GIBSON, DUNN & CRUTCHER LLP

awright@gibsondunn.com

March 19, 2004

(202) 887-3770

(202) 530-9656

VIA E-MAIL

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Re: *Proposed Rules Regarding Security Holder Director Nominations, 68 Fed. Reg. 60,784 (Release No. 34-48626, October 23, 2002); File No. S7-19-03*

Dear Mr. Katz:

I am enclosing for inclusion in the rulemaking record in the above-titled proceeding a Freedom of Information Act ("FOIA") appeal that has been submitted today to the Commission's Office of the General Counsel.

Very truly yours,

Ashley Wright
Gibson, Dunn & Crutcher LLP

Enclosure (w/out exhibits)

escalia@gibsondunn.com

March 19, 2004

(202) 955-8206

(202) 530-9606

VIA HAND-DELIVERY

FOIA/PA Office
Securities and Exchange Commission
Operations Center
Room 1418
6432 General Green Way
Mail Stop 0-5
Alexandria, VA 22312-2413

Re: ***Freedom Of Information Act Appeal: Request No. 2004-0835; Expedited Treatment Requested***

Dear Sir or Madam:

Pursuant to 5 U.S.C. § 552(a) and 17 C.F.R. §§ 200.80(d)(5) and (6), the firm of Gibson, Dunn & Crutcher LLP hereby appeals the February 17, 2004 decision of the FOIA/Privacy Act Office of the Securities and Exchange Commission (the "Office") denying the vast bulk of the Freedom of Information Act ("FOIA") request made by the firm on November 26, 2003.

On November 26, 2003, Ashley Wright of Gibson, Dunn & Crutcher submitted an electronic FOIA request to the Office, a copy of which is attached hereto as Exhibit A. The request seeks copies of all data and studies that the Securities and Exchange Commission cited or relied upon in its proposing release regarding "Security Holder Director Nominations," file number S7-19-03 (the "Proposed Rules"), and that are otherwise not publicly available. The data and studies requested include, but are not limited to, those cited in footnotes 78-85, 114, 187, 189-92, 194-95, and 197-98 of the proposing release. These materials were requested on an

expedited basis so that they could be used during the initial public comment period on the Proposed Rules, which ended on December 22, 2003.[1]

On February 17, 2004—some *55 business days* after the FOIA request was submitted—the Office issued a substantive determination denying the majority of the request. A copy of that "final response," which we received on February 20, 2004, is attached hereto as Exhibit B. The February 17 letter disposed of the firm's FOIA request in the following manner: (1) To the extent the request sought material "relied upon" by the agency, the Office ruled that the request failed to "reasonably describe" the material sought; (2) materials that in the Office's judgment were properly identified, nonetheless were not "agency records" for purposes of FOIA; (3) even assuming *arguendo* that these materials were agency records, they were confidential commercial or financial information exempted from release by FOIA Exemption 4; and (4) approximately 50 pages of internal staff research was protected from disclosure by the deliberative process and attorney-client privileges of FOIA Exemption 5. The only documents the Office agreed to disclose were the sample data submitted to the Commission by Georgeson Shareholder Communications, Inc. and cited by the Commission in footnotes 80, 84 and 85. The Office maintained that these documents, like the other documents withheld from disclosure, were confidential business records, but explained that the documents were nonetheless being made available because Georgeson had consented to their release. Access has been denied to all other documents implicated by the FOIA request.

In this appeal, we address each rationale given by the Office to justify its withholding. Of course, the Commission ultimately bears the burden to demonstrate that the materials sought are not "agency records" or have otherwise been properly withheld. *See Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 143 n.3 (1989) ("*Tax Analysts I*"). As demonstrated below, in each case, the Office's rationale is not supported in law.[2]

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[1] The Commission has announced that it will "accept comments regarding issues addressed in the [March 10, 2004] roundtable discussion and otherwise regarding the proposed rule amendments from March 10, 2004 until March 31, 2004." Accordingly, the information addressed in this appeal continues to be sought on an expedited basis so that it may be reviewed in connection with the current comment period.

[2] It is noteworthy that the Office's processing of this FOIA request has been procedurally flawed as well. The firm sought expedited handling of the request because the material requested is fundamental to the Commission's development and justification of its proposed rule. The request for expedition was denied, in a decision letter that failed to recognize the heightened interest of the public—and the Commission—in timely review of materials on which a proposed rule is based. In the absence of expediting the request, the Office had 20 business days to substantively respond to the request, *see* 5 U.S.C. § 552(a)(6)(A)(i) and 17

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I. PRODUCTION OF THE REQUESTED MATERIALS IS REQUIRED BY THE ADMINISTRATIVE PROCEDURE ACT

Before turning to the specifics of the Office's rationale, we emphasize—as we have done repeatedly in conjunction with these requests—that the Commission's continued failure to make the materials at issue available for public inspection is fundamentally at odds with basic principles of agency rulemaking. The Administrative Procedure Act ("APA") requires that an agency "disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based." *Home Office Box, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphases added); *see also, e.g.*, *Nat'l Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 884 n.10 (D.C. Cir. 1987) (same). As the D.C. Circuit has stressed time and again, during the notice and comment period "it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules[;]" "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (emphases added); *see also, e.g.*, *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994); *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). This bedrock principle of administrative law is well recognized throughout the federal courts. *See, e.g.*, *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1023-24 (2d Cir. 1986); *Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985)*; Air Prods. & Chems., Inc. v. FERC*, 650 F.2d 687, 699 n.17 (5th Cir. 1981).

Notwithstanding this uniform legal rule and without reasonable explanation, the Office has repeatedly denied access to the data and studies that the Commission cited and relied upon in issuing the Proposed Rules. The Commission has proceeded instead as if the pendency of the current important rulemaking were irrelevant to the FOIA request, and as if agencies were permitted to base rulemaking on secret evidence which is neither made available as part of the rulemaking record—the normal course under the APA—nor provided when requested under FOIA. This is the very antithesis of the open and public rulemaking process that Congress has

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C.F.R. § 200.80(d)(5), unless—within those 20 days—it issued a notice identifying "unusual circumstances" that required an extension, and indicating the date, not to exceed an additional 10 days, by which a determination was expected. *See* 17 C.F.R. § 200.80(d)(7). The Office took neither of these steps. On the contrary, in a letter dated December 12, 2003, it stated that the request would be processed under "normal guidelines." Ultimately, however, the Office took 55 business days to substantively respond to the request.

designed. The consequence for the agency is not merely that it is in violation of FOIA and the APA, but also that—by failing to share with the public the evidentiary basis for its rulemaking—it is committing clear legal error that by itself would be grounds for a court to invalidate the proposed election contest rules.

II. PRODUCTION OF THE REQUESTED MATERIALS IS REQUIRED BY FOIA

A. The FOIA Request Was Not Ambiguous Or Overbroad

FOIA obligates requesters to "reasonably describe[]" the records being sought from an agency. 5 U.S.C. § 552(a)(3)(A)(i); *see also* 17 C.F.R. § 200.80(a)(4) and (d)(3). Gibson Dunn accordingly requested copies of *all* data and studies that the Commission "cites or relies upon its proposing release . . . including, but not limited to those cited in footnotes 78-85, 114, 187, 189-92, 194-95, and 197-98." In response to this straightforward request, the Office cites cases of general application—only one of which even involves rulemaking—for the proposition that the FOIA request did not "reasonably describe" the records being sought. To the contrary, the text and legislative history of FOIA and its amendments, as well as federal case law addressing squarely the adequacy of requests for records in the rulemaking context, leave no doubt that the Office committed serious error.

The text of the Freedom of Information Act currently provides that a request for records must "reasonably describe[] such records"; this language was added in 1974, to replace language from the original Act which stated that a request must be for "identifiable records." *See Truitt v. Dep't. of State*, 897 F.2d 540, 544 (D.C. Cir. 1990) (undertaking a comprehensive analysis of FOIA's legislative history, including that of its amendments). As the legislative history states unequivocally, "[t]he 1974 substitution of language . . . 'makes explicit the liberal standard for identification that Congress intended and that courts have adopted, and should thus create no new problems of interpretation.'" *Id.* at 545 (citations omitted) (emphasis added). In enacting FOIA's present-day text, Congress's objective was clear: "'[T]he identification standard in the FOIA should not be used to obstruct public access to agency records.'" *Id.* (citation omitted).

The 1974 FOIA amendment was intended, in part, to prevent agencies from withholding rulemaking evidence in the manner at issue here. *See id*. at 544 & n.32 (explaining that the 1974 Senate Report singled out two prior court decisions where courts "'have felt called upon to chide the government for attempting to use the identification requirements as an excuse for withholding documents'" during rulemaking proceedings) (citation omitted). Thus, for instance, in *Bristol-Myers v. Federal Trade Commission*, 424 F.2d 935 (D.C. Cir. 1970), a FOIA request in the context of a Federal Trade Commission rulemaking sought "'each item of material . . . which . . . has contributed to or constitutes the extensive staff investigation, accumulated experience, available studies and reports and other things referred to in the Commission's Notice.'" 424 F.2d at 938 n.7 (emphasis added). The district court refused to compel production of the documents, but the D.C. Circuit reversed. The court of appeals explained that the agency

"can hardly claim that it [is] unable to ascertain which documents [are being] sought by [the requester]. The Commission relied on certain materials in promulgating its proposed rule, and referred to them in announcing the rulemaking proceeding." 424 F.2d at 938 (emphases added). Thus, it is the same documents that allegedly form the underpinnings of an agency's "reasoned decision-making" that must be disclosed pursuant to a FOIA request. *See Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 192-93 (D.C. Cir. 1973) (holding that "[w]here rulemaking proceedings have taken place, the agency has, by definition, already identified its supporting documents. . . . It would be most difficult to rebut the presumption that the agency would be able to produce the documents . . . ."); *see also id.* at 193 (observing that "[i]ndeed, it would be a most reasonable practice for the agency to retain the documents [used in a rulemaking proceeding] as a group or index them for future retrieval"). This rule applies even to those materials that an agency does not "directly refer to or rely on" in its rulemaking proceedings. *Id.* at 192 (explaining that *Bristol-Myers* "did not impose a requirement that the notice directly refer to or rely on the documents to be disclosed").

The Office expresses puzzlement at what it might mean for an agency to "rely" on a document in rulemaking; this "requires a highly subjective assessment," it objects. In fact, few concepts are more basic to administrative law and rulemaking than that an agency must, and does, "rely" on certain materials in rulemaking; these materials are to be included in the rulemaking record and form an important part of the basis on which the rule is reviewed by courts. *See, e.g.,* 1 CHARLES H. KOCH, JR., ADMIN. LAW & PRACTICE, § 4.44 (2d ed. 1997 & Supp. 2003-04) ("the rulemaking record is all the information which the agency used to make the rule."). *See also Am. Med. Ass'n*, 57 F.3d at 1132; *Engine Mfrs. Ass'n*, 20 F.3d at 1181; *Nat'l Black Media Coalition*, 791 F.2d at 1023-24; *Lloyd Noland Hosp. & Clinic*, 762 F.2d at 1565; *Air Prod. & Chem.*, 650 F.2d at 699 n.17; *Home Office Box*, 567 F.2d at 35; *Portland Cement Ass'n*, 486 F.2d at 393 (all holding that relevant information for purposes of a rulemaking is that information that an agency uses to develop a proposed rule). Lest there be any doubt, the "'ordinary, contemporary, common meaning'" of "rely on" is "depends on"; that is, an agency relies on certain material if it uses that material in the course of its rulemaking procedures. *AT&T Communications, Inc. v. Eachus*, 174 F. Supp. 2d 1119, 1123-24 (D. Or. 2001) (citations omitted) (turning to WEBSTER'S II NEW COLLEGE DICTIONARY to define the phrase "rely on").

Thus, Gibson Dunn's request for information "cited or relied upon" by the Commission in its rulemaking proceedings can hardly be described as "ambiguous," "far reaching," "over broad," or requiring a "highly subjective assessment" as the Office claims.[3] To the contrary, the

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[3] The Office seizes upon *dictum* in a footnote of a district court decision to advance the proposition that, in the Office's words, "[g]enerally, a request for all documents related to a topic is not appropriate, as it would require a far-reaching search for documents without any

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FOIA request fits squarely within the holdings of *National Cable Television* and *Bristol-Myers*, Congress's view of a "reasonably described" request, and the most rudimentary concept of a rulemaking record. Documents that were specifically cited by the Commission in footnotes 78-85, 114, 189 and 190 are plainly encompassed by the request. Documents that were not cited in the notice, but that were relied on by the Commission in its rulemaking efforts, were also properly identified and requested in light of the function they served in the development of the Commission's proposed rules. Those documents include, by way of example only, those that were relied upon by the Commission in footnotes 187, 191, 192 194, 197 and 198. *See Truitt*, 897 F.2d at 543. Accordingly, we request that the General Counsel's Office remand our FOIA request to the Office with instructions that it promptly conduct a search of the Commission's records to uncover all documents responsive to the request. *See id.* at 542. It matters not that the request might inconvenience the Commission to "retrace the steps taken in the development of the rulemaking notice." *Nat'l Cable Television*, 479 F.2d at 191. The alternative is the agency taking the awkward position that it does not know what it "relied upon" in developing federal law.

B. <u>The Third-Party Data And Studies Are "Agency Records"</u>

Having narrowed Gibson Dunn's request to materials actually cited in the proposing release, the Office then proceeded to determine that these "sample data and databases" were not "agency records" because they amount to "proprietary" information supplied to the Commission by third parties. Moreover, the Office stated, the sample data are subject to contractual prohibitions on public release or redistribution. Also factoring into the Office's analysis was the consideration that "the submitters object to the release of their data." On these bases, the Office found that the data and studies supplied by Automated Processing, Inc. (referred to in footnotes 78, 84 and 85), Vickers Stock Research Form 13-F database (referred to in footnotes 79 through 83, inclusive), and the Investor Responsibility Research Center (referred to in footnotes 84, 85, 114, 189, 190 and 195) (hereinafter, all three submitters will be collectively referred to as the "Submitters") were not subject to FOIA disclosure. This determination is erroneous.

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basis to determine whether they are, in fact, related to the topic." *See Massachusetts v. Dep't of Health & Human Servs.*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989). From this proposition, the Office jumps to the conclusion that a "request for all documents relied on presents similar difficulties." That is incorrect. The term "relate" would include materials that were not examined, considered, or used by the agency in any way in the rulemaking. "Rely" is a term of art in the rulemaking context that refers precisely to documents that play such a role.

The Securities and Exchange Act of 1934 (the "Exchange Act") itself defines "agency records" as "all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this chapter or otherwise." 15 U.S.C. § 78x (emphases added). *See also Forsham v. Harris*, 445 U.S. 169, 185 (1980) (noting that § 78x defines agency records for purposes of SEC FOIA requests). The data and studies requested by Gibson Dunn clearly constitute "other documents filed with or obtained by the Commission" and, hence—under this plain language which the Office's determination letter ignores—are agency records subject to production. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citation omitted).

Production also is clearly warranted under case law interpreting FOIA. To qualify as "agency records" subject to FOIA's disclosure rules, "the agency must 'either create or obtain' the requested materials," and "the agency must be in control of [them] at the time the FOIA request is made." *Tax Analysts I*, 492 U.S. at 144-45 (quoting *Forsham*, 445 U.S. at 182). Here, the data and studies Gibson Dunn identified, particularly those in footnotes 78 through 85, 114, 189, 190 and 195, were plainly obtained by the Commission from the Submitters. In fact, the Office concedes as much in its analysis, referencing "databases provided by [the Submitters]." (Emphasis added). Thus, this first part of *Tax Analysts I* is easily met.

With respect to the "control" requirement, the Supreme Court has made clear that an agency is in control of requested material if the "materials have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts I*, 492 U.S. at 145; *Forsham*, 445 U.S. at 986 n.14 (explaining by reference to the Records Disposal Act, that materials that qualify as agency records often are those that are "preserved or [are] appropriate for preservation by [an] agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them") (quoting 44 U.S.C. § 3301) (ellipsis in original) (emphasis added). Here, the data and studies at issue were in the control of the Commission at the time of the FOIA request. That is, the data and studies had "come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts I*, 492 U.S. at 145. Moreover, the data and studies by definition furnish information pertaining to the Commission's rulemaking and decision-making functions. Thus, the second part of *Tax Analysts I* is also easily satisfied. *See Burka v. Dep't of Health & Human Servs.,* 87 F.3d 508, 515 (D.C. Cir. 1996) (holding that data tapes were agency records because *inter alia* the agency "read and relied significantly on the information in writing articles and developing agency policies"); *see also Tax Analysts I*, 492 U.S. at 138-39, 143; *Forsham*, 445 U.S. at 175-77 & nn.4, 7; *Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1068 (D.C. Cir. 1988), *aff'd on other grounds*, 492 U.S. 136 (1989); *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971); *Lombardo v. Handler*, 397 F. Supp. 792, 802 (D.D.C. 1975).

Undeterred by this authority, the Office cites *Gilmore v. Department of Energy*, 4 F. Supp. 2d 912 (N.D. Cal. 1998), *Tax Analysts v. Department of Justice*, 913 F. Supp. 599 (D.D.C. 1996), *aff'd without opinion*, 107 F.3d 923 (D.C. Cir.), *cert. denied*, 522 U.S. 931 (1997) ("*Tax Analysts II*") and *Baizer v. Department of the Air Force*, 887 F. Supp. 225 (N.D. Cal. 1995) for the far-reaching proposition that a purported "restrictive license" or "contractual prohibition[]" on disclosure or redistribution divests documents of their status as agency records. That logic is flawed. First, there is no basis for the Office's unexplained assertion that the sample data and database supplied by the Submitters are "proprietary." As between the Submitters and potential third parties, any alleged "proprietary" status was waived once the Submitters provided their material to the Commission for use in the development of the Proposed Rules. And, to the extent the purported proprietary license is thought to lie between the Submitters and the Commission, it should go without saying that an agency cannot shroud its rulemaking in secrecy by relying on material that it covenants to share with no one other than the party submitting it. *See Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177 (5th Cir. 1989), *clarified*, 885 F.2d 253 (5th Cir. 1989) (explaining that "a contractual provision . . . cannot, absent unusual circumstances, relieve an agency of its duty to publish data"); *Weisburg v. Dep't of Justice*, 631 F.2d 824, 825, 828 (D.C. Cir. 1980) (even "the mere existence of [a private party's] copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records" especially when non-disclosure would shield "the operations, or decision-making functions of the agency") (emphasis added).

None of the cases cited by the Office supports the claim that a contract or license can permit an agency to base a rulemaking on data that it refuses to submit to public review and scrutiny. In *Gilmore*, a FOIA request sought to compel the Department of Energy to produce a third-party computer software known as CLERVER, as well as all documentation relating to the software, including its source code. 4 F. Supp. 2d 912. The plaintiff sought these materials so he could publish them on the Internet. *Id.* In concluding that the materials were not "agency records," the court emphasized the software "does not illuminate the structure, operation, or decision-making structure of [the] DOE." *Id.* at 920. By contrast, the court recognized, courts have found that computer programs do constitute agency records when they reflect on those matters. *Id.* at 921 (discussing *Clearly, Gottlieb, Steen & Hamilton v. Dep't of Health & Human Servs.*, 844 F. Supp. 770, 781-82 (D.D.C. 1993); *Windels, Marx, Davies & Ives v. Dep't of Commerce*, 576 F. Supp. 405 (D.D.C. 1983)).

Similarly, in *Tax Analysts II*, when the plaintiff sought a research database known as "JURIS," which was provided by West Publishing Group pursuant to a non-exclusive license, the court again underscored that the

> Plaintiff is not seeking information about the structure, operation, or decision-making procedures of the Department. Preventing access to this database does not permit DOJ to insulate itself from public scrutiny of its operations and

> regulatory decisions. The West-provided data does not provide information about the conduct of DOJ, and the disclosure of the data would not shed light on the conduct of any agency or official.

913 F. Supp. at 607. The case here is the opposite, of course; the Commission has placed the requested materials in issue by publicly citing them as support and explanation for government rulemaking. The materials are now sought by the public to understand and evaluate the government's asserted bases for its decisions, and as a consequence are required to be provided under FOIA as well as under the APA. Finally, in the third case cited by the Office, an attorney sought to compel the Air Force to provide an electronic copy of its JURIS database, which contains decisions of the Supreme Court. *Baizer*, 887 F. Supp. at 226. Although denying the FOIA request there, the court made clear that when "an agency integrates material into its files and relies on it in decision making, then the agency controls the material" and must produce it under FOIA. *Id.* at 228 (emphasis added).

In sum, the cases cited by the Office stand for the unremarkable proposition that when an agency receives or generates proprietary material primarily of a reference or commercial nature that do not illumine the agency's structure, operation or decision-making function, the material typically does not constitute an agency record for purposes of FOIA. Not a single case cited by the Office involved materials requested in the rulemaking context, or that had been identified by the agency itself as support and authority for its transaction of public business. In none of the cases would the lack of disclosure have allowed an agency to mask its bases for deciding important matters of public policy, as would be the case here. And in each case, the court recognized that the analysis regarding "agency records" would have been fundamentally different had the FOIA request implicated information concerning an agency's structure, operation, or decision-making. The cases cited by the Office are inapposite.

The data and studies implicated by our request, particularly those in footnotes 78 through 85, 114, 189, 190 and 195, were obtained by the Commission from the Submitters and were subsequently referred to or relied upon by the Commission in discharging its public responsibilities. Accordingly, all the requested materials fall squarely within the definition of agency records for purposes of FOIA; the Office must be reversed on this ground.

C. The Third-Party Data And Studies Are Not Subject To FOIA Exemption 4

The Office also ruled that even assuming *arguendo* that the data and studies cited in the identified footnotes of the proposing release were "agency records," it would be appropriate to bar their release under FOIA Exemption 4, which protects "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4); *see also* 17 C.F.R. § 200.80(b)(4). This position, too, is unfounded.

"Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute." *Washington Post Co. v. Dep't of Health & Human Servs.*, 865 F.2d 320, 324 (D.C. Cir. 1989). An agency claiming an exemption ultimately bears the burden of proof on that issue. *Exxon Corp. v. FTC*, 663 F.2d 120, 126 (D.C. Cir.1980). Here, the Office relies exclusively on *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*) for its withholding of the data and studies. However, absent from its analysis is the necessary balancing test that the Supreme Court has held must accompany an evaluation of the applicability of a FOIA exemption. *See Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). "[T]he only relevant public interest in disclosure to be weighted in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Id.* (internal quotation marks, citation and emphasis omitted). When this balancing is performed, the scales tip decidedly in favor of public access.

Here, disclosure of the data and studies cited and relied upon by the Commission would contribute significantly to the public's understanding and evaluation of the "triggers" the Commission has proposed in connection with the Proposed Rules. The Commission based certain "thresholds" in the Proposed Rules on technical studies, evaluations, and data obtained from the Submitters or generated internally within the Commission. Access to such information goes to the very core of FOIA's purpose. *See, e.g.*, *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) ("information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose"). The data is basic to public understanding and analysis of the Commission's justification for its threshold requirements. For this reason, not only is disclosure essential under FOIA, it is mandated under the APA. *See, e.g.*, *Connecticut Light & Power Co.*, 673 F.2d at 531.

In contrast, any asserted confidentiality interest on the part of the Submitters is not nearly as great as the public's right to access. This is particularly true because it appears that the Commission either specifically engaged the Submitters to generate data to be used in the proposing release, or the Submitters voluntarily offered this material to the Commission with the expectation and intent that it be used in rulemaking proceedings. To permit private parties to submit data to the government to be used to develop federal law, while insulating that data from public review and scrutiny would violate the "crystal clear congressional objective . . . 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted).

Furthermore, the statutory scheme of FOIA "does not permit a bare claim of confidentiality to immunize agency files from scrutiny." *Bristol-Myers*, 424 F.2d at 938. Nor does it allow an agency to promise confidential treatment to information that is otherwise subject to FOIA disclosure. *See Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 n.4 (D.D.C. 1973) ("The mere promise of confidentiality by an agency cannot create an exemption from the statute under

which the agency is required to disclose the information"), *rev'd on other grounds*, 494 F.2d 1073 (D.C. Cir. 1974). Moreover, Exemption 4 "does not protect all data contained in . . . filings, but only that information which cannot be rendered sufficiently anonymous by deletion of the filing party's name and other identifying information." *Nat'l Cable Television*, 479 F.2d at 195. *See* 5 U.S.C. § 552(b); 17 C.F.R. § 200.80(b); *see also Soucie*, 448 F.2d at 1078-79; *Bristol-Myers*, 424 F.2d at 938-39. Here, the Office has failed to meet its burden of explaining why legitimate and appropriate redactions would not address the Submitters' reported concerns, while at the same time permitting the necessary exchange of information and views between the public and the Commission. We would be prepared to accept redactions needed to protect identifying or other "confidential" details in the "sample data and databases," that did not also shield from public disclosure the information necessary to understand and evaluate the Commission's asserted bases for its actions. There is no support in the law, however, for an agency to thwart public understanding of its decision-making through overbroad and unsupported claims of confidentiality. *See, e.g.*, *Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 388 (D. Utah 1991); *Teich v. Food & Drug Admin.*, 751 F. Supp. 243, 253 (D.D.C. 1990).

In sum, the Office's three-sentence analysis failed to weigh the public's strong and statutorily-recognized interest in the data and studies requested, against the Submitters' generalized and doubtful claim of confidentiality—a claim that can easily be accommodated if necessary through legally proper redaction of details such as specific corporations' names. Accordingly, we request the General Counsel's Office to order disclosure of all material previously withheld pursuant to FOIA Exemption 4.

D. <u>The Office Has Failed To Establish The Applicability Of Exemption 5</u>

The Office has also withheld "approximately" 50 pages of purportedly internal staff research pursuant to 5 U.S.C. § 552(b)(5) and 17 C.F.R. § 200.80(b)(5) on the grounds that these documents are protected by the deliberative process and attorney-client privileges embodied in FOIA Exemption 5. However, other than providing four conclusory sentences, and without citing any case law in support of its finding, the Office has failed to explain the applicability of either privilege—a burden that it carries. In fact, the Office has collapsed the two privileges for purposes of its analysis: "These records from an integral part of the predecisional process <u>and/or</u> reveal recommendations to the Commission by its attorneys." (Emphasis added). Accordingly, based on the record before us, we appeal the Office's conclusion that these privileges constitute a proper basis for withholding the requested documents. *See, e.g.*, *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987) ("If a person requests particular factual material . . . the agency will usually be able to excise the material from the draft document and disguise the material's source, and thus the agency will usually be able to release the material without disclosing any deliberative process."); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) ("[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency

position on an issue or is used by the agency in its dealings with the public."); *Bristol-Myers*, 424 F.2d at 939 ("Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only 'those internal working papers in which opinions are expressed and polices formulated and recommended.'") (citation omitted); *id.* ("[A]n internal memorandum may lose its protected status when it is publicly cited by an agency as the sole basis for the agency action."); *see also, e.g.*, *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (discussing the conditions that must be satisfied for an agency to properly invoke the attorney-client privilege in response to a FOIA request).

III. CONCLUSION

For all the foregoing reasons, we request expedited treatment of this appeal and the prompt release of the data requested. Thank you for your attention to this matter.

Sincerely yours,

Eugene Scalia

Attachments

cc: Giovanni P. Prezioso, Esq.