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HOMELAND DEFENSE: SECRECY OR SECURITY?

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"A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operations. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."

U.S. Senate Judiciary Committee (1965)

INTRODUCTION[1]

In passing the Freedom of Information Act (FOIA) in 1966, Congress wrestled with the opposing principles of governmental transparency and the legitimate need for occasional secrecy.

"It is not an easy task to balance the opposing interests, but it's not an impossible one either," the Senate Judiciary Committee said in its report on the FOIA.[2] The report continued:

> It is not necessary to conclude that to protect one of the interests, the other must ... either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances and protects all interests, yet places emphasis on the fullest responsible disclosure.

To achieve that balance, FOIA includes nine exemptions to disclosure.[3] It has been left to the courts to flesh out the boundaries of those exemptions. But, this has not been an easy task, as Judge Edward A. Tamm observed in a 1982 FOIA case. "Few areas of the corpus of federal law have given rise to the need for a greater number of borderline calls than has the application of the exemptions ... contained" in FOIA, he wrote.[4]

In the case of Exemption 4 – which covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential" – the U.S. Court of Appeals for the D.C. Circuit had achieved a favorable interpretation by 1974,

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[2] S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).

[3] See 5 U.S.C. 552(b). The exemptions generally cover: 1) national security 2) internal personnel rules and practices of an agency 3) nondisclosure mandated by another statute 4) trade secrets and commercial or financial information 5) agency memoranda not generally available except through litigation 6) personnel and medical files 7) law enforcement 8) reports regarding regulation or supervision of financial institutions and 9) geological and geophysical information and data, including maps, concerning wells.

[4] *The Washington Post Co. v. U.S. Department of Health and Human Services,* 690 F.2d 252, 270 (D.C. Cir. 1982)(Tamm, J., dissenting).

when it decided *National Parks and Conservation Association v. Morton.*[5] The *National Parks* decision – which established a two-prong test that nicely balanced FOIA's presumption of openness and its recognition of the periodic need for confidentiality – stood as the leading Exemption 4 case for nearly two decades.

But in its 1992 decision in *Critical Mass Energy Project v. Nuclear Regulatory Commission* (known as *Critical Mass III* because of its judicial history), the D.C. Circuit made a wrongheaded decision to alter the *National Parks* test – lowering the withholding threshold for voluntarily submitted information.[6]

Now Congress may compound the problem in its understandable zeal to thwart any terrorist attacks like those suffered on Sept. 11. As of the writing of this report, lawmakers were considering a plan to codify the *Critical Mass III* test into statute as part of legislation to establish a Department of Homeland Security. The effort is part of a plan to protect the nation's "critical infrastructure," which refers broadly to all sorts of basic services like telecommunications and water treatment.

Proponents of the move say that, in order for the government to help safeguard the nation's nerve center, officials needs to know where the system is most vulnerable to attack. Since the vast majority of these resources are owned and operated by the private sector, President Bush and his congressional allies argue business executives must feel comfortable submitting sensitive critical infrastructure information to the government without fear that the information will get in the wrong hands through FOIA.

Commentators have noted the unlikely scenario of a would-be terrorist "crouched in the mouth of a cave in the wind-swept hills outside Kandahar scribbling in broken

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[5] *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

[6] *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992)[hereinafter *Critical Mass III*].

English a written FOIA request … seeking information about U.S. facilities that store toxic and hazardous materials."[7]

Still, there can be little doubt that – as the U.S. Supreme Court has observed – FOIA can "exacerbate the uneasiness" of individuals or corporations that provide information to the government, causing fears that sensitive material will be released to the public.[8]

Nowhere, perhaps, is that uneasiness greater than when business and government intersect. "A portrayal of every private enterprise of any consequence lies in Governmental files, frequently unassembled like pieces of a picture puzzle," the House Government Operations Committee wrote in 1978 after studying the impact of FOIA on business.[9] The committee added:

> Collection and maintenance of such information is a universal characteristic of Government operations that regulate private industry, license commercial activities, purchase, and sell goods and services and deal in numerous other ways with the Nation's businesses. ...Understandably, firms that submit confidential documents to Federal agencies have expressed concern about their release.

Thus, Congress is wading into complicated waters in the homeland security legislation. On the one hand, there is a justifiable desire to protect the nation from terrorists. And the cooperation of business is undoubtedly needed on this front. On the other hand, there is the principle of openness embodied in FOIA. Up until the *Critical Mass III* decision, FOIA managed the government-business relationship well. Congress will be making a mistake if it codifies this misguided decision into law. A better move would be to recognize the superiority of the *National Parks* test and codify *that* into statutory law.

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[7] Jason Forrester and Stephen Gidiere, *Balancing Homeland Security and Freedom of Information,* 16 Nat. Resources & Env't 139 (Winter 2002).

[8] *Chrysler Corp. v. Brown,* 441 U.S. 281, 285 (1979).

[9] H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 1 (1978).

To put the current debate in context, Part I of this paper will analyze the freedom of information landscape prior to the passage of FOIA, stretching back to the 1946 Administrative Procedure Act (APA). Governmental abuses of the feeble APA illustrate the need for a strong disclosure statute, and embedding *Critical Mass III* into law would do nothing but weaken FOIA. Part II of the paper will discuss the flaws in the *Critical Mass III* decision.

Ultimately, the paper will argue against the need for a critical infrastructure exemption for two reasons. Part III will show that corporations and utilities already have ample protections against governmental disclosure of their secrets. Part IV will demonstrate that there is good reason to be skeptical of a cozy relationship between government and business.

It should be noted at the outset that the Society of Professional Journalists and other media organizations grudgingly support the language that, by and large, would adopt the *Critical Mass III* decision. The language is included in the Senate version of the homeland security bill.[10] The organizations did so only after it became clear that some version of the critical infrastructure protection was likely to pass, and after deciding the scope of the Senate language was narrower than the wording proposed by the Bush administration or the House. The House and Senate still must reconcile their two versions, but it appears the final bill will qualify as what is known as an Exemption 3 statue. That means it is covered by the third FOIA exemption, which says agencies can withhold material if a statute mandates nondisclosure of a specific type of material.

Signing on to such a measure does not please the Society. "No one wants more government records to be exempted from the FOIA, except perhaps those with something to hide," said Robert D. Lystad, a partner at Baker & Hostetler LLP, the Society's First

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[10] See National Homeland Security and Combating Terrorism Act of 2002, S. 2452, 107th Cong. Sec. 195

Amendment counsel.[11] The firm spearheaded a lobbying effort among media groups this summer to limit the types of records that would be exempted by the homeland security legislation.

But, supporting the Senate version is different from applauding the concept. Exempting critical infrastructure information from disclosure could hide potentially serious flaws, said Rebecca Daugherty, director of the FOI Service Center at the Reporters Committee for Freedom of the Press. "One of the best ways to solve a problem is to put a lot of eyes on [it]," Daugherty said. "But if the problem only belongs to industry – or belongs only to industry and government – and other people aren't allowed to see it, then you diminish the number of people who could help you solve that problem."[12]

Therefore, the Society's firm stance – as is argued in this paper – remains that no new FOIA exclusion is needed. Moreover, we believe that if any judicial standard is to be codified into law, it should be *National Parks* instead of *Critical Mass III.*

PART I. BACKGROUND

By the mid-1940s, the growth of the federal bureaucracy had produced a "growing chaos of Government regulation."[13] Taking notice, Congress passed the APA, which was signed in June 1946.[14] One of the most important features of the bill was Section 3, which required agencies to keep the public informed about their operations and

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(2002).

[11] Interview with Robert D. Lystad, partner, Baker & Hostetler, in Washington, D.C. (July 2002).

[12] Telephone interview with Rebecca Daugherty, director, FOI Service Center, Reporters Committee for Freedom of the Press (July 2002).

[13] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 3 (1966).

[14] Section 3 of the Administrative Procedure Act.

procedures.[15] Though clearly intended as a public disclosure statute, its broad exemptions gave agencies ample room to deny access to public information.

For instance, the act allowed the withholding of anything "requiring secrecy in the public interest" or which related "solely to the internal management of an agency."[16] Additionally, it limited dissemination only to people "properly and directly concerned" with the information requested and allowed confidentiality for "good cause."

All those deficiencies led critics to determine APA was not "in any realistic sense" a statute that encouraged disclosure.[17] In its report accompanying the original FOIA legislation, the House Government Operations Committee noted a number of abuses under APA – including a 1961 incident where the Navy withheld telephone directories under the "internal management" clause.[18] The committee also cited a 1959 decision by the Postmaster General that the public was not "properly and directly concerned" in knowing the names and salaries of postal employees.[19] "A government by secrecy benefits no one," the Senate Judiciary Committee concluded in its report on the FOIA legislation.[20] "It injures the people it seeks to serve; it injures its own integrity and operations. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."

Along with this loyalty to the public, though, lawmakers built into FOIA a fealty to the corporate world through Exemption 4.

As explained by both the House Government Operations Committee and the Senate Judiciary Committee, the exemption was to have a wide scope. Among the items

[15] H.R. Rep. No. 1497 at 3.
[16] Section 3 of the Administrative Procedure Act.
[17] H.R. Rep. No. 1497 at 5.
[18] *Id.*
[19] *Id.* at 6.
[20] S. Rep. No. 813, 89th Cong., 1st Sess., 10 (1965).

the Senate Judiciary Committee said it was meant to cover were business sales statistics, inventories, customer lists, and manufacturing processes.[21] To that list, the House Government Operations Committee added negotiation positions or requirements in the case of labor-management mediations.[22] Both committees said the exemption should also cover information customarily subject to doctor-patient, lawyer-client or lender-borrower privileges, with the House panel explaining that the last privilege also covered data submitted in pursuit of a government loan or loan guarantee.[23] Additionally, the House report said the government should be able to honor any promises of confidentiality. Meanwhile, both reports said the exemption covered material "not customarily ... made public by the person from whom it was obtained."[24]

In the years following FOIA's passage, courts set the boundaries of Exemption 4.

In early cases, courts established the "promise of confidentiality" test in which the threshold question was merely if the government had given an express or implied promise not to divulge the information. This approach originated from the language in the 1966 House report on FOIA that discussed the government's need to be able to keep its promises of secrecy.[25] That test was quickly abandoned, according to the 1978 House Government Operations Committee report, since it gave agencies complete discretion in making such promises.[26]

As judicial thinking evolved, courts developed an "expectation of confidentiality" test that based disclosure on the customs of the submitter. If the submitter didn't release the information to the public, according to that reasoning, neither should the

[21] *Id.* at 9.
[22] H.R. Rep. No. 1497 at 10.
[23] *Id.*
[24] S. Rep. No. 813 at 9, H.R. Rep. No. 1497 at 10.
[25] H.R. Rep. No. 95-1382 at 17.
[26] Id.

government.[27] This test also fell into disfavor. As the House Government Operations Committee noted, "The Government's disclosure policy cannot be contingent on the subjective intent of those who submit information."[28]

Thus, the stage was set for the 1974 *National Parks* decision. The case involved a FOIA request for audits, annual statements and other financial information submitted to the National Park Service by national parks concessionaires.

In a decision written by Judge Tamm, the court determined that Exemption 4 had the dual purpose of protecting the interests of both "persons who supply information as well as the agencies which gather it."[29] Summarizing the issue, Tamm concluded that, "Unless persons having the necessary information can be assured that it will remain confidential, they may decline to cooperate with officials, and the ability of the Government to make intelligent, well informed decisions will be impaired."[30] (Ironically, the National Association of Broadcasters was among the organizations pushing for a "trade secrets" exemption in FOIA; the organization – which one would think would want few restrictions given its membership base – was concerned about business information supplied to the Federal Communications Commission.[31])

Thus, the court established a two-part test to evaluate Exemption 4 cases. To justify withholding, the court concluded, an agency would have to prove that release of the information would: (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the

[27] *Id.*
[28] *Id.* at 18.
[29] *Id.* at 770.
[30] *Id.* at 767.
[31] *Id.* at 768.

person from whom the information was obtained.[32]

Having established the new test, Tamm set about applying it to the case at hand.

The case before the court was an appeal of a district court decision allowing the Park Service to withhold the audits and financial statements concessionaires filed with the government. The district court had ruled the information was not customarily released to the public.[33]

With regard to the first part of its new test, known as the "impairment prong," the appeals court reasoned that the government's interest would suffer little if the information were made public. Tamm concluded disclosure would not harm the government's ability to collect the information because it was "a mandatory condition of the concessionaire's right to operate in national parks."[34] Thus, the contractor could not withhold the information from the government if it wanted to maintain the contract.

As for the second part of the test, the "competitive harm" prong, Tamm was inclined to side with the National Parks association as well. He found "very compelling" the argument that the contractors would not suffer competitively because they were essentially monopolists "enjoying a statutory preference over other bidders" when the contract was up for renewal.[35] But, the court found that disclosure of the National Park Service contracts could put the concessionaires in a competitive disadvantage in other business dealings. Such a situation would make disclosure improper, and the court remanded the case for a fuller hearing on the "competitive harm" prong.

Upon rehearing the case, the district court found that the concessionaires did face competition and would be harmed by the release of the information sought. On appeal,

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[32] *Id.* at 770.
[33] *Id.*
[34] *Id.*
[35] Id.

the D.C. Circuit partially upheld the lower court decision, agreeing that five of the seven concessionaires in question would be damaged by the release of the financial data. The appeals court reversed the lower court on the other two concessionaires, saying there was not enough evidence that they faced competition.[36]

The *National Parks* decision brought order to the judicial interpretation of Exemption 4, as other circuits adopted the two-prong test. By 1994, seven other circuits had explicitly adopted the *National Parks* test; none had rejected it, according to the decision of the U.S. District Court for the Eastern District of Virginia in *Comdisco, Inc. v. General Services Administration.* [37] It is no surprise that other circuits accepted *National Parks*, given that the two-part test was developed after a detailed review of congressional intent surrounding Exemption 4. Tamm devised a very workable solution that balanced confidentiality with openness. Quite frankly, given the expansive language in the committee reports accompanying FOIA, Tamm came down more on the side of disclosure than perhaps even Congress envisioned. Both the House and Senate committees, after all, said Exemption 4 was supposed to cover information not customarily disclosed by the submitter.

But, 18 years after *National Parks,* the full D.C. Circuit court issued a decision modifying this leading Exemption 4 decision. The modification came in *Critical Mass III.*

At issue in *Critical Mass III* were safety reports generated by the Institute for Nuclear Power Operations (INPO), a nonprofit corporation comprised of utility companies that operated or constructed U.S. nuclear plants.[38] Formed after the 1979 Three Mile Island accident, INPO focused on improving the safety and reliability of the

[36] *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976).
[37] *Comdisco, Inc. v. General Services Administration*, 864 F. Supp. 510, 515 n.3 (E.D. Va. 1994).
[38] *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 931 F.2d 941[hereinafter *Critical Mass*

nuclear power industry.[39] INPO compiled safety reports – candid assessments of operations – through the Significant Event Evaluation and Information Network (SEE-IN). The reports were distributed to a number of participants, including the NRC, under an agreement that they not be disseminated without INPO's consent.

In 1984, Critical Mass Energy Project submitted a FOIA request to the NRC seeking the SEE-IN reports. The NRC denied the request, citing Exemption 4, and the project challenged that decision in district court. The case bounced back and forth between the circuit and district court levels for years. In the end, the major unanswered question became whether disclosure would diminish the quality of information being provided to the regulatory commission. In *Critical Mass II*, a three-judge panel of the appeals court ordered the district court to take testimony from "working-level employees" to determine how important the promise of confidentiality was in their willingness to speak with INPO workers, but the full court vacated that ruling.

In *Critical Mass III,* the full court observed "when information is obtained under duress, the Government's interest is in ensuring it's continued reliability; when that information is volunteered, the Government's interest is in ensuring its continued availability."[40]

This thinking is embodied in the two-part test established in *National Parks*. Yet instead of recognizing – as it had in the past – that the compelled or voluntary nature of the submission was inherent in the *National Parks* "impairment prong," the appeals court in *Critical Mass III* set out a categorical rule regarding voluntarily submitted business information. In those cases, the court ruled, it would return to the "expectation of

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[39] *Id.*

[40] *Critical Mass III,* 975 F.2d 878.

confidentiality" test that was rejected by *National Parks*. In the case of voluntarily submitted data, the court said, an agency could reject a FOIA request simply if the information was not customarily made public by the submitter.[41] Based on that line of reasoning, the court concluded that the INPO reports were confidential within the meaning of Exemption 4.

PART II. *CRITICAL MASS III* PROBLEMS

But returning to the "expectation of confidentiality" standard for voluntarily submitted data brings with it a host of problems – problems that Congress would ingrain in legislative language if it included the *Critical Mass III* reasoning in the final homeland security legislation.

Perhaps most importantly, the flawed *Critical Mass III* reasoning allows submitters to dictate government disclosure policies. As Judge Ruth Bader Ginsburg wrote in the dissent on *Critical Mass III,* the backpedaling removes the "independent judicial check on the reasonableness" of the provider's custom of withholding the information from the public.[42]

Since corporations are hardly bastions of openness, it is bad policy to allow them to dictate the government's disclosure policy. As one commentator put it, "Virtually unlimited deference to corporate interests seems the order of the day, as the courts appear content to trust business when it labels a record 'confidential.'"[43]

One can also argue that the *National Parks* impairment prong is aimed *specifically at* voluntarily submitted information, further reducing any need for a *Critical Mass III* standard. Ginsburg made this point in her dissent. She noted that Tamm, in his *National Parks* decision, had presumed the government's ability to collect the

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[41] *Id.* at 879.
[42] *Id.* at 883.
[43] Charles N. Davis, *A Dangerous Precedent: The Influence of Critical Mass III on Exemption 4 of the*

information from the concessionaires would not be impeded by disclosure because these were required submissions. That statement, she said, implied that the impairment prong had its "principal utility" in cases where information was volunteered.[44]

Allowing these safety reports to remain confidential simply because they were provided to the government voluntarily violated FOIA's fundamental policy of disclosure, Ginsburg also argued. There were no personal privacy issues involved, she noted, nor were any commercial interests at stake. Critical Mass Energy Project, she argued, was merely seeking information that was critical to public safety and would "undoubtedly shed light" on the NRC's regulatory mission.[45]

The flawed *Critical Mass III* test has led to some tortured decisions, including a 1996 ruling by the U.S. District Court for the Eastern District of Missouri.[46] In a decision that the Justice Department said "arguably takes the characterization of 'voluntary' to its outermost reaches," the court held that subpoenaed material qualified as a voluntary submission, given the fact that subpoenas can be challenged.[47]

Some circuits have followed the *Critical Mass III* standard. S*ee Utah v. United States DOI,* 256 F.3d 967, 969 (10th Cir. 2001)("the first step in an Exemption 4 analysis is determining whether the information submitted … was given voluntarily or involuntarily.") Others have merely acknowledged it while finding it irrelevant to a particular case. *See Frazee v. United States Forest Service,* 97 F.3d 367, 371 (9th Cir. 1996)(*Critical Mass III* standard need not be considered because the submission was required by the Forest Service). Yet the decision has not been embraced like *National*

Federal Freedom of Information Act, 5 Comm. L. & Pol'y 183, 202 (Spring 2000).

[44] *Critical Mass III,* 975 F.2d 883-884.

[45] *Id.* at 885.

[46] *McDonnell Douglas Corp. v. EEOC,* 922 F. Supp. 235 (E.D. Mo. 1996).

[47] U.S. JUSTICE DEPT, FREEDOM OF INFORMATION ACT GUIDE, at http://www.usdoj.gov/oip/exemption4.htm, n. 117 [hereinafter *FOIA Guide*].

Parks – another reason Congress should not adopt the test as lawmakers attempt to protect critical infrastructure information.

The harshest criticism of *Critical Mass III* came in *Comdisco*, where the court found "no sound reason" for the categorical distinction between voluntarily submitted and compelled information.[48] The court argued that the *National Parks* test, which the Fourth Circuit had followed since 1988, took into account how the information was obtained.

Comdisco revolved around pricing information in a contract the government awarded for back up computers to be used in case a disaster knocked out the front line systems. GSA received two FOIA requests for financial information from the contract; the agency determined some of the pricing information was covered by Exemption 4, but that other aspects should be released. The company disagreed with GSA's determination, and the case ended up in court. In *Comdisco,* the court came down on the side of disclosure, saying that the company had not proven that release of the pricing information would cause it competitive harm.

The upshot is that *Critical Mass III* needlessly called into question the longstanding *National Parks* decision, concocting a watered-down test that is overly protective of voluntarily submitted business information. At its heart, the *Critical Mass III* decision is a boon to the business community. It takes FOIA back to the bad old days where the submitter's disclosure policies dictate what the government can and cannot release to the public through FOIA.

PART III. CORPORATE PROTECTIONS

[48] *Comdisco,* 864 F.Supp. 517.

What is most disheartening about the *Critical Mass III* decision – and lawmakers' seeming inclination to want to follow it – is that corporate America does not need the help.

Through favorable court decisions – even in the *National Parks* days – along with a Reagan-era executive order and other protections, the government has ample means at its disposal to protect sensitive business information. (This is not an endorsement of the use of those tools; it is merely an acknowledgement that they exist.) Thus, even in the name of homeland security, bureaucrats certainly should not receive yet another tool to withhold information of vital interest to the public. Adding the critical infrastructure FOIA exclusion would do just that.

Whereas both *National Parks* and *Critical Mass III* embody the concept that officials can withhold information if they feel their future information gathering efforts will be hindered, the D.C. Circuit has left the door open to the idea that a broader, more nebulous interest – that of program effectiveness and efficiency – can also justify withholding under Exemption 4. And courts have taken notice.

In *Public Citizen Health Research Group v. National Institutes of Health*, a case the U.S. District Court for the District of Columbia decided in March, the court rejected an appeal to have NIH release information on royalties it collected on inventions stemming from its work.[49] The court found that, if the royalty information were open to disclosure, the licensing program under which they were negotiated would suffer because private-sector participants might not participate.

The First Circuit used a similar rationale in *9 to 5 Organization for Women Office Workers v. The Board of Governors of the Federal Reserve System*.[50] At issue in the case

[49] *Public Citizen Health Research Group v. National Institutes of Health*, 2002 U.S. Dist. LEXIS 7457.
[50] *9 to 5 Organization for Women Office Worker v. The Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983).

was salary data the Federal Reserve received from the private sector, which was used to help set competitive Federal Reserve salaries. The Fed had argued that if it were forced to release this information, it would be expelled from the salary survey group in which it participated.

The U.S. District Court for the District of Massachusetts ruled that while the information was helpful to the Federal Reserve, it was not necessary for the bank to carry out its central role mission.[51] In ruling that the information should be disclosed, the district court noted that 8 of 12 Federal Reserve Banks established salaries without the use of the private sector data. The appeals court, however, determined that the lower court had taken a restrictive view of what constituted important – and therefore protected – information. Even though this salary data had virtually nothing to do with the Fed's main economic functions, the court found the salary data served "a valuable purpose" and aided the central bank in the "effective execution of its statutory responsibilities."[52]

The message, then, is that any shred of business information that helps an agency carry out any of its vast functions qualifies for protection under Exemption 4. This is a far cry from the original congressional debate about Exemption 4, which focused on sensitive submissions that the government used for important purposes, such as producing economic reports. The salary data in question in *9 to 5* certainly wasn't critical to the Fed's operation; the board could have set salaries without the information.

The U.S. District Court for the Southern District of New York has recognized the perils of a so-called program effectiveness prong, noting the "danger that a formulation as loose as 'program effectiveness' might cause the confidentiality exemption to devour the rule of broad disclosure."[53]

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[51] *Id.* at 6.
[52] *Id.* at 11.
[53] *Jerrold Nadler v. Federal Deposit Insurance Corp.*, 899 F. Supp. 158, 162 (S.D. N.Y. 1995).

Nevertheless, in *Jerrold Nadler v. Federal Deposit Insurance Corp.*, the court came down on the side of the FDIC, ruling that the insurance corporation was within its rights under Exemption 4 to withhold details of a development agreement calling for construction of a 21-story New York City hotel. The FDIC became a party to the agreement after it was appointed the receiver of a failed bank, which had entered into the business deal through a wholly owned subsidiary. The court found that disclosing the details of the deal would hurt the FDIC's receivership program by tipping off competitors and "hurt the venture's prospects of success and … reduce returns to the FDIC."[54]

Again, as in *9 to 5,* the issue was not merely if the government could continue to collect necessary information. In *Nadler*, the court said all an agency had to do to invoke Exemption 4 was to claim some potential injury to a program.

Thus, FOIA court decisions have given agencies ample authority to shield from the public the business information it collects. But FOIA is far from the only protection businesses can depend upon to protect information they provide to the government.

For instance, a 1987 executive order requires agencies to notify a business that it is considering the release of potentially confidential information through FOIA.[55] Additionally, the order requires that agencies give businesses time to object to the disclosure, and agencies must explain in writing any decision to release documents over the submitter's objections.

In addition, there are dozens of statutes that exempt specific types of information from release.

In fact, in its 1966 report on the original FOIA legislation, the House Government Operations Committee said there were nearly 100 statutes or parts of statutes

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[54] *Id.* at 162.

[55] Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987).

that restricted public access to specific government records.[56] That was nearly 40 years ago, and given the inclination of legislative bodies to pass new laws while keeping old ones on the books, it seems fair to assume there are many more secrecy statutes in place now than there were in 1966.

Indeed, a 1996 defense bill severely restricts the availability of bid proposals – even ones that are eventually accepted – submitted to government agencies.[57] Additionally, the Federal Transfer and Technology Act prohibits disclosure of business information about partnerships the government enters into to encourage the development of new technology.[58]

Yet it is the Trade Secrets Act – which has a history dating back to 1864 – that arguably affords the greatest government protection to business data.[59] That is because the act makes it a crime to divulge information covered by this "extraordinarily broadly worded" statute, as the U.S. Justice Department describes it.[60] The Court of Appeals for the D.C. Circuit, ruling in a 1987 FOIA case, said the Trade Secrets Act appeared to "cover practically any commercial or financial data collected by any federal employee from any source."[61]

Therefore, given all these statutory protections already in place, does Congress really need to tamper with the FOIA to keep business information safe? Hardly.

PART IV. BUSINESS-GOVERNMENT RELATIONS

[56] H.R. Rep. No. 1497 at 10.
[57] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, Sec. 821, 110 Stat. 2422.
[58] 15 U.S.C. Sec. 3710a(c)(7)(A).
[59] 18 U.S.C. Sec. 1905 (2000).
[60] FOIA GUIDE at 28.
[61] *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1140 (D.C. Cir. 1987). See 18 U.S.C. Sec. 1905, which says, in part, government officials cannot divulge "the trade secrets, processes, operations, style of work, or … confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." Violators of the law can be fined and imprisoned for up to one year.

Both business executives and government officials say the FOIA limitation under discussion is needed to encourage complete candor on the part of the private sector. In other words, the legislation is intended to solidify a partnership between government and business, and there is good reason to worry about such a cozy relationship.

Exhibit A is *Center for Public Integrity v. Department of Energy*.[62] In this case, the government watchdog group had to sue to obtain basic information about the sale of a federal petroleum reserve to Occidental Petroleum Corp. The largest privatization in U.S. history, the price tag of the October 1997 sale was $3.65 billion.[63]

The Center was suspicious of the sale, since it came as an outgrowth of Vice President Gore's high-profile "Reinventing Government" initiative to streamline the federal bureaucracy. The longstanding ties of Gore and his father, former U.S. Sen. Albert Gore Sr., to Occidental piqued the interest of the Center, which wondered if the government gave the oil company a sweetheart deal.[64]

The Center filed a FOIA request in January 2000, seeking the names of all organizations that bid on the oil reserve and the amounts of those bids. DOE denied the request, relying in part on Exemption 4. Releasing the bidders' identities, DOE argued, would reveal competitive information about the bidders' business strategy, such as their intent to add to their reserves. In addition, the department argued bid amounts could help competitors determine certain other sensitive cost assumptions built into the bid. Saying DOE's assertions were not "supported by logic or the evidence," the district court on March 25 ordered DOE to release the names and the bids.

The Center has not alleged any official wrongdoing in regard to the sale, but it has raised questions about whether the government got as much as it should have for the oil

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[62] *Center for Public Integrity v. Department of Energy*, 191 F. Supp. 2d 187 (D.C. 2002).
[63] *Id.* at 190.
[64] *See* Josey Ballenger, Nathaniel Heller, and Knut Royce, *Did Taxpayers Lose on Deal For Oil Field?*, at

field. Center investigators uncovered a 1997 DOE study that concluded the field was worth as much as $6.64 billion, and they also noted that one assistant energy secretary recommended that the government maintain control of the field.

The point here is not to indict the former vice president or the DOE, but the case does raise a cloud of suspicion that a government agency was stonewalling a basic FOIA request to hide favorable treatment to a corporation. If this is what government/business cooperation looks like, it does not look good. Should a public interest group really have to go to court to obtain such basic procurement information as the names of bidders and the amounts of those bids?

The Center was not coming out of left field. The 1978 House Government Operations Committee report singled out contracting as a specific governmental function that FOIA rightly helps the public monitor. The committee noted that, during its review of Exemption 4, a company involved with the federal procurement process had urged openness to combat fraud, corruption or just plain errors. "The availability of information under FOIA," the committee noted, "was viewed as a way of policing the awarding of Government contracts."[65]

Another problem with a buddy-buddy relationship between government and business is that bureaucrats have a tendency to abrogate their regulatory responsibilities.

Courts have noted "the temptation of government and business officials to follow the path of least resistance and say 'confidential' whenever they seek to satisfy the government's vast information needs."[66]

The *Critical Mass III* case is instructive in this regard. The NRC certainly had

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http://www.public-i.org/dtaweb.

[65] H.R. Rep. No. 95-1382 at 10.

[66] *9 to 5 Organization for Women*, 721 F.2d 38.

every right to require the submission of these safety reports; yet it took the path of least resistance by accepting them voluntarily on the promise that they would not be released to the public.

In *Critical Mass II,* the NRC went so far as to argue that it needed to continue gathering these reports voluntarily because the only other alternative was a burdensome subpoena process. The district court bought that line of reasoning, but the appeals court did not – finding that the commission could require the information through "far less burdensome" regulatory processes.[67]

Ultimately, a close relationship between executives and regulators not only obscures business information, but it also throws a cloak of secrecy around government actions.

As the Government Operations Committee said in 1978:

> Information supplied to Government agencies by regulated industries can reveal what the regulators are doing and how well they are doing it. Information received from contractors or builders shows what the Government is purchasing, what it costs, and how the procurement process functions. … While this and other information about the interrelationships between business and Government is revealing about business activities, it is also revealing about Government activities and therefore of legitimate public interest.[68]

CONCLUSION

Thus, there is clearly no need for the type of FOIA critical infrastructure exclusion under consideration in the homeland security bills. As has been shown, the public needs a strong disclosure statute to ensure the dissemination of important information. The experience with the APA shows what can happen when a toothless sunshine law governs federal bureaucrats. Remember that under APA government officials withheld such basic information as a telephone directory and the salaries of

[67] *Critical Mass II,* 931 F.2d 944.
[68] H.R. Rep. No. 95-1382 at 9.

postal employees. FOIA was enacted to counteract such foolishness, but its effectiveness is limited every time a statute is enacted to put certain information outside the purview of the law.

Keep in mind as well the predilection of government officials to take the path of least resistance in dealing with businesses. Rather than use the regulatory stick to gather information, bureaucrats often prefer cooperative agreements sealed with a promise of confidentiality. That's exactly the road Congress is marching down now, and it is a dead end as far as public information is concerned.

It is not as if FOIA does not already have ample withholding provisions, including the nine exemptions. In the case of business information, lawmakers crafted a broad "trade secrets" exemption. Not only is the wording vague, but the committee reports that accompanied the new law in the mid-1960s made it clear that Congress envisioned a very far-ranging exemption, covering everything from labor negotiations to manufacturing processes.

Taking their cue from such language, courts have ruled favorably for business. Don't forget that in neither of the benchmark Exemption 4 cases, *National Parks* or *Critical Mass III,* did the D.C. Circuit rule in favor of releasing the information. In *National Parks,* the court remanded for further hearings on whether audits and financial statements of concessionaires should be open to the public (and then mostly upheld the district court when it again decided the information should not be released). In *Critical Mass III*, the wrongheaded decision that now lets businesses themselves dictate what the government can disclose, the court ruled that safety reports from nuclear energy facilities were off limits to taxpayers.

The issue of program effectiveness is also an important one that is often overlooked. Discussion of Exemption 4 cases often centers on the two-prong test set out

in *National Parks* and its weakening in *Critical Mass III.* Those tests are stringent enough, but cases such as *Public Citizen Health Research Group* and *9 to 5 Organization for Women* are just as detrimental to the public's right to know as is the *Critical Mass III* decision. These cases say that all an agency needs to do is show some infringement on the efficient operation of a program to justify withholding under Exemption 4. This is a much broader test than having to prove that certain information-collection activities will be impaired.

And again, it is not as if businesses need this kid-glove treatment through FOIA.

The Trade Secrets Act – one of dozens of information-withholding statutes on the books – makes it a *criminal act* to release sensitive business information. It is worth repeating the conclusion of the D.C. Circuit that the Trade Secrets Act seems to "cover practically any commercial or financial data collected by any federal employee from any source."

For all these reasons, the critical infrastructure proposals are a bad idea. From all appearances, it might be too late to stop something from making it onto to the books. That's too bad.