 18 U.S.C. § 1905, specifically incorporate and apply the statute's prohibition. *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d at 1203; *Parkridge Hospital* v. *Blue Cross and Blue Shield*, 430 F.Supp. 1093 (E.D.Tenn. 1977).

1. *5 U.S.C. § 301 Does Not Authorize Agency Regulations In Derogation Of 18 U.S.C. § 1905*

Section 301 of Title 5 of the U.S. Code is a housekeeping statute designed to enable agencies to carry out routine administrative tasks and to promulgate regulations for the conduct of their day-to-day operations. The statute provides:

> "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

The first precursors of § 301 were enacted in 1789 to enable the early executive agencies to administer their daily affairs. See, *e.g.,* Act of July 27, 1789, ch. 4, § 4, 1 Stat. 28. Those laws were consolidated into one housekeeping statute in 1874,[52] and the current version of the statute was enacted in 1958. Pub. L. No. 85-619, 72 Stat. 547 (1958).

The only significant legislative history of § 301 is that which was generated by the 1958 amendment. The final sentence of § 301 was added at that time to stop the repeated citation of the statute by agencies *as authority to withhold* information from Congress and the public. The Senate report accompanying the 1958 amendment stated:

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[52] Revised Statutes of the United States § 161 (1st Ed. 1873-1874).

> "Nothing in the legislative history of [§ 301] shows that Congress intended this statute to be a grant of authority to the heads of the executive departments to withhold information from the public or to limit the availability of records to the public." S.Rep.No. 1621, 85th Cong., 2d Sess. 2 (1958).

During the debates on the 1958 amendment, a number of Congressmen expressed the fear that the amendment to § 301 would be deemed to require the disclosure of information that was immune from release under other statutes. Congressman Moss, the sponsor of the amendment, assured his colleagues that this was not the case. He stated that the amendment would not affect the right of agencies to withhold information pursuant to other statutes and, in particular, that the amendment would "*not affect the confidential status of information given to the Government and carefully detailed in Title 18, United States Code, Section 1905.*" 104 Cong. Rec. 6550 (1958) (emphasis added); *see also id.* at 6549, 6564. Congress' intent in amending § 301 was similarly described by Congressman Meader, who stated that § 301 was no more intended to authorize the release of information than to authorize withholding:

> "[The amendment] merely authorized department heads to make regulations governing the day-to-day housekeeping function * * * [Section 301] *was not intended to deal with the authority to release or withhold information or records.* * * * [A]uthority derived from any other sources . . . to withhold information or limit the availability of records would not in any way be affected . . ." *Id.* at 6562 (emphasis added).

In short, the amendment to § 301 was intended neither to expand or contract an agency's authority to disclose records, nor to enlarge or limit the reach of other statutes which governed an agency's power to withhold or disclose. The amendment to § 301 was intended merely to "neutralize" 5 U.S.C. § 301 so that it would not be cited as authority for withholding documents. In accomplishing that purpose, it was not Congress' intention to transform § 301 into a separate grant of authority for agency disclosure of confidential information.

Based on this legislative history, the Court of Appeals for the District of Columbia Circuit has concluded that "Section 301 does not authorize regulations limiting the scope of section 1905." *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d 935, 942 (D.C. Cir. 1975). *See also Babcock & Wilcox Co.* v. *Rumsfeld,* 70 F.R.D. 595, 601 (N.D. Ohio 1976); *Parkridge Hospital, Inc.* v. *Blue Cross & Blue Shield,* 430 F.Supp. at 1098; *Metropolitan Life Ins. Co.* v. *Usery,* 426 F.Supp. 150, 170 (D.D.C. 1976). The court below, however, declined to read the legislative history in this manner. While apparently conceding that the amendment itself was not intended to authorize disclosure, the court took the position that authority to disclose documents has existed under § 301 and its predecessors since 1789—a proposition for which the court provided no support—and that the amendment did not curtail such authority. Pet. App. A, p. 29a.

The construction of § 301 by the court below is erroneous. Section 301 was never intended to authorize promulgation of regulations providing for the disclosure of information whose release was otherwise con-

trary to law.[53] Indeed, until removed "as surplusage" by the recodifiers of the present U.S. Code, the statute explicitly stated that it authorized only those regulations "not inconsistent with law." Revised Statutes of the United States § 161 (1st Ed. 1873-1874). Thus, the House Report accompanying the 1958 amendment stated that "[t]he documents involved [in § 301] are papers pertaining to the day-to-day business of Government *which are not restricted under any other specific laws* . . ." H.R.Rep.No. 1461, 85th Cong., 2d Sess. (1958), *reprinted in* [1958] U.S. Code Cong. & Adm. News 3352 (emphasis added).

Petitioner submits that the legislative history of the 1958 amendment demonstrates that Congress intended that regulations promulgated pursuant to a housekeeping statute such as § 301 be subordinate to the policy of any conflicting statute such as 18 U.S.C. § 1905. In construing § 301 in this fashion, the Court would effectuate the congressional intent that the statute not serve as a basis for either the withholding *or* the release of information.[54]

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[53] Construing § 301 as authorizing agency disclosure regulations which restrict the applicability of 18 U.S.C. § 1905 would amount, in effect, to an implied repeal of § 1905, at least in part. As this Court has repeatedly stated, repeals by implication are not to be favored. *Bulova Watch Co.* v. *United States,* 365 U.S. 753, 758 (1961). Moreover, the fact of the matter is that where Congress has wanted to limit the applicability of § 1905 to disclosure of information by particular agencies, it has done so by *express statutory statement,* not by implication. See, *e.g.,* 15 U.S.C. § 1418(a)(2)(B), 29 U.S.C. § 664, and 42 U.S.C. § 263g(d), where Congress has specifically authorized disclosure of information whose release otherwise would have violated § 1905.

[54] This Court's decisions in *FCC* v. *Schreiber,* 381 U.S. 279 (1965), *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139 (1937), and *Norwegian Nitrogen Co.* v. *United States,* 288 U.S.

2. *Neither the FOIA Nor Executive Order 11246 Authorizes the Adoption of Regulations Which Would Limit the Applicability of § 1905*

Although the court below did not expressly reach the question, it intimated that, if § 301 did not support regulations limiting the applicability of § 1905, such support would be provided by the FOIA and by Executive Order 11246. As shown below, neither of these provides such support.

First, disclosure regulations such as Respondents,[55] which were promulgated for the express purpose of implementing the FOIA,[56] cannot constitute authorization by law within the meaning of 18 U.S.C. § 1905. As this Court observed in *FAA Administrator* v. *Robertson,* Congress was aware in fashioning the disclosure provisions of the FOIA that

> "there are 'nearly one hundred statutes . . . which restrict public access to specific Government records. *These would not be modified* by the public records provisions of S. 1160.' " 422 U.S. at 265 (emphasis in original)

Included among these was 18 U.S.C. § 1905. *See Hearings Before the Subcommittee on Constitutional Rights*

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294 (1933), which were cited by the court below (Pet. App. A, p. 27a n. 69), are inapposite to the instant case. Although those cases recognized an agency's power to promulgate disclosure regulations pursuant to an express or implied delegation of a congressional enabling statute, they did not consider whether 5 U.S.C. § 301 constituted a base of authority for such regulations or whether an agency may promulgate disclosure regulations which authorize the disclosure of information which falls within the scope of § 1905.

[55] 41 C.F.R. Part 60-40; 32 C.F.R. Part 1285.

[56] *See* 41 C.F.R. § 60-40.1; Pet. App. D, p. 62a.

of the Senate Committee on the Judiciary, on S. 921, 85th Cong., 2d Sess. 985-87 (1958); and *see Attorney General's Memorandum, supra,* at 31-32. On the basis of the legislative history of the FOIA, the Court concluded that Congress intended that "these statutes would remain unaffected by the new Act" and that the Act could not be "read as repealing by implication all existing statutes 'which restrict public access to specific Government records' [H.R.Rep.No. 1497, 89th Cong., 2d Sess. 10 (1966)]." 422 U.S. at 264, 265.

Since Congress intended that the FOIA itself would not affect the applicability of preexisting nondisclosure statutes such as 18 U.S.C. § 1905, then agency disclosure regulations such as Respondents' *which were promulgated for the express purpose of implementing the FOIA* cannot have that effect. *See* 41 C.F.R. § 60-40.1. Consequently, even if Respondents' disclosure rules were promulgated in compliance with the Administrative Procedure Act and, in a general sense, have "the force of law",[57] that alone does not establish that *within the meaning of 18 U.S.C. § 1905* disclosure of the documents is "authorized by law."

Moreover, since § 1905 has been recognized as being "coextensive with" Exemption 4,[58] it can be assumed

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[57] In fact, Respondents' disclosure rules—which were described as "relating solely to interpretive rules, general statements of policies, and rules of agency procedure and practice"—were promulgated without prior notice to the public or opportunity for public comment (38 F.R. 3193 (Feb. 2, 1973)) and therefore do not have "the force of law." *See National Nutritional Foods Assn.* v. *Weinberger,* 512 F.2d 688 (2d Cir.), *cert. denied,* 423 U.S. 827 (1975); *Pacific Gas & Electric Co.* v. *FPC,* 506 F.2d 33 (D.D.Cir. 1974).

[58] *See, e.g., Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1204 n. 38.

that information which falls within § 1905 is also exempt from disclosure under Exemption 4. Where an FOIA exemption is found to apply, the Act itself does not apply and therefore cannot be construed to provide "authorization by law" for disclosure within the meaning of 18 U.S.C. § 1905. H.R.Rep.No. 94-880, 94th Cong., 2d Sess. at 23 (1976); *cf. NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. at 147-8. It follows, therefore, that administrative regulations promulgated to implement the FOIA cannot be relied upon to authorize disclosure once the Act itself is found to be inapplicable. *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d at 942.

Second, Executive Order 11246 is equally unavailing as a source of authority for regulations which purport to authorize disclosure of information falling within 18 U.S.C. § 1905. Although Respondents' disclosure rules refer to both the FOIA and the Executive Order as authority for the regulations, the routine reference to the Executive Order does not conceal the fact, as the rules themselves state, that the purpose of the regulations is to "implement 5 U.S.C. § 552, the Freedom of Information Act", 41 C.F.R. § 60-40.1, and thereby to satisfy the agency's responsibility under the FOIA to publish regulations stating the procedures to be followed by the agency in making documents available to the public. See 5 U.S.C. § 552(a)(3). Consequently, for the reasons noted above, regulations such as these which were adopted to implement the FOIA cannot constitute authorization by law under 18 U.S.C. § 1905.[59]

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[59] *See Charles River Park "A", Inc.* v. *HUD,* 519 F.2d 935, where the rules at issue (24 C.F.R. Part 15) listed as their authority 5 U.S.C. § 552 *and* 42 U.S.C. § 3555, the latter provision which, like Executive Order 11246, granted the Secretary of the agency

Moreover, the general authorization to adopt "necessary and appropriate" regulations provided by § 201 of the Executive Order—which makes no mention whatsoever of disclosure of a contractor's documents—cannot be construed as overriding, or impliedly repealing, the specific congressional prohibition in § 1905 against disclosure of confidential business information. Therefore, even if *arguendo* Executive Order 11246 could be deemed to authorize the promulgation of rules by OFCCP dealing with documents in its custody, those rules could authorize disclosure only to the extent that disclosure was not prohibited by some other law such as § 1905, or contrary to a clear statement of legislative intent such as that which underlies FOIA Exemption 4.[60] *See, e.g., Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936).

In each of these respects, Executive Order 11246 and the FOIA, like 5 U.S.C. § 301, fail to provide the necessary authority for adoption by Respondents of regulations which limit the applicability of § 1905. Consequently, Respondents' disclosure of Petitioner's documents—substantial parts of which were found by the district court to fall within 18 U.S.C. § 1905—is not authorized by law and would violate § 1905.

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authority to make rules and regulations necessary to carry out the agency's functions. The court of appeals concluded that, despite the reference to 42 U.S.C. § 3555, the purpose of the rules was to implement the FOIA and it was the FOIA which served as the underlying authority for those regulations.

[60] Indeed, it is questionable whether an Executive Order or rules promulgated thereunder could limit the applicability of a legislative prohibition which is largely directed at the Executive Branch without running afoul of established principles of separation of powers. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

C. 18 U.S.C. § 1905 Constitutes A Specific Statutory Exemption From Disclosure Within The Meaning Of FOIA Exemption 3

Should this Court agree with Petitioner that agency disclosure regulations promulgated under 5 U.S.C. § 301, the FOIA or Executive Order 11246 do not constitute "authorization by law" within the meaning of 18 U.S.C. § 1905, Petitioner submits that the Court should also consider the related question of whether § 1905 is a specific statutory exemption from disclosure within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), and whether, therefore, documents whose disclosure would violate § 1905 are also exempt from mandatory disclosure under the FOIA. This question, which has recently been referred to as the "threshold issue" in reverse FOIA cases involving confidential commercial information[61] and on which circuit courts are presently awaiting this Court's guidance,[62] was raised in the Petition at n. 33.

Exemption 3 of the FOIA provides that the disclosure mandate of the FOIA shall not apply to matters which are

> "specifically exempted from disclosure by statute (other than section 552b of this title), *provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.*"[63] 5 U.S.C. § 552(b)(3); Pet. App. D, pp. 60a-61a.

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[61] *Sears, Roebuck and Co.* v. *GSA*, 553 F.2d 1378, 1385 (D.C.Cir. 1977), *cert. denied*, 46 U.S.L.W. 3215 (Oct. 4, 1977).

[62] *Id.*

[63] The portion in italics was added by the 1976 amendment to the FOIA. See discussion below.

While many early decisions declined to construe § 1905 as the type of specific statutory exemption from disclosure which will trigger Exemption 3,[64] the decisions of this Court in *FAA Administrator* v. *Robertson,* the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger,* and the D.C. Circuit in *Sears, Roebuck and Co.* v. *GSA,* as well as the recent amendment of Exemption 3 show that those early decisions too narrowly construed the third exemption in disregard of pertinent legislative history, and that documents such as Petitioner's whose disclosure is prohibited by § 1905 are exempt from disclosure under Exemption 3.

First, as noted above, this Court's decision in *FAA Administrator* v. *Robertson* shows that Congress, in enacting Exemption 3 of the FOIA, intended that preexisting nondisclosure statutes such as 18 U.S.C. § 1905 would remain in effect subsequent to passage of the FOIA and that the Act would not repeal or otherwise affect the applicability of those statutes. 422 U.S. at 263-66. That same view was adopted by the U.S. Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger,* where the court of appeals specifically found that "§ 1905 is a statute qualifying under Exemption 3 . . ." 542 F.2d at 1201-3.

Second, the recent amendment to Exemption 3 found in § 5(b) of the Government In The Sunshine Act [65] reinforces the conclusion that 18 U.S.C. § 1905 falls within the terms of the exemption. Amended Exemp-

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[64] See, *e.g., Sears, Roebuck and Co.* v. *General Services Administration,* 509 F.2d 527, 529 (D.C.Cir. 1974); and see generally *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1199-1203.

[65] PL 94-409, 90 Stat. 1241, approved Sept. 13, 1976, codified as 5 U.S.C. § 552b.

tion 3 provides that statutes which (A) require "that . . . [information] be withheld from the public in such a manner as to leave no discretion on the issue" or (B) establish "particular criteria for withholding or [refer] to particular types of matters to be withheld" are statutes which specifically exempt matters from disclosure by statute within the meaning of Exemption 3.

Section 1905 satisfies both provisos.[66] It satisfies proviso (A) because it does not provide for any discretion to disclose documents which fall within its terms; indeed, since § 1905 is a criminal statute, it can have no discretionary element. *See Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 168-68 (1972); *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939). Section 1905 also clearly satisfies proviso (B) of the exemption because it refers to particular matters to be withheld, such as trade secrets, confidential statistical data, and data relating to a manufacturer's processes, operations, profits, etc. *See Seymour* v. *Barabba,* 559 F.2d 806 (D.C.Cir. 1977). Therefore, under *either* proviso to Exemption 3, § 1905 qualifies as an exempting statute.

Nor does the isolated view expressed in the Report of the House Government Operations Committee[67] require a contrary conclusion. Although the House Report states that the purpose of the amendment to FOIA Exemption 3 was to overrule this Court's decision in *FAA* v. *Robertson,* it should be noted that the

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[66] The two provisos of Exemption 3 are clearly disjunctive. *Irons* v. *Gottschalk,* 548 F.2d 992, 994 n. 3 (D.C.Cir. 1976); *see* Note, *The Effect of the 1976 Amendment to Exemption 3 of the Freedom of Information Act,* 76 Colum.L.Rev. 1029, 1041-42 (1976).

[67] H.R.Rep.No. 94-880, Part I, 94th Cong., 2d Sess. 23 (1976).

scope of the *Robertson* opinion was considerably broader than that of the amendment to Exemption 3. *Robertson* held that the FOIA could not be read to have impliedly repealed the more than one hundred nondisclosure statutes which were in existence at the time the FOIA was enacted; those one hundred statutes ranged in nature from the very specific and nondiscretionary to the very general and discretionary, the latter category exemplified by the FAA statute involved in *Robertson*. In contrast, the recent amendment to Exemption 3 relates *only* to those of the one hundred preexisting nondisclosure statutes which either (A) failed to describe with specificity the criteria for withholding or the types of material to be withheld or (B) allowed wide discretion to withhold information, e.g., the FAA statute involved in *Robertson*. Thus, as indicated by the authoritative Conference Report, PL 94-409 overrules *Robertson* only with respect to statutes which do not satisfy either of the two provisos to amended Exemption 3.[68] With respect to

[68] The Conference Report on the Sunshine Act states with respect to the amendment to Exemption 3 that "[t]he conferees intend this language to overrule the decision of the Supreme Court in Administrator, FAA v. Robertson, 422 U.S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (59 U.S.C. 1504). Another example is section 1106 of the Social Security Act (42 U.S.C. 1306)." Conf. Rep. No. 94-1178, 94th Cong., 2d Sess. 24-25 (1976). Both § 1104 of the Aviation Act and § 1106 of the Social Security Act are statutes that, in contrast to 18 U.S.C. § 1905, provide the agency concerned with broad diseretion in making disclosure decisions and, at the same time, fail to identify particular types of documents to be withheld or standards for withholding. *See Robertson* v. *Butterfield,* 498 F.2d 1031 (D.C.Cir. 1974); *Schechter* v. *Weinberger,* 506 F.2d 1275 (D.C.Cir. 1974). Nothing in the Conference Report suggests any intent to affeet a statute, such as 18 U.S.C. § 1905, which clearly meets one or both of the provisos to amended Exemption 3.

the remaining nondisclosure statutes which do satisfy those requirements either by containing adequate nondisclosure criteria or by not committing disclosure to agency discretion—such as 18 U.S.C. § 1905—*Robertson* remains good law.

Moreover, the House Report constitutes a highly unreliable indicium of congressional intent regarding the amendment to Exemption 3 because the report was based on a considerably more restrictive version of Exemption 3 than that which was ultimately enacted. After being considered by the House Committee on Government Operations, the bill went to the House Judiciary Committee, which revised the proposed amendment to Exemption 3 because of its unduly restrictive scope. H.R.Rep.No. 94-880, Part II, 94th Cong., 2d Sess., 3-4, 7, 14-15 (1976). On the House floor, a substitute version which again revised the Government Operations Committee's proposal was introduced which, with one clarifying addition in conference, was the version of the amendment that was finally enacted into law. 122 Cong. Rec. H7896 (daily ed. July 28, 1976). As indicated by the remarks of Congressman McCloskey, the sponsor of the House floor amendment, the intent was to repudiate the extreme position on disclosure taken by the House Committee on Government Operations and to *include* within the exemption generally worded, nondiscretionary confidentiality statutes which he believed were excluded from the Government Operations Committee's proposal. *Id.* at 7897-98. Thus, the legislative history of the amendment to Exemption 3 reveals that preexisting nondisclosure statutes such as 18 U.S.C. § 1905 were intended to survive as Exemption 3 statutes.

Third, Petitioner's interpretation of *Robertson, Westinghouse* and amended Exemption 3 is given considerable support by the recent decision of the D.C. Circuit in *Sears, Roebuck & Co.* v. *GSA*. There, the D.C. Circuit noted a chain of events which began with that court's early refusal to consider 18 U.S.C. § 1905 as an Exemption 3 statute, continued with the subsequent decision of this Court in *Robertson,* and had as its final link the amendment of Exemption 3 in the Government In The Sunshine Act. Considering the impact of these events, the court of appeals stated that although the amendment to Exemption 3 had the clear effect of excluding from the scope of the exemption the particular statute which was involved in *Robertson,* that was not necessarily the case with 18 U.S.C. § 1905. Instead, notwithstanding the court of appeals' earlier decisions excluding § 1905 from Exemption 3, the court said that, in light of *Robertson* and the amendment of Exemption 3, the courts of the District of Columbia Circuit must now reconsider their earlier decisions to determine whether, as the D.C. Circuit implied, § 1905 is in fact an Exemption 3 statute. 553 F.2d at 1383-85.

Petitioner submits that the foregoing analysis demonstrates that 18 U.S.C. § 1905 constitutes a specific statutory exemption under FOIA Exemption 3 and compels the conclusion that Petitioner's documents, substantial parts of which were found to fall within § 1905, are also exempt from disclosure under Exemption 3 of the FOIA.

III. A Person Seeking to Enjoin Disclosure of Documents in Violation of 18 U.S.C. § 1905 or FOIA Exemption 4 Is Entitled to a Trial *De Novo*

This Court should declare that, in a civil action brought by the submitter of documents to enjoin disclosure of confidential commercial information which assertedly would contravene FOIA Exemption 4 and 18 U.S.C. § 1905, the plaintiff is entitled to a trial *de novo*. The court below, having rendered Exemption 4 and § 1905 virtually impotent to protect confidential commercial information, proceeded to deprive persons who submit such information to government agencies of the last remaining safeguard on which they can depend—the right to a trial *de novo*. Finding that a cause of action could not be implied under 18 U.S.C. § 1905 or Exemption 4, the court held that a submitter's cause of action in a reverse FOIA case arose only under the APA and that the scope of judicial review in such actions was to be limited to a determination, based on the agency record, of whether the disclosure decision was arbitrary, capricious or an abuse of discretion. Pet. App. A, pp. 23a-25a, 30a-31a, 36a-39a. Here, we demonstrate that the holding of the court below is erroneous in at least three material respects.

A. A Civil Cause of Action Giving Rise To A Right To A Trial *De Novo* Should Be Implied Under 18 U.S.C. § 1905 And FOIA Exemption 4

The decisions of this Court compel the conclusion that a cause of action to enjoin disclosure of trade secrets or confidential commercial information, which gives rise to a right to a trial *de novo*, should be implied under Exemption 4 of the FOIA and 18 U.S.C. § 1905.

1. In *Renegotiation Board* v. *Bannercraft Clothing Co.*, this Court held that the fact that Congress, in the FOIA, specifically conferred jurisdiction upon the federal district courts to grant injunctive relief to compel an agency to disclose agency records does not "suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." 415 U.S. at 20. In so holding, the Court specifically rejected, as being "not applicable to FOIA cases", the principle that where a statute provides a special remedy, that remedy is exclusive. *Id.*

Although the primary reason for enacting the FOIA was to promote the disclosure of nonexempt government information, the legislative history clearly reflects that Congress had an equally important purpose in enacting Exemption 4 to protect the *private interests* of persons who submit commercial data to government agencies. *National Parks and Conservation Assn.* v. *Morton,* 498 F.2d at 770; see discussion, *supra*, pp. 14-19, 33-38. As this Court has recited, in an FOIA context, "all parts of an Act 'if at all possible, are to be given effect.'" *FAA Administrator* v. *Robertson,* 422 U.S. at 261 (citations omitted). Since nothing in the Act provides any suggestion that Congress' provision in 5 U.S.C. § 552(a)(4)(B) of a specific remedy to compel disclosure of documents was intended to limit district courts' "inherent equitable powers"[69] to protect the important private interests reflected in Exemption 4, the fact that the FOIA does not expressly provide for a cause of action in favor of a person resisting

[69] *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1945).

disclosure under Exemption 4 should not be construed to imply a congressional intent to deny such a right of action under the Act. See Pet. App. A, p. 24a.

2. Moreover, implication of a cause of action on the part of a person resisting disclosure under FOIA Exemption 4 and, as well, 18 U.S.C. § 1905 is entirely consistent with this Court's decision in *Cort* v. *Ash,* 422 U.S. 66 (1975). There, the Court described the factors which are relevant in determining "whether a private remedy is implicit in a statute not expressly providing one."[70] *Id.* at 78. In applying those factors to FOIA Exemption 4 and 18 U.S.C. § 1905, it becomes amply apparent that a private cause of action, which gives rise to a right to a trial *de novo,* should be implied.

First, Petitioner is "one of the class for whose *especial* benefit" 18 U.S.C. § 1905 and FOIA Exemption 4 were enacted. As recounted above, the primary purpose of both 18 U.S.C. § 1905 and Exemption 4 was to protect individuals and companies such as Petitioner from the harm which would result if trade secrets or confidential business information which such persons submit to federal agencies were to be disclosed.

Second, although the legislative histories of § 1905 and Exemption 4 do not expressly reflect an intent to create a private cause of action for persons seeking to enjoin disclosure,[71] more significantly they do not ex-

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[70] *See also J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *Wyandotte Transportation Company* v. *United States,* 389 U.S. 191 (1967).

[71] The fact that Congress expressly created a civil cause of action in the Privacy Act of 1974 (5 U.S.C. § 552a(g)(1)) for individuals, but not businesses, to enjoin any violation of the law, including disclosure of exempt information under the FOIA, does not lead to the conclusion reached by the court below (Pet. App. A, p. 24a) that

pressly or impliedly reflect an intent to deny one.[72]

Third, a cause of action to enjoin federal agencies from violating federal laws by disclosing a federal government contractor's documents is clearly not a cause of action traditionally relegated to state law or of concern to the States.

Finally, implication of a civil cause of action under 18 U.S.C. § 1905 and FOIA Exemption 4 is "consistent with the underlying purposes," and would promote the goals, of those statutes. Both 18 U.S.C. § 1905 and, notwithstanding the FOIA's fundamental disclosure philosophy (Pet. App. A, p. 24a-25a), Exemption 4 constitute express statements of congressional intent that persons who submit trade secrets and confidential business information to the Government should be safeguarded from the injury which disclosure would cause. Since the loss of "confidentiality" which results from improper disclosure is nearly always *irreparable,* it is essential that a right of action to enjoin disclosure

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Congress intended to deny businesses such as Petitioner the *implied* civil cause of action to enjoin disclosure which has always existed under the preexisting FOIA and 18 U.S.C. § 1905. Indeed, it is understandable that an express cause of action was not created for businesses for, in enacting the Privacy Act in 1974, Congress undertook to deal only with the impact of government information policies on individuals. It left for another day the distinct problems posed by disclosure of business records, to which Congress has recently turned its attention. See, *e.g., 1977 House Hearings, supra* n. 20; *1977 Senate Hearings, supra* n. 24.

[72] Here, in contrast to *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974), there is no "explicit legislative history" of a congressional intent to make the remedies expressly provided in § 1905 and the FOIA "exclusive" or to "preclude [the implication of] private causes of action" under those statutes.

prior to release be recognized if the congressional purposes underlying Exemption 4 and § 1905 are to be achieved; for, once confidential documents are improperly disclosed, no amount of monetary damages and no criminal or disciplinary sanctions can restore the information to its original confidential state. However, because the government officials whose responsibility it is to scrutinize the disclosure of documents under § 1905 and Exemption 4 are the very persons whose conduct the statutes are intended to control, it cannot be expected that they would recognize, expose, or institute actions against their own unlawful conduct either before or after disclosure has occurred. It is only persons such as Petitioner—who are the intended beneficiaries of § 1905 and Exemption 4 and who will be most directly injured by improper disclosure—that will be in a position, or be inclined, to serve as a "watchdog" against improper disclosure.

In each of these respects, contrary to the view of the court below (Pet. App. A, p. 30a-31a), the criminal remedy provided by § 1905 is alone inadequate to effectuate the purposes of the statute [73] and, therefore, a private cause of action on the part of those persons such as Petitioner whose documents are to be disclosed is essential if the congressional purposes underlying § 1905 and Exemption 4 are to be achieved. This was precisely the conclusion reached by the U.S. Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger.* There, contrary to the decision of the court below in this case, the Fourth Circuit held both that

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[73] *Wyandotte Transportation Company* v. *United States,* 389 U.S. at 202.

> "the FOIA itself . . . confers on a supplier of *private* information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within Exemption 4"

and that a cause of action may also be implied to enjoin

> "the threat of action by a public officer '. . . contrary to a specific [federal statutory] prohibition' such as § 1905 . . ." 542 F.2d at 1210, 1209.

Recognizing that Exemption 4 and § 1905 constitute "express affirmation[s] of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests", the court of appeals held that

> "when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection. It matters not that the statute does not in express terms accord him that right." *Id.* at 1211.

In such an action based on an implied cause of action under § 1905 or Exemption 4, the person seeking to enjoin disclosure must be afforded a trial *de novo* on his claims under those statutes. Noting that "the protection of a competitive position is both a valuable and often complex matter, dependent on full proof," the Fourth Circuit observed:

> "Should not the person who is threatened with harm through a disclosure, which 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?" *Id.* at 1213 (footnote omitted).

Similarly, with respect to the submitter's implied cause of action under § 1905, the Fourth Circuit expressed its view that

> "[t]he supplier . . . is entitled to a fair and adequate hearing, on proper evidence, in the courts, a hearing that is no less broad and adequate than that given the merely curious who may seek disclosure." *Id.* at 1215 (footnote and citations omitted).

Nor does the fact that the exemptions to the FOIA are, *arguendo,* "permissive" in nature suggest a congressional intent to limit the scope of review by district courts, as the court below concluded (Pet. App. A, pp. 23a-25a). The legislative history of the FOIA reflects significant congressional concern, as embodied in Exemption 4, that the proprietary rights of private parties in confidential commercial information which is furnished to the Government not be impinged by the Act's disclosure provisions. To disregard the applicability of a protective exemption to the FOIA and the harm which disclosure would precipitate by providing only a right of limited review would "[make] the statutory exemption meaningless and [fly] in the face of the protective purpose of the exemption . . ."

Westinghouse Electric Corp. v. *Schlesinger,* 392 F. Supp. 1246, 1250 (E.D.Va. 1974), *aff'd.,* 542 F.2d 1190 (4th Cir. 1976).[74]

Accordingly, Petitioner submits that the Court should hold that a cause of action to enjoin disclosure of trade secrets and confidential commercial information, which gives rise to a right to a trial *de novo,* should be implied under 18 U.S.C. § 1905 and 5 U.S.C. § 552 (b)(4).

B. A Trial *De Novo* On The Applicability Of 18 U.S.C. § 1905 And FOIA Exemption 4 Is Appropriate Even If Petitioner's Cause Of Action Arises Under The APA

In *Charles River Park "A", Inc.* v. *HUD,* the court of appeals declined to imply a private cause of action under 18 U.S.C. § 1905, and instead found that the reverse FOIA plaintiff's right of action arose under the Administrative Procedure Act. 519 F.2d at 941 n. 6. Nonetheless, the court of appeals held that the plaintiff was entitled to a *de novo* hearing in the district court on its claim that disclosure would violate 18 U.S.C. § 1905 and was contrary to an FOIA exemption. It reached that result pursuant to the following analysis.

In any reverse FOIA action, the threshold question is whether the documents which the plaintiff seeks to prevent from being disclosed are within the scope of

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[74] The District of Columbia Circuit, while viewing the FOIA exemptions as permissive, has consistently held that a *de novo* determination of the information's status under the FOIA exemptions (and 18 U.S.C. § 1905) is appropriate. *See Sears, Roebuck and Co.* v. *GSA,* 553 F.2d at 1381; *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d at 940 n.4.

any of the exemptions to the FOIA. 519 F.2d at 940-41 n. 4. If the court finds that the documents do not fall within any of the exemptions and that the Government could be forced in a traditional FOIA suit to disclose the documents, then the reverse FOIA plaintiff is entitled to no relief and the reverse FOIA action is at an end. *Id.*

In making this initial determination, the court in *Charles River Park* stated that the district court is not confined to reviewing the agency record but instead must "hold a hearing to determine whether the information involved here would have been exempt just as it would be if a suit had been brought under the FOIA to compel disclosure." *Id.* This is because in holding such a hearing, "the district court is not reviewing agency action; it is making a threshhold determination whether the plaintiff has any cause of action at all." *Id.*; *Sears, Roebuck and Co.* v. *GSA,* 553 F.2d at 1381;[75] *Sonderegger* v. *Department of Interior,* 424 F.Supp. 847, 848-49 (D.Id. 1976); *Hughes Aircraft Co.* v. *Schlesinger,* 384 F.Supp. 292 (C.D.Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

Similarly, in determining whether disclosure would contravene the criminal prohibition of a nondisclosure statute such as 18 U.S.C. § 1905, the court is not reviewing the agency's exercise of discretion. Rather, it

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[75] In *Sears,* another panel of the D.C. Circuit reached the same conclusion, although on somewhat differently articulated grounds:

> "[S]ince this reverse FOIA case is brought as a declaratory judgment action * * * on whether any of the documents are exempt under the FOIA, * * * *not for review of agency action* under the APA [,t]he review standard of the FOIA in a suit to compel disclosure is also the appropriate standard in the reverse FOIA case." 553 F.2d at 1381 (footnote and citation omitted) (emphasis added).

is engaging in a basic exercise of statutory interpretation which requires the *de novo* receipt of evidence "so the court [can] better determine whether [the document falls] within . . . the statutory language of § 1905." [76] *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1215; *Charles River Park "A", Inc.* v. *HUD,* 519 F.2d at 943.

Indeed in reverse FOIA cases arising under Exemption 4 and 18 U.S.C. § 1905, a district court will never be called upon to review agency discretion or agency action. On the one hand, should the district court find that the documents do not fall within an exemption to the FOIA, then the documents *must* be disclosed. On the other hand, should the district court find that the information falls within Exemption 4 or that its disclosure would violate 18 U.S.C. § 1905, there would still be no occasion for the court to review any act of agency discretion. For, as shown above, an agency has *no* discretion to disclose private, confidential commercial information which falls within Exemption 4; and, likewise, an agency has *no* discretion to release information the disclosure of which would violate § 1905.[77]

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[76] The primary rationale behind the doctrine of deference to administrative interpretations of statutes is the notion of administrative expertise. *Wilderness Society* v. *Morton,* 479 F.2d 842, 866 (D.C.Cir.), *cert. denied,* 411 U.S. 917 (1973). Because the question of whether documents fall within 18 U.S.C. § 1905 or §552 (b)(4) is one which "does not significantly engage the agency's expertise", the judiciary is ultimately the institution best equipped to perform that task. *Barlow* v. *Collins,* 397 U.S. 159, 166 (1970), quoting *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1, 14 (1968) (Harlan, J., dissenting).

[77] The court below, while reaching the wrong result, appeared to recognize this: "It seems to us that in reverse FOIA cases under the APA a reviewing court should make the following analysis. First it should inquire whether any non-disclosure statute or non-

Moreover, even assuming *arguendo* that FOIA Exemption 4 is "permissive", the district court still would be required initially to determine *de novo* whether the documents fall within the exemption or the terms of 18 U.S.C. § 1905. Only if the court found on that basis that the documents were exempt from mandatory disclosure under the FOIA but were not protected from release by a nondisclosure statute such as § 1905 would the agency's decision to disclose constitute a discretionary act; and only at that time would review by the district court need to be based on an "agency record."

Accordingly, in actions brought to enjoin disclosure of private documents which assertedly will contravene FOIA Exemption 4 and 18 U.S.C. § 1905, the only (or at least the threshold) inquiry for the district court is whether the documents fall within the terms of those statutes. Because that inquiry involves no consideration of agency action or discretion and is not, therefore, dependent upon a preexisting agency record, the reverse FOIA plaintiff should be afforded a trial *de novo* even if his cause of action is deemed to arise under the APA.

C. Reverse FOIA Plaintiffs Are Entitled To A Trial *De Novo* In Exemption 4 Cases Because Of The Inherent Inadequacy Of Agency Fact-finding Procedures Under The FOIA

Even if the Court were of the view that a reverse FOIA action under Exemption 4 and 18 U.S.C. § 1905

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disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. * * *" Pet. App. A, p. 38a.

does seek review of agency action and that the limitations on judicial review set forth in the APA would ordinarily be applicable, Petitioner submits that a trial *de novo* would still be mandated under this Court's decision in *Citizens To Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971), because of the nature and *inherent inadequacies* of the factfinding procedures employed by all federal agencies in Exemption 4 cases.

Under § 706(2)(F) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(F), "*de novo* review is authorized when the agency action is *adjudicatory* in nature and the agency *fact finding procedures are inadequate.*" *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. at 415 (emphasis added).[78] Although the court below noted this principle, it rejected its application to the instant case.[79]

The factfinding procedures employed by all federal agencies in cases involving Exemption 4 and 18 U.S.C.

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[78] There can be no doubt that decisions to disclose documents which are assertedly immune from disclosure under the FOIA or 18 U.S.C. § 1905—decisions which require determination of the type of information contained in the disputed documents, the uses to which the information could be put if disclosed, and the effect which disclosure will have on the submitter—are adjudicatory in nature. See 1 K Davis, *Administrative Law Treatise,* § 7.02 at 413 (1958); *Bi-Metallic Inv. Co.* v. *State Board of Equalization,* 329 U.S. 441, 446 (1971).

[79] The court of appeals' action was based, at least in part, on its view that the district court had not considered the issue. See Pet. App. A, p. 37a. In fact, the issue was briefed and argued by the parties before both the district court and the court of appeals. Apparently, the district court found *sub silentio* that *de novo* review was appropriate under 5 U.S.C. § 706. See Pet. App. B, p. 48a. The court of appeals, however, declined to reach the question and *sub silentio* rejected Petitioner's argument. Pet. App. A, p. 37a.

§ 1905 are inherently inadequate because of the constraints imposed on the agencies by the FOIA itself. The principal limitation on agency factfinding found in the Act appears in § 552(a)(6)(A)(i) which requires that an agency determine *within ten working days* from the initial date of an FOIA disclosure request whether to comply with the request.[80] This rigid time limitation imposes insuperable defects in agencies' factfinding procedures in several respects.[81]

First, because of the extremely short time available to submitters in which to submit objections to disclosure (generally, less than five days), it is often impossible for submitters to analyze thoroughly the documents to be disclosed and to submit the kind of detailed documentary and testimonial economic evidence which agencies require on the issue of whether disclosure of the documents would cause substantial competitive injury[82] to the submitter. Indeed, since the question of whether to disclose confidential commercial information or trade secrets is a complex matter requiring analysis of copious documents and possible testimony by expert witnesses, allowance of only five or fewer days

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[80] President Ford vetoed the bill because, *inter alia,* he considered the time limits imposed upon agencies unworkable. President's Veto Message, 120 Cong. Rec. 36,243-44 (1974). His veto was overridden.

[81] "Ten days is clearly insufficient to complete the lengthy process of notification of submitters, preparation of arguments by submitters, and consideration of these arguments by agencies." 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, 635 (1977) (hereinafter *Clement*).

[82] See n. 19, *supra.*

for submission of comments is often tantamount to a denial of a right to object at all.[83]

Second, as many agencies have admitted, even where the submitter is able to compile his case for exemption within the several days afforded to him, the statutorily mandated ten day time limit simply does not afford enough time for the agency to evaluate the sophisticated economic issues involved in Exemption 4 cases.[84] Moreover, because of these same time constraints, submitters' objections and the agencies' consideration of those

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[83] Because of the inadequate time to object when a request for disclosure is received by the agency, the mode of review endorsed by the court of appeals—review on the agency record—will require all companies such as Petitioner, who submit confidential information to the Government which they would assert is nondisclosable, to create a complete agency record in support of their claim of confidentiality *at the time the documents are first submitted* and *before* it is known whether a request for disclosure will ever be made. For a company such as Petitioner which submits hundreds of thousands of pages of documents each year to the Government, thousands of which are truly confidential in nature, the burden of creating such a record in each instance would be so great as to practically preclude Petitioner from asserting these rights of confidentiality in most cases. For federal agencies and the taxpaying public, the costs of developing and considering such an agency record each time an assertedly confidential document is filed would be equally unacceptable. In short, the decision of the lower court "would place an intolerable burden upon . . . [submitters and federal agencies] which, in my view, Congress never intended to inflict." *Dept. of Air Force* v. *Rose,* 425 U.S. 352, 385 (1976) (Burger, C.J., dissenting). *See Patten, supra* n.19, 29 Ad. L.Rev. at 200.

[84] *See, e.g., 1977 House Hearings, supra* n. 20, at 5 (". . . because the Freedom of Information Act requires an initial response within 10 days, the [EPA] decided that there was no time to evaluate the issue involved in a particular situation except in those cases where information is clearly not entitled to confidential treatment . . ."); and see *Clement, supra* n. 81, 55 Tex.L.Rev. at 635.

objections are necessarily generalized and conclusory in nature and, conseqently, give rise to an inadequate "record" of the agency's action. Thus, for example, the "administrative records" in this case (A. 51-102, 103-129) consist merely of the agency's unexplained and unsubstantiated opinions that the information does not fall within Exemption 4 or 18 U.S.C. § 1905 and will not injure Petitioner if disclosed, findings which were contrary to those reached by the district court after a *de novo* trial. Totally absent from the agency record was any careful analysis of Petitioner's claim that disclosure would cause it substantial competitive injury, a claim which Petitioner would have documented even more fully had it been afforded adequate time.

In addition to these time constraints, the administrative factfinding process in Exemption 4 suffers from a total lack of necessary expertise. As courts,[85] commentators,[86] and even the agencies themselves have repeatedly observed over the decade in which the FOIA has been in force, federal agencies are unable to evaluate the competitive consequences of disclosure of confidential commercial documents because of the agencies' total lack of expertise in the economic disciplines necessary to analyze the complex questions presented by

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[85] See, *e.g.*, *Westinghouse Electric Corp.* v. *Schlesinger*, *supra*, 542 F.2d at 1212-13, where the Fourth Circuit observed that the ageney, in contrast to the submitter of the doeuments, "does . . . [not] have, . . . in most instances, sufficient knowledge to assert properly the private party's right to eonfidentiality."

[86] See, *e.g.*, O'Reilly, *supra* n.43, 30 Bus. Lawyer at 1134; Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Northwestern L.Rev. 995, 998-99 (1976) (hereinafter *Reverse FOIA Suits*).

claims of confidentiality under Exemption 4.[87] Thus, a representative of the Federal Trade Commission recently bemoaned his agency's inability to make the kinds of judgments necessary in Exemption 4 cases:

> "[E]ach request for information calls for an individual and often an original analysis involving a series of dynamic factors. In determining whether release will cause substantial competitive harm, an examination of such factors including the make-up of the industry, the submitter's position therein, the age of the documents in question, and the ability of competitors to glean such information elsewhere will often be required. Aside from the fact that this exemption is not susceptible to ready application and calls for a burdensome and time-consuming series of evidentiary analyses, a further problem arises. *The processors of Freedom of Information Act requests are not industry analysts or financial experts and therefore often lack the expertise* required to perform an analysis akin to those undertaken in the *National Parks* cases, particularly in the limited time allowed under the Act, even if the required information were readily available." *1977 Senate Hearings, supra* n. 24, at 13 (emphasis added); *see also 1977 House Hearings, supra* n. 20, at 5.

This lack of adequate time and expertise is particularly significant when it is recalled that an analysis of competitive injury, such as is required under the courts' current interpretation of Exemption 4, requires factual analysis of detailed evidentiary matters,

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[87] *See 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, 2114 (1972), where some of Respondents' agencies testified concerning their inability to make such analyses.

not generalized application of agency regulations;[88] and that, since the disclosure of even mere fragments of information can often have significant consequences, competitive and otherwise, to the affected business,[89] an agency may simply be unable to recognize the presence of valuable information in a document which it proposes to release.

Numerous other aspects of the agency disclosure process and the FOIA itself demonstrate the inherent inadequacy of the factfinding procedures employed by federal agencies in cases involving Exemption 4 and 18 U.S.C. § 1905. *First,* neither the FOIA nor most agency regulations require that notice be provided to persons whose documents are to be disclosed; and, in practice, many agencies often do not provide such notice. *See, e.g., 1977 House Hearings, supra* n. 20, at 93-94. *Second,* agency disclosure regulations uniformly deny submitters the opportunity to cross-examine government experts, if any, or to otherwise challenge the basis for the Government's decision to disclose, a right which the D.C. Circuit recently recognized in *Sears, Roebuck and Co.* v. *GSA* as essential in cases such as this where the confidentiality of documents is at issue. 553 F.2d at 1382. Some agencies even deny the submitter the right to *assert* that its documents are confidential, and thereby exclude the person whose vital interests are at stake from ensuring that the agency record reflects and considers his position regarding disclosure.[90] *See 1977 House Hearings, supra* n. 20, at 93-94.

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[88] 1 K. Davis, *Administrative Law Treatise,* § 7.02 at 412-15 (1958).

[89] *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1213.

[90] Indeed, in the instant case, Respondents refused to provide Petitioner with copies of two of the documents which were to be disclosed—which Petitioner had not previously seen. Thereby, Re-

Third, as demonstrated by this case, the FOIA does not require an agency to make findings in support of its decision to disclose and, in fact, virtually no agencies do so, thereby making judicial review on the basis of an "agency record" impossible. Moreover, when the record is supplemented by the agency on remand from the district court to permit judicial review, the supplementary material is characteristically an after-the-fact defense of the agency's prior decision and, consequently, the impartiality of the agency's decision is destroyed. *Finally,* as also reflected by this case, few agencies afford the submitter an administrative appeal from an adverse initial disclosure decision [91] and, even when they do, that right is often illusory because of the inadequacy of the underlying agency record and, more importantly, because agencies, under compulsion of the FOIA time limits, must disclose the documents prior to completion of the appeal.[92]

Apart from these limitations, it must also be recalled that many agencies are now characterized by an insti-

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spondents undermined Petitioner's ability to develop a factual record in support of its claim of confidentiality and deprived themselves of a necessary predicate for a fair and intelligent agency ruling.

[91] *Reverse FOIA Suits, supra* n. 86, 70 Northwestern U.L. Rev. at 999.

[92] Although Respondents had in force a regulation (41 C.F.R. § 60-60.4(d)) which provided for a review and appeal procedure at the time Petitioner's documents were initially furnished to Respondents, the agencies' own documents show that, solely for reasons of Respondents' own administrative expedience, they did not allow Petitioner or other contractors to utilize that procedure until the time a request for public disclosure was received. A. 48. Yet, at that point, even though the intent of § 60-60.4(d) was to allow for an appeal of an adverse ruling on confidentiality *prior* to disclosure, Respondents refused to stay disclosure pending such an appeal. A. 49.

tutional bias in favor of disclosure [93] which may render these agencies insensitive to businesses' claims of confidentiality and may well impair an agency's ability to develop a fair and adequate record of the administrative action. Indeed, as a result of the 1974 amendments to the FOIA,[94] agencies have little or no incentive to protect the confidentiality of private information.[95]

In each of these respects, the factfinding procedures by which federal agencies decide to disclose private documents which assertedly are exempt from disclosure under FOIA Exemption 4 are wholly inadequate.

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[93] *Patten, supra* n. 19, 29 Ad.L.Rev. at 204.

[94] The 1974 amendments to the FOIA were intended to assist parties seeking disclosure by, *inter alia,* specifying a rigid timetable for agencies to follow in acting upon requests for disclosure (5 U.S.C. § 552(a)(6)(A)(i) and (a)(6)(A)(ii)), providing for disciplinary action against government officials who arbitrarily deny FOIA requests (5 U.S.C. § 552(a)(4)(F) and (a)(4)(G)), and permitting plaintiffs who substantially prevail in an action to compel disclosure to recover reasonable attorneys' fees and other costs from the Government (5 U.S.C. § 552(a)(4)(E)). These factors, together with the rapidly escalating number of FOIA requests which all federal agencies are now receiving, make it "easier" for an agency official to disclose documents rather than to refuse to disclose them, even though those documents may be deserving of protection. See also n. 25, *supra.*

[95] The Fourth Circuit, quoting several commentators, observed that " 'the agencies cannot always be relied upon to protect adequately the confidentiality of that information. * * * Counsel for the agency . . . has little or no incentive to protect the secrets of the business community. * * * It may be bad for appearances in a period of "openness" and "honesty" for an agency to refuse disclosure from its files.' " *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d at 1212. *See O'Reilly, supra* n. 43, 30 Bus. Lawyer at 1134; *Reverse FOIA Suits, supra* n. 86, 70 Northwestern U.L. Rev. at 998-99.

While it is well recognized that inadequacies in the administrative record can be remedied by "obtain[ing] from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary", inadequacies in the agency's factfinding process itself cannot be cured by remand to the agency and must give rise to *de novo* review of the agency's adjudicatory action by the district court. *Camp* v. *Pitts,* 411 U.S. 138, 142-43 (1973). This is particularly true with respect to factfinding in Exemption 4 cases because the inadequacies described above are not merely isolated problems of but a few agencies which could be cured by remand on a case-by-case basis; rather, they are systemic ailments which plague all federal agencies because of the terms and requirements of the FOIA itself.

Consequently, at least until Congress amends the Act to eliminate these deficiencies, Petitioner submits that this Court should hold that a person seeking to enjoin the disclosure of documents which assertedly are protected by Exemption 4 or 18 U.S.C. § 1905 has a right to a trial *de novo.*[96]

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[96] Recognition of a right to a trial *de novo* will not result in any greater burden on the district courts because (1) evidentiary hearings in Exemption 4 cases, while often complex in economic theory, usually require only a brief trial or are resolved on summary judgment motions; (2) review on the basis of the agency record, because of the fact finding deficiencies noted above, will typically require one or more remands to the agency, thus resulting in multiple district court proceedings (see, *e.g.,* cases cited at n. 11, *supra*); and (3) even absent a right to a *de novo* trial, district courts would still have to engage in evidentiary hearings in deciding whether to issue temporary or preliminary injunctive relief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BURT A. BRAVERMAN
FRANCES CHETWYND
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C. 20006

A. WILLIAM ROLF
P.O. Box 1919
Detroit, Michigan 48288

Attorneys for Petitioner Chrysler Corporation

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