

FOIA and Business Decisions

U.S.'s Freedom of Information Act is well intentioned, but the effect on business can be damaging; it should be amended

BY LEE G. MEYER*

Every business enterprise in the U.S. is required, as part of doing business, to file certain information with various agencies of federal, state and local governments. This information may range from income tax returns to building plans. Although the requested and/or required information is probably, in large measure, necessary for the particular governmental agency to carry out its regulatory or license mandate, this collecting of data permits vast amounts of sensitive information to be amassed under the control of a few.

16 Historically, governmental entities have been able to exercise a great deal of power by controlling the use and dissemination of not only their own internally generated information but also that which is supplied to them by the private sector. Because of this power, big government, and more particularly big federal government, has been suspect and even feared by the public. Many agencies have been arbitrary, biased and self-serving in determining who should have access to what information. Governmental officials have used the cloak of their offices to hide questionable dealings. Federal agencies have been known to vie for political power by using and even trading "secret" information.

In order to counter the public fear and mistrust of government and government dealings and to diminish agency power, various groups proposed "sunshine" laws to bring the workings of the government into the light of day. The idea behind such laws was to bring the actions of government agencies and officials under the scrutiny of the public eye by creating an openness in government.

Although open government and a free flow of government information allows the public to evaluate governmental performance, it also allows business entities, competitors and the like a means for acquiring valuable business data. While the data held by a single agency regarding any particular enterprise may not, by itself, be harmful if disclosed to a competitor, the disclosure of the cumulative information regarding that enterprise held by all government agencies reveals an accurate picture of the business and may

well disclose certain business secrets of the enterprise.

The genesis of the concept of open government, from which emerged the Freedom of Information Act was various state and federal legislative attempts to thwart the perceived secrecy in government and governmental agencies. The immediate precursor to FOIA was Section 3 of the Administrative Procedure Act (APA).¹ However, Congress felt that, even under Section 3 of the APA, government agencies still had too much control over information generated internally, as well as that supplied to government by the private sector. When Congress enacted the Freedom of Information Act, a principal aim was to eliminate broad agency discretion in withholding documents and in determining those who should have access to agency information.

The Freedom of Information Act (FOIA)² was signed into law on July 4, 1966, and became effective a year later on July 4, 1967. It has been amended twice.³ New amendments and legislation are now pending before Congress.⁴ As presently enacted, FOIA is intended to make available to a requester any agency information that can reasonably be identified. The FOIA provides that, subject to nine specific exemptions, each agency shall make available to any person, on request, all "agency records." The requester need not state any reason or cause for requesting the information.

The FOIA has been the basis of a great deal of litigation, including the so-called "reverse FOIA" causes which have been significantly influenced by the Supreme Court decision in *Chrysler Corporation v. Brown*.⁵ In order to understand the Court's interpretation of the FOIA and the impact of the *Chrysler* decision on business and business decisions, it is necessary to review the purpose of the FOIA and the scope of the act as interpreted by the courts.

Scope of FOIA

Agency Records

In order to be subject to disclosure under FOIA the information or data sought must be an "agency record". While the term "agency record" is not specifically defined in the act, the term "agency" is. An "agency" is defined very broadly to include "any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency."⁶ The term "government corporation" includes a corporation that is a wholly government-owned enterprise,

*General and Patent Counsel for Donn, Inc., Cleveland, OH.

established by Congress through statute, such as the St. Lawrence Seaway Development Corporation, the Federal Crop Insurance Corporation (FCIC), the Tennessee Valley Authority (TVA), and the Inter-American Foundation. The term "government-controlled corporation" includes a corporation which is not owned by the federal government but which performs governmental functions and controls information of interest to the public, such as the National Railroad Passenger Corporation (Amtrak) and the Corporation for Public Broadcasting (CPB).

Requested material does not, however, fall within the FOIA if it is not in the form of a "record". Although the legislative history suggests that Congress intended that the information be in the form of a "record" already formed and that agencies not be forced to create files, Congress did not specify what physical characteristics a "record" should have. Most materials requested under the FOIA are documents written on paper, undoubtedly falling within a common sense definition of a "record". The courts have held that such modern means of storing information on films, tape recordings and computer output are also "records", but at least one court has held that physical objects are outside the scope of the act (the rifle used to assassinate President Kennedy).

"Agency Record"

As a general rule, one can be fairly well assured that when an agency obtains access to information, that information will become an "agency record". The reason for which the information was originally disclosed to the agency and the method by which the agency obtained the information are generally not determinative although circumstances attending the document's generation, as well as reasons for the agency's acquiring the information, have been considered by some courts. Conflict in these court opinions has created some confusion and uncertainty about the requisites for determining what is an "agency record". As a general matter, however, mere agency possession will be sufficient to raise a rebuttable presumption that the record is an agency record. This is particularly true where the information is generated by the agency itself.

The FOIA, as amended, is intended to allow access to agency records. It, therefore, will be a difficult, uphill battle for any agency to refuse the release of information predicated on the defense that the information is not an "agency record".

Agency Obligation

Section (a) (1) of the FOIA requires each agency to publish certain specific information regarding its organization and procedures in the *Federal Register*. The specific information is enumerated in Section (a) (1)A through (a) (1)E. For example, Category A requires each agency to publish procedures for implementing the FOIA. Category B provides for regularity in agency proceedings. C requires publication of all rules of general agency procedures, while D requires publication of substantive rules, policy statements and interpretations of general applicability which have been adopted by the agency. Finally, Category E

requires publication of amendments, revisions, or repeals of any of the above.

Section (a) (2) requires that certain agency materials be publicly available but does not require publication. Included in this section are:

1. Final opinions made in the adjudication of cases.
2. Statements of policy and interpretations which have been adopted by the agency but not published in the Federal Register.
3. Agency staff manuals and formal instructions to staff members which have an effect on a member of the public.

Section (a) (3) provides that, "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (a) reasonably describe such records and (b) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person."

PERSONS ENTITLED TO INFORMATION

It is important to note that "person" is defined broadly to include "an individual, partnership, corporation, association, or public or private organization other than an agency."⁸ The courts have even construed it to include a foreign government.⁹ The requester of records under Section (a) (3) is not required to show need for the information requested. However, some agencies, such as the Securities and Exchange Commission, will routinely suggest that the requester submit an explanation of special need to assist it in determining whether records which might otherwise be withheld should nevertheless be disclosed.

Exemptions from Disclosure

Under FOIA all agency records are statutorily presumed available to any person who requests them. However, Congress provided that certain categories of information are to be exempt from disclosure. Hence, Section (b) limits the scope of the disclosures otherwise required by Section (a). Nine exemptions are enumerated. They include agency records which are

- (1) Authorized by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order;
- (2) Related solely to the internal personnel rules and practices of an agency;
- (3) Specifically exempt from disclosure by statute (other than Section 552 (b) of this title), provided that such statute
 - (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
 - (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (a) interfere with enforcement proceedings, (b) deprive a person of a right to a fair trial or an impartial adjudication, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (e) disclose investigative techniques and procedures, or (f) endanger the life or physical safety of law enforcement personnel;

(8) Contained in or related to examination, operating, or the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

Of the nine exemptions, the third and fourth are of special interest to most business organizations. The (b) (3) exemption has been strictly interpreted by the courts to embrace only those statutes incorporating a congressional mandate of confidentiality that, however general, is "absolute and without exception."

A statute, in order to qualify as a Section (b) (3) exemption, must meet one of the two separate and distinct tests. While the courts have recognized that Section (b) (3) does permit some discretion by the agency, the courts perceive that its unmistakable thrust, like the mandatory disclosure requirements of Section (a), is to assure that disclosure and exemption policy decisions are made by the legislative rather than the executive branch. "Nondisclosure is countenanced by Subsection (b) if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw."¹⁰ An example of such a statute is the 1976 amendment to the Internal Revenue Code which specifically exempted disclosure of information concerning a particular taxpayer's tax return, especially IRS private letter rulings.

The "trade secrets" exemption (Section (b) (4)) applies only to trade secrets, or to information which is

- (1) Commercial or financial
- (2) Obtained from a person, and
- (3) Privileged or confidential.

Since the courts have tended to construe the exemptions very narrowly, the most commonly used definition of "trade secrets" for FOIA purposes is:

"An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities."¹¹

It should be noted that this judicial definition is much narrower than that contained in the Restatement of Torts. There is question as to whether the more narrow court interpretation embraces sensitive business information or other information which is unrelated to trade commodities.

Information other than trade secrets does not fall within the preview of the Section (b) (4) exemption unless it satisfies all three requirements. The agency may determine what is "privileged or confidential commercial information" by using a "competitive

harm test" comprised of two steps. First, commercial or financial matter is "confidential" for purpose of the exemption if disclosure of the information would be likely to have either of the following effects:

- (A) To impair the government's ability to obtain necessary information in the future; or
- (B) To cause substantial harm to the competitive position of the person from whom the information was obtained.¹²

Second, substantial harm must be shown by affirmatively demonstrating that:

- (A) The persons from whom documents were obtained by the government *actually face competition*, and
- (B) *Substantial competitive injury to the submitter will likely result from disclosure (although no actual adverse effect on competition need be shown).*¹³

Disclosure Procedures

Within 10 working days of receiving a request for agency records, the agency must respond indicating whether the agency is willing to disclose the requested documents. If the agency chooses not to disclose, it must provide its reasons and explain to the requester that he has the right of appeal. The agency must make its appellate decisions within 20 working days after receipt of an appeal. If an appeal is denied, the appellant's right of judicial review must be outlined. The agency must act within the given time limits unless it is able to point to one of three "unusual circumstances":

- (A) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (B) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (C) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

Once an agency has made a decision to comply with a request for disclosure, the agency is required to make the information "promptly" available. Because the FOIA necessarily focuses upon the speedy release of information to the public, it is silent on the rights of persons other than requesters of information. Businesses which submit information to government agencies should note that the FOIA does not require an agency to notify a submitter that a request for information which the submitter has turned over to the agency has been made. In fact, the strict 10-day deadline within which the agency must respond to an FOIA request can make notification difficult. Some agencies have promulgated regulations providing for notification of a submitter, but the practice is usually informal and is by no means universal.

REVERSE FOIA LAWSUIT

While the purpose of the FOIA is to assure public access to government records, Congress recognized that certain categories and types of information should be exempt from the mandatory disclosure provisions of the Act.¹⁴ Ironically, Congress provided re-

questers of information with a cause of action to compel disclosure¹⁵ but made no explicit provision for a comparable cause of action for submitters of information who wished to prevent the release of its data by the agency.

Submitter's recourse

There being no statutory provision allowing a submitter to prevent release of an agency record, the submitter must resort to the courts. The success of any reverse-FOIA suit depends on meeting two requisites. The first is that the information sought to be protected falls within one of the exemptions of the act.¹⁶ The second is that the submitter has standing to invoke the protection of the exemption.

As a first step the information sought to be protected must be evaluated against the language and provisions of the act itself. Certain classes of information must be published in the Federal Register¹⁷ or made available for public inspection even in the absence of a specific request.¹⁸ As to this type of information the submitter apparently has no recourse. All other "agency records" are subject to the broad disclosure provisions when disclosure is requested. The only information which is able to be excluded from mandatory disclosure upon request is that which specifically falls within one of the nine exemptions.

Submitter's standing

In order for a submitter to prevent the disclosure of his information, a private right or cause of action must be shown. In this regard, three theories have been advanced.

The first relies on the statutory language and is predicated upon the argument that Congress intended the nine specific exemptions to be nondiscretionary, mandatory nondisclosure provisions. Thus, a submitter could compel the agency to comply with the mandatory nondisclosure provisions of the statute, leaving the agency no discretion in the matter.

The second theory is predicated upon a reliance on statutory authority other than the FOIA. Under this theory the submitter contends that various statutes, other than the FOIA, provide a cause of action to enjoin the agency from disclosing. Such statutes would impliedly take precedence over the mandatory disclosure provisions of the FOIA.

The third theory relies on the Administrative Procedure Act¹⁹ which explicitly provides for judicial review for "persons suffering legal wrong because of agency action or adversely affected or aggrieved by agency action".

*Chrysler Litigation*²⁰

The Chrysler litigation is an excellent example of the various theories upon which submitters have sought to bar the release of information requested under the FOIA. Chrysler, as a government contractor had complied with Executive Orders 11246 and 11375 requiring that corporations benefiting from government contract establish affirmative action programs and file reports regarding such programs as well as the general composition of their work force. When the government agency to which Chrysler reported informed the company that the company's reports would

be disclosed to a third party in accordance with a request, Chrysler filed suit in federal district court to enjoin release of the documents.

Chrysler challenged the disclosure under the FOIA, the Trade Secrets Act,²¹ the judicial review section of the Administrative Procedures Act,²² the Civil Rights Act, 42 U.S.C. Section (e)-8 (e) (1976), and the Federal Reports Act of 1942, 44 U.S.C. Section 3508 (1976). Chrysler claimed that the disclosure was unlawful under the Civil Rights Act, and the Federal Report Act, but these sections were held inapplicable by the circuit court and were not raised before the Supreme Court. First, it claimed that disclosure was in violation of the FOIA itself. Second, it asserted that the Trade Secrets Act barred release of the materials. Finally, it claimed that disclosure of the documents would constitute an abuse of discretion, in violation of the APA.

FOIA — MANDATORY v. PERMISSIVE EXEMPTION

This basis for reverse-FOIA suits was predicated on the wording of the statute itself. The argument was made that, since Congress specifically intended to protect certain information from disclosure, the submitter was the one for whom the cloak of confidentiality was mandated. The interests of the submitter (as a member of the class the statute was intended to protect) could not be adequately protected in accordance with the terms of the statute unless the FOIA exemptions were mandatory. Thus, Chrysler argued, that agencies were not just permitted to withhold agency records containing information that fell within an exemption, they were required to do so.

A unanimous Supreme Court held that Congress did not design the FOIA exemptions to be mandatory bars to disclosure which would limit agency discretion. The Court stated that while there was sentiment that government agencies should have the latitude to afford the confidentiality desired by those submitting records to agencies, the congressional concern was with the agency's need or preference for confidentiality. The FOIA by itself protects the submitter's interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

Therefore, a statutory FOIA exemption does not prevent a governmental agency from disclosing records just because they fall within one of the exemptions of the act; disclosure is discretionary with the agency. Further, since Congress intended to statutorily protect an agency by allowing the agency discretion in disclosing information, a submitter of information, whether the information is within the scope of an exemption or not, has no standing to enjoin agency disclosure of that information.

Trade Secrets Act

This statute imposes criminal sanctions on those who disclose broad categories of certain business information "except as provided by law."²³ While the Trade Secrets Act only provided for criminal sanction, Chrysler contended that an ancillary civil enforcement was available to an aggrieved private party.

March 1981

Chrysler argued that disclosure of statutorily "exempt" records would be divulging information without legal authorization.

This argument was rejected on the grounds that:

- (A) The Court was unwilling to imply a private cause of action under federal criminal statute except in very narrow and demanding circumstances such as civil rights.
- (B) The Court, in order to hold for Chrysler, would have had to assume the exemptions under the FOIA were mandatory, not permissive.

Administrative Procedure Act

Chrysler argued that disclosure would be an abuse of agency discretion in that:

- (A) It conflicted with agency rules.
- (B) It constituted "agency action" within Section 10 (a).
- (C) The adverse consequence of that action would be the alleged harm to Chrysler's competitive position.

The Court concurred in this argument. It decided that a submitter of information could seek judicial review of an agency's disclosure decision under the APA and that Chrysler, in particular, as a party "adversely affected or aggrieved" by the proposed disclosure, could obtain judicial review under Section 10 (a) of the Administrative Procedure Act.

Generally, it can be concluded that accessibility of agency records has been greatly facilitated by the Chrysler decision limiting the submitter's right to enjoin agency disclosure. The Administrative Procedure Act appears to be the only judicially sanctioned legal avenue to thwart the effects of the FOIA.

20 AVOIDING THE EFFECTS OF FOIA

The federal government's amassing of detailed financial and commercial information from individuals and corporations pursuant to its expanding regulatory activity has raised widespread concern about privacy infringement and potential government abuse. It has been apparent from the outset that the FOIA's broad scope and *prima facie* applicability to all records contained in governmental files require corporations (and persons) to exercise extreme caution before providing records. Businesses should consider two courses of action when asked to submit information:

- (A) Limit or avoid disclosure of corporate records.
- (B) Invoke one or more of the nine exemptions at the time of submission, with special attention to those pertaining to privileged and confidential information of the submitter using the "competitive-harm test" as a guideline.

Limiting or avoiding written record disclosure

A business being asked to submit information should consider alternative to providing written records. In some instances, agency personnel may be interested not so much in "records" as in "information." Consideration should be given to whether the information can be conveyed by some other means. Where this is possible, it may be worth suggesting, for example, that the information be provided in informal discussions. Where informal discussions are not a viable alternative, a business might consider permitting agency personnel to inspect or examine company records off the agency premises — that is, at the company. For convenience, certain procedures will need to

be established beforehand, including probably, the understanding that specific documents requested by agency personnel will be provided under clearly delineated circumstances. In certain instances, an agency may be satisfied with temporary possession of corporate documents. Unless otherwise required by law, there is no theoretical reason why an agency must have permanent possession of all corporate submissions. The submitter should ask agency personnel about the possibility of such an arrangement.

Invoking confidentiality

If there is no alternative to submission, the business must consider how to protect its information. No company record should be casually transmitted to a government agency without some thought as to the effect of disclosure in accordance with FOIA. The first step toward protecting confidentiality is a review of the FOIA rules and regulations adopted by the specific agency regarding the confidential status of submitted records. By law these regulations must set forth the exact procedures to be followed by persons wishing to assert an FOIA exemption. They should be followed to the letter. Any clarifications or alternatives given by agency personnel should be carefully logged and noted on the documents at the time they are submitted to the agency. Since the burden will ultimately fall on the submitter, one should be leary of blindly following oral instructions from agency personnel regarding the confidential status of documents.

The second step is to provide records in a form that lends itself to easy identification. The simpler it is for agency staff to identify and segregate the portions alleged to be confidential and exempt under the FOIA the easier to submitter's task of asserting confidentiality will be. While the exact procedures for claiming an exemption may vary among government agencies, one should always claim the exemption concurrently with submitting the information. The information should be accompanied by a document claiming the exemption and generally containing the following:

1. A catalogue of the information being presented with as much detail as necessary to identify the material.
2. A statement of the submitter's understanding of the agency's use of the information. If the information was specifically requested, a statement of the circumstances surrounding the acquiescence to surrendering the information.
3. A statement to the effect that the information submitted is exempt from disclosure under one or more of the nine exemptions.
 - a. This statement should be specific as to the nature of the exemptions(s). If confidentiality is invoked, the statement should include the facts establishing the confidential nature in a manner which will compel the agency to invoke the substantial harm test.
 - b. The statement should include a preemption from disclosure to other than employees of the agency.
 - c. The statement should include reference to all meetings, interviews, memoranda and writings made by such employees which relate directly or indirectly to the documents or the subject matter to which they relate.
 - d. The statement should include reference to meetings, interviews, phone conversations, etc. between representatives of the author of information and the agency, agency employees and

- agency representatives.
- 4. A statement that the submitter is to be:
 - a. Immediately notified of a request by any person (including a government employee who is not an employee of the agency which has the information) for the disclosure of the confidential information.
 - b. Promptly furnished with all written materials pertaining to such request (including the request and any agency determinations with respect to the request).
- 5. A statement to the effect that:
 - a. The information submitted is not to be disclosed to any person who is not an employee of the agency.
 - b. Memos, notes and writings made by employees or members of the agency regarding the information be treated in the same manner as the information.
 - c. Interviews, telephonic communiques and the like by agency member or employees of the agency regarding the information are to be treated in the same manner as the information.
- 6. A statement of the applicable exemptions and any applicable regulations or other laws relating to the protected nature of the submitted material including:
 - a. A request that submitter be allowed to substantiate the grounds for claiming an exemption.
 - b. A request that the material be returned to the submitter if of no further agency
- 7. A statement to the effect that submittal of the information is in no way to be construed as:
 - a. A waiver of any attorney/client privilege.
 - b. An acquiescence that the information is a "public" or "published" document.
 - c. A waiver of the submitter's right to refuse to provide further information.
 - d. A relinquishment of the ownership of the physical documents as well as the information contained therein.
 - e. A relinquishment of the right to refuse to submit further information or request the return of any submitted information
- 8. A statement that the transmittal letter is to be considered confidential.

ENJOINING DISCLOSURE

A notice provision to the submitter when its information had been requested and was about to be disclosed was not included in the statute by Congress. The various agencies, however, have themselves adopted policies regarding notice to submitters. Therefore, a submitter must familiarize himself with the regulations of each agency. Some agencies have policies which require that a submitter be immediately informed when any request is received and that the submitter be invited to substantiate his claim for exemption. Other agencies notify a submitter only after the agency has actually decided to release the requested information. Since, statutorily, an agency has only 10 days in which to comply with a request, after a submitter receives notice, it has little time to act to enjoin disclosure. A submitter must have a procedure for review which will enable it to quickly determine whether to attempt to enjoin disclosure.

There are several factors that should be considered in determining whether to seek judicial relief. First, one should consider the characterization given the information by the agency itself and whether there is any ground for the agency independently invoking

the exemption. In many cases, one can show that it is in the agency's own best interest to consider the material exempt under one of the nine exemptions. Certainly prior statements to the submitter regarding exempt status should be reviewed.

Second, one should consider the nature of the decision to disclose. Is it arbitrary, capricious, an abuse of power or agency discretion or is it otherwise unlawful?

Third, one should consider the property aspects of the information and whether the disclosure is a taking without due process. This argument is probably the strongest in the sensitive business documents or technical trade secrets area.

If one can substantiate a violation of the APA or of the submitter's constitutional rights, the courts may enjoin the release of the material.

INTELLECTUAL PROPERTY RIGHTS

A collateral issue of which one should be aware in dealing with FOIA is that of loss of intellectual property rights. The result of public dissemination of trade secrets is obvious. Not so apparent is the result of submission of matter which is to become the subject matter of a patent. A very important question which has not been litigated is the nature of written records in the hands of agencies which are or may be subject to dissemination under FOIA. If such written records are available to public scrutiny, they may be deemed published in accordance with the definition of that term in the patent law.

In this country (and in Canada) a person filing an application is given a grace period in which to file after publication. In most countries of the world, however, there is no such period. A publication anywhere will be deemed sufficient to bar issue of a patent.

In this respect, the submitter should be particularly careful to invoke every conceivable method or means for maintaining the confidential nature of any information which is to be or conceivably could be interpreted to be associated with subject matter upon which patent applications are to be filed.

CONCLUSION

As Abraham Lincoln said, this is a government "of the people, by the people and for the people". In order to maintain a "people"-oriented government, legislation such as the Freedom of Information Act is necessary. Incidents such as Watergate have shown that the ability to shroud in secrecy and cover up governmental acts leads to corruption. But the rights of the many to an open and honest government must be balanced against our inherent constitutional right not to be deprived without due process. It makes no sense on the one hand for the Department of Justice to prohibit the exchange of highly proprietary and confidential information to competitors as anticompetitive activity, while on the other hand it winks at the government's dissemination of the same information to a competitor.

Every individual, but the business community in particular, must support legislation to amend the FOIA to more closely balance the needs of a governed

March 1981

people to assure openness of the sovereign with the needs of an economic system which is predicated on the competitive use of intellectual property and proprietary information. One may or may not dispute the need of government and governmental agencies to obtain the most intimate and closely guarded secrets and proprietary concepts of the business community. But to contend or even pretend that the subsequent, indiscriminate dissemination of such information in the name of "open government" serves a legitimate purpose in our supposedly "free" enterprise system is folly.

NOTES

1. 5 USC Section 702 (1976).
2. 5 USC Section 552 Pub. L. 89-487, 80 Stat 250 (1966).
3. 2974 Amendment (5 USC Section 552 Pub. L. 93-502, 88 Stat 1561-1564) 1976 Government in the Sunshine Act Amendment (5 USC Section 552 (6) Pub. L. 94-409 Section 5).
4. H.R. 5861 proposed November 9, 1979 by Representative Richardson Preyer and an amendment to expand the the (b) () exemption of the FOIA by Senator Robert Dale.
5. 47 USLW 4434; 99 S. C. 1705 (1979).
6. 5 USC Section 552 (e).
7. 5 USC Section 552 (a) (3).
8. 5 USC Section 551 (2).
9. *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp 769 (D.D.C. 1974).
10. *American Jewish Congress v. Kreps*, 574 F. 2nd 624, 628-629 (D.C. Cir. 1978).

11. *Consumers Union v. Veterans Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969).
12. *National Parks & Conservation Association v. Morton* ("National Parks I") 498 F. 2nd 765, 770 (D.C. Cir. 1974).
13. *National Parks & Conservation Association v. Kleppe*, ("National Parks II") 547 F. 2d 673, 679, (D.C. Cir. 1976).
14. 5 USC Section 552(b)(1) through (9) (1976).
15. 5 USC Section 552 (a)(4)(B) (1976).
16. *Sears, Roebuck & Co. v. General Servs. Admin.*, 384 F. Supp.996, 1003-04 (D.D.C. 1974), reconsidered after remand, 402 F. Supp. 378 (1975), aff'd in part and remanded in part, 553 F. 2d 1378 (D.C. Cir.), cert. denied, 434 U.S. 826 (1977).
17. 5 USC Section 552 (a)(1) and (2).
18. 5 USC Section 552(a)(2) mandates that final opinions, policy statements and certain staff manuals be made available to the public.
19. 5 USC Section 702.
20. *id.*, footnote 5.
21. 18 USC Section 1905 (1976). "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes . . . or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment . . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both . . ."
22. 5 USC Section 702 (1976) "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."
23. *id.*, footnote 21.