Since under section 7 this production information is presumptively confidential, it may not be made public unless it has been determined to be non-confidential in accordance with the procedures specified in 40 CFR Part 2. Certain types of disclosure are authorized by the regulations. Under 40 CFR 2.209(b) EPA may disclose otherwise confidential information to either house of Congress, to a congressional committee or subcommittee, or to the Comptroller General. This disclosure may only be made in response to a written request signed by the presiding officer of either house, the committee or subcommittee chairman, or the Comptroller General. If EPA furnishes confidential information to one of these, EPA must inform them of any unresolved business confidentiality claims covering the information or any confidentiality determinations that have been made concerning the information.

Under 40 CFR 2.209(c) EPA may disclose otherwise confidential information to another Federal agency, such as the Department of Agriculture, if (1) EPA receives a written request from a duly authorized officer of the agency, (2) the request sets forth the official purpose for which the information is needed, (3) EPA notifies the other agency of unresolved business confidentiality claims and any confidentiality determiniations that have been made concerning the information, and (4) the other ageucy agrees not to disclose the information further without the consent of EPA or of the affected businesses unless the agency has statutory authority to compel production of the information and to make the proposed disclosure.

In connection with the RPAR process EPA may furnish information concerning proposed actions, including production information, to congressional committees. However, FIFRA does not require EPA to do this. Therefore, in keeping with EPA's confidentiality regulations EPA may not furnish information to the committees or subcommittees until they make a formal written request.

Section 6 of FIFRA requires that EPA give advance notice of proposed RPAR cancellation actions to the Department of Agriculture for comment. This obviates the need for EPA to receive a written request for the information from them. However, the Department of Agriculture would still not be able to publicly disclose any confidential business information, including production information, that it receives from EPA unless it meets one of the tests set out in the regulations that would allow it to make such a disclosure.

Assuming that most of the production information in question in the RPAR process is confidential, I will attempt to deal with your specific concerns about how such informatiou may be used in the process.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 28 1977

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: EPA's Freedom of Information Act Regulations and Procedures

FROM: G. William Frick
General Counsel (A-130)

TO: All Regional Counsels

EPA's new Freedom of Information Act regulations have now been in effect for over six months. I have been generally pleased with the way in which the various offices in the Agency have acted to implement the regulations. I realize that the regulations are complex and that it takes time for the full import of them to be understood. As with any new regulation, there has to be a period during which people learn to work with the regulation.

During the past six months many questions have been raised concerning the meaning of various provisions of the regulations. One of the most important of these questions concerns the specific duties that have been delegated to the Offices of Regional Counsel. Under the regulations when a requestor appeals an initial denial of a request for information, the final determination is made by the General Counsel. This function may in turn be delegated by the General Counsel to the Regional Counsel or other EPA attorneys. Under subpart B of the regulations concerning confidentiality of business information, final confidentiality determinations are to be made by the "EPA Legal Office" which is defined as the "General Counsel and any EPA office over which the General Counsel exercises supervisory authority, including the various offices of Regional Counsel." This was intended as an explicit delegation of authority to the Offices of Regional Counsel to make all final confidentiality determinations, including those where the requestor has filed a formal appeal of the initial denial based on a business confidentiality claim. From this time on, for all business confidentiality matters that arise in the regions, the Offices of Regional Counsel should assume primary responsibility for performing all the duties assigned to the "EPA legal office" under subpart B.

case developments, Agency decisions, and specific questions and answers that have arisen under EPA's regulations. Attached to this memorandum is the first of these communications.

We are preparing a road show on the Freedom of Information Act and the Privacy Act. Our proposal is to send a representative of this office to any region that requests it to give a general presentation on both Acts to an audience that would be made up of representatives of all interested offices in the region. The general presentation would discuss the two Acts, EPA's procedures and regulations, and general issues of broad applicability. After the general presentation, the representative would be available to meet with specific offices, such as Regional Counsel or Enforcement, in smaller meetings to discuss issues and questions that have arisen in the specific activities of the offices. We hope to have this ready in the next few weeks. If you think it would be productive for a presentation to be made in your region, give Dick Boehlert a call.

It is important for us to have a specific contact or contacts in each Office of Regional Counsel for Freedom of Information matters. If you have assigned specific responsibilities for Freedom of Information matters to people on your staff, please have them contact this office so that we can develop a list of contact people.

As a final note, I encourage you to contact this office whenever you have specific questions or problems under Freedom of Information. It is important that we coordinate as much as possible in this area.

Enclosure

clear the denial with members of the Committee. If they do not approve of the denial and EPA goes ahead and issues it and is sued, the Committee may recommend that the Department not defend EPA in the suit. Therefore, we usually follow their recommendations. We have developed a good working relationship with the Committee and the Department. They have given us the impression that EPA is one of the outstanding agencies in terms of complying with the Freedom of Information Act. This reputation is important to preserve.

The Office of Legal Counsel in the Department publishes an "FOI CASE LIST" which is updated periodically. I have enclosed a copy of the list. This is very useful since it has all the FOI case citations in one place. I suggest that you make copies of this list available to attorneys on your staff who work in this area. We will send out new editions of the list as they are issued.

Also enclosed is a set of final determinations that have been issued by the General Counsel since the new regulations went into effect. This is not a complete set, especially in the business confidentiality area because many are repetitious. We have attempted to compile all significant appeal determinations to date and examples of final confidentiality determinations. We hope that the appeal decisions will give you some feel for the issues that have arisen and will guide you in issuing final confidentiality determinations for your region.

We will continue to distribute significant decisions made by the General Counsel periodically. In return we would like to receive copies of all final confidentiality determinations issued in your region. We will then distribute these to the other regions so that each region will know what both headquarters and the other regions are doing.

We have also enclosed copies of typical correspondence we have used in dealing with final confidentiality determinations. Many program offices have asked us for guidance in writing letters. We have developed some standardized letters that we feel may be adapted for use in the regions. A short explanation is attached to each of the sample letters.

As the General Counsel points out in his memorandum, all final confidentiality determinations should be cleared with this office before they are issued. This is necessary so that we can coordinate an agency-wide position on confidentiality and get Department of Justice approval of our decisions. In most cases these clearances can be accomplished by a telephone call. In other cases it may be necessary to send a telecopy of the decision to us for review. To obtain a clearance of a final confidentiality determination, call me at 755-0774 or Jim Nelson at 755-0794. We will handle these as quickly as possible.

We are available at any time to answer specific questions that arise under the Freedom of Information or Privacy Acts. We also encourage you to send in suggestions concerning better ways to handle procedures and questions that you feel should be addressed in future memoranda for the benefit of all the regions.

Enclosures

information clearly is not entitled to confidential treatment. Unless the program office is willing to say that the information is not entitled to confidential treatment, the program office must conclude that it may be entitled to confidential treatment. In order to decide that the information clearly is not entitled to confidential treatment, the program office must consider the substantive criteria under 2.208. If the program office finds:

(a) The business has not taken reasonable measures to protect the confidentiality of the information (such as publishing it in annual stockholder reports or trade journals or routinely giving it to competitors without restrictions); or

(b) The information is reasonabye obtainable without the business' consent by persons other than government bodies by use of legitimate means other than judicial process. (The information is routinely available in publications, libraries, published reports by state and local government, Federal agencies, private individuals, etc., is available in public reference facilities such as the document room at the Securities and Exchange Commission, or is part of the public record in an administrative or court proceeding with no restrictions on its use.); or

(c) Disclosure of the information is mandated by a statute such as the Clean Air Act. (However, there are restrictions in section 2.301 concerning the extent to which "emission data" is publicly available when it contains trade secret information.); or

(d)(i) Disclosure of the information is not likely to cause substantial harm to the business' competitive position. (The business may be a public utility which has no competition because it has an official monopoly. This type of a determination is a judgment call, and a program office should refrain from hinging its decision to release solely on this.) and (ii) If the information is voluntarily submitted, its disclosure would not be likely to impair the Government's ability to obtain necessary information in the future. (This is also a judgment call, and the program office should refrain from hinging its decision to release solely on this.)

Thus the test in your Step 3 should be not that all the five criteria are met but that the program office cannot say that one or more of them is not met. The presumption here should be in the direction of confidentiality. However, if the program feels that one of the substantive criteria is clearly not met, then the program may make the decision that the information clearly is not entitled to confidential treatment. If it makes that decision, before it can release the information in question, it must notify the affected business as specified in 2.205(f) giving it the opportunity to sue EPA to prevent disclosure.

MEMORANDUM

SUBJECT: Applicability of Subpart B to 40 CFR Part 2 to ESED Prepared Trip Reports

FROM: James C. Nelson, Attorney
Contracts & General Administration Branch (A-134)

TO: Mr. George W. Walsh, Assistant to the Director
Emission Standards and Engineering Division (MD-13)

Mr. Tom Bibb of your staff informed me that you had sent a memorandum dated February 9, 1977, to Don Nantkes of this office concerning the above referenced matter. I searched our records and was unable to find the memorandum. It is likely that it never reached our office. Tom Bibb sent me a duplicate of the memorandum.

The questions you raised are important. Even though ESED trip reports are internally generated documents, they often contain information that has been supplied by a business either in written form or by allowing EPA personnel to have access to a plant during which the EPA personnel make visual observations and discuss various matters with plant personnel. The information supplied by the business in writing, in conversations with plant personnel, or in allowing EPA personnel to observe plant operations and facilities may be information that the business considers as proprietary or confidential. As such, a presumption is raised that the information may be entitled to confidential treatment under Subpart B of 40 CFR Part 2. In this light, I will address your specific questions.

(1) The regulations always apply to information that may be entitled to confidential treatment. The regulations are not intended to hinder internal EPA use of information. The regulations govern the treatment of information when someone proposes to make the information available to the public or others outside of EPA. The regulation should put each employee on notice that when he or she is handling business information certain special procedures must be followed before the information can be released outside of EPA. Each employee should treat business information on the presumption that it is entitled to confidential treatment unless the employee has specific knowledge of circumstances under the regulations that make the information publicly available.

of the office that requested it. The only time this issue should even arise is when the nature of the request from another EPA office seems unusual to the EPA office receiving it. If that is the case, the office receiving the request may feel it is appropriate to make further inquiries concerning the specific "official need" that the other office claims.

It may be appropriate, when sending trip reports to other EPA offices, to make clear to them that the information contained in them may be entitled to confidential treatment. If a final determination has been made that it is entitled to confidential treatment, this should be made clear. If the information has not been cleared in any way concerning possible claims of confidentiality, you should make this clear to the office receiving the report. This is to put the other office on notice that this is information that may be protected under Subpart B so that they will not release it without following the proper procedures for clearance.

I hope this discussion answers your questions. If you have any questions concerning this memorandum or any other questions related to the regulations, call me at 755-0794.

cc. A-134 Reading
A-134 Contracts
A-134/CRBJNCelson/cm/W527/50774/4-19-77

notice format set out in Attachment 1, there is a presumption that there may be confidential business information contained in it. Therefore, each submitter who made no claim should receive a letter. Since there will be a problem with noting the claims on previously submitted rebuttals, the letter asks the submitter to send a new deleted copy of the original submission to be placed in the public file.

All of this can be routinely handled by OPP. The public will have access to the deleted versions of the rebuttals. If Freedom of Information requests are received for the undeleted versions, the matter will be handled in accordance with procedures set out in 40 CFR Part Subpart B.

This approach should allow OPP to get maximum information in the rebuttals while at the same time protecting information that is entitled to confidential treatment.

Attachments

A-134/JCNelson/cn/W521/50794/7-14-77
cc. A-134 Reading & Contracts

ATTACHMENT 2

Letter to registrants and applicants for registration which have already submitted rebuttal evidence without having been given the opportunity to assert claims of business confidentiality:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Addressee:

Re: Notice of Rebuttable Presumption Against Registration and Reregistration of Pesticide Products Containing _____, OPP-_____.

Dear :

In response to the above-referenced notice, you submitted evidence in rebuttal of the presumption. There is no indication in your submission whether you consider any of the information to be confidential business information. It is EPA's intent to place this submission in the public comment file where it will be available for public inspection.

Before EPA places your submission in the public comment file, you have the opportunity to assert a business confidentiality claim covering part or all of the information. Please examine your submission. If you consider any of the information submitted to be confidential business information, write to the address set out below specifying which information is claimed as confidential. If a confidentiality claim is asserted, the information covered by the claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in 40 CFR Part 2, Subpart B (41 FR 36906, September 1, 1976).

You have 10 business days from the day on which you receive this letter to assert any claim. If you fail to assert a claim within the 10-day period, the information you submitted will be placed in the public comment file for public inspection without further notice to you.

If you do assert a claim for part, but not all, of the information in your submission, EPA intends to place an excised version of your submission in the public comment file, deleting all information claimed as confidential. You may assist us in this work if you are willing to submit, at the same time you submit your claim, an excised version of your submission that includes all of the original information except the information that you claim as confidential. EPA would then place that copy in the public comment file. This will insure that all appropriate deletions are made.

15 JUL 1977

MEMORANDUM

SUBJECT: Congressional and Other Requests for Information Concerning RPAR Chemicals

FROM: James C. Nelson, Attorney
Contracts & General Administration Branch (A-134)

TO: Director, Office of Special Pesticide Review (WH-566)

David E. Menotti, Deputy Associate General Counsel, has informed me that the Office of Special Pesticide Review (OSPR) receives many requests for company-submitted information concerning chemicals that are undergoing scrutiny in the RPAR process. These requests may come from the public, business competitors, the press, the Comptroller General, individual members of Congress, or congressional committees and subcommittees. Mr. Menotti expressed his concern that the various requests of this nature received by OSPR may be receiving different treatment. He asked me to send you a memorandum discussing how these requests should be handled.

The basic issue here is the possibility that EPA might reveal confidential business information in the course of the RPAR process. Prior to starting the RPAR process for a particular pesticide, EPA has already collected a large quantity of information concerning the pesticide and the registrants or applicants. Some of this information may be entitled to confidential treatment. After publishing a Notice of Rebuttable Presumption Against Registration and Continued Registration, EPA receives rebuttal comments and evidence from registrants and applicants for registration. These comments and evidence also may contain confidential business information.

In the course of the RPAR process OSPR may receive requests for information contained in the rebuttal comments or evidence submitted by registrants or applicants or in other information in EPA's possession. Upon receipt of such a request, OSPR must first consider who is making the request. The public, business competitors, the press, and individual members of Congress are treated alike in responding to their requests. If a request is written, it constitutes a Freedom of Information request (an oral or telephone request need not be honored) and is subject to the exemptions in the Freedom of Information Act, including the exemption for "trade secrets and

APPENDIX 3.—LETTER FROM DONALD ELISBURG, ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS, DEPARTMENT OF LABOR, DATED DECEMBER 21, 1977

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS
WASHINGTON, D.C. 20210

DEC 21 1977

Honorable Richardson Preyer
Chairman
Subcommittee on Government Information
and Individual Rights
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Please accept my apology for the delay in responding to your letter dated October 26, 1977, enclosing a number of questions as a follow-up to my October 3 testimony before your Subcommittee on the Freedom of Information Act and our experience under exemption 4 of the Act.

Before responding to your questions, I do wish to state, as I did in my October 3 testimony, that we fully support the underlying purpose of the Freedom of Information Act (FOIA) to allow access to Federal records and information so that citizens may know how their government operates. The Act should be construed liberally so as to provide the public with the maximum information possible consistent with the law and effective functioning of the government. We believe that disclosure of information as to contractors' compliance with Executive Order 11246, in addition to informing the public on a matter of interest to all citizens, also greatly assists us in our ability to assure an effective equal employment opportunity program under E.O. 11246.

With your October 26 letter you posed four questions, each of which had a number of subparts. Our response addresses each of the questions separately and in the numerical order in which you posed them. Before proceeding, it was necessary, in order to respond as fully as possible to question 2, parts (a) through (e), to seek information from the Federal agencies with compliance enforcement responsibility under E.O. 11246. As soon as we receive the information from the agencies, we shall respond to those parts of question 2. The following are our responses to the remainder of your questions:

responsible for conducting compliance reviews of Federal contractors and subcontractors. The compliance agencies obtain possession of affirmative action programs in the course of compliance reviews. They hold possession of these documents as agents of the Secretary of Labor who ultimately has responsibility for the determination of contractor compliance and has control over the disposition of these documents. Therefore the Secretary has the authority to direct the FOIA release policies of compliance agencies with respect to these documents. OFCCP regulations only provide for review by the Director of agency decisions to disclose, not withhold, documents. Although as a practical matter OFCCP has not found it necessary to review agency decisions to withhold information, we believe that OFCCP could require agencies to disclose information if the Director determined it was in the public interest and furthered the purposes of the Executive Order to do so.

b) Similarly, the authority and responsibility of the Secretary and the Director under E.O. 11246, including the authority to manage Government disposition of documents submitted under E.O. 11246, is the basis for appeals to OFCCP of compliance agency decisions to release information. We believe that an agency is obligated to refrain from releasing information pending a decision by OFCCP as long as the requirements of the FOIA are complied with.

c) We think that a change in the FOIA procedures under the Executive Order to allow each compliance agency to handle FOIA requests and objections from contractors would be useful. It would expedite the entire process and help to ensure that the FOIA time limits are complied with. However, we are concerned that all compliance agencies follow uniform procedures. If such a procedure were adopted, it would be necessary to require some means of assuring uniform decisions in parallel cases.

Question

2) Your procedures provide that contractors, at the time of submission of data, should identify any equal employment information that is believed to be confidential and should specify the reasons why.

time of submission. The contractor will be given an opportunity to state its objections to and reasons for nondisclosure before a decision is made on the FOIA request.

g) The FOIA is silent on whether the submitter is required to identify the confidentiality of information. It is our position that an agency may by regulation require the submitter to so identify information when submitted. In the legislative history of the 1974 amendments to the FOIA, Congress clearly indicated that agencies have the authority to promulgate regulations implementing the FOIA. Congress criticized agencies which had regulations prohibiting the disclosure of exempt information and approved regulations providing for disclosure of exempt information when justified by the public interest. (See House Report No. 92-1419, 92nd Cong. 2d Sess. at 14-15.)

We believe that, as part of their general authority to establish regulations implementing the FOIA, agencies may require submitters to identify allegedly exempt information at the time of submission. Such a requirement will assist the agency in meeting the FOIA time limits if a request is received.

We would also point out that, in our opinion, the Secretary of Labor has the authority to promulgate regulations including such a requirement as part of his authority to administer and enforce Executive Order 11246. The Secretary has the authority to require the submission of "information and reports" by Government contractors and to provide for the management of such informaton in the custody of the Government. (E.O. 11246, Section 202(5)).

h) We believe that an agency can make a determination whether documents are disclosable at the time they are submitted. This will make it possible for the agency to comply with the FOIA time limits. Of course, if there has been a significant change in the circumstances or the passage of time has reduced the competitive value of the material, a new determination should be made at the time of the request.

In Chrysler Corp. v. Schlesinger--F2d--(3rd Cir. September 26, 1977), on the other hand, the court held that there is no implied cause of action for a submitter under the FOIA. Rather, that court held that a submitter has a cause of action to seek judicial review of agency action under 28 U.S.C. 1331 and the Administrative Procedure Act. The submitter is not entitled to a trial de novo but only to a review by the court of whether the agency applied the proper legal standards for the applicability of the exemptions and whether the agency considered the proper factors in determining that disclosure was permitted under its own regulations.

a) The position taken by the Government in reverse FOIA cases arising under Executive Order 11246 is that the court should inquire only whether the agency action was arbitrary or capricious and should limit its review to the agency record.

b) Yes. In Chrysler, supra, the Court of Appeals reversed the District court's de novo review but remanded to the agency because the basis for the agency decision was not clear from the record.

c) We have taken the position that review should be based on the arbitrary and capricious standard. We think the substantial evidence standard is only applicable where the court is reviewing an agency decision based on adjudicatory hearing. We believe an adjudicatory hearing is not required in these cases.

d) OFCCP procedures provide for an opportunity for contractors to present evidence and arguments to the compliance agency which receives an FOIA request and for an opportunity to appeal an adverse decision to the Director of OFCCP. We think these procedures are adequate to make a record appropriate for judicial review.

e) The length of time necessary to process a reverse FOIA claim by a contractor varies considerably depending on the nature of the material in question and of the contractor's objections to disclosure. OFCCP and the compliance agencies always make every effort to deal with contractor objections as rapidly as possible so that the time limits in the FOIA for responding to requests can be met. Of course, the time necessary to

than Contract Compliance. This type of information is collected in connection with investigations under the Occupational Safety and Health Act, the Fair Labor Standards Act and other employment standards statutes, and Trade Adjustment Assistance and through surveys conducted by the Bureau of Labor Statistics. It may be possible to utilize rulemaking under some of these programs to establish procedures similar to those in effect for Federal Contract Compliance Programs. In those instances in which rules have been published, the purpose of the rule has been to determine what information is disclosable rather than to determine confidentiality. For example, the Occupational Safety and Health Administration has, by regulation, determined that all citations issued against companies under its program are fully disclosable when issued. In most cases, however, it would be difficult to establish a general rule which would cover all business data submitted because the circumstances of a given situation may determine whether the information, as to the particular company involved, is confidential. While we do not preclude the possibility of rulemaking in this area, our experience to date has not indicated any particular need to do so since we have been able to handle this problem through informal contacts with the organization which supplied the data.

Information which may be subject to protection under exemption 4 is the type of information which would seem most appropriate to rulemaking. (The Department has had no experience with information which might be subject to protection under exemption 8 and 9). Information covered by other exemptions would not appear to be the type of data which would lend itself to generalization so as to be subject to rulemaking. It is our understanding that each Freedom of Information request must be considered on its own merits and in light of the circumstances prevailing at the time. We believe that the confidentiality of the type of information which would be subject to exemptions in investigative records, personnel records, or internal memoranda must be left to agency discretion and would not lend itself to the establishment of restrictive regulations.

I hope the information we have provided will be helpful to your Subcommittee in its deliberations.

Sincerely,

Donald Elisburg
Assistant Secretary

[Subcommittee note: Material referred to on page 4 is available in subcommittee office.]

Question 1

Your Freedom of Information Act regulations provide for determinations of the confidentiality of information before formal submission.

(a) How do you treat a FOIA request for this "pre-submission" information before a determination of confidentiality has been made?

(b) Is there anything in the FOIA that permits you to categorically deny requests for this information?

(c) Can a determination of confidentiality be made in advance of an actual request for the information? Shouldn't a new determination be made at the time of the request, since information may lose its confidential character over time or the public interest may require a different policy at the time the data is requested?

(d) Does this same "pre-submission" determination procedure apply to confidential business information submitted in FDA rule-making proceedings?

Response

1. (a) The Food and Drug Administration (FDA) has never received a request for records sent to the Agency under the pre-submission review provisions of our Freedom of Information (FOI) regulations before a determination on confidentiality has been made. As you are aware, this section of our regulations provides that any person who wishes to submit information to FDA on a voluntary basis, is entitled to a presubmission determination of the status of the documents involved if that status has not already been determined by other provisions of the regulation. The Agency has stated in the regulations that pending a determination, the records will be held in confidence by the FDA, and shall not be received as a part of the Agency's files. Should a Freedom of Information request subsequently

would be aware of such changes. However, without having made some predeterminations regarding the confidential nature of certain generic classes of documents, we would have utter chaos in trying to deal with our FOI workload.

(d) The presubmission review provision would also apply to confidential business information submitted in our rule-making proceedings if the business information in question has not been addressed in some other part of our regulations. We have clearly stated that business information which is privileged or confidential will not be disclosed. In other places in the regulations we have identified the type of records which the Agency will consider as confidential business information. We also provide by regulation that anyone wishing to voluntarily submit information considered confidential in a rulemaking proceeding, shall do so in accordance with the presubmission review requirements of our FOI regulations. Additionally, our regulations governing the conduct of hearings provide for special treatment for confidential information (e.g., in camera viewing). See 21 C.F.R. section 10.20.

exhausted. However, there is no specific notification to the requester that there has been outside consultation by the Agency with the submitter of the data.

(b) Marking data "confidential" at the time of submission would have very little direct impact on our existing practices. If the Agency had an FOI request for records so marked, and the Agency disagreed with the company's confidential designation, the records would be released. We have stated publicly in our regulations that marking records as confidential does not trigger any obligation on the part of the Agency to treat that material as confidential or to even undertake a presubmission review. Obviously, as a routine matter, we would look particularly close at any records which bore a designation of "confidential," unless, of course, the marking was used indiscriminately.

A requirement that FDA provide notice of the impending release of data, which has been marked as confidential, would differ greatly from our existing practice. FDA has always rejected the concept of notification of impending release of records, except in very limited circumstances. We believe that such prior notification would severely hinder our implementation of the FOI Act and that specific notice to a person that a particular record will be disclosed is impracticable, particularly

Question 3

The total fees collected in 1976 by FDA were about $96,000, or about $4.50 per request. The small total amount collected suggests either that most requests were small or that fees were waived in many instances. Is either inference correct? Why wasn't a larger amount collected?

Response

FDA adheres to the Department of Health, Education, and Welfare (HEW) fee schedule regarding the amount of money that can be charged for search time on an FOI request. That fee is presently $3.00 per hour, with the first half hour being free. FDA considers this fee to be ridiculously low. Prior to adopting the HEW fee schedule, FDA proposed a two-tiered fee schedule with one charge for professional search time at $15.00 per hour, and a different charge for nonprofessional search time at $5.00 per hour. We estimate that had we been able to operate under our own proposed fee schedule in calendar year 1976, the Agency would have collected $166,000 rather than $96,000. Even though revenue from fee charges goes to the general Treasury and not FDA, at least the general taxpayer would be less burdened under our proposed fee schedule. Also, a higher fee schedule might discourage voluminous requests by industry, which divert Agency personnel from their basic responsibilities to protect the public health.

APPENDIX 5.—LIST OF LITERATURE PERTAINING TO TRADE SECRETS EXEMPTION OF THE FREEDOM OF INFORMATION ACT

The Library of Congress

Congressional Research Service

Washington, D.C. 20540

December 6, 1977

TO: House Subcommittee on Government Information
Attn: Bob Gellman

FROM: Harold C. Relyea, Specialist
Government Division

SUBJECT: List of Literature Pertaining to Trade Secrets
Exemption of the Freedom of Information Act

In response to your request, and as per our telephone conversation, we are providing the following list of published materials pertaining to the trade secrets exemption (5 U.S.C. 552(b)(4)) of the Freedom of Information Act. This is not a large collection of literature and our citations here do not include the Subcommittee's own hearings on this topic.

As we agreed, items from this list will be supplied to you after you have determined which articles you need. The items are as follows:

Anon. More business data from government files. Business week, July 20, 1974: 81-82 HF5001.B89

Anon. Protection from government disclosure--the reverse-FOIA suit. Duke university law review, v. 1976, May, 1976: 330-365. Law

Anon. Reverse-Freedom of Information Act suits: confidential information in search of protection. Northwestern university law review, v. 70, Jan.-Feb., 1976: 995-1019.

APPENDIX 6.—LETTER FROM JOHN M. HARMON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, DATED SEPTEMBER 28, 1977

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

SEP 28 1977

Honorable Richardson Preyer
Chairman, Government Information
and Individual Rights Subcommittee
U. S. House of Representatives
Washington, D. C. 20515

Dear Chairman Preyer:

This responds to question 4 of the letter from yourself and Congressman McCloskey to Attorney General Bell dated August 25, 1977. That question, on which you asked for a response by September 26, 1977, raises various problems under Exemption 4 (confidential business information) of the Freedom of Information Act. Set forth below, in question and answer format, are responses to each of the ten subdivisions of question 4.

We should emphasize that these responses are primarily based upon our experience and impressions gained from counselling federal agencies on Exemption 4 matters. While this experience has been extensive, a survey specifically designed to explore points such as those raised in your question may well modify our present views.

QUESTION: "4. Exemption 4 -- trade secrets -- and reverse FOIA cases present some of the most difficult Freedom of Information problems.

"a. Is too much business information disclosed or not enough?"

ANSWER: We do not have sufficiently complete data on how much business information is being disclosed to answer this question with assurance, and even if we had such data our answer might involve policy judgments that perhaps should be made clear. Nevertheless, we believe that broadly speaking the agencies,

As more caselaw develops, the zone of uncertainty should decrease, although serious conflicts among the circuits may undercut such progress. But some borderline instances are inevitable where cases turn on disputed facts, or on difficulty in applying government-wide legislation that seeks to reconcile important public policies like open government with adequate protection for private enterprise.

We believe the reduction of uncertainty in this as in other areas of Freedom of Information is important. But to the extent that some uncertainty under Exemption 4 may be difficult to eliminate in a satisfactory way, the residual uncertainty may be essentially just the latest in the innumerable kinds of business risks that may face a company, like, e.g., public reaction to a new service or product, changes in technology or fashion, accidents, war, strikes, economic fluctuations of all kinds, new laws, regulations or taxes, adverse weather, etc. Even the security of sensitive company information is subject to various risks other than those under the Act. Moreover, where the Freedom of Information Act is concerned, one can generally say that the more serious the risk to the company from the release of particular business information, the more certain it is that such information will be protected. Accordingly, the areas of uncertainty are generally those of lesser importance to the businesses concerned.

QUESTION: "c. Is it restraining the flow of information necessary to the Government?"

ANSWER: This question involves a large degree of speculation and judgment, since we rarely have direct knowledge of business information that does not find its way into agency records. Generally, we believe that there is probably

such as that obtained for census purposes under Exemption 3; (c) that some of it may meet government needs without including an identification of the company to which the information pertains; and (d) that the courts in interpreting Exemption 4 have upheld its use not only where a prospect of competitive injury to the company from disclosure can be shown but also where prospective disclosure would deprive an agency of business information which it solicits to perform an agency function, which it needs to obtain by voluntary means, and which it cannot obtain unless the information will be protected. National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (the so-called test number one in the court's opinion). When these considerations are fully appreciated by agency and company personnel alike, the restraining effect on the flow of information needed by the government may be further reduced and hopefully confined to a few types of situations amenable to special remedies.

Finally, it may add some perspective to note that the risk that Exemption 4 will be so applied or perceived as to restrain the flow of information needed by the government is not the only risk of this kind in the Freedom of Information area. Rather, the risk of such a restraining effect on business communications to agencies is a variant of several "chilling effects" sometimes anticipated with respect to many kinds of sources. Thus, such a risk may pertain to foreign sources as regards their fears with respect to the effectiveness of Exemptions 1 and 7; to individuals as regards Exemptions 6 and 7, to agency personnel as regards Exemption 5, etc. In other words, a general policy of open access to government-held information involves various potential conflicts with the government's overall ability

To treat Exemption 4 material as never subject to discretionary release, even where there may be a strong public interest in access and/or where the risk to the company in releasing the information is minor, would be to exalt business confidentiality over most other public and private interests recognized in the Act, inclusing individual privacy and law enforcement.

The comparison with Exemption 6 (individual privacy) is especially instructive. Under Exemption 6, personal privacy interests must as a matter of law yield to compulsory disclosure if there is a public interest which outweighs the individual's personal privacy. Rose v. Dept. of Air Force, 425 U.S. 352 (1976). In contrast, under Exemption 4, an agency is now legally free to disregard any public interest, however strong, in determining to withhold business information. It would seem unacceptable to go even further and read the law as not merely permitting but compelling an agency to disregard any such public interest, however important, and however minor the risk to the company.

It would of course be an abuse of discretion and thus legally impermissible for an agency voluntarily to release company furnished materials of a sufficiently strong Exemption 4 character so that its release is likely to cause serious or substantial injury to the company where there is not a strong enough public interest in favor of the release to counterbalance the risk to the company. In addition, there may be an exception to an agency's discretionary power as regards that special type of confidential business information which is a true trade secret in the strict sense of that term -- a technical process, formula, design or the like, in the nature of an unpatented invention -- which the law may recognize as property, so that a discretionary release might be a taking under the Fifth Amendment.

agency's ability to obtain information in the future, if there is any possibility that the release of the record would adversely affect the submitter and if there is any legal basis on which the record might be withheld. There may, of course, be situations in which a submitter has expressly or by clear implication waived such notice.

We believe it is a nearly universal practice among agencies to give companies the kind of notice discussed above. Although such notice may be informal and only a few days before the scheduled release of the records under the time limits in the Act, it should be sufficient to enable the company to seek judicial protection for its interests. In addition, where an agency while processing a request under the Act has invited a company to furnish support or explanation for a claim of confidentiality that is not clearly good or bad on its face (a procedure which we have frequently suggested to agencies), the company will have had earlier notice of the possibility of a release by the agency.

QUESTION: "g. Is there a need for an explicit cause of action for reverse cases? If so what form should it take?"

ANSWER: While some type of reverse suit is a necessary part of our present legal system to protect private interests in appropriate cases, there is an apparent need for controls or other measures to deal with some of the tactical and other advantages used in reverse suits by large corporations with considerable financial resources for legal and related services, and such controls could be provided as an explicit cause of action for reverse cases. The resources of large corporate plaintiffs are likely to exceed by far those that an agency or a requester can muster in any given dispute. One problem is forum

to give plaintiffs in reverse FOI suits only the same range of four choices of judicial districts as is now given for suits by requesters: Where the plaintiff resides, or has his principal place of business, or where the records are situated, or in the District of Columbia. For situations where this may result in an FOI suit and a reverse suit in two different districts, the available provisions for consolidating the suits in a district most convenient to all the parties might be reviewed for effectiveness. 5/

QUESTION: "h. Should there be an administrative proceeding as a necessary prelude to court in such cases? What kind of proceeding?"

ANSWER: It would be very desirable expressly to authorize, but not to require routinely or automatically, an administrative proceeding as a necessary prelude to the filing of a reverse suit, and perhaps to proceedings on the merits in such a suit if already filed. Such administrative proceedings should result in better decisions by agencies, less frequent recourse to the courts, and a better record for the court in the event of judicial review, which could be based on the administrative record and thus be more expeditious. It is doubtful whether such a proceeding could ordinarily be conducted under the time limits in the present Act unless the requester consents. The decision to conduct such a proceeding should

5/ Such a situation should clearly not be resolved by routinely consolidating the suits in the district in which the first of the two suits was filed, as this would encourage a rush to litigate and would foreseeably mean that the district in which the reverse suit was filed would handle both suits. When an agency notifies a company that it has decided to grant a request for company-submitted information over the company's objection, the company rather than the requester is likely to sue first.

proceedings if he wishes to effectively maintain his position. And, so long as the administrative proceeding has not been concluded, the company will be enjoying protection very similar to what it might seek in a reverse suit. For these reasons, such proceedings should be as informal and speedy as practicable, and a requester should have some recourse to judicial relief if it appears that the proceeding is involving excessive time and is to that extent operating as similar in effect to a denial.

As to the kind of proceeding, it should obviously be tailored to the two types of issues to be resolved, and to the need for speed and low cost for all concerned. Beyond this, the following comments are highly tentative. On the issue of prospective injury to the company, explanatory and supporting submissions by the company should be invited with due consideration for the company's possible dilemma of jeopardizing the security of such supplemental information in an effort to support the protection of the records already in dispute. Such company presentations, which may at times be roughly analogous to in camera judicial proceedings, emphasize the need for a tribunal willing and able to scrutinize them effectively, and having real independence and impartiality, -- perhaps an administrative law judge or an appropriate entity or panel from outside the agency in question or some combination thereof. As to the other issue, the nature and weight of the public interests, if any, pertinent to possible discretionary release if the records are found to be legally exempt, the requester or the agency should often be able adequately to identify and describe such interests. Nevertheless, some provision should probably be made, by public notice, notice to other interested agencies, or the designation of a qualified public counsel, to assure adequate presentation of the public's interest.

apparently complete by-passing of the agency function of considering a possible discretionary release of exempt matter in the public interest, or the exercise of that agency function by a court in the first instance.

There may be a few special circumstances which call for early declaratory relief, in especially urgent public programs involving extremely sensitive business information, but these circumstances should probably be defined and limited as clearly as practicable. Also, the procedures for providing such early relief in special areas should not necessarily be by litigation, or litigation alone; special legislative or executive action might also be considered. 6/

QUESTION: "In addition, we would like your comments on the approach to confidentiality of business and commercial data taken in the draft report of the Commission on Federal Paperwork on Privacy and Confidentiality."

ANSWER: We have not been able to review the entire draft report, but after a preliminary reading of pages IV-20 through IV-24 ("Findings and Recommendations" -- "Business and Commercial Data under a Fair Information Practices Act") we are inclined to agree in principle with the general thrust of much of the discussion. For example, we agree (as suggested above by our answer to 4f) with Recommendation No. 8, calling for agency notice to companies that have submitted information in confidence prior to its contemplated disclosure, but without necessarily favoring the suggestion of 20 days of such

6/ We understand that some such relief was recently provided by Congress in connection with certain ERDA activities.

APPENDIX 7.—LETTER FROM S. L. TERRY, VICE PRESIDENT, PUBLIC RESPONSIBILITY AND CONSUMER AFFAIRS, CHRYSLER CORP., DATED OCTOBER 11, 1977

CHRYSLER
CORPORATION

S. L. TERRY
VICE PRESIDENT
PUBLIC RESPONSIBILITY
AND CONSUMER AFFAIRS

October 11, 1977

Government Information and
Individual Rights Subcommittee
of the Committee on Government
Operations
Rayburn House Office Building
Room B-394-B-C
Washington, D.C. 20515

Re: Hearings on Exemption 4 of
Freedom of Information Act;
Reverse Freedom of
Information Act Cases

Gentlemen:

Chrysler Corporation submits this written statement for inclusion in the record of the above hearings scheduled for October 3 and 4, 1977.

Chrysler Corporation provides information to the Federal Government in many capacities including that of taxpayer, employer, issuer of securities, government contractor and motor vehicle manufacturer. Reporting of much of such information is required by statute, regulation or order. However, Chrysler supplies a substantial amount of information to the Federal Government, not under threat of any sanction but purely because the Government has asked for it, has promised to keep it confidential, and Chrysler desires to be a good citizen. A partial list of this voluntarily supplied information is enclosed as Exhibit 1 hereto.

Although Chrysler is willing in most such cases to cooperate and supply the Government the information it requested, Chrysler desires — understandably, we think —

> will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act."

Thus, it appears the Government requests information on promises of confidentiality which it cannot keep and, even worse, has no intention of keeping.

The purpose of the FOIA, as stated by President Johnson upon signing the bill into law on July 4, 1966, was "to provide guidelines for the public availability of the records of Federal departments and agencies." Congress, in short, intended that the people have the right to find out what their Government is doing. That purpose is implemented by the Act's provisions permitting access to documents in the possession of the Government. Chrysler has no objection to the concept that the people have the right to know what their Government is doing. However, because the Government's files contain so many documents from private persons, either required to be filed or voluntarily submitted, the effect of the Act is not only to disclose what the Government has done, it also describes what the people who communicate with the Government are doing.

One searches in vain through the Act's legislative history for any indication of any intent of Congress to require disclosure of activities of private parties. When Congress intended that activities of private persons be disclosed, Congress knew full well how to implement such a requirement. See, for example, the disclosure requirements under the federal securities laws as well as under the laws regulating lobbying. However, Congress has not affirmatively determined that all — or practically all — private documents filed with the Government are to be made available for public disclosure. In fact, Congress expressed just the opposite concern. Through enactment of the Privacy Act of 1974, Congress recognized that accumulation of substantial amounts of data in the hands of the Government concerning private persons could result in the improper and harmful use of that information and accordingly, has restricted its availability.

differentiate between public documents and private documents in the hands of the Government. Second, in applying Exemption 4 to private documents in the hands of the Government, the courts improperly departed from the standard established by Congress (i.e. the document would be disclosed only if it would customarily be made public by the person from whom it was obtained by the Government) and instead adopted the "competitive harm" standard explication in National Parks and Conservation Association v. Morton, 498 F2d 765 (DC Cir 1974). Under the National Parks standard, commercial and financial matters will be exempt only if disclosure of the information would either "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F2d at 770.

There is much objectionable about this newly enunciated standard. First, it is not enough that disclosure results in "harm." The harm must also be "substantial" and the only harm which this standard recognizes is to the "competitive position." Even that, however, is not enough; the substantial harm must be to the competitive position of "the person from whom the information was obtained." All these quoted words, with all their limitations and ambiguities, have thus become the standard the courts have adopted to replace the clearly enunciated criteria which Congress voiced, i.e. would the person supplying the information himself reveal it to the public.

Second, even if all of the quoted criteria are met (at least in the eyes of the provider of information), and even if the requesting agency agrees the criteria have been met, there is still no assurance that the Government will make any good faith effort to keep the information confidential as witnessed by the above-quoted excerpt from the May 5, 1977 letter of Attorney General Griffin Bell. If the Government then does not step in to attempt to defend the confidentiality of privately supplied information, then it is up to the provider of the information to

EXHIBIT 1 to written Statement of Chrysler Corporation dated October , 1977 to Government Information and Individual Rights Subcommittee respecting Hearings on Exemption 4 of Freedom of Information Act.

INFORMATION VOLUNTARILY SUPPLIED TO THE GOVERNMENT ON A RECURRING BASIS

Name of Survey or Report	Data Supplied	Use of Data by Government	Frequency of Response
Productivity Study	Motor vehicle production, prices and optional equipment, by car line and model, hourly and salaried employment and hours worked.	Calculates change in output per manhour (Productivity) from prior year and also trend rate for motor vehicle and equipment industry.	Annual
Occupational Outlook Handbook	Review of selected job descriptions and text of the Handbook.	Provides job descriptions, wage or salary ranges and employment trends for a cross section of jobs.	Biennial or as requested
Expenditures for Employee Compensation	Hourly and salaried annual costs for each fringe benefit and total hours paid for certain benefits for hourly employees.	Biennial publication of total employee compensation. Expenditures for individual or groups of benefits presented as a percent of total compensation.	Biennial
DL 1219 Monthly Report of Labor Turnover	Number of quits, discharges, layoffs, other separations, new hires, other accessions, and total number of employees who worked in reporting period.	Publishes national data on labor turnover rates.	Monthly

	Name of Survey or Report	Data Supplied	Use of Data by Government	Frequency of Response
10.	Professional, Administrative, Technical and Clerical Pay Survey (PATC)	Employment and wage or salary rates for selected classifications	A primary input to the President for the establishment of federal employees' pay rates.	Annual
11.	Occupational Employment Statistics Survey for Manufacturing	Total employment by occupation by location.	Published by the individual states; shows the occupational composition patterns of the manufacturing industry.	Triennial
12.	Occupational Employment Statistics Survey for Wholesale Trade	Total employment by occupation by location.	Published by the individual states; shows the occupational patterns in the Wholesale Trades.	Triennial
13.	Area Wage Surveys	Employment, wage or salary rates, and once every three years, level of benefits for selected classifications by plant.	Some of these surveys are commissioned by local governments for the purpose of establishing wage and benefits rates for government employees. By metropolitan area combines data from various employers and shows rates paid for various types of work. Once every three years also identified wage trends and the distribution of benefits provided.	Annually for each survey
14.	Quarterly Cost Information	Cost information by major product, by material, labor and other cost elements on a per unit basis.	Shows trend of cost increases by quarter by each major cost element and by major product.	Annual

EXHIBIT 2 to written statement of Chrysler Corporation dated October , 1977 to Government Information and Individual Rights Subcommittee respecting Hearings on Exemption 4 of Freedom of Information Act

January 1977

Reference: Your letter dated December 1976

Gentlemen:

This letter confirms the Chrysler position stated in our January meeting with Messrs. _____.

Chrysler Corporation did not use the information requested in your letter in the preparation of its proposal. This information does not reveal elemental costs such as indirect labor, fringe benefits, Other Manufacturing Expense, and is nothing more than the distribution of the total departmental operating expense to cost objectives using the accepted . . . procedure. The data is not related to the negotiation, pricing or performance of subject contract, hence, it is not necessary to permit adequate evaluation of the cost or pricing data submitted.

It is the instant contract proposal that is to be evaluated. Your desire to evaluate the historical trend of expense distribution by contract departs from the concept of evaluating a specific proposal and enters an entirely different area of interest - how we operate.

We are a . . .producer. It is a highly competitive business. We have only recently successfully competed against . . . . Our success is attributable to how we operate and our internal operations are a valuable asset which we jealously guard. As a general rule, we will not release any more information about our internal operations than is required by law or regulation. In a free, commercial, competitive industrial arena, this is a perfectly logical, understandable, acceptable and in fact necessary position.

In the interest of timely concluding the negotiations, we suggest that both parties negotiate from data used to prepare the proposal. All data furnished with the proposal or subsequently made available is comparable in type of content to that used in previous negotiations over the years. Accordingly, we must respectfully decline your request for the data mentioned in the subject letter . . . .

Our general attitude remains that for competitive reasons we will resist disclosing more than that which is legally required and after the satisfaction of the purpose intended, proposal evaluation, we insist that data and information furnished be restricted from use for any other purpose.

Very truly yours,

CHRYSLER CORPORATION

[LETTER RETYPED WITH IDENTIFYING DETAILS DELETED]

STATEMENT OF ATTORNEYS OF THE
WOMEN'S RIGHTS PROJECT
OF THE
CENTER FOR LAW AND SOCIAL POLICY
TO THE
GOVERNMENT INFORMATION AND INDIVIDUAL
RIGHTS SUBCOMMITTEE OF THE HOUSE
COMMITTEE ON GOVERNMENT OPERATIONS

We are attorneys with the Women's Rights Project of the Center for Law and Social Policy. We appreciate the invitation to make a written statement to this Subcommittee on the problems which reverse Freedom of Information Act cases raise for groups seeking information from the government.

The Women's Rights Project of the Center for Law and Social Policy is a public interest law firm in Washington, D.C. We represent individual women and women's rights organizations before federal agencies and in the federal courts. Our primary areas of concentration are on education, health and insurance issues.

Our experience with the effects of reverse Freedom of Information Act cases on information seekers grows out of our representation of the National Organization for Women, Washington, D.C. Chapter ("D.C. NOW") in its efforts to obtain certain equal employment information which four insurance companies have filed with the federal government as part of the federal contract compliance program. The complex nature of this case and the delays in disclosure caused by protracted litigation are illustrative of the problems caused for information requestors by reverse FOIA cases.

some months, they sought legal counsel. In January, 1976, we filed suit on D.C. NOW's behalf in the United States District Court for the District of Columbia seeking the documents. We joined the insurance companies as parties because of their obvious interest in the litigation. One company promptly decided to disclose the documents directly to D.C. NOW, and was dropped from the suit.

Also in August and September, 1975, all four companies filed requests with federal agencies seeking confidential treatment of EEO-1s and AAPs--i.e. that no disclosure of the documents would be made.

In February, 1976, after extensive documentation of the companies' reasons for their objections to disclosure had been presented to the agency, the agency denied the companies' request with regard to most of the documents; thereafter, in March, 1975, they granted D.C. NOW's appeal for disclosure of most of the documents sought. The three companies remaining in the law suit took their own appeal within the agencies, and again filed extensive papers and briefs. Thereafter in July, 1975, OFCCP reaffirmed that most of the materials sought must be disclosed under the FOIA.

At the end of this full administrative process, three companies sought stays of disclosure in the pending District Court suit. The Court granted a temporary restraining order, and set the case for hearing, with witnesses and oral argument, on companies' motion for preliminary injunction. In September, 1976, the Court took three and one-half days of testimony on the motions. All

in order to obtain better enforcement of equal employment laws and promote important national goals of fair employment opportunity, a reverse FOIA case has been filed and has tied up disclosure of the data sought for a period of years. See, e.g. Chrysler Corp. v. Schlesinger, __F.2d__, Nos 76-1970 and 76-2238 (3rd Cir. Sept. 26, 1977), reversing 412 F. Supp. 171 (D. Del. 1976); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Calif. 1974) (appeal pending in Ninth Circuit); Sears, Roebuck & Co. v. General Services Administration, 509 F.2d 527 (D.C. Cir. 1974) and 402 F. Supp. 378 (D.D.C. 1975), and __F.2d__, No. 75-2127 (D.C. Cir, April 1, 1977), cert. denied 46 U.S. L.W. (October, 1977); Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 97 S.Ct. 2199 (1977).

In addition, the delay in disclosure caused by complex litigation engendered by Reverse Freedom of Information Act cases is not limited to disclosure of equal employment opportunity data. Such cases have been brought and had the effect of delaying disclosure of information relevant to a variety of substantive areas. See, e.g. Consumers' Union v. Consumer Product Safety Commission, 400 F. Supp. 848 (D.D.C. 1975) and __F.2d__, No. 75-2059 (D.C. Cir. July 5, 1977); Charles River Park "A" Inc. v. HUD, 519 F.2d 765 (D.C. Cir. 1974) and 547 F.2d 673 (D.C. Cir. 1976).

Interest of the Information Requestor

Present procedures which apply in reverse FOIA cases, and which have the effect of causing serious delay, present particular problems to groups like D.C. NOW and others which seek

Recommendations

A number of issues arise in reverse Freedom of Information Act suits. Rather than address all of them here, we will highlight a few of the most important changes needed in the process to facilitate disclosure without being unfair to information providers. Insofar as court decisions are inconsistent with our recommendations, legislation may be called for to reverse those decisions. Alternatively, since many of the cases attempt to construe Congress' intent in passing the FOIA, some indication from Congress of how it intended the procedure to work may be helpful.

1. No court consideration de novo. When it passed the FOIA, Congress was concerned that agencies would be reluctant to disclose documents. Therefore, Congress looked to the courts as more neutral decision-makers to consider appropriateness of disclosure. To that end, the FOIA provides that if an information request is denied, the applicant could seek review de novo (on a fresh record) in the federal district courts, without being in any way bound by the agency decision. 5 U.S.C. §552(a)(4)(B).

The very reasons which motivated provisions for de novo review in the FOIA dictate that the information provider not be accorded review de novo when a decision to disclosure information has been made by the agency. The usual procedure in a reverse FOIA case is for the information provider to request confidential treatment of the documents by the agency;

2. Process for rule-making. Many of the documents which information requestors seek are in a standard format regularly collected by federal agencies. For example, in the case of D.C. NOW v. Social Security Administration, supra, some documents sought were the standard two-page EEO-1 forms. Agencies should be encouraged to promulgate regulations making determinations about the disclosability of such regularly collected forms.

When determinations about disclosability are made on the basis of such agency rules, information providers should have the right to seek review of the propriety of the rule-making only under the Administrative Procedure Act, 5 U.S.C. §706. Development of rules will help alleviate the need for case-by-case development of disclosure standards, and will provide fair guidelines to information providers about agency views of disclosability. In addition, such rules and review of the rules and the Administrative Procedure Act can help reduce the number and scope of reverse FOIA suits.

3. Provide for attorneys' fees in reverse-FOIA cases. To assure that information requestors can obtain information, Congress has provided in the FOIA for award of attorneys' fees to requestors. 5 U.S.C. §552(a)(4)(E). No such clear statutory provision permits award of attorneys' fees against the information provider which effectively precludes disclosure. Since in many reverse-FOIA cases the government has a similar (if not

Business Information: The Reverse Freedom of Information Lawsuit", 55 Texas Law Review 587 (March 1977), at 605-626. A clear restriction of §1905 to its intended purpose would reduce much of the reverse FOIA litigation. Clarification to show that statistics on the EEO-1 form are not within the intended scope of §1905 would be particularly helpful to organizations like D.C. NOW. Further, it would help carry out the important national purposes of furthering equal employment opportunity.

5. Notice to information requestors that reverse FOIA suit has been filed. No systematic procedure exists for assuring that agencies notify information requestors when reverse FOIA suits affecting their requests are filed. Moreover, at the time the suit is filed, information requestors often seek a temporary restraining order, in lieu of which the government may consent to refrain from disclosing the information at issue pendente lite. In D.C. NOW v. Social Security Administration, supra, for example, the government did make such a stipulation; as a result, by the time D.C. NOW got notice of the reverse FOIA suit, the government had already waived a requestors right in agreeing to stipulate. Without prompt notice of a reverse FOIA suit, as well as an understanding that the government will not stipulate to withold information pendente lite, an information requestor cannot properly assess its interests or determine whether to intervene in the suit or rely on the government to protect its interests, and cannot itself fully pro-

CONCLUSION

Thank you for the opportunity to make a written statement on this important subject. We would be pleased to provide any further information which the Subcommittee would find helpful in its oversight of the Freedom of Information Act.

Respectfully submitted,

Margaret A. Kohn

Lois J. Schiffer
Margaret A. Kohn
Women's Rights Project
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

October 14, 1977

be entitled to notice by the most practicable and prompt means, prior to any agency action upon a decision to grant a request for disclosure of the documents or records. Such notice shall include written notification of the intention to promptly disclose such records to any person under subsection (a) of this Act, and shall advise such submitter of the right to seek judicial relief in the District Court within five days from receipt of such notice. The District Court may, upon complaint, restrain such disclosure upon a showing by the plaintiff that the documents or other records are exempt from disclosure under subsection (b) of this section and that the public interest would be served by granting the requested relief.

The elements of this statutory amendment would:

1. Provide a threshhold requirement that business confidential documents be marked as such within the agency files as a condition of reverse-Freedom of Information Act litigation rights;

2. Assure predictability of treatment for all submitters by establishing a right to prior notice, which may be by phone with a subsequent written notification, after any agency decision not to invoke the (b)(4) exemption (or (b)(3) exemption to the extent that (b)(3) may still apply to certain classes of confidential business information under specific statutes);

3. Give standing to reverse-Freedom of Information Act litigants which is statutory in origin, rather than debated on a case-by-case basis with varying results by the trial and appellate courts;

and 4. Establish guidance for future reverse-Freedom of Information Act cases, which explicitly sets a public interest standard as the measure of relief or denial of relief to the information's owner.

In addition, if the Subcommittee wishes to amend the administrative agency procedures for the resolution of disclosure disputes, so as to eliminate some hasty denials which have led to additional litigation, subsection 552(a)(6)(A)(ii) could be amended to add at the end of the first sentence thereof the following:

(ii) make a determination. . . of such appeal. Each agency may provide for certification of complex technical or legal issues involved in such appeal to an administrative law judge or other hearing officer of the agency for a recommendation

recently featured articles on the protection of trade secrets.If trade secrets protection is to keep pace with government's rapidly-expanding demands for private sector information inputs, then the implicit assumption of the Moss Committee that exemption (b)(4) was sufficient to protect business data, should be updated through a new §552(f).

The expectation to be protected through the proposed §552(f) is that of predictability for the business person. At the present time, no consistent procedural rule exists for the handling of reverse-FOIA lawsuits. The existence of the lawsuits is a natural outgrowth of agency attitude changes, toward open files and away from past practices of dissemination of information on an exempt vs. non-exempt basis. A procedural rule is needed for the review of those pro-disclosure determinations at the agency level, which are felt [by the person in the best position to know] to endanger continued value of trade secret materials. Without a procedural direction from the Congress, these suits will continue to be filed as a sort of safety valve from what a trade secret owner may perceive as error or apathy on the part of the federal agency employee -- but their procedural basis will be as varied as the judges before whom they are brought.

Predictability in the procedures might assuage some fears, among persons asked to submit information to the government, that their data will be secretly but lawfully leaked to their competition. One may speculate that an agency like the Food and Drug Administration would benefit most from greater predictability, since that agency has evoked criticism for its policy that it alone will determine when secret data can remain secret and when the very issues of confidential status will be discussed. Cooperation in the presenting of more data, more willingly, would meet one of the D.C. Circuit's concerns in the Nationsl Parks v Morton litigation, that exemption (b)(4) should foster confidence in government agencies on the part of data owners.

Finally, an established pattern of cases recognize the existence of the submitters' rights to preserve confidentiality against agency claims of complete discretion to pass confidential business information to any requester.(Chapter 10 of my text discusses this case law at some length.) The proposed action for the Congress does not represent a departure from the case law -- it instead sets a point of departure for the orderly future development of the case law.

Rationale for Revision of Administrative Appeals

At present, the time limits for administrative appeals work to force an agency to deny a request where the request is so extensive or technical in its scope that detailed exemption decisions are difficult. Appeals are the stage at which the "law of the agency" is made, and the time and resources for making that law are not realistically available now. The Federal Power Commission's use of an Administrative Law Judge in Planning Research Corp. v Federal Power Comm'n., No. 75-1540 (DC Cir.,1977) is a possible source of a solution to the appeals problem. ALJ decisions are

APPENDIX 10.—LETTER FROM WILLIAM J. ROCHE, VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL, TEXAS INSTRUMENTS, INC., DATED OCTOBER 27, 1977



TEXAS INSTRUMENTS
INCORPORATED
POST OFFICE BOX 5474 • DALLAS, TEXAS 75222

NOV 2, 19

October 27, 1977

Congressman Richardson Preyer
Chairman
Government Information and Individual
Rights Subcommittee
House Committee on Government Operations
Room B-349-C
Rayburn House Office Building
Washington, D.C. 20515

Re: Oversight Hearings on Trade Secrets Provisions in FOIA

Dear Congressman Preyer:

Texas Instruments is required, as are numerous other companies, to provide a substantial quantity of information to a multitude of Federal agencies. In light of the competitive nature of the electronics industry and the impact of involuntary loss of technological leadership, we are vitally interested in legislative proposals affecting the issue of disclosure of our technical and financial information under the FOIA.

Accordingly, we submit herewith our statement and recommendations regarding governmental disclosure.

We hope you will find these comments useful in your deliberations.

Very truly yours,

William J. Roche,
Vice President, Secretary
and General Counsel

WJR:gkw
Enclosure

In view of this problem, some determination must be made as to whether any such "pure" documents exist, and if so, set standards for classifying such documents. There should be no short-circuiting of the FOIA procedures where a private source will be exposed. We do not believe, however, that a "pure" government-generated document exists.

Confidentiality Designations and Agency Procedure

Some of the following suggestions are predicated on a uniform system under FOIA being established for a submitter to designate, in advance of or simultaneously with the submission, those portions which the source contends should not be subject to disclosure under the FOIA. The designation "Confidential" or some other identifying legend could be used to alert the agency that the submitter would object to the information's disclosure under FOIA.

Under such a designation system, agency response time for FOIA requests should be lengthened, as the short time presently allowed virtually mandates a disclosure decision which could, on proper review, be determined to be unjustified.

Additionally, the submitter should be notified immediately of the request for the portions it designated as non-releasable because of "confidentiality" or other appropriate legend.

We would further propose that a source be allowed to make an unofficial submission of information which it expects to be covered by potential agency reporting requirements proposed in the Federal Register, seeking a determination as to whether the agency would view the information in question as non-disclosable. Information submitted for this "pre-determination" would not be disclosed under any circumstances.

Uniformity in handling of FOIA requests might well ease the burden of the various agencies who have been scurrying to provide regulations to deal with these issues, as well as ease the aura of uncertainty currently surrounding the submission of data to the government which the source believes should be mandatorily exempt from disclosure to the public.

Exemption 4 - Mandatory?

Trade secrets and other proprietary information are, by definition, the property of the submitter. The constitutional prohibition against deprivation of property without due process of law should hold for FOIA, as under any similar legislative proposal. If a true balancing of the public's right to know as against the right of privacy is to prevail under FOIA, trade secrets and other proprietary information should not be disclosed. Likewise, 18 U.S.C. §1905 should be clarified as it relates to Exemptions 3 and 4, as there appears to be some confusion as to whether the Government in the Sunshine Act amendments to FOIA were intended to abrogate the effect of §1905 in FOIA cases. The right of property has always been regarded with reverence in our society, and it would appear clearly applicable to such fundamental property rights in data referred to in Exemption 4, and to the intent of the drafters of FOIA in Exemption 3. Perhaps the best solution to the ambiguous role of §1905 would be to legislatively mandate its applicability as regards Exemptions 3 and 4.

* * *

Although our comments are brief, we trust that they will give some insight into FOIA problems. We believe that these comments reflect the position of many submitters who are daily impacted by FOIA. We welcome the opportunity to provide further assistance to the Committee.

of governmental agencies who obtained such private information in the performance of their lawful functions.

The findings of the Council on Wage and Price Stability of May 13, 1977 includes a statement which we believe fairly well describes the situation. It reads as follows:

> "The TSCA inventory requirement is similar to those of the Food and Drug Administration with respect to products controlled by that agency. The matter of maintaining confidentiality is also a concern of FDA as well as those regulated by FDA. In a recent assessment of requests for information now available under the Freedom of Information Act, FDA indicated the receipt of some 20,000 requests in 1975 and predicted some $1 million to process, '...86 percent...[came] from industry and private attorneys, while only 14 percent [came] from the general public, consumers, press, health professionals, and scientists.' The FDA suggested that the large bulk of these requests were associated with '...industrial espionage in which many commercial firms engage.' [See: Food and Drug Administration, 'Public Information' (42 Fed. Reg. 3094).]" (Emphasis added)

With growing U.S. trade deficits and, for example, with the obvious need for new and improved technology to solve both our short- and long-term energy needs, innovators must be rewarded for their contributions to the solution of these and other problems. We fear, that unless the technology which will solve our problems is protected

A few years ago, The Dow Chemical Company was involved in negotiations with a foreign firm regarding the sale or exchange of Dow technology relating to a proprietary process for producing a commercial product. During the negotiations, Dow was required by a federal agency to submit certain information about this process to the agency. Two other U.S. producers of this product were also required to submit information about their processes to the same agency. A short while later, the foreign firm indicated to Dow that they were no longer interested in the process details which Dow had submitted to the agency. Upon investigating the matter with the agency, it was learned that the foreign firm had obtained from the agency under the Freedom of Information Act, copies of the information submitted by both Dow and the two other U.S. producers.

From these facts, it is clear that the foreign firm was able to obtain at no cost some of three U.S. competitors' technology for which it otherwise would have had to furnish adequate consideration. What effect this had on the American economy in terms of jobs and lost profits is only speculative. It is not speculative that three U.S. firms lost property for which they could have demanded adequate compensation from the foreign firm either in terms of other technology or hard currency.

More instances regarding losses of information

to foreign and local competitors is found in the May 9, 1977 edition of The Wall Street Journal, a copy of which is enclosed for the record.

Who is Obtaining Private Information

Numerous comments by witnesses before the Subcommittee show that the majority of Freedom of Information Act requests are directed at the agencies by industrial competitors or attorneys. The concerns represented by these attorneys are not known. However, the report issued September 20, 1977, by the Senate Permanent Subcommittee on Investigations, titled "Transfer of Technology to the Soviet Union and Eastern Europe," illustrates that there is a great hunger for technology in the Soviet Union and Eastern Block Countries. A copy of the Subcommittee's report, released by Senator Jackson, is included for the record. There have, in the past year, been several arrests by the FBI of employees of American companies on the charge of conspiring to steal technical information and know-how and to pass it on to the Soviet Union. Are we so naive as to believe that given these allegations of criminal activity by the Soviet Union that it would not utilize requests legitimately placed under the Freedom of Information Act to obtain proprietary technical information?

private submittor should be called on to justify withholding of such information. There is judicial authority for requiring a requestor do more than just file a request: Honeywell Information Systems vs. NASA, No. 76-353 (D.D.C. July 28, 1976) reported summarily at 290 Patent, Trademark & Copyright Journal A-7 (BNA Aug. 12, 1976). The court, recognizing that the identity and purpose of one seeking disclosure under the Freedom of Information Act are important factors to consider in the release of information, denied the information which was being sought because the requestor was a competitor of the submittor and the request was for the purpose of "industrial espionage".

We believe that such a standard incorporated into Exemption 4 would drastically reduce the burden on the several federal agencies and accompanying cost to the public from administering the Freedom of Information Act. This cost to the public in terms of adminstrative time and resources has not, we feel, been adequately explored in these hearings. The September 15, 1977, testimony of Mr. Sherwin Gardner, Deputy Commissioner of the Federal Drug Administration before the Senate Subcommittee on Administrative Practice and Procedure shows that resources allocated to this task, at least by that agency, have risen geometrically

has a right to be informed and that the statute should be construed in favor of disclosure. Using this rationale, proponents of this position argue, in essence, that the owner of information of private origin should be denied protection equal to one seeking information with no proven justification. We oppose any changes which would effectively deny submittors injunctive relief, elevating requestor's rights above those of the submittor. In cases involving trade secrets, injunctive action is often the only effective remedy the trade secrets' owner has due to the nature of the subject matter.

We favor the proposal that would permit intervention as a matter of right and consolidation of actions by either a requestor or a submittor of information. This would conserve the time and resources of the litigants, the agencies, and the courts.

Related Statute

Some of the testimony before the Subcommittee has suggested that 18 U.S.C. 1905 should also be addressed by the Congress to make clear that the term "authorized by law" as utilized in that section refers to agency rule-making which would permit release of trade secret or

Conclusion

In summary, The Dow Chemical Company believes that an important national resource, the technology of its numerous companies and businesses, is in grave danger of being compromised in a way that will aid our foreign competitors to the detriment of the U.S. labor force and economy. The policy presently being followed will also stifle innovation because the innovators will no longer enjoy the reward of a deserved competitive edge in our free enterprise system. For this reason, we urge Congress to adopt measures to strengthen rather than weaken the protection given to privately generated trade secrets and the commercial or financial information which may be found in government records.

We submit that the public's interest in preserving a highly competitive and innovative atmosphere in industry far outweighs the personal interests of a few members of the public. Such a result can only be maintained by strong laws to protect intellectual property and competitive information of industry in the hands of federal agencies.

We thank you for the opportunity to present these comments in the record of the hearings which you have held.

Respectfully submitted,
THE DOW CHEMICAL COMPANY

James H. Hanes
Vice-President and
General Counsel
Dow Chemical U.S.A.

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[Subcommittee note: Enclosures not included; available in subcommittee files.]

TESTIMONY BY NIELS J. REIMERS, MANAGER, TECHNOLOGY LICENSING, STANFORD UNIVERSITY, ON THE PUBLIC DISCLOSURE OF RESEARCH INFORMATION BEFORE THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH

My name is Niels Reimers, and I am responsible for the Office of Technology Licensing at Stanford University. This Office has dual goals of (1) endeavoring, through arrangements with industry, to obtain development of results of research at Stanford for public use and benefit, and (2) to generate income from this endeavor for research and education. It can be observed research funded through royalty income has the promise of deriving yet other useful inventions, in a self-regenerative fashion.

Why do we as a nation support biomedical research? Surely not simply to maintain the livelihood of NIH and university research scientists, public interest research groups, or the administrative structure involved in processing and monitoring the research effort, including assuring the protection of human subjects. Biomedical research surely is supported by the taxpayer because of its potential for future benefits in health care of the same taxpayers. If this assessment is correct, or even nearly so, then a primary concern of all of us who somehow relate to biomedical research is to aid--or at least not inhibit--the process by which research results are delivered to the public.

The recommendation of the Kirkland Paper is not atypical of recent Congressional and Agency actions which would inhibit, if not stop, the transfer of results of government-funded research to the U.S. public. My first reaction after reading this paper was to echo a recent comment by a company president where he explained he had an uncontrollable urge to get on a horse, ala

about patent applications, reports, and proposals relating to the NSF grant, citing the Freedom of Information and Sunshine Acts. The New York law firm refused to divulge who their clients were, and why they wanted the information. Our response to them was that if they had an intellectual interest in the research, and if we could understand whom they were representing, we would be pleased to cooperate. We next received a call from the National Science Foundation, where the New York law firm successfully obtained an appointment with the NSF, again citing the Freedom of Information and Sunshine Acts in order to review all the files relating to the Stanford grant.

By this time, we had determined that the New York law firm was counsel for EMI in their suit versus Ohio Nuclear, and that the information that they probably were seeking was any evidence of the dates of conception of the Stanford inventions, dates of reduction to practice, and an indication of the future thrust of our research. Parenthetically, I should note that the NSF funding of CAT research at Stanford was for a short period, and the research physicist has left Stanford.

We believe the foreign firm's acquisition of data from grant files, through resourceful utilization of U.S. law, will be not in the interest of the U.S. public or our U.S. licensee. The primary purpose of my trip this week to Washington was to visit the NSF and find out specifically what information was provided to the New York law firm. Ironically, a recent NSF annual report, in justifying the public benefit potential of basic research, cited

Sunshine Acts will inhibit or stop innovation of research results for the public, particularly by U.S. companies, which is not why the U.S. taxpayer allows a portion of his tax dollar to pay for biomedical or other research.

Concluding these brief comments, I must question the cost vs. benefit to the U.S. public of unrestrained application of the Freedom of Information and Sunshine Acts, particularly in connection with HEW and NSF research. Are there in fact a large number of documented abuses to human subjects that have occurred in the last number of years and were prevented by "file fishing expeditions?" Every institution that is involved in research involving human subjects has a functioning committee attending to the protection of human subjects. Does the "open season fishing license" produce more benefit than detriment to the welfare of the U.S. taxpayer? The reasons of preventing "secret research" or "favoritism" in award of grants are red herrings. Any useful results of research are published in the open literature. Peer review of publications clearly indicates who is doing good research or not. Without a record of quality publications, it is unlikely that a research scientist will continue to receive further funding.

Without sufficient documented evidence of benefit to the U.S. taxpayer, there appears certainly no justification to alter the present methods (a) of selecting grantees, (b) of communicating research results to the public through open literature, and (c) of preserving intellectual property rights of research results so that such results can be brought forward to public use and benefit. This can continue while ensuring the full protection of human subjects of biomedical and behavioral research.

COMMENTS ON HEARINGS FOR FOIA EXEMPTIONS 4 AND 5

Government Sales Consultants is engaged in the business of interpreting the federal procurement system to government agencies and prospective vendors to the government. As such, we are heavily engaged in assisting with writing solicitation documents and in responding to such documents. In most cases, the evaluation methods are complex. After award, we find, in many instances, the winning vendor and the losing vendors attempt to prohibit the agencies from releasing any information relative to why the winner won or why the losers lost. In some instances, the outside viewer is unable to ascertain whether the winner deserved to win. We would like to take this opportunity to offer the following:

One of the clear purposes of the present procurement system is to make certain that the government spends appropriated monies in a fair manner. Indeed, the Comptroller General has stated in defining the purpose of the advertising requirements of the procurement system as follows: "The clear purpose of the law (93709 R.S.) in this regard is to restrict the uses of appropriations to the acquiring of actual government needs; to secure such needs at the lowest cost; and to guard against injustice, favoritism, collusion, graft, etc., in the transacting of the public business." 13 Comp. Gen. 284 (1934), at page 286.

As can be seen from the above quote, when an agency or vendor hides behind exemption 4 or 5 in prohibiting the release of prices and terms contained in a government contract, several things occur. One, an unbiased party cannot then determine, in an independent manner, if errors occured in award of the contract. This is not a mere intellectual exercise. Our firm is aware of many instances in the last few years, involving millions of dollars, where the government made such errors. They are as follows:

1. GSA awarded a contract for ADP equipment to a company as a result of an error in evaluation of the firms bid whereby the cost was incorrectly computed and, thereby, the winner was thought to be the low offeror but in fact was second low.

2. The Army at Aberdeen, Maryland, in a contract for ADP maintenance, forgot to subtract the prompt payment discount from a vendor and incorrectly awarded to the apparent low offeror as a result of the error.

APPENDIX 14.—LETTER FROM HOWARD W. BREMER, PATENT COUNSEL, WISCONSIN ALUMNI RESEARCH FOUNDATION, DATED NOVEMBER 2, 1977

NOV 7 1977

WISCONSIN ALUMNI RESEARCH FOUNDATION

POST OFFICE BOX 7365 • MADISON, WIS. 53707 • TELEPHONE (608) 263-2500

November 2, 1977 263-2831

The Honorable Richardson Preyer
U. S. House of Representatives
Washington, D. C. 20515

Dear Congressman Preyer:

It is my understanding that the record of the hearings of the House Subcommittee on Government Information and Individual Rights, held on October 4 and 5, 1977, which considered problems involving the (b) (4) exemption of the Freedom of Information Act is open for a period of thirty days.

On behalf of the University of Wisconsin System I would therefore like to submit the following two items and request that they be made a part of the record of those hearings:

1. A copy of the statement made by Howard W. Bremer on behalf of the National Association of College and University Business Officers before the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research on December 11, 1976;

2. A paper given by Norman J. Latker, Patent Counsel, Department of Health, Education, and Welfare, before the Academy of Pharmaceutical Sciences in Atlanta, Georgia on November 19, 1975 and entitled "The Protection of Intellectual Property Under the Fourth Exemption of the Freedom of Information Act."

As a personal note, I do appreciate the time you were able to give George Holcomb, Clark McCartney and me in your office on October 12 and the attentive interest which you and Tim Ingram showed in our problems.

Sincerely,

Howard W. Bremer
Patent Counsel

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guarantee to all citizens the absolute right to access to all aspects of the Executive's business, subject to some narrow exceptions, underestimates or chooses to ignore the vastness of the Executive's interface with private industry, universities, and nonprofit organizations in the area of product and service regulation, and the seeding of research and development to solve social problems.

This interface as we all know requires submission of documentation within which are included disclosures of ideas, inventions, technical and clinical data, novel business and accounting methods, trade secrets, computer programs, etc. which represent the end result of a significant private investment and do now, or could in the future, confer the competitive advantages which justify the owners' past and continued investment and/or advocacy in delivering the service or item disclosed to the marketplace. This array of intellectual property is truly a substantial portion of the present and future building blocks and cornerstones of our free enterprise system.

Now, presuming that such submissions must continue in order to obtain the Government action sought, whether it be seed money to encourage initial research and development in areas of public concern or clearance of an item of service for public use, it follows that full "openness" could result in the total loss of the property value in such intellectual property which has not already been covered by patent protection. In other words, the entire area of legal protection of intellectual property available since the founding of this republic,

intellectual property within the research proposal in the interest of the public since the Government in turn must disclose to any third party under FOIA.

When one explores the present FOIA and the excessive burden it places on the Government administrator in protecting intellectual property against premature disclosure, it is clear that Congressman Moss's view had substantially prevailed in the drafting of the Act.

The FOIA generally requires disclosure of all Government records upon request. There are a number of exemptions to the required disclosure. Of these exemptions, we are primarily interested today in number 4 which appears to exempt "trade secrets and commercial or financial information which is privileged or confidential." The leading case on the fourth exemption, National Parks and Conservation Association v. Morton, 498 Fed. 765 (1974), D.C. Circuit Court, states that the fourth exemption applies if it could be shown that disclosure was either likely, first, to impair the Government's ability to obtain necessary information or second, to cause substantial harm to a competitive position of a person providing the information. The Court toughened the qualification in Petkas v. Staats, 501 F. 2d 887 (1974) by refusing to accept a government assurance of nondisclosure in a regulation requiring information where filing the information was conditioned on confidentiality. The Cost Accounting Standards Board regulation in the case required defense contractors to submit disclosure statements setting forth their accounting procedures, and the suit was to obtain public disclosure of the statements filed by Lockheed,

to deny access to their research proposals appear to have little hope of meeting this test in light of Washington Research Project v. Weinberger. In that case, Washington Research Project sought access to a number of research proposals from different universities and nonprofit organizations in order to investigate the ethics of the experiments in question, most of which dealt with the treatment of hyperactive children. Washington Research supported its claim to access with indications that "it is essential for researchers to be held accountable, and the research process has to be something other than the closed society which it is now." The court indicated, in denying the use of the fourth exemption, that:

> "It is clear enough that a noncommercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce. This is not to say that the scientist may not have a perference for or an interest in nondisclosure of this research design, only that it is not a trade or commercial interest . . ."

Now, if it is not already clear that the FOIA and present court interpretation is severely imbalanced toward prompting Federal Administrators to release intellectual property whether arguable within the fourth exemption or not, consider the Act's requirement

because the Administrator doesn't know how to make a case? In those few situations where "novel" information can be decisively identified and a denial considered justifiable, the Act further requires that the information to be denied be excised from the documents requested and the resulting "swiss cheese" document forwarded to the requester. Now multiply this procedure by the 200 research proposals Washington Research Projects requested shortly after prevailing in their first suit for access or the number of requests for similar information FDA receives.

Can it really be suggested that many Federal Agencies will travel the denial route in other than situations where the equities of the owner are immediately and dramatically apparent, when release merely requires a xerox copy to the requester with no threat of penalty under 18 U.S.C. 1905?

I note on the bright side that NIH has voluntarily adopted a policy of contacting our research investigators immediately after a request for release of research proposals to determine whether there is any intellectual property which he believes will be destroyed through premature disclosure. Of course, as already noted, the investigator's request to deny access is not determinative of the action which the Government will take under the National Parks case test, but it is certainly helpful in identifying those situations where access may be particularly damaging.

been made by only two groups. The large number of requests made by public interest groups seems easy enough to explain since the search for or the discovery of possible abuse appears to be the only way such groups can justify continued existence.

The requests from the commercial concerns and other research investigators cover a much smaller number of grants coming from a larger number of sources, since its appears that these requesters have a preconceived idea of exactly what they want.

Based on this preliminary and rather sketchy data, I am of the opinion that the primary beneficiaries of the Act gaining access to research proposals have been parties interested in enhancing their own financial or organizational positions at the expense of the work product of NIH-funded investigators, rather than the public on the basis of any identified evidence of redirection of policy development due to the action of public interest groups.

It is my understanding that the imbalance between the number of requests for intellectual property from commercial concerns and public interest groups is even more pronounced in the direction of commercial concerns at FDA.

At a September 24 meeting, the Inter-Assembly Council of the Assemblies of Scientists of NIH and NIMH voted to send every NIH and NIMH scientist and to Science magazine a notice of their concern, a part of which is as follows:

The public interest groups insist that the timing of access should be in the hands of the public. The public in practice turns out to be self-designated surveillance groups whose opinions cannot be identified as representing any kind of public consensus and who are not subject to the "checks and balance" system.

In support of their position, public interest groups point to a very small number of research projects which they believe involve abuse of human subjects which they claim would not have been funded if they were involved in the clearance procedure. Now it is well known that NIH-funding procedure already includes means to devote special attention to the risk v. benefit problem when human subjects are to be involved. It seems entirely speculative that the addition of another echelon of review by public interest groups will enhance the quality of the existing review. In fact, the opposite may be the effect, since it seems that the groups now functioning outside the official surveillance procedure tend to equate the public interest to funding only those research projects with identified benefits and no risks. A number of investigators have noted that the atmosphere created by these groups is already resulting in replacing the remote possibility of any error of commission by many errors of omission. Dr. Dwight Harken of Boston, one of the Nation's pioneer heart surgeons, recently warned, "The fact that any failure of a device or procedure may be penalized has stifled innovation, restricted industry and

STATEMENT ON BEHALF OF THE

NATIONAL ASSOCIATION OF COLLEGE AND

UNIVERSITY BUSINESS OFFICERS

BY HOWARD W. BREMER

BEFORE THE NATIONAL COMMISSION FOR THE

PROTECTION OF HUMAN SUBJECTS OF

BIOMEDICAL AND BEHAVIORAL RESEARCH

DECEMBER 11, 1976

Mr. Chairman and Members of the Commission:

My name is Howard Bremer and I appear before you this morning as a representative of the National Association of College and University Business Officers which association represents 102 institutions of higher education. The members of this Association include many of the major educational institutions in this country and all have on-going research functions which are funded through Federal agency grants. I have been engaged in the transfer of technology from the University environment to the public sector for over 16 years as Patent Counsel for the Wisconsin Alumni Research Foundation and have drawn upon that experience for some of the facts which I will present to you.

The charge to your Commission by Congress is amply and fully stated on page 5 of the memorandum to the Commission authored by Messrs. Wallace and Arthur.

Commission Memorandum is also significant to my remarks. At page 17 the Commission Memorandum states that the Act's purposes is "to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities." In the application of this basic tenet of the Sunshine Act the Commission Memorandum has emphasized the protection of the rights of individuals as a general class but has ignored the proprietary rights of individuals in the scientific community and perhaps, of even greater importance, of protecting the ability of the Government to carry out its responsibilities.

It is firmly believed that one such major responsibility is that the Government use its best efforts to transfer as much as possible of the technology which is generated by Federally supported research, and in particular that technology which relates to the health-care field, to the public sector. To aid in accomplishing such transfer the Government has sought the cooperation of private enterprise and the expenditure of private funds as a desirable and necessary element of transfering the fruits of basic research funded by the Government from the academic environment into the marketplace for the benefit of the public. In our experience the patent system has provided and continues to provide the most viable vehicle for accomplishing such end since it provides the incentive necessary to the commitment of private funds to such an effort.

Since premature disclosure will destroy the patent base there is little question in our minds that through operation of the legislation

remembered that disclosure of the research proposal will immediately prohibit filing of patent applications in most foreign countries and will start the 12-month statutory bar running in the United States. Thus, the basic advance which might have been patentable after the research program under the proposal had progressed would in most cases be unpatentable and any patentability of improvement inventions would have been severely jeopardized.

Premature disclosure would also permit anyone to garner valuable research ideas and protocols which could then be applied for selfish purposes. For example, a commercial company, either domestic and foreign, could take such ideas and then develop them internally for its own particular use. In such a situation it is not only conceivable but highly probably that a private commercial interest, with concentrated effort, and without any external indication of that effort, could have moved to acquire a strong position relative to a research idea and protocol even before it is funded by a Federal agency. The investigator would have literally transferred his birthright for a mess of potage.

Let me give you some examples of what, as a practical matter, the impact of premature disclosure can have upon the public. Since this Commission is operating under the auspices of the Department of Health, Education, and Welfare the experience at the University of Wisconsin under the Institutional Patent Agreement with the Department is probably the most significant. Under that Agreement, which became effective December 1, 1968, the Wisconsin Alumni Research Foundation, on behalf

a patent is necessary to a license, in that situation disclosure through the public availability of the research proposal would have precluded any patent coverage.

In a broader aspect, over its 51 year history the Wisconsin Alumni Research Foundation has been successful in licensing a high percentage (over 20%) of the inventions which were brought to it. By back calculating from the royalties paid it can be estimated that all of WARF's licensees have collectively enjoyed close to two billion dollars of sales under license while the royalties were being utilized for additional research at the University of Wisconsin. More importantly, these inventions included some which had a world-wide impact. Among such inventions are: the warfarin rodenticides, which have for many years been the rodenticides of choice throughout the world - the benefit to the public from the use of these rodenticides in savings of food crops and reducing the spread of disease is incalculable; the use of warfarin as a life-saving drug used extensively as a blood anticoagulant in humans throughout the world; a particular combination of urea and dextrose which reduces intracranial pressure. (That this invention found its way into medical application only because of the ability to license under the patent system is documentable.)

The foregoing are only a few examples of technology at the University of Wisconsin which has been transferred from the academic environment into the public sector via the patent system. With any of

APPENDIX 15.—LETTER FROM REAGAN SCURLOCK, EXECUTIVE DIRECTOR, COMMITTEE ON GOVERNMENTAL RELATIONS, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, DATED NOVEMBER 3, 1977

COMMITTEE ON GOVERNMENTAL RELATIONS

National Association of College & University Business Officers

ONE DUPONT CIRCLE, N.W. • SUITE 510 • WASHINGTON, D.C. 20036 • (202) 296-2346

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ASSISTANT EXECUTIVE DIRECTOR

MILTON GOLDBERG

NOV 7 1977

November 3, 1977

The Honorable Richardson Preyer
Congressman, United States House of Representatives
Washington, D.C. 20515

Dear Congreseman Preyer:

Reference is made to the October 3 and 4, 1977, hearings before the Government Information and Individual Rights Subcommittee. As you indicated in your opening remarks, the focus of the hearing would be on the 4th exemption of the Freedom of Information Act (FOIA) "which deals with trade secrets and commercial and financial information obtained from businesses or individuals which is considered priviledged or confidential." (underscoring provided)

Our review of the statements made before the Subcommittee and the transcript of the question and answer period indicates that the problem of the university investigator submitting research proposals for possible funding by an agency of the Executive Branch was not discussed in detail sufficient to elucidate our concern over protection of the ideas contained in such proposals.

It is our hope that you might schedule in the near future additional hearings on the problems we perceive we are having and may continue to have in protecting the investigator's ideas. In order to aid you and others in focusing on this problem it would be appreciated if you would include as part of the record of the October 3 and 4, 1977, hearings, this letter and the attached reports by the President's Biomedical Research Panel and the National Commission on Human Subjects, both of which deal with the impact of the FOIA on proprietary rights.

Sincerely,

Reagan Scurlock

Reagan Scurlock

[Subcommittee note: Submissions previously published elsewhere and also available in subcommittee files.]

2. A statutory scheme should be devised whereby a presumption of confidentiality would be afforded to documents claimed to be confidential by the submitter and whereby the submitter need not advance grounds substantiating the claims of confidentiality until an FOIA request for production of material is actually made by an outside party. This would avoid the burden of present procedures in many agencies that require arguments for confidentiality to be made at the time of submission, rather than at the time an FOIA request is made, and would eliminate the necessity for making such arguments with respect to documents that may never in fact be the subject of FOIA requests.

3. Standard procedures should be devised that: (a) give the submitter of documents claimed to be confidential a standard 10-day period of notice to make a submission supporting its claim of confidentiality before an agency determination on FOIA requests for disclosure is made; (b) give the submitter a standard 10-day period of grace between such an agency determination and the actual release of material during which to seek relief from the final agency decision; and (c) give the submitter notice of any government decision (specifically, a decision by the Department of Justice) not to resist disclosure, despite an original agency decision in favor of non-disclosure.

4. Once an agency makes its determination as to whether criteria for non-disclosure are met, that determination should be binding and the agency should have no discretion to hand over the material except pursuant to court order.

These points are treated more fully below.

the intent to reverse customary rules of business privacy and allow private business information to be publicly disclosed absent a showing of economic harm. To achieve the goals of the FOIA and, at the same time, secure protection for obviously private information (such as the materials we have mentioned containing client confidences) which does not fall within the economic harm test, we believe Congress should make it clear that the b(4) Exemption is intended to protect against disclosure of information submitted to the Government that "would not customarily be made public by the person from whom it was obtained," regardless of whether disclosure would necessarily cause economic harm.

A number of points may be made in support of this proposal:

- K. C. Davis, perhaps the foremost scholar on administrative law and a strong supporter of the FOIA, has stated that the "substantial economic harm" test "seems obviously too narrow, because adequate reasons for confidentiality may have no relation to competition, and the court quite properly said in Washington Research Project, Inc. v. Department of HEW, 504 F2d 238, 244 (CADC 1974), cert den 421 U.S. 963 (1975), that 'the reach of the exemption . . . is not necessarily coextensive with the existence of competition in any form.'" Davis, Administrative Law Treatise of the Seventies 91 (1976);

2. The Need to Defer Submissions in Support of Non-Disclosure or Confidentiality Until After an FOIA Request Has Actually Been Made

A fundamental problem encountered by Coopers & Lybrand in its efforts to protect against disclosure of confidential documents supplied to the Federal Trade Commission has been the burden of complying with procedures that require it to persuade the Commission of the need for confidentiality at the time it submitted the material, before any FOIA request for disclosure has ever been made. These procedures mean that Coopers & Lybrand has had to engage in a costly and time-consuming process of submitting arguments for the confidential treatment of documents which may in fact never be the subject of an FOIA request. Additionally, information that was confidential when submitted to the Government may, because of changed circumstances, no longer need to be kept confidential at the time a request is actually made. These problems have doubtless been experienced by many other businesses submitting material to government agencies and could readily be avoided by some simple procedural changes in the statute.

We suggest that a statutory scheme be devised that would permit a submitter of information to categorize material as subject to confidentiality claims, and would not require detailed arguments for confidentiality to be presented

particular documents are exempted from disclosure under FOIA Exemption b(4). Because significant issues are often at stake, it is obviously necessary that a reasonable period of perhaps ten business days be provided for private interests to present arguments for non-disclosure and this in turn requires that the statutory time period provided for the agency decision be extended.

The need for private parties to have an opportunity to present arguments for non-disclosure is obvious. In many cases government personnel may have no expertise enabling them to predict the possible harm that could result from disclosure. Moreover, without prompting by the affected interests, agency personnel may have no incentive to maintain the confidentiality of the private business information obtained by them under government authority. Unless adequately apprised of the dangers of disclosure, there may be a natural tendency for agency personnel to adopt the path of least resistance and release information on request.

Despite all these reasons meriting a comment period for private parties affected by FOIA requests, there is at present no standard provision to this effect. It is our suggestion that any contemplated amendment of the statute provide that the submitter of information subject to an FOIA request be given at least ten business days' notice and

c. The Need for Notice of any Decision Not to Defend FOIA Suits Seeking Disclosure of Documents Previously Found by the Appropriate Agencies to Fall within FOIA Exemptions

Even when the appropriate agency has found FOIA Exemption b(4) or some other exemption to apply, the problems of private parties seeking confidentiality for the material are not over. This is because under current Department of Justice policy, the Government will not necessarily defend FOIA suits seeking disclosure even if the agency involved has determined that the b(4) Exemption applies. This policy was stated in the Attorney General's letter of May 5, 1977 to heads of all Federal departments and agencies, in which he said that "[t]he government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding . . . [and that] the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act." The ramifications of this policy were illustrated in a recent case in the United States District Court for the District of Columbia, LaSalle Extension School v. FTC, Civ. Action No. 77-0002 (D.D.C. 1977), where the Justice Department, after initially agreeing to defend the FTC's refusal

relevant agency and (2) prescribing a period during which such parties may themselves seek judicial relief against disclosure.

4. The Need for Agencies to Comply with Their Own Decisions on the Applicability of FOIA Exemptions

Problems for private parties submitting materials to agencies are also created when agencies having determined that material falls under an FOIA exemption nonetheless exercise their discretion in favor of disclosing such exempt information.[5/] Where an agency thus acts at odds with its own decision, there are a number of undesirable consequences. One concern is that, depending upon the whim of the individual exercising discretion, identical kinds of information may receive entirely different treatment from the standpoint of disclosure. More importantly, however, a private party having submitted information may rely to its detriment upon an original decision that the information is exempt and be totally unaware of a discretionary volte-face in favor of disclosure until the information has actually been released.

5/ Such inconsistencies between agency decisions and subsequent action were considered in a recent opinion by the U.S. Court of Appeals for the Third Circuit which concluded "that the FOIA does not limit the discretionary authority of federal agencies to disclose FOIA information." Chrysler Corp. v. Schlesinger, 46 U.S.L.W. 2202, 2203 (3rd Cir. Sept. 26, 1977).

against disclosure. An appropriate measure would be to provide that agencies must give at least ten business days' notice before disclosing material pursuant to such a change in position.

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/

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Counsel for Coopers & Lybrand

November 3, 1977

Association of American Medical Colleges

January 28, 1977

National Commission for the
Protection of Human Subjects
5333 Westbard Avenue, Room 125
Bethesda, Maryland 20016

Dear Commissioners:

I am writing in response to the Federal Register notice of Monday, December 27, 1976, requesting comments on the impact of the Freedom of Information (and Federal Advisory Committee Act) on the disclosure of research proposals submitted to DHEW. You are aware of the position of the Association of American Medical Colleges on these matters as presented to the Commission on December 12, 1976, by Dr. Thomas Morgan. I will not reiterate this position now other than to remind the Commissioners that our previous statement addressed questions raised in the Federal Register notice. While reinforcing our earlier position I believe there is a facet of the history of DHEW patent policy which deserves further comment.

Implicit in the issues on which comments are encouraged is a recognition on the part of the Congress and the Commission that the proprietary interests of a research investigator should be protected from public access which would result in the possible destruction of these interests. The DHEW, in its current patent policy, recognizes the proprietary interests of investigators based on the belief that such protection would best advance the broad application of postive research findings for the benefit of the public. History affirms the wisdom of such a policy.

The Commissioners should realize that the present DHEW patent policy has been in effect for only a few years, replacing a policy articulated in 1962 which dedicated the results of departmentally funded research to the public and in effect, abandoned all proprietary interests. (Parenthetically, DHEW policy in the 1960's was equivalent in its effect on patentability to an open peer review system). The Government Accounting Office Report B-164031 (2) of August 12, 1968 made emphatically clear to DHEW that industry investment in the development of postive findings would not be forthcoming without the transfer of the investigator's exclusive rights in any successfully developed invention to industry. This transfer is necessary to justify the additional

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NATIONAL ACADEMY OF SCIENCES

OFFICE OF THE PRESIDENT
2101 CONSTITUTION AVENUE
WASHINGTON, D. C. 20418

January 28, 1977

Mr. Charles U. Lowe
Executive Director
National Commission for the Protection
of Human Subjects in Biomedical and
Behavioral Research
5333 Westbard Avenue
Room 125
Bethesda, Maryland 20016

Dear Mr. Lowe:

Rather belatedly I have been informed of the notice in the Federal Register for Monday, December 27, and of what is now an immediate deadline for receipt of the communications invited by that notice. I am aware that the Commission has been taking testimony for some time and has had opportunity for its own discussions. And I am also aware that the Commission will have had access to the various materials assembled with respect to the case of Washington Research Project, Inc. vs. The Department of Health, Education, and Welfare and Caspar W. Weinberger. Under these circumstances it seems rather unlikely that I can add any information or point of view to which the Commission has not already been exposed. Nevertheless, I would be remiss were I to fail to indicate, however briefly and superficially, my own views in these matters, views which, I believe, reflect those of many of the relevant scientific community.

If I properly appreciate the significance of the questions posed in the notice of the Federal Register, within the context of the charge to the Commission, a two-sided question is at issue: (a) To what extent is it necessary to make publicly available the information within applications for research support in order to assure that maximum protection would be afforded the potential subjects of the research proposed therein, insofar as the information in such applications may contribute to that process; (b) To what extent would such disclosure be detrimental to the public interest from other standpoints?

satisfy itself by direct communication with the investigator or the officials of the investigator's institution concerning the procedures that will be followed to avoid the problem that has been detected. Formal award should await satisfactory resolution of the problem.

As one who was for more than two dozen years recipient of research grants awarded by the competitive process and peer review and who himself served as chairman of two study sections at NIH, on one panel at the National Science Foundation, on two Advisory Councils at NIH and as chairman of the National Science Board at the National Science Foundation, I have developed a firm belief in and deep respect for the mechanisms which have been evolved for the operation of the competitive peer review process.

Every examination that has been made of that process has concluded that it is equitable, consistent and highly successful in identifying those projects and investigators of greatest research promise. No alternative has been offered which might comparably serve the public interest. That same interest demands that applications to be reviewed provide sufficient detail to permit adequate examination by the reviewers with respect to the historical background of the problem, the guiding hypothesis of the research, the general experimental approach to be followed, the scientific significance of the findings which are sought and their potential for application. From the standpoint of the prospective investigator, assurance is required that his "intellectual property rights" will be respected throughout this process.

Were the confidentiality of research grant applications and their review to be surrendered, there must surely follow a steady deterioration in the efficacy and value of the entire process. Inevitably, investigators, concerned for those intellectual property rights, will come to practice artful evasion; applications will be less than fully forthcoming and candid. When informed that their comments are no longer to be held confidential, scientists who have heretofore welcomed the opportunity to serve on study sections and review panels will either practice a comparable form of evasive generality or decline to serve in the first instance. It is difficult for me to consider that such deterioration is in the public interest, particularly when no remotely comparable public good is served other than "freedom of information" as a fetish rather than as a device for protection of the public interest. Repeated examination has failed to confirm the allegations which have occasionally been brought against the peer review process, e.g., favoring of an

undermined by a measure that would require unrestricted public access to research grant applications. Surely, it is as serious to deny to a scientist his right to hold and exploit his own original ideas as it is to deny him the right to patent their subsequent culmination in a mature "invention."

Relevant also is the Fifth Amendment of the Constitution: "No person shall be deprived of life, liberty or property without due process of law nor shall private property be taken for public use without just compensation." I believe it to be accepted in the law that the term "property," in this context, embraces "intellectual property" of the type accorded special treatment under Article I, section 8, i.e., a citizen has a right to his own ideas and may not be deprived of their fruits without "due process" or "just compensation." It seems to me that it might well be argued that the conditions of disclosure which some have contemplated would destroy the prospective property rights of the applicant without just compensation or due process. Were a research grant application to be judged to be, effectively, a waiver of property rights, surely the wisdom of such a policy would be subject to question. The reality of our circumstances is inherent in the fact that the government controls the preponderance of the financial resources now devoted to biomedical research and, thus, is in position to exercise effective coercion. But, were the government to exact such a price, would it not erode other rights and jeopardize policies which have served our society well?

Conceivably, there may be specific instances in which it may prove necessary that such property rights be subordinated in order that sufficient protection be afforded to persons who stand to be adversely affected as the subjects of research. But such instances should be identified and appraised on their individual merits; the Commission might find it useful to consider recommending the procedures to be utilized in such instances. For research, in general, too much will be lost and little gained by wholesale disclosure. The loss is certain and predictable; the gain is at best uncertain and highly speculative. It is not evident that a formula can be developed for the classification of projects, in advance, on some a priori basis, which would permit automatic decision as to when disclosure would result in minimal loss and maximal gain.

Perhaps the deliberations of the Commission will be illuminated by a passage which has recently been called to my attention. They are the words of James Madison in a letter to Thomas Jefferson,

APPENDIX 18.—LETTER FROM VICO E. HENRIQUES, PRESIDENT, COMPUTER & BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION, DATED NOVEMBER 4, 1977

CBEMA

November 4, 1977

Honorable Richardson Preyer
Chairman
Government Information and Individual
Rights Subcommittee
House Committee on Government Operations
Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Preyer:

As Chairman of the Government Information and Individual Rights Subcommittee you conducted hearings on 3 and 4 October, 1977, the subject being the Freedom of Information Act (FOIA). At the conclusion of the hearings you announced the record would be held open for submission of additional comments by other interested parties.

The Computer and Business Equipment Manufacturers Association (CBEMA) greatly appreciates the opportunity to submit these remarks. CBEMA is the trade association of the manufacturers of computer and business equipment. This Association has been most concerned over recent FOIA developments, with particular focus on (1) the law's fourth exemption "trade secrets and commercial or financial information obtained from a person and privileged or confidential", (2) the administrative practices utilized by Executive branch agencies in addressing exemption 4, and (3) the unreasonable burden placed on its member companies (and industry generally) when seeking to protect its data from public disclosure.

CBEMA recognizes that exemption 4 is permissive, not mandatory, in its application. Since the bulk of the data supplied by the private sector to various government agencies must be protected, if at all - under this exemption, it necessarily follows that permissiveness raises three basic questions: (1) what are the applicable criteria for determining release, or withholding, of the data? (2) are the criteria reasonable and do they conform to the legislative intent?; (3) are the disclosing private party's substantive and procedural interests appropriately taken into account? No doubt your Subcommittee and its staff hes received through testimony, or written communication, many of the points we will enumerate below. Operating on this assumption we will attempt to be brief and succinct.

1. Considerable confusion has developed over the criteria for release, when addressing an FOIA request involving the fourth exemption. It is our view that the reasonable protection Congress sought to accord "trade secrets" and other confidential commercial and financial information has been eroded by subsequent court decisions and administrative practices. In particular the two National Parks decisions (498 F.2d 765 and 547 F.2d 673) have placed a greater burden on the agency - requiring it to show that release of the requested data would either (1) impair the Government's ability to obtain such

Computer and Business Equipment Manufacturers Association 1828 L Street, N.W., Washington, D.C. 20036 (202) 466-2288

It is clear to this Association that Congress must take the lead in obtaining remedies to these problems. First, Congress must overturn the "competitive harm" and "demonstrably harmful" criteria and return the disclosure test to the standards Congress recognized and outlined in the House and Senate reports that preceded the original Act. Second, as to exemption 4 data, the private as opposed to public origin of this data requires improved administrative safeguards; in this context we believe (1) predetermination prior to submission and (2) advance notice of an agency's decision to release - with reasonable time remaining for judicial relief - should be mandated.

In closing, we again express our appreciation for this opportunity to submit these comments.

Very truly yours,

VICO E. HENRIQUES
President

VEH:MJW

Furthermore, release of technical information on aircraft and aircraft engines through the FOI mechanism can violate existing regulations governing the export of technical data. A simple FOI request can secure for a foreign requestor (either directly or through an intermediary) technical information which the manufacturer owning the information cannot disclose without an export license issued by the State Department under the International Traffic in Arms Regulations (ITAR). Foreign access to technical data can have an adverse impact on security, as recognized by ITAR, but it can also have a severe economic impact since it can undermine the technical advantage which American-built commercial aircraft and engines enjoy in the world market.

We believe that the intent of Congress as expressed during the hearings and in the reports on the FOI Act is to recognize and honor the confidentiality of privately owned information in government possession. Reference to exemption from release of information which "would not customarily be made public by the person from whom it was obtained by the government" (House Report No. 1497, 89th C., p. 10) is indicative of such interest.

Accordingly, we wish to suggest for your consideration the following clarifying amendment to the FOI Act which could perhaps be incorporated as Exemption 10:

> "Privately owned data, drawings, and related material provided to Government agencies for their use in carrying out statutory functions, such as certification of aircraft, aircraft engines, and related equipment, shall not be released by the Government."

We appreciate the opportunity to present these thoughts to you and will be happy to provide any additional information you may desire or to discuss the matter at your convenience.

Yours very truly,

/Karl G. Harr/

Karl G. Harr, Jr.

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President

WRITTEN STATEMENT OF THE
NATIONAL SECURITY INDUSTRIAL ASSOCIATION
FOR THE
SUBCOMMITTEE ON GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS
COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

These written comments are submitted in behalf of the National Security Industrial Association which has a deep interest in the October 3-4, 1977 proceedings before the Subcommittee. NSIA is a non-profit association of some 265 American industrial and research organizations. Established at the urging of Secretary of Defense James Forrestal, NSIA has for 32 years provided a forum of communications between industry and the Government in matters relating to national security. Thus, NSIA has, since its inception, acted as a spokesman for defense contractors, by providing technical assistance to the Government, by receiving and communicating the policy of Government and the views of industry, and by representing the defense contracting community in efforts to alleviate problems of concern to its membership.

Our interest in the issues being considered by the Subcommittee concerns the rights of many of its members which are threatened by existing circumstances in the implementation of the Freedom of Information Act. In particular, NSIA believes that the provisions of the Freedom of Information Act relevant to private confidential business information are currently being implemented by agencies, and adjudicated in the courts, with unintended, impractical and inequitable results.

The Federal Government, acting through the procurement process as well as regulatory agencies, obtains from individual companies a great volume of information which is considered by the industry to be of a confidential nature. This information ranges from proprietary technical concepts to sensitive cost and sales information. There is no dispute that such information has long been considered, by independent as well as interested parties, as confidential in nature. Indeed such information has in the past and is currently solicited and received by the Government with a pledge of confidential treatment and recognition of the proprietary nature of the data in question.

(b) Decisions emasculating the Congressional intent reflected in 18 U.S.C. Sec. 1905;

(c) Judicial decisions interpreting the fourth exemption as requiring expensive and onerous proof of competitive harm, rather than an objective determination of traditional "confidentiality";

(d) Application to private information of disclosure deadlines, presumptions and procedures appropriate only for purely governmental information, with a resulting administrative dilemma for public information officers and risk that private rights would never be fairly considered, and

(e) Threatening indications that the Government might abdicate its obligation to defend administrative decisions made in furtherance of the Congressionally intended balance and thus sacrifice legitimate non-disclosure interests of private parties.

This erroneous view of the existing statute and the lack of an administrative procedure to deal with confidential business information has created a dangerous condition. It has put an impractical burden on public information officers; properly interpreted, the Act already creates an enormous burden upon the agencies and courts. This erroneous view has put at risk property of citizens. It has forced citizens to great expense and difficulty in what should be the simple task of protecting confidential information -- a burden harder on small business than large, but unfair to both. It has, by ignoring the Congressional purpose of allowing the Government to honor its promises, jeopardized the flow of information needed by the Government.

This condition is not only unintended and unsound, it is manifestly anomalous: The Government obtains information from private parties because it has a legitimate cause to have information it considers private in nature. The Government would not and could not obtain such information without a legitimate cause. After the Government obtains the private information, other persons (such as competitors, disgruntled employees, adversaries and profiteers) can, without showing any cause whatsoever, obtain the information, simply by coattailing the Government's access. This anomaly threatens business confidence in its dealings with the Government.

One by-product of the present circumstances has been the so-called "reverse FOIA case," which has, under the described circumstances, been a vital -- indeed in some cases the only -- protection of private rights under the fourth exemption. The reverse FOIA case is a necessary ultimate insurance for the preservation of the Congressionally intended balance between public information and private interests.

Of course NSIA's preference is that reverse FOIA actions would not be necessary. These actions have proven to be complicated, expensive, and burdensome to both the litigants and the courts. Such actions would certainly be minimized if the Act were implemented in a way consistant with the Congressionally intended protection of legitimate private interests.

NSIA urges the Subcommittee to effect a restoration of the recognition that private information in the hands of the Government is different in nature from purely government information. We urge the Subcommittee to call for treatment of such information consistant with the originally intended balancing of interests and under procedures consistent with fairness to legitimate private interests.

In summary, we urge a restoration of the original intent of the Act. It is hoped that this could be achieved in the administration and adjudication of existing provisions. Certainly this effort will go forward, but it is these very processes that have created the current deleterious condition. Legislation restoring the balance, by recognizing the Government's obligations to those from whom it receives information and enabling the Government to treat private interests fairly, is the surest, quickest course.

○

The Freedom of Information Act was enacted with the Congressional purpose of opening the Government to public scrutiny. Since its enactment, and more particularly in recent years, the Act has been misused by persons seeking information not about the Government but about other citizens. The Act has thus permitted a new type of industrial espionage, rather than Government in the sunshine.

Clearly this was not Congress' intent. The fourth exemption purported to protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The legislative history reflected not only a recognition of the confidential nature of business information but of the following vital concept in the Government's dealings with its citizens:

> . . . where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations. (H.R. Rep. No. 1497, 89th Cong., 1st Sess. (1966).)

The initial judicial decisions are consistent with these concepts. The Supreme Court, in EPA v. Mink, 410 U.S. 73, (1973), recognized that the Act called for a balancing of interests. In Sterling Drug v. FTC, 450 F.2d 698 (D.C. Cir. 1971), the court interpreted the fourth exemption as protecting information submitted in confidence and normally treated as such.

In essence there was a legislative recognition, supported by the initial judicial decisions, of the following principle: The Government's possession of confidential business information is a fact which does not change the non-public nature of the information; notwithstanding disclosure to the Government, the basic fact remains that the information submitted in confidence was created by and belongs to private citizens. Congress intended that, in the administration of the Act, this principle would be respected.

Unfortunately Congress' purpose has not been fulfilled, and the intended balance of interests is dangerously askew. This jeopardizing of legitimate private interests has been brought about by the following combination of circumstances:

(a) Judicial decisions nullifying pledges of confidentiality and indicating that the Government has discretion -- indeed may be required -- to ignore its promises;

APPENDIX 20.—LETTER FROM WALLACE H. ROBINSON, JR., PRESIDENT, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, UNDATED

NATIONAL SECURITY INDUSTRIAL ASSOCIATION

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Chairman, Executive Committee

J.R. Lien
Vice Chairman
Executive Committee

W.H. Robinson, Jr.
President

The Honorable
Richardson Preyer
House of Representatives
Chairman, Subcommittee on
Government Information
and Individual Rights
B-349-C Rayburn House Office Bldg.
Washington, DC 20515

Dear Mr. Chairman:

Transmitted herewith are copies (5) of the NSIA testimony for the Record concerning the provisions of the Freedom of Information Act relevant to private confidential business information which are currently being released and adjudicated in the courts with unintended, impractical and unequal results.

It is our understanding that written testimony for the Record may be submitted up to and including 4 November 1977.

Sincerely,

Wallace H. Robinson, Jr.
President

Enclosures (5)

APPENDIX 19.—LETTER FROM KARL G. HARR, JR., PRESIDENT, AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., DATED NOVEMBER 7, 1977

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

1725 DE SALES STREET, N.W., WASHINGTON, D. C., 20036 TEL. 347-2315

OFFICE OF THE PRESIDENT

November 7, 1977

The Honorable Richardson Preyer, Chairman
Subcommittee on Government Information
and Individual Rights
Committee on Government Operations
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

We followed with great interest the oversight hearings your Subcommittee held on the Freedom of Information Act and specifically on Exemption 4 to that Act. We have serious concern about recent judicial interpretations and executive implementation of the Act, particularly Exemption 4, and would like to offer the following comments for your consideration.

First, there is a manifest need for clarification of the legislation to differentiate between government information and privately owned information in the possession of the government. Privately owned information provided to the government, voluntarily or otherwise, to assist an agency of government in carrying out its statutory functions, does not become government owned information and hence should not be subject to release by the government. This principle is recognized in Exemption 9 to the Act which relates to a specific kind of privately owned information.

Aerospace companies provide extensive and detailed information to government agencies such as the FAA to assist in the certification of commercial aircraft, aircraft engines, and related equipment before introduction into service. Certification is an important safety function; proper exercise of this responsibility by the FAA depends on an uninhibited flow of information from the manufacturers. The information provided by the manufacturers represents the investment of large amounts of private capital, in the hundreds of millions of dollars or even in the billions in the case of programs now in their early stages. The excellent safety record of American-produced commercial aircraft in worldwide service attests to the success of the certification process to date. The flow of information from the manufacturers to the certifying agency has depended on government protection of the information provided to it and would certainly be inhibited if the data were to be released by the government in response to Freedom of Information requests of third parties.

data in the future or (2) cause substantial harm to the competitive position of the disclosing party. This "competitive harm" test clearly reflects a stricter standard than Congress envisioned would be applied. Moreover, it places an unreasonable burden on the agency, since the agency is not privy to many of the facts from which a conclusion of "competitive harm" from disclosure could be drawn.

2. The difficulty associated with the "competitive harm" test must now be examined in consort with the recent Attorney General's 5 May 1977 letter to the "Heads of All Federal Departments and Agencies". Clearly this letter will further tilt the administrative process toward release, when Attorney General Bell advises that: "The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act." Such a directive will hardly prompt an agency official to "stand tall and be counted" in refusing to disclose exemption 4 data, when the Government's chief legal officer will not support his position in court. Thus, we see a further erosion of the disclosure criteria from "competitive harm" to "demonstrably harmful" through what we believe was an unfortunate administrative action.

3. The program associated with the disclosure criteria, noted above should be considered in this context: the FOIA does not require - nor is it agency policy and practice - the particular agency and the disclosing private party to sit down together and predetermine that the data to be tendered meets the exemption 4 criteria and that the agency will resist FOIA disclosure unless so ordered by a court of competent jurisdiction. Your Committee no doubt recognizes that aside from disclosures mandated by regulatory agencies (e.g. SEC and Renegotiation Board reports) a significant amount of trade secret and other confidential data is obtained, or demanded, through the procurement process. We believe that if this sensitive data is to repose in agency files, a predetermination is appropriate. If the agency will not grant such an assurance of subsequent FOIA protection, the contractor may still have options open to him, such as not submitting the data and declining to bid.

4. The present law does not require the agency to advse the disclosing party that the agency has received an FOIA request affecting his data. While many agencies do provide a notice and seek the originator's opinion regarding disclosure, the practice is not uniform. Of greater significance is the fact that the originator is rarely advised of the agency's subsequent decision to release, after previously seeking and receiving the initial opinion not to release. The originator is faced with a fait accompli unless he anticipates the pending release and initiates a reverse FOIA action. These administrative practices result in unnecessary litigation being initiated because the originator either is not advised of the ultimate decision or little time remains before the agency must render its decision (whether initial of on appeal).

dated 17 October 1788 in support of Article 1, section 8 of the then Proposed Constitution,

> "With regard to monopolies, they are justly classed among the greatest nuisances in government, but is it clear that, as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Monopolies are sacrifices of the many to the few. Where the power is in the few, it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many, not in the few, the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many."

The Commission has accepted the considerable burden of helping to steer the Nation on a course which will maximize the protection that our society owes to those who are the subjects of research while at the same time assuring that the research enterprise can go forward with a minimum of impediment so that its benefits may be brought to our people as soon as possible. Accordingly, may I respectfully urge the Commission to seek means for the protection of human subjects which will not so erode the rights and satisfactions of the individual investigator as seriously to weaken his motivation and thereby markedly impair the entire research process upon which progress depends.

Sincerely yours,

P Handler

Philip Handler
President

"Old Boys Club," favoring of applicants from the institutions represented by members of the study section, failure to support untried young investigators, etc. And the diverse members of a given study section are sufficient in number and stature to assure that none of their own group can successfully appropriate, as his own, the ideas in a research grant application.

To be sure, it is desirable that there be a public record of the basic fact of the award of a research grant or contract together with a sufficient amount of information to indicate the subject of the research and the most general description of the nature thereof. This has long been afforded in the form of a publicly available abstract prepared by the applicant investigator himself. When such an abstract is insufficiently informative, the agency can request its improvement.

It is unlikely that any of the thoughts recorded above are new to the Commission. But there is a point of view with respect to what I have, above, called "intellectual property rights" to which I would like to give a special emphasis. It is not unlike that which appeared, in part, in the paper entitled "Confidentiality of Research Grant Proposals" by T. E. Morgan, J. A. Keyes, and J. F. Sherman in CLINICAL RESEARCH, 24, 5 (1976).

The social utility of promoting the arts and sciences by extraordinary measures directed toward this end was made explicit in the Constitution. Article I, section 8, directs the Congress to "promote the progress of science and useful arts; by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The patent and copyright systems that derive therefrom exist not for the enrichment of a privileged few but for the stimulus they give to innovation and the public benefits which result therefrom. Implicit in the patent system is detailed disclosure of each invention in a prescribed form and by a prescribed process. Premature disclosure or prior publication of the ideas involved preclude forever award of patent protection under this system.

The patent policy of the Department of Health, Education, and Welfare has taken cognizance of the role that the granting of exclusive rights and inventions must play in the prospective transfer of technology "from the laboratory bench to the patient beds." The NIH system for awarding research grants has deliberately operated in such fashion as not to adversely affect the patentability of any inventions which may result from federally funded projects. This productive articulation of governmental policy would be seriously

I shall speak only briefly to the first question. It seems unlikely that extending the "Freedom of Information Act" and the "Government in the Sunshine Act" to research grant applications and the comments of those who review such applications would indeed afford a significant measure of protection except in instances which involve the most gross violation of ethical practice. Detailed research protocols are seldom found in research grant applications, largely because actual research requirements develop as the research itself develops and are rarely adequately foreseeable. Indeed, the specific populations to be examined are frequently uncertain in the mind of the investigator at the time of making application. And it would surely be an immense hindrance and a monstrous bureaucratic snare to expect each individual research protocol to find approval at the supporting federal agency before an experiment can be undertaken. A significant fraction of all such clinical research is conducted under nonfederal auspices in any case and the subjects of such studies also warrant our protection.

The burden of responsibility for the protection of human subjects must be placed back on the institution within which the research is conducted. Appropriate and increasingly effective local mechanisms for such monitoring now exist in most such institutions and means exist to assure that every institution must put an appropriate mechanism into place and utilize it faithfully. The details of such mechanisms are well known to the Commission and need not be recounted here. Transgressions can only be prevented at the local institutional level. External regulations with sufficient force can assure that monitoring at the local level will be continuous and consistent. A principal challenge to the Commission is the formulation of an appropriate and definitive code or set of guidelines for such local use.

If one accepts the argument above, then it becomes apparent that relatively little is to be gained, in fact, by way of additional protection by opening the research grant application to public scrutiny. On the other hand, considerable security is achievable by formally placing upon each "study section" that examines applications for clinical research a requirement for specific comment with respect to each application for which it recommends approval concerning any possible breaches of ethical practice which it might sense to be explicit or implicit in the research proposed. Whenever a problem is thus detected and noted, the burden is then transferred to the administering agency to

risk capital investment by industry to bring such findings into public use. While arguements might be made that public funding could be made available to substitute for the private funding necessary to the completion of the development of such innoaations, historically public funds have not served as an adequate substitute. But even if they were to be forthcoming for such a purpose, I question the wisdom of such an approach on the basis that it would severely impair the successful pluralistic approach to development of health innovations in this country. It would place the Government in the unhealthy position of judging which ideas in the area of health research should go forward and which should be abandoned.

The GAO Report urged DEHW to revise its patent policy and in reviewing the recommendations, then Assistant Secretary and Comptroller, James F. Kelly, commented in a letter to Frederick K. Rabel, Assistant Director, GAO, as follows:

> " In summary, we consider that the results of Department sponsored research, including newly synthesized or identified compounds, constitute a valueable national resource, ant that the effective utilization of such compounds is an essential part of the Department's program goals. We intend to continue to make such changes in our practices as are necessary to foster the fullest utilization of all compuunds synthesized or identified during the course of research supported by the Department in such a manner as to recognize and protect the legitimate interests of the public, the investigator, and the screening organizations."[1]

If, as appears likely, a major consideration in the opening of the peer review system and the disclosure of research information is the protection of human subjects, I hope that the Commission will carefully balance the probable harm of disclosure against the possible benefits. Indeed, it seems very likely to us that the best protection of human subjects lies with the institutional review board and not at the level of scientific peer-review.

I appreciate the opportunity to make these views known to the Commission becuase I feel deeply, as I know many other members of the academic community do also, that the NIH peer-review system is one of the finest creations of our society. The biomedical research community and the general public who reap the benefits of research will follow the deliberations of the Commission on this vital subject with keen interest.

Yours sincerely,

Original signed by
J. A. D. COOPER, M.D.

John A. D. Cooper, M.D., Ph.D.
President

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1 GAO report cited, appendix II.

APPENDIX 17.—LETTER FROM JOHN F. SHERMAN, VICE PRESIDENT, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, DATED NOVEMBER 3, 1977

aamc association of american medical colleges

November 3, 1977

Honorable Richardson Preyer
Chairman
Subcommittee on Government Information
and Individual Rights
Committee on Government Operations
B-349-3 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Preyer:

The AAMC is deeply concerned about the effect of the Freedom of Information Act (FOIA) on the nation's system for conducting federally-sponsored research. We believe that premature disclosure of an investigator's ideas by the operation of this Act will undermine what is widely regarded as a highly productive enterprise. We bring these concerns to your attention at this time, first, because this problem was not considered in detail at the October 3 and 4 hearings before the Government Information and Individual Rights Subcommittee which focused on the 4th Exemption of the FOIA, and second, because Section 480 of H.R. 7897 which was directed at addressing this problem in the context of Recombinant DNA legislation has been amended to delete the protections for scientists in non-commercial settings. We understand that it is your intention to systematically address this issue in future hearings. We applaud this intention and urge that such hearings be scheduled in the near future.

In the interim, it may be of assistance for you to know that the President's Biomedical Research Panel and the National Commission on Human Subjects considered these problems in some detail in response to a mandate from the Congress and each has made recommendations which address our concerns. The attached letters from Philip Handler, President of the National Academy of Sciences, and from John A. D. Cooper, President of the AAMC, suggest the dimensions of the problem.

We would be grateful if you would consider these matters and include this letter and its enclosures as part of the record of the October 3 and 4 hearings.

Sincerely yours,

John F. Sherman

John F. Sherman, Ph.D.
Vice President

We suggest that the Subcommittee consider whether it is appropriate for agencies in their discretion to hand over information they have found to be exempt where this can result in inconsistent treatment of like information submitted by different parties, and can result in uncertainty as to whether, for practical purposes, information is exempt or non-exempt. It has been judicially recognized that disclosure of private information submitted by outsiders to the government "is qualitatively different from disclosure of information relating directly to government operations [or information generated by the government] and that the interest in privacy appears stronger with respect to [the former]."6/ In light of this distinction, it bears mentioning that while it might be somewhat appropriate for a government agency in its discretion to change its position as to disclosure of exempt government information, this is certainly not true in the case of private information supplied by outsiders. There the emphasis should rather be upon adherence to a consistent government position.

At the very least it is only right that private parties should be put on notice before an agency decides, in its discretion, to hand over information it has found to be exempt so that the private party can take necessary action to protect

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6/ Chrysler Corporation v. Schlesinger, supra, 46 U.S.L.W. at 2202.

to disclose information under an FOIA exemption, declined to defend the suit, citing the Attorney General's May 5 letter.[3/] Although the FTC continued to maintain that the information was exempt from disclosure, the District Court ordered its release.[4/]

When different branches of the Government sing different tunes, the result is necessarily confusing for private parties concerned with protecting confidential commercial and financial information from disclosure. Indeed, the Subcommittee may agree that there is a need for consistent and certain application of the FOIA exemptions, which would be better served if the original agency determination could not in effect be nullified by the exercise of Justice Department discretion. At the very least, however, affected private parties relying on an agency decision in favor of non-disclosure should be given notice if the Justice Department will not defend that decision, so that the affected parties themselves have an opportunity to defend against disclosure. We suggest, therefore, that there is a need for statutory amendments (1) entitling private parties to notice of any law enforcement agency decision not to defend FOIA suits seeking disclosure of material previously found to be exempt by the

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3/ See Defendant's Supplemental Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment, LaSalle Extension School v. FTC, Civ. Action No. 77-0002 (D.D.C. 1977), filed October 19, 1977.

4/ See Order of October 20, 1977, LaSalle Extension School v. FTC, supra.

time for comment prior to any agency decision on the request and that the statutory period within which agencies are required to make such decisions be extended accordingly.

b. The Need for Notice to Private Parties of an Agency Decision in Favor of Disclosure and for a Prescribed Grace Period before Release to Permit Appeal of the Agency Decision

Currently the law does not entitle private parties submitting information subject to FOIA requests to be given any notice of an agency decision in favor of disclosure, and provides no grace period during which affected parties can appeal the disclosure decision before the documents actually go public. Consequently, private parties at the time of submitting information are obliged to file individual requests for notice of the agency's decision and for an opportunity to seek judicial relief from an adverse determination. The result is a burden on both the private parties and the many government agencies that have to consid r these requests. This burden could readily be avoided by simple statutory amendments giving private parties submitting material to the government an express right to notice of an agency decision on disclosure and a period of ten business days thereafter to seek judicial relief against disclosure before the material can in fact be released.

until a request for disclosure under the FOIA is actually made. This procedure has been adopted successfully by the Environmental Protection Agency which has found that the ultimate requirement to justify confidentiality claims inhibits any tendency to make overly broad or blanket claims of confidentiality. The indisputable benefit is that myriad private business organizations are saved from having to make detailed arguments about confidentiality that may never in fact be needed. Similarly, government agencies are saved from having to make determinations on the need for confidentiality about documents that may never be the subject of FOIA requests, or that will not need to be kept confidential at the time a request is actually made. The benefits of such an approach are obvious and can be achieved by relatively simple amendments to the Act.

3. The Need for Standardized Procedures for Notice to Private Parties and an Opportunity to Seek Protection for Materials Claimed to Fall Within FOIA Exemptions

a. The Need for Notice and a Comment Period for Private Parties Before an Agency Decision Is Made on FOIA Requests

Under the present law, agencies are required to make a decision on FOIA requests within ten days. No comparable period, however, is provided to give private parties affected by disclosure an opportunity to present arguments as to why

- The "customarily would not disclose" test conforms to the original Congressional intent with respect to Exemption b(4). See H. R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965);

- The "substantial economic harm" test is not supported by a common sense interpretation of the statutory references to confidential commercial/financial information -- "confidential" ordinarily means "not publicly disseminated" and "known only to a limited few." Webster's Third New International Dictionary (1971);

- If the "substantial economic harm" test (or any test other than the Congressionally mandated "customarily would not disclose" test) is to be used, Congress, not the courts, should make that policy decision so that Congress may receive comments on the desirability of that test from all interested parties;

- Reaffirmation of Congressional intent that the "customarily would not disclose" test should apply to Exemption b(4) is a simple solution to many of the problems which have prompted this hearing.

DISCUSSION

1. Inadequacies in the "Substantial Economic Harm" Test for Non-Disclosure of Confidential Commercial/Financial Information Mandate Reviving the "Customarily Not Disclosed" Test Originally Intended by Congress

An obvious problem with the "substantial economic harm" test developed by the courts[2/] as a requirement for confidential treatment is that there are many classes of documents clearly intended by Congress to be worthy of confidentiality which may not fall within this test. Particularly with respect to professional organizations, it is repugnant to make a financial test the criterion for privacy. In its dealings with the Federal Trade Commission, Coopers & Lybrand has encountered a number of instances where it has been asked to hand over documents whose disclosure would not necessarily cause substantial economic harm to Coopers & Lybrand. Yet those documents are of a kind that the firm would not customarily disclose and which Congress, therefore, would have intended to fall within the non-disclosure provisions of FOIA Exemption b(4). This is particularly true of documents containing private information about clients and detailing various client confidences.

The purpose of the FOIA was to insure full disclosure of Government information to the public to enable citizens to make informed social and political decisions. It was not

2/ National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

APPENDIX 16.—STATEMENT OF COOPERS & LYBRAND, DATED NOVEMBER 3, 1977

SUBCOMMITTEE ON GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS
HOUSE COMMITTEE ON GOVERNMENT INFORMATION
HEARING ON b(4) EXEMPTION IN
FREEDOM OF INFORMATION ACT

Statement of Coopers & Lybrand

INTRODUCTION AND SUMMARY

Coopers & Lybrand submits this statement for consideration by the Subcommittee because its recent experience in seeking confidentiality for documents submitted under subpoena to the Federal Trade Commission in connection with the Commission's current investigation of the accounting profession has made it aware of deficiencies in the current legal framework under which, pursuant to the b(4) Exemption, protection from disclosure may be sought for confidential commercial and financial information.

The points and suggestions for reform made here are in summary as follows:

1. The judicially imposed requirement that protection against disclosure of confidential commercial/financial information be accorded only on a showing of "substantial economic harm"[1/] exceeds the original intent of Congress, and does not protect many classes of material that are obviously confidential. It should therefore be replaced by the test originally intended by Congress which would give protection for material that a party "customarily would not disclose."

1/ National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

these inventions, premature disclosure, as through availability of research proposals, would have precluded patenting and, therefore, the transfer of this desirable and life-saving technology to the public. Based upon the many years of experience with the technology transfer mechanism we believe we can summarily state that a completely open technological system will become a technologically stagnant system.

We believe that it is imperative that some action be taken to amend the Public Health Service Act to protect the proprietary rights of investigators and the public from the adverse consequences of premature disclosure.

As a final point, the scope of this statement, because of the time alloted for its presentation is inadequate to consider all of the elements which must be addressed. If the Commission is to be responsive to the charge given it by Congress it should also obtain, in full and fair hearings, the views of researchers on the "open" vs. "closed" peer review system, what is meant by the free exchange of scientific information, the impossibility of separating a basic idea from other material in a research proposal and the existing multilayer protection afforded human subjects in the system as it exists today.

of the University of Wisconsin, has filed 53 patent applications from which 31 patents have matured to date. Under those patent applications and issued patents there are now 17 licensees who are spending substantial sums of money in the development of the inventions for the market. Many of the inventions involved are health related and, therefore, require the expenditure of inordinately large amounts of money to meet the criteria established by the Food and Drug Administration and other regulatory agencies before the inventions can be placed in the market. One of these inventions is now being actively marketed in France and is earning royalties but, more importantly, is being used in the treatment of a multiple number of disease states. Moreover, other of the licensees are expected to shortly introduce different one of these inventions into the market in other parts of the world, including the United States. Had the research proposals which ultimately led to these inventions been publicly available there would have been little likelihood that any of these licensees would have been willing to embark on the necessary development program. Patenting would have been precluded by early disclosure and the incentive supplied by the patent system would not have been available to motivate the development efforts.

In another situation where the invention has been licensed we are relying upon the disclosure in a research proposal to establish the date of conception of the invention. From the date of the proposal to the actual reduction to practice of the invention a period of almost three years elapsed while constant research effort was being put forth. Since both conception and reduction to practice are necessary to patentability and

discussed in the Commission Memorandum public access to research proposals and an open peer review system will practically stifle the ability of the Government to carry out its responsibility to secure the transfer of technology generated by its funded research programs. (Note the comments in the Commission Memorandum at Page 41, last full sentence and page 42.)

The preservation of the proprietary rights of individuals in the contents of their research proposals is another major concern. Such proposals contain the stock in trade, or, if you will, the trade secrets, of scientists and investigators and should be afforded the full protection which is guaranteed under the Constitution. That there is a concern about this situation is evidenced by the remarks at page 49 of the Commission Memorandum which says "the real danger to proprietary rights comes in the case where a patentable idea is developed in the course of a project which was originally intended to be basic research. There is an obvious unfairness in jeopardizing the patent rights of a scientist whose application may have been disclosed before anyone was aware that ideas of potential commercial value were involved." Yet the memorandum suggests nothing to assuage this situation.

In our estimation, and based upon experience, the unfairness is not limited to the situation described, since at the proposal stage most investigators do not and cannot know what the commercial potential or commercial application of their research results may be. It must be

Although the interest and experience of the National Association of College and University Business Officers flow to all of the items in the Congressional charge to the Commission I will consider primarily the effect of premature disclosure of research protocols on the proprietary interests of the researcher, the destructive effect such disclosure will have on potential patent protection relative to such rights, and the serious impact on the public of the loss of such proprietary rights. I will present some statistics which I believe are enlightening and which will serve to show the adverse impact premature disclosure can have.

At the outset it must be presumed that Federal research dollars are made available in the expectation of not only developing basic knowledge but also in the expectation that the funded research will lead to products, processes and techniques which will be useful and acceptable in all or parts of our society to improve the well being of the society in general. More specifically, and under the Department of Health, Education, and Welfare auspices to which the Congressional charge is directly pointed, the expectation is that the research results will benefit the public in the health-care area. In the face of this presumption, full and careful consideration must be given to the making of any policy which affects the entire process of the transfer of the technology generated by Federally funded research.

Since a major consideration leading to the Congressional charge is the Sunshine Act a portion of that Act which is quoted on page 17 of the

unfavorably affected the quality, distribution and cost of the delivery of health care."

Now when one compares the highly speculative benefits to be derived from permitting random access of research proposals to a few self-designated public interest groups against the measureable loss of intellectual property, investigator privacy, candor in decision making, effective evaluations and incentives for continued innovation, it is difficult to justify the present state of the law.

Although I and others in the Government believe this to be one of the more serious problems confronting our society, it has virtually had to beg for a forum. Both NASA and ERDA have brought this problem to Congress in the context of their research and as far as I can determine have made little progress toward resolution. The Association of American Medical Colleges has explained the problem to Congress in the context of NIH research in a much more comprehensive and articulate fashion than I have here, and have been equally unsuccessful. As far as I can determine, these organizations have been unable to separate to the satisfaction of Congress the issue of the need to protect most intellectual property in the hands of the Executive branch from Congress's preoccupation with opening the Executive's policy development process.

Admittedly there is an overlap, but not to the extent that the baby needs to be thrown out with the bath water.

"The Inter-Assembly Council of the Assemblies of Scientists of the National Institutes of Health and National Institutes of Mental Health, while fully recognizing the legal right of scientists to make such a request, strongly urges NIH and NIMH Intramural scientists voluntarily continue to act according to past practice and not request copies of Grant Applications. We advocate this policy because we fear the effectiveness of the peer review system may be diminished and biomedical research impeded if applicants believe their Grant Applications will be widely circulated. This recommendation is subject to revision should professional scientific societies adopt appropriate guidelines."

(I would suggest that when any group of scientists can agree to make a positive recommendation on anything, the situation has probably reached the point where other elements of society need also be concerned.)

Now the real issue in the controversy over release of research proposals is not whether the information therein will be released but when it will be released. It is perfectly clear that investigators are anxious to publish the results of their research for the scrutiny and critique of the entire profession when they believe it has moved to some reportable conclusion. The above statement by NIH and NIMH scientists clearly indicates that investigators in general, are not ready to relinquish the timing of publication to an unidentified third party.

As suggested in the wake of the Washington Research Project case there has been a large surge of requests for release of research proposals. Although requesters need not identify the purpose of their requests, volunteered information in addition to their organizational identification seems to place requesters in two broad but identifiable categories:

1) Public interest groups pursuing the possibility that research investigators are in some way abusing the public interest in the course of their research, or
2) Commercial concerns and other research investigators wishing to capitalize on the work product disclosed.

The requester in the second category can ordinarily be identified as having an investment in the same field of research as the research proposal he is seeking. It has been ascertained through volunteered information from these requesters that they wish the information sought generally to either 1) determine the degree to which the investigator is moving the state of the art ahead or 2) use as a format for the requesters own grant or contract application.

At this time, it appears that public interest groups are requesting access to more research proposals than commercial concerns and research investigators. Notwithstanding the large number of research proposals requested by public interest groups, to my knowledge substantially all of the requests have

that the Federal Administrator provide a "yes" or "no" answer to a requester within 10 days of the request or be subject to severe personal financial penalties. The 10-day rule, as noted by Deputy Assistant Attorney General Mary Lawton, is "absolutely irrational. In some case you can't even get through the material required in 10 days."

Let me illustrate, in the case of a request for access to a research proposal. To say "no" basically requires that a Federal Administrator handling the request apply the National Parks test to the situation and provide a written prima facie case to the Department Public Information Officer recommending denial. If the information the Federal Administrator believes should be denied involves a disclosure of an idea, invention, trade secret, etc., a prior art search which indicates that such idea, invention, trade secret, etc., is in fact novel in comparison to the prior art must be conducted before a prima facie case could be made. If novelty cannot be shown it seems clear that the Governemnt could not prevail in a suit to show that there will be "substantial harm to the owners' competitive position." I would ask inferentially at this point, how can a Federal Administrator, yet alone the owner, show that a computer program or a business method is novel compared to the prior art? Where would you look for the prior art? Should the owner be penalized

IIT, and General Motors. The court held that the Government assurance and the Corporations' respective filings conditioned on confidentiality were not determinative, and remanded the case for disposition in accordance with the test of the National Parks case noted above. Thus, a promise of confidentiality by the Government in and of itself may not prevent disclosure.

The Office of Legal Counsel of the Justice Department has advised that as a result of the above cases, government protection of intellectual property and its withholding under the fourth exemption under a FOIA suit is very unpredictable, at best.

Further, 18 U.S.C. 1905 does not appear to have any effect in a FOIA suit. This statute, if applicable, would impose criminal penalties on Government officials who disclose proprietary information in the possession of the Government. At best, then, it is a deterrent to unauthorized disclosure, but it only takes effect after the disclosure and the damage to the owner. 18 U.S.C. 1905 has been virtually ignored by the courts in FOIA suits because of a general exemption contained in the statute, "unless otherwise provided by law." Courts generally have interpreted the quoted passage as exempting disclosure under the FOIA. Section 1905's penalties, therefore, would not be applied to an official who disclosed proprietary information in response to a freedom of information suit.

Even though commercial concerns might with predictable difficulty meet the "substantial harm to a competitive position" test of the National Parks case, universities and nonprofit organizations wishing

which exists due to the ability of the owner to control its accessibility, will have no relevance when dealing with the Executive Branch. (I would add inferentially at this point that as far as I can determine none of the "sunshine laws," including FOIA, distinguishes between the U.S. public and foreign interests. Thus, where a U.S. citizen can gain access, so can a foreign competitor or government.

When one of Congressman John E. Moss's constitutents wrote to set forth his opinion that the present FOIA did not provide sufficient protection against premature disclosure of inventive ideas that were not yet patentable, the Congressman responded by indicating that:

> "While I am sorry that the Act imposes a certain hardship on inventors, I feel strongly that the public has a right to know how Government funds are spent. As you realize, the FOIA only applies to Government information and if anyone is willing to accept Government funding for a project he must also be willing to accept the added responsibility of public scrutiny."

Of course, to construe, as I believe Congressman Moss had done, that a research proposal submitted for some type of funding support is government property is tantamount to a declaration that one forfeits all past and future personal proprietary rights and private equities in such dealings with the Government. I would note that the Congressman's position even denies to the Government the right to protect any

Presentation of Norman J. Latker, Patent Counsel, DHEW
Before the Academy of Pharmaceutical Sciences
Atlanta, Georgia - November 19, 1975

"THE PROTECTION OF INTELLECTUAL PROPERTY
UNDER THE FOURTH EXEMPTION OF THE FREEDOM
OF INFORMATION ACT"

(Oral disclaimer on representing Department view)

Since the departure of President Nixon, it appears to many that much of Congress's effort to restore itself, as it deems necessary, as an equal partner to the Executive and Judicial Branches in the "checks and balance" system has been directed to earlier involvement in the development of policy. Unfortunately, accompanying Congress's undeniable right to pursue such a course, a great many indiscriminate statements such as: "We've had it to the teeth with secrets" or "Anything the Executive refuses to make public amounts to lying to the American people" have served to create an atmosphere in which even the most obvious of the Executive's discretionary powers have become suspect. It is against this tidal wave of indignation and demands for openness that Federal Agencies must attempt to protect intellectual property placed in their hands by persons presuming that such property has nothing to do with the development of policy. Some such Agencies have already been swept away with this current passion while others are frustrated by the added administrative burden of protection which they view diverting their energy from primary assignments. Thus, some have moved to presumptions that no excuse for protection is available.

While I hold no particular brief for policy-making behind closed doors, I believe the fervor to promulgate "sunshine laws" to

3. The Navy, in a remote computing services proposal, made mathematical errors in computation of life cycle cost in an RFP issued by the Naval Regional Procurement Office in Washington, D. C.

4. GSA, in another action, lost a vendors proposal, never opened the proposal, and incorrectly awarded to another vendor.

If a vendor or agency is allowed to conceal the method of award in a negotiated procurement and the reasons for award and, more importantly, the reasons why the losers lost it is contrary to the entire spirit of the federal procurement system and paves the way for concealment of errors forever and, even worse, increases the propensity for fraud and graft. Thus, in your committee considerations you should make clear that nothing in exemption 4 or 5 is intended to prevent the open intent of the current federal procurement system.

In Summary:

It is our opinion that the Congressional intent of the Freedom of Information Act to allow an open government and to stifle secrecy and, thereby, pass on the benefits of citizen participation in the administrative process is very well served when the government must reveal the voluntary business information received from the business community in hopes of obtaining a government contract. In government procurement, Congress has stressed that the primary method of contracting be the Invitation For Bid (advertised procurement) which completely opens the process to the public and through this eliminates the ability to conceal fraud, corruption, or just plain ignorant procurement. The negotiated process is allowed for several reasons and is a secret process during the actual acquisition cycle. However, once the contract is signed the reason for negotiating disappears and the Act should allow openness at this time for the protection of the citizens to ensure that during the brief negotiated secret process that it was justly and accurately accomplished. The long run advantage of this should be obvious in that it will increase competition and, thereby, gain the benefits we receive from full and open competition under the free enterprise system. We would be more than happy to sit and discuss all of the above or provide additional information to this committee when deliberating exemption 4 and 5 now under consideration in relationship to government procurement.

APPENDIX 13.—LETTER FROM TERRY D. MILLER, PRESIDENT, GOVERNMENT SALES CONSULTANTS, INC., DATED NOVEMBER 4, 1977

Government Sales Consultants, Inc.

NOV 4

November 2, 1977

Honorable Richardson Preyer
Chairman, Government Information and
Individual Rights Sub-Committee
2157 Rayburn House Office Building
Washington, D. C. 20515

Dear Sir:

We welcome the opportunity to submit, for your deliberation, our comments on the business use of the Freedom of Information Act.

Thank you for your consideration.

Very truly yours,

Terry Miller

Terry D. Miller
President

TDM/dd

Atch.

7023 Little River Turnpike, Suite 205, Annandale, Virginia 22003
703-354-4050

our CAT license to a U.S. firm.

This is the second occasion regarding the same technology on which a foreign firm has sought otherwise unavailable data, citing the Freedom of Information Act.

In most countries other than the U.S., the patent situation is a "race to file." That is, the patent grant goes to the first applicant to file. By contrast, in the U.S., the patents are filed in the names of the inventor, and the patent grant is dependent on the date of conception and reduction to practice rather than being first to file. You can readily see the competitive advantage given to a company by having lead time access to unpublished information is lost through unrestrained access to grant files.

Studies have demonstrated that in the U.S., the transfer of technology occurs primarily through personal interaction and in the presence of personal incentives. It is a very difficult job to interest a U.S. company in taking on for development an invention that was not originally conceived within that company. In contrast, and for particular example in Japan, the emphasis is more upon group than personal achievement, and they will quite readily drop an internal project if they see another technical approach that appears better. Another study, of innovation in the Soviet Union, has illustrated that their system simply does not produce innovation. Federal agencies and grantees are well aware of tremendous interest of foreign nations in gaining rapid access to the latest U.S. research information.

The point of citing the foregoing CAT case, the comparison of our first-to-invent and most foreign first-to-file patent systems, and the contrast of our system of incentives with other countries, needs to be made clear. It is that the unrestrained application of the Freedom of Information and

Paul Revere, and ride through the streets shouting, "The Government is coming! The Government is coming!"

It is usually helpful to be able to focus on an issue, to understand it in terms of its relationship to specific cases, rather than to discuss an issue as an abstraction. I would like to briefly recount recent experiences which will be relevant to an understanding of at least one facet of the impact of the Freedom of Information Act and the Sunshine Act on inhibiting utilization of research results for benefit to the U.S. public.

The Commission is perhaps aware of the computerized axial tomography (CAT) market because of the effect of X or Gamma Radiation upon patients undergoing CAT. This is a very fast-moving market, with the first sale of a CAT system having occurred in 1973. The market is presently dominated by a British company, EMI, and apparently only one U.S. company, Ohio Nuclear, is profitable, according to trade sources. EMI has had over 20 U.S. patents issued to date, and Ohio Nuclear is now a defendant in patent infringement litigation initiated by EMI.

A Stanford research physicist on an NSF research grant involving a particle accelerator in our high-energy physics laboratory became interested in the computerized reconstruction of images of x-rays. He conceived some significant inventions, and through the NSF Institutional Patent Agreement, we filed patent applications and were eventually successful in licensing a U.S. company hoping to enter the CAT market.

We received a telephone call the week before last from a New York law firm which asked that we produce all information

APPENDIX 12.—LETTER FROM NIELS J. REIMERS, MANAGER, TECHNOLOGY LICENSING, OFFICE OF TECHNOLOGY LICENSING, STANFORD UNIVERSITY, DATED NOVEMBER 2, 1977

STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
Area Code 415 497-3567

OFFICE OF
TECHNOLOGY LICENSING
ENCINA 6-930

November 2, 1977

NOV 1977

The Honorable Richard Preyer
Chairman, Government Information and
Individual Rights Subcommittee
U.S. House of Representatives
Washington, D.C.

Dear Congressman Preyer:

Will you please make the following document part of the record of your October 3 and 4 hearings on the third and fourth exemptions of the Freedom of Information Act: "Testimony Before the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research."

Very truly yours,

Niels J. Reimers
Manager, Technology Licensing

Enclosure
NJR:sh

commercial or financial information if found to be in the public interest. We strongly oppose such a suggestion. The sanctions of 18 U.S.C. 1905 were in existence long before the Freedom of Information Act. The scope of exemption of the Freedom of Information Act for "trade secret and commercial or financial information" suggests the scope of the subject matter protected by the criminal statute.

To give an agency the discretion suggested would amount to total abdication by the Congress of its responsibility for protecting the property rights inherent in trade secret, commercial or financial information; information which is presently protected by the criminal statute. Provisions similar to this criminal statute are found in a host of different laws pertaining to individual agencies which further evidences the intent to protect this valuable property from unwarranted disclosure. Clearly, the Congressional intent in Exemption 4 was to avoid any appearance that the Freedom of Information Act should preempt the criminal sanctions of 18 U.S.C. 1905. If there is any ambiguity about this fact, we believe that Congress should clearly state that the two sections are in harmony and that Exemption 4 of the Act was included to avoid any conflict with the preexisting criminal statute.

over the last three years. Mr. Gardner mentions 13,000 Freedom of Information Act requests in 1975, 21,800 in 1976, and about 470 per week in 1977. Uncompensated cost in 1976, he estimates, exceeded one million dollars. More than 80 percent of these 1976 requests "originated from industry or persons working on their behalf." Mr. Gardner stated that in 1974, seven person-years were consumed in responses to these requests, 43 person-years in 1975 and 67 person-years in 1976. A copy of Mr. Gardner's written statement is attached.

It is definitely in the public interest to put a stop to the use of government time and resources by private concerns for industrial espionage and by attorneys seeking to bypass established discovery procedures in the courts. Accordingly, to prevent the abuses which have thus far become evident we urge the Congress to clarify its intent regarding this portion of the Freedom of Information Act.

"Reverse Information Act Suits"

It has been suggested in some testimony that "reverse Freedom of Information Act suits" be severely restricted. The rationale advanced is that the public

Procedural Defects

A number of the speakers before this Subcommittee have noted certain procedural defects in the administration of the Freedom of Information Act's Exemption 4, probably the most noticeable of which is the lack of provision for notice to the submittor of information when a request is made to the agency under the Freedom of Information Act. The two examples cited above of Dow's experience illustrate the difference that such notice can have on the ultimate loss or protection of technology.

Mr. Braverman's testimony has noted the distinction intended by Congress between information of government origin and information of private origin. Since the fourth exemption is essentially an exemption for information of private origin, and since it has been documented that the majority of requests under the act are made by competitors or attorneys for private litigants or competitors, it would be reasonable to apply a separate standard to requests for information which is of private origin as opposed to information which is of government origin. As to information of private origin, such information should not be disclosed except upon a showing by the requestor of necessity and undue hardship. This showing would be required before the government or the

In another example, Dow was required to submit information to a federal agency concerning production rates and total production of a specific Dow product as well as some detailed technical information concerning the process itself. U.S. competitors of Dow requested the information from the agency under the Freedom of Information Act. An alert agency official, noting that the information requested was typically considered trade secret or commercial or financial information, notified Dow of the request thereby permitting us to make claims to the confidential portions of the information and requiring us to substantiate these claims. The request was subsequently denied for almost all of the information designated by Dow as confidential. This is an example of good agency practice recognizing the value and proprietary nature of privately developed technology. However, the expense to Dow in terms of employee hours expended to review and justify the claim of confidentiality for this limited amount of information was at least 110 person-hours. This involved diverting the efforts of at least ten different Dow personnel from otherwise productive activities. It is certainly not within the spirit of the law to require that much effort to justify the protection of one's own property.

against industrial espionage, there will be absolutely no incentive for private industry to generate such technology.

We are in almost complete agreement with the remarks of Mr. Braverman before this Subcommittee and commend him for one of the most thoughtful analyses of the issues surrounding Exemption 4 we have encountered.

It is clear, as Mr. Braverman's testimony has shown, that the original intent of Congress for including the "trade secret" exemption to the Freedom of Information Act was to preserve in confidence any private technology which happens to come into the possession of the government. However, in many instances the burden imposed by the courts on the submittor of information or the agency holding such information has been so great that little, if any, protection has been given.

Specific Examples

We have noted that the record before your Subcommittee contains little in the way of actual examples where a business has lost privately generated information. For that reason, we are pleased to report on some actual incidents.

APPENDIX 11.—LETTER FROM JAMES H. HANES, VICE PRESIDENT AND GENERAL COUNSEL, DOW CHEMICAL CO., DATED NOVEMBER 1, 1977



THE DOW CHEMICAL COMPANY

MIDLAND, MICHIGAN 48640

November 1, 1977

The Honorable Richardson Preyer, N.C.
Chairman, Subcommittee on Government
Information and Individual Rights
House Committee on Government Operations
B-349-C Rayburn House Office Building
Washington, D.C. 20515

Subject: OVERSIGHT HEARINGS ON EXEMPTION (b)(4) OF THE FREEDOM OF INFORMATION ACT

Sir:

The Dow Chemical Company appreciates the opportunity to submit the following comments concerning the operation and administration of the trade secrets and commercial or financial information exemption to the Freedom of Information Act.

We recognize that citizens of our country have a legitimate interest in observing the workings of their government by inspecting some of the documents this government generates in the performance of its duties. However, we believe it is not in the public's interest for a domestic or foreign competitor of a business, or indeed even a foreign government, to obtain privately generated trade secret, commercial or financial information contained in the files



Reverse FOIA - Right of Judicial Review

There seems to still be some doubt in some courts as to the viability of the so-called "reverse FOIA" action. There should be a statutory right created under FOIA for a source to bring a suit seeking an injunction to prevent disclosure of information which it designated, either prior to or at the time of submission to the Federal agency, as being non-disclosable. In order to prevent abuse of this provision, attorneys' fees could be provided for the prevailing party. Any review in such litigation should be de novo, i.e., review should not be limited to the issue of whether or not the agency abused its discretion, but rather all issues of releasability should be encompassed in the litigation.

The Competition Question

The intent of the FOIA was not to release any and all information in the government's hands to the public. It was recognized at a very early stage that the release of certain information, such as trade secrets, was not advisable. The test that has evolved in the courts is whether release would cause substantial competitive harm to the submitter. However, current judicial interpretations do not allow review of the basis of the information request, and the nature of the requester's business, in making a determination as to whether the information requested should be disclosed. If the standard for non-disclosure is potential for substantial competitive harm to the submitter, these avenues of inquiry seem exceedingly relevant, and should be reviewable issues of fact in a reverse FOIA suit. If the substantial competitive harm test is to be maintained, it should be defined and codified.

THE DISCLOSURE DILEMMA - PUBLIC vs. PRIVATE RIGHTS

Introduction

Much space has been devoted to the plethora of paper submitted to the government. At present, the U.S. Paperwork Commission is rumored to be buried under a mound of it, and there appears to be a state of chaos in industry and government because of the large number of reports required by law and regulation to be filed with a multitude of Federal agencies.

Much of the data contained in these reports is of a highly confidential nature and would not ordinarily be voluntarily released by the submitter to the public. Some Federal agencies have included pledges of confidentiality on their reporting forms or in their regulations, but these pledges are beginning to be retracted prospectively. This is putting many submitters into the position of being afraid that compliance with the law will jeopardize their competitive positions through release of their confidential information to persons or companies to whom it would not otherwise be available.

Thus -- the dilemma: what is the legislative response when the public's right to know collides with the private right of confidentiality? We hope that some of the following thoughts and recommendations may shed some light on this dilemma.

Public vs. Private Documents

One problem presented in this area evolves from the efforts of some agencies to circumvent FOIA's tortuous route in allowing requesters to make "non-FOIA" requests without application of FOIA safeguards by the agency. If such a direction is to be allowed, some clear definition must be stated vis-a-vis what constitutes "pure" government-generated data as opposed to private source-generated data.

Oftentimes what an agency may deem to be a "pure" government-generated document may well be composed of information which was derived from reports submitted by various private sources. In the hands of skillful minds, the wheel may be disassembled so as to expose the spoke, i.e., the source. Such exposure may indeed result in substantial competitive harm, or perhaps violate the prohibition of Exemption 3 of the FOIA.

sufficiently objective that the requester can be certain that the agency has given his request a fair hearing, even though a "proceeding" or a "rulemaking" is not conducted during the appellate stage unless the ALJ and the agency agree to provide one. While the final decision to waive the invocation of the exemption would still be made by a political official responsible to the agency head (as is the current accountability system for appeals), better input to that decision would be received and an agency would have an incentive of additional time as an inducement to its use of the more thoughtful procedures.

The problem to be resolved is the crush of many documents, a brief time period, and complex legal decisions to be made about release or withholding. Presently, denial is the easiest course of action, but that breeds more litigation and more work for the agency during preparations for in camera review. Use of administrative law judges would offer hope of resolving each of these issues.

* * * * *

I appreciate the opportunity to file these comments for your Subcommittee's hearing record.

Sincerely,

James T. O'Reilly

cc Hon. Bill Gradison
House of Representatives
Washington D.C. 20515

> to the agency prior to its final determination, but in no case shall the additional period for such examination exceed forty days. If on appeal. . .

Rationale for Proposed 5 USC §552(f)

Perhaps the clearest statement of the privacy concerns which underlie the existing Freedom of Information Act amendments was the 1963 Senate testimony of the Administration's lead witness, Assistant Attorney General Schlei:

> "[C]oequal to the right of members of the public to information in the possession of their Government is their right to the protection of that information to the extent that its disclosure would unjustly injure them as individuals. In our society, the individual's right to privacy is as deserving of recognition as his 'right to know'. "

Business confidential information may not seem, on its face, to bear a relation to individual privacy. But the perspective of the Congress which adopted the Freedom of Information Act in 1966 should be kept in mind by the reader in 1977. Private information about individuals was deemed exempt under exemption (b)(6) at the request of the agencies, and private competitively-sensitive data which was filed with agencies by the private sector commercial "person" was also the subject of a number of specific, agency-originated requests for exempt status. The Treasury and other agencies testified about the need for commercial firms to be able to continue their practice of limiting dissemination of confidential business information, lest, in the Treasury's words, the "ground rules of American business" would be upset.

Those ground rules enforce privacy with a variety of traditional legal sanctions, the predominant of which is the trade secrets protection of state criminal law. Trade secrets consist of those nonpatented items which are used or available for use in the continuous operation of a business enterprise, which are in fact secret, and which provide a competitive advantage to the secret's owner. As recently as in the 1974 Kewanee case, the Supreme Court has respected the need for confidentiality to be supported by stiff sanctions against misappropriation. As recently as 1976, Congress has imposed sanctions to protect against misappropriation of government-filed private secrets in specific fields (Toxic Substances Control Act, 15 USC §2613).

These historical expectations of business privacy are as alive today as they were when the Moss Committee accepted them as exemption (b)(4) in its revision of the Scher draft of the Freedom of Information Act. The expert in this legal field, Roger Milgrim, Esq., has estimated that one billion dollars of the nation's favorable balance of world payments comes from licensing of trade secrets and proprietary technology. Journals such as the Harvard Business Review and the American Criminal Law Review have

APPENDIX 9.—LETTER FROM JAMES T. O'REILLY, ATTORNEY AT LAW, DATED OCTOBER 25, 1977

JAMES T. O'REILLY
ATTORNEY AT LAW
2849 EAST ST. CHARLES PLACE
CINCINNATI, OHIO 45208
(513) 321-5040

October 25, 1977

Hon. Richardson Preyer
Chairman
Government Information & Individual Rights Subcommittee
House Government Operations Committee
B-349C Rayburn Building
Washington, D.C. 20515

Re: Freedom of Information Act Oversight Hearings, October 1977

Dear Mr. Chairman:

I would like to submit a statement for the record of your Subcommittee's hearings on the Freedom of Information Act, in the expectation that it may be of some value to your staff's examination of the issues. I regret that I was not aware in advance of the hearings, but I have been able to read portions of the testimony presented therein by representatives of several federal agencies.

On August 22, McGraw-Hill Book Company published my text, Federal Information Disclosure: Procedures, Forms, and The Law. The book is the first comprehensive sourcebook on the Freedom of Information Act and the Privacy Act, and also includes chapters on the Federal Advisory Committee Act, the Government in the Sunshine Act, and federal agency publicity practices. I have also published twelve legal articles, the majority of them on the subject of government openness and confidentiality issues, in such journals as Business Lawyer and the University of Missouri's Freedom of Information Center Reports. My views on this subject are my own and do not represent the views of any institution.

An issue which your hearings discussed, according to newsletter reports, was the troublesome topic of protecting commercial business information from inappropriate disclosures while maintaining the balance of openness which has been the goal of the trilogy of openness statutes developed by or in cooperation with your Subcommittee over the past two decades. Since approximately 120 of the 800 pages of my text, and several articles, have been devoted to the subject of busiuess confidentiality matters, I would appreciate an opportunity to file these comments on that subject.

Proposed Language

As suggested in Chapter 10 of my text at page 10-37, a first step to resolve this controversial issue would be consideration of the following statutory amendment to 5 USC §552, adding at the end thereof:

> (f) Any person submitting documents or other records which are properly identified as the private, confidential property of that person at the time of submission, or which subsequently are marked in accordance with agency regulations as confidential, shall

tect its interests. In short, notice and appropriate government response to a restraining order requests are essential to the information requestor in its attempts to obtain the information. Provision should be made for such timely notice to be given by the agency possessing the information.

Finally, a number of other issues arising in conjunction with reverse FOIA suits are explored in two thoughtful law review articles, to which we invite the attention of this Subcommittee. The articles are Clement, "The Rights of Submitters", supra, and Campbell, "The Reverse Freedom of Information Suit: The Need for Congressional Action" (to be published). Although we do not agree with every suggestion in each of the articles, they outline a number of provisions which, if incorporated into statutes, would alleviate the more serious delays and expense caused by reverse-FOIA cases, while preserving a fair opportunity for the information provider to protect any legitimate interest in document confidentiality.

identical) position to the information requestor regarding disclosure, the applicability of current FOIA provisions may be ambiguous. Some provision for award of attorneys' fees to the information requestor who is forced to pursue information in the face of a reverse-FOIA suit would help further the original purposes of the attorneys' fees provision in the FOIA itself.

4. Clarification of the scope of 18 U.S.C. §1905 and its effect on the FOIA. A great deal of reverse FOIA litigation has focused on 18 U.S.C. §1905, a statute which provides criminal sanctions against the government officials disclosing trade secrets. The issue comes up in two ways: first, information providers argue that Congress intended to incorporate §1905 into Exemption (b)(3) of the FOIA, which exempts from disclosure information otherwise exempted by statute. Although it seems fairly clear that Congress has not intended to include such a broad and general statute as §1905 in that exemption (see H. Rep. No. 94-880, 94th Cong., 2nd Sess., Part I. 23 (1976)), a clarifying statement would be helpful.

Second, information providers argue that §1905 is a broad statute and encompasses a great deal of the information which is provided to the government. In fact, substantial evidence exists that §1905 was intended to be quite restrictive. A cogent argument for that view is made in Clement, "The Rights of Submitters to Prevent Agency Disclosure of Confidential

if the agency denies that request and decides to disclose the documents, the information provider then goes to court to block disclosure of the information. The review sought is from agency action (denial of a request for confidential treatment) which has been made on an agency record. The review--just like any other review of administrative agency action--should be made under the Administrative Procedure Act provisions for review on the agency record. 5 U.S.C. §706(2)(A). No special reasons to accord information providers review de novo in the district courts have been put forth, and none exist.

Nevertheless, most courts which have considered the matter have held that the information provider has a right to de novo review in the district court just because the FOIA provides such a right to the information requestor. See, e.g. Sears, Roebuck and Co. v. GSA, supra (opinion of April 1, 1977); Westinghouse Electric Corp. v. Schlesinger, supra. Only the Third Circuit has ruled otherwise. See Chrysler Corp. v. Schlesinger, supra, F.2d , slip op. at 43-47.

The de novo procedure seriously delays review and causes extraordinary expense to both the information requestor and the government, which must go through a second evidentiary process. Congress should make clear that no reason exists for the information provider to have the extraordinary remedy of de novo review, and that review on the agency record is sufficient. Of course, the customary standards for sufficiency of the agency record and agency process applicable in all Adminstrative Procedure Act reviews would protect the information provider adequately.

equal employment statistics in order to work on remedying employment discrimination. Such organizations generally have limited funds and cannot easily pursue expensive reverse-FOIA litigation. When faced with the bar of a reverse FOIA suit standing between them and access to the data which they want and the government wants to give them, such groups are faced with the choice of giving up their request, or relying on government attorneys to press their claims in lawsuits in which they have a serious interest but cannot afford to be parties. As courts have recognized, reliance on the government, which is not always sufficiently diligent in pressing the interests of the information requestor, is not adequate. See Consumers Union v. Consumer Product Safety Commission, supra, slip op. at 8-9, 12-13, 16-17. Some changes in the procedures governing reverse FOIA cases can help assure that courts do not continue to be seriously weighed down with extended reverse-FOIA litigation.

Interest of the Information Provider

We would like to stress that we believe the information provider does have an interest in the process to determine what information must or should be disclosed to an information requestor under the Freedom of Information Act. We think that sound rules and principles would balance the interest of the information requestor against the interests of the information provider, but would redress the current imbalance which weighs so heavily in favor of the information supplier.

parties, including the government and D.C. NOW, also prepared extensive written documents. In December, 1976, the District Court entered an order denying the injunction in part. D.C. NOW v. SSA, supra, 426 F. Supp. 150. Significantly, the Court did not enjoin disclosure of the EEO-1 forms, in accordance with a requirement for disclosure of those documents in an OFCCP regulation, 41 C.F.R. §60-40.4.

All parties appealed the District Court ruling. In addition, the companies sought certiorari in the Supreme Court before action by the Court of Appeals. When certiorari before judgment was denied, 97 S.Ct. 2198 (1977), the companies went back to the Court of Appeals and sought a further stay there. A stay of disclosure of certain documents was entered, and the cases are now being briefed in the Court of Appeals.

We have set forth this rather lengthly procedural history of the case as an example of the complexities and delay which reverse FOIA cases can bring about for those seeking disclosure of government information under the Freedom of Information Act. In light of the clearly-expressed intention of Congress that the Freedom of Information Act be a tool to make available information expeditiously, that delay must be a source of concern to this Subcommittee as well.

Nor is the case of D.C. NOW v. Social Security Administration an isolated one. In a large number of cases in which organizations and individuals have sought similar equal employment data

Under the federal contract compliance program, every government contractor, as a condition of doing business with the government, pursuant to the requirements of Executive Order 11246 as amended must work to eliminate discrimination in its workforce on the basis of race, sex, national origin and religion. The Executive Order contract compliance program is administered in the first instance by the Office of Federal Contract Compliance Programs of the Department of Labor ("OFCCP"), which has delegated enforcement responsibility to a number of other federal agencies. The Social Security Administration is the primary enforcer for the insurance industry.

In August, 1975, D.C. NOW filed a request under the Freedom of Information Act seeking the EEO-1 forms and AAPs which four insurance companies had filed with the government for a single year--1975. It sought the information in order to determine whether the companies it had targeted had discriminatory employment practices, and if so, to seek a remedy for the discrimination. That purpose would help implement an important national goal to create fair employment opportunities for all citizens. The federal government itself has recognized that making employment statistics regarding use of women and minorities available to outside groups will help further that goal.

Shortly after D.C. NOW filed its request, a Freedom of Information Act officer denied their request. D.C. NOW took an appeal within the agency. When the appeal went undecided for

APPENDIX 8.—LETTER FROM LOIS J. SCHIFFER, CENTER FOR LAW AND SOCIAL POLICY, DATED OCTOBER 14, 1977

CENTER FOR LAW AND SOCIAL POLICY

1751 N STREET, N.W. WASHINGTON, D.C. 20036 202 872-0670

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Herbert Semmel
Harvey J. Shulman
Attorneys at Law
* Not admitted in D.C.

October 14, 1977

The Honorable Richardson Preyer
Chairman, Government Information and
Individual Rights Subcommittee
Rayburn House Office Building, Rm B-349-B-C
Washington, D.C. 20515

Dear Respresentative Preyer:

Thank you for your invitation to submit written comments on the issue of reverse Freedom of Information Act suits. We understand that they will be included in the record for hearings held on this subject by the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations on October 3 and 4, 1977. Enclosed is a written statement setting forth our position on these matters.

Thank you again for your consideration.

Sincerely yours,

Lois J. Schiffer /pmt

Lois J. Schiffer

Encl:
LJS/pmt

	Name of Survey or Report	Data Supplied	Use of Data by Government	Frequency Response
15.	Current Industrial Reports on Manufacturers' Shipments, Inventories and Orders	Shipments or net sales, net new orders received and unfilled orders end of month, and material and supplies, goods in process, finished goods and total inventories.	Is one of the most important current economic indicators prepared in the U.S. Also the Council of Economic Advisors, other government agencies, business and consulting firms use these statistics to evaluate business conditions.	Monthly
16.	Current Industrial Reports on Mill Shapes and Forms	Receipts, use and inventory of steel mill shapes and forms.	The Census Bureau will publish industry totals in the Current Industrial Reports.	Monthly
17.	Current Industrial Reports on Copper-Base Mill Products	Receipts, use and inventory of copper-base mill products.	The Census Bureau will publish industry totals in the Current Industrial Reports.	Monthly
18.	Current Industrial Reports on Export Sales and Orders	Shipments or net sales of export.	The Census Bureau will publish industry totals in the Current Industrial Reports.	Monthly
19.	Current Industrial Reports on Paint, Varnish and Lacquer	Production and sales of paint, varnish and lacquer.	The Census Bureau will publish industry totals in the Current Industrial Reports.	Monthly
20.	Sources and applications of funds of U.S. Direct Investments Abroad	Source of funds, applications of funds and sales for each foreign affiliate which is owned directly or indirectly to the extent of 50% or more by Chrysler Corporation.	This data will give a measure of foreign investment by United States companies with and comparable to data on gross capital investment in the United States and in foreign countries and will accurately reflect trends in real investment activity sources of funds and output.	Annual

	Name of Survey or Report	Data Supplied	Use of Data by Government	Frequency of Response
5.	Employment Cost Index	Base wage rates for selected classifications (in September will begin to report fringe benefit cost data).	An index of changes in the price of labor similar to the CPI which measures changes in the price of goods.	Quarterly
6.	BLS 790-C Report on Employment, Payroll and Hours-Manufacturing	By month, by location, employment by sex, number of production employees, total production worker payroll, and manhours and overtime manhours.	Data utilized in 2,600 separate published series, some directly from the data collected; others after adjustments, such as seasonality, are made.	Monthly
7.	Foundry Survey - Industry Wage Survey Series	Employment, wage or salary, and level of benefits for selected jobs in the industry.	Shows wage or salary rates and benefits provided for selected jobs within the industry nationally and by major geographic regions.	Triennial
8.	Metal Working - Industry Wage Survey Series	Employment, wage or salary, and level of benefits for selected jobs in the industry.	Shows wage or salary rates and benefits provided for selected jobs within the industry nationally and by major geographic regions.	Once every five years
9.	Motor Vehicles and Parts - Industry Wage Survey Series	Employment, wage or salary, and level of benefits for selected jobs in the industry.	Shows wage or salary rates and benefits provided for selected jobs within the industry nationally and by major geographic regions.	Once every five years

defend confidentiality in a "reverse FOIA" suit — a suit which companies such as Chrysler who have brought such suits have found very, very expensive. The cost to Chrysler of the reverse FOIA suit it is maintaining most certainly has to be recognized as a substantial disincentive to Chrysler's continued willingness to supply the Government the information it from time to time requests.*

Finally, in addition to decreasing the trust a citizen can have in his Government and the Government's ability and will to keep its promises, the most egregious fault of this substitution of standards is that the courts have ignored the will of Congress and substituted their own tests for maintaining the confidentiality of the privately supplied information. The courts in National Parks and that line of cases have ignored the role of Congress in making laws and arrogated that function to themselves.

In the opinion of Chrysler these developments constitute a gross misapplication of the law. We urge Congress to make clear the law to the courts through the enactment of specific language adopting the Senate and House reports on the original Exemption 4. Thereafter, when Congress determines that a specific category of documents should be made available to the public, Congress can do so through mechanisms familiar to it. However, for the courts to make wholesale categories of private documents available generally to the public is a gross misconception of the intent of Congress which Congress should at this time correct.

Very truly yours,

SLT:sly

Enclosures

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*In fact, much to its regret, Chrysler has recently been forced to deny the Government information it sought because of the sensitivity of the information and, quite frankly, Chrysler could not trust the Government's assurances of confidentiality. See Exhibit 2 hereto. It would certainly be unfortunate if, because of the Government's untrustworthiness, Chrysler were required to deny the Government the information listed in Exhibit 1, for in such event all the people (including the Government) would be the losers.

Clearly, when Congress enacted the Freedom of Information Act, it did not intend to make generally available all information obtained from the public. In fact, the Senate reported on Exemption 4 that:

> "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained."
>
> (S. Rept., 88th Cong. 6)

The House likewise reported that Exemption 4:

> ". . . would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government . . . It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."
>
> (H. Rept., 88th Cong. 10)

Chrysler submits that in construing the Act the courts have misconceived, and therefore departed from the intent of Congress in two respects. First, the courts failed to

not to be penalized for having been cooperative. When Chrysler voluntarily supplies the Government information Chrysler indicates is confidential, Chrysler usually does so on an express promise of confidentiality. In most such cases Chrysler has had a relationship with the requesting agency such that Chrysler felt it could have confidence in the agency's promise of confidentiality. However, Chrysler is becoming increasingly concerned that these promises will be meaningless in the face of Freedom of Information Act (hereafter sometimes called "FOIA") requests. Grounds for such concern are based on published decisions of the courts, such as Legal Aid Society of Alameda County v. Schultz, 349 FSupp 771 (ND Cal 1972), where the court said:

> ". . . administrative promises of confidentiality cannot extend the command of the Freedom of Information Act that only matters 'specifically exempted from disclosure by statute' are protected . . . it is now well settled that because of the specific command of §552(c), discussed above, the courts have no discretion to refuse to order disclosure on equitable principles. . . ."
>
> At page 776.
> Emphasis in original.

Furthermore, even if an FOIA exemption is available, providers of information such as Chrysler have absolutely no assurance that the Government will raise that exemption as a shield against disclosure. By his letter of May 5, 1977 to "Heads of All Federal Departments and Agencies", Attorney General Griffin Bell advised that:

> "The Government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department

notice, or the suggested use of a Presidential directive or agency regulations to help assure such notice. For example, if a company has participated in an administrative proceeding such as is discussed above in answer to question 4h, 20 days notice before a decision adverse to the company can be carried out may be more than necessary, considering the policy favoring speedy processing of FOI requests. We also believe that the Recommendation No. 9 for a recodification of so-called Exemption 3 statutes at least warrants serious consideration. Such a project would probably require considerable effort involving numerous agencies. It might point to the elimination of some undesirable or unnecessary statutes with the benefits suggested in the draft report, although other 3rd exemption statutes, such as that protecting income tax returns, census information, etc., would presumably be left undisturbed.

Time has not permitted us to ascertain in detail the relationship of the suggestions expressed in this letter to the program of the President, or to discuss with the Office of Management and Budget or other agencies the legal analysis we have set forth. Accordingly, this letter does not necessarily express the policies of the Administration and its conclusions may be subject to later modification.

Sincerely,

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

If an agency upon instituting an administrative proceeding agrees in advance that the decision of the independent tribunal which is to conduct it will be accepted as binding by the agency, court review upon suit by either the requester or the company should require the plaintiff to prove the decision was clearly erroneous and substantially prejudicial. But if an agency institutes a proceeding before a tribunal that is not independent of the agency, or if the agency retains its right not to follow the decision of an independent tribunal, the actions of both the tribunal and of the agency should be admissible in any suit under the Act or reverse suit and be given such weight as they may merit.

QUESTION: "i. Should declaratory relief be available?"

ANSWER: We take it that this question means, should a company be permitted to sue and obtain a court decision on whether company furnished information can legally be released by an agency over the company's objection, in advance of an agency's decision to make such a release, and perhaps in advance of a request for the material under the Act, or even before the material has been provided to the agency.

We doubt that there is a sufficient need for such relief, in the form of a general remedy of this nature that goes beyond such declaratory relief as may now be available, to warrant its drawbacks. Such drawbacks seem to include litigation that might otherwise be avoided altogether (a factor to be weighed against the earlier attainment of certainty which declaratory relief is designed to provide), litigation that would be likely not to include adequate challenges to the plaintiff's assertions due to the absence of a requester and an

lie with the agency, which might institute it upon its own initiative or upon that of the requester, the company, the Justice Department, or the court. Of course, if an agency chose not to have an administrative proceeding on a particular matter, this would not preclude a reverse suit; also, an agency could institute such a proceeding without being sure that a reverse suit would be filed if it finds a substantial controversy between the requester and the submitter of information.

Some of the possible advantages of such administrative proceedings have already been noted: better agency decisions that take adequate account of both sides, and less frequent but more informed and expeditious judicial review. Such proceedings may also tend gradually to develop a body of precedent, practice or expertise that should reduce present uncertainties and thus benefit agencies, companies, and the public.

Such proceedings should not be automatically and routinely required, because they involve some delay and burdens for the requester, the company, and the agency, and may well be unnecessary and wasteful where the issues are simple and the answers seem clear. Moreover, to make such proceedings a "necessary prelude" to any reverse suit would create other complications. When an agency is trying to decide whether to grant or deny access and whether to institute a proceeding to help reach such a decision, the agency will not know for certain whether a decision to grant access will mean a reverse suit, and it would seem undesirable to force the company into a binding commitment to sue or not to sue in case of a grant before the agency has reached its decision, merely so that the agency will know whether or not it must institute a proceeding.5a/ Whether or not a company expresses an intent to file suit in case of a grant, to require the agency to conduct an otherwise unnecessary administrative proceeding would actually serve chiefly to delay possible release, and to involve the requester in the added burden of such

5a/ Of course, participation in an administrative proceeding should probably be a "necessary prelude" to filing a reverse suit where the agency has chosen to conduct such a proceeding but the reverse suit plaintiff has chosen not to participate in it.

shopping, which of course is not confined to corporate plaintiffs and may not always be undesirable. In reverse FOI suits this tactic may mean the filing of suit in judicial districts that are geographically inconvenient to the defendant agency and to the requester seeking the information, or where the court selected can be viewed as more sympathetic to corporate positions and less familiar with the Act. The result may be effectively to discourage participation in court by the requester, or to present the problem of two suits in two different judicial districts over access to the same records, a suit under the Act to obtain access and a reverse suit to enjoin access. 4/

Another general problem in reverse suits is that of building a court record that adequately reflects not only the plaintiff's case but also those of the agency and the requester. Agencies and requesters will seldom have available the services of experts to test or challenge the presentations of company witnesses that the contemplated release would be injurious. In addition, the adversary judicial process is not likely to achieve desirable results in those reverse suits where the agency feels itself to be largely a disinterested stakeholder in a dispute between the company and the requester, while the requester lacks the resources effectively to dispute the company and relies on the agency to do so. This problem can be considerably alleviated by administrative proceedings, as discussed below in answer to the next question, "h".

A partial remedy for undue forum shopping, and one that certainly seems fair, would be

4/ See story "Court Reaffirms Order Reinstating Suit to Get Television Set Safety Data" in Access Reports, Sept. 20, 1977 at p. 12, describing developments in a reverse FOI suit brought by manufacturers in Delaware and an FOI suit by public-interest groups in the District of Columbia involving the same material.

QUESTION: "e. Should exemption 4 material be identified when submitted?"

ANSWER: It would often be of some help to companies, to agencies, and perhaps to courts, to encourage the practice by companies of identifying at the time of submission the particular materials or portions thereof that the company claims to be covered by Exemption 4. It would safeguard against the inadvertent release by agency personnel of such material. However, such a company claim would not be conclusive, especially where the 4th exemption character of the material is not plain, or where the passage of time may erode such character. Moreover, the function of deciding whether particular material is or is not covered by Exemption 4 rests with the agency that holds it, 3/ subject to possible court review at the instance of a requester under the Act or the company.

It would be wasteful for all agencies to determine in every case what business information is covered by Exemption 4 at the time of submission, as most of it would never be sought under the Act, and, as to the balance, matter determined to be covered when submitted may have lost its exempt character at the time of a request under the Act. Nevertheless, there may be special circumstances where such a determination by the agency at the time of submission would be of sufficient value to a company and to the public to warrant making it despite the drawbacks noted.

QUESTION: "f. Should submitters be notified of requests for information that they have submitted before records are disclosed?"

ANSWER: Clearly yes, in the interests of fairness to the submitter as well as of maintaining the

3/ This is a function in which the company can assist the agency, both by notice of its claim of confidentiality and by providing explanatory matter where the basis of the claim is unclear.

to obtain information from those who may fear its further dissemination, and experience in coping with some of these conflicts may be of possible use in dealing with others. Before devising specific remedies for a conflict, however, it would often be highly desirable to have more precise information on the magnitude and seriousness of the loss of needed information by the government.

QUESTION: "d. Can exemption 4 material be released on a discretionary basis?"

ANSWER: The correct answer in our view is clearly yes, despite some conflict and confusion in the caselaw, 2/ where such a release would not be an abuse of discretion or a violation of some other statute.

Exemptions under the Act have long been recognized as options to withhold, not as prohibitions against access, although other laws may sometimes prohibit access. This option principle is not only important to the Act's main objective of greater openness, but it is also administratively very valuable in permitting the granting of FOI requests without the need for difficult and possibly precedential determinations whenever the legal status of the requested records is clearly exempt or uncertain but the agency has no good practical reason to deny access. Attorney General Bell's May 5, 1977 letter to the heads of all agencies, calling for the release of technically exempt material where release would involve no sufficient prospect of actual harm to legitimate public or private interests, is based in part upon the power of discretionary release under the Act.

2/ Two court of appeals decisions have plainly stated that there is some discretion to release fourth exemption material. Charles River Park "A" Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976). One Court of Appeals decision, which erroneously cited Charles River Park A as supporting its conclusion, seems to hold that there is not. Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied 45 U.S.L.W. 3749.

a definite restraining effect, and the effect may be greater when fears by business, whether or not exaggerated, outweigh any incentives to submit the information, but that the overall effect seldom amounts to a final cut-off of information that is clearly necessary to the government, even though substantial detriment to the effective performance of some governmental functions can be anticipated. 1/

More specifically, the existence and extent of this restraining effect can be expected to vary according to the particular agency, the agency component, the agency officials, the agency program or activity, and the policies and circumstances of the particular company, division or executives involved. The specific restraining effect, if any, is especially likely to vary with the general type or particular nature of the information, the motivations of the company and agency for respectively submitting and obtaining it, past relationships between them or company experiences with other agencies, a balancing by companies of financial and other risks and advantages of providing particular information, and whether the company is innocent, fearful, or accurately advised as to the degree and seriousness of the risks of disclosure.

It is important to note (a) that much of the business information that may be necessary to the government can be obtained by subpoena or similar powers, (b) that much of it can he protected under other exemptions,

1/ See story "Fear of Disclosure Makes it Hard to Collect Confidential Business Data, Agencies Say" in Access Reports of Sept. 20, 1977 at p. 11, reporting that witnesses for the FTC, EPA, and FDA told the Senate Administrative Practice and Procedure Subcommittee that there is increasing business resistance to furnishing needed information because of FOIA, particularly in connection with agency survey activities.

despite considerable difficulties and rare instances of excess or insufficient disclosure, are increasingly proficient in striking a reasonable balance between overdisclosure and underdisclosure. The conflicting pressures on agencies from both requesters and submitters of business information may offer some rough confirmation of this.

QUESTION: "b. Is the exemption as interpreted by the courts sufficiently predictable?"

ANSWER: Additional predictability is desirable and could perhaps be achieved without violence to present statutory policies, primarily by developing new procedures, but one should not exaggerate either the need for or the prospects of greater predictability without adverse policy effects. Predictability, while often important, is only one goal in most laws. Exemption 4 is probably no more uncertain in its overall application than, for example, Exemption 6.

Many practical questions under Exemption 4 are relatively easy to answer. For example, resumes of identifiable company executives and other skilled personnel, technology or business plans generated by a company and not generally known, or costs experienced by a company during current or recent periods, and not generally known, would be exempt. By a similar token, a list of previous federal contract awards to a company, financial data which can be found in the annual reports to stockholders of a publicly held company, or other information which could readily and legally have been observed by newsmen or others or which could not reasonably be expected to affect the company adversely, would probably not be covered by Exemption 4. In between, there are instances in which the facts are unclear, or where judgments are difficult.

Anon. Why many business secrets are now in danger. Nation's business, v. 63, December, 1975: 28-31. HF1.N4

Clement, Daniel Gorham. The rights of submitters to prevent agency disclosure of confidential business information: the reverse Freedom of Information Act lawsuit. Texas law review, v. 55, March, 1977: 587-662.

Cohen, Richard E. Justice report: new information law gets heavy use from public, businesses.. National journal, v. 7, July 5, 1975: 985-992. JK1.N28

Drachsler, David A. The Freedom of Information Act and the "right" of non-disclosure. Administrative law review, v. 28, Winter, 1976: 1-11. Law

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Redburn, Thomas. Open files: letting Exxon in. The washington monthly, v. 7, July-August, 1975: 18-23. E838.W37

Robinson, Proctor D. H. Notes: the plain meaning of the Freedom of Information Act: NLRB v. Getman. Indiana law journal, v. 47, Spring, 1972: 530-545. Law

We trust this list will be useful to you. Please do not hesitate to contact us (426-5821) if we may be of further assistance in this, or any other matter.

HR:mb

Question 4

In his testimony, Mr. Pape indicated that one person accounted for approximately five percent of all requests, and that this person published the information he obtained in a newsletter. If there is sufficient interest in the business community to support such a newsletter, has FDA explored the possibility of releasing the information on a subscription basis and thereby reducing many of the FOIA requests?

Response

FDA has no basis for supposing that there would be any interest at all in a newsletter related to FOI activities in this Agency, or that the commercial endeavor referred to by Mr. Stuart Pape will even be successful. There already exist several trade publications which routinely include FOI information on a weekly basis. Thus far, the existence of these publications has not resulted in any reduction in the Agency's FOI requests. In fact, it would be the Agency's judgment that the number of requests has actually increased whenever more exposure is given to our FOI activities.

For your information, the individual referred to by Mr. Pape represents a class of persons that accounts for approximately 40 percent of all the Agency's FOI requests.

in view of the number of requests received by this Agency. If such a requirement became a matter of law, the Agency would have to give notice of an impending release of material which has been marked as confidential much more often than we are currently consulting with firms where a close question is involved.

(c) A claim of confidentiality made at the time of submission would affect the consultation process only if Agency personnel determined that there was a question regarding the confidentiality of the records at the time the records were being reviewed in response to an FOI request. Before receipt of an FOI request for the records in question, there would be no need to be concerned with the confidential claim. It is highly doubtful that a claim of confidentiality would result in a significant increase in the opportunity for consultation between FDA and the submitter of the records.

(d) More often than not, consultation with the submitter of information to FDA results in the Agency having to exceed the statutory time limit in arriving at a determination regarding the disclosability of the records in question.

Question 2

Your regulations provide for consultation with the submitter of information when the confidentiality of data is uncertain.

(a) Is the person who requested the documents notified that consultation with the company has occurred? When an appeal of a release decision is filed by the submitter of the data, is the requester notified at this point that there has been outside consultation?

(b) It has been suggested by some that companies should identify confidential data at the time of submission, and that agencies should provide notice of the impending release of data so marked. Would this requirement differ greatly from your existing practice? Do you think that you would be required to give notice about as frequently as you presently consult with submitters?

(c) How does a claim of confidentiality made at the time of submission affect the consultation process? Will such a claim tend to result in more opportunities for consultation?

(d) What effect does a consultation have on meeting the time limits of the Act?

Response

2. (a) A person who requests documents under the provisions of the FOI Act is not normally notified that FDA has consulted with the submitter of the data in situations where the confidentiality is uncertain. After a determination has been made by the Agency, the records will either be disclosed or denied based upon the information received in the consultation process. If the submitter of the data brings suit to enjoin FDA from disclosing the data, the requester is notified that the matter is in litigation and that no disclosure can be made until all court appeals have been

be received for records which have been submitted pursuant to the presubmission review provision, we would respond to the requestor that the requested records were not a part of the Agency's files.

(b) The FOI Act contains no provisions which permit an agency to categorically deny requests for this type of information, if the records are a part of the agency's files and can be properly classified as "agency records." However, FDA has clearly stated that it will not accept documents submitted under a presubmission review request as part of the Agency's files until a determination of their status has been made. Therefore, rather than having to deny a request for these records, we would simply state that the requested information was not in the Agency's files.

(c) FDA believes that a determination of confidentiality can be made in advance of an actual request. This is, in fact, the basis of the presubmission review provisions. It is our belief that our regulations have adequately addressed the situation where changing circumstances could possibly alter the confidential character of information in our files. It must be remembered that all requests for records are handled individually in this Agency by a professional who is familiar with the records involved. Should there be a change in the status of specific records, the professional handling the request would be one of the few people who

APPENDIX 4.—LETTER FROM DONALD KENNEDY, COMMISSIONER OF FOOD AND DRUGS, DATED NOVEMBER 29, 1977

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION
ROCKVILLE, MARYLAND 20857

NOV 29 1977

Honorable Richardson Preyer
Chairman, Subcommittee on Government
Information and Individual Rights
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Preyer:

This is in reply to your letter of October 26 in which you posed a number of questions to supplement the record of your Subcommittee's hearing on the Freedom of Information Act.

Our answers to these questions are enclosed. If we can provide additional information, please let me know.

Sincerely yours,

Donald Kennedy
Commissioner of Food and Drugs

Enclosure

compile an adequate record for judicial review varies considerably depending on the length of documents and the complexity of the issues involved.

Question

4) Your regulations include some substantial guidelines for the release of OFCC information submitted by contractors.

a) Would it be desirable to use binding rules governing the release or withholding of some classes of information? Could this be done with information submitted on forms containing standardized EEO data?

b) Do you have authority under existing law to issue such rules? Should the FOIA be amended to specifically provide for this type of rulemaking?

c) Is there any other category of information within the Department of Labor whose confidentiality could be determined through rulemaking?

Answer

a) OFCCP regulations now provide for automatic disclosure of the so-called EEO-1 form. We are studying the possibility of establishing clear, binding rules for the disclosure or withholding of other data such as portions of the affirmative action program.

b) We believe that we do have such authority, because the legislative history of the 1974 FOIA amendments approved agency regulations providing for the disclosure of exempt information. One court has held that an agency may provide that certain types of documents shall be disclosed. See Pharmaceutical Manufacturers Association v. F.D.A. 411 F. Supp. 576 (D.D.C. 1976). However, some courts have ruled, without discussing the legislative history, that agencies have no power to issue regulations of any kind implementing the FOIA (see Westinghouse, supra, and Charles River Park "A", Inc. v. HUD 519 F. 2d 935 (D.C. Cir. 1975)).

c) The Department of Labor is privy to information which consists of trade secrets and/or confidential business information under several of its programs other

Question

3) The appeal procedure of OFCC leads to the compilation of a record as a basis for your decision. The FOIA requires the court to decide a denial of release of documents on a de novo basis. If OFCC decides to release documents, and the submitter of the records sues to prevent release, what does the court look at--the record you have compiled or a review of the matter de novo?

a) Do you argue in such lawsuits for a review based on the record?

b) Have any courts expressed an interest in reviewing your decision based on the record but have gone on to find the record to be inadequate?

c) What standard of review should apply to a review on the record? Substantial evidence? Arbitrary and capricious? Abuse of discretion?

d) Are there any additional procedural steps that are necessary or desirable to improve the quality of the record in order to make it more acceptable as a basis for possible court review?

e) Would it be possible to compile an adequate record, including participation from all parties, in 30 days? 45 days?

Answer

In Westinghouse Electric Corp. v. Schlesinger, 542 F2d 1190 (4th Cir. 1975) the court held that a submitter was entitled to a de novo hearing in an injunction action based on the FOIA itself, as well as Federal question jurisdiction under 28 U.S.C. 1331. The court reasoned that exemption 4 prohibits disclosure of information which comes within its terms. A supplier of information covered by that exemption, therefore, may invoke the FOIA as the basis of a cause of action in which he has the right to a de novo trial to prove the applicability of the exemption. If an "envious competitor or ... curious busybody demanding access to that private information has the right to a de novo trial" the court asked rhetorically, shouldn't a supplier have the same right?

a) How often do submitters mark information as confidential?

b) Do they tend to mark all information as confidential or are they selective?

c) How often do submitters give reasons for the confidential treatment of data at the time of submission?

d) The Contract Compliance Officer is supposed to make a ruling on the confidentiality of data within ten days, with an appeal to OFCC also to be decided within ten days. Do Contract Compliance Officers in fact make the rulings required by your regulations?

e) If this procedure is not used, why haven't you revised your regulations accordingly?

f) If information is not marked as confidential, will it automatically be released without notifying the submitter?

g) Under the FOIA, is a submitter required to identify the confidentiality of information at the time of submitting it to an agency? Can an agency by regulation require the submitter to so identify information when submitted?

h) Can a determination of confidentiality by the agency be made in advance of a request for disclosure of that information? Shouldn't a new determination be made at the time of request, not submission, since information may lose its confidential character over time or the public interest may later require a different policy?

Answer

a) to e). As noted above, we will provide responses as soon as we obtain the necessary information from the compliance agencies.

f) No, the agency practice is that the submitter will be notified when an FOIA request is received whether or not the submitter has marked the documents confidential at the

Question

1) In response to a question about the authority of the Department of Labor to direct the Freedom of Information release policies of contract compliance agencies, Mr. Henry testified that the determining factor is whether the requested documents belong to the Department of Labor or to the various compliance agencies.

a) The FOIA specifically covers the release of records "in the possesssion" of an agency, and provides only for "consultation" with another agency having a substantial interest in the determination concerning the release of those records. Please discuss Mr. Henry's reply in light of these FOIA provision.

b) What is the legal basis for appeals to OFCC of compliance agency decisions to release information? Is an agency legally obliged to stay release pending a decision by OFCC?

c) Would you support a recommendation that the entire FOIA process involving contract compliance data, including appeals, be handled directly by the various compliance agencies holding that data?

Answer

a) We understood the context of this question to be whether the Office of Federal Contract Compliance Programs (OFCCP) could direct disclosure if a compliance agency had decided to withhold information. In our view, the procedure involved under E.O. 11246 in dealing with the FOIA requests for affirmative action plan documents is not covered by the consultation language in the FOIA. The basis for the procedure is the authority of the Secretary of Labor under E.O. 11246, which designates the Secretary as the Government official responsible for the administration and enforcement of the Order. He has delegated this responsibility, except the responsibility to issue rules and regulations of general applicability, to the Director of the Office of Federal Contract Compliance Programs. The Order also makes contracting agencies (compliance agencies) primarily

commercial or financial information." If the information requested has been claimed to be confidential, might be claimed to be confidential if the affected business knew that EPA proposed to release it, or had been determined to be entitled to confidential treatment either by a court or by the EPA General Counsel in a final confidentiality determination, then the request may be denied in writing citing 5 U.S.C. 552(b)(4). The matter should then be treated in accordance with the procedure set out in 40 CFR Part 2, Subpart B.

However, if the request is from the Comptroller General, a committee or subcommittee of Congress, or either house of Congress, EPA may not deny the request on the grounds it is for confidential business information. To determine that a request is officially made by a congressional committee or subcommittee, the request must be in writing and signed by the committee or subcommittee chairman. A request from either house of Congress must be signed by the presiding officer. The request must indicate that the chairman or presiding officer is making the request as chairman of the committee or subcommittee or as presiding officer of the particular house.

Even though EPA may not deny confidential information to the Comptroller General, a congressional committee or subcommittee, or either house of Congress, EPA still has a duty to inform them, when supplying the requested information, whether the information has been claimed as confidential or has been determined to be entitled to confidential treatment. In addition, each EPA office supplying confidential information to the Comptroller General, congressional committees or subcommitteea, or either house of Congress must maintain a record of the disclosures for at least three years.

Recognizing that there is a current problem with identifying confidential information that has been submitted to EPA in rebuttal comments or evidence, I am working with Mr. Menotti to modify the RPAR notices so that any registrant or applicant for registration will be required to make confidentiality claims at the time the comments or evidence are submitted to EPA. In addition, we will devise a way to allow registrants and applicants which have already submitted comments or evidence to make claims of confidentiality for the information contained in those comments or evidence already in EPA's possession.

cc. Mr. D. Menotti

bc. A-134 Reading
A-134 Contracts
A-134/JCNelson/cm/W521/50794/7-13-77

Please address all correspondence on this matter to:

(address)

and reference OPP-_____ in the correspondence.

If you are unable to submit your claim within the 10-day period, you may request an extension of the time period by written request to the above address. Any request for extension must be made within the 10-day period. EPA will grant extensions only in extraordinary circumstances.

ATTACHMENT 1

To be inserted in III. Registrations and Products Subject to the Notice--
Claim of business confidentiality:

All registrants and applicants for registration listed below are being notified by certified mail of the rebuttable presumption existing against registration and continued registration of their products.

The registrants and applicants for registration shall have 45 days from the date this notice is sent or until _____ to submit evidence in rebuttal of the presumption. However, the Administrator may, for good cause shown, grant an additional 60 days during which evidence may be submitted. Notice of any extension, if granted, will appear in the Federal Register.

A registrant or applicant for registration may, if it desires, assert a business confidentiality claim covering part or all of the information submitted in rebuttal. The registrant or applicant may assert the claim by placing on or attaching to the information a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as "trade secret," "proprietary," or "company confidential." Allegedly confidential portions of otherwise nonconfidential documents should be clearly marked.

If a confidentiality claim is asserted, the information covered by the claim will be disclosed by EPA only to the extent and by means of the procedures set forth in 40 CFR Part 2, Subpart B (41 FR 36906, September 1, 1976). If no confidentiality claim accompanies the information at the time it is received by EPA, EPA will place the information in the public comment file where it will be available for public inspection.

If a registrant or applicant does assert a confidentiality claim for some, but not all, of the information submitted to EPA in rebuttal, the registrant or applicant should furnish two copies of the information to EPA. The first copy should contain all of the information submitted in rebuttal with information claimed as confidential clearly identified. The second copy should be identical to the first except that all information claimed as confidential should be deleted. The second copy will be placed in the public comment file. The first copy will be treated in accordance with the procedures set out above.

18 JUL 1977

MEMORANDUM

SUBJECT: Confidential Information in RPAR Rebuttals

FROM: James C. Nelson, Attorney
Contracts & General Administration Branch (A-134)

TO: Mr. David E. Menotti
Deputy Associate General Counsel
Pesticides, Toxic Substances & Radiation Division (A-132)

Dorothy Patton informed me that you and she had discussed the problem of confidential business information in RPAR rebuttals. She indicated that you would like me to develop drafts of language for future RPAR notices to instruct submitters concerning their rights to claim information in their rebuttals as confidential and a letter to go to those submitters who have already submitted rebuttals without having had the opportunity to make confidentiality claims.

Using the pronamide RPAR notice as a model, I have developed a rewrite of section III. Registrations and Products Subject to the Notice (Attachment 1). This gives notice of the opportunity to assert confidentiality claims, specifies how information claimed as confidential will be treated, and specifies what will be done with the information if no claim is asserted. In addition, it asks the submitter to send in two copies of the rebuttal: one complete version with the confidential material clearly identified and one excised version with the confidential information deleted. This notice is sufficient to spell out the rights of the submitters and to bind them if they fail to assert confidentiality claims. However, EPA must continue to send a copy of the notice by certified mail so that the registrants and applicants have actual notice and can be bound.

I have also developed a letter (Attachment 2) that can be sent to all those who have submitted rebuttals without having been given the opportunity to assert confidentiality claims. Some of the submitters may have asserted confidentiality claims on their submissions even though they were not asked to do so. These need not be sent the letter. But for any rebuttal that was submitted prior to instituting the new

(2) The business about which information is collected and reduced to a trip report may wish to assert a business confidentiality claim covering all or part of the information. When that claim should be asserted is left up to the discretion of ESED. Since the information you collect for trip reports is usually not received from the business in writing, the notice set out in 2.203(a) of the regulations would not be appropriate. However, it might be appropriate to furnish each business a copy of the trip report, give them the notice in 2.203(a), and allow them to make any claims. This is not necessary. If your Division or other divisions of EPA have been receiving Freedom of Information requests for this type of information, it might be appropriate to check each report with the affected business to see if they wish to make a claim. However, if you have been receiving few, if any, Freedom of Information requests for these reports, such an exercise might be an unnecessary expenditure of time and resources. If you rarely receive requests for these reports from outside EPA, it would seem more appropriate to deal with each request as it comes in and only contact the business about asserting a claim when you actually have had a request for it.

On the other hand, Subpart B also deals with the situation where EPA makes information public through channels other than under a Freedom of Information request. In any situation where EPA proposes to make business information public, if it is the type of information about which a claim might be expected to be asserted, the information cannot be released until the affected business has had an opportunity to submit a claim; and if either the program office or the appropriate EPA legal office makes a determination that the information is not entitled to confidential treatment, the business has been given the 10-day notice spelled out in 2.205(f) before release can take place. If ESED needs to make business information in a trip report available to someone outside of EPA, it may be appropriate to start this procedure by asking the business whether it desires to assert a claim.

If ESED gets few Freedom of Information requests for trip reports and seldom has occasion to release their contents outside of EPA, it is probably not necessary to give each business an opportunity to assert a claim except on a case-by-case basis when made necessary by a Freedom of Information request or need to release.

(3) & (4) Section 2.209(c) of the regulation specifies that any EPA office may disclose business information to another EPA office with "an official need for the information." In terms of EPA's work under various statutes, most offices do have "an official need" for the information collected by other offices. There is a great deal of discretion here for the office that has the information as far as deciding whether to give it to another office. No one should criticize one EPA office for giving information to another EPA office unless the information clearly has nothing to do with the activities

The way you have phrased Step 3, program people reading this may think they have to expolore these issues in depth. The regulation is designed to allow program offices to make a determination that information is clearly not entitled to confidential treatment, but it is not designed to require an in-depth analysis by the program office, especially when the office is acting under the 10-day limitation of a Freedom of Information request.

When a claim has been made for information that clearly is already public (such as having already appeared in a report published by another agency, in an annual stockholder report, a book, or magazine, or when it is available in some reference facility without restriction), then it is appropriate and desirable for the program office to make a determination that the information is clearly not entitled to confidential treatment. In that case, OGC does not become involved since the program office notifies the business of that decision.

(4) You mention that "forms" will be supplied for the purpose of asking affected businesses to comment and for initial denials of requests. I have attached sample letters that may be helpful to you in this regard.

Enclosures

cc. A-134 Reading
A-134 Contracts
File
A-134/JCNelsonc/m/W521/50774/5-22-77

MEMORANDUM

SUBJECT: Review of IERL "Procedures Under EPA Regulations on Confidentiality of Business Information"

FROM: James C. Nelson, Attorney
Contracts & General Administration Branch (A-134)

TO: Roger Hansen, IERL (MD-63)

I have reviewed your draft memorandum of procedures concerning business confidentiality. You have done a good job of presenting the procedures to project people in a way that they can avoid plowing through the regulations. I have enclosed your copy of the draft with some editorial changes and comments. However, there are some specific areas of the document where I do have comments. Please call me if you have any questions concerning my comments.

(1) A distinction should be drawn between information that is currently in IERL's possession that has never been agreened and future information that may be collected. Future data collection should emphasize collecting all claims of confidentiality at the same time the information is collected. For data already in IERL, screening should be started whenever there is an FOI request pending or whenever IERL proposes to publish or otherwise release the information. In the future much of the first step of giving notice and recording claims can be done by the contractors, but now a lot of this work for older information will have to be done by IERL.

(2) If a business has already made a confidentiality claim, there is no need to make the inquiry under Step 2(b).

(3) I think Step 3 should be changed. The substantive criteria are spelled out in section 2.208 for an initial determination. However, the program office cannot necessarily be expected to be able to answer all the questions under 2.208. If a business has asserted a claim, it has gained the right to be notified before any release can be made so that it can sue to prevent the release. Once a claim has been made the program office must follow 2.204(d) and make a preliminary determination. The preliminary determination goes one of two ways: either the information may be entitled to confidential treatment or the

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

28 APR 1977

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Freedom of Information Developments - #1

FROM: C. Richard Boehlert
Deputy Associate General Counsel
Contracts & General Administration Branch (A-134)

TO: All Regional Counsels

This is the first of a continuing series of memoranda that we will be sending to each Office of Regional Counsel periodically. We intend to use this as a means of keeping you informed of the latest developments in the area of Freedom of Information and Privacy. Since the new regulations went into effect on October 1, 1976, this Branch has had the responsibility of performing all the legal functions on behalf of the General Counsel. We have been very busy in this role. The volume of Freedom of Information requests coming into EPA has increased each year and appears to be increasing every month.

The only way in which the Agency can live up to its responsibilities under the Freedom of Information Act is to encourage openness in its work to the maximum extent possible without interfering with its duties under various laws. This policy is expressed in the regulations: "EPA will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons in business information entitled to confidential treatment, and the need for EPA to promote frank internal policy deliberations and to pursue its official activities without undue disruption." We should act to encourage program offices within EPA to disclose information unless they have a specific need to withhold. If they do have such a need, we must counsel them as to whether the information is in fact exempt under the Act. In future memoranda we will explore specific questions that have arisen concerning the various exemptions and how they apply to EPA records. This memorandum serves as an introduction.

The Department of Justice has primary reponsibility for coordinating the Federal position concerning the Freedom of Information and Privacy Acts. Within the Department they have set up a Freedom of Information Committee. Before EPA issues a final denial of any request, we must

The extent of business confidentiality allowed under the Freedom of Information Act is still unresolved. Many suits are pending in Federal courts, including some involving EPA, concerning the type of information which is exempt from disclosnre under the Freedom of Information Act's fourth exemption. The pending suits have been brought by requestors who have been denied information under the fourth exemption and by businesses which have been threatened with the release of information that they consider to be entitled to confidential treatment. There is no clear line of decisions in this area, and there is often conflict among the circuits.

It is very important for EPA to make consistent legal decisions regarding the disclosure or nondisclosure of business information. EPA's Freedom of Information Act regulations were written to provide each affected business the maximum possible due process protections within the time constraints imposed by the Act. Final confidentiality determinations, whether made by this Office or by Regional Counsels, are final EPA actions. If EPA is sued either by a requestor or an affected business, the Department of Justice has the responsibility to defend the Agency. The Department has a standing policy that before any agency can issue a final denial of a request for information, the denial must be cleared by the Department's Freedom of Information Committee which coordinates the Federal Freedom of Information stance. Failure to clear a denial with the Committee might result in a decision by the Department not to defend the agency in a resulting suit.

Because of the incomplete case law in the area of the fourth exemption, the need for consistent EPA legal opinions, and the necessity of obtaining Committee clearance of EPA final denials, I would like all final confidentiality determinations proposed to be issued by the Offices of Regional Counsel to be cleared with my office first. In most cases this can be accomplished with a telephone call, but in some cases it may require submission of the documents to us. For business confidentiality issues and all procedural matters concerning the Freedom of Information Act regulations, I have given responsibility to the Contracts & General Administration Branch of this office (A-134). Whenever you have specific questions concerning issues raised by the Act or the regulations or when you have a proposed final confidentiality determination, please contact Dick Boehlert at 755-0774 or Jim Nelson at 755-0794.

The Offices of Regional Counsel have an important role in counseling the offices within their regions on all the issues that arise under the Freedom of Information Act. Recognizing that it is important to keep all staff attorneys in the Offices of Regional Counsel informed of the latest developments in Freedom of Information area, I have asked the Contracts & General Administration Branch to communicate with the Offices of Regional Counsel periodically to share the latest

It is clear that EPA will have to consider production information in making RPAR decisions. Nothing in this discussion should be taken to imply that EPA cannot make full use of production information within EPA. This discussion concerns only public disclosure of the information.

A notice prepared under section 6 must be transmitted to the Department of Agriculture for comment 60 days prior to publication. In this case, the Department of Agriculture could be furnished with more complete information than would be permitted in the published notice. In the case of a published RPAR notice, a notice of Administrator's determination, a public hearing, or a final order of denial or cancellation, EPA may not disclose confidential production information. This does not mean that the production information cannot be relied on in making the decisions.

If production information is considered in the RPAR process, there should be reference to this fact in the public notices. However, the information itself cannot be published. In essence, this creates a secret record in a particular RPAR action. Thus, the notices should contain the conclusions reached but not all of the background data.

It may be possible to use aggregated data as suggested in your memorandum. However, even in using aggregated data, we must consider whether the aggregating itself will protect the confidentiality of the underlying data. For example, if only one company makes the pesticide in question, aggregating does nothing to protect the amount of the company's total production if that is confidential. Or if only two company's make the pesticide, revealing the aggregate would tell each company how much the other company makes. Clearly, aggregating has problems when we are speaking in terms of pesticides with only a small number of manufacturers. Perhaps the best approach, would be to follow the rules which have been set out by the International Trade Commission for publishing aggregates of data. They have formulae to deal with the situations of five or fewer manufacturers. Industry has accepted the ITC approach for years with no complaints that it violates confidentiality. This applies to production figures of both technical and formulated materials and all five of the types of aggregation suggested in your memorandum.

Given the problems discussed above, my suggestion would be to avoid trying to publish production information(other than aggregated data, as discussed above). Instead use the production information as secret background information. But make it clear in the course of the RPAR process that the data is being used. It is possible to make conclusions based on the production data without making the data itself public. Congressional committees and the Department of Agriculture can perform their review without the information being disclosed to the public.

Note that companies may waive their claims of confidentiality concerning this production information or may give their permission for its publication. However, any waiver or permission must be clear.

If you have specific questions concerning the confidentiality of particular information or other aspects of this memorandum, you may contact me at 50794.