

## EXEMPTION 4

Act is not an Exemption 3 statute.<sup>250</sup> Thus, the Supreme Court dismissed the appeals in these cases and this issue has been placed to rest.<sup>251</sup>

### EXEMPTION 4

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."<sup>1</sup> This exemption is intended to protect the interests of both the government and submitters of information.<sup>2</sup> Its very existence encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable.<sup>3</sup> The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.<sup>4</sup> The exemption covers two broad categories of information in federal agency records: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

#### Trade Secrets

For purposes of Exemption 4, the Court of Appeals for the District of

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<sup>250</sup> Pub. L. No. 98-477, § 2(c), 98 Stat. 2209, 2212 (1984) (amending what is now subsection (t) of Privacy Act).

<sup>251</sup> U.S. Dep't of Justice v. Provenzano, 469 U.S. 14 (1984); FOIA Update, Vol. V, No. 4, at 4. But see Hill v. Blevins, No. 92-0859, slip op. at 7 (M.D. Pa. Apr. 12, 1993) (holding that subsection (f)(3) of Privacy Act, which authorizes agency to establish procedures for disclosure of medical and psychological records, is "exempting" statute under FOIA), aff'd, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision).

<sup>1</sup> 5 U.S.C. § 552(b)(4) (2000 & Supp. IV 2004).

<sup>2</sup> See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767-70 (D.C. Cir. 1974) (concluding that the legislative history of the FOIA "firmly supports an inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which collect it").

<sup>3</sup> See Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc).

<sup>4</sup> See National Parks, 498 F.2d at 768; see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in FOIA Post (posted 10/15/01) (recognizing fundamental societal value of "protecting sensitive business information").

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Columbia Circuit in Public Citizen Health Research Group v. FDA,<sup>5</sup> has adopted a "common law" definition of the term "trade secret" that is narrower than the broad definition used in the Restatement of Torts.<sup>6</sup> The D.C. Circuit's decision in Public Citizen represented a distinct departure from what until then had been almost universally accepted by the courts -- that a "trade secret" encompasses virtually any information that provides a competitive advantage. In Public Citizen, a "trade secret" was more narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."<sup>7</sup> This definition also incorporates a requirement that there be a "direct relationship" between the trade secret and the productive process.<sup>8</sup>

The Court of Appeals for the Tenth Circuit has expressly adopted the D.C. Circuit's narrower definition of the term "trade secret," finding it "more consistent with the policies behind the FOIA than the broad Restatement definition."<sup>9</sup> In so doing, the Tenth Circuit noted that adoption of the broader Restatement definition "would render superfluous" the remaining category of Exemption 4 information "because there would be no category of information falling within the latter" category that would be "outside" the reach of the trade secret category.<sup>10</sup> Like the D.C. Circuit, the Tenth Circuit was "reluctant to construe the FOIA in such a manner."<sup>11</sup> More recently, the Tenth Circuit declined to "address whether [it] should supplement" this narrower trade secret definition "to require a governmental showing that

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<sup>5</sup> 704 F.2d 1280, 1288 (D.C. Cir. 1983).

<sup>6</sup> Restatement (First) of Torts § 757 cmt. b (1939) (stating that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it"), quoted in Pub. Citizen, 704 F.2d at 1284 n.7.

<sup>7</sup> 704 F.2d at 1288; see also Appleton v. FDA, 451 F. Supp. 2d 129, 142 & n.8 (D.D.C. 2006) (rejecting plaintiff's argument that trade secret, as defined in Public Citizen, requires "sole showing of 'innovation or substantial effort,'" and emphasizing that trade secret applies to information that constitutes the "'end product of either innovation or substantial effort'" (quoting Pub. Citizen, 704 F.2d at 1288)).

<sup>8</sup> Pub. Citizen, 704 F.2d at 1288; accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 150-51 (D.C. Cir. 2001) (reiterating the Public Citizen definition and emphasizing that it "narrowly cabins trade secrets to information relating to the 'productive process' itself").

<sup>9</sup> Anderson v. HHS, 907 F.2d 936, 944 (10th Cir. 1990).

<sup>10</sup> Id.

<sup>11</sup> Id.

the documents in question are actually owned by the submitting entity or by any other party," finding that in the case before it, involving plans and specifications for an antique aircraft, the agency had shown a "corporate 'chain of ownership'" for the requested documents, leading from "the original owner and submitter" to the company currently claiming "trade secret" protection for them.<sup>12</sup>

Trade secret protection has been recognized for product manufacturing and design information,<sup>13</sup> but has been denied for general information concerning a product's physical or performance characteristics or a product

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<sup>12</sup> Herrick v. Garvey, 298 F.3d 1184, 1191 (10th Cir. 2002) (declaring that the agency "need not show" that "ownership of these particular documents was specifically mentioned and transferred" with each corporate succession, because "such a requirement would be overly burdensome," and finding that the agency "need only show that there was a corporate successor that received the assets of the prior corporation").

<sup>13</sup> See, e.g., Appleton, 451 F. Supp. 2d at 142 & n.7 ("drug product manufacturing information, including manufacturing processes or drug chemical composition and processes"); Herrick v. Garvey, 200 F. Supp. 2d 1321, 1326 (D. Wyo. 2000) ("technical blueprints depicting the design, materials, components, dimensions and geometry of" 1935 aircraft (quoting agency declaration)), aff'd, 298 F.3d 1184, 1190 n.3 (10th Cir. 2002) (noting requester's concession at oral argument that blueprints remained commercially valuable); Heeney v. FDA, No. 97-5461, 1999 U.S. Dist. LEXIS 23365, at \*25 & n.13 (C.D. Cal. Mar. 18, 1999) ("compliance testing" and "specification of the materials used in constructing" electrode catheter), aff'd, 7 F. App'x 770 (9th Cir. 2001); Sokolow v. FDA, No. 1:97-CV-252, slip op. at 7 (E.D. Tex. Feb. 19, 1998) (description of how drug is manufactured, including "analytical methods employed to assure quality and consistency" and "results of stability testing"), aff'd, 162 F.3d 1160 (5th Cir. 1998) (unpublished table decision); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, 1993 WL 1610471, at \*7 (C.D. Cal. May 10, 1993) ("information about how a pioneer drug product is formulated, chemically composed, manufactured, and quality controlled"), aff'd in part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995); Pac. Sky Supply, Inc. v. Dep't of the Air Force, No. 86-2044, 1987 WL 25456, at \*1 (D.D.C. Nov. 20, 1987) (design drawings of airplane fuel pumps developed by private company and used by Air Force), modifying No. 86-2044, 1987 WL 18214 (D.D.C. Sept. 29, 1987), on motion to amend judgment, No. 86-2044, 1987 WL 28485 (D.D.C. Dec. 16, 1987); see also Yamamoto v. IRS, No. 83-2160, slip op. at 2 (D.D.C. Nov. 16, 1983) (report on computation of standard mileage rate prepared by private company and used by IRS); cf. Myers v. Williams, 819 F. Supp. 919 (D. Or. 1993) (granting preliminary injunction to prevent FOIA requester from disclosing trade secret acquired through mistaken, but nonetheless official, FOIA release) (non-FOIA case). But see Wash. Research Project, Inc. v. HEW, 504 F.2d 238, 244-45 (D.C. Cir. 1974) (denying trade secret protection for "non-commercial scientist's research design"); Physicians Comm. for Responsible Med. v. NIH, 326 F. Supp. 2d 19, 23 (D.D.C. 2004) (same).

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formula when release would not reveal the actual formula itself.<sup>14</sup> Moreover, one appellate court has concluded that "where the submitter or owner of documents held by the government grants the government permission to loan or release those documents to the public, those documents are no longer 'secret' for purposes of [trade secret protection under] Exemption 4" and so must be released.<sup>15</sup>

### Commercial or Financial Information

If information does not qualify as a trade secret, it nonetheless may be protected pursuant to Exemption 4 if it falls within its second, much larger category. To be protected as such, the information must be commercial or financial, obtained from a person, and privileged or confidential.<sup>16</sup> The overwhelming majority of Exemption 4 cases focus on this standard.

Courts have little difficulty in regarding information as "commercial or financial" if it relates to business or trade.<sup>17</sup> The Court of Appeals for the

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<sup>14</sup> See Ctr. for Auto Safety, 244 F.3d at 151 (airbag characteristics relating "only to the end product -- what features an airbag has and how it performs -- rather than to the production process"); Nw. Coal. for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201-02 (D.D.C. 1996) ("common names and Chemical Abstract System . . . numbers of the inert ingredients" contained in pesticide formulas).

<sup>15</sup> Herrick, 298 F.3d at 1194 & n.10 (distinguishing the facts of the case before it, and upholding trade secret protection nonetheless, based upon the subsequent revocation of that permission and the requester's failure to challenge both whether such revocation could legally operate to "restore the secret nature of the documents" and, if so, whether such revocation could properly be made after the documents had been requested under the FOIA).

<sup>16</sup> See, e.g., Gulf & W. Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979); Consumers Union v. VA, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

<sup>17</sup> See, e.g., Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (information relating "to business decisions and practices regarding the sale of power, and the operation and maintenance" of generators (quoting agency declaration)); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001) ("[i]nformation regarding oil and gas leases, prices, quantities and reserves"), appeal dismissed, No. 01-1347 (10th Cir. Sept. 4, 2001); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at \*2, \*29 (D.D.C. Sept. 28, 2001) (letter detailing "financial situation" of private primate research facility); Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) ("identities of businesses having unclaimed deposits"), aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); Cohen v. Kessler, No. 95-6140, slip op. at 9 (D.N.J.

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District of Columbia Circuit has firmly held that these terms should be given their "ordinary meanings" and has specifically rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.<sup>18</sup> Such a commercial interest has been found, for example, for information pertaining to water rights held by Indian tribes in light of the tribes' interest in "maximizing" their position vis-a-vis this valuable resource.<sup>19</sup>

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<sup>17</sup>(...continued)

Nov. 25, 1996) ("rat study's raw data" submitted to support application for approval of new animal drug); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, No. 94-0173-B, slip op. at 7 (D. Me. Apr. 17, 1995) ("information relating to proposed [land] usage charges"); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 987 (D.D.C. 1992) (software "output data and reports and extensive descriptive and instructional material"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); RMS Indus. v. DOD, No. C-92-1545, slip op. at 3, 6 (N.D. Cal. Nov. 24, 1992) ("interim pricing, type and quality of machines owned" and names and background of key employees and suppliers"); ISC Group v. DOD, No. 88-0631, 1989 WL 168858, at \*2-3 (D.D.C. May 22, 1989) (investigative report concerning allegations of overcharging on government contract); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settlement negotiation documents reflecting "accounting and other internal procedures"); see also FOIA Update, Vol. VI, No. 1, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value"); FOIA Update, Vol. IV, No. 4, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA").

<sup>18</sup> Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing Wash. Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982), and Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980)); accord Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 319-20 (D.C. Cir. 2006) (citing Pub. Citizen Health Research Group, 704 F.2d at 1290, and finding that letters describing "favorable market conditions for domestic [lumber] companies" constituted "commercial information," because those companies "have a 'commercial interest' in such letters"); Judicial Watch, Inc. v. U.S. Dep't of Energy, 310 F. Supp. 2d 271, 308 (D.D.C. 2004) (holding that reports that "constitute work done for clients" are "commercial' in nature"), aff'd in part & rev'd in part on other grounds, 412 F.3d 125 (D.C. Cir. 2005); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (finding export-insurance applications containing detailed information on goods and customers to be "commercial or financial"); Brockway v. Dep't of the Air Force, 370 F. Supp. 738, 740 (N.D. Iowa 1974) (concluding that reports generated by commercial enterprise "must generally be considered commercial information"), rev'd on other grounds, 518 F.2d 1184 (8th Cir. 1975).

<sup>19</sup> Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (declaring that "water rights themselves are an object of commerce . . . that is bought and sold," and holding that "infor-

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Nearly three decades ago, in a case involving a request for employee authorization cards submitted by a labor union, the Court of Appeals for the Second Circuit articulated a straightforward definition of the term "commercial," declaring that "surely [it] means [anything] pertaining or relating to or dealing with commerce."<sup>20</sup> In doing so, it categorically rejected the requester's argument that the information was "not commercial or financial because the [labor union did] not have profit as its primary aim."<sup>21</sup> The Second Circuit declared that such an "interpretation [would give] much too narrow a construction to the phrase in question."<sup>22</sup> Instead, the Second Circuit focused on the union's relationship with "commerce" and found that "[l]abor unions, and their representation of employees, quite obviously pertain to or are related to commerce and deal with the commercial life of the country."<sup>23</sup> Accordingly, the employee authorization cards were readily deemed to be "commercial."<sup>24</sup> Likewise, the D.C. Circuit has squarely held that a submitter's "nonprofit status is not determinative of the character of the information it reports," holding instead that "information may qualify as 'commercial' even if the provider's . . . interest in gathering, processing, and reporting the information is noncommercial."<sup>25</sup>

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<sup>19</sup>(...continued)

mation about the quantity available," or "information that creates the Tribes' negotiating position, supports their claims," or maximizes their position, "is all commercial information in function"), appeal dismissed, No. 04-35230 (9th Cir. Feb. 11, 2005); see also Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (concluding that "well and water related information" on an Indian reservation is "commercial or financial in nature" because "'water is a precious, limited resource'" and disclosure "'would adversely affect the Band's ability to negotiate its water rights or to litigate that issue'" (quoting agency declaration)).

<sup>20</sup> Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978).

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.; see also FlightSafety Servs. v. U.S. Dep't of Labor, No. 3:00CV 1285P, 2002 WL 368522, at \*5 (N.D. Tex. Mar. 5, 2002) (protecting "information relating to the employment and wages of workers"), aff'd per curiam, 326 F.3d 607, 611 (5th Cir. 2003); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (same).

<sup>25</sup> Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (finding that safety reports submitted by the nonprofit Institute for Nuclear Power Operations were "commercial," because the Institute's "'constituent utility companies [were] assuredly commercial enterprises engaged in the production and sale of electrical power for profit'" and "the commercial for-

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Despite the widely accepted breadth of the term "commercial or financial," it is not without meaning and nevertheless remains a necessary element of Exemption 4 protection. For example, the D.C. Circuit recently rejected an agency's rather strained argument that data pertaining to the location of endangered pygmy owls qualified as "commercial or financial" information "simply because it was submitted pursuant to a government-to-government cooperative agreement" whereby a state agency provided "access to its database in return for money" from the federal government.<sup>26</sup> The D.C. Circuit reasoned that "[s]uch a quid-pro-quo exchange between governmental entities does not constitute a commercial transaction in the ordinary sense."<sup>27</sup> Moreover, the D.C. Circuit found, the requested "owl-sighting data itself [was] commercial neither by its nature (having been created by the government rather than in connection with a commercial enterprise) nor in its function (as there [was] no evidence that the parties who supplied the owl-sighting information [had] a commercial interest at stake in its disclosure)."<sup>28</sup> Consequently, the D.C. Circuit was "unpersuaded" that Exemption 4 applied.<sup>29</sup>

Similarly, a district court rejected an agency's attempt to convert "factual information regarding the nature and frequency of in-flight medical emergencies"<sup>30</sup> into "commercial information" for purposes of Exemption 4, finding instead that the "medical emergencies detailed in the [requested] documents [did] not naturally flow from commercial flight operations, but rather [were] chance events which happened to occur while the airplanes were in flight."<sup>31</sup> In delimiting the scope of the term "commercial," the court opined that "[t]he mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding

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<sup>25</sup>(...continued)

tunes of [those] member utilities . . . could be materially affected by" disclosure (quoting district court)), vacated en banc on other grounds, 975 F.2d 871, 880 (D.C. Cir. 1992) (reiterating that it "agree[d] with the district court's conclusion that the information [contained in the nonprofit Institute's safety reports] is commercial in nature"); see also Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir. 1985) (summarily declaring that audit reports submitted by nonprofit water supply company are "clearly commercial or financial").

<sup>26</sup> Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 38 (D.C. Cir. 2002).

<sup>27</sup> Id. at 38-39.

<sup>28</sup> Id. at 39.

<sup>29</sup> Id. at 38.

<sup>30</sup> Chi. Tribune Co. v. FAA, No. 97 C 2363, 1998 WL 242611, at \*3 (N.D. Ill. May 7, 1998).

<sup>31</sup> Id. at \*2.

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that event into commercial information."<sup>32</sup>

Conversely, in an atypical ruling, the District Court for the Southern District of New York held that documents submitted by the General Electric Company (GE) to EPA supporting GE's alternative Hudson River dredging plan -- which would have been less costly to GE than the plan scheduled to be imposed on it by EPA -- were somehow not "commercial" under Exemption 4.<sup>33</sup> Despite the fact that GE "had a financial stake" in the matter and provided the documents in an effort "to convince the EPA to adopt its less expensive remedy," the court nonetheless held that EPA had "failed to establish that the information [had] any intrinsic commercial value."<sup>34</sup>

Interestingly, an agency's failure to establish the "commercial" character of requested information precluded Exemption 4 protection in the only appellate court decision to address the protection of information submitted by a scientist in connection with a grant application.<sup>35</sup> In that case, the D.C. Circuit found that research designs submitted as part of a grant application were not "commercial," despite claims that "[t]heir misappropriation," which "would be facilitated by premature disclosure, [would] deprive[ the researcher] of the career advancement and attendant material

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<sup>32</sup> Id.; see also Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 48-49 (D.D.C. 2003) (rejecting an agency's argument that a company's report should be deemed "commercial" merely because it was "labeled" as "'proprietary and confidential,'" and denying Exemption 4 protection based upon the agency's failure to provide "any description of the report's content"), renewed motion for summary judgment granted in part & denied in part on other grounds, 362 F. Supp. 2d 316 (D.D.C. 2005); In Def. 2001 U.S. Dist. LEXIS 24975, at \*29 (observing that "identities of [private] Foundation employees . . . standing alone, may not be commercial"); Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 303 (D.D.C. 1999) (denying summary judgment when the agency's declaration merely "state[d]" that the company's "proposals contain 'commercial and financial information'" but failed to provide a "description of the documents to permit the [requester] or [the] Court to test the accuracy of that claim").

<sup>33</sup> N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 332-34 (S.D.N.Y. 2003) (describing the documents as containing GE's "analyses of the costs, benefits, and environmental impact associated with the EPA's proposed remedy and GE's alternative remedy").

<sup>34</sup> Id. at 334 (finding also that EPA had not shown "that disclosure would jeopardize GE's commercial interests or reveal information about GE's ongoing operations, or that GE generated the information for a purpose other than advocating a policy to a governmental agency"); see also id. at 330 (noting that GE had neither submitted an affidavit nor "taken a position with regard to the documents").

<sup>35</sup> See Wash. Research Project, Inc. v. HEW, 504 F.2d 238, 244 (D.C. Cir. 1974).



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rewards in which the academic and scientific market deals."<sup>36</sup> Finding that "the reach" of Exemption 4 "is not necessarily coextensive with the existence of competition in any form," the D.C. Circuit declared 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."<sup>37</sup> Although recognizing that a scientist may have "a preference for or an interest in nondisclosure of his research design," the D.C. Circuit held that if that interest is "founded on professional recognition and reward, it is surely more the interest of an employee than of an enterprise" and so is beyond the reach of Exemption 4.<sup>38</sup> Significantly, the D.C. Circuit noted that a given grantee "could conceivably be shown to have a commercial or trade interest in his research design," but it emphasized that "the burden of showing" such an interest "was on the agency."<sup>39</sup> Because the agency "did not introduce a single fact relating to the commercial character of any specific research project," the D.C. Circuit concluded that in that case, the agency had failed to "carr[y] its burden on this point."<sup>40</sup>

Lastly, protection for financial information is not limited to economic data generated solely by corporations or other business entities, but rather has been held to apply to personal financial information as well.<sup>41</sup> Examples of items usually regarded as commercial or financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating

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<sup>36</sup> Id. (observing that "the government has been at some pains to argue that biomedical researchers are really a mean-spirited lot who pursue self-interest as ruthlessly as the Barbary pirates did in their own chosen field").

<sup>37</sup> Id.

<sup>38</sup> Id. at 245.

<sup>39</sup> Id. at 244 n.6.

<sup>40</sup> Id.; see also Physicians Comm. for Responsible Med., 326 F. Supp. 2d 19, 24-25 (D.D.C. 2004) (citing Wash. Research Project, 504 F.2d at 244, and concluding "as a matter of law" that a noncommercial scientist's research designs did "not amount to commercial information," after finding that the scientist "never manufactured or marketed any drug . . . that was produced as a result of his research" and that "none of [his] research results have been marketed or used and subsequently subjected to additional study").

<sup>41</sup> See Wash. Post, 690 F.2d at 266; Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 15 (D.D.C. 2004) (finding that draft severance agreements which contained "financial information surrounding [the Deputy Secretary's] separation from his former company . . . are within the common understanding of the term 'financial information'"); see also FOIA Update, Vol. IV, No. 4, at 14. But see Wash. Post, 690 F.2d at 266 (holding that mere "list of non-federal employment" is not "financial" within meaning of Exemption 4).

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costs; and information on financial condition.<sup>42</sup>

### Obtained from a "Person"

The second of Exemption 4's specific criteria, that the information be "obtained from a person," is quite easily met in almost all circumstances. The term "person" refers to individuals as well as to a wide range of entities,<sup>43</sup> including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government.<sup>44</sup> The reach of Exemption 4 is "sufficiently broad to encompass financial and commercial information concerning a third party" and protection is therefore available regardless of whether the information pertains directly to the commercial interests of the party that provided it -- as is typically the case -- or pertains to the commercial interests of another.<sup>45</sup> The courts have held, however, that information generat-

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<sup>42</sup> See, e.g., Landfair v. U.S. Dep't of the Army, 645 F. Supp. 325, 327 (D.D.C. 1986).

<sup>43</sup> See, e.g., Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996) (term "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency" (quoting definition found in Administrative Procedure Act, 5 U.S.C. § 551(2) (2000))); Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (same).

<sup>44</sup> See, e.g., FlightSafety Servs. v. Dep't of Labor, 326 F.3d 607, 611 (5th Cir. 2003) (per curiam) (business establishments); Stone v. Exp.-Imp. Bank, 552 F.2d 132, 137 (5th Cir. 1977) (foreign government agency); Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (Indian tribes (citing Indian Law Res. Ctr. v. Dep't of the Interior, 477 F. Supp. 144, 146 (D.D.C. 1979) (holding that an Indian tribe, "as a corporation that is not part of the Federal Government, is plainly a person within the meaning of the Act"))), appeal dismissed, No. 04-35230 (9th Cir. Feb. 11, 2005); Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) (banks), aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (state government). See generally Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1189 (D. Colo. 2001) (rejecting Apache Tribe's claim of confidentiality for information "accumulated by the Tribe [pursuant to a cooperative agreement] that would otherwise be submitted by [oil and gas] lessees directly to the agency," and concluding that although the lessees could invoke Exemption 4, the Tribe could not), appeal dismissed, No. 01-1347 (10th Cir. Sept. 4, 2001).

<sup>45</sup> Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 405 (D.C. Cir. 1980) (holding that the "plain language" of Exemption 4 "does not in any way suggest that" the requested information "must relate to the affairs of the provider"); accord Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (citing Board of Trade and protecting safety re-

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ed by the federal government itself is not "obtained from a person" and is therefore excluded from Exemption 4's coverage.<sup>46</sup> Such information might possibly be protectible under Exemption 5, though, which incorporates a qualified privilege for sensitive commercial or financial information generated by the government.<sup>47</sup> (For a further discussion of the "commercial privilege," see Exemption 5, Other Privileges, below.)

Documents prepared by the government can still come within Exemption 4, however, if they simply contain summaries or reformulations of information supplied by a source outside the government,<sup>48</sup> or contain in-

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<sup>45</sup>(...continued)

ports submitted by power-plant consortium based on commercial interests of member utility companies), vacated en banc on other grounds, 975 F.2d 871 (D.C. Cir. 1992); see, e.g., Miami Herald Publ'g Co. v. SBA, 670 F.2d 610, 614 & n.7 (5th Cir. 1982) (analyzing Exemption 4 argument raised on behalf of borrowers even though no Exemption 4 argument was raised for lenders, who actually had "directly" supplied requested loan agreements to agency); see also Department of Justice FOIA Regulations, 28 C.F.R. § 16.8(a)(2) (2006) (defining a "submitter" as "any person or entity from whom the Department obtains business information, directly or indirectly").

<sup>46</sup> See Bd. of Trade, 627 F.2d at 404 (concluding that scope of Exemption 4 is "restrict[ed]" to information that has "not been generated within the Government"); Pohlman, Inc. v. SBA, No. 4:03-01241, slip op. at 20 (E.D. Mo. Sept. 30, 2005) (finding that information prepared by consultants hired by the agency and information generated by the agency in the course of its involvement with its borrowers was not "obtained from a person") (appeal pending); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) (declaring that "person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); see also, e.g., Maydak v. U.S. Dep't of Justice, 254 F. Supp. 2d 23, 49 (D.D.C. 2003), renewed motion for summary judgment granted in part & denied in part on other grounds, 362 F. Supp. 2d 316 (D.D.C. 2005); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 28 (D.D.C. 2000); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 469 (W.D.N.Y. 1987); Consumers Union v. VA, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

<sup>47</sup> See Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); Morrison-Knudsen Co. v. Dep't of the Army of the U.S., 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985).

<sup>48</sup> See, e.g., OSHA Data/C.I.H., Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 162 n.23 (3d Cir. 2000) (ratio calculated by agency, but based upon "individual components" supplied by private-sector employers); Gulf & W. Indus. v. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (contractor information contained in agency audit report); Dow Jones, 219 F.R.D. at  
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formation obtained through a plant inspection.<sup>49</sup> Moreover, the mere fact that the government supervises or directs the preparation of information submitted by sources outside the government does not preclude that information from being "obtained from a person."<sup>50</sup> Similarly, the District Court for the District of Columbia has held that the fact that particular information is "arrived at through negotiation" with the government does not preclude it from being regarded as "obtained from a person."<sup>51</sup>

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<sup>48</sup>(...continued)

170, 176 (power-plant information obtained by agency staff through interviews with "employees or representatives" of companies); Matthews v. USPS, No. 92-1208-CV-W-8, slip op. at 6 (W.D. Mo. Apr. 15, 1994) (technical drawings prepared by agency personnel, but based upon information supplied by computer company); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,121 (D.D.C. Dec. 4, 1980) (contractor information contained in agency documents). But see Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (characterizing an agency audit as "not simply a summary or reformulation of information supplied by a source outside the government" and finding that an analysis "prepared by the government" is not "obtained from a person" and so "may not be withheld under Exemption 4"), appeal dismissed per stipulation, No. 99-5335 (D.C. Cir. Mar. 17, 2000).

<sup>49</sup> Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1076 (9th Cir. 2004) (quality assessment of raisins, "including weight, color, size, sugar content, and moisture" reflected in "Line Check Sheets" prepared by USDA inspectors during plant visits); Mulloy v. Consumer Prod. Safety Comm'n, No. 85-645, 1985 U.S. Dist. LEXIS 17194, at \*2 (S.D. Ohio Aug. 2, 1985) (manufacturing and sales data compiled in establishment inspection report prepared by Commission investigator after on-site visit to plant), aff'd, No. 85-3720 (6th Cir. July 22, 1986).

<sup>50</sup> See High Country Citizens Alliance v. Clarke, No. 04-CV-00749, 2005 WL 2453955, at \*5 (D. Colo. Sept. 29, 2005); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001), appeal dismissed, No. 01-1347 (10th Cir. Sept. 4, 2001); Silverberg v. HHS, No. 89-2743, 1991 WL 633740, at \*2 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 4 (M.D. Fla. June 3, 1986). But see Consumers Union, 301 F. Supp. at 803 (deciding that when "[t]he only things . . . obtained from outside the government were the hearing aids themselves," and the requested product testing on those hearing aids actually was performed by government personnel using their expertise and government equipment, the resulting data was not "obtained from a person" for purposes of Exemption 4).

<sup>51</sup> Pub. Citizen Health Research Group v. NIH, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the agency, that did "not alter the fact that the licensee is the ultimate source of [the] information," inasmuch as the

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"Confidential" Information

The third requirement of Exemption 4 is met if the submitted information is "privileged or confidential." By far, most Exemption 4 litigation has focused on whether requested information is "confidential" for purposes of Exemption 4. In earlier years, courts based the application of Exemption 4 upon whether there was a promise of confidentiality by the government to the submitting party,<sup>52</sup> or whether the information was of the type not customarily released to the public by the submitter.<sup>53</sup>

These earlier tests were then superseded by National Parks & Conservation Ass'n v. Morton,<sup>54</sup> which significantly altered the test for confidentiality under Exemption 4 and became the leading case on the issue.<sup>55</sup> In National Parks, the Court of Appeals for the District of Columbia Circuit held that the test for confidentiality was an objective one.<sup>56</sup> Thus, whether information would customarily be disclosed to the public by the person from whom it was obtained was not considered dispositive.<sup>57</sup> Likewise, an agency's promise that information would not be released was not considered dispositive.<sup>58</sup> Instead, the D.C. Circuit declared in National Parks that the term "confidential" should be read to protect governmental and private interests in accordance with the following two-part test:

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive posi-

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<sup>51</sup>(...continued)

licensee "must provide the information in the first instance").

<sup>52</sup> See, e.g., GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969).

<sup>53</sup> See, e.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972).

<sup>54</sup> 498 F.2d 765 (D.C. Cir. 1974).

<sup>55</sup> See, e.g., Burroughs v. Schlesinger, 403 F. Supp. 633, 637 (E.D. Va. 1975) (recognizing National Parks as "the leading case on defining the scope of" Exemption 4).

<sup>56</sup> Id. at 766.

<sup>57</sup> Id. at 767.

<sup>58</sup> See Wash. Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (citing Nat'l Parks, 498 F.2d at 766).

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tion of the person from whom the information was obtained.<sup>59</sup>

These two principal Exemption 4 tests, which apply disjunctively, have often been referred to in subsequent cases as the "impairment prong" and the "competitive harm prong." In National Parks, the D.C. Circuit expressly reserved the question of whether any other governmental interests -- such as compliance or program effectiveness -- might also be embodied in a "third prong" of the exemption.<sup>60</sup> (For a further discussion of this point, see Exemption 4, Third Prong of National Parks, below.)

Seventeen years later, in a surprising development, D.C. Circuit Court Judge Randolph, joined by Circuit Court Judge Williams, suggested in a concurring opinion in Critical Mass Energy Project v. NRC, that if it were a question of first impression, they would "apply the common meaning of [the word] 'confidential' and [would] reject" the National Parks test altogether.<sup>61</sup> Judges Randolph and Williams contended that there was no "legitimate basis" for the D.C. Circuit's addition of "some two-pronged 'objective' test" for determining if material was "confidential" in light of the unambiguous language of the exemption.<sup>62</sup> Nevertheless, they recognized that they were "not at liberty" to apply their "common sense" definition because the D.C. Circuit had "endorsed the National Parks definition many times," thus compelling them to follow it as well.<sup>63</sup> Thereafter, the government petitioned for, and was granted, an en banc rehearing in Critical Mass<sup>64</sup> so that the full D.C. Circuit could have an opportunity to consider whether the definition of confidentiality set forth in National Parks -- and followed by the panel majority in Critical Mass -- was indeed faithful to the language and legislative intent of Exemption 4.<sup>65</sup>

Fifteen years ago, the D.C. Circuit issued its en banc decision in Critical Mass. After examining the "arguments in favor of overturning National Parks, [the court] conclude[d] that none justifies the abandonment of so well established a precedent."<sup>66</sup> This ruling was founded on the principle of stare decisis -- which counsels against the overruling of an estab-

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<sup>59</sup> 498 F.2d at 770.

<sup>60</sup> Id. at 770 n.17.

<sup>61</sup> 931 F.2d 939, 948 (D.C. Cir.) (Randolph & Williams, JJ., concurring), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> 942 F.2d 799 (D.C. Cir. 1991).

<sup>65</sup> See FOIA Update, Vol. XIII, No. 4, at 1.

<sup>66</sup> 975 F.2d 871, 877 (D.C. Cir. 1992).

lished precedent.<sup>67</sup> The D.C. Circuit determined that "[i]n obedience to" stare decisis, it would not "set aside circuit precedent of almost twenty years' standing."<sup>68</sup> In so holding, it noted the "widespread acceptance of National Parks by [the] other circuits," the lack of any subsequent action by Congress that would remove the "conceptual underpinnings" of the decision, and the fact that the test had not proven to be "so flawed that [the court] would be justified in setting it aside."<sup>69</sup>

Although the National Parks test for confidentiality under Exemption 4 was thus reaffirmed, the full D.C. Circuit went on to "correct some misunderstandings as to its scope and application."<sup>70</sup> Specifically, the court "confined" the reach of National Parks and established an entirely new standard to be used for determining whether information "voluntarily" submitted to an agency is "confidential."<sup>71</sup> The United States Supreme Court declined to review the D.C. Circuit's en banc decision,<sup>72</sup> and it thus stands as the leading Exemption 4 case on this issue.<sup>73</sup> Indeed, almost ten years after rendering its decision, the D.C. Circuit remarked that it had had numerous occasions to address the applicable standards to be used under Exemption 4, but by far "[t]he judgment of the court sitting en banc in Critical Mass [was its] most significant statement on the subject."<sup>74</sup>

#### The Critical Mass Decision

Through its en banc decision in Critical Mass Energy Project v. NRC, a seven-to-four majority of the Court of Appeals for the District of Columbia Circuit established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is "confidential" under Exemption 4.<sup>75</sup> Specifically, the tests for confidentiality set forth in National Parks & Conservation Ass'n v. Morton,<sup>76</sup> were confined "to the category of cases to which [they were] first applied; namely, those

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<sup>67</sup> See id. at 875.

<sup>68</sup> Id.

<sup>69</sup> Id. at 876-77 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

<sup>70</sup> Id. at 875.

<sup>71</sup> Id. at 871, 879.

<sup>72</sup> 507 U.S. 984 (1993).

<sup>73</sup> See FOIA Update, Vol. XIV, No. 2, at 1.

<sup>74</sup> Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 147 (D.C. Cir. 2001).

<sup>75</sup> 975 F.2d 871, 879 (D.C. Cir. 1992).

<sup>76</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

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in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government."<sup>77</sup> The D.C. Circuit announced an entirely new test for the protection of information that is "voluntarily" submitted: Such information is now categorically protected provided it is not "customarily" disclosed to the public by the submitter.<sup>78</sup>

In reaching this result, the D.C. Circuit first examined the bases for its decision in National Parks and then identified various interests of both the government and submitters of information that are protected by Exemption 4.<sup>79</sup> By so doing, it found that different interests are implicated depending upon whether the requested information was submitted voluntarily or under compulsion.<sup>80</sup> As to the government's interests, the D.C. Circuit found that when submission of the information is "compelled" by the government, the interest protected by nondisclosure is that of ensuring the continued reliability of the information.<sup>81</sup> On the other hand, it concluded, when information is submitted on a "voluntary" basis, the governmental interest protected by nondisclosure is that of ensuring the continued and full availability of the information.<sup>82</sup>

The D.C. Circuit found that this same dichotomy between compelled and voluntary submissions applies to the submitter's interests as well: When submission of information is compelled, the harm to the submitter's interest is the "commercial disadvantage" that is recognized under the Na-

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<sup>77</sup> Critical Mass, 975 F.2d at 880.

<sup>78</sup> Id. at 879; accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 147-48 (D.C. Cir. 2001) (emphasizing that there are two distinct standards to be used in determining confidentiality under Exemption 4, depending on whether information is provided on a "mandatory" or a "voluntary" basis); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (reiterating that "[t]he test for whether information is 'confidential' depends in part on whether the information was voluntarily or involuntarily disclosed to the government") (non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000)); cf. Homeland Security Act of 2002, 6 U.S.C. § 133 (Supp. IV 2004) (establishing protection under Exemption 3, 5 U.S.C. § 552(b)(3) (2000 & Supp. IV 2004), for any properly marked "critical infrastructure information" that is voluntarily provided to the Department of Homeland Security); *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04); *FOIA Post*, "Homeland Security Law Contains New Exemption 3 Statute" (posted 1/27/03).

<sup>79</sup> Critical Mass, 975 F.2d at 877-79.

<sup>80</sup> Id.

<sup>81</sup> Id. at 878.

<sup>82</sup> Id.



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tional Parks "competitive injury" prong.<sup>83</sup> When information is volunteered, on the other hand, the exemption recognizes a different interest of the submitter, that of protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained."<sup>84</sup>

Having delineated these various interests that are protected by Exemption 4, the D.C. Circuit then noted that the Supreme Court had "encouraged the development of categorical rules" in FOIA cases "whenever a particular set of facts will lead to a generally predictable application."<sup>85</sup> The court found that the circumstances of the Critical Mass case -- which involved voluntarily submitted reports -- lent themselves to such "categorical" treatment.<sup>86</sup>

Accordingly, the D.C. Circuit held that it was reaffirming the National Parks test for "determining the confidentiality of information submitted under compulsion," but was announcing a categorical rule for the protection of information provided on a voluntary basis.<sup>87</sup> It declared that such voluntarily provided information is "'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."<sup>88</sup> It also emphasized that this categorical test for voluntarily submitted information is "objective" and that the agency invoking it "must meet the burden of proving the provider's custom."<sup>89</sup>

Applying this test to the information at issue in the Critical Mass case, the D.C. Circuit agreed with the district court's conclusion that the reports were commercial in nature, that they were provided to the agency on a voluntary basis, and that the submitter did not customarily release

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<sup>83</sup> Id.

<sup>84</sup> Id. (quoting Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971)).

<sup>85</sup> Id. at 879 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989)).

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id. But see Lee v. FDIC, 923 F. Supp. 451, 454 (S.D.N.Y. 1996) (characterizing the Critical Mass test for withholding voluntary submissions as including an additional requirement that "disclosure would likely impair the government's ability to obtain necessary information in the future").

<sup>89</sup> Critical Mass, 975 F.2d at 879.

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them to the public.<sup>90</sup> Thus, the reports were found to be confidential and exempt from disclosure under this new test for Exemption 4.<sup>91</sup>

The D.C. Circuit concluded its opinion by addressing the objection raised by the requester in the case that the new test announced by the court "may lead government agencies and industry to conspire to keep information from the public by agreeing to the voluntary submission of information that the agency has the power to compel."<sup>92</sup> The court dismissed this objection on the grounds that there is "no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act," and that it did not "see any reason to interfere" with an agency's "exercise of its own discretion in determining how it can best secure the information it needs."<sup>93</sup>

### Applying Critical Mass

The pivotal issue that has arisen as a result of the decision in Critical Mass Energy Project v. NRC<sup>94</sup> is the distinction that the court drew between information "required" to be submitted to an agency and information provided "voluntarily." Although the Court of Appeals for the District of Columbia Circuit never expressly articulated a definition of these two terms in its opinion in Critical Mass, the Department of Justice has issued policy guidance on this subject based upon an extensive analysis of the underlying rationale of the D.C. Circuit's decision, as well as several other

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<sup>90</sup> Id. at 880 (citing first district court decision and first panel decision in Critical Mass, which recognized that submitter made reports available on confidential basis to individuals and organizations involved in nuclear power production process pursuant to explicit nondisclosure policy).

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Id.; see Animal Legal Def. Fund v. Sec'y of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) (finding, based upon this holding in Critical Mass, that there was "nothing" it could do, "however much it might be inclined to do so," to upset agency regulations that permitted regulated entities to keep documents "on-site," outside possession of agency, and thus unreachable under FOIA) (non-FOIA case brought under Administrative Procedure Act), vacated for lack of standing sub nom. Animal Legal Def. Fund, Inc. v. Espy, 29 F.3d 720 (D.C. Cir. 1994); cf. Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 245 n.6, 247 (2d Cir. 2006) (agreeing with this holding of Critical Mass, but declining to adopt its "amendment" to National Parks test for voluntarily submitted information).

<sup>94</sup> 975 F.2d 871 (D.C. Cir. 1992) (en banc).

indications of the court's intent.<sup>95</sup>

The Department of Justice has concluded that a submitter's voluntary participation in an activity -- such as seeking a government contract or applying for a grant or a loan -- does not govern whether any submissions made in connection with that activity are likewise "voluntary."<sup>96</sup> Rather than examining the nature of a submitter's participation in an activity, agencies are advised to focus on whether submission of the information at issue was required for those who chose to participate.<sup>97</sup> The Department of Justice's policy guidance also points out that information can be "required" to be submitted by a broad range of legal authorities, including informal mandates that call for submission as a condition of doing business with the government.<sup>98</sup> Furthermore, the existence of agency authority to require submission of information does not automatically mean such a submission is "required"; the agency authority must actually be exercised in order for a particular submission to be deemed "required."<sup>99</sup> By consistently

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<sup>95</sup> See FOIA Update, Vol. XIV, No. 2, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking"); accord McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316, 317-18 (D.D.C. 1995) (noting that "[a]lthough no bright line rule exists for determining voluntariness, examination of the Critical Mass opinion sheds light on the type of information the D.C. Circuit Court contemplated as being voluntary") (reverse FOIA suit), aff'd on other grounds, No. 95-5290 (D.C. Cir. Sept. 17, 1996).

<sup>96</sup> See FOIA Update, Vol. XIV, No. 2, at 5.

<sup>97</sup> See id.; see also id. at 1 (pointing to significance of this guidance to procurement process and its development in coordination with Office of Federal Procurement Policy); accord Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (declaring that "when the government requires a private party to submit information as a condition of doing business with the government" the submission is deemed "required").

<sup>98</sup> See id. at 5; accord Lepelletier v. FDIC, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997) ("Information is considered 'required' if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government."), aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); see also Sun-Sentinel Co. v. DHS, 431 F. Supp. 2d 1258, 1275 (S.D. Fla. 2006) (submission required by agency's contracts); Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 8-11 (D.D.C. Sept. 2, 1993) (submission "compelled" both by agency statute and by agency letter sent to submitters) (reverse FOIA suit).

<sup>99</sup> See FOIA Update, Vol. XIV, No. 2, at 5; accord Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 246-48 & nn. 7-8 (2d Cir. 2006); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S.

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applying these principles to each item of information requested, agencies can best ensure that they are analytically distinguishing "voluntary" submissions from those that are "required," consistent with the D.C. Circuit's direction that the test is "objective."<sup>100</sup>

The D.C. Circuit rendered its first decision containing an extensive analysis of Critical Mass six years ago, in a case that did "not involve a typical voluntary information submission," but instead involved what the court characterized as a "mistaken submission."<sup>101</sup> The case, Center for Auto Safety v. National Highway Traffic Safety Administration, concerned an agency "Information Request" that was issued to airbag manufacturers and importers, and which "appeared mandatory on its face."<sup>102</sup> Not only did the request state that the agency "require[d]" submission of the specified information, it also included language indicating that "[f]ailure to respond promptly and fully . . . could subject [the recipient] to civil penalties."<sup>103</sup> Despite all of this, the D.C. Circuit upheld the district court's determination that this agency request had been issued in violation of the Paperwork Reduction Act,<sup>104</sup> because the agency had failed to "obtain prior approval from OMB."<sup>105</sup> As a result, the court held, the request could "be ignored without penalty," could not be enforced by the agency, and consequently could not "be considered mandatory."<sup>106</sup>

In making this determination, the D.C. Circuit held that "actual legal

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<sup>99</sup>(...continued)

Dist. LEXIS 24975, at \*33-35 (D.D.C. Sept. 28, 2001); Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 78 n.6 (D.D.C. 2001); Gov't Accountability Project v. NRC, No. 86-1976, 1993 WL 13033518, at \*5 (D.D.C. July 2, 1993) (dicta).

<sup>100</sup> See Critical Mass, 975 F.2d at 879; see also Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 149 (D.C. Cir. 2001) (describing the "distinction between voluntary and mandatory submissions that was delineated in Critical Mass" as one "rooted in the importance of establishing clear tests in interpreting FOIA"); accord FOIA Update, Vol. XIV, No. 2, at 6-7 (setting forth detailed, step-by-step guidance for agency personnel to use in applying Critical Mass distinction).

<sup>101</sup> Ctr. for Auto Safety, 244 F.3d at 148.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> 44 U.S.C. § 3502(3)(A)(i) (2000 & Supp. III 2003) (requiring that OMB approve all agency forms seeking to collect information from ten or more persons or entities).

<sup>105</sup> Ctr. for Auto Safety, 244 F.3d at 148.

<sup>106</sup> Id. at 148-49.

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authority, rather than the parties' beliefs or intentions, governs judicial assessments of the character of submissions.<sup>107</sup> The court "reject[ed] the argument" that it "should look to subjective factors," such as the submitting parties' beliefs, or "whether the agency, at the time it issued the request for information, considered the request to be mandatory."<sup>108</sup> Such a focus on the "parties' intentions," it declared, "would cause the court to engage in spurious inquiries into the mind" and would be at odds with the decision in Critical Mass, which emphasized that "the voluntary versus mandatory distinction [is] an objective test."<sup>109</sup>

In Center for Auto Safety, the D.C. Circuit also rejected the "argument that if a recipient does not assert that a submission is voluntary before submitting" requested information, it has somehow "waived" its ability to assert that the submission was voluntary.<sup>110</sup> This approach, too, was found to be at odds with Critical Mass, which recognized "an important policy interest in minimizing resistance" to agency requests for information.<sup>111</sup> Any agency insistence that submitters "identify and air legal objections" before responding to an agency's request for information would, the court found, "tend to frustrate" submitter cooperation.<sup>112</sup> The D.C. Circuit concluded that in this case, "the agency essentially 'flashed its badge' to gain entrance to a private sphere when it had no legal authority to do so," and that "[g]iven this unusual situation" it could not "treat the submissions as 'mandatory.'"<sup>113</sup>

When presented with a case involving essentially the opposite factual situation, the District Court for the District of Columbia applied this "objective test" and held that a submission made by a grant recipient was "required" -- even though it was submitted in response to an agency letter that, on its face, "merely requested, but did not require," that the information be provided.<sup>114</sup> The district court rejected the agency's argument that it "did not send th[e] letter under any statutory or regulatory authority," that it did not consider it a "demand [or] a threat," and that it viewed its

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<sup>107</sup> Id. at 149.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> Id. at 150.

<sup>114</sup> In Def., 2001 U.S. Dist. LEXIS 24975, at \*32.

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letter as "merely a request for information."<sup>115</sup> Rather, the court declared, it would "not attempt to discern the authors' intent in sending the letter" -- as the agency urged it to do -- "because [that] would require the [c]ourt to employ the exact [subjective] approach rejected by the Court of Appeals" in Center for Auto Safety.<sup>116</sup> Examining the submission under an "objective test," the court concluded that because the agency had by regulation a "right of access" to any relevant documents maintained by grant recipients, it did in fact have "the legal authority to compel" the requested grant recipient's response.<sup>117</sup> Moreover, the court found, the letter sent to the grant recipient sufficed as the agency's "exercise" of that authority.<sup>118</sup> Accordingly, the court refused to look at the agency's subjective intent in sending the letter, and it held that because "the agency here did in fact send a letter requesting information that it had the legal authority to compel," the submission "was required."<sup>119</sup>

In a recent decision that relied extensively on the approach adopted by the D.C. Circuit in Center for Auto Safety, the District Court for the District of Columbia rejected the requester's argument that draft severance agreements provided by a Deputy Secretary nominee "were not voluntarily provided" to the agency, and instead it found particularly "persuasive" the agency's argument that although it had authority to require a nominee "to submit a description of [his] severance agreements," it had no "actual legal authority to compel him to submit" copies of them.<sup>120</sup> The agency explained that if it had found the nominee's description of a given severance agreement to be lacking, "the most [it] could have required him to do was to provide a more detailed description of the agreement's terms."<sup>121</sup> In light of these facts, and utilizing "the objective test set forth in Center for Auto Safety," the court concluded that submission of the requested draft severance agreements themselves "must be considered voluntary."<sup>122</sup>

There are numerous other district court decisions that have applied

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<sup>115</sup> Id. at \*32 (quoting declarations from authors of letter).

<sup>116</sup> Id. at \*34 (citing Ctr. for Auto Safety, 244 F.3d at 149); see also Parker, 141 F. Supp. 2d at 78 n.7 (likewise citing Center for Auto Safety and refusing to examine "subjective factors," such as submitter's belief at time of submission, when making determination on voluntariness).

<sup>117</sup> In Def., 2001 U.S. Dist. LEXIS 24975, at \*35.

<sup>118</sup> Id. at \*34.

<sup>119</sup> Id. at \*35.

<sup>120</sup> Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 16-17 (D.D.C. 2004) (appeal pending).

<sup>121</sup> Id. (quoting agency's brief).

<sup>122</sup> Id. at 17.

the Critical Mass distinction between "voluntary" and "required" submissions. In one of the first such cases, involving an application for approval to transfer a contract, the District Court for the District of Columbia found that the submission had been required both by the agency's statute -- which did not on its face apply to the submission at issue, but was found to apply based upon the agency's longstanding practice of interpreting the statute more broadly -- and by the agency's letter to the submitters which required them to "submit the documents as a condition necessary to receiving approval of their application."<sup>123</sup> Using the same approach as the Department of Justice's Critical Mass guidance, the court specifically held that "[u]nder Critical Mass, submissions that are required to realize the benefits of a voluntary program are to be considered mandatory."<sup>124</sup> Similarly, when the FDA conditioned its approval of a new drug on the manufacturer's submission of a post-marketing study, the protocol for that study (i.e., its design, hypotheses, and objectives) was deemed a required submission (even in the absence of agency regulations requiring manufacturers to conduct such post-marketing studies) because submission for that particular manufacturer had, in fact, been "necessary in order to obtain FDA approval" for the drug and that rendered it "required."<sup>125</sup>

In another case that also used the same approach as the Department of Justice's Critical Mass guidance, the District Court for the District of New Jersey found that when a submitter provided documents to agency officials during a meeting concerning its tax status, it did so voluntarily, because "if the submission of the documents were obligatory, there would be a controlling statute, regulation or written order."<sup>126</sup> In the absence of any such "mandate," the court concluded that the submission was volun-

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<sup>123</sup> Lykes, No. 92-2780, slip op. at 9 (D.D.C. Sept. 2, 1993).

<sup>124</sup> Id. at 9 n.4; accord FOIA Update, Vol. XIV, No. 2, at 3-5; see also Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 169 (D.D.C. 2004) (acknowledging that information "required of parties hoping to participate in" agency's trade missions was "compelled"); Lee v. FDIC, 923 F. Supp. 451, 454 (S.D.N.Y. 1996) (rejecting agency's attempt to characterize submission as "voluntary" when documents were "required to be submitted" in order to obtain government approval to merge two banks).

<sup>125</sup> Pub. Citizen Health Research Group v. FDA, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997); see also, e.g., Pub. Citizen Health Research Group v. FDA, 997 F. Supp. 56, 62 n.3 (D.D.C. 1998) (concluding that information submitted in connection with New Drug Application was "required"), aff'd in pertinent part, 185 F.3d 898, 901, 903 (D.C. Cir. 1999); Sokolow v. FDA, No. 1:97-CV-252, slip op. at 6 (E.D. Tex. Feb. 19, 1998) (same), aff'd, 162 F.3d 1160 (5th Cir. 1998) (unpublished table decision).

<sup>126</sup> AGS Computers, Inc. v. U.S. Dep't of Treasury, No. 92-2714, slip op. at 10 (D.N.J. Sept. 16, 1993).

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tary.<sup>127</sup>

In that case, the court rejected an argument advanced by the requester that despite the absence of a mandate requiring the submission, the court should "rule as a matter of law" that the documents were "required" to be submitted because submission was for the "benefit" of the submitter.<sup>128</sup> Finding that such an approach "results in putting the cart before the horse," the court noted that in Critical Mass, the D.C. Circuit decided first whether a submission was voluntary and only then did it apply the "less stringent standard for nondisclosure under the FOIA as an incentive for voluntary submitters to provide accurate and reliable information."<sup>129</sup> The requester's proposed test was "flawed," the court found, because it relied "too heavily on hindsight" and the court could "envision cases where someone at the time of submitting the documents is clearly doing so on a voluntary basis, but when a benefit analysis . . . is performed thereafter, the incorrect result is reached that the submission was compulsory."<sup>130</sup>

Three years ago, the District Court for the District of Columbia readily found documents provided by three different companies all to have been "voluntarily submitted," based primarily upon the representations made to the agency by the companies.<sup>131</sup> The court noted that the first submitter had "informed" the agency that its documents were provided "as a voluntary public service with the view that these independent studies might be useful."<sup>132</sup> Similarly, the second submitter had "indicated" that its document was provided voluntarily "in order to resolve disputes with the government."<sup>133</sup> By contrast, the third submitter admitted that it was not "certain[]" how the agency "came into possession of the report," but was able to state that the report had not been "requested" or paid for by any federal agency and that it did know that it had sent "courtesy" copies of it "to various government officials."<sup>134</sup> Despite the requester's argument that as to this third submission the agency was unable to "state specifically how" the report was "obtained by the government," the court "agree[d]" with the agency's "conclusion" -- which was based upon the submitter's representa-

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<sup>127</sup> Id. at 9-10.

<sup>128</sup> Id. at 10.

<sup>129</sup> Id.

<sup>130</sup> Id. at 10-11.

<sup>131</sup> Judicial Watch, Inc. v. U.S. Dep't of Energy, 310 F. Supp. 2d 271, 308-09 (D.D.C. 2004), aff'd in part & rev'd in part on other grounds, 412 F.3d 125 (D.C. Cir. 2005).

<sup>132</sup> Id. at 308 (quoting agency declaration).

<sup>133</sup> Id.

<sup>134</sup> Id. at 309 (quoting agency declaration).



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tions -- that the documents were indeed "voluntarily provided."<sup>135</sup>

Another submission was deemed to be "voluntary" in a case involving a submitter which promptly "cooperated with agency officials" and provided agency inspectors "all the information" they requested "prior to the issuance of any subpoenas or warrants," which in turn ensured that the investigation "was neither delayed nor impeded in any manner."<sup>136</sup> In yet another case, a submission was found to be "voluntary" where the requester sought copies of the comments that a submitter had provided to the agency in response to the notice that it had been given concerning a FOIA request that had been made for its information.<sup>137</sup> In finding that such comments had been "voluntarily submitted" to the agency, the court focused on the agency's submitter-notice regulations and found that they "clearly did not require . . . [the submitter] to provide any comments whatsoever."<sup>138</sup> The court noted that under those regulations, the failure to submit objections to the disclosure of requested information did "not constitute a waiver" and that the agency was still obligated to review the information to determine whether release was appropriate.<sup>139</sup>

Other agencies do, in fact, expressly require submitters of information to provide comments if they have any objection to disclosure of their information in response to a FOIA request.<sup>140</sup> Such an approach is consistent with the submitter-notification process mandated by Executive Order 12,600,<sup>141</sup> and it ensures that when an agency is analyzing sensitive business information for Exemption 4 applicability it has the benefit of the submitter's expertise and viewpoint.<sup>142</sup> (These "required" submitter comments are themselves, of course, still entitled to all available Exemption 4 protection under the several tests for confidentiality set out in National Parks &

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<sup>135</sup> Id.

<sup>136</sup> Shell Oil Co. v. U.S. Dep't of Labor, No. H-96-3113, slip op. at 13 (S.D. Tex. Mar. 30, 1998) (reverse FOIA suit), aff'd on other grounds, No. 98-20538 (5th Cir. Oct. 14, 1999).

<sup>137</sup> McDonnell Douglas Corp. v. NASA, No. 93-1540, 1993 WL 796612, at \*1 (D.D.C. Nov. 17, 1993) (reverse FOIA suit).

<sup>138</sup> Id.

<sup>139</sup> Id. at \*2 n.1.

<sup>140</sup> See, e.g., Department of Justice FOIA Regulations, 28 C.F.R. § 16.8(f) (2006); NLRB FOIA Regulations, 29 C.F.R. § 102.117(c)(2)(iv)(D) (2006).

<sup>141</sup> 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (2000), and in FOIA Update, Vol. VIII, No. 2, at 2-3.

<sup>142</sup> Accord FOIA Update, Vol. III, No. 3, at 3 (emphasizing importance of establishing procedures for notifying submitters).

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Conservation Ass'n v. Morton.<sup>143</sup> For a complete discussion of these tests, see Exemption 4, Impairment Prong of National Parks; Exemption 4, Competitive Harm Prong of National Parks; and Exemption 4, Third Prong of National Parks, below.)

There have been other decisions in which the wording of an agency's regulation was the key factor in determining whether a submission was "voluntary." The District Court for the District of Columbia has held that an agency properly determined that certain information relating to proposed pipeline projects was submitted "voluntarily," because the agency's regulations detailed specific items that were "required" to be included in the pipeline right-of-way applications, but then also specified items that an applicant "may submit" to "assist" in the processing of the application.<sup>144</sup> Because the information at issue did not fall within the list of items "required" for an application, the court concluded that it was "submitted voluntarily."<sup>145</sup>

In another case that turned on the wording of an agency's regulation, the same court found that the agency had demonstrated that the submission of information by kidney dialysis centers was voluntary and that the regulation relied on by the requester -- in support of its contention that the submission was required -- did not actually "require" the centers "to provide any particular information" and instead merely stated, "without further elaboration," that information "must be provided in the manner specified" by the agency's Secretary.<sup>146</sup> In that regard, the court found persuasive the agency's declaration that stated "unequivocally that the information was produced voluntarily and not subject to a statutory requirement."<sup>147</sup> By contrast, summary judgment was denied in another case when the agency's declaration entirely failed to indicate how the agency had received the requested documents.<sup>148</sup>

In a ruling that arguably takes the characterization of "voluntary" to

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<sup>143</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>144</sup> Parker, 141 F. Supp. 2d at 77-78.

<sup>145</sup> Id. at 78 (rejecting as well requesters' argument that submitted information was "required" to be provided under NEPA regulations, when requesters failed to cite, and court could not find, any such mandatory provision in those regulations).

<sup>146</sup> Minntech Corp. v. HHS, No. 92-2720, slip op. at 8 (D.D.C. Nov. 17, 1993).

<sup>147</sup> Id.

<sup>148</sup> See Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 303 (D.D.C. 1999) (observing that "nowhere in his declaration does [the agency declarant] aver that [the submitter's] submissions came to the [agency] 'voluntarily'").

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its outermost reaches, the District Court for the Eastern District of Missouri held that a submission was voluntary even though the agency not only had the authority to issue a subpoena for the documents, but had in fact exercised that authority by actually issuing such a subpoena.<sup>149</sup> The court flatly rejected the agency's argument that the issuance of the subpoena rendered the submission "required," finding that that "conclusion ignore[d] the fact that subpoenaed parties may challenge [the subpoena], both administratively and through objections to enforcement proceedings."<sup>150</sup> Although no challenge to the subpoena was actually brought, the court found it "highly likely" that such a challenge would have been successful given the fact that the court had previously ruled that the same documents were privileged and hence did not have to be disclosed to private parties who were in litigation with the submitter.<sup>151</sup> "This," the court declared, "shows that the production in fact was voluntary, not required."<sup>152</sup>

Significantly, the District Court for the District of Columbia has issued a total of eight decisions that all hold -- consistent with the Department of Justice's policy guidance on this issue -- that prices submitted in response to a solicitation for a government contract are "required" submissions.<sup>153</sup>

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<sup>149</sup> McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 242 (E.D. Mo. 1996) (reverse FOIA suit), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996).

<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> Id.

<sup>153</sup> Canadian Commercial Corp. v. Dep't of the Air Force, 442 F. Supp. 2d 15, 29 (D.D.C. 2006) (reverse FOIA suit) (appeal pending); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 205 & n.3 (D.D.C. 2002) (reverse FOIA suit), aff'd in pertinent part & rev'd in part on other grounds, 375 F.3d 1182 (D.C. Cir. 2004), reh'g en banc denied, No. 02-5432 (D.C. Cir. Dec. 16, 2004); McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 15 (D.D.C. 1997) (reverse FOIA suit), reconsideration denied, No. 96-2611, slip op. at 7-8 (D.D.C. May 1, 1998), rev'd on other grounds, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999), dismissed as moot on motion for entry of judgment, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after D.C. Circuit issued decision), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 39 (D.D.C. 1997) (reverse FOIA suit); McDonnell Douglas, 895 F. Supp. at 317-18; McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 325-26 (D.D.C. 1995) (reverse FOIA suit), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996); CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at \*4 (D.D.C. June 28, 1995) (reverse FOIA suit); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at \*4 (D.D.C. Feb. 28, 1995) (reverse FOIA suit); cf. MTB Group, Inc.

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In the first of these decisions, the court held that the submitter "had no choice but to submit the unit price information once it chose to submit its proposal," as the terms of the Request for Proposals (RFP) "compelled [it] to submit its unit prices."<sup>154</sup> Relying on that decision, the court reiterated in the second case that a contract "bidder only provides confidential information because the agency requires it [and that] once a firm has elected to bid, it must submit the mandatory information if it hopes to win the contract."<sup>155</sup>

In the third decision (which was subsequently vacated when the FOIA request was withdrawn while the case was on appeal),<sup>156</sup> the court again relied on the terms of the agency's RFP, which, it noted, "used language of compulsion in reference to pricing information."<sup>157</sup> There, the court also rejected as "temptingly simple" the submitter's argument that because it "did not have to enter into a contract, no information within the contract [should] be considered mandatory."<sup>158</sup> This "rather simplistic approach" was flatly rejected by the court as it "would result in classifying all government contractors as per se volunteers whose pricing information could easily be withheld from the public domain."<sup>159</sup>

In the fourth decision, after analyzing the Critical Mass decision, the

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<sup>153</sup>(...continued)

v. United States, 65 Fed. Cl. 516, 526-29 & n.22 (Fed. Cl. 2005) (concluding that the disclosure of "financial information in the bidding system is not voluntary" (citing as "persuasive authority" McDonnell Douglas, 215 F. Supp. 2d at 205, and Chem. Waste, 1995 WL 115894, at \*4)) (non-FOIA case); Judicial Watch v. Dep't of the Army, 466 F. Supp. 2d 112, 125 (D.D.C. 2006) (noting that "price elements necessary to win a government contract" would be considered required, but finding that the information in question in the case before it was submitted voluntarily, because it was provided "not in an effort to bid for or obtain a contract but to negotiate the administration of [a] contract" already awarded); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 171-72 (D.D.C. 2004) (stating that "bidding information submitted at an agency's behest is required, but finding that the information at issue in the case before it was voluntarily provided, because it was submitted to foreign governments for consideration and was "not required by any United States legal authority").

<sup>154</sup> Chem. Waste, 1995 WL 115894, at \*4.

<sup>155</sup> CC Distributions, 1995 WL 405445, at \*4.

<sup>156</sup> See McDonnell Douglas Corp. v. NASA, No. 95-5288 (D.C. Cir. Apr. 1, 1996) (reverse FOIA suit).

<sup>157</sup> McDonnell Douglas, 895 F. Supp. at 325.

<sup>158</sup> Id.

<sup>159</sup> Id.

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court expressly concluded "as a matter of law" that "the price elements necessary to win a government contract are not voluntary."<sup>160</sup> Once again faced with an argument by the submitter that its submission of a proposal and its entry into a government contract were "obviously voluntary acts," the court found that such contentions were simply "inapposite."<sup>161</sup> Declaring that "no one disputes that the process of offer and acceptance giving rise to contractual obligations is voluntary," the court held that the "focal point" must be "the information itself" and that there was no question that the agency "required that the contract itemize the prices for specific services."<sup>162</sup> The court then went on to somewhat sarcastically note that the submitter was "not doing the government a favor by providing the most basic information in a contract -- price" -- and it then observed that if "contractors want to win lucrative government contracts they must provide [agencies] with specific pricing elements for their goods and services."<sup>163</sup>

In the fifth decision, the court held that although the D.C. Circuit "has yet to address the issue, district court precedent in this Circuit uniformly and firmly points to the conclusion that the financial/commercial information found in the [submitter's] contracts was 'required' in the National Parks sense of the term by [the] Federal Acquisition Regulation[] . . . and therefore [was] subject to the National Parks test."<sup>164</sup> In so holding, the district court again noted that "[w]hether to compete for [the agency's] business at all was, of course, [the submitter's] option, but having elected to do so it was required to submit the information [the agency] insisted on having if it hoped to win the contract."<sup>165</sup>

The court relied on this case law in the sixth decision and held that "the relevant inquiry is whether the specific price elements and other information provided by [the submitter] were required to be submitted before [the agency] would award the contract."<sup>166</sup> Because the contract solicitation "included several statements indicating that bidders must submit certain information," the court determined that the agency "did not exceed the bounds of reasonableness in concluding that [the submitter] was 'required' to submit" the requested pricing information.<sup>167</sup>

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<sup>160</sup> McDonnell Douglas, 895 F. Supp. at 318.

<sup>161</sup> Id.

<sup>162</sup> Id.

<sup>163</sup> Id.

<sup>164</sup> Martin Marietta, 974 F. Supp. at 39.

<sup>165</sup> Id.

<sup>166</sup> McDonnell Douglas, 981 F. Supp. at 15.

<sup>167</sup> Id.

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In the seventh of these decisions, the court readily upheld the agency's determination that the submission of the requested contract pricing information was "not provided voluntarily."<sup>168</sup> After finding that the submitter "was required to provide its cost and pricing information in order to complete the Air Force's Request for Proposal and be considered for the contract," the court reasoned that such a "factual situation is distinctly different" from that presented in the Critical Mass case, where information had been volunteered "despite the fact that the disclosing entity was under no obligation to provide the government with information."<sup>169</sup> By contrast, the court firmly held, "[b]ecause contractors are required to submit cost and pricing information if they wish to bid on a government contract, cases in this district have found price and cost requirements to be compulsory, not voluntary, submissions."<sup>170</sup>

Lastly, in the most recent of these decisions, the court relied on this prior case law, which, it noted, "most often deemed" contract pricing information to be "a required element of government solicitations, and hence involuntarily submitted."<sup>171</sup> The court further relied on the terms of the agency's contract solicitation, which it found "support[ed] the conclusion that [the] pricing information was required" and thus did "not warrant departure from this line of precedent."<sup>172</sup>

Two other recent decisions by the District Court for the District of Columbia -- while not directly ruling on the issue -- further support the court's holdings in the above cases. In one case, in the course of distinguishing rebate and incentive information from unit prices, the court declared that "it is beyond dispute that unit pricing data is required to be submitted in order to compete for a government contract."<sup>173</sup> In the other case, the court, while holding that computer matrices containing millions of pricing elements were not unit prices, nonetheless conducted an alternative analysis as if they were -- and it did so by utilizing the National Parks competitive harm test, after earlier describing the matrices' submission to the agency as having been "required" in order to obtain the con-

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<sup>168</sup> McDonnell Douglas, 215 F. Supp. 2d at 205.

<sup>169</sup> Id. at 205.

<sup>170</sup> Id. at 205 & n.3; see also FOIA Post, "New McDonnell Douglas Opinion Aids Unit Price Decisionmaking" (posted 10/4/02).

<sup>171</sup> Canadian Commercial, 442 F. Supp. 2d at 29 (citing Martin Marietta Corp., 974 F. Supp. at 39, and McDonnell Douglas, 895 F. Supp. at 325-26).

<sup>172</sup> Id. at 29-30.

<sup>173</sup> Mallinckrodt v. West, 140 F. Supp. 2d 1, 5 (D.D.C. 2000) (reverse FOIA suit), appeal dismissed voluntarily, No. 00-5330 (D.C. Cir. Dec. 12, 2000).

tract.<sup>174</sup>

The District Courts for the Eastern District of Missouri,<sup>175</sup> the Southern District of Alabama,<sup>176</sup> and the District of Colorado<sup>177</sup> likewise have ruled that contract submissions were not provided voluntarily and that, as a consequence, the greater protection afforded by Critical Mass for voluntary submissions was not applicable. In so holding, the Colorado court also specifically rejected the argument advanced by the submitter that because it had "voluntarily entered into the contract with the Government" the contract submission should be considered "voluntary."<sup>178</sup> In contrast, two cases decided in the Eastern District of Virginia immediately after Critical Mass reached the opposite conclusion and held that contract submissions were voluntarily provided.<sup>179</sup> (As noted below, however, one of those cases later was expressly repudiated by a subsequent court in that same district for failing to provide any justification whatsoever for its conclusion.<sup>180</sup>)

Two years after the decision in Critical Mass, a case involving government contract prices reached the D.C. Circuit -- after having been decided by the lower court prior to the Critical Mass decision.<sup>181</sup> The D.C. Circuit, however, elected not to opine on the meaning of Critical Mass, or its

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<sup>174</sup> MCI Worldcom, Inc. v. GSA, 163 F. Supp. 2d 28, 30, 35 (D.D.C. 2001) (reverse FOIA suit).

<sup>175</sup> See TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1098 (E.D. Mo. 1998) (relying on case law from the District Court for the District of Columbia) (reverse FOIA suit).

<sup>176</sup> Clearbrook, L.L.C. v. Ovall, No. 06-0629, 2006 U.S. Dist. LEXIS 81244, at \*10 n.2 (S.D. Ala. Nov. 3, 2006) (denying plaintiff's motion for preliminary injunction) (citing Canadian Commercial, 442 F. Supp. 2d at 29), dismissed with prejudice per stipulation (S.D. Ala. Nov. 22, 2006) (reverse FOIA suit).

<sup>177</sup> See Source One Mgmt., Inc. v. U.S. Dep't of the Interior, No. 92-Z-2101, transcript at 6 (D. Colo. Nov. 10, 1993) (bench order) (reverse FOIA suit).

<sup>178</sup> Id. at 5.

<sup>179</sup> Envtl. Tech., Inc. v. EPA, 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (summarily declaring that unit price information provided in connection with government contract was voluntarily submitted) (reverse FOIA suit); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992) (bench order) (same).

<sup>180</sup> Comdisco, Inc. v. GSA, 864 F. Supp. 510, 517 n.8 (E.D. Va. 1994) (denigrating Envtl. Tech., 822 F. Supp. at 1229) (reverse FOIA suit); accord FOIA Update, Vol. XIV, No. 2, at 5 (same).

<sup>181</sup> McDonnell Douglas Corp. v. NASA, No. 92-5342, slip op. at 2 (D.C. Cir. Feb. 14, 1994) (reverse FOIA suit).

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applicability to government contract submissions, and instead remanded the case to the district court with instructions for that court to "reexamine the applicability of exemption 4 to the contract prices at issue under our holding in Critical Mass."<sup>182</sup> (On remand, the district court found Critical Mass to be inapplicable to a government contract submission.<sup>183</sup>) Similarly, another case was remanded back to the agency -- which had made its Exemption 4 determination prior to the issuance of Critical Mass -- so that any voluntarily submitted information could be identified and then analyzed under the Critical Mass standards.<sup>184</sup>

In McDonnell Douglas Corp. v. NASA, the D.C. Circuit once again declined to analyze this issue.<sup>185</sup> Although the submitter argued that "its submission of bidding information [was] part and parcel of the voluntary act of submitting a bid," the D.C. Circuit found that it was not necessary to decide that issue because "assuming arguendo" that the submission was "required," the court "believe[d that] the disputed line item price information [was] confidential commercial or financial information under the National Parks test" in any event.<sup>186</sup>

There now have been two decisions by the District Court for the District of Columbia that have differentiated between discrete items contained in a government contract. In the first case, the court found that General and Administrative (G & A) rate ceilings were voluntarily provided to the government even though submission of actual G & A rates was "undisputed[ly] . . . a mandatory component" of an offeror's submission.<sup>187</sup> In so holding, the court rejected the agency's argument that because "submission of a cost proposal, including actual G & A rates was mandatory in order to compete for the contract," the G & A rate ceilings -- which had been requested by the contracting officer during negotiations -- "were also a

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<sup>182</sup> Id.

<sup>183</sup> McDonnell Douglas, 895 F. Supp. at 318.

<sup>184</sup> Alexander & Alexander Servs. v. SEC, No. 92-1112, 1993 WL 439799, at \*12 (D.D.C. Oct. 19, 1993) (reverse FOIA suit), appeal dismissed, No. 93-5398 (D.C. Cir. Jan. 4, 1996).

<sup>185</sup> McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999) (reverse FOIA suit), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999), dismissed as moot on motion for entry of judgment, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after issuance of D.C. Circuit decision), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000).

<sup>186</sup> Id. at 305-06 (referencing extensive Department of Justice guidance -- set forth at FOIA Update, Vol. XIV, No. 2, at 3-7 -- which thoroughly analyzes distinction between "voluntary" and "required" submissions).

<sup>187</sup> Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 12 (D.D.C. 1996) (reverse FOIA suit), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996).



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mandatory part of the cost proposal.<sup>188</sup> Because the contract solicitation was "silent as to G & A rate ceilings," and in the absence of any firm evidence that the submitter "was required to provide G & A rate ceilings in order to continue to compete for the contract," the court concluded that their submission had been voluntary.<sup>189</sup>

Relying on this decision, the court in the second such case similarly rejected the agency's argument that "all of the information submitted in an effort to win a government contract should be viewed as having been required by the contract solicitation."<sup>190</sup> Instead, the court distinguished those items that the contract solicitation stated "should" be included in a proposal from those that the solicitation stated "must" be included.<sup>191</sup> The court found that the rebate and incentive information at issue "may have made the bid more appealing or valuable to the government," but because it was not included within the list of items that the solicitation stated "must" be provided, it "was not required to be submitted within the meaning of Critical Mass."<sup>192</sup>

In contrast to the above cases, the District Court for the District of Columbia has found that where a contract resulted from "intense arms-length negotiations," as opposed to a solicitation by the government for a competitive bid, the contract terms (which included pricing and rate information) were voluntarily provided.<sup>193</sup> Because the government did not have the legal authority to compel the submission of the requested contract terms, and there was "no indication" of "any demand" by the government that specific terms had to be submitted for consideration, the court held that the information must "be judged according to Critical Mass."<sup>194</sup>

Other cases decided subsequent to Critical Mass have applied the voluntary/required distinction, but they have done so with only limited rationale or analysis for their conclusions on this pivotal issue. Instead, the information at issue was summarily found either to have been voluntarily

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<sup>188</sup> Id.

<sup>189</sup> Id. at 12-13.

<sup>190</sup> Mallinckrodt, 140 F. Supp. 2d at 6 (quoting agency's brief).

<sup>191</sup> Id.

<sup>192</sup> Id. (rejecting the agency's argument that because the "solicitation required the submission of pricing information, it necessarily follows that rebates and incentives were [also] required to be submitted").

<sup>193</sup> Airline Pilots Ass'n, Int'l v. USPS, No. 03-2384, 2004 U.S. Dist. LEXIS 26067, at \*4, \*12-17 (D.D.C. June 24, 2004).

<sup>194</sup> Id. at \*13-17 (citing Ctr. for Auto Safety, 244 F.3d at 149).

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provided<sup>195</sup> or, conversely, to have been a required submission.<sup>196</sup> The D.C. Circuit had occasion to review one of these cases on appeal, but its unpublished opinion did not provide any further guidance on the Critical Mass distinction and instead merely affirmed the lower court's decision on that point.<sup>197</sup>

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<sup>195</sup> See, e.g., Hull v. U.S. Dep't of Labor, No. 04-CV-01264, slip op. at 8 (D. Colo. Dec. 2, 2005) (noting that requester did "not dispute that this information was provided voluntarily"); Judicial Watch, Inc. v. U.S. Dep't of Justice, 306 F. Supp. 2d 58, 68 (D.D.C. 2004) (observing that the requester had failed to "offer a reason to support its belief that the documents in question were not submitted voluntarily," and deferring to the agency affidavits that said otherwise, as they were "the only evidence" before the court) (appeal pending); Pentagen Techs. Int'l v. United States, No. 98CIV.4831, 2000 WL 347165, at \*3 (S.D.N.Y. Mar. 31, 2000) (alternative holding) (opining that the "information may be viewed as having been produced voluntarily in order to supplement the Government's understanding of the IBM proposal"); Clarkson v. Greenspan, No. 97-2035, slip op. at 9 (D.D.C. June 30, 1998) (holding that the information "was voluntarily provided in confidence, and, according to [the agency] its release could jeopardize the continued availability of such information"), summary affirmance granted, No. 98-5349, 1999 WL 229017 (D.C. Cir. Mar. 2, 1999); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) (declaring that "[t]o the extent that the information sought was submitted voluntarily, the material was properly withheld"), aff'd, No. 92-5351, slip op. at 3 (D.C. Cir. May 27, 1994).

<sup>196</sup> See Nat'l Air Traffic Controllers Ass'n v. FAA, No. 06-53, 2007 WL 495798, at \*2 (D.D.C. Feb. 12, 2007) (deciding that it "must use the more stringent standard for documents required to be submitted," because the parties failed to proffer evidence addressing whether the information at issue was voluntarily submitted or required by the agency); Trans-Pac. Policing Agreement v. U.S. Customs Serv., No. 97-2188, 1998 WL 34016806, at \*2 (D.D.C. May 14, 1998) (concluding that information provided on import declaration form "is supplied under compulsion"), rev'd & remanded for segregability determination, 177 F.3d 1022 (D.C. Cir. 1999); Garren v. U.S. Dep't of the Interior, No. CV-97-273, slip op. at 12 n.10 (D. Or. Nov. 17, 1997) (magistrate's recommendation) (finding that information concerning purchase of river-rafting concession contract was required to be submitted), adopted (D. Or. Jan. 8, 1998); Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at \*7 & \*8 n.3 (S.D.N.Y. May 26, 1993) (holding that information provided in export license applications was required to be submitted); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, 1993 WL 1610471, at \*8 (C.D. Cal. May 10, 1993) (finding that information concerning New Drug Application was required to be submitted), aff'd in part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995).

<sup>197</sup> Allnet Commc'n Servs. v. FCC, No. 92-5351, slip op. at 3 (D.C. Cir. May 27, 1994) (finding no error in lower court's first concluding that requested information was exempt under standard for required submissions

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In a case involving rather unusual factual circumstances, the District Court for the District of Columbia discussed the applicability of the Critical Mass distinction to documents that had been provided to the agency not by their originator, but as a result of the unauthorized action of a confidential source.<sup>198</sup> Although these documents were not actually at issue in the case, the court nevertheless elected to analyze their status under Critical Mass.<sup>199</sup> The court first noted that the decision in Critical Mass provided it with "little guidance" as those documents "had been produced voluntarily by the originator, without any intervening espionage."<sup>200</sup> The court nevertheless opined that in its case "the secret, unauthorized delivery" of the documents at issue made the submission "'involuntary' in the purest sense," but that application of the "more stringent standard for involuntary transfer would contravene the spirit" of Critical Mass.<sup>201</sup> Thus, the court declared that in such circumstances the proper test for determining the confidentiality of the documents should be the "more permissive standard" of Critical Mass, i.e., protection would be afforded if the information was of a kind that is not customarily released to the public by the submitter.<sup>202</sup>

The District Courts for the District of Maine, the Eastern District of Virginia, and most recently for the Southern District of New York and the Central District of California all have issued decisions that expressly declined to consider the possible applicability of Critical Mass to the information at issue because the Critical Mass distinction has not yet been adopted by their respective courts of appeals.<sup>203</sup> In so holding, the District Court

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<sup>197</sup>(...continued)

and then also concluding that it would be exempt under standard for voluntary submissions).

<sup>198</sup> Gov't Accountability, 1993 WL 13033518, at \*1.

<sup>199</sup> Id. at \*4.

<sup>200</sup> Id. at \*5.

<sup>201</sup> Id.

<sup>202</sup> Id.

<sup>203</sup> See Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 380 F. Supp. 2d 211, 216 n.2 (S.D.N.Y. 2005) (stating that the "Second Circuit has explicitly held off on determining whether it would accept the Critical Mass 'amendment' of the National Parks test"), reconsideration denied, No. 04 Civ. 8337, 2005 WL 2560396 (S.D.N.Y. Oct. 11, 2005), aff'd in part & remanded in part on other grounds, 463 F.3d 239, 246-47 n.8 (2d Cir. 2006); N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 335 (S.D.N.Y. 2003) (noting that "[t]he Second Circuit has not commented on the Critical Mass modification of the National Parks test, and no circuit court has expressly adopted" it); Lahr v. NTSB, 453 F. Supp. 2d 1153, 1175 (C.D. Cal. 2006) (observing that "the Ninth Circuit has not ad-

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for the Eastern District of Virginia noted that although a previous decision arising out of that same district had, in fact, "adopted the Critical Mass test," in its view that earlier opinion "provided little justification for its conclusion"; therefore, the court "decline[d] to follow" it.<sup>204</sup> In a 2003 decision addressing this issue, the District Court for the Southern District of New York similarly acknowledged that other courts in that district "have cited Critical Mass with approval," but nonetheless expressed the view that those other decisions gave "little justification for their conclusion."<sup>205</sup>

Years earlier, using a strictly pragmatic approach, the District Court for the Southern District of New York declared that it "need not decide whether Critical Mass is governing law in the Second Circuit" because the records at issue -- which were acquired by the FDIC by operation of law when it became receiver of a failed financial institution -- were "not produced voluntarily [and so] the Critical Mass standard simply [did] not apply."<sup>206</sup> On appeal, the Court of Appeals for the Second Circuit agreed with the lower court on this point, stating that because the records at issue were not provided voluntarily, the Critical Mass test simply was "irrelevant to the issue presented" by the appeal.<sup>207</sup> Similarly, the Court of Appeals for the Ninth Circuit has observed that the Critical Mass distinction between voluntary and required submissions "becomes relevant only when information is submitted to the government voluntarily."<sup>208</sup> Finding that the records at issue in the case before it were required to be submitted by the terms of the agency's contract solicitation, the Ninth Circuit declared that

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<sup>203</sup>(...continued)

dressed the Critical Mass modification" of the National Parks test); Dow Jones Co. v. FERC, 219 F.R.D. 167, 178 (C.D. Cal. 2002) (remarking that "the test set forth in Critical Mass has not been adopted by any other circuit" and "is not consistent with Ninth Circuit jurisprudence"); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, No. 94-0173-B, slip op. at 9 n.3 (D. Me. Apr. 18, 1995) (observing that the "First Circuit . . . has not distinguished between information provided on a voluntary basis and that which must be disclosed" to the government); Comdisco, 864 F. Supp. at 517 (opining that "it is doubtful that the Fourth Circuit would be persuaded to embrace the Critical Mass standard with respect to voluntary submissions").

<sup>204</sup> Comdisco, 864 F. Supp. at 517 n.8 (referring to Envtl. Tech., 822 F. Supp. at 1226).

<sup>205</sup> N.Y. Pub. Interest Group, 249 F. Supp. 2d at 335 (referring to Pentagon, 2000 WL 347165, at \*2, and Afr. Fund, 1993 WL 183736, at \*7 n.3).

<sup>206</sup> Nadler v. FDIC, 899 F. Supp. 158, 161 (S.D.N.Y. 1995), aff'd, 92 F.3d 93 (2d Cir. 1996).

<sup>207</sup> Nadler v. FDIC, 92 F.3d 93, 96 n.1 (2d Cir. 1996).

<sup>208</sup> Frazer v. U.S. Forest Serv., 97 F.3d 367, 372 (9th Cir. 1996) (reverse FOIA suit).

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in light of that fact, it "need not address" the Critical Mass distinction.<sup>209</sup> More recently, the Court of Appeals for the Fourth Circuit declined to "decide which test governs within" that circuit, in a case where it found the requested information to be properly withheld under Exemption 3 of the FOIA,<sup>210</sup> which obviated any "need to reach the issue of Exemption 4's applicability."<sup>211</sup>

By contrast, using language that denoted its approval of the Critical Mass distinction, the Court of Appeals for the Tenth Circuit began its analysis in a case by citing to Critical Mass and then declaring that the "first step in an Exemption Four analysis is determining whether the information submitted to the government agency was given voluntarily or involuntarily."<sup>212</sup> As with the earlier decisions in the Second and Ninth Circuits, however, the Tenth Circuit had no opportunity to actually address the application of the standard, because the parties agreed that the submission in question was in fact "an involuntary one."<sup>213</sup>

In its most recent Exemption 4 decision, the District Court for the Southern District of New York acknowledged that a portion of the records in question were "provided voluntarily,"<sup>214</sup> but it nevertheless found that the issue of the applicability of the Critical Mass analysis "need not be reached."<sup>215</sup> In so deciding, the court again relied upon the fact that the Second Circuit had "explicitly held off on determining whether it would accept" Critical Mass.<sup>216</sup> Moreover, it noted that the parties recognized that the National Parks test applied.<sup>217</sup> Interestingly, the court opined in dicta that in any event, "the Critical Mass amendment is merely a commonsensical extrapolation of the first prong of the National Parks test: If a person, for any reason of substance, would not ordinarily wish a particular type of information to be disclosed to the public and truly has a choice whether or not to submit the information to the government, that person will likely

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<sup>209</sup> Id.

<sup>210</sup> 5 U.S.C. § 552(b)(3) (2000 & Supp. IV 2004).

<sup>211</sup> Wickwire Gavin, P.C. v. USPS, 356 F.3d 588, 597 (4th Cir. 2004).

<sup>212</sup> Utah v. U.S. Dep't of the Interior, 256 F.3d 967, 969 (10th Cir. 2001).

<sup>213</sup> Id.

<sup>214</sup> Inner City Press, 380 F. Supp. 2d at 217-18 (ruling that a "telephonic request" from an agency was "too amorphous" to be construed as a demand for the submission of certain information, but that it sufficed "to qualify at least a portion of the information provided as mandatory").

<sup>215</sup> Id. at 216 n.2.

<sup>216</sup> Id. (citing Nadler, 92 F.3d at 96 n.1).

<sup>217</sup> Id.

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choose not to submit such information if the government may disclose it to the public.<sup>218</sup> On appeal, the Court of Appeals for the Second Circuit agreed with the district court that the information at issue on appeal was provided voluntarily.<sup>219</sup> However, it, too, eschewed the opportunity to consider the Critical Mass test on its merits, and instead it pragmatically bypassed Critical Mass on the grounds that the parties did "not argue for its adoption" and the district court "did not apply it in its decision."<sup>220</sup>

Under Critical Mass, once information is determined to be voluntarily provided, it is afforded protection as "confidential" information "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."<sup>221</sup> The D.C. Circuit observed in Critical Mass that this test was "objective" and that the agency invoking it "must meet the burden of proving the provider's custom."<sup>222</sup> The subsequent cases that have applied this "customary treatment" standard to information found to have been voluntarily submitted typically contain only perfunctory discussions of the showing necessary to satisfy it.<sup>223</sup>

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<sup>218</sup> Id.

<sup>219</sup> Inner City Press, 463 F.3d at 248 (remarking that the agency's response to the submitter's telephone inquiry appeared to have been "merely informative," and, as the district court found, "too amorphous" to be considered a demand" for the disputed information (quoting Inner City Press, 380 F. Supp. 2d at 218)).

<sup>220</sup> Id. at 245 n.6.

<sup>221</sup> 975 F.2d at 879; accord Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, 374 F. Supp. 2d 129, 132 (D.D.C. 2005) (reiterating the Critical Mass test and finding that the "current operating status of the submitting party has no effect on whether the information is of the type that would be publicly released").

<sup>222</sup> Id.; see Animal Legal Def. Fund, 44 F. Supp. 2d at 303 (noting that "unless [the agency declarant] would have personal knowledge about [the company's] customary practices, the [agency] will need an affidavit from an officer of [the company] to satisfy this final element of Critical Mass").

<sup>223</sup> See Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 393 F. Supp. 2d 15, 18 (D.D.C. 2005) (finding that certain information was "of the type that would not be normally provided to the public at large," citing submitter's declaration); Judicial Watch, 310 F. Supp. 2d at 308 (remarking that the submitter "has indicated that [the requested documents] are not customarily disclosed to the public"), aff'd in part & rev'd in part on other grounds, 412 F.3d 125 (D.C. Cir. 2005); Cortez, 921 F. Supp. at 13 (noting that the submitter's "unrefuted sworn affidavits attest to the fact that G & A rate ceilings are the type of information that is not regularly disclosed to the public"); Thomas, No. 91-3278, slip op. at 6 (D.D.C. Oct. 7, 1994) (observing that the "uncontradicted affidavits reveal that the information is of a kind

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Nevertheless, there are several decisions that contain a more detailed analysis of the standard. Most recently, the evidence that was provided to demonstrate the submitter's customary treatment consisted of a declaration from the submitter that averred that the company considered the documents to be "proprietary financial information that it [had] never made available to the public," and that it had provided them to the agency "only after" receiving assurances that they "would remain confidential."<sup>224</sup> Similarly, the standard was found satisfied by the attestations made by submit- ters that described the limited distribution within the company on a "need to know" basis and attached as exhibits the confidentiality agreements that were entered into with outside contractors.<sup>225</sup> In another case, the evi- dence identified by the court to establish customary treatment consisted of a consulting contract, a protective order, and markings on the documents -- which the court deemed "most persuasive."<sup>226</sup> Similarly, the submitter's practice of "carefully guard[ing]" disclosure of the documents "even within the corporate structure," the markings on the documents, and the fact that the company "strenuously, and successfully, opposed their production in discovery in multiple civil cases" was found to establish customary treat- ment.<sup>227</sup>

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<sup>223</sup>(...continued)

that the provider would not normally release to the public"); Minntech, No. 92-2720, slip op. at 8 n.3 (D.D.C. Nov. 17, 1993) (declaring that "[t]he Court accepts HHS's declarations that the type of information provided is not the type that dialysis centers would release to the public"); Gov't Accountability, 1993 WL 13033518, at \*5 (opining that it "is not to be doubted" that the documents are "unavailable to the public"); Env'tl. Tech., 822 F. Supp. at 1229 (finding that it is "readily apparent that the information is of a kind that [the submitter] would not customarily share with its competitors or with the general public"); Harrison v. Lujan, No. 90-1512, slip op. at 1 (D.D.C. Dec. 8, 1992) (deciding that the agency's "uncontradicted evidence . . . establishes that the documents at issue contain information that the provider would not customarily make available to the public"); Cohen, Dunn, No. 92-0057-A, transcript at 27 (E.D. Va. Sept. 10, 1992) (concluding that pricing information "is of a kind that would customarily not be re- leased to the public by the entity from which it is obtained"); Allnet, 800 F. Supp. at 990 (holding that "it has been amply demonstrated that [the sub- mitters] would not customarily release the information to the public").

<sup>224</sup> Defenders, 314 F. Supp. 2d at 17 (quoting submitter's declaration).

<sup>225</sup> Parker, 141 F. Supp. 2d at 79; see also Airline Pilots Ass'n, 2004 U.S. Dist. LEXIS 26067, at \*17 (finding the standard met where the submitter's declaration described how the records at issue were subject to "very limited disclosure within the organization").

<sup>226</sup> AGS, No. 92-2714, slip op. at 11 (D.N.J. Sept. 16, 1993).

<sup>227</sup> McDonnell Douglas, 922 F. Supp. at 242.

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In yet another case, the court found the standard satisfied by attestations made in agency affidavits, coupled with a detailed description of the documents that "reveal[ed] that they contain material that would not ordinarily be divulged to the general public."<sup>228</sup> Lastly, a court provided useful elaboration on this issue by specifically noting and then rejecting as "vague hearsay" the requester's contention that there had been "prior, unrestricted disclosure" of the information at issue.<sup>229</sup> In so doing, the court expressly found the requester's evidence to be "nonspecific" and lacking precision "regarding dates and times" of the alleged disclosures; conversely, it noted that the submitter had "provided specific, affirmative evidence that no unrestricted disclosure" had occurred.<sup>230</sup> Accordingly, the court concluded that it had been "amply demonstrated" that the information satisfied the "customary treatment" standard of Critical Mass.<sup>231</sup>

In the course of remanding another case for further proceedings based on the district court's "flawed" application of the "customary treatment" standard,<sup>232</sup> the D.C. Circuit nonetheless addressed several contentions concerning the standard. First, the court flatly rejected "the argument that the mere selling [of] a product on the open market can constitute evidence of customary disclosure."<sup>233</sup> Second, it rejected the argument "that a difference in level of detail is inadequate to establish a difference in type of information," finding instead that "substantial differences in level of

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<sup>228</sup> Judicial Watch, 306 F. Supp. 2d at 68.

<sup>229</sup> Allnet, 800 F. Supp. at 989.

<sup>230</sup> Id.

<sup>231</sup> Id. at 990. But cf. Atlantis Submarines Haw., Inc. v. U.S. Coast Guard, No. 93-00986, slip op. at 9 (D. Haw. Jan. 28, 1994) (upholding an agency's decision to release a voluntarily submitted safety report that was provided to the agency in an effort to "influence" its "regulatory decisions"; although not expressly ruling on the "customary treatment" standard, finding that "after seeking to have its safety-related material incorporated into the [agency's] decision-making process," the submitter could not then "have the report exempted from public disclosure") (denying motion for preliminary injunction in reverse FOIA suit), dismissed per stipulation (D. Haw. Apr. 11, 1994).

<sup>232</sup> Ctr. for Auto Safety, 244 F.3d at 151-52 (finding that the district court had incorrectly equated the concept requiring release of information when "identical information" is already public, as a matter of exemption waiver, with the "customary treatment" standard, which allows Exemption 4 protection of voluntarily provided information if it "is of a kind that would customarily not be released to the public").

<sup>233</sup> Id. ("The fact that airbags can be bought on the open market and inspected certainly does not establish that information describing the physical characteristics of every vehicle produced over many years is customarily disclosed.").



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detail can produce a difference in type of information."<sup>234</sup> Finally, the D.C. Circuit directed the district court to review the submitters' declarations "and any other relevant responses" that they might supply, thereby endorsing the use of, and reliance upon, submitter declarations to establish customary treatment.<sup>235</sup>

In creating this "customary treatment" standard, the D.C. Circuit in Critical Mass articulated the test as dependent upon the treatment afforded the information by the individual submitter and not the treatment afforded the information by an industry as a whole.<sup>236</sup> This approach has been followed by all the cases applying the "customary treatment" standard thus far, although one court also found it "relevant" that the requester -- who was a member of the same industry as the submitters -- had, "up until the eve of trial," taken the position that the type of information at issue ought not to be released.<sup>237</sup> Further, as applied by the D.C. Circuit in Critical Mass, the "customary treatment" standard allows for some disclosures of the information to have been made, provided that such disclosures were not made to the general public.<sup>238</sup>

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<sup>234</sup> Id. at 152.

<sup>235</sup> Id. at 153.

<sup>236</sup> 975 F.2d at 872, 878-80; accord Ctr. for Auto Safety, 244 F.3d at 148 (emphasizing that "in assessing customary disclosure, the court will consider how the particular party customarily treats the information, not how the industry as a whole treats the information"); Judicial Watch, 466 F. Supp. 2d at 126 (same); Parker, 141 F. Supp. 2d at 79 & n.8 (explaining that due to individualized nature of "customary treatment" standard, declaration concerning usual treatment by "petroleum industry" was "not probative"); see also FOIA Update, Vol. XIV, No. 2, at 7 (advising agencies applying "customary treatment" standard to examine treatment afforded information by individual submitter).

<sup>237</sup> Cohen, Dunn, No. 92-0057-A, transcript at 27 (E.D. Va. Sept. 10, 1992).

<sup>238</sup> See 975 F.2d at 880 (specifically citing to lower court decision that noted records had been provided to numerous interested parties under nondisclosure agreements, but had not been provided to public-at-large); accord Judicial Watch, 310 F. Supp. 2d at 309 (recognizing that although the requested document "was commissioned as a multiclient study," and the resulting report was "sold for \$2,500," because its receipt was conditioned on the signing of "a confidentiality agreement," the report was deemed "not customarily disclosed to the public"); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 17-18 (D.D.C. 2000) (emphasizing that "[l]imited disclosures, such as to suppliers or employees, do not preclude protection under Exemption 4, as long as those disclosures are not made to the general public"), remanded, 244 F.3d 144 (D.C. Cir. 2001); see also FOIA Update, Vol. XIV, No. 2, at 7 (advising agencies that

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As a matter of sound administrative practice, the Department of Justice has advised agencies to employ procedures analogous to those set forth in Executive Order 12,600<sup>239</sup> when making determinations under the "customary treatment" standard.<sup>240</sup> (For further discussions of this executive order and its requirements, see Exemption 4, Competitive Harm Prong of National Parks, and "Reverse" FOIA, Executive Order 12,600, below.) Accordingly, whenever an agency is uncertain of a submitter's customary treatment of requested information, the submitter should be notified and given an opportunity to provide the agency with a description of its treatment of the information, including any disclosures that are customarily made and the conditions under which such disclosures occur.<sup>241</sup>

### Impairment Prong of National Parks

For information that is "required" to be submitted to an agency, the Court of Appeals for the District of Columbia Circuit has held that the tests for confidentiality originally established in National Parks & Conservation Ass'n v. Morton<sup>242</sup> continue to apply.<sup>243</sup> The first of these tests, the impairment prong, traditionally has been found to be satisfied when an agency demonstrates that the information at issue was provided voluntarily and that submitting entities would not provide such information in the future if

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<sup>238</sup>(...continued)

"customary treatment" standard allows submitter to have made some disclosures of information, provided such disclosures are not "public" ones).

<sup>239</sup> 3 C.F.R. 235.

<sup>240</sup> See FOIA Update, Vol. XIV, No. 2, at 7.

<sup>241</sup> See id.; accord Hull v. U.S. Dep't of Labor, No. 1:04-CV-01264, slip op. at 9-11 (D. Colo. Dec. 2, 2005) (concluding that agency had "failed to meet its burden" where agency's affiant lacked requisite "personal knowledge" about how submitter customarily handled certain documents; conversely, finding that agency had "met its burden" for other information at issue where submitter provided statements "specifically addressing" its customary treatment of such information); N.Y. Pub. Interest Group, 249 F. Supp. 2d at 337 (alternative holding) (finding that in the absence of "personal knowledge" the government had "not met its burden" under Critical Mass and that "without a statement" from the submitter "about its customary practice with regard to these documents, any finding of exemption would be based on agency speculation"); cf. Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 171 (D.D.C. 2004) ("While affidavits from the information providers themselves or evidence of confidentiality agreements would carry more weight on the custom issue, it is sufficient for an agency to proceed solely on its sworn affidavits.").

<sup>242</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>243</sup> See Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc).

it were subject to public disclosure.<sup>244</sup> Conversely, protection under the

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<sup>244</sup> See, e.g., FlightSafety Servs. v. Dep't of Labor, 326 F.3d 607, 612 (5th Cir. 2003) (per curiam) (protecting raw data reflecting salaries and wages, because disclosure "presents a serious risk that sensitive business information could be attributed to a particular submitting business [and such] attribution would indisputably impair [the agency's] future ability to obtain similar information from businesses [that] provide it under an explicit understanding that such information will be treated confidentially"); O'Harvey v. Comp. Programs Workers, No. 98-35106, 1999 WL 626633, at \*1 (9th Cir. Aug. 16, 1999) (protecting information contained in a physician directory service database because disclosure "would impair the government's ability to purchase commercial data in the future" and to "obtain necessary medical information from physicians who would be unlikely to risk the dissemination of distorted data to the general public"); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (protecting manufacturing formulas, processes, and quality-control and internal-security measures submitted voluntarily to FDA to assist with cyanide-tampering investigations because agencies relied heavily on such information and would be less likely to obtain it if businesses feared that it would be made public); Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 380 F. Supp. 2d 211, 218 (protecting bank's client lists, loan terms, and similar data included with its merger application, because disclosure "would impair the [agency's] ability to collect such information"), aff'd in pertinent part & remanded on other grounds, 463 F.3d 239 (2d Cir. 2006); Kennedy v. DHS, No. 03-CV-6076, 2004 WL 2285058, at \*7 (W.D.N.Y. Oct. 8, 2004) (protecting names and coding of inks provided voluntarily by ink manufacturers, because disclosure "would hinder future government efforts to obtain such information"); Forest Conservation Council v. U.S. Dep't of Labor, No. Civ. 011259, 2003 WL 21687927, at \*3 (D.N.M. May 6, 2003) (protecting wage and employment data provided voluntarily by the State of New Mexico in accordance with a cooperative agreement that ensured confidentiality, because the agency's "ability to gather" such information "in the future is at risk"); Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 81 (D.D.C. 2001) (alternative holding) (protecting detailed market studies relating to proposed pipeline projects because "if agencies seeking assistance from private parties in fulfilling their obligations under NEPA [could not] maintain the confidentiality of proprietary materials that have been submitted to [them], the government's ability to obtain such information would be impaired"); Heeney v. FDA, No. 97-5461, 1999 U.S. Dist. LEXIS 23365, at \*31-32 (C.D. Cal. Mar. 18, 1999) (protecting name of withdrawn medical device because, if disclosed, "manufacturers would be loathe to provide" such data in future applications and agency's "ability to carry out its regulatory objectives would be thwarted"), aff'd, 7 F. App'x 770 (9th Cir. 2001); Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 923 (N.D. Cal. 1998) (protecting videoconferencing software provided to an agency as part of a joint venture, as there "can be no doubt that corporations will be less likely to enter into joint ventures with the government to develop technology if that tech-

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impairment prong traditionally has been denied when the court determines that disclosure will not, in fact, diminish the flow of information to the agency<sup>245</sup> -- for example, when it determines that the benefits associated with submission of particular information make it unlikely that the agency's ability to obtain future such submissions would be impaired.<sup>246</sup>

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<sup>244</sup>(...continued)

nology can be distributed freely").

<sup>245</sup> See, e.g., PETA v. USDA, No. 03-195, 2005 WL 1241141, at \*5-6 (D.D.C. May 24, 2005) (finding no impairment because submission was required by federal regulations); Dow Jones Co. v. FERC, 219 F.R.D. 167, 178-79 (C.D. Cal. 2002) (no impairment based on asserted agreement of confidentiality because such agreements, "standing alone, are insufficient" and claim is undercut in any event because agency itself had previously "threatened [submitters] with disclosure" of very information at issue); Inter Ocean Free Zone, Inc. v. U.S. Customs Serv., 982 F. Supp. 867, 871 n.3 (S.D. Fla. 1997) (no impairment because "there can be no reasonable concern that those who are required by statute to submit [requested data] will risk violating the law"); Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997) (same), appeal dismissed, No. 97-5357 (D.C. Cir. Feb. 2, 1998); Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475-A, slip op. at 4 (E.D. Va. June 7, 1996) (no impairment based on "merely speculative fear" that "disclosure might discourage future responses from credit unions"); Nadler v. FDIC, 899 F. Supp. 158, 161 (S.D.N.Y. 1995) (dicta) (no impairment possible when agency "gained access to [submitter's] information by operation of law when it became receiver"), aff'd on other grounds, 92 F.3d 93 (2d Cir. 1996); Key Bank of Me., Inc. v. SBA, No. 91-362-P, 1992 U.S. Dist. LEXIS 22180, at \*11 (D. Me. Dec. 31, 1992) (no impairment based on the speculative assertion that the public disclosure of Dun & Bradstreet reports will adversely affect a company's profits and thus make it "unlikely" that credit agencies will do business with the government; this "intimation regarding impairment of profits in no way speaks to the ability of affected credit agencies to continue to exist and supply needed data"); Wiley Rein & Fielding v. U.S. Dep't of Commerce, 782 F. Supp. 675, 677 (D.D.C. 1992) (no impairment given fact that requested documents contained no "sensitive information" and there was "no reason to believe" that such information would not be provided in future), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993).

<sup>246</sup> See, e.g., Lahr v. NTSB, 453 F. Supp. 2d 1153, 1175 (C.D. Cal. 2006) (no impairment from the release of information pertaining to "flight characteristics and performance of a Boeing 747" where the submitter did "not argue" that impairment would be likely, but instead simply "speculate[d] that [in the event of disclosure] it would reconsider its policies of providing information such as this to the government" (quoting submitter's declaration)); N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 336-37 (S.D.N.Y. 2003) (no impairment from release of submitter's alternative river-dredging analysis, because submitter "had significant external incen-

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<sup>246</sup>(...continued)

tives to provide" it, given that submitter was seeking "to convince" agency to "abandon, or at least downscale," its own, more costly plan); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 205 & n.3 (D.D.C. 2002) (no impairment from release of contract prices when even submitter itself "at no point represent[ed] that should" the agency disclose them, "it would no longer apply for government contracts") (reverse FOIA suit), aff'd in part & rev'd in part on other grounds, 375 F.3d 1182 (D.C. Cir. 2004), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004); Ctr. for Pub. Integrity v. Dep't of Energy, 191 F. Supp. 2d 187, 196 (D.D.C. 2002) (no impairment from release of the amounts of unsuccessful bids to buy government land, because "the benefits accruing to bidders from contracting with the federal government make it unlikely that an agency's future contracting ability will suffer"); McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 15 (D.D.C. 1997) (no impairment from release of contract price information, because "[g]overnment contracting involves millions of dollars and it is unlikely that release of this information will cause [agency] difficulty in obtaining future bids") (reverse FOIA suit), rev'd on other grounds, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999), dismissed as moot on motion for entry of judgment, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after D.C. Circuit issued decision), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 (D.D.C. 1997) (dictum) (no impairment from release of cost, pricing, and management information incorporated into a government contract, because contractors "will continue bidding for [agency] contracts despite the risk of revealing business secrets if the price is right") (reverse FOIA suit); Cohen v. Kessler, No. 95-6140, slip op. at 12 (D.N.J. Nov. 25, 1996) (no impairment from release of raw research data submitted in support of an application for approval of a new animal drug, "in light of the enormous profits that drug manufacturers reap through product development and improvement"); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment from release of financial information, because "it is in the [submitter's] best interest to continue to supply as much information as possible" in order to secure better usage charges for its lands); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (no impairment from release of loan status information, because it is unlikely that borrowers would decline benefits associated with obtaining loans simply because status of loan was released); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 6 (M.D. Fla. June 3, 1986) (no impairment from release of product testing data when submission "virtually mandatory" if supplier wished to do business with government); Badhwar v. U.S. Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (no impairment from release of mishap reports when submission is "effectively mandatory" in order to do business with government), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment from release of contract prices, because "[i]t

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Under the categorical test announced by the D.C. Circuit in Critical Mass Energy Project v. NRC, the voluntary character of an information submission is sufficient to render it exempt, provided the information would not be customarily released to the public by the submitter.<sup>247</sup> (For a further discussion of this point, see Exemption 4, Applying Critical Mass, above.) In this regard, the D.C. Circuit has made it clear that an agency's unexercised authority, or mere "power to compel" submission of information, does not preclude such information from being provided to the agency "voluntarily."<sup>248</sup> This holding was compatible with several decisions rendered prior to Critical Mass that had protected information under the impairment prong despite the existence of agency authority that could have been used to compel its submission.<sup>249</sup>

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<sup>246</sup>(...continued)

is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"). But see Orion Research, Inc. v. EPA, 615 F.2d 551, 554 (1st Cir. 1980) (finding impairment for technical proposals submitted in connection with government contract, because release "would induce potential bidders to submit proposals that do not include novel ideas"); Pentagen Techs. Int'l v. United States, No. 98CIV.4831, 2000 WL 347165, at \*2-3 (S.D.N.Y. Mar. 31, 2000) (alternative holding) (finding impairment for "highly proprietary technical solution proposed by IBM" that, if "viewed as being required by the Government in order to full[y] comprehend the IBM bid, . . . would impair the Government's ability to obtain necessary information from bidders in the future" if it were disclosed); RMS, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (finding impairment for equipment descriptions, employee, customer, and subcontractor names submitted in connection with government contract, because "bidders only submit such information if it will not be released to their competitors"); Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A, transcript at 29 (E.D. Va. Sept. 10, 1992) (bench order) (finding impairment for detailed unit price information despite lack of "actual proof of a specific bidder being cautious in its bid or holding back").

<sup>247</sup> 975 F.2d at 879.

<sup>248</sup> Id. at 880; accord Parker, 141 F. Supp. 2d at 78 n.6 (noting that "in certain circumstances an agency may decline to require [submission of] information that it has the authority to compel and instead pursue voluntary compliance"); see FOIA Update, Vol. XIV, No. 2, at 5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); see also id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

<sup>249</sup> See, e.g., Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.29 (D.C. Cir. 1983) (concluding that whether submissions are mandatory is a factor to be considered in an impairment claim, but that factor is "not necessarily dispositive"); Wash. Post Co. v. HHS, 690 F.2d 252, 268-69 (D.C. Cir. 1982). But see Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990) (declaring that when "compelled cooperation will obtain precisely the same (continued...)

The Court of Appeals for the Second Circuit likewise has rejected a requester's contention that the "mere legal authority to compel the production of information . . . is sufficient for that submission of information to be deemed mandatory."<sup>250</sup> The adoption of such a standard, it found, would result in an "undesirable general presumption against impairment."<sup>251</sup> The court further reasoned that "[i]f the vast majority of submissions" were "deemed mandatory," which "would seem to be the effective result" of the requester's suggested standard, then there would be "an overwhelming presumption against impairment."<sup>252</sup> This, in the court's view, would "essentially undermine[] Exemption 4's goal of protecting the government's ability to obtain information."<sup>253</sup> The requester, by contrast, offered "little reason for adopting such a broad rule."<sup>254</sup> Additionally, the court found that the adoption of the requester's proposed standard would "interfere[] with the government's discretion as to how to obtain information."<sup>255</sup> Like the D.C. Circuit, the Second Circuit saw "no reason for interfering with" such discretion.<sup>256</sup> Accordingly, it held that an agency "must both possess and exercise the legal authority to obtain information for the resulting submission of information to be deemed 'mandatory' under the National Parks

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<sup>249</sup>(...continued)

results as voluntary cooperation, an impairment claim cannot be countenanced") (decided prior to Critical Mass and thus now overtaken by controlling precedent), appeal dismissed voluntarily, No. 91-5023 (D.C. Cir. July 2, 1992); see also Dow Jones, 219 F.R.D. at 178-79 (rejecting an impairment claim, based in part on the fact that the agency "retain[ed] subpoena and investigatory power," so that "even if disclosure [of the requested record] were to cause individuals to decide not to voluntarily disclose information in the future . . . [the agency] would still be able to access the relevant information") (decided after Critical Mass, but by court that declined to apply it).

<sup>250</sup> Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 246 (2d Cir. 2006).

<sup>251</sup> Id. at 246-47 (reiterating that "if a submission is deemed mandatory, then there is a presumption against impairment" (citing Nat'l Parks, 498 F.2d at 770)).

<sup>252</sup> Id. at 247.

<sup>253</sup> Id.

<sup>254</sup> Id.

<sup>255</sup> Id. (explaining that under requester's proposed standard, the agency "would be forced" to assert its authority "to compel information," because if the submitters knew "that their information was subject to public disclosure, [they] would likely submit the bare minimum required" (quoting Inner City Press, 380 F. Supp. 2d at 217 n.5)).

<sup>256</sup> Id. (citing Critical Mass, 975 F.2d at 880).

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test.<sup>257</sup>

As a result of the D.C. Circuit's ruling in Critical Mass the significance of the impairment prong is undoubtedly diminished.<sup>258</sup> Nevertheless, the D.C. Circuit recognized that even when agencies require submission of information "there are circumstances in which disclosure could affect the reliability of such data."<sup>259</sup> Thus, after Critical Mass, the impairment prong of National Parks now applies to those more limited situations in which information is required to be provided, but where disclosure of that information under the FOIA will result in a diminution of the "reliability" or "quality" of what is submitted.<sup>260</sup>

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<sup>257</sup> Id. at 247-48.

<sup>258</sup> See FOIA Update, Vol. XIV, No. 2, at 7.

<sup>259</sup> Critical Mass, 975 F.2d at 878 (citing Wash. Post, 690 F.2d at 268-69); see Goldstein v. HHS, No. 92-2013, slip op. at 5 (S.D. Fla. May 21, 1993) (magistrate's recommendation) (rejecting an argument that the decision in Critical Mass "essentially did away" with the impairment prong, and noting that under that decision "it is appropriate to consider whether or not disclosure of the information would undermine the government's interest in insuring its reliability"), adopted (S.D. Fla. July 21, 1993).

<sup>260</sup> See Critical Mass, 975 F.2d at 878; accord Judicial Watch, Inc. v. Exp.- Imp. Bank, 108 F. Supp. 2d 19, 29 (D.D.C. 2000) (protecting export-insurance applications that contained detailed financial information and customer lists, because "disclosure of such information might encourage exporters to be less forthcoming in their submissions"); Afr. Fund v. Mosbacher, No. 92 CIV. 289, 1993 WL 183736, at \*7 (S.D.N.Y. May 26, 1993) (protecting information submitted with export license applications as it "fosters the provision of full and accurate information"); see also Goldstein, No. 92-2013, slip op. at 5, 7 (S.D. Fla. May 21, 1993) (protecting information concerning laboratory's participation in drug-testing program as it furthers agency's ability to continue to receive reliable information). But see Niagara Mohawk Power Corp. v. U.S. Dep't of Energy, 169 F.3d 16, 18 (D.C. Cir. 1999) (rejecting, as "inherently weak," a claim of qualitative impairment when the agency "secured the information under compulsion" and the data itself "appear[] to take the form of hard, cold numbers on energy use and production, the fudging of which may strain all but the deliberately mendacious"); Ctr. to Prevent Handgun Violence, 981 F. Supp. at 23 (rejecting, as "speculative" and unreasonable, agency's claim that accuracy of information required to be reported on multiple sales reports "would be jeopardized by public disclosure"); Pub. Citizen Health Research Group v. FDA, 964 F. Supp. 413, 415 (D.D.C. 1997) (rejecting, as "unsupported, even by an assertion of agency experience on the point," an agency's claim "that data submitted to the agency as part of its drug approval process 'would not be submitted as freely'" if the requested document were disclosed (quoting agency declaration)); Silverberg v. HHS, No. 89-2743, 1991 WL 633740, at (continued...)



If an agency determines that release will not cause impairment, that decision should be given extraordinary deference by the courts.<sup>261</sup> In this regard there have been a few decisions addressing the feasibility of a submitter raising the issue of impairment on behalf of an agency. In one, the district court ruled that a submitter has "standing" to raise the issue of impairment.<sup>262</sup> Subsequently, however, the Court of Appeals for the Fourth Circuit refused to allow a submitter to make an impairment argument on

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<sup>260</sup>(...continued)

\*4 (D.D.C. June 14, 1991) (rejecting, as "entirely speculative," claim of qualitative impairment based on contention that laboratory inspectors -- who work in teams of three and whose own identities are protected -- would fear litigation and thus be less candid if names of laboratories they inspected were released), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Teich, 751 F. Supp. at 252 (rejecting, as "absurd," a submitter's contention that companies would be less likely to conduct and report safety tests to the FDA for fear of public disclosure, because the companies' own interests in engendering good will and in avoiding product liability suits is sufficient assurance that they will conduct "the most complete testing program" possible).

<sup>261</sup> See, e.g., Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (observing that there is not "much room for judicial review of the quintessentially managerial judgment" that disclosure will not cause impairment) (reverse FOIA suit); McDonnell Douglas, 215 F. Supp. 2d at 206 (holding that "[t]he managerial decision about how to best protect the government's interests in gathering information simply does not lend itself easily to judicial review"); McDonnell Douglas, 981 F. Supp. at 15-16 (declaring that "court should defer to the administrative agency's determination that release will not cause impairment"); CC Distribs. v. Kinzinger, No. 94-1330, 1995 WL 405445, at \*4 (D.D.C. June 28, 1995) (same) (reverse FOIA suit); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at \*4 (D.D.C. Feb. 28, 1995) (same) (reverse FOIA suit); AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1401 (D.D.C. 1986) (finding that agency "is in the best position to determine the effect of disclosure on its ability to obtain necessary technical information" (quoting Orion, 615 F.2d at 554)) (reverse FOIA suit), rev'd on procedural grounds & remanded, 810 F.2d 1233 (D.C. Cir. 1987); cf. Ctr. for Pub. Integrity, 191 F. Supp. 2d at 196 (explaining that the rationale for showing deference is premised on the fact that "if the agency is willing to release information, it can be safely assumed that the agency is acting to protect" its interests; thus rejecting agency argument that it should be accorded deference when it invokes impairment prong to withhold information). But see Canadian Commercial Corp. v. Dep't of the Air Force, 442 F. Supp. 2d 15, 30 (D.D.C. 2006) (opining that case law does not endorse "blind acceptance of the government's vague and unsupported contentions" that disclosure was unlikely to impair its future interests) (reverse FOIA suit) (appeal pending).

<sup>262</sup> United Techs. Corp. v. HHS, 574 F. Supp. 86, 89 (D. Del. 1983).

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the agency's behalf.<sup>263</sup> That appellate court decision was, in turn, subsequently relied on by a lower court which found that because "it is the government's interests that are protected" by the impairment prong, "it follows that it is the government that is best situated to make the determination of whether disclosure would inhibit future submissions."<sup>264</sup> That court reasoned that "it would be nonsense to block disclosure" of information "under the purported rationale of protecting government interests" when the government itself "wants to disclose" it.<sup>265</sup>

In Washington Post Co. v. HHS, the D.C. Circuit held that an agency must demonstrate that a threatened impairment is "significant," because a "minor" impairment is insufficient to overcome the general disclosure mandate of the FOIA.<sup>266</sup> Moreover, in Washington Post the D.C. Circuit held that the factual inquiry concerning the degree of impairment "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure."<sup>267</sup> Because the case was remanded for further proceedings, the court found it unnecessary to decide the details of such a balancing test at that time.<sup>268</sup>

Five years later, in the first panel decision in Critical Mass, the D.C. Circuit cited Washington Post to reiterate that a threatened impairment must be significant, but it made no mention whatsoever of a balancing test.<sup>269</sup> The notion of a balancing test was resurrected in a subsequent decision of the D.C. Circuit in the Washington Post case.<sup>270</sup> This time, the D.C. Circuit elaborated on the balancing test -- even suggesting that it

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<sup>263</sup> Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988); accord McDonnell Douglas, 215 F. Supp. 2d at 206 (holding that "[w]hen an agency makes the decision to disclose information, a party opposing disclosure makes little headway in raising the issue of impairment of information gathering on the agency's behalf").

<sup>264</sup> Comdisco, Inc. v. GSA, 864 F. Supp. 510, 515 (E.D. Va. 1994) (reverse FOIA suit).

<sup>265</sup> Id. at 516; accord McDonnell Douglas, 215 F. Supp. 2d at 206 (disparaging submitter's attempt to raise impairment claim even though agency itself had "determined that its interests [would] not be harmed" by disclosure, as "effectively telling [the agency] that [the submitter] knows better than [the agency] what is in [the agency's] long term interest").

<sup>266</sup> 690 F.2d at 269.

<sup>267</sup> Id.

<sup>268</sup> Id.

<sup>269</sup> 830 F.2d 278, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992).

<sup>270</sup> 865 F.2d 320, 326-27 (D.C. Cir. 1989).

might apply to all aspects of Exemption 4, not just the impairment prong -- and held that "information will be withheld only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in National Parks I (and its progeny) militating against disclosure on the other side."<sup>271</sup> Because the case was remanded once again (and ultimately was settled), the court did not actually rule on the outcome of such a balancing process.<sup>272</sup>

The district court decision in Critical Mass, on remand from the first panel decision of the D.C. Circuit, was the first decision to explicitly apply a balancing test under the impairment prong of Exemption 4.<sup>273</sup> (Other decisions have utilized or made reference to a balancing test in ruling under the competitive harm prong. For a further discussion of this point, see Exemption 4, Competitive Harm Prong of National Parks, below.) In Critical Mass, the district court held that a consumer organization requesting information bearing upon the safety of nuclear power plants had "no particularized need of its own" for access to the information and thus was "remitted to the general public interest in disclosure for disclosure's sake to support its request."<sup>274</sup> Although the court conceded that the public has an interest "of significantly greater moment than idle curiosity" in information concerning the safety of nuclear power plants, that same interest was shared by the NRC and the submitter of the information and their interest in preventing disclosure was deemed to be of "a much more immediate and direct nature."<sup>275</sup> Curiously, when this decision in Critical Mass was subsequently reviewed by both a second panel of the D.C. Circuit and then by

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<sup>271</sup> Id. at 327.

<sup>272</sup> Id. at 328.

<sup>273</sup> 731 F. Supp. 554, 555-56 (D.D.C. 1990), rev'd in part on other grounds & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992); see also Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475-A, slip op. at 4 (E.D. Va. June 7, 1996) (rejecting agency's impairment claim as "merely speculative," and in so doing both referencing requester's citation to Washington Post balancing test and noting requester's assertion of "public interest" in disclosure of documents).

<sup>274</sup> 731 F. Supp. at 556.

<sup>275</sup> Id.; see Gilmore, 4 F. Supp. 2d at 922-23 (declaring, for FOIA exemptions generally, that the court "must balance the public interest in disclosure against the interest Congress intended the exemption to protect" and, upon determining that the requested video conferencing software fell within protection of both prongs of Exemption 4, the court balanced in favor of protection, finding "no countervailing public interest" in disclosure of the software inasmuch as it "sheds no light whatsoever on [agency's] performance of its duties").

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the entire D.C. Circuit sitting en banc, no mention was made of any balancing test under Exemption 4.<sup>276</sup>

This issue appears to have been finally resolved by the D.C. Circuit in its decision in Public Citizen Health Research Group v. FDA.<sup>277</sup> There, the D.C. Circuit squarely rejected "a consequentialist approach to the public interest in disclosure" as "inconsistent with the '[b]alanc[e of] private and public interests' th[at] Congress struck in Exemption 4."<sup>278</sup> The court went on to state that "[t]hat balance is accurately reflected in the test of confidentiality" established by National Parks and that a requester cannot "bolster the case for disclosure by claiming an additional public benefit" in release.<sup>279</sup> "In other words," the D.C. Circuit declared, "the public interest side of the balance is not a function of the identity of the requester, . . . or of any potential negative consequences disclosure may have for the public, . . . nor likewise of any collateral benefits of disclosure."<sup>280</sup>

### Competitive Harm Prong of National Parks

The great majority of Exemption 4 cases have involved the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton.<sup>281</sup> Information is "confidential" under this prong if disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>282</sup> The Court of Appeals for the District of Columbia Circuit has "empha-

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<sup>276</sup> 931 F.2d 939, 945-47 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

<sup>277</sup> 185 F.3d 898, 904 (D.C. Cir. 1999) (ruling under competitive harm prong, but applying rationale applicable to all prongs of Exemption 4).

<sup>278</sup> Id.

<sup>279</sup> Id.

<sup>280</sup> Id. (holding that "Congress has already determined the relevant public interest" by requiring disclosure of information under the FOIA unless it falls within "a specific exemption"); accord Lahr, 453 F. Supp. 2d at 1176 (rejecting the plaintiff's argument that "for any record falling under Exemption 4, the Court must apply a balancing test between the public interest in disclosure and the private interests protected by the exemption," and holding instead that the "only test" that it may apply "is that found in National Parks" (citing Pub. Citizen, 185 F.2d at 904)); Utah v. U.S. Dep't of the Interior, No. 2:98 CV 380, slip op. at 7 (D. Utah Nov. 3, 1999) (holding that "there is no balancing in applying Exemption 4 beyond the balancing that is inherent in the exemption itself").

<sup>281</sup> 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>282</sup> Id.

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size[d]" that the "important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by competitors" and that this "should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement."<sup>283</sup>

In order for an agency to make a determination under this prong it is essential that the submitter of the requested information be given an opportunity to provide the agency with its views on the possible competitive harm that would be caused by disclosure. While such an opportunity had long been voluntarily afforded submitters by several agencies and had been recommended by the Department of Justice,<sup>284</sup> since 1987 it has been expressly required by executive order.

Executive Order 12,600<sup>285</sup> requires, with certain limited exceptions,<sup>286</sup> that agencies provide notification to submitters of confidential commercial

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<sup>283</sup> Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (quoting Mark O. Connelly, Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data, 1981 Wis. L. Rev. 207, 235-36); accord CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 & n.158 (D.C. Cir. 1987) (reiterating "policy behind Exemption 4 of protecting submitters from external injury" and rejecting submitter objections that did "not amount to 'harm flowing from the affirmative use of proprietary information by competitors'" (quoting Pub. Citizen, 704 F.2d at 1291 n.30)) (reverse FOIA suit). But see McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 306-07 (D.C. Cir. 1999) (accepting as legally valid -- without any reference to D.C. Circuit precedent to the contrary -- submitter's claim that disclosure of government contract prices would cause submitter harm by permitting its "commercial customers to bargain down ('ratchet down') its prices more effectively") (reverse FOIA suit), reh'g en banc denied, No. 98-5251, slip op. at 2 (D.C. Cir. Oct. 6, 1999) (Silberman, J., concurring) (attempting to explain the panel's acceptance of the submitter's claim by opining that "[o]ther than in a monopoly situation anything that undermines a supplier's relationship with its customers must necessarily aid its competitors"), dismissed as moot on motion for entry of judgment, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after D.C. Circuit issued decision), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000).

<sup>284</sup> See FOIA Update, Vol. III, No. 3, at 3 (guidance issued in 1982 detailing steps that agencies should follow to notify submitters when their information is requested under the FOIA).

<sup>285</sup> 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (2000), and in FOIA Update, Vol. VIII, No. 2, at 2-3.

<sup>286</sup> See Exec. Order No. 12,600, § 8 (listing six circumstances in which notice is not necessary -- for example, when agency determines that requested information should be withheld, or conversely, when it already is public or its release is required by law).

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information whenever an agency "determines that it may be required to disclose" such information under the FOIA.<sup>287</sup> Once submitters are notified, they must be given a "reasonable period of time" within which to object to disclosure of any of the requested information.<sup>288</sup> The executive order requires that agencies give careful consideration to the submitters' objections and provide them with a written statement explaining why any such objections are not sustained.<sup>289</sup> (For a further discussion of these procedures, see "Reverse" FOIA, Executive Order 12,600, below.)

As one court aptly emphasized, consultation with a submitter is "appropriate as one step in the evaluation process, [but it] is not sufficient to satisfy [an agency's] FOIA obligations."<sup>290</sup> Consequently, an agency is "required to determine for itself whether the information in question should be disclosed."<sup>291</sup> Indeed, when a submitter itself provided the requester with a copy of the requested document -- containing redactions made by the submitter, not by the agency -- the District Court for the District of Columbia held that the submitter's action "[did] not relieve" the agency of the obligation to make "an independent determination" as to the applicability of Exemption 4.<sup>292</sup> Without such an "independent assessment" by the agency "regarding the scope of [the submitter's] redactions," the court found that it could not properly make an Exemption 4 determination.<sup>293</sup>

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<sup>287</sup> Exec. Order No. 12,600, § 1; cf. Venetian Casino Resort v. EEOC, No. 00-2890, 2006 WL 2806568, at \*2, \*5 (D.D.C. Sept. 29, 2006) (finding that in absence of FOIA request for submitter's information, Executive Order 12,600 had no applicability to action challenging agency's policy by which "it releases documents identified by submitting party as containing trade secrets and/or confidential information") (non-FOIA case). See generally OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 168 (3d Cir. 2000) (concluding that estimated \$1.7 million costs for notifying more than 80,000 submitters was properly charged to FOIA requester seeking documents for commercial use).

<sup>288</sup> Exec. Order No. 12,600, § 4.

<sup>289</sup> Id. § 5.

<sup>290</sup> Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996).

<sup>291</sup> Id.; accord Exec. Order No. 12,600, § 5 (notification procedures specifically contemplate that agency makes ultimate determination concerning release); see also Nat'l Parks, 498 F.2d at 767 (concluding that in justifying nondisclosure, the submitter's treatment of information is not "the only relevant inquiry"; rather, the agency must also be satisfied that the harms underlying the exemption are likely to occur).

<sup>292</sup> Nw. Coal. for Alternatives to Pesticides v. EPA, 254 F. Supp. 2d 125, 131 (D.D.C. 2003).

<sup>293</sup> Id. at 132, 134 (remanding case to agency for appropriate explanation (continued...))

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If an agency decides to invoke Exemption 4 and that decision is subsequently challenged in court by a FOIA requester, the submitter's objections to disclosure -- usually provided in an affidavit filed in conjunction with the agency's court papers, but sometimes provided separately if the submitter intervenes as a party in the lawsuit<sup>294</sup> -- will, in turn, be evaluated and relied upon by the court in determining the propriety of the exemption claim.<sup>295</sup> Courts have repeatedly rejected competitive harm claims

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<sup>293</sup>(...continued)

of agency's position). But see Anderson v. HHS, 907 F.2d 936, 940 (10th Cir. 1990) (accepting, without comment, the existing posture of the case in which the submitter had "intervened and [had] defended the action on behalf of the FDA").

<sup>294</sup> See, e.g., Pub. Citizen Health Research Group v. FDA, 185 F.3d 898, 900 (D.C. Cir. 1999) (noting that submitter had intervened in case); Appleton v. FDA, 310 F. Supp. 2d 194, 196-97 (D.D.C. 2004) (permitting submit-  
ters to intervene "as of right").

<sup>295</sup> See, e.g., Madison Mech., Inc. v. NASA, No. 99-2854, 2003 WL 1477014, at \*5 (D.D.C. Mar. 20, 2003) (magistrate's recommendation) (grap-  
pling with the fact that the submitter "[m]ysteriously . . . merely submitted  
a brief letter stating that the information was deemed to be confidential  
business information," which, when coupled with the "conclusory state-  
ments" provided by the agency, compelled a finding "that there is nothing  
in the record" to support judgment for either party, and so recommending  
"an evidentiary hearing"), adopted, No. 99-2854, slip op. at 1 (D.D.C. Mar.  
31, 2003) (denying both parties' cross-motions for summary judgment with-  
out prejudice "to further proceedings before" magistrate), removed from ac-  
tive calendar (D.D.C. Nov. 25, 2003); Pub. Citizen Health Research Group v.  
NIH, 209 F. Supp. 2d 37, 50 (D.D.C. 2002) (alternative holding) (finding --  
when the agency sent notices to nearly five hundred submitters and fewer  
than two hundred responded -- that the "evidence of those who did re-  
spond was overwhelmingly against disclosure, which tips the scales heav-  
ily toward a conclusion that release of the information would likely cause  
substantial competitive injury"); Pub. Citizen Health Research Group v.  
FDA, 997 F. Supp. 56, 64 n.4 (D.D.C. 1998) (noting with approval submit-  
ter's "recognition that some of the requested documents may be safely re-  
leased" and considering it "evidence that their claims of exemption . . . are  
grounded in good faith -- that the company is not reflexively resisting every  
request for disclosure"), aff'd in part, rev'd in part & remanded, 185 F.3d 898  
(D.C. Cir. 1999); Teich v. FDA, 751 F. Supp. 243, 254 (D.D.C. 1990) (striking  
original declaration of submitter "on basic fairness grounds," and then find-  
ing submitter "not . . . able to support its position"), appeal dismissed vol-  
untarily, No. 91-5023 (D.C. Cir. July 2, 1992); see also Durnan v. U.S. Dep't of  
Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991) (rejecting challenge to  
agency's reliance on submitter's declaration, finding it entirely "relevant" to  
competitive harm determination); cf. Silverberg v. HHS, No. 89-2743, 1990  
WL 599452, at \*1 (D.D.C. June 26, 1990) (when only some submitters made  
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-- and even have ordered disclosure -- when those claims were advanced by agencies on their own.<sup>296</sup> The Court of Appeals for the Ninth Circuit upheld a competitive harm determination that was justified solely by an agency declarant, but in doing so it emphasized that this particular agency declarant was "very familiar" with the industry at issue and that he had experience that "put him in 'almost daily contact' with" it, all of which was found to lend "considerable weight to his testimony."<sup>297</sup> "More importantly," the Ninth Circuit emphasized, in that case the agency declarant had supported his conclusions with "detailed and specific descriptions" of the withheld information, including "the ways in which each category of informa-

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<sup>295</sup>(...continued)

objections to disclosure, court permitted requester to obtain copies of those objections through discovery in order to enable him to substantiate his claim that not all submitters were entitled to Exemption 4 protection) (discovery order).

<sup>296</sup> See, e.g., N.C. Network for Animals v. USDA, No. 90-1443, slip op. at 8-9 (4th Cir. Feb. 5, 1991) (finding "evidence presented by" agency "insufficient to support" its burden, remanding case, and noting absence of sworn affidavits or detailed justification for withholding from submitters); Newry Ltd. v. U.S. Customs & Border Prot. Bureau, No. 04-02110, 2005 WL 3273975, at \*4 & n.8 (D.D.C. July 29, 2005) (rejecting competitive harm argument advanced solely by agency), reconsideration granted (D.D.C. Mar. 30, 2006) (upholding competitive harm argument following agency's submission of supplemental declarations, including one from submitter); Pentagon Fed. Credit Union v. Nat'l Credit Union Admin., No. 95-1475-A, slip op. at 4-5 (E.D. Va. June 7, 1996) (rejecting competitive harm argument, noting failure of agency even to give notice to submitters who, in turn, ultimately provided sworn declarations to requester explicitly stating that disclosure would not cause them harm); Wiley Rein & Fielding v. U.S. Dep't of Commerce, 782 F. Supp. 675, 676 (D.D.C. 1992) (rejecting competitive harm argument, ordering disclosure, and emphasizing that "no evidence" was provided to indicate that submitters objected to disclosure), appeal dismissed as moot, No. 92-5122 (D.C. Cir. Mar. 8, 1993); Brown v. Dep't of Labor, No. 89-1220, 1991 U.S. Dist. LEXIS 1780, at \*7 (D.D.C. Feb. 15, 1991) (denying competitive harm claim, ordering disclosure, and noting failure of submitters to object to disclosure), appeal dismissed, No. 91-5108 (D.C. Cir. Dec. 3, 1991); Black Hills Alliance v. U.S. Forest Serv., 603 F. Supp. 117, 121 (D.S.D. 1984) (finding agency affidavits inadequate, ordering disclosure, and noting that "[i]t is significant that [the submitter] itself has not submitted an affidavit addressing" issue of competitive harm); cf. N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 330 (S.D.N.Y. 2003) (rejecting an agency's assertion that disclosure would impair its ability to obtain similar information in the future, ordering disclosure, and noting that the submitter had not provided "any affidavits or taken a position" on the documents at issue).

<sup>297</sup> Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1080 (9th Cir. 2004) (quoting agency declaration).



tion could be turned to [the requester's] competitive advantage."<sup>298</sup>

The courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines. For example, in some contexts customer names have been withheld because disclosure would cause substantial competitive harm<sup>299</sup> and in other contexts customer names have been ordered released because disclosure would not cause substantial competitive harm.<sup>300</sup> Similarly, in one case the table of contents and introductions to certain documents were withheld because the court found that their disclosure would "provide valuable descriptions of proprietary information,"<sup>301</sup> but in another case the court upheld an agency's decision to release a table of contents and other summary information because they revealed "only an outline" of the submitter's "operations and capabilities" and were "devoid of the detail which would be of value" to competitors.<sup>302</sup> The individualized and sometimes conflicting determinations indicative of competitive harm holdings is well illustrated in one case in which the D.C. Circuit originally affirmed a district court's decision which found that customer names of "CAT" scanner manufacturers were protected,<sup>303</sup> but subsequently vacated that decision upon the death of one of its judges.<sup>304</sup> On reconsideration, the newly constituted panel found that disclosure of the customer list raised a factual question as to the showing of competitive harm that precluded the granting of summary judgment after all.<sup>305</sup>

Factual disputes concerning the likelihood that disclosure of requested information would cause competitive harm precluded a ruling on summary judgment motions in two cases decided a decade ago by the District

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<sup>298</sup> Id.

<sup>299</sup> See, e.g., RMS Indus. v. DOD, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992); Goldstein v. ICC, No. 82-1511, 1984 WL 3228, at \*6-7 (D.D.C. July 31, 1985) (reopening case and protecting customer names); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,044, at 81,120 (D.D.C. Dec. 4, 1980).

<sup>300</sup> See, e.g., Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1566 (D.D.C. 1985); Braintree Elec. Light Dep't v. Dep't of Energy, 494 F. Supp. 287, 290 (D.D.C. 1980).

<sup>301</sup> Allnet Commc'n Servs. v. FCC, No. 92-5351, slip op. at 5 (D.C. Cir. May 27, 1994).

<sup>302</sup> Dynalectron Corp. v. Dep't of the Air Force, No. 83-3399, 1984 WL 3289, at \*5 (D.D.C. Oct. 30, 1984) (reverse FOIA suit).

<sup>303</sup> Greenberg v. FDA, 775 F.2d 1169, 1172-73 (D.C. Cir. 1985).

<sup>304</sup> Greenberg v. FDA, 803 F.2d 1213, 1215 (D.C. Cir. 1986).

<sup>305</sup> Id. at 1219.

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Court for the District of Columbia.<sup>306</sup> In the first case, after reviewing the "claims made by the experts" for both parties, the court concluded that because the claims were "contradictory," summary judgment was "an inappropriate vehicle" for resolution of the case, and the court instead scheduled a bench trial.<sup>307</sup> (The case ultimately was settled, however, and no trial took place.<sup>308</sup>) In the second case, the court found that the record did "not present a clear picture as to the competitive injury, if any, that would result from releasing" the requested document -- a protocol (an outline of objectives and hypotheses) for a post-marketing study of a pharmaceutical drug.<sup>309</sup> Rather than proceeding to a trial, the court in that case ordered that the document and a memorandum supporting its withholding be submitted to the court in camera.<sup>310</sup> Thereafter, at the court's suggestion,<sup>311</sup> the document was also reviewed by "two experts identified by the parties and appointed by the court."<sup>312</sup> The experts then concluded, and the court agreed, that no competitive harm would "flow from the release" of the document, and disclosure was ordered.<sup>313</sup>

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<sup>306</sup> Pub. Citizen Health Research Group v. FDA, 964 F. Supp. 413, 416 (D.D.C. 1997), review by expert witness suggested, No. 96-1650 (D.D.C. Mar. 18, 1997), summary judgment denied & document ordered released (D.D.C. Nov. 3, 1997); Pub. Citizen Health Research Group v. FDA, 953 F. Supp. 400, 402-03 (D.D.C. 1996), dismissed per stipulation, No. 94-0169, slip op. at 1 (D.D.C. Feb. 3, 1997); see also Madison, 2003 WL 1477014, at \*5 (recommending the denial of both parties' summary judgment motions and the convening of an "evidentiary hearing" upon a finding that "there is nothing in the record which would allow any reasonable finder of fact to conclude in either party's favor") (case ultimately removed from active calendar).

<sup>307</sup> Pub. Citizen, 953 F. Supp. at 403.

<sup>308</sup> Pub. Citizen Health Research Group v. FDA, No. 94-0169, slip op. at 1 (D.D.C. Feb. 3, 1997) (agency agreed to release requested information as part of settlement).

<sup>309</sup> Pub. Citizen, 964 F. Supp. at 416.

<sup>310</sup> Id.

<sup>311</sup> See Pub. Citizen Health Research Group v. FDA, No. 96-1650, slip op. at 2 (D.D.C. Mar. 18, 1997) (concluding that an in camera submission had "disabled" the normal "adversary process," and so directing the parties to recommend candidates for appointment as expert witnesses who, under a protective order, could review material "and offer an opinion" as to the likelihood of competitive harm).

<sup>312</sup> Pub. Citizen Health Research Group v. FDA, No. 96-1650, slip op. at 1 (D.D.C. Nov. 3, 1997).

<sup>313</sup> Id. at 1-2.

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Actual competitive harm need not be demonstrated for purposes of the competitive harm prong; rather, evidence of "actual competition and a likelihood of substantial competitive injury" is all that need be shown.<sup>314</sup> Although the requirement that a submitter face "actual competition" usually is readily satisfied,<sup>315</sup> the D.C. Circuit remanded a decision for further proceedings concerning the existence of "actual competition" and, in doing so, suggested that "a competitive injury is too remote for purposes of Exemption 4 if it can occur only in the occasional renegotiation of long-term contracts."<sup>316</sup>

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<sup>314</sup> CNA, 830 F.2d at 1152 ; accord Frazer v. U.S. Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996) (reverse FOIA suit); GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994); Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); see, e.g., Judicial Watch v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 169 (D.D.C. 2004) (rejecting plaintiff's contention that agency was required to submit "concrete evidence of specific harm," and finding instead that substantial harm need be only "likely" (quoting Nat'l Parks, 498 F.2d at 770)); NBC v. SBA, 836 F. Supp. 121, 124 n.3 (S.D.N.Y. 1993) (noting that agency "should have provided more details" regarding possible competitive harm, but ruling nonetheless that generalized sworn declaration from submitter was sufficient); Journal of Commerce, Inc. v. U.S. Dep't of the Treasury, No. 86-1075, 1987 WL 4922, at \*2 (D.D.C. June 1, 1987) (holding that submitter was not required to document or pinpoint actual harm, but need only show its likelihood) (partial grant of summary judgment), renewed motion for summary judgment granted, No. 86-1075, 1998 U.S. Dist. LEXIS 17610 (D.D.C. Mar. 30, 1988), aff'd, 878 F.2d 1446 (Fed. Cir. 1989) (unpublished table decision); HLI Lordship Indus. v. Comm. for Purchase from the Blind & Other Severely Handicapped, 663 F. Supp. 246, 251 (E.D. Va. 1987) (concluding that competitive harm was likely, based upon fact that requester, who was a competitor of the submitter, had requested confidential treatment for its own similar submission).

<sup>315</sup> See, e.g., Lion Raisins, 354 F.3d at 1076, 1080 (characterizing the raisin industry as "highly competitive," and noting that "[t]he parties agree that there is actual competition in the relevant market"); PETA v. USDA, No. 03-195, 2005 WL 1241141, at \*5-6 (D.D.C. May 24, 2005) (rejecting requester's argument that submitter's declaration was "too generic to show actual competition," when declaration listed number of competitors and described nature of competition but did not identify competitors by name); Pub. Citizen, 209 F. Supp. 2d at 47 (recognizing that the "pharmaceutical industry is a highly competitive market where companies routinely attempt to discover a possible advantage over their competitors"); Utah v. U.S. Dep't of the Interior, No. 2:98 CV 380, slip op. at 4-5 (D. Utah Nov. 3, 1999) (rejecting requester's argument that submitter had "no viable competitors," and finding that agency had "met its burden of justification" on that issue).

<sup>316</sup> Niagara Mohawk Power Corp. v. U.S. Dep't of Energy, 169 F.3d 16, 18 (D.C. Cir. 1999); see also Hercules, Inc. v. Marsh, 659 F. Supp. 849, 854

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In this regard, a submitter's "admittedly weakened financial position" has been held "not [to] amount to a complete inability to suffer competitive harm," inasmuch as a "struggling, perhaps even failing, business remains entitled to the protections that Exemption Four affords to any company."<sup>317</sup> Moreover, it should be noted that the District Court for the Southern District of New York has held that the potential for competitive injury generally is measured "without regard to the total size or composition of the business whose competitive interests are at stake," but rather "in respect to the relevant market."<sup>318</sup>

In applying the competitive harm prong, one court has gone so far as to order disclosure based upon a "balancing test." Although it never expressly referred to it as such or cited to any supporting authority, this court found that disclosure of certain safety and effectiveness data pertaining to a medical device was "unquestionably in the public interest" and that the benefit of releasing this type of information "far outstrips the negligible competitive harm" alleged by the submitter.<sup>319</sup> In contrast, another court

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<sup>316</sup>(...continued)

(W.D. Va. 1987) (given fact that contract always awarded to submitter, protection under competitive harm prong unavailable as submitter failed to meet "threshold requirement" of facing competition) (reverse FOIA suit), aff'd, 839 F.2d 1027 (4th Cir. 1988).

<sup>317</sup> Inter Ocean Free Zone, Inc. v. U.S. Customs Serv., 982 F. Supp. 867, 872 (S.D. Fla. 1997); accord Nadler v. FDIC, 899 F. Supp. 158, 164 (S.D.N.Y. 1995) (determining that company in receivership was entitled to Exemption 4 protection), aff'd, 92 F.3d 93 (2d Cir. 1996); see also Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, 374 F. Supp. 2d 129, 132 & n.3 (D.D.C. 2005) (noting in dicta that "it is not apparent that the operating status" of a company no longer in business "would be dispositive" in adjudicating the competitive harm issue).

<sup>318</sup> Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 380 F. Supp. 2d 211, 219-20 (S.D.N.Y. 2005) (finding that the competitive injury to "a small subset" of the submitter's business would be "substantial," notwithstanding the submitter's total assets worth approximately 418 billion dollars), aff'd in part & remanded in part on other grounds, 463 F.3d 239 (2d Cir. 2006); cf. Lion Raisins, 354 F.3d at 1079 (requiring a showing of actual competition "in the relevant market").

<sup>319</sup> Teich, 751 F. Supp. at 253; see also Pub. Citizen, 964 F. Supp. at 415 (citing Teich and stating that "an additional factor that may be considered is whether there is a strong public interest in release of the information") (insufficient record precluded court from actually ruling on claim of competitive harm and in camera inspection ordered). But cf. Citizens Comm'n on Human Rights v. FDA, No. 92-5313, 1993 WL 1610471, at \*9 (C.D. Cal. May 10, 1993) (finding competitive harm and thus protecting research data used to support safety and effectiveness of pharmaceutical drug), aff'd in

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employed a balancing test under Exemption 4, but that court balanced in favor of protection -- under both the impairment and competitive harm prongs -- declaring that "there is no countervailing public interest in disclosure [of the requested video conferencing software] because [the software] sheds no light whatsoever on [the agency's] performance of its duties."<sup>320</sup>

The Court of Appeals for the Ninth Circuit has cited to National Parks and then declared that it "agree[d] with the D.C. Circuit" that in making an Exemption 4 determination it "must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information."<sup>321</sup> Although the Ninth Circuit thus used the term "balance," it did so in the context of holding that the agency had entirely failed to meet its burden of showing that disclosure of the very general information at issue was likely to cause "any potential for competitive harm, let alone substantial harm," and as a result, the court stated, rather colloquially, that the "FOIA's strong presumption in favor of disclosure trumps the contractors' right to privacy."<sup>322</sup>

As discussed earlier, the D.C. Circuit appears to have dispositively resolved this issue in Public Citizen Health Research Group v. FDA, where it flatly rejected a requester's proposal that the court "should gauge whether the competitive harm done to the sponsor of an [Investigational New Drug] by the public disclosure of confidential information 'is outweighed by the strong public interest in safeguarding the health of human trial partici-

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<sup>319</sup>(...continued)

part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995).

<sup>320</sup> Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 923 (N.D. Cal. 1998); cf. Trans-Pac. Policing Agreement v. U.S. Customs Serv., No. 97-2188, 1998 U.S. Dist. LEXIS 7800, at \*14 (D.D.C. May 14, 1998) (concluding, without actually using the word "balancing," that the agency's "proper application of Exemption 4 in this case does not offend the purposes of the FOIA"), rev'd & remanded for segregability determination, 177 F.3d 1022 (D.C. Cir. 1999).

<sup>321</sup> GC Micro, 33 F.3d at 1115.

<sup>322</sup> Id.; Garren v. U.S. Dep't of the Interior, No. CV-97-273, slip op. at 13 n.11 (D. Or. Nov. 17, 1997) (magistrate's recommendation) (referring to GC Micro and questioning "nature" of public interest to be considered in Exemption 4 cases, but declining to resolve that issue inasmuch as requested information was outside Exemption 4's protection), adopted (D. Or. Jan. 8, 1998); cf. Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 41 (D.D.C. 1997) (in context of holding that submitter had failed to demonstrate that it would suffer competitive harm from release of information incorporated into government contract, court notes importance of opening government procurement process to public scrutiny) (reverse FOIA suit).

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pants.<sup>323</sup> Declaring that a requester cannot "bolster the case for disclosure by claiming an additional public benefit" in release, the D.C. Circuit held that Congress has already struck the appropriate balance between public and private interests and that "[t]hat balance is accurately reflected in the test of confidentiality set forth in National Parks."<sup>324</sup> (For a further discussion of this point, see Exemption 4, Impairment Prong of National Parks, above.) Despite this firm ruling by the D.C. Circuit, the Court of Appeals for the Tenth Circuit, without making any reference to the D.C. Circuit decision or its reasoning, observed that a requester had made a "strong public policy argument in favor of a 'rough balancing of interests' test under Exemption Four."<sup>325</sup> The court went on to agree with the requester that "the public interest in disclosure of information regarding the handling, storage, and disposal of dangerous materials such as spent nuclear fuel is high."<sup>326</sup> However, because the competitive harm from disclosure was "overwhelming" in that case, the court concluded that it "need not reach the issue of whether a balancing test is appropriate under Exemption Four."<sup>327</sup>

In assessing whether a submitter would suffer competitive harm, courts have held that "elaborate antitrust proceedings" are not required.<sup>328</sup>

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<sup>323</sup> 185 F.3d at 903 (quoting requester's brief).

<sup>324</sup> Id. at 904; accord Lahr v. NTSB, 453 F. Supp. 2d 1153, 1176 (C.D. Cal. 2006) (rejecting the plaintiff's argument that "for any record falling under Exemption 4, the Court must apply a balancing test between the public interest in disclosure and the private interests protected by the exemption," and holding instead that the "only test" that it may apply "is that found in National Parks" (citing Pub. Citizen, 185 F.2d at 904)); Utah, No. 2:98 CV 380, slip op. at 7 (D. Utah Nov. 3, 1999) (holding that "there is no balancing in applying Exemption 4 beyond the balancing that is inherent in the exemption itself"); see also Pub. Citizen, 209 F. Supp. 2d at 45-51 (relying on D.C. Circuit's decision in Public Citizen, court uses phrase "rough balancing," but actually conducts disclosure analysis focused solely on harms recognized under Exemption 4); cf. NARA v. Favish, 541 U.S. 157, 172 (observing that under the FOIA's exemption scheme "the general interest in disclosure" is balanced in only "certain areas defined in the exemptions") (emphasis added) (Exemption 7(C) case), reh'g denied, 541 U.S. 1057 (2004).

<sup>325</sup> Utah v. U.S. Dep't of the Interior, 256 F.3d 967, 971 (10th Cir. 2001) (quoting Wash. Post Co. v. HHS, 865 F.2d 320, 326-28 (D.C. Cir. 1989) (decided a full ten years prior to the clarifying D.C. Circuit decision in Public Citizen and thus effectively overruled by that controlling precedent)).

<sup>326</sup> Id.

<sup>327</sup> Id.

<sup>328</sup> Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 681 (D.C. Cir. 1976); accord GC Micro, 33 F.3d at 1115 ("law does not require [agency] (continued...)

On the other hand, mere conclusory allegations of harm are unacceptable.<sup>329</sup> For example, the Ninth Circuit reversed a competitive harm determination made by the lower court which had protected, on a standard government form, the "percentage and dollar amount of work subcontracted out" to small disadvantaged businesses.<sup>330</sup> In so deciding, the Ninth Circuit rejected the contention advanced by the submitting contractors that disclosure would allow their competitors to "undercut future bids," holding that their "rather conclusory statements" to that effect were insufficient as the data was "made up of too many fluctuating variables for competitors to

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<sup>328</sup>(...continued)

to engage in a sophisticated economic analysis of the substantial competitive harm . . . that might result from disclosure"); Pub. Citizen, 704 F.2d at 1291.

<sup>329</sup> See, e.g., Pub. Citizen, 704 F.2d at 1291 ("[C]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents."); Nw. Coal. for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 202 (D.D.C. 1996) (same); Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (declaring that submitters are "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict") (reverse FOIA suit); see also Nat'l Air Traffic Controllers Ass'n v. FAA, No. 06-53, 2007 WL 495798, at \*2 (D.D.C. Feb. 12, 2007) (declaring that an agency "is not required to provide a detailed economic analysis of the competitive environment, [but] it must provide affidavits that contain more than mere conclusory statements of competitive harm" (quoting Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau, 457 F. Supp. 2d 6, 10 (D.D.C. 2006))); Delta Ltd. v. U.S. Customs & Border Prot. Bureau, 384 F. Supp. 2d 138, 149 (D.D.C. 2005) (same), reconsideration granted in part on other grounds, 393 F. Supp. 2d 15, 19 (D.D.C. 2005); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at \*38 (D.D.C. Sept. 28, 2001) (rejecting agency's "conclusory and vague statements" which provided "little more than speculation about potential problems in securing future contracts"); Pub. Citizen Health Research Group v. FDA, No. 99-0177, 2000 U.S. Dist. LEXIS 4108, at \*6-9 (D.D.C. Jan. 19, 2000) (rejecting submitter's "conclusory" and "speculative" arguments regarding competitive harm); Heeney v. FDA, No. 97-5461, 1999 U.S. Dist. LEXIS 23365, at \*36 (C.D. Cal. Mar. 18, 1999) (rejecting competitive harm argument when submitter "provide[d] no reason" for seeking to withhold requested information), aff'd on other grounds, 7 F. App'x 770 (9th Cir. 2001); Lee, 923 F. Supp. at 455 (rejecting competitive harm when the submitter failed to provide "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury").

<sup>330</sup> GC Micro, 33 F.3d at 1115.

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gain any advantage from the disclosure."<sup>331</sup>

Similarly, the District Court for the District of Columbia upheld an agency's decision to disclose three broad categories of information incorporated into a government contract -- specifically, "cost and fee information, including material, labor and overhead costs, as well as target costs, target profits and fixed fees"; "component and configuration prices, including unit pricing and contract line item numbers"; and "technical and management information, including subcontracting plans, asset allocation charts, and statements of the work necessary to accomplish certain system conversions" -- based upon the submitter's failure to specifically demonstrate that it would suffer competitive harm from their release.<sup>332</sup> In upholding release of this information, the court affirmed the agency's determination that "neither the revelation of cost and pricing data nor proprietary management strategies were likely to result in such egregious injury to [the submitter] as to disable it as an effective competitor for [the agency's] business in the future."<sup>333</sup>

Some courts have utilized a "mosaic" approach to sustain a finding of competitive harm, thereby protecting information that would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester.<sup>334</sup> In one case -- where it was

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<sup>331</sup> Id. at 1114-15; see also Berlin Steel Constr. Co. v. VA, No. 95-752, slip op. at 1, 5-6 (D. Conn. Sept. 30, 1996) (rejecting a competitive harm claim for "payment and progress reports" because the variables used by the contractor to reach its "final bid for this one project . . . remain unknown" and because no evidence was presented "that over the past years market fluctuations have remained substantially stable").

<sup>332</sup> Martin Marietta, 974 F. Supp. at 38, 40.

<sup>333</sup> Id. at 41.

<sup>334</sup> See, e.g., Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau, 457 F. Supp. 2d 6, 11 (D.D.C. 2006) (protecting names and addresses of importers because when they were associated with a particular shipping time frame and Harmonized Tariff Schedule and when cross-referenced with publicly available vessel manifest information, disclosure would provide requester with "valuable knowledge regarding its competitors' business operations"); Trans-Pac., 1998 U.S. Dist. LEXIS 7800, at \*10-11 (protecting Harmonized Tariff Numbers, which otherwise were publicly released, when they were linked to specific shipments of goods, because a "knowledgeable person can use [such] numbers to uncover information concerning the nature, cost, profit margin, and origin of shipments"); Lederle Lab. v. HHS, No. 88-0249, slip op. at 22-23 (D.D.C. July 14, 1988) (protecting scientific tests and identities of agency reviewers because disclosure would permit requester to "indirectly obtain that which is directly exempted from disclosure"); Timken Co. v. U.S. Customs Serv., 491 F. Supp. 557, 559

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found that a company's labor costs would be revealed by disclosure of its wage rate and manhour information -- the court took the opposite approach and disaggregated the requested information, ordering release of the wage rates without the manhour information, because release of one without the other would not cause the company competitive harm.<sup>335</sup> In denying a competitive harm claim, another court noted that because the requested information pertained to every laboratory in a certain program, disclosure would not create a competitive advantage for any one of them because "each laboratory would have access to the same type of information as every other laboratory in the program."<sup>336</sup>

Many courts have held that if the information sought to be protected is itself publicly available through other sources, disclosure under the FOIA will not cause competitive harm and Exemption 4 is not applicable.<sup>337</sup>

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<sup>334</sup>(...continued)

(D.D.C. 1980) (protecting data reflecting sales between a parent company and its subsidiary, because even if disclosure of such data "would be insufficient, standing by itself, to allow computation of the cost of production, this cost would be ascertainable when coupled with other information").

<sup>335</sup> Painters Dist. Council Six v. GSA, No. 85-2971, slip op. at 8 (N.D. Ohio July 23, 1986); see also Lykes, No. 92-2780, slip op. at 15 (D.D.C. Sept. 2, 1993) (submitter failed to show any harm given fact that proposed disclosures would "redact all price terms, financial terms, rates and the like"); San Jose Mercury News v. Dep't of Justice, No. 88-20504, slip op. at 4-5 (N.D. Cal. Apr. 17, 1990) (no harm once company name and other identifying information deleted from requested forms).

<sup>336</sup> Silverberg v. HHS, No. 89-2743, 1991 WL 633740, at \*4 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); see also PETA, 2005 WL 1241141, at \*7 (finding that a bank is not at a "competitive disadvantage" when "all banks would suffer the same alleged harm" if the type of information at issue were disclosed); Carolina Biological Supply Co. v. USDA, No. 93CV00113, slip op. at 8 (M.D.N.C. Aug. 2, 1993) (competitive harm unlikely when all companies involved in same business will have equal access to information in question) (reverse FOIA suit).

<sup>337</sup> See, e.g., Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 244 (2d Cir. 2006) (concluding that Exemption 4 does not apply "if identical information is otherwise in the public domain" (citing Niagara Mohawk Power, 169 F.3d at 19); Anderson v. HHS, 907 F.2d 936, 952 (10th Cir. 1990) (declaring that "no meritorious claim of confidentiality" can be made for documents that are in public domain); CNA, 830 F.2d at 1154 (holding that "[t]o the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality -- a sine qua non of Exemption 4"); Cont'l Stock  
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(The public availability of information has also defeated an agency's impairment claim,<sup>338</sup> as well as a submitter's protection under Critical Mass Energy Project v. NRC,<sup>339</sup> for a document that had been voluntarily provided.<sup>340</sup>) In addressing a claim of public availability, the District Court for the District of Columbia has declared that it is "[t]he party asserting public availability [who] must initially produce evidence to support its assertion,

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<sup>337</sup>(...continued)

Transfer & Trust Co. v. SEC, 566 F.2d 373, 375 (2d Cir. 1977) (concluding that "[n]o cognizable harm, much less any substantial harm," would occur from the release of information "almost all" of which already was readily available to the public); Newry, 2005 WL 3273975, at \*4 n.8 (denying Exemption 4 protection for information that was "readily available" through search of database on agency's Web site); Lepelletier v. FDIC, 977 F. Supp. 456, 460 (D.D.C. 1997) (finding that when state laws provide for publication of names of depositors of abandoned accounts, "it is clear that Exemption 4 is not applicable, because depositors who abandon their funds likewise relinquish their claims to confidentiality"), aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); MCI Telecomms. Corp. v. GSA, No. 89-0746, 1992 WL 71394, at \*6 (D.D.C. Mar. 25, 1992) (holding that "publicly available documents cannot be considered confidential under exemption 4"), defendants' subsequent motion for summary judgment granted on basis of collateral estoppel, No. 89-0746 (D.D.C. Feb. 27, 1995); see also R & W Flammann GmbH v. United States, 339 F.3d 1320, 1323 (Fed. Cir. 2003) (finding that sealed bid, which was "publicly opened and became immediately available to the public as required by" procurement regulations, has entered the "public domain and is therefore not confidential under Exemption 4") (non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000)). Compare Lee, 923 F. Supp. at 455 (competitive injury claim rejected for information already available to public, albeit in different format), with Heeney, 1999 U.S. Dist. LEXIS 23365, at \*38 (competitive injury claim accepted when the "context of the information in agency records is different than that in the marketplace").

<sup>338</sup> See Farmworkers Legal Servs. v. U.S. Dep't of Labor, 639 F. Supp. 1368, 1371 (E.D.N.C. 1986).

<sup>339</sup> 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc).

<sup>340</sup> See Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 80-81 (D.D.C. 2001) (ordering disclosure of an e-mail message that was provided voluntarily, because the court "agree[d] that [the] information is now publicly available [elsewhere] and [that] therefore [it] is not protected from disclosure under Exemption 4"). But cf. Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 320-21 (D.C. Cir. 2006) (rejecting plaintiff's argument that Tariff Act's official record requirement, found at 19 U.S.C. § 1516a(b)(2)(A)(i), required public disclosure of information that submitter had voluntarily provided).

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but the burden of persuasion remains on the opponent of disclosure.<sup>341</sup>

In applying this principle, one court has held that simply because individuals subject to a drug test had "a right of access to the performance and testing information" of the laboratory conducting their tests, that did "not make the [requested] information [concerning all certified laboratories] publicly available."<sup>342</sup> Similarly, release of a summary of a safety and effectiveness study was found not to waive Exemption 4 protection for the underlying raw data because the disclosed information did not "match the withheld information."<sup>343</sup> Significantly, when an agency had previously re-

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<sup>341</sup> Nw. Coal., 941 F. Supp. at 202 (citing Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989)); accord Inner City Press, 463 F.3d at 245 & n.5 ("While the government retains the burden of persuasion that information is not subject to disclosure under FOIA, 'a party who asserts that material is publicly available carries the burden of production on that issue." (quoting Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992))); Gilda, 457 F. Supp. 2d at 12 (rejecting public domain argument where the requester showed "at most, only that the same general type of information" was publicly available); Boyes v. U.S. Dep't of Energy, No. 03-1756, 2005 WL 607882, at \*7 (D.D.C. Mar. 16, 2005) (declaring that "[i]t is not enough for a requester to argue that some unspecified amount of the same information 'may' be public in some other forum"); Campaign for Responsible Transplantation v. FDA, No. 00-2849, slip op. at 10 (D.D.C. Sept. 24, 2004) (declaring that "the party favoring disclosure . . . has the burden of demonstrating that the information sought is identical to the information made public" (citing Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 151 (D.C. Cir. 2001))); Heeney, 1999 U.S. Dist. LEXIS 23365, at \*27 (observing that "[w]hile it may generally be known" that a certain company manufactures catheters, the requester failed to supply "evidence that the information redacted in fact concerns" that company).

<sup>342</sup> Silverberg, 1991 WL 633740, at \*3; see also OSHA Data, 220 F.3d at 163 n.25 (finding that the posting of a summary of data at the workplace and the placing of selected examples on an agency's Web site were nothing more than "limited disclosure[s] to a limited audience" and were "surely insufficient to render the data publicly available"); N.Y. Times Co. v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 401-02 (S.D.N.Y. 2004) (citing OSHA Data and likewise concluding that the posting of data at the workplace was not "public" disclosure).

<sup>343</sup> Cohen v. Kessler, No. 95-6140, slip op. at 12 (D.N.J. Nov. 25, 1996); see also Herrick v. Garvey, 200 F. Supp. 2d 1321, 1329 (D. Wyo. 2000) (finding that when company had reversed its prior authorization to disclose documents claimed as "trade secrets" and specific documents had not in fact been released previously, there was "no waiver of Exemption 4 protection"), aff'd on other grounds, 298 F.3d 1184, 1193-95 & n.10 (10th Cir. 2002) (explaining that the "[w]aiver doctrine" is distinct from the argument actually advanced by the requester -- who challenged the applicability of "trade se-

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leased data without the submitter's "knowledge or consent," the District Court for the District of Columbia rejected the agency's argument that that data was "now in the public domain and no longer entitled to confidential treatment."<sup>344</sup> In rebuffing that proposition, the court held that "[t]he prior release of information to a limited number of requesters does not necessarily make the information a matter of common public knowledge, nor does it lessen the likelihood that [the submitter] might suffer competitive harm if it is disclosed again."<sup>345</sup>

Confidentiality was also upheld in a case where the requester argued that some of the withheld material had been disclosed "collaterally."<sup>346</sup> First, the D.C. Circuit declared that "assuming that certain information is available publicly," it saw "little reason why the government must go through the expense and burden of producing the information now; there is no benefit to . . . [the requester] or to the public that can be gained by imposing such a duplicative function on the government."<sup>347</sup> As to the requester's argument that there was "value to be gained from the juxtaposition" of that "public information within" the submitter's materials, the D.C. Circuit found that the requester's own argument "concedes the confidentiality" of the material, because the requester clearly wanted "not only the collaterally disclosed information, but the proprietary manner with which" it had been utilized.<sup>348</sup>

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<sup>343</sup>(...continued)

cret" protection "in the first place" when the submitting company, by virtue of giving its permission to the agency to disclose the information, thereby clearly "no longer intends" it to be "secret" -- and then assuming, "without deciding, that it was possible for the grant of permission to be revoked and the secret nature of the documents" to be restored, which in fact is what occurred).

<sup>344</sup> Martin Marietta, 974 F. Supp. at 40; accord Parker, 141 F. Supp. 2d at 80.

<sup>345</sup> Martin Marietta, 974 F. Supp. at 40; accord Trans-Pac., 1998 U.S. Dist. LEXIS 7800, at \*13 (when "past release" of data "was isolated and unauthorized by" agency, such release found "not [to] affect the application of Exemption 4"); see also Pub. Citizen, 953 F. Supp. at 401, 405 (when submitter's document "inadvertently released" to requester by agency and subsequently filed on public record, court noted absence of evidence that anyone had "taken advantage" of that public access and issued protective order sealing court record and precluding requester from publicly disseminating document pending court's determination of Exemption 4 applicability).

<sup>346</sup> Allnet, No. 92-5351, slip op. at 4 (D.C. Cir. May 27, 1994).

<sup>347</sup> Id.

<sup>348</sup> Id.; see Pub. Citizen, 997 F. Supp. at 66 (recognizing that although some requested information "may be available because of overseas market-  
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The feasibility of "reverse engineering" (i.e., the process of independently recreating the requested information -- for example, by obtaining a finished product and dismantling it to learn its constituent elements) has been considered in evaluating a showing of competitive harm because it "is germane to the question whether information is in the public domain (and thus whether a showing of competitive harm can be made)."<sup>349</sup> (Although in one case the court declined to even consider the requester's contention that reverse engineering was possible for information protected as a "trade secret" under Exemption 4,<sup>350</sup> in a subsequent "trade secret" decision the court did consider such a claim.<sup>351</sup>)

In Worthington Compressors, Inc. v. Costle,<sup>352</sup> the D.C. Circuit held that the cost of reverse engineering is a pertinent inquiry and that the test should be "whether release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it."<sup>353</sup> In that case, the D.C. Circuit pointed out that agency disclosures of

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<sup>348</sup>(...continued)

ing," the "context provided by" agency release renders it "different," and competitive harm is not "diminish[ed]").

<sup>349</sup> Nw. Coal., 941 F. Supp. at 202.

<sup>350</sup> See Pac. Sky Supply, Inc. v. Dep't of the Air Force, No. 86-2044, 1987 WL 28485, at \*1 (D.D.C. Dec. 16, 1987) (refusing to consider feasibility of reverse engineering for documents withheld as trade secrets, because once trade secret determination is made, documents "are exempt from disclosure, and no further inquiry is necessary" (quoting Pub. Citizen, 704 F.2d at 1286)).

<sup>351</sup> See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 15 (D.D.C. 2000) (considering, but rejecting, requester's argument that physical characteristics of air bags "are easily discernible" by "using simple hand tools to dismantle" them and finding instead that "[d]ismantling air bags to learn this information is dangerous, time-consuming, and expensive" and that therefore trade secret protection was appropriate), remanded on other grounds, 244 F.3d 144, 151 (D.C. Cir. 2001) (rejecting district court's conclusion that requested information qualified as a "trade secret," but holding that "it may nonetheless qualify for protection" as a voluntary submission).

<sup>352</sup> 662 F.2d 45 (D.C. Cir.), supplemental opinion sub nom. Worthington Compressors, Inc. v. Gorsuch, 668 F.2d 1371 (D.C. Cir. 1981).

<sup>353</sup> Id. at 52; accord Greenberg, 803 F.2d at 1218; Nw. Coal., 941 F. Supp. at 202; Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 7-8 (M.D. Fla. June 3, 1986); Air Line Pilots Ass'n, Int'l v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Zotos Int'l v. Young, 830 F.2d 350, 353 (D.C. Cir. 1987) (if commercially valuable information has remained secret for many years, it is  
(continued...))

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information that benefit competitors at the expense of submitters deserve "close attention" by the courts.<sup>354</sup> As the court of appeals observed:

Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.<sup>355</sup>

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<sup>353</sup>(...continued)

incongruous to argue that it may be readily reverse-engineered) (non-FOIA case); Heeney, No. 97-5461, 1999 U.S. Dist. LEXIS 23365, at \*42 (rejecting the requester's claim that reverse engineering was possible, based on his failure to demonstrate "that he has the technical expertise to offer opinions about reverse-engineering of the devices at issue," and finding that the documents requested revealed "more than could be learned through reverse-engineering" in any event).

<sup>354</sup> 662 F.2d at 51.

<sup>355</sup> Id.; see, e.g., Pub. Citizen, 185 F.3d at 905 (declaring that Exemption 4 "clearly" is designed to protect against disclosures that would permit competitors "to eliminate much of the time and effort that would otherwise be required to bring to market a [competitive] product" (citing Webb v. HHS, 696 F.2d 101, 103 (D.C. Cir. 1982) ("If a [drug] manufacturer's competitor could obtain all the data in the manufacturer's [New Drug Application (NDA)], it could utilize them in its own NDA without incurring the time, labor, risk, and expense involved in developing them independently.")); Campaign for Responsible Transplantation, No. 00-2849, slip op. at 10 (protecting information contained in Investigational New Drug Application, because "sponsors would have much less incentive to make the enormous investments required . . . if other companies could [get a] free ride on their research developments and investments"); Parker, 141 F. Supp. 2d at 81 (alternative holding) (protecting detailed market studies relating to proposed pipeline projects because "the compilation and analysis of the publicly available data were undertaken at significant cost"); Pub. Citizen, 2000 U.S. Dist. LEXIS 4108, at \*10-12 (protecting a company's investigators' names and the titles of unpublished articles because disclosure would permit competitors to "eliminate much of the time and effort that would otherwise be required to bring to market" a competitive product and because the company had "provid[ed] evidence that it would be costly for competitors to figure out through their own efforts all of the names and unpublished article titles at issue"); Sokolow v. FDA, No. 1:97-CV-252, slip op. at 7 (E.D. Tex. Feb. 19, 1998) (protecting drug safety and effectiveness information because it "could be used by competitors to develop clinical studies or

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An agency's assertion of competitive harm for portions of a pesticide formula -- which admittedly was capable of being reverse engineered -- was rejected when the agency failed to explain "how difficult and costly" it would be to do so because, as the party "seeking to avoid disclosure," the agency was found not to have sustained its burden of "production and persuasion on that point."<sup>356</sup> Likewise, when information was found to be "freely or cheaply available from various sources," a court rejected a competitive harm claim, declaring that such information "cannot be considered protected confidential information."<sup>357</sup>

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<sup>355</sup>(...continued)

other research toward a competing product"), aff'd, 162 F.3d 1160 (5th Cir. 1998) (unpublished table decision); Cohen, No. 95-6140, slip op. at 12 (D.N.J. Nov. 25, 1996) (protecting raw data contained in a research study inasmuch as disclosure "would allow competitors to develop or refine their [own] products and avoid [incurring] the [corresponding] research and development costs because of the opportunity to piggy-back upon [the submitter's] development efforts," which "would therefore have [an] unwarranted deleterious impact on [the submitter's] competitive position"); Wash. Psychiatric Soc'y v. OPM, No. 87-1913, 1988 U.S. Dist. LEXIS 17069, at \*6 (D.D.C. Oct. 13, 1988); Pac. Sky Supply, Inc. v. Dep't of the Air Force, No. 86-2044, 1987 WL 18214, at \*4-5 (D.D.C. Sept. 29, 1987), modified, No. 86-2044 (D.D.C. Nov. 20, 1987), motion to amend judgment denied, No. 86-2044 (D.D.C. Dec. 16, 1987); Air Line Pilots Ass'n, Int'l v. FAA, 552 F. Supp. 811, 814 (D.D.C. 1982); see also Allnet, 800 F. Supp. at 988-89 (noting submitter's twenty-two-million-dollar investment and rejecting requester's argument that receipt of seven million dollars in annual sales revenue is somehow "de minimis"); SMS Data Prods. Group, Inc. v. U.S. Dep't of the Air Force, No. 88-0481, 1989 WL 201031, at \*3 (D.D.C. Mar. 31, 1989) (noting that release would allow competitors access to information that they would otherwise have to spend "considerable funds" to develop on their own).

<sup>356</sup> Nw. Coal., 941 F. Supp. at 202; see also Lahr, 453 F. Supp. 2d at 1181-82 (noting submitter's claim that a competitor would need to invest twenty million dollars to reproduce its flight simulator training data, but rejecting competitive harm argument because requester countered that data could be independently reproduced at a cost of less than \$33,000, and finding that court "was required" to "draw inferences in [requester's] favor").

<sup>357</sup> Fraze, 97 F.3d at 371 (upholding an agency decision to release a contractor's operating plan for managing recreational areas in a national forest, because a "large portion of the [requested] information, such as details regarding collection and handling of fees, operating season dates, rules, and law enforcement, is available to anyone using or visiting the facilities" and other information, "such as employee uniforms, maintenance equipment, and signs, is in public view daily" -- thereby making it unlikely that disclosure of the operating plan would cause competitive harm); see also Atlantis Submarines Haw., Inc. v. U.S. Coast Guard, No. 93-00986, slip (continued...)

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Neither the willingness of the requester to restrict circulation of the information<sup>358</sup> nor a claim by the requester that it is not a competitor of the submitter<sup>359</sup> should logically defeat a showing of competitive harm.<sup>360</sup> The question is whether "public disclosure" would cause harm; there is no "middle ground between disclosure and nondisclosure."<sup>361</sup> Additionally the passage of time, while usually eroding the likelihood of competitive harm,<sup>362</sup>

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<sup>357</sup>(...continued)

op. at 8 (D. Haw. Jan. 28, 1994) (finding that disclosure of admittedly "readily-observable" procedures in submarine operations manual would not afford competitors "any substantial 'windfall'" and so would not cause competitive harm) (denying motion for preliminary injunction in reverse FOIA suit), dismissed per stipulation (D. Haw. Apr. 11, 1994).

<sup>358</sup> See Seawell, Dalton, Hughes & Timms v. Exp.-Imp. Bank, No. 84-241, slip op. at 2 (E.D. Va. July 27, 1984); cf. Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996) ("limited access" to exempt records, subject to protective order, "not authorized by FOIA") (Exemption 7(C) case).

<sup>359</sup> See, e.g., Burke Energy Corp. v. Dep't of Energy for the United States, 583 F. Supp. 507, 512 (D. Kan. 1984) (characterizing the requester's "argument that it is not a competitor" as "totally without merit").

<sup>360</sup> See Heeney, No. 97-5461, 1999 U.S. Dist. LEXIS 23365, at \*19 n.10 (explaining that the "identity of the requester is irrelevant . . . because once information has been released -- even to a private, noncompeting individual such as [this particular requester] -- the information has reached the public domain and cannot be withheld from subsequent requesters"); cf. NARA v. Favish, 541 U.S. at 172 (re-emphasizing that "[a]s a general rule, if the information is subject to disclosure, it belongs to all").

<sup>361</sup> Seawell, No. 84-241, slip op. at 2 (E.D. Va. July 27, 1984).

<sup>362</sup> See, e.g., Lahr, 453 F. Supp. 2d at 1180 (positing that information pertaining to the design and performance of an aircraft "developed in the 1960s" had "little or no remaining commercial value"); N.Y. Times, 340 F. Supp. 2d at 402 (rejecting competitive harm argument for number of employee hours worked four years previously, based partly on fact that contemporaneous information regarding hours was available); Ctr. for Pub. Integrity v. Dep't of Energy, 191 F. Supp. 2d 187, 195 (D.D.C. 2002) (rejecting a competitive harm claim for the amounts offered by unsuccessful bidders seeking to buy government land, because competitors would be "naive to assume that" the bidders' "business strategies and valuation methodologies remain the same over time in the face of changing market conditions"); Garren, No. CV-97-273, slip op. at 19-20 (D. Or. Nov. 17, 1997) (rejecting a competitive harm claim for sales prices for concessions sold "seven or eight years" ago, and finding that "price may be different for future transactions involving other parties and other companies and, potentially, a different operating environment"); Lee, 923 F. Supp. at 455 (rejecting competitive harm argument because the "financial information in question is given for

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does not necessarily defeat Exemption 4 protection provided that disclosure of the material would still be likely to cause substantial competitive harm.<sup>363</sup> Finally, the D.C. Circuit has emphasized that it is incumbent upon the courts -- and, logically, upon agencies in the first instance -- to consider whether it is possible to redact requested information "in order to avoid application of Exemption 4."<sup>364</sup> (See the further discussions of this point under

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<sup>362</sup>(...continued)

[a period two years previously] and any potential detriment which could be caused by its disclosure would seem likely to have mitigated with the passage of time"); Teich, 751 F. Supp. at 253 (rejecting competitive harm claim based partly upon fact that documents were as many as twenty years old); see also Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at \*8 (S.D.N.Y. May 26, 1993) (rejecting argument that exemption permanently precludes release because passage of time might render later disclosures "of little consequence").

<sup>363</sup> See Ctr. for Auto Safety, 93 F. Supp. 2d at 16 (declaring that "[i]nformation does not become stale merely because it is old"); see also, e.g., Burke, 583 F. Supp. at 514 (nine-year-old data protected); Timken Co. v. U.S. Customs Serv., 3 Gov't Disclosure Serv. (P-H) ¶ 83,234, at 83,976 (D.D.C. June 24, 1983) (ten-year-old data protected); FOIA Update, Vol. IV, No. 4, at 14; cf. Herrick, 200 F. Supp. 2d at 1328 (protecting as "trade secret" technical blueprints for 1935 aircraft despite documents' "age or antiquity").

<sup>364</sup> Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1029 (D.C. Cir. 1999) (holding that although "[t]here is certainly no doubt" that Exemption 4 was properly applied to a ten-digit customs code, a remand was necessary to determine whether "disclosure of redacted [codes] poses a likelihood of substantial harm"); see also, e.g., FlightSafety Servs. v. Dep't of Labor, 326 F.3d 607, 612-13 (5th Cir. 2003) (per curiam) (adjudicating the requester's contention that the agency "should be required to redact any uniquely identifying private company descriptives and disclose the remainder of" the requested statistics regarding salary and wage data, and finding, after an "independent review" of the documentation submitted in camera, that "any disclosable information, is so inextricably intertwined with the exempt, confidential information that producing it would require substantial agency resources and produce a document of little informational value"); Pub. Citizen, 185 F.3d at 907 (remanding to determine "whether the documents the agency has withheld contain information that can be segregated and disclosed"); Elec. Privacy Info. Ctr. v. DHS, 384 F. Supp. 2d 100, 111 & n.12 (D.D.C. 2005) (performing segregability analysis even though parties did not raise issue and requester conceded proprietary of agency's Exemption 4 withholdings (citing Schiller v. NLRB, 964 F.2d 1205, 1210 (D.C. Cir. 1991)); In Def. of Animals v. USDA, No. 02-0557, slip op. at 2, 30-34 (D.D.C. Sept. 28, 2004) (deferring a ruling on the applicability of Exemption 4, because defendants provided "insufficient evidence" to permit the court to "entertain a segregability analysis"); Piper & Marbury, L.L.P. v. USPS, No. 99-2383, 2001 WL 214217, at \*4 (D.D.C. Mar. 6, 2001) (magis-

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Procedural Requirements, "Reasonably Segregable" Obligation, above, and Litigation Considerations, "Reasonably Segregable" Requirements, below.)

Numerous types of competitive injury have been identified by the courts as properly cognizable under the competitive harm prong, including the harms generally caused by disclosure of:

(1) detailed financial information such as a company's assets, liabilities, and net worth;<sup>365</sup>

(2) a company's actual costs, break-even calculations, profits and profit rates;<sup>366</sup>

(3) data describing a company's workforce that would reveal labor

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<sup>364</sup>(...continued)

trate's recommendation) (recommending full disclosure of contract when agency broadly claimed that it was exempt in its entirety; finding instead that Exemption 4 protects "particular knowledge, facts, or data, rather than entire documents"), adopted, No. 99-2383, slip op. at 4 (D.D.C. Mar. 30, 2001) (holding that "[i]n this circuit, an entire document simply does not qualify as 'information' ex[em]pted from disclosure under" the FOIA; concluding that although "particular 'information' may be redacted upon an adequate showing," the agency had "not pursued such a course in this case"; and, consequently, ordering release of the contract in its entirety), reconsideration denied (D.D.C. Feb. 28, 2002); Judicial Watch, Inc. v. U.S. Dept of Commerce, 83 F. Supp. 2d 105, 111 (D.D.C. 1999) (deferring ruling on applicability of Exemption 4, despite finding that the affidavits "appear to support the withholding" of the documents, because they failed to provide enough detail "to permit the Court to conclude that documents withheld in their entirety do not contain any reasonably segregable information").

<sup>365</sup> See, e.g., Nat'l Parks, 547 F.2d at 684; Inner City Press/Cmtty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., No. 98 CIV. 4608, 1998 WL 690371, at \*5 (S.D.N.Y. Sept. 30, 1998) ("capital situation, [company's] assets, cash flow, investments, leverage ratios, 'cross-selling strategy,' pre-tax earnings by product line, dividend capacity, revenues, and rate changes for its insurance operations"), aff'd, 182 F.3d 900 (2d Cir. 1999) (unpublished table decision).

<sup>366</sup> See, e.g., Gulf & W., 615 F.2d at 530; see also Hecht v. U.S. Agency for Int'l Dev., No. 95-263, 1996 WL 33502232, at \*8-10 (D. Del. Dec. 18, 1996) (fringe benefits, overhead, and General and Administrative (G & A) costs); Cortez III Serv. Corp. v. NASA, 921 F. Supp. 8, 12 (D.D.C. 1996) (G & A rate ceilings that are "nearly identical" to actual G & A rates) (alternative holding) (reverse FOIA suit), appeal dismissed voluntarily, No. 96-5163 (D.C. Cir. July 3, 1996).

costs, profit margins, and competitive vulnerability;<sup>367</sup>

(4) a company's selling prices, purchase activity and freight charges;<sup>368</sup>

(5) shipper and importer names, type and quantity of freight hauled, routing systems, cost of raw materials, and information constituting the "bread and butter" of a manufacturing company;<sup>369</sup>

(6) type and volume of sales;<sup>370</sup>

(7) "currently unannounced and future products, proprietary technical information, pricing strategy, and subcontractor information," and similar data;<sup>371</sup>

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<sup>367</sup> See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976); see also Pub. Citizen, 209 F. Supp. 2d at 47 (royalty rate information when release "could easily lead to a competitor being able to make a rough calculation of a firm's profit margin on a particular drug").

<sup>368</sup> See, e.g., Braintree, 494 F. Supp. at 289; see also Destileria Serralles, Inc. v. Dep't of the Treasury, No. 85-0837, slip op. at 9 (D.P.R. Sept. 22, 1988) (purchase records, including prices paid for advertising).

<sup>369</sup> Journal of Commerce, Inc. v. U.S. Dep't of the Treasury, No. 86-1075, 1988 U.S. Dist. LEXIS 17610, at \*9-10 (D.D.C. Mar. 30, 1988), aff'd, 878 F.2d 1446 (Fed. Cir. 1989) (unpublished table decision); see, e.g., Suzhou Yuan-da Enter., Co. v. U.S. Customs & Border Prot., 404 F. Supp. 2d 9, 13 (D.D.C. 2005) (appeal pending); Inter Ocean Free Zone, 982 F. Supp. at 869, 873.

<sup>370</sup> Lion Raisins, 354 F.3d at 1081.

<sup>371</sup> SMS, 1989 WL 201031, at \*4; see, e.g., Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 29 (D.D.C. 2000) (export-insurance documents when "transaction is in a highly competitive state," or is part of "an ongoing transaction"); Matthews v. USPS, No. 92-1208-CV-W-8, slip op. at 6 (W.D. Mo. Apr. 15, 1994) (technical drawings relating to computer system sold to government, technology for which still was being sold to others); RMS, No. C-92-1545, slip op. at 6-7 (N.D. Cal. Nov. 24, 1992) ("descriptions of equipment and the names of contacts, customers, key employees, and subcontractors"); BDM Corp. v. SBA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,189, at 81,495 (D.D.C. Mar. 20, 1981) (names of consultants and subcontractors, and performance, cost, and equipment information); see also Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135 (D.D.C. 2003) (dicta) (business and marketing plans "would" be exempt) (non-FOIA case brought under Administrative Procedure Act). But see Nat'l Air Traffic Controllers Ass'n v. FAA, No. 06-53, 2007 WL 495798, at \*3 (D.D.C. Feb. 12, 2007) (rejecting agency's withholding of names of contrac-

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(8) raw research data used to support a pharmaceutical drug's safety and effectiveness, information regarding an unapproved application to market the drug in a different manner, and sales and distribution data of a drug manufacturer;<sup>372</sup> and

(9) technical proposals which are submitted, or could be used, in conjunction with offers on government contracts.<sup>373</sup>

The Tenth Circuit has upheld protection under the competitive harm prong for a lease entered into by a fuel storage company and the Skull Valley Band of Goshute Indians that would allow the company to store "spent nuclear fuel" on land owned by the Band.<sup>374</sup> Although the requester colorfully argued that "given 'the dangerous nature of the material [that] is the subject of the [l]ease . . . [most] regions would be about as anxious to attract a chance to store spent nuclear fuel as they would be to encourage an outbreak of leprosy,'" the Tenth Circuit found that competitive harm had been established because disclosure of the lease would weaken the negotiating positions of both the company and the Band in future such deals with other partners.<sup>375</sup> Similarly, protection has been recognized for information related to water rights held by Indian tribes inasmuch as disclosure

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<sup>371</sup>(...continued)

tor's employees, because agency "only provided conclusory statements . . . about competitive harm to [submitter] due to employee raiding"); News-Press v. DHS, No. 2:05CV102, 2005 WL 2921952, at \*20 (M.D. Fla. Nov. 4, 2005) (rejecting Exemption 4 protection for names of the contractor's "key personnel," because the contracts at issue had expired and the submitter's affidavits made "no reference to any attempts by their respective employers to protect their interest in key personnel, such as confidentiality agreements, non-compete agreements, or the like").

<sup>372</sup> See Citizens Comm'n, 1993 WL 1610471, at \*9-10; see also Heeney v. FDA, 7 F. App'x 770, 771 (9th Cir. 2001); Sokolow, No. 1:97-CV-252, slip op. at 7-8 (E.D. Tex. Feb. 19, 1998); Cohen, No. 95-6140, slip op. at 11-12 (D.N.J. Nov. 25 1996).

<sup>373</sup> See, e.g., Boyes, 2005 WL 607882, at \*7; Pentagen Techs. Int'l v. United States, No. 98CIV.4831, 2000 WL 347165, at \*3 (S.D.N.Y. Mar. 31, 2000) (alternative holding); Hecht, 1996 WL 33502232, at \*10; Joint Bd. of Control v. Bureau of Indian Affairs, No. 87-217, slip op. at 8 (D. Mont. Sept. 9, 1988); Landfair v. U.S. Dep't of the Army, 645 F. Supp. 325, 329 (D.D.C. 1986); Prof'l Review Org. v. HHS, 607 F. Supp. 423, 426 (D.D.C. 1985) (detailing manner in which professional services contract was to be conducted).

<sup>374</sup> Utah, 256 F.3d at 971.

<sup>375</sup> Id. at 970-71; accord Judicial Watch, 108 F. Supp. 2d at 29 (accepting competitive harm claim for export-insurance documents based upon threat of injury to submitters' "future negotiating position" in obtaining "financing on favorable terms").

would hurt their "negotiating position" in "real estate transactions, water leasing, and other commercial dealings."<sup>376</sup>

The District Court for the Southern District of New York has recognized protection under the competitive harm prong for documents pertaining to a proposed real estate venture, despite the fact that the harm that would flow from disclosure would come from a citizens group, rather than from competing real estate developers.<sup>377</sup> The court made its finding in light of the fact that the "avowed goal" of that group was "to drive the joint venture out of business."<sup>378</sup> The court found that irrespective of the identity of the requester, "the economic injury they may inflict on the joint venture is nonetheless a competitive injury" that would "jeopardize both the venture's relative position vis-a-vis other New York City real estate developers and its solvency."<sup>379</sup> This holding was affirmed by the Court of Appeals for the Second Circuit, which reiterated that "[t]he fact that [the] harm would result from active hindrance by the [requester] rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four."<sup>380</sup>

The Second Circuit was faced with another "unusual question" concerning the applicability of the competitive harm prong when it decided a case involving a FOIA requester who "already [had] knowledge of the confidential information contained in the withheld documents."<sup>381</sup> The case concerned a request for design drawings that had been submitted by two

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<sup>376</sup> Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221-22 (D. Mont. 2004) (explaining that tribes, "in developing a negotiating position with the State of Montana over the amount of their water rights, ought to be able to investigate the amount of water available to them as a part of creating their strategy"), appeal dismissed, No. 04-35230 (9th Cir. Feb. 11, 2005); see also Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (recognizing a competitive harm claim for "well and water related information" on an Indian reservation because release "would adversely affect the [Tribe's] ability to negotiate its water rights").

<sup>377</sup> Nadler v. FDIC, 899 F. Supp. 158, 163 (S.D.N.Y. 1995), aff'd, 92 F.3d 93 (2d Cir. 1996).

<sup>378</sup> Id.

<sup>379</sup> Id.

<sup>380</sup> Nadler v. FDIC, 92 F.3d 93, 97 (2d Cir. 1996). But cf. CNA, 830 F.2d at 1154 (observing, in the context of rejecting a competitive harm argument based on "anticipated displeasure of [submitter's] employees" and fear of "adverse public reaction," that such objections "simply do not amount to 'harm flowing from the affirmative use of proprietary information by competitors'" (quoting Pub. Citizen, 704 F.2d at 1291 n.30)).

<sup>381</sup> United Techs. Corp. v. FAA, 102 F.3d 688, 689 (2d Cir. 1996).

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companies seeking approval to manufacture aircraft parts.<sup>382</sup> Those companies sought approval pursuant to "identity" regulations, which permit a manufacturer to obtain approval for its parts based upon a showing that those parts are "identical" to parts which have already been approved; in this case, the approved parts were manufactured by the requester.<sup>383</sup> The requester argued that because the requested documents were "identical in all respects to the drawings" that it itself had previously submitted, they could not "be 'confidential' as to [the requester] within the meaning of FOIA Exemption 4."<sup>384</sup>

In rejecting that contention, the Second Circuit first noted that "[i]t is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed."<sup>385</sup> Accordingly, the fact that the requester "already ha[d] knowledge of the information contained in the withheld documents" was found to be "irrelevant."<sup>386</sup> The Second Circuit also rejected the requester's argument that the Supreme Court's decision in United States Department of Justice v. Julian,<sup>387</sup> supported its contention "that confidentiality under Exemption 4 should be examined on a requester-specific basis," holding that because the requester was "not the party for whom the protections of Exemption 4 were intended, it ha[d] no claim of special access."<sup>388</sup> Inasmuch as the requester "freely concede[d] that it [could not] prevail if it must proceed" as if it were "any other member of the general public," the Second Circuit upheld the agency's decision to withhold the information.<sup>389</sup>

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<sup>382</sup> Id.

<sup>383</sup> Id.

<sup>384</sup> Id. at 690.

<sup>385</sup> Id.

<sup>386</sup> Id. at 691.

<sup>387</sup> 486 U.S. 1 (1988) (holding that presentence report privilege, which is designed to protect subjects of such reports, cannot be invoked against those same subjects when they seek access to their own reports).

<sup>388</sup> United Techs., 102 F.3d at 691-92 (noting that the test for determining competitive harm "does not appear to contemplate its application on a requester-specific basis"); cf. Changzhou Laosan Group v. U.S. Customs & Border Prot. Bureau, No. 04-1919, 2005 WL 913268, at \*6 (D.D.C. Apr. 20, 2005) (stating that the court was "unwilling to sustain a claim of Exemption 4 where the competitive harm, if any, is to the plaintiff, as opposed to a third party"), reconsideration granted in part & denied in part on other grounds, 374 F. Supp. 2d 129 (D.D.C. 2005).

<sup>389</sup> Id.; cf. Favish, 541 U.S. at 172 (reiterating that in FOIA cases "disclo-

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On the other hand, protection under the competitive harm prong has been denied when the prospect of injury is remote<sup>390</sup> -- for example, when a government contract is not awarded competitively<sup>391</sup> -- or when the re-

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<sup>389</sup>(...continued)

sure does not depend on the identity of the requester").

<sup>390</sup> See, e.g., City of Chicago v. U.S. Dep't of the Treasury, No. 01 C 3835, 2002 WL 370216, at \*2 (N.D. Ill. Mar. 8, 2002) (holding that the disclosure of information regarding firearms dealers "who shipped firearms that were lost or stolen from an interstate carrier" would not cause competitive harm to the carriers because the requested information pertaining to the dealers was not "otherwise linked in any way" to the carriers), rev'd & remanded on other grounds, No. 02-2259 (7th Cir. Nov. 29, 2005); Hecht, 1996 WL 33502232, at \*8 (ruling that disclosure of "biographical information" about a contractor's employees would not cause competitive harm because the "possibility of another company recruiting away one's employees is present in nearly every industry," and opining that to "conclude that a competitor could determine, merely by looking at employee resumes, a company's technical and operational approach to a project would require a leap of logic that this court is unwilling to make"); Carolina, No. 93CV00113, slip op. at 9 (M.D.N.C. Aug. 2, 1993) (finding that disclosure of the number of animals sold by companies supplying laboratory specimens "will be simply a small addition to information available in the marketplace" and thus will not cause competitive harm); Teich, 751 F. Supp. at 254 (concluding that disclosure of safety and effectiveness data pertaining to medical device at "this late date" in product approval process "could not possibly help" competitors of submitter); see also PETA, 2005 WL 1241141, at \*7 (concluding that certain financial information was not protected, because no showing was made that submitter would suffer "substantial competitive injury" if information were disclosed); Brown, 1991 U.S. Dist. LEXIS 1780, at \*7 (concluding that certain wage information is not protected because no showing was made that submitter would suffer "'substantial' injury" if information were disclosed).

<sup>391</sup> See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1030 (4th Cir. 1988) (reverse FOIA suit); see also Garren, No. CV-97-273, slip op. at 22 (D. Or. Nov. 17, 1997) (ordering the disclosure of sales price information for river-rafting concessions in Grand Canyon National Park as there was "very little competition, and [a] built-in preference favors existing concessioners and allows them to match any competing bid, thereby negating the potential competitive harm from disclosure of the information"); U.S. News & World Report v. Dep't of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at \*14 (D.D.C. Mar. 26, 1986) (ordering disclosure of aggregate contract price for armored limousines for the President because release would not be competitively harmful given unique nature of contract and agency's role in design of vehicles); cf. Cove Shipping, Inc. v. Military Sealift Command, No. 84-2709, slip op. at 8-10 (D.D.C. Feb. 27, 1986) (ordering the release of a contract's wage and benefit breakdown because it related to "one isolated

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quested information is too general in nature.<sup>392</sup> In addition, the D.C. Circuit, as well as several other courts, have held that the harms flowing from "embarrassing disclosure[s],"<sup>393</sup> or disclosures which could cause "customer or employee disgruntlement,"<sup>394</sup> are not cognizable under the competitive harm prong of Exemption 4.<sup>395</sup> (Moreover, such harms would not be cog-

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<sup>391</sup>(...continued)

contract, in an industry where labor contracts vary from bid to bid") (civil discovery case in which Exemption 4 case law was applied).

<sup>392</sup> See, e.g., GC Micro, 33 F.3d at 1111 (general information on the percentage and dollar amount of work subcontracted out to small disadvantaged businesses that does not reveal "breakdown of how the contractor is subcontracting the work, nor . . . the subject matter of the prime contract or subcontracts, the number of subcontracts, the items or services subcontracted, or the subcontractors' locations or identities"); N.C. Network, No. 90-1443, slip op. at 9 (4th Cir. Feb. 5, 1991) (general information regarding sales and pricing that would not reveal submitters' costs, profits, sources, or age, size, condition, or breed of animals sold); SMS, 1989 WL 201031, at \*4 (general information regarding publicly held corporation's management structure, financial and production capabilities, corporate history and employees, most of which would be found in corporation's annual report and SEC filings and would in any event be readily available to any stockholder interested in obtaining such information); Davis Corp. v. United States, No. 87-3365, 1988 U.S. Dist. LEXIS 17611, at \*10-11 (D.D.C. Jan. 19, 1988) (information contained in letters from contractor to agency regarding performance of contract that did not reveal contractor's suppliers or costs) (reverse FOIA suit); EHE Nat'l Health Serv. v. HHS, No. 81-1087, slip op. at 5 (D.D.C. Feb. 24, 1984) ("mundane" information regarding submitter's operation) (reverse FOIA suit); Am. Scissors Corp. v. GSA, No. 83-1562, 1983 U.S. Dist. LEXIS 11712, at \*11 (D.D.C. Nov. 15, 1983) (general description of manufacturing process with no details) (reverse FOIA suit).

<sup>393</sup> Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (reverse FOIA suit). But see Bauer v. United States, No. 92-0376, slip op. at 4 (D.D.C. Sept. 30, 1993) (upholding the deletion of the name of a corporation mentioned in an investigatory report on the basis that release of the name "in connection with a criminal investigation could cause undue speculation and commercial harm to that corporation"), remanded, No. 94-5205 (D.C. Cir. Apr. 14, 1995).

<sup>394</sup> Pub. Citizen, 704 F.2d at 1291 n.30 (declaring that competitive harm should "be limited to harm flowing from the affirmative use of proprietary information by competitors" and "should not be taken to mean" harms such as "customer or employee disgruntlement" or "embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials" (quoting law review article)).

<sup>395</sup> See, e.g., CNA, 830 F.2d at 1154 (declaring that "unfavorable publici-

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nizable under Exemption 6 either, for it is well established that businesses have no "corporate privacy."<sup>396</sup> For a further discussion of this point, see Exemption 6, Privacy Considerations, below.) Nevertheless, the D.C. Circuit skirted this issue and expressly did not decide whether an allegation of harm flowing only from the embarrassing publicity associated with disclosure of a submitter's illegal payments to government officials would be

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<sup>395</sup>(...continued)

ty" and "demoralized" employees insufficient for showing of competitive harm); Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997) (denying competitive harm claim for disclosure that would cause "unwarranted criticism and harassment" inasmuch as harm must "flow from competitors' use of the released information, not from any use made by the public at large or customers"), appeal dismissed, No. 97-5357 (D.C. Cir. Feb. 2, 1998); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, 1997 WL 578960, at \*4 (W.D. Ark. Feb. 5, 1997) (declaring that court "cannot condone" use of FOIA "as shield[] against potentially negative, or inaccurate, publicity") (reverse FOIA suit), aff'd, 133 F.3d 1081 (8th Cir. 1998); Pub. Citizen, 964 F. Supp. at 415 n.2 (opining that it is "questionable whether the competitive injury associated with 'alarmism' qualifies under Exemption 4," because competitive harm does not encompass "adverse public reaction"); Martech USA, Inc. v. Reich, No. C-93-4137, slip op. at 5 (N.D. Cal. Nov. 24, 1993) (maintaining that although "information could damage . . . [submitter's] reputation, this is not the type of competitive harm protected by" Exemption 4) (denying motion for temporary restraining order in reverse FOIA suit); Silverberg, 1991 WL 633740, at \*4 (discounting possibility that competitors might "distort" requested information and thus cause submitter embarrassment as insufficient for showing of competitive harm); Badhwar v. U.S. Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (concluding that "fear of litigation" insufficient for showing of competitive harm), aff'd in part & rev'd in part on other grounds, 829 F.2d 182 (D.C. Cir. 1987); cf. Playboy Enters. v. U.S. Customs Serv., 959 F. Supp. 11, 17 (D.D.C. 1997) (finding, in context of awarding attorney fees, that when an agency initially withheld documents to protect the "commercial interests of an alleged counterfeiter," that position was so unreasonable as to be "devoid of any merit"), appeal dismissed, No. 97-5128 (D.C. Cir. June 18, 1997).

<sup>396</sup> See, e.g., Nat'l Parks, 547 F.2d at 685 n.44; cf. Judicial Watch, Inc. v. FDA, 407 F. Supp. 2d 70, 75 (D.D.C. 2005) (alternative holding) (protecting the names and addresses of manufacturers of an abortion drug because the plaintiff failed to create any genuine issue as to whether "abortion-related violence would, or could, cause harm to the drug sponsor's competitive position"), aff'd in part & remanded in part on other grounds, 449 F.3d 141, 150 (D.C. Cir. 2006) (declining to address district court's ruling on Exemption 4 after finding that information in question was protected under Exemption 6).

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sufficient to establish competitive harm.<sup>397</sup> The court did go on to declare, however, that the submitter's "right to an exemption, if any, depends upon the competitive significance of whatever information may be contained in the documents" and that the submitter's motive for seeking confidential treatment, even if it was to avoid embarrassing publicity, was "simply irrelevant."<sup>398</sup>

Despite a wealth of previous case law upholding agency decisions to disclose government contract prices submitted as part of negotiated procurements, the D.C. Circuit has issued two decisions in the last seven years that have abruptly overturned -- in full or in part -- such agency decisions based on deficiencies in the underlying administrative record.<sup>399</sup>

In the first of these decisions, McDonnell Douglas v. NASA, the District Court for the District of Columbia had upheld NASA's decision to release contract prices based on the agency's thorough rebuttal of McDonnell Douglas's claims that release would cause it competitive harm.<sup>400</sup> The lower court reiterated the numerous grounds for NASA's disclosure decision, including the fact that release of contract pricing information "furtheres the goals of FOIA."<sup>401</sup> In addition, the court held that NASA had effectively disputed McDonnell Douglas's contentions regarding competitive harm when it determined that contractors "compete on a variety of factors other than price," that foreign competitors were "not likely to be substantially aided by release," and that "any difficulty" McDonnell Douglas "may face in future commercial contract negotiations [did] not qualify as a substantial competitive injury and should be viewed as the cost of doing business with the

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<sup>397</sup> Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir. 1989) (reverse FOIA suit).

<sup>398</sup> Id.

<sup>399</sup> See McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004) (reverse FOIA suit), reh'g en banc denied, No. 02-5342 (Dec. 16, 2004); McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999) (reverse FOIA suit), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999), dismissed as moot on motion for entry of judgment, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after D.C. Circuit issued decision), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000).

<sup>400</sup> McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 16 (D.D.C. 1997) (reverse FOIA suit), reconsideration denied, No. 96-2611, slip op. at 7-8 (D.D.C. May 1, 1998), rev'd, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999), dismissed as moot on motion for entry of judgment, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after D.C. Circuit issued decision), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000).

<sup>401</sup> Id.

Government."<sup>402</sup>

The D.C. Circuit reversed, however, characterizing NASA's responses to McDonnell Douglas as "silly," "mystifying," "convoluted," and "even astonishing."<sup>403</sup> Without reference to any of the prior appellate court rulings on the issue,<sup>404</sup> or even to its own prior decisions limiting the type of harm recognized under the competitive harm prong to harm flowing from affirmative use of the information by competitors,<sup>405</sup> the D.C. Circuit declared McDonnell Douglas's arguments -- that release "would permit its commercial customers to bargain down ('ratchet down') its prices more effectively" and "would help its domestic and international competitors to underbid it" -- to be "indisputable."<sup>406</sup>

In response to the government's petition for rehearing -- which was denied -- D.C. Circuit Court Judge Silberman, the author of the opinion, ameliorated the government's concerns regarding prior D.C. Circuit precedent by first expressly clarifying that the McDonnell Douglas v. NASA decision did not hold that "line item pricing would invariably" be protected.<sup>407</sup> Rather, he explained, the court had held "only that the agency's explanation of its position [in that particular case] bordered on the ridicu-

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<sup>402</sup> Id.

<sup>403</sup> 180 F.3d at 306-07.

<sup>404</sup> See Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (upholding disclosure of contract unit prices) (reverse FOIA suit); Acumenics Research & Tech., Inc. v. U.S. Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988) (same) (reverse FOIA suit).

<sup>405</sup> See CNA, 830 F.2d at 1154; Pub. Citizen, 704 F.2d at 1291 n.30.

<sup>406</sup> McDonnell Douglas, 180 F.3d at 306-07; see also McDonnell Douglas Corp. v. NASA, No. 91-3134, transcript at 10 (D.D.C. Jan. 24, 1992) (bench order) (permanently enjoining disclosure of unit prices in light of "direct, specific" showing of competitive harm made by submitter and lack of "contrary information or evidence" in administrative record supporting release) (reverse FOIA suit), remanded for further consideration in light of Critical Mass, No. 92-5342 (D.C. Cir. Feb. 14, 1994), on remand, 895 F. Supp. 316, 319 (D.D.C. 1995) (finding Critical Mass inapplicable, denying agency opportunity to remedy "inadequacies" in record, and holding that permanent injunction "remains in place"), aff'd for agency failure to timely raise argument, No. 95-5290 (D.C. Cir. Sept. 17, 1996); Sperry Univac Div. v. Baldrige, 3 Gov't Disclosure Serv. (P-H) ¶ 83,265, at 84,052 (E.D. Va. June 16, 1982) (protecting unit prices on finding that they revealed submitter's pricing and discount strategy), appeal dismissed, No. 82-1723 (4th Cir. Nov. 22, 1982).

<sup>407</sup> See McDonnell Douglas Corp. v. NASA, No. 98-5251, slip op. at 2 (D.C. Cir. Oct. 6, 1999) (Silberman, J., concurring in denial of rehearing en banc).

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lous."<sup>408</sup> Second, Judge Silberman seemingly sought to reconcile prior D.C. Circuit cases with the McDonnell Douglas v. NASA decision by commenting that "[o]ther than in a monopoly situation[,] anything that undermines a supplier's relationship with its customers must necessarily aid its competitors."<sup>409</sup>

In the first case to date to distinguish the results of McDonnell Douglas v. NASA, the Department of the Air Force initially prevailed in a challenge made to its decision to release contract prices.<sup>410</sup> In McDonnell Douglas v. Air Force, the District Court for the District of Columbia began its analysis by emphasizing that an "agency is not required to prove that its predictions of the effect of disclosure are superior" to those of the submitter's, but rather that "[i]t is enough that the agency's position is as plausible as the [submitter's] position."<sup>411</sup> The court then analyzed each of the three categories of Contract Line Item Number (CLIN) prices at issue in the case -- option prices, vendor prices, and "over and above" prices -- and found that the Air Force had "presented reasoned accounts of the effect of disclosure based on its experiences with government contracting."<sup>412</sup> The court concluded that the Air Force's "accounts are at least as compelling as [the submitter's] accounts" and so readily upheld the Air Force's decision to disclose all three categories of prices, based upon its determination that disclosure would not be likely to cause substantial competitive harm.<sup>413</sup>

Most significantly, in issuing this ruling the court specifically found that the D.C. Circuit's McDonnell Douglas v. NASA decision did not require a different result.<sup>414</sup> The submitter had pressed such a position in its challenge to the Air Force's decision to release option prices, arguing that the D.C. Circuit had "rejected" the "exact argument" made by the Air Force to support its decision to release.<sup>415</sup> The district court soundly rejected the submitter's contention and found that the arguments that were made by the Air Force regarding disclosure of option prices, based upon its administrative record, "differ[ed] markedly" from those put forth by NASA in that

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<sup>408</sup> Id.

<sup>409</sup> Id.

<sup>410</sup> See McDonnell Douglas v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 207-08 (D.D.C. 2002) (reverse FOIA suit), aff'd in part & rev'd in part, 375 F.3d 1182 (D.C. Cir. 2004), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004).

<sup>411</sup> Id. at 205.

<sup>412</sup> Id. at 209.

<sup>413</sup> Id. at 206-09.

<sup>414</sup> Id. at 208.

<sup>415</sup> Id. at 207.

earlier D.C. Circuit case.<sup>416</sup>

This decision was in turn appealed to the D.C. Circuit, which then issued its second opinion addressing contract prices, in McDonnell Douglas v. Air Force.<sup>417</sup> On appeal, a divided panel of the D.C. Circuit reversed the district court's decision in part by holding that two of the categories of line item prices -- option prices and vendor prices -- could not be disclosed.<sup>418</sup> Unlike what had happened in its earlier decision in McDonnell Douglas v. NASA, however, the panel upheld the Air Force's decision to disclose a third category of line item prices, specifically "over and above" prices, finding that the agency's administrative record on that issue adequately "refute[d]" the arguments made by the submitter.<sup>419</sup> With respect to the option prices at issue in the case, McDonnell Douglas had argued that its competitors could "reverse-engineer" them and discern "sensitive" pricing factors.<sup>420</sup> The Air Force had responded that the base year prices and the option year prices were made up of too many factors and unknown variables for a competitor to be able to derive any sensitive information from them.<sup>421</sup> The panel majority did not address this aspect of the case, however.<sup>422</sup> Instead, it focused on and rejected outright the Air Force's judgment that McDonnell Douglas was not likely to suffer competitive harm from disclosure of the option prices where price would be only one of many factors used to evaluate any possible future bid.<sup>423</sup> It held, rather, that disclosure of the option prices "would significantly increase the probability McDonnell Douglas's competitors would underbid it in the event the Air Force rebids the contract" because, it declared, "price is the only objec-

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<sup>416</sup> Id.

<sup>417</sup> 375 F.3d at 1182.

<sup>418</sup> See id.; see also *FOIA Post*, "Treatment of Unit Prices After McDonnell Douglas v. Air Force" (posted 9/8/05); *FOIA Post*, "Full Court Review Sought in McDonnell Douglas Unit Price Case (posted 10/7/04).

<sup>419</sup> See McDonnell Douglas, 375 F.3d at 1191-92; see also id. at 1200-01 & n.10 (Garland, J., dissenting) (pointing out that the court "did not explain why" its determination pertaining to over and above prices "should be any different with respect to the option years").

<sup>420</sup> See McDonnell Douglas, 375 F.3d at 1190 n.3.

<sup>421</sup> See id. at 1200 (Garland, J., dissenting)

<sup>422</sup> See McDonnell Douglas, 375 F.3d at 1190 n.3; see also id. at 1195 n.3, 1200 (Garland, J., dissenting) (noting that in the case of "line-item" prices, "disclosure likely to result in substantial harm "only if a competitor is able to 'reverse-engineer' from the winning bidder's price to the sensitive strategic information upon which it is based" (citing Pac. Architects, 906 F.2d at 1347-48, and Acumenics Research, 843 F.2d at 808)).

<sup>423</sup> See id. at 1189.

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tive, or at least readily quantified, criterion among the six criteria for awarding government contracts.<sup>424</sup> Despite the Air Force's uncontested factual showing that in any rebidding price would be considered together with five other factors, and then weighted equally with them, the panel majority nevertheless concluded that "[w]hether price will be but one of several factors to be weighted equally in any future [bidding process] . . . is necessarily somewhat speculative."<sup>425</sup>

Furthermore, the majority held that the Air Force's argument in this regard had already been "considered and rejected" by the D.C. Circuit in McDonnell Douglas Corp. v. NASA.<sup>426</sup> After first positing an entirely new definition of the term "underbidding," the panel proceeded to rule that the district court wrongly held that the Air Force's argument in this case "differs markedly" from the argument that had been rejected in McDonnell Douglas v. NASA.<sup>427</sup> On this basis, it held that the option prices in the contract were protected by Exemption 4 and could not be disclosed by the Air Force.<sup>428</sup>

Regarding the CLINs that McDonnell Douglas contended were made up primarily of vendor costs, McDonnell Douglas argued that its competitors probably obtained "the same or nearly the same" quotes from the same vendors and that disclosure of these unit prices therefore would allow them to calculate its "Vendor Pricing Factor."<sup>429</sup> The Air Force determined that disclosure of these CLINS would not cause McDonnell Douglas substantial competitive harm because in its experience it is "not uncommon" for a vendor to quote different prices to its different customers.<sup>430</sup> Rather than examine the evidence (or lack of it) behind McDonnell Douglas's argument, though, the panel majority instead stated that the Air Force had "provided no actual evidence" to support this proposition, and it then declared that it is "probable as a matter of economic theory" that a subcontractor would quote its prime contractors similar prices.<sup>431</sup> Based upon that theory of the case, and of the marketplace as well, the panel held that the Air Force's decision to disclose CLINs comprised of vendor prices was arbi-

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<sup>424</sup> Id.

<sup>425</sup> Id.

<sup>426</sup> Id.

<sup>427</sup> Id.

<sup>428</sup> See id.

<sup>429</sup> Id. at 1190.

<sup>430</sup> Id.

<sup>431</sup> Id. at 1191.

trary and capricious.<sup>432</sup>

Lastly, as to the CLINs consisting of "over and above" rates in the contract -- i.e., rates that McDonnell Douglas agreed to charge the Air Force for work not priced in the basic contract -- McDonnell Douglas had argued that their disclosure would allow a competitor to calculate its labor markup because the wages McDonnell Douglas was paying were common knowledge.<sup>433</sup>

The Air Force refuted that claim and had determined that McDonnell Douglas's wages were not publicly known and that in fact McDonnell Douglas had submitted significantly different "over and above" rates in a contract to service another type of aircraft at the very same facility.<sup>434</sup> For this one category of prices, the panel agreed with the agency, holding that the Air Force "reasonably concluded [that] McDonnell Douglas failed to carry its burden of showing release of the Over and Above CLINs was likely to cause it substantial competitive harm. Therefore, the decision of the Air Force to release the[se] CLINs was not arbitrary and capricious."<sup>435</sup>

In dissent, Judge Garland strongly disagreed with the panel majority's decisions regarding both the option prices and the vendor prices, and he pointedly countered each of the stated justifications for those decisions.<sup>436</sup> Regarding the vendor pricing CLINs, Judge Garland pointed out that "it is the opponent of disclosure -- not the requester -- who bears the burden of proving whether substantial competitive harm is likely to result,"<sup>437</sup> but that in this case the panel majority "st[ood] the burden of proof on its head" by requiring the Air Force to provide special evidence to support its stated judgment.<sup>438</sup> Judge Garland also faulted the majority for using mere economic theory -- "a theory of the court's own invention" -- to support its decision that the vendor pricing CLINs are protected by Exemp-

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<sup>432</sup> See id.

<sup>433</sup> See id. at 1191-92.

<sup>434</sup> See id. at 1192.

<sup>435</sup> Id.

<sup>436</sup> Id. at 1194-1204.

<sup>437</sup> Id. at 1195-96 (citing Occidental Petroleum, 873 F.2d at 342 (holding that the opponent of disclosure bears the "ultimate burden of persuasion"), and National Parks, 547 F.2d at 679 n.20 (declaring that "[t]he party seeking to avoid disclosure bears the burden of proving that the circumstances justify nondisclosure")).

<sup>438</sup> Id. at 1196.

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tion 4.<sup>439</sup> Further, among other criticisms, Judge Garland stated that "unless we reverse the burden of proof and deny the Air Force the deference it is owed, there is no basis for overturning its conclusion that disclosure of the prices it paid for McDonnell Douglas's services is unlikely to cause substantial harm to the contractor's competitive position."<sup>440</sup>

Judge Garland also found errors in the majority's decision regarding the option prices in the contract. He recognized that the Air Force's argument regarding the option prices was not, in fact, the same argument that the D.C. Circuit had rejected in McDonnell Douglas v. NASA, and he observed that the panel majority was able to characterize the arguments in the two cases as the same only by "embellish[ing]" the definition of "underbidding."<sup>441</sup> Judge Garland further faulted the majority for simply dismissing the Air Force's determination that because price was only one of many evaluation factors used in awarding contracts the disclosure of option prices was not likely to cause substantial harm to McDonnell Douglas's competitive position.<sup>442</sup> He pointed out that the Air Force made clear in both its Request for Proposal (RFP) and final decision letter that multiple factors would be used to evaluate proposals, and therefore the majority was "wrong" to state its own view that whether or not "price will be one of several factors to be weighted equally in any future RFP . . . is necessarily speculative."<sup>443</sup> He further observed that the contract at issue in this case was "not to supply cafeteria food, but to service planes that 'will be flown by American military personnel on highly dangerous missions,'" and that it therefore should not be surprising that "considerations of safety, quality, and confidence in an incumbent contractor would at least be the equal of price."<sup>444</sup> Judge Garland concluded that "[i]n dismissing the government's non-price factors argument and failing to address its reverse-engineering contention, my colleagues come perilously close to treating a contractor's claim of 'underbidding' as a talisman that bars disclosure of any line-item price."<sup>445</sup>

Notwithstanding this concern raised by Judge Garland, the panel majority in both of these McDonnell Douglas decisions expressly stated that the court was not creating a per se rule that prices in awarded govern-

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<sup>439</sup> Id. at 1197.

<sup>440</sup> Id. at 1198 (citing CNA, 830 F.2d at 1155 (deferring to agency when presented with "no more than two contradictory views of what likely would ensue upon release of [the] information"))).

<sup>441</sup> Id. at 1201.

<sup>442</sup> See id. at 1202.

<sup>443</sup> Id. (quoting majority opinion).

<sup>444</sup> Id. (quoting agency's brief).

<sup>445</sup> Id.



ment contracts must invariably be withheld.<sup>446</sup> Indeed, as discussed above, in the McDonnell Douglas v. Air Force decision, the court upheld the release of certain contract prices.<sup>447</sup> Thus, the net effect of these decisions is that agencies are best advised to continue both their practice of notifying all submitters of contract price information in order to obtain any objections to disclosure and to then carefully conducting a thorough competitive harm analysis on a case-by-case basis, thereby ensuring that they always have a sufficient administrative record on which to base and support their decisions.<sup>448</sup>

Subsequently, in its first unit price case decided since McDonnell Douglas v. Air Force, the District Court for the District of Columbia ruled similarly, and upheld the agency's decision to disclose "over and above" prices, but enjoined the agency from disclosing option year prices.<sup>449</sup> In so deciding, the court was presented with several arguments that the D.C. Circuit had declined to consider in McDonnell Douglas v. Air Force due to the parties' failure to raise them during the administrative process.<sup>450</sup>

With respect to option prices, the plaintiffs argued that disclosure would result in substantial competitive harm because competitors could submit unsolicited, lower bids to the Air Force, which the Air Force could then accept.<sup>451</sup> The court rejected the plaintiffs' argument, agreeing instead with the Air Force that under the FAR it could not accept an unsoli-

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<sup>446</sup> See McDonnell Douglas v. Air Force, 375 F.3d at 1193; McDonnell Douglas v. NASA, No. 98-5251, slip op. at 2 (D.C. Cir. Oct. 6, 1999).

<sup>447</sup> See McDonnell Douglas v. Air Force, 375 F.3d at 1192.

<sup>448</sup> See *FOIA Post*, "Treatment of Unit Prices After McDonnell Douglas v. Air Force" (posted 9/8/05) (advising agencies that in light of D.C. Circuit's McDonnell Douglas v. Air Force decision they should continue their practice of conducting submitter notice in response to requests that seek unit prices and, where disclosure is required, creating a detailed administrative record to support their decisions) (supplementing *FOIA Post*, "Treatment of Unit Prices Under Exemption 4" (posted 5/29/02)) (emphasizing importance of undertaking submitter notice each time unit prices are requested and of carefully documenting agency rationale) (superseding *FOIA Update*, Vol. XVIII, No. 4, at 1, and *FOIA Update*, Vol. V, No. 4, at 4); see also *FOIA Post*, "New McDonnell Douglas Opinion Aids Unit Price Decisionmaking" (posted 10/4/02). See generally *FOIA Update*, Vol. IV, No. 4, at 10 (setting forth similar approach to handling requests for unit prices).

<sup>449</sup> Canadian Commercial Corp v. Dep't of the Air Force, 442 F. Supp. 2d 15, 41 (D.D.C. 2006) (reverse FOIA suit) (appeal pending).

<sup>450</sup> See *id.* at 38.

<sup>451</sup> *Id.* at 34; see also McDonnell Douglas v. Air Force, 375 F.3d at 1187-88 (declining to consider this argument because it was not made at the administrative level).

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cited bid.<sup>452</sup> The plaintiffs also contended that the mere submission of unsolicited, lower-priced proposals by its competitors could induce the Air Force to issue a new solicitation for the option-year work, and that thereafter its competitors could make offers that would undercut the plaintiff's prices.<sup>453</sup> The Air Force countered that it "regularly and routinely" exercised options, and that the plaintiffs had failed to present any evidence to the contrary.<sup>454</sup> The court held that the Air Force had "improperly shifted" the burden to the plaintiffs, and that it was the Air Force, not the plaintiffs, that had failed to produce any evidence to support its argument.<sup>455</sup>

The Air Force had further argued that, pursuant to the FAR, a competitor's price would have to offset the transaction costs associated with changing contractors in order to persuade the Air Force not to exercise an option.<sup>456</sup> The court rejected this argument, concluding that it was just a "repackaging" of the "price is just one of many factors" argument which was rejected by the D.C. Circuit.<sup>457</sup> More specifically, the court found that the FAR "merely suggests that such considerations 'should' be taken into account, not that such a finding is required in order to decline to exercise an option."<sup>458</sup>

Although the court rejected the Air Force's disclosure decision with respect to option year prices, the court nonetheless addressed, and rejected, the plaintiffs' alternative argument that disclosure of option prices would allow their competitors to ascertain their pricing strategy and, consequently, to undercut their offers in future procurements.<sup>459</sup> Notably, the court pointed out that the burden was on plaintiffs to show that reverse-engineering was "not merely possible, but likely."<sup>460</sup> In this regard, the court found that the Air Force had refuted plaintiffs' arguments using "spe-

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<sup>452</sup> Id. at 34 (citing 48 C.F.R. §§ 2.101, 15.603(c)).

<sup>453</sup> See id. at 34.

<sup>454</sup> Id. at 34-35

<sup>455</sup> Id. at 35-36.

<sup>456</sup> Id. at 38-39 (citing 48 C.F.R. § 17.207(c)); see also McDonnell Douglas, 375 F.3d at 1188-89 (refusing to consider such argument because it played no role in the agency's administrative decision).

<sup>457</sup> Canadian Commercial, 442 F. Supp. 2d at 35, 39.

<sup>458</sup> See id. at 38 (observing further that Air Force had failed to present any evidence that it had followed practice of requiring such finding notwithstanding FAR's permissive language).

<sup>459</sup> See id. at 33 & n.8.

<sup>460</sup> Id. at n.8.

cific and illustrative" reasoning.<sup>461</sup> Moreover, the court observed, the Air Force had highlighted the difficulty of accurately calculating plaintiffs' future offers, because of the "subjective variables that factor into cost analysis."<sup>462</sup> Given these circumstances, the court concluded that the plaintiffs had failed to show that competitors were "likely" to predict plaintiffs' future prices.<sup>463</sup>

Continuing this line of reasoning, the court upheld the agency's disclosure decision with respect to the "over and above" prices.<sup>464</sup> The plaintiffs had argued that their disclosure would allow their competitors' employees to learn, through their union memberships, the plaintiffs' negotiated pay rates.<sup>465</sup> This combination of pay rates and fixed hourly labor rates for over and above work CLINs, they further argued, would enable their competitors to deduce plaintiffs' overhead rates.<sup>466</sup> The court found that while such a "multi-step" occurrence might be "possible," the plaintiffs had failed to offer any evidence that this was "likely" to occur.<sup>467</sup> Therefore, for this category of prices, the court upheld the Air Force's decision that substantial competitive harm was not likely to result from its disclosure.<sup>468</sup>

In explaining the rationale for its decision, the court pointed out that it had not relied upon McDonnell Douglas v. Air Force to create "a strict mandate or per se rule" pertaining to unit prices.<sup>469</sup> Rather, the court explained, its conclusions were driven by the D.C. Circuit's analysis in that case, as well as by "the shortfalls in logic and evidence" in the Air Force's administrative decision in the case before it.<sup>470</sup> Thus, this decision further underscores the need for agencies to carefully evaluate competitive harm claims on a case-by-case basis and to carefully document their reasons for disclosing unit prices.

There are many well-reasoned decisions upholding agency determinations to disclose unit prices in the absence of convincing evidence of competitive harm. In a recent case, the submitter failed to present any ev-

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<sup>461</sup> Id.

<sup>462</sup> Id. (citing Acumenics Research, 843 F.2d at 808).

<sup>463</sup> Id.

<sup>464</sup> See id. at 38 n.10.

<sup>465</sup> Id.

<sup>466</sup> See id.

<sup>467</sup> Id.

<sup>468</sup> See id.

<sup>469</sup> Id. at 39.

<sup>470</sup> Id.

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idence showing how its unit prices could be reverse engineered by its competitors in order to allow them to determine the submitter's pricing strategy.<sup>471</sup> Similarly, the court found that the submitter had failed to demonstrate that the pricing structure for the contracts at issue would be relevant for "any potential future government contracts."<sup>472</sup> In another case, the submitter provided only "conclusory and generalized assertions" of harm, that "mainly detailed measures it took to guard and protect its pricing information," that the court found were "simply not relevant to the National Parks analysis."<sup>473</sup> An additional argument -- that the submitter would suffer harm because the "contract contemplates option years and may be rebid," was not raised before the agency and so was considered to be "outside the scope of the administrative record."<sup>474</sup> Nonetheless, the court addressed it in the alternative, finding it "unpersuasive," as the precedent primarily relied on by the submitter concerned the possibility of "re-bidding a contract for unperformed work," a situation deemed "factually and legally distinguishable from" the case at hand.<sup>475</sup>

A similar challenge to an agency's decision to disclose, among other things, a contractor's unit price information was soundly rejected in yet another decision by the District Court for the District of Columbia.<sup>476</sup> In upholding the agency's decision to release the information, the court rejected the submitter's contention that disclosure would enable its competitors "to predict its costs and profit margin, significantly enhancing their ability to underbid."<sup>477</sup> Declaring that "[t]he public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and indeed, even to learn how to be more effective competitors in the future," the court upheld the agency's decision to release the information because the submitter had "simply failed to demonstrate" how it would be competitively harmed by the information's disclo-

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<sup>471</sup> Clearbrook, L.L.C. v. Ovall, No. 06-0629, 2006 U.S. Dist. LEXIS 81244, at \*12 (S.D. Ala. Nov. 3, 2006) (denying plaintiff's motion for preliminary injunction), dismissed with prejudice per stipulation (S.D. Ala. Nov. 22, 2006) (reverse FOIA suit).

<sup>472</sup> Id.

<sup>473</sup> TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1099 (E.D. Mo. 1998) (reverse FOIA suit).

<sup>474</sup> Id.

<sup>475</sup> Id. at 1100.

<sup>476</sup> Martin Marietta, 974 F. Supp. at 38 (specifically, "cost and fee information," and "component and configuration prices" -- including unit pricing and contract line item numbers -- and "technical and management information").

<sup>477</sup> Id. at 40.

sure.<sup>478</sup> Although noting that the submitter "might prefer that less be known about its operations, and that the reasons for its past successes remain a mystery to be solved by the competitors on their own," the court held that the submitter had not shown "that it will in fact be unable to duplicate those successes unless [the agency] acquiesces in keeping the competition in the dark."<sup>479</sup>

The outcome of that case was consistent with the outcome in four cases concerning contract price information that were decided previously -- all of which were brought by submitters challenging agency decisions to disclose such information -- and in which none of the submitters were able to convince the court that disclosure of the prices charged the government would cause them to suffer competitive harm.<sup>480</sup> One of the cases was remanded back to the agency for further factfinding on that issue,<sup>481</sup> but in the remaining three cases the competitive harm arguments were rejected outright by the court.<sup>482</sup> (One of these cases subsequently was vacated after the FOIA request was withdrawn while the case was on appeal.<sup>483</sup>)

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<sup>478</sup> Id. at 41.

<sup>479</sup> Id.

<sup>480</sup> McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319, 326 (D.D.C. 1995) (reverse FOIA suit), vacated as moot, No. 95-5288 (D.C. Cir. Apr. 1, 1996); CC Distributions v. Kinzinger, No. 94-1330, 1995 WL 405445, at \*5-6 (D.D.C. June 28, 1995) (reverse FOIA suit); Chem. Waste Mgmt., Inc. v. O'Leary, No. 94-2230, 1995 WL 115894, at \*4-5 (D.D.C. Feb. 28, 1995) (reverse FOIA suit); Comdisco, Inc. v. GSA, 864 F. Supp. 510, 516 (E.D. Va. 1994) (reverse FOIA suit).

<sup>481</sup> Chem. Waste, 1995 WL 115894, at \*5 (requiring the agency to correct its administrative record by addressing the submitter's "actual complaints of [competitive] harm," i.e., that when the contract was rebid, the new contractor "will be asked to perform the exact same -- and, as yet, unrendered -- services that were expected to be performed under" the existing contract).

<sup>482</sup> McDonnell Douglas, 895 F. Supp. at 326 (submitter "failed to show with any particularity how a competitor could use the information at issue to cause competitive injury"); CC Distributions, 1995 WL 405445, at \*5 (submitter failed "to explain how its competitors could reverse-engineer its pricing methods and deduce its concessions from suppliers," which it had conclusorily claimed would occur if its unit prices were disclosed); Comdisco, 864 F. Supp. at 516 (submitter failed to satisfy standard that it "present persuasive evidence that disclosure of the unit prices would reveal some confidential piece of information, such as a profit multiplier or risk assessment, that would place the submitter at a competitive disadvantage").

<sup>483</sup> See McDonnell Douglas Corp. v. NASA, No. 95-5288 (D.C. Cir. Apr. 1, 1996).

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Additionally, there are three other cases which contain a thorough analysis of the possible effects of disclosure of unit prices -- including two appellate decisions -- and in all three of these cases the courts likewise denied Exemption 4 protection, finding that disclosure of the prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and that the possibility of competitive harm was thus too speculative.<sup>484</sup> For example, the Court of Appeals for the Ninth Circuit denied Exemption 4 protection for the unit prices provided by a successful offeror despite the offeror's contention that competitors would be able to determine its profit margin by simply subtracting from the unit price the other component parts which are either set by statute or standardized within the industry.<sup>485</sup> The Ninth Circuit upheld the agency's determination that competitors would not be able to make this type of calculation, because the component figures making up the unit price were not, in fact, standardized, but instead were subject to fluctuation.<sup>486</sup>

Subsequent to the issuance of McDonnell Douglas v. NASA, but before the district court's decision in McDonnell Douglas v. Air Force, the District Court for the District of Columbia rendered an opinion in MCI Worldcom, Inc. v. GSA, that contained an alternative holding addressing the issue of disclosure of unit prices.<sup>487</sup> At issue in MCI Worldcom were tables containing complex matrices specifying millions of "pricing elements" for telecommunications services provided by contractors to the government.<sup>488</sup> The agency had informed the submitters that pursuant to a new policy, "it would now publicly disclose all 'contract unit prices'" pursuant to the disclosure provisions of the Federal Acquisition Regulation (FAR).<sup>489</sup> In overturning that agency decision, the court first ruled that the

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<sup>484</sup> Pac. Architects, 906 F.2d at 1347; Acumenics, 843 F.2d at 808; J.H. Lawrence Co. v. Smith, No. 81-2993, slip op. at 8-9 (D. Md. Nov. 10, 1982).

<sup>485</sup> Pac. Architects, 906 F.2d at 1347.

<sup>486</sup> Id. at 1347-48; see RMS, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (declaring that the court was "unconvinced based on the evidence that the release of contract bid prices, terms and conditions whether interim or final will harm the successful bidders"); see also GC Micro, 33 F.3d at 1114-15 (relying on Pacific Architects, and ordering disclosure of percentage and dollar amount of work subcontracted out by defense contractors).

<sup>487</sup> 163 F. Supp. 2d 28, 35-36 (D.D.C. 2001) (reverse FOIA suit).

<sup>488</sup> Id. at 29-30.

<sup>489</sup> Id. at 30-31 (citing 48 C.F.R. §§ 15.503(b)(1), 15.506(d)(2) (currently at volume 2005), which mandate disclosure of unit prices in post-award notices and debriefings for contracts solicited after Jan. 1, 1998); see also Comdisco, 864 F. Supp. at 516 (noting that unit prices are "the sort of pricing information routinely disclosed under the [FAR]" (citing Acumenics, 843 (continued...)

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tables did not, in fact, contain "unit prices," but instead "more closely resemble[d] 'cost breakdowns,' which," it noted, "are specifically prohibited from disclosure by the very FAR provision relied upon" by the agency.<sup>490</sup> Noting the absence of any "standard definition of 'unit price'" in the FAR or in the case law, the court found that because the "pricing elements and components" at issue were "not separately purchased, ordered or billed to the government," they did not constitute the "price" for a "good or service."<sup>491</sup> Accordingly, the court concluded that the tables did not contain "'unit price' information" within the meaning of the FAR.<sup>492</sup>

Although the court could have finished its decision with that holding, it nonetheless went on to rule that "even assuming" that the tables did contain "unit price' information," the FAR did not "permit their disclosure."<sup>493</sup> Focusing on language contained in both of the FAR provisions relied on by

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<sup>489</sup>(...continued)

F.2d at 807-08)); JL Assocs., 90-2 CPD 261, B-239790 at 4 n.2 (Oct. 1, 1990) (Comptroller General decision rejecting argument that disclosure of option prices would cause submitter competitive harm by revealing pricing strategy and decisionmaking process and noting that FAR "expressly advises awardees that the unit prices of awards will generally be disclosed to unsuccessful offerors"); cf. McDonnell Douglas Corp. v. Widnall, No. 94-0091, slip op. at 13 (D.D.C. Apr. 11, 1994) (ruling on different FAR disclosure provision, and holding that that provision served as legal authorization for agency to release exercised option prices and that such prices thus were "not protected from disclosure by the Trade Secrets Act," 18 U.S.C. § 1905 (2000 & Supp. IV 2004), and that the court need not reach the issue of the applicability of Exemption 4), and McDonnell Douglas Corp. v. Widnall, No. 92-2211, slip op. at 8 (D.D.C. Apr. 11, 1994) (same), cases consolidated on appeal & remanded for further development of the record, 57 F.3d 1162, 1167 (D.C. Cir. 1995) (holding that because the agency's FAR "authorization argument is intertwined analytically" with the Exemption 4 coverage issue, a remand to the agency was necessary so that the court could "have one considered and complete statement of the Air Force's position" on the submitter's claim that its prices were protected by Exemption 4) (non-FOIA cases brought under Administrative Procedure Act). See generally Flammann, 339 F.3d at 1323 (holding, in a pre-award bid protest case concerning unit prices contained in sealed bids -- as distinct from prices contained in proposals -- which were subject to the public opening requirement contained in a different FAR provision, that such bid prices "entered the public domain upon bid opening, and therefore . . . did not fall within Exemption 4 of FOIA").

<sup>490</sup> MCI Worldcom, 163 F. Supp. 2d at 33.

<sup>491</sup> Id. at 32-33.

<sup>492</sup> Id. at 34.

<sup>493</sup> Id.

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the agency -- that prohibited "release of information that is confidential, trade secret, or otherwise exempt under FOIA Exemption 4" -- the court determined that the "unmistakable meaning" of the FAR provisions was that unit price information could be disclosed "only insofar as it" is not otherwise exempt from disclosure.<sup>494</sup> Moving to an analysis of whether the tables were protected under Exemption 4, the court relied on the D.C. Circuit's decision in McDonnell Douglas v. NASA, finding that the submitters had "set forth detailed facts" establishing that they would suffer "precisely the injuries that led [the D.C.] Circuit to declare that line item pricing was confidential information and not disclosable."<sup>495</sup> Most significantly, in making this determination, the court was greatly influenced by the fact that the agency was unable to "point[] to anything in the administrative record that establishes that the information is not confidential," as it had "never made any findings" on that issue.<sup>496</sup>

In a recent decision, the same court relied in part upon MCI Worldcom in holding that the Trade Secrets Act prohibited the disclosure of option year prices.<sup>497</sup> The agency in that case had argued that the FAR required it to disclose unit price information and therefore authorized its disclosure under the Trade Secrets Act.<sup>498</sup> Like in MCI Worldcom, however, the court determined that another provision of the FAR specifically "unauthorize[d]" the disclosure of any information that is protected by Exemption 4.<sup>499</sup> The agency had argued that the case law ultimately relied upon by the court, including MCI Worldcom, failed to address the history of the

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<sup>494</sup> Id. at 34-35 (citing Mallinckrodt v. West, 140 F. Supp. 2d 1, 5-6 (D.D.C. 2000) (concluding that the FAR provisions "do no more than require the disclosure of information unless its disclosure would reveal information that is exempt from release under the FOIA") (reverse FOIA suit), appeal dismissed voluntarily, No. 00-5330 (D.C. Cir. Dec. 12, 2000)); accord Env'tl. Tech., Inc. v. EPA, 822 F. Supp. 1226, 1229 n.4 (E.D. Va. 1993) (interpreting even less specific, pre-1998 version of unit price FAR provision to prohibit release of unit prices if such information "constitutes 'confidential business information'" (reverse FOIA suit).

<sup>495</sup> MCI Worldcom, 163 F. Supp. 2d at 36; see also Mallinckrodt, 140 F. Supp. 2d at 6 n.4 (dictum) (opining that it "need not reach" the issue, because the requested rebate and incentive information was protected as a voluntary submission, but nonetheless noting that "it appears" that it would be protected under the competitive harm test (citing McDonnell Douglas v. NASA, 180 F.3d at 306)).

<sup>496</sup> MCI Worldcom, 163 F. Supp. 2d at 36 & n.10.

<sup>497</sup> See id. at 40.

<sup>498</sup> See id. at 40 (relying on 48 C.F.R. §§ 15.503(b)(1)(iv), 15.506(d)(2), and 5.303(b)(2)).

<sup>499</sup> Id. (citing 48 C.F.R. § 15.506(e), Mallinckrodt, 140 F. Supp. 2d at 5-6, and MCI Worldcom, 63 F. Supp. 2d at 34 & n.7).



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FOIA and the FAR and accordingly should not guide the court's analysis.<sup>500</sup> The court found that argument "unconvincing," opining that the legislative history of the FOIA was "at best, ambiguous and inconclusive."<sup>501</sup> It further declared that "[t]he FAR may not be interpreted in a way that contravenes [the] statutory prohibition on disclosure' that is contained in the FAR and its authorizing statute."<sup>502</sup>

More than a quarter-century ago, in the absence of a showing of competitive harm, the District Court for the District of Columbia denied Exemption 4 protection for the prices charged the government for computer equipment, and in so doing stated that "[d]isclosure of prices charged the Government is a cost of doing business with the Government."<sup>503</sup> This "cost of doing business" principle was later expressly recognized by the District Court for the District of Columbia as a "general proposition" that agencies may reasonably follow.<sup>504</sup> Although it is not applicable "to every case that arises,"<sup>505</sup> the court nevertheless found that it is "incumbent upon" a submitter challenging a contract price disclosure decision to "demonstrate that [an agency's] decision to follow this general proposition" -- namely, that disclosure of contract prices is a cost of doing business with the government -- is somehow arbitrary or capricious.<sup>506</sup> This ruling comports with the court's decision in an earlier unit price case in which it had recognized the "strong public interest in release of component and aggregate prices in Government contract awards."<sup>507</sup>

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<sup>500</sup> See id.

<sup>501</sup> Id.

<sup>502</sup> Id. (quoting MCI Worldcom, 163 F. Supp. 2d at 34).

<sup>503</sup> Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981); accord CC Distribs., 1995 WL 405445, at \*6; JL Assocs., 90-2 CPD 261, B-239790 at 4 (Oct. 1, 1990) (Comptroller General decision noting that "disclosure of prices charged the government is ordinarily a cost of doing business with the government"); see also EHE, No. 81-1087, slip op. at 4 (D.D.C. Feb. 24, 1984) ("[O]ne who would do business with the government must expect that more of his offer is more likely to become known to others than in the case of a purely private agreement.").

<sup>504</sup> CC Distribs., 1995 WL 405445, at \*6.

<sup>505</sup> Id. (referring to Chem. Waste, 1995 WL 115894, at \*5, where the prices at issue were those of a subcontractor who was "not in privity of contract" with the agency and thus was not, in fact, "doing business with the government").

<sup>506</sup> Id.

<sup>507</sup> AT&T Info. Sys. v. GSA, 627 F. Supp. 1396, 1403 (D.D.C. 1986) (reverse FOIA suit); rev'd on other grounds & remanded, 810 F.2d 1233, 1236 (D.C.

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Similarly, in a case involving unexercised option prices rather than "ordinary" unit prices the court expressly stated that it "generally agrees that '[d]isclosure of prices charged the Government is a cost of doing business with the Government."<sup>508</sup> It then upheld the agency's decision to release the option prices because "competitively sensitive information such as cost, overhead, or profit identifiers would not be revealed."<sup>509</sup> This decision was subsequently vacated by the D.C. Circuit, however,<sup>510</sup> after the FOIA requester withdrew its request while the case was pending on appeal. In the absence of a FOIA requester seeking access to the information, the court held that the case had become moot.<sup>511</sup>

The D.C. Circuit in McDonnell Douglas v. NASA noted that NASA had advised the submitter "that publication of line item prices is the 'price of doing business' with the government," but the court characterized the statement as one that "either assumes the conclusion, or else assumes a legal duty or authority on the government to publicize these prices," which NASA did not assert it had.<sup>512</sup> Nonetheless, the "cost of doing business" principle was again cited with approval by the District Court for the District of Columbia in an opinion issued five years ago that ordered disclosure of "the names of all entities that placed bids" to buy land that the government was selling, as well as "the amounts of all bids."<sup>513</sup> In rejecting the agency's competitive harm claim -- which was similar to the argument often made by submitters seeking to withhold unit prices, namely, that competitors could "reconstruct each factor in the bidder's calculations" by "comparing the total bid amount with information already in the public domain" -- the court relied on several of the district court decisions within the D.C. Circuit that "have viewed such arguments with skepticism" and have "required disclosure of both aggregate and unit prices," and then it ordered

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Cir. 1987).

<sup>508</sup> Gen. Dynamics Corp. v. U.S. Dep't of the Air Force, 822 F. Supp. 804, 807 (D.D.C. 1992) (quoting Racal-Milgo, 559 F. Supp. at 6) (reverse FOIA suit), vacated as moot, No. 92-5186 (D.C. Cir. Sept. 23, 1993).

<sup>509</sup> Id.; see RMS, No. C-92-1545, slip op. at 7 (N.D. Cal. Nov. 24, 1992) (rejecting competitive harm claim for "interim" prices).

<sup>510</sup> Gen. Dynamics Corp. v. Dep't of the Air Force, No. 92-5186, slip op. at 1 (D.C. Cir. Sept. 23, 1993) (reverse FOIA suit).

<sup>511</sup> Id.

<sup>512</sup> McDonnell Douglas v. NASA, 180 F.3d at 306.

<sup>513</sup> Ctr. for Pub. Integrity, 191 F. Supp. 2d at 196 (citing Racal-Milgo, 559 F. Supp. at 6).

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disclosure itself.<sup>514</sup> One of the principal cases relied upon to make this determination was Brownstein Zeidman & Schomer v. Department of the Air Force, in which the court had ordered disclosure of unit prices, rejecting as "highly speculative" the argument that their release would allow competitors to calculate the submitter's profit margin and thus be able to underbid it in future procurements.<sup>515</sup>

Fifteen years ago, in yet another case involving unit prices, the court found that it was a "fact-intensive question" whether the submitter would suffer competitive harm from release of its "price information" and it therefore declined to rule on the applicability of Exemption 4 in the context of a summary judgment motion.<sup>516</sup> (That case was never resolved on the merits by the District of Columbia court as the issue was first litigated by a party acting on behalf of the plaintiff in the Eastern District of Virginia<sup>517</sup> and the principle of collateral estoppel was then found to prevent the plaintiff from relitigating the issue in the District of Columbia.<sup>518</sup>)

In the immediate wake of the decision by the D.C. Circuit in Critical Mass Energy Project v. NRC,<sup>519</sup> two decisions somewhat reflexively afforded protection to unit prices premised on the theory that contract submissions are "voluntary" and that such pricing terms are not customarily disclosed to the public.<sup>520</sup> These decisions appear to implicitly define voluntary submissions according to the nature of the activity to which they are connected and thus are contrary to the policy guidance issued by the Department of Justice concerning the voluntary/required distinction.<sup>521</sup> Indeed, one of these decisions<sup>522</sup> was expressly disclaimed by another judge in that same judicial district for failing to identify any justification

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<sup>514</sup> Id. at 194, 196.

<sup>515</sup> 781 F. Supp. 31, 33 (D.D.C. 1991).

<sup>516</sup> MCI, 1992 WL 71394, at \*6.

<sup>517</sup> Cohen, Dunn & Sinclair, P.C. v. GSA, No. 92-0057-A (E.D. Va. Sept. 10, 1992) (bench order).

<sup>518</sup> MCI Telecomms. Corp. v. GSA, No. 89-0746, slip op. at 4-9 (D.D.C. Feb. 27, 1995).

<sup>519</sup> 975 F.2d 871 (D.C. Cir. 1992) (en banc).

<sup>520</sup> Envtl. Tech., 822 F. Supp. at 1229; Cohen, Dunn, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992).

<sup>521</sup> See FOIA Update, Vol. XIV, No. 2, at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4"); id. at 6-7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

<sup>522</sup> Envtl. Tech., 822 F. Supp. at 1229.

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whatsoever for its conclusion.<sup>523</sup> (For a further discussion of Critical Mass and its "voluntariness" standard, see Exemption 4, Applying Critical Mass, above.) In addition to affording protection to contract pricing information under Critical Mass, the other decision, in a rather cursory order issued from the bench, went on to alternatively afford protection under the competitive harm prong.<sup>524</sup>

None of the above cases concerning unit prices involved a request for pricing information submitted by an unsuccessful offeror. In the first decision to touch on this point, the court considered a situation in which the requester did not actually seek unit prices, but instead had requested the bottom-line price (total cumulative price) that an unsuccessful offeror had proposed for a government contract, as well as the bottom-line prices it had proposed for four years' worth of contract options.<sup>525</sup> Accepting the submitter's contention that disclosure of these bottom-line prices would cause it to suffer competitive harm by enabling competitors to deduce its pricing strategy, the court found that unsuccessful offerors had a different expectation of confidentiality than successful offerors, that the public interest in disclosure of pricing information concerning unawarded contracts was slight, and most importantly, that the unsuccessful offeror -- who would be competing with the successful offeror on the contract options as well as on future related contracts -- had demonstrated factually how the contract and option prices could be used by its competitors to derive data harmful to its competitive position.<sup>526</sup> By contrast, such a detailed explanation of harm was found lacking in an analogous case involving the sale of land by the government, and as a consequence the court ordered disclosure of the names of the unsuccessful bidders seeking to buy the land as well as the amounts of their bids.<sup>527</sup>

Congress addressed this issue in the procurement context with a statute that prohibits most agencies from disclosing solicited contract proposals -- which would contain proposed price information -- if those proposals have not become incorporated into an ensuing government con-

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<sup>523</sup> Comdisco, 864 F. Supp. at 517 n.8.

<sup>524</sup> Cohen, Dunn, No. 92-0057-A, transcript at 29; Findings of Fact at 7-8 (E.D. Va. Sept. 10, 1992) (accepting argument that disclosure of detailed unit price information would reveal pricing strategy and permit future bids to be predicted and undercut).

<sup>525</sup> Raytheon Co. v. Dep't of the Navy, No. 89-2481, 1989 WL 550581, at \*1 (D.D.C. Dec. 22, 1989).

<sup>526</sup> Id. at \*5-6; see also FOIA Update, Vol. XI, No. 2, at 2; FOIA Update, Vol. IV, No. 4, at 10-11.

<sup>527</sup> Ctr. for Pub. Integrity, 191 F. Supp. 2d at 195-96.

tract.<sup>528</sup> This Exemption 3 statute<sup>529</sup> has the practical effect of providing statutory protection for the prices proposed by unsuccessful offerors because, by definition, that information is not incorporated into the resulting government contract.<sup>530</sup>

### Third Prong of National Parks

In addition to the impairment prong and the competitive harm prong of the test for confidentiality established in National Parks & Conservation Ass'n v. Morton, the decision specifically left open the possibility of a third prong that would protect other governmental interests, such as compliance and program effectiveness.<sup>531</sup> Several subsequent decisions reaffirmed this possibility in dicta<sup>532</sup> and, as discussed below, with its en banc decision in Critical Mass Energy Project v. NRC, the Court of Appeals for the District of Columbia Circuit conclusively recognized the existence of a "third prong" under National Parks.<sup>533</sup>

The third prong received its first thorough appellate court analysis and acceptance by the Court of Appeals for the First Circuit.<sup>534</sup> In 9 to 5

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<sup>528</sup> National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 821, 110 Stat. 2422 (containing parallel measures applicable to armed services and most civilian agencies) (codified at 10 U.S.C. § 2305(g) (2000), amended by Pub. L. No. 106-65, 113 Stat. 512 (1999) (extending coverage of statute to all agencies listed in 10 U.S.C. § 2303 (2000), notably NASA and Coast Guard), and at 41 U.S.C. § 253b(m) (2000)); see Ctr. for Pub. Integrity, 191 F. Supp. 2d at 194 (construing the statute's coverage to include "a private party with whom the government has a procurement contract for products or services," but not "a private party purchasing government land").

<sup>529</sup> 5 U.S.C. § 552(b)(3) (2000 & Supp. IV 2004); see Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 29-30 (D.D.C. 2003).

<sup>530</sup> See FOIA Update, Vol. XVIII, No. 1, at 2 (discussing statute and fact that key determinant of exempt status under it is whether proposal was incorporated into or otherwise set forth in resulting contract).

<sup>531</sup> 498 F.2d 765, 770 n.17 (D.C. Cir. 1974).

<sup>532</sup> Wash. Post Co. v. HHS, 690 F.2d 252, 268 n.51 (D.C. Cir. 1982); Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976); Pub. Citizen Health Research Group v. FDA, 539 F. Supp. 1320, 1326 (D.D.C. 1982), rev'd & remanded on other grounds, 704 F.2d 1280 (D.C. Cir. 1983).

<sup>533</sup> 975 F.2d 871, 879 (D.C. Cir. 1992); see also FOIA Update, Vol. XIV, No. 2, at 7 ("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking").

<sup>534</sup> 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed.

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Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, the First Circuit expressly admonished against using the two primary prongs of National Parks as "the exclusive criteria for determining confidentiality" and held that the pertinent inquiry is whether public disclosure of the information will harm an "identifiable private or governmental interest which the Congress sought to protect by enacting Exemption 4 of the FOIA."<sup>535</sup>

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<sup>534</sup>(...continued)

Reserve Sys., 721 F.2d 1 (1st Cir. 1983); accord Afr. Fund v. Mosbacher, No. 92-289, 1993 WL 183736, at \*7 (S.D.N.Y. May 26, 1993) (finding the third prong satisfied when the agency "submitted extensive declarations that explain why disclosure of documents . . . would interfere with the export control system" (citing Durnan v. U.S. Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991))).

<sup>535</sup> 9 to 5, 721 F.2d at 10; see, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 170 (D.D.C. 2004) (protecting finance agreement, based partly upon third prong, because otherwise agency "would face difficulty negotiating future agreements with borrowers fearful of disclosure"); Nadler v. FDIC, 899 F. Supp. 158, 161-63 (S.D.N.Y. 1995) (protecting a joint venture agreement acquired when the FDIC became the receiver of a failed bank under the third prong because disclosure could "hurt the venture's prospects for financial success," which in turn would "reduce returns to the FDIC," and thereby "interfere significantly with the FDIC's receivership program, which aims to maximize profits on the assets acquired from failed banks"), aff'd on other grounds, 92 F.3d 93, 96 (2d Cir. 1996) (declining to consider applicability of the third prong and noting that while it had previously "adopted the National Parks formulation of Exemption 4," that previous "adoption did not encompass the speculation regarding 'program effectiveness'" that was set forth in National Parks); Allnet Comm'n Servs. v. FCC, 800 F. Supp. 984, 990 (D.D.C. 1992) (protecting computer models under third prong because disclosure would make providers of proprietary input data reluctant to supply such data to submitter, and without that data computer models would become ineffective, which, in turn, would reduce effectiveness of agency's program), aff'd on other grounds, No. 92-5351 (D.C. Cir. May 27, 1994); Clarke v. U.S. Dep't of the Treasury, No. 84-1873, 1986 WL 1234, at \*2-3 (E.D. Pa. Jan. 24, 1986) (protecting identities of Flower Bond owners under third prong because government had legitimate interest in fulfilling "pre-FOIA contractual commitments of confidentiality" given to investors in order to ensure that pool of future investors willing to purchase government securities was not reduced; if that occurred, the pool of money from which government borrows would correspondingly be reduced, thereby harming national interest); Comstock Int'l, Inc. v. Exp.-Imp. Bank, 464 F. Supp. 804, 808 (D.D.C. 1979) (protecting loan applicant information under third prong on showing that disclosure would impair Bank's ability to promote U.S. exports); see also FOIA Update, Vol. IV, No. 4, at 15; cf. M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (protecting settlement negotiation documents  
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Thereafter, the Department of Justice issued policy guidance regarding Exemption 4 protection for "intrinsically valuable" records -- records that are significant not for their content, but as valuable commodities which can be sold in the marketplace.<sup>536</sup> Because protection for such documents is well rooted in the legislative history of Exemption 4, the third prong of the National Parks test should permit the owners of such records to retain their full proprietary interest in them when release through the FOIA would result in a substantial loss of their market value.<sup>537</sup> Of course, this protection would be available only if there were sufficient evidence to demonstrate factually that potential customers would actually utilize the FOIA as a substitute for directly purchasing the records from the submitter.<sup>538</sup>

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<sup>535</sup>(...continued)

upon a finding that "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure . . . were required"). But see News Group Boston, Inc. v. Nat'l R.R. Passenger Corp., 799 F. Supp. 1264, 1269 (D. Mass. 1992) (recognizing existence of third prong, but declining to apply it based on lack of specific showing that agency effectiveness would be impaired), appeal dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992).

<sup>536</sup> See FOIA Update, Vol. VI, No. 1, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value").

<sup>537</sup> See id.; see also FOIA Update, Vol. IV, No. 4, at 3-5 (setting forth similar basis for protecting copyrighted materials against substantial adverse market effect caused by FOIA disclosure).

<sup>538</sup> See Cody Zeigler, Inc. v. U.S. Dep't of Labor, No. C2-00-134, 2002 WL 31159309, at \*2-3 (S.D. Ohio Sept. 3, 2002) (recognizing that "there would be little reason for anyone else to purchase" the "Dodge Reports" sold by the McGraw-Hill Company "if they could be obtained for free from a government agency through a FOIA request," but refusing to accord Exemption 4 protection to the particular reports at issue due to the failure of McGraw-Hill to demonstrate that these "older" reports "retain[ed] any special value or significance today"); Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 10-12 (D.D.C. Mar. 12, 1993) (rejecting argument that FOIA disclosure of Dun & Bradstreet report would cause "loss of potential customers" because no evidence was presented to support contention that potential customers would use FOIA in such a manner, particularly in light of time involved in receiving information through FOIA process; nor was it shown how many such reports would be available through FOIA and court would not assume that majority, or even substantial number, could be so obtained); Key Bank of Me., Inc. v. SBA, No. 91-362-P, 1992 U.S. Dist. LEXIS 22180, at \*11-12 (D. Me. Dec. 31, 1992) (denying protection for Dun & Bradstreet reports because "the notion that those who are in need of credit information will use the government as a source in order to save costs belies common sense").

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Such a showing was made in a case concerning a request for copy-righted video conferencing software that the requester wanted to distribute on the Internet.<sup>539</sup> The court readily held that in such a situation "[t]here can be no doubt" that disclosure would cause "substantial commercial harm,"<sup>540</sup> because if the "technology is freely available on the Internet, there is no reason for anyone to license [it] from [its owner], and the value of [the owner's] copyright effectively will have been reduced to zero."<sup>541</sup>

The third prong was at issue in a case that concerned an agency that had the authority -- but had not yet had the time and resources -- to promulgate a regulation that would require submission of certain data.<sup>542</sup> During this interim period the agency was relying on companies to voluntarily submit the desired information.<sup>543</sup> In that case the court rejected the agency's argument that under these circumstances disclosure would impair its efficiency and effectiveness, holding instead that because Congress had "announced a preference for mandatory over voluntary submissions," the agency was "hard-pressed to support its claim that voluntary submissions are somehow more efficient."<sup>544</sup>

Thirteen years after the National Parks decision first raised the possibility that Exemption 4 could protect interests other than those reflected in the impairment and competitive harm prongs, a panel of the Court of Appeals for the District of Columbia Circuit embraced the third prong in the

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<sup>539</sup> Gilmore v. U.S. Dep't of Energy, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998).

<sup>540</sup> Id. at 922 (protecting software, but not expressly doing so under "third prong").

<sup>541</sup> Id. at 923 (discounting the requester's argument that the copyright owner had "received only relatively meager royalties" and declaring that "there is a presumption of irreparable harm when a copyright is infringed"); see also FOIA Update, Vol. XVIII, No. 1, at 5-6 (cautioning agencies to "guard against the possibility that [Internet] dissemination of [reading room records] might be regarded as copyright infringement" in exceptional cases) (reiterated in FOIA Post, "FOIA Counselor Q&A: "Frequently Requested Records" (posted 7/25/03)); cf. Cody Zeigler, 2002 WL 31159309, at \*3-4 (accommodating, with requester's acquiescence, copyright owner's preference that requested copyrighted reports, although not protected by Exemption 4, be made available for inspection only, not copying).

<sup>542</sup> Teich v. FDA, 751 F. Supp. 243, 251 (D.D.C. 1990), appeal dismissed voluntarily, No. 91-5023 (D.C. Cir. July 2, 1992).

<sup>543</sup> Id. at 251.

<sup>544</sup> Id. at 252-53.



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first appellate decision in Critical Mass.<sup>545</sup> There, the panel adopted what it termed the "persuasive" reasoning of the First Circuit and expressly held that an agency may invoke Exemption 4 on the basis of interests other than the two principally identified in National Parks.<sup>546</sup>

Upon remand from the D.C. Circuit, the district court in Critical Mass found the requested information to be properly withheld pursuant to the third prong.<sup>547</sup> The court reached this decision based on the fact that if the requested information were disclosed, future submissions would not be provided until they were demanded under some form of compulsion -- which would then have to be enforced, precipitating "acrimony and some form of litigation with attendant expense and delay."<sup>548</sup> On appeal for the second time, a panel of the D.C. Circuit reversed the lower court on this point, but that decision was itself vacated when the D.C. Circuit decided to hear the case en banc.<sup>549</sup>

In its en banc decision in Critical Mass, the D.C. Circuit conducted an extensive review of the interests sought to be protected by Exemption 4 and expressly held that "[i]t should be evident from this review that the two interests identified in the National Parks test are not exclusive."<sup>550</sup> In addition, the D.C. Circuit went on to state that although it was overruling the first panel decision in Critical Mass, it "note[d]" that that panel had adopted the First Circuit's conclusion in 9 to 5 that Exemption 4 protects a "governmental interest in administrative efficiency and effectiveness."<sup>551</sup> Moreover, the D.C. Circuit specifically recognized yet another Exemption 4 interest -- namely, "a private interest in preserving the confidentiality of

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<sup>545</sup> 830 F.2d 278, 282, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992).

<sup>546</sup> Id. at 286.

<sup>547</sup> 731 F. Supp. 554, 557 (D.D.C. 1990), rev'd in part & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

<sup>548</sup> Id.

<sup>549</sup> 931 F.2d 939, 944-45 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

<sup>550</sup> 975 F.2d at 879.

<sup>551</sup> Id.; see also Allnet, 800 F. Supp. at 990 (recognizing, after Critical Mass, availability of third-prong protection to prevent impairment of agency effectiveness).

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information that is provided the Government on a voluntary basis."<sup>552</sup> It declined to offer an opinion as to whether any other governmental or private interests might also fall within Exemption 4's protection.<sup>553</sup>

The District Court for the District of Columbia relied on the en banc decision in Critical Mass to hold that "impairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under" Exemption 4.<sup>554</sup> The court utilized that test in a case involving a request for royalty rate information contained in licensing agreements that NIH entered into with pharmaceutical companies in accordance with a statutory mandate "to use the patent system to promote inventions arising from federally supported research."<sup>555</sup> The court upheld NIH's determination that it "would cease to be an attractive or viable licensor of patented technology" were it to disclose the royalty rate information.<sup>556</sup> The court found that "[s]uch a result obviously would hinder the agency in fulfilling its statutory mandate," and accordingly it afforded protection under the third prong of Exemption 4.<sup>557</sup> That same court issued a similar ruling in a case involving export-insurance documents, finding that disclosure "would interfere with the [Export-Import] Bank's ability to promote U.S. exports, and result in loss of business for U.S. exporters," which in turn would interfere with the agency's "ability to carry out its statutory purpose" of promoting the exchange of goods between the United States and foreign countries.<sup>558</sup>

### Privileged Information

The term "privileged" in Exemption 4 has been utilized by some courts as an alternative for protecting nonconfidential commercial or financial information. Indeed, the Court of Appeals for the District of Columbia Circuit has indicated that this term should not be treated as being merely synonymous with "confidential," particularly in light of the legislative history's explicit reference to certain privileges, e.g., the attorney-client and

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<sup>552</sup> 975 F.2d at 879.

<sup>553</sup> Id.

<sup>554</sup> Pub. Citizen Health Research Group v. NIH, 209 F. Supp. 2d 37, 52 (D.D.C. 2002) (alternative holding).

<sup>555</sup> Id. at \*42-43.

<sup>556</sup> Id. at \*45 (quoting agency declaration).

<sup>557</sup> Id.

<sup>558</sup> Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 30 (D.D.C. 2000).

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doctor-patient privileges.<sup>559</sup> Nevertheless, during the FOIA's first two decades, only two district court decisions discussed "privilege" in the Exemption 4 context.

In one case, the court upheld the Department of the Interior's withholding of detailed statements by law firms of work that they had done for the Hopi Indians on the ground that they were "privileged" because of their work-product nature within the meaning of Exemption 4: "The vouchers reveal strategies developed by Hopi counsel in anticipation of preventing or preparing for legal action to safeguard tribal interests. Such communications are entitled to protection as attorney work product."<sup>560</sup> In the second case, a legal memorandum prepared for a utility company by its attorney qualified as legal advice protectible under Exemption 4 as subject to the attorney-client privilege.<sup>561</sup> In both of these cases the information was also withheld as "confidential."

It was not until another five years had passed that a court protected material relying solely on the "privilege" portion of Exemption 4 -- specifically, by recognizing protection for documents subject to the "confidential report" privilege.<sup>562</sup> In a brief opinion, one court recognized Exemption 4 protection for settlement negotiation documents, but did not expressly characterize them as "privileged."<sup>563</sup> Another court subsequently recog-

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<sup>559</sup> Wash. Post Co. v. HHS, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

<sup>560</sup> Indian Law Res. Ctr. v. Dep't of the Interior, 477 F. Supp. 144, 148 (D.D.C. 1979).

<sup>561</sup> Miller, Anderson, Nash, Yerke & Wiener v. U.S. Dep't of Energy, 499 F. Supp. 767, 771 (D. Or. 1980).

<sup>562</sup> Wash. Post Co. v. HHS, 603 F. Supp. 235, 237-39 (D.D.C. 1985), rev'd on procedural grounds & remanded, 795 F.2d 205 (D.C. Cir. 1986).

<sup>563</sup> M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986); see also FOIA Update, Vol. VI, No. 4, at 3-4 ("OIP Guidance: Protecting Settlement Negotiations"); Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 983 (6th Cir. 2003) (recognizing, after extensive discussion of its rationale, settlement negotiation privilege) (non-FOIA case); cf. FOIA Post, "Supreme Court Rules in Exemption 5 Case" (posted 4/4/01) (advising that viability of settlement privilege under Exemption 4 remained "entirely unaffected" by Supreme Court's decision in Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001)). But see In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 208-10 (D.D.C. 2005) (refusing to recognize settlement negotiations privilege) (non-FOIA case), aff'd in part on other grounds, 439 F.3d 740, 754-55 (D.C. Cir. 2006) (finding it unnecessary to decide whether federal settlement negotiations privilege exists, because proponent of privilege failed to meet its burden to show that disputed documents were created

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nized Exemption 4 protection for documents subject to the critical self-evaluative privilege.<sup>564</sup>

Sixteen years after the first decision protecting attorney-client information under Exemption 4, the District Court for the Eastern District of Missouri issued the second such decision.<sup>565</sup> The court held that a company's "adverse impact analyses, [prepared] at the request of its attorneys, for the purpose of obtaining legal advice about the legal ramifications of [large scale] reductions in force,"<sup>566</sup> were protected by the attorney-client privilege.<sup>567</sup> In so holding, the court found that disclosure of the documents to the agency "constituted only a limited waiver and did not destroy the privilege."<sup>568</sup>

On the other hand, the Court of Appeals for the Tenth Circuit has held that documents subject to a state protective order entered pursuant to the State of Utah's equivalent of Rule 26(c)(7) of the Federal Rules of Civil Procedure -- which permits courts to issue orders denying or otherwise limiting the manner in which discovery is conducted so that a trade secret or other confidential commercial information is not disclosed or is only disclosed in a certain way -- were not "privileged" for purposes of Exemption 4.<sup>569</sup> While observing that discovery privileges "may constitute an additional ground for nondisclosure" under Exemption 4, the Tenth Circuit noted that those other privileges were for information "not otherwise specifically

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<sup>563</sup>(...continued)  
for purpose of settlement discussions).

<sup>564</sup> Wash. Post Co. v. U.S. Dep't of Justice, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at \*21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted, No. 84-3581 (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96, 99 (D.C. Cir. 1988). But cf. Kan. Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (holding that because self-critical analysis privilege had been rejected previously in state court proceeding brought to suppress disclosure of documents, "doctrine of collateral estoppel" precluded "relitigation" of that claim in federal court) (reverse FOIA suit).

<sup>565</sup> McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 237, 242-43 (E.D. Mo. 1996) (alternative holding) (reverse FOIA suit), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996).

<sup>566</sup> Id. at 237.

<sup>567</sup> Id. at 242-43.

<sup>568</sup> Id. at 243.

<sup>569</sup> Anderson v. HHS, 907 F.2d 936, 945 (10th Cir. 1990).

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embodied in the language of Exemption 4.<sup>570</sup> By contrast, it concluded, recognition of a privilege for materials protected by a protective order under Rule 26(c)(7) "would be redundant and would substantially duplicate Exemption 4's explicit coverage of 'trade secrets and commercial or financial information.'"<sup>571</sup> Additionally, the Court of Appeals for the Fifth Circuit has "decline[d] to hold that the [FOIA] creates a lender-borrower privilege," despite the express reference to such a privilege in Exemption 4's legislative history.<sup>572</sup> (For a further discussion of atypical privileges, see Exemption 5, Other Privileges, below.)

### Interrelation with the Trade Secrets Act

Finally, it should be noted that the Trade Secrets Act<sup>573</sup> -- an extraordinarily broadly worded criminal statute -- prohibits the disclosure of much more than simply "trade secret" information and instead prohibits the unauthorized disclosure of all data protected by Exemption 4.<sup>574</sup> (See the discussion of this statute under Exemption 3, Additional Considerations, above.) Indeed, nearly every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be "coextensive."<sup>575</sup> In 1987, the Court of Appeals for the District of Columbia Circuit issued a long-awaited decision which contains an extensive analysis of the argument advanced by several commentators that the scope of the Trade Secrets Act is narrow, extending no more broadly than the scope of its three predecessor statutes.<sup>576</sup> The D.C. Circuit rejected that argument and held that the scope of the Trade Secrets Act is "at least co-extensive with that of Exemption 4."<sup>577</sup> Thus, the court held that if information falls within the

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<sup>570</sup> Id.

<sup>571</sup> Id.

<sup>572</sup> Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir. 1985).

<sup>573</sup> 18 U.S.C. § 1905 (2000).

<sup>574</sup> See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987) (noting that the Trade Secrets Act "appears to cover practically any commercial or financial data collected by any federal employee from any source" and that the "comprehensive catalogue of items" listed in the Act "accomplishes essentially the same thing as if it had simply referred to 'all officially collected commercial information' or 'all business and financial data received'" (reverse FOIA suit).

<sup>575</sup> See, e.g., Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (reverse FOIA suit).

<sup>576</sup> CNA, 830 F.2d at 1144-52.

<sup>577</sup> Id. at 1151; accord McDonnell Douglas Corp. v. U.S. Dep't of the Air

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scope of Exemption 4, it also falls within the scope of the Trade Secrets Act.<sup>578</sup>

The Trade Secrets Act, however, does not preclude disclosure of information "otherwise protected" by that statute, if the disclosure is "authorized by law."<sup>579</sup> (For a further discussion of this point, see "Reverse" FOIA, below.) For that reason, the D.C. Circuit has concluded that it need not "attempt to define the outer limits" of the Trade Secrets Act -- i.e., whether information falling outside the scope of Exemption 4 was nonetheless still within the scope of the Trade Secrets Act -- because the FOIA itself would provide authorization for release of any information falling outside the scope of an exemption.<sup>580</sup>

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<sup>577</sup>(...continued)

Force, 375 F.3d 1182, 1185-86 (D.C. Cir. 2004) (quoting CNA) (reverse FOIA suit), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (citing CNA and declaring: "[W]e have held that information falling within Exemption 4 of FOIA also comes within the Trade Secrets Act.") (non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000)); Canadian Commercial Corp. v. Dep't of the Air Force, 442 F. Supp. 2d 15, 39 (D.D.C. 2006) (reverse FOIA suit) (appeal pending). But see McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1165 n.2 (D.C. Cir. 1995) (noting in dicta that the court "suppose[s] it is possible that this statement [from CNA] is no longer accurate in light of [the court's] recently more expansive interpretation of the scope of Exemption 4" in Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992)) (non-FOIA case brought under Administrative Procedure Act).

<sup>578</sup> CNA, 830 F.2d at 1151-52; see also McDonnell Douglas, 375 F.3d at 1185-86 (finding that the Trade Secrets Act "effectively prohibits an agency from releasing information subject to [Exemption 4]"); Bartholdi, 114 F.3d at 281 (declaring that when information is shown to be protected by Exemption 4, agencies are generally "precluded from releasing" it due to provisions of Trade Secrets Act); Canadian Commercial, 442 F. Supp. 2d at 39 (declaring that "if information is covered by Exemption 4, it must be withheld because the [Trade Secrets Act] prohibits disclosure"); Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 77 n.5 (D.D.C. 2001) (noting that "[a]lthough FOIA exemptions are normally permissive rather than mandatory, the D.C. Circuit has held that the disclosure of material which is exempted under [Exemption 4 of the FOIA] is prohibited under the Trade Secrets Act").

<sup>579</sup> Bartholdi, 114 F.3d at 281 (quoting Trade Secrets Act).

<sup>580</sup> CNA, 830 F.2d at 1152 n.139; see also Chrysler Corp. v. Brown, 441 U.S. 281, 318-19 & n.49 (1979) (noting in dicta that "there is a theoretical possibility that material might be outside Exemption 4 yet within the [Trade Secrets Act]," but acknowledging that "that possibility is at most of

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The practical effect of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise-exempt material, because to do so in violation of the Trade Secrets Act would not only be a criminal offense, it would also constitute "a serious abuse of agency discretion" redressable through a reverse FOIA suit.<sup>581</sup> Thus, in the absence of a statute or properly promulgated regulation giving the agency authority to release the information -- which would remove the disclosure prohibition of the Trade Secrets Act -- a determination by an agency that information falls within Exemption 4 is "tantamount" to a decision that it cannot be released.<sup>582</sup>

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Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>1</sup> The courts have construed this somewhat opaque language, with its sometimes confusing threshold requirement,<sup>2</sup> to "exempt those documents, and only those documents that are normally privileged in the civil discovery context."<sup>3</sup>

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<sup>580</sup>(...continued)

limited practical significance"); Frazer v. U.S. Forest Serv., 97 F.3d 367, 373 (9th Cir. 1996) (holding that because requested document was "not protected from disclosure under Exemption 4," it also was "not exempt from disclosure under the Trade Secrets Act") (reverse FOIA suit).

<sup>581</sup> Nat'l Org. for Women v. Soc. Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord McDonnell Douglas, 57 F.3d at 1164 (holding that the Trade Secrets Act "can be relied upon in challenging agency action that violates its terms as 'contrary to law' within the meaning of the Administrative Procedure Act"); Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975) (reverse FOIA suit); see also FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4") (advising that the Trade Secrets Act is "a potent barrier to the disclosure of any information that falls within the protection of Exemption 4").

<sup>582</sup> CNA, 830 F.2d at 1144.

<sup>1</sup> 5 U.S.C. § 552(b)(5) (2000 & Supp. IV 2004).

<sup>2</sup> See, e.g., U.S. Dep't of Justice v. Julian, 486 U.S. 1, 19 n.1 (Scalia, J., dissenting on a point not reached by the majority) (discussing the "most natural reading" of the threshold and the "problem[s]" inherent in reading it in that way).

<sup>3</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819

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