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WAIVING GOODBYE TO NONDISCLOSURE UNDER FOIA'S EXEMPTION 4: THE SCOPE AND APPLICABILITY OF THE WAIVER DOCTRINE

Patrick Lightfoot[+]

Congress designed the Freedom of Information Act (FOIA)[1] to provide the general public with broad access to information held by government agencies.[2] However, Congress limited the scope of disclosure by enumerating nine specific exemptions, which entitle the government to withhold certain information from release.[3] The fourth FOIA exemption protects confidential commercial and financial information that private entities have provided to the government.[4] Traditionally, courts will find that an agency has waived the protection of a FOIA exemption under the public-domain doctrine if the information requested has been made available in a permanent public record.[5] The Ninth Circuit recently disturbed this long-held trend of applying the

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1. 5 U.S.C. § 552 (2006 & Supp. IV 2010).

2. *See* S. REP NO. 89-813, at 3 (1965) (asserting that the purpose of the Act is to eliminate the loopholes in previous disclosure law to promote full agency disclosure, absent a specific exception); *see also* H.R. REP. NO. 89-1497, at 1 (1966) (stating that the Act revises previous law to increase disclosure to the general public). Both congressional reports accompanied Senate Bill 1160, which Congress ultimately enacted as FOIA on July 4, 1996. Freedom of Information Act (FOIA), Pub. L. No. 89-487, 80 Stat. 250, 250 (1996) (current version at 5 U.S.C. § 552).

3. 5 U.S.C. § 552(b) (specifying the nine statutory exemptions).

4. *Id.* § 552(b)(4) (exempting from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential"). The information is protected to prevent harm to competition, which will likely result from disclosure of such information. *See* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Exemption 4 is unique because it shields from disclosure information obtained from a person outside of the agency who intends for that information to be confidential. *See* Benson v. Gen. Servs. Admin., 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969); *see also* H.R. REP. NO. 89-1497, at 10; S. REP. NO. 89-813, at 9 (explaining that this exemption protects persons who otherwise would not release the information).

5. *See* Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999) (explaining that information loses protection under certain exemptions once it enters the public domain and is preserved in a permanent public record); *see also* Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421 (2d Cir. 1989) (noting that the first and third exemptions cannot be invoked if the government *officially* disclosed the information previously); U.S. Student Ass'n v. CIA, 620 F. Supp. 565, 571 (D.D.C. 1985) ("It is well established that specific information cannot be withheld [under the first and third exemption] if it has been the subject of prior 'official and documented disclosure.'" (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983))).

public-domain doctrine by introducing a new test in determining the waiver of Exemption 4.[6] In *Watkins v. U.S. Bureau of Customs & Border Protection*, the Ninth Circuit created a new "unlimited disclosure" test, concluding that an agency waives its entitlement to a FOIA exemption when it freely discloses confidential information to a person without restricting that person's ability to further disclose that information.[7]

The public-domain test is the prevailing rule among the circuit courts of appeal.[8] For example, the U.S. Court of Appeals for the District of Columbia applied the test in *Center for Auto Safety v. National Highway Traffic Safety Administration*, rejecting the plaintiff's argument that the government had waived Exemption 4 through the release of automakers' air-bag-system information to manufacturers.[9] The D.C. Circuit approved of the district court's holding that limited disclosures to people who required the information was not automatically equivalent to a release of the information to the general public.[10]

Congress enacted FOIA under the overarching "philosophy of full agency disclosure."[11] The nine exemptions limiting disclosure do not negate this policy, and the Supreme Court has recognized Congress's intent for all FOIA exemptions to be narrowly construed.[12] Exemption 4 protects information that the federal government receives from others by necessitating a certain amount of confidentiality so that "a citizen [may] be able to confide in his Government."[13] The public-domain test reflects both FOIA's broad disclosure policy and Exemption 4's protection.[14]

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6. *See* Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1196–99 (9th Cir. 2011) ("While the public domain test will be persuasive in most cases, it does not reach the concerns of confidentiality in circumstances like those presented in this case.").

7. *Id.* at 1196. The court acknowledged that the Agency in question was required by statute to disclose the information, but reasoned that the Agency's "no-strings-attached" disclosure that did not limit further dissemination waived confidentiality. *Id.* at 1197.

8. *See infra* Part I.D.

9. 244 F.3d 144, 152 (D.C. Cir. 2001).

10. *See id.* 152–53; *see also* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 18 (D.D.C. 2000) *rev'd in part on other grounds,* 244 F.3d 144.

11. S. REP. NO. 89-813, at 3 (1965); *see also infra* Part I.B.

12. *See, e.g.*, Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (stating that FOIA's broad policy of disclosure limits the Act's exemptions); EPA v. Mink, 410 U.S. 73, 80 & n.6 (1972) (observing that Congress intended a policy of broad disclosure when enacting FOIA, subject to specifically delineated exceptions (citing S. REP. NO. 89-813, at 3 (1965))), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, sec. 2(a), § 553(b)(1), 88 Stat. 1561, 1563 (amending 5 U.S.C. § 552 (1970) to require that information classified as secret in the interest of national security or foreign policy by executive order be in fact properly classified as such); *see also* Bristol Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970) (recognizing the primary intent of FOIA to increase public access to government records and to close loopholes in previous disclosure legislation).

13. *See* H.R. REP. NO. 89-1497, at 10 (1966) (stating that Exemption 4 "would assure the confidentiality of information obtained by the Government"); *see also* Gen. Servs. Admin. v. Benson, 415 F.2d 878, 881 (9th Cir. 1969) (affirming the district court's interpretation of

Yet, the Ninth Circuit's decision in *Watkins* constitutes a puzzling departure from the well-settled public-domain test.[15] *Watkins*'s expansion of the waiver doctrine will have unintended negative consequences. Corporations and business entities whose information Congress intended Exemption 4 to protect will be less willing to provide information to the government voluntarily,[16] and when compelled to do so, will provide less reliable information for fear that the slightest government disclosure will subject the information to full public access under FOIA.[17] Thus, despite granting the public greater access to information in the short term,[18] an expansion of the waiver doctrine would cause a decrease in both the quality and quantity of information provided to the government—a result directly at odds with FOIA's primary purpose.[19]

This Comment examines the Ninth Circuit's recent departure from the well-recognized test for determining waiver, and analyzes both the public-domain test and the Ninth Circuit's unlimited-disclosure test in the context of Exemption 4. Part I provides a historical perspective by examining the early law of public disclosure, including section 3 of the Administrative Procedure Act, and the later enactment of FOIA. Part I also surveys the changing interpretations of Exemption 4 and the development of the waiver doctrine. Lastly, Part I examines *Center for Auto Safety* and *Watkins* in significant detail. Part II demonstrates how the new *Watkins* test contradicts well-established principles underlying the waiver doctrine, which requires an official, public disclosure to constitute waiver. Finally, Part III advocates for the uniform adoption of the public-domain test through one of three mechanisms—a Supreme Court holding, a legislative amendment to FOIA, or a modification of importation regulations—as the best solution to further the purposes underlying FOIA.

Exemption 4 as applying only to information "obtained from a person outside the agency . . . [who] wishes the information to be kept confidential" (quoting Benson v. Gen. Servs. Admin., 289 F. Supp. 590, 594 (W.D. Wash. 1968))).

14. *See infra* Part I.B–C (recognizing that a balance must be struck between confidentiality and public access to information).

15. *See* Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1197–98 (9th Cir. 2011) (determining that the public-domain test should not be the only test for government waiver because it did not fit the confidentiality concerns generated by the particular case).

16. *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) ("Where . . . the information is provided to the Government voluntarily, the presumption is that its interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation.").

17. *See id.* ("[W]here the production of information is compelled . . . disclosure could affect the reliability of such data . . . [thus] the governmental impact inquiry will focus on the possible effect of disclosure on its quality.").

18. *See Watkins*, 643 F.3d at 1196–98 (providing another means for the release of information).

19. *See supra* note 2 and accompanying text (describing the purpose of FOIA).

I. THE EVOLUTION OF GOVERNMENT DISCLOSURE LAW: THE ADMINISTRATIVE PROCEDURE ACT, FOIA, EXEMPTION 4, AND THE WAIVER DOCTRINE

A. The Administrative Procedure Act: Precursor to FOIA and an "[E]xcuse for [S]ecrecy"[20]

The Administrative Procedure Act of 1946 (APA) was the federal government's first major attempt to organize federal administrative-agency information.[21] The APA allowed the public access to government information.[22] In particular, section 3 of the APA originally provided for the release of government information unless it involved: "(1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency."[23]

Despite section 3's broad disclosure policy, "gaping loop-holes"[24] provided the government with "numerous excuses" for withholding information.[25] Consequently, disclosure of official records was only available for "persons properly and directly concerned," and information could be withheld from disclosure for good cause.[26] Government agencies refused to release properly disclosable information in "case after case."[27] In proposing revisions to the

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20. S. REP. NO. 89-813, at 3 (1965).

21. Administrative Procedure Act, Pub. L. No. 79-505, ch. 324, 60 Stat. 237 (1946) (current version in scattered sections of 5 U.S.C.). The APA was "an attempt to settle . . . [the] escalating conflict between public demands for agency transparency and the government's need to keep some information confidential." Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 521 (2006).

22. Administrative Procedure Act § 3 (codified as amended at 5 U.S.C. § 552 (2006)).

23. *Id.*

24. Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation*, 54 ADMIN. L. REV. 983, 993 (2002).

25. 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW § 8437, at 504; *see also* JACQUELINE KLOSEK, THE RIGHT TO KNOW: YOUR GUIDE TO USING AND DEFENDING FREEDOM OF INFORMATION LAW IN THE UNITED STATES 14 (2009) (stating that "little information was actually released" under section 3).

26. Administrative Procedure Act § 3(c); *see also* Halstuk & Chamberlin, *supra* note 21, at 522 ("This restriction thus blocked third parties, such as journalists, attorneys, public interests groups, scientists and historians, from getting hold of government records.").

27. H.R. REP. NO. 89-1497, at 5 (1966).

> The misapplication of these minor exceptions soon made the Administrative Procedure Act the fountainhead of secrecy within government. Federal agencies exploited the vague provisions in the act requiring "secrecy in the public interest" or "for good cause," and also claimed the right to deny requests for information "relating solely to the internal management of an agency" unless the requestor was "properly and directly concerned." Armed with such implied authority, the government routinely denied

APA, members of Congress observed that section 3 was "used more as an excuse for withholding than as a disclosure statute."[28] To make matters worse, section 3 "failed to provide a judicial remedy for wrongfully withholding information, thus allowing capricious administrative decisions forbidding disclosure to go unchecked."[29] Those whose requests for disclosure were rejected were left without any recourse.[30]

Shortly after the enactment of section 3, President Harry Truman expanded government secrecy by issuing an executive order allowing nonmilitary agencies to classify information, thus making section 3's shortcomings increasingly apparent.[31] The growing abuse of section 3's inherent loopholes to expand government secrecy, typified by this executive order, fueled the fire for reform.[32]

B. The Freedom of Information Act: More Disclosure and More Debate

In 1966, Congress amended section 3 of the APA[33] through the enactment of FOIA in an effort to end the policy of obstructionism that section 3 permitted.[34] Considered "a momentous occasion," the passage of FOIA made the United States the third country in the world to enact such legislation.[35] FOIA expanded access beyond just those "properly and directly concerned,"

> public access to such aged and harmless materials as George Washington's intelligence methods and a Confederate general's memoirs.

HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 36 (1999); *see also* Halstuk & Chamberlin, *supra* note 21, at 522 ("[T]he APA contained numerous caveats and loopholes that federal agencies routinely exploited to block public access to their records.").

28. S. REP. NO. 89-813, at 3 (1965); *see also* EPA v. Mink, 410 U.S. 73, 79 (1973) (stating that the public-disclosure section of the APA was "generally recognized as falling far short of its disclosure goals"), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, sec. 2(a), § 552(b)(1), 88 Stat. 1561, 1563 (amending 5 U.S.C. § 552 (1970)). Congress also recognized that the statute was "full of loopholes which allow agencies to deny legitimate information to the public." S. REP. NO. 89-813, at 3.

29. Kenneth D. Salomon & Lawrence H. Wechsler, Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 151 (1969).

30. *Id.*; *see also* H.R. REP. NO. 89-1497, at 5 ("The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures . . . ."); S. REP. NO. 89-813, at 5 ("There is no remedy in case of wrongful withholding of information from citizens by Government officials.").

31. Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the OPEN Government Act of 2007 Falls Short*, 16 COMMLAW CONSPECTUS 427, 435 (2008) (citing Exec. Order No. 10,290, 3 C.F.R. 789, 790 (1949–1953)).

32. *Id.* at 434–35.

33. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, 251 (codified as amended at 5 U.S.C. § 552 (2006)).

34. *See* KLOSEK, *supra* note 25, at 14 (explaining that FOIA was enacted after a push for a more comprehensive law to replace the failed section 3).

35. *Id.*; *see also* FOERSTEL, *supra* note 27, at 44 (describing FOIA as "trailblazing legislation").

and instead permits *any* person to obtain information from the government.[36] In contrast with section 3, FOIA requires agency disclosure by default,[37] only permitting agencies to withhold information covered under one of the nine specific exemptions.[38] More importantly, FOIA created a system of judicial review, giving members of the public a forum in which they can voice their claims.[39]

Despite FOIA's benefits, agencies implemented the Act reluctantly.[40] Much to the disappointment of the law's proponents, agencies did not immediately embrace FOIA's underlying policies of open government and disclosure.[41] Eventually in 1972, Congress acknowledged FOIA's deficiencies[42] and amended the Act in 1974.[43] Congress has since amended FOIA five times: revising the exemptions in 1976 and 1986,[44] updating FOIA in 1996 in response to the growth in Internet usage and electronically available

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36. *See* 5 U.S.C. § 552(a)(3)(A); *see also* S. REP. NO. 89-813, at 5 (1965) (stating that "the public as a whole has a right to know what its Government is doing").

37. 110 AM. JUR. TRIALS *Litigation Under the Freedom of Information Act* § 2 (2008) ("Under FOIA, agencies of the federal government have a duty to fully disclose any and all records unless such information is subject to one of the specific nine statutory exemptions . . . .").

38. *See* 5 U.S.C. § 552(b)(1)–(9) (2006 & Supp. IV 2010) (specifying the nine exemptions that permit withholding information).

39. *Id.* § 552(a)(4)(B); *see also* EPA v. Mink, 410 U.S. 73, 80 (1973) ("[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."), *superseded by statute*, Act of Nov. 21, 1974, Pub. L. No. 93-502, sec. 2(a), § 552(b)(1), 88 Stat. 1561, 1563 (amending 5 U.S.C. § 552 (1970)).

40. H.R. REP. NO. 92-1419, at 8 (1972); *see also* FOERSTEL, *supra* note 27, at 44, 71 (explaining how, despite public support for FOIA and its policy of broad disclosure, opposition by the federal bureaucracy and executive resistance impeded the Act's success).

41. *See* Halstuk, *supra* note 31, at 444 (noting that the years immediately following FOIA's enactment were disappointing); *see also* Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG.: AEI J. GOV'T & SOC'Y, Mar.–Apr. 1982, at 14, *reprinted in* FREEDOM OF INFORMATION 117 (Robert G. Vaughn ed., 2000) (describing how agencies resisted FOIA by delaying responses for documents, replying with arbitrary denials, and overclassifying documents).

42. *See* H.R. REP. NO. 92-1419, at 8 (describing the operation of FOIA as "hindered by 5 years of foot-dragging by the Federal bureaucracy," and the bureaucracy's "widespread reluctance . . . to honor the public's legal right to know").

43. *See* Act of Nov. 21, 1974, 88 Stat. at 1561; *see also* Halstuk, *supra* note 31, at 445 (describing how the political climate in 1974 provided an appropriate time period to reform FOIA in light of President Richard Nixon's Watergate scandal). Congress's primary changes to FOIA involved modifications of Exemption 1, covering national-security information, and Exemption 7, covering law enforcement. Halstuk, *supra* note 31, at 446 (citing 5 U.S.C. § 552(b)(1), (7) (2006)). These changes were necessary "because both [exemptions] contained overbroad language that led to arbitrary enforcement and made it possible for agencies to justify withholding decisions," inconsistent with Congress's intent. *Id.*

44. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, secs. 1801–1804, § 552(a), (b)(7), 100 Stat. 3207, 3207-48 to -50 (codified as amended at 5 U.S.C. § 552); Government in the Sunshine Act, Pub. L. No. 94-409, § 3(a), 90 Stat. 1241, 1242 (1976) (codified as amended at 5 U.S.C. § 552(b) (2006 & Supp. IV 2010)).

information,[45] attempting to streamline the FOIA request process in 2007,[46] and revising Exemption 3 in 2009.[47]

C. Exemption 4: Trade Secrets and Commercial or Financial Information

Exemption 4 exempts from disclosure information that includes "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[48] The D.C. Circuit has defined a trade secret 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."[49] This definition implies that the trade-secret information must be directly related to the productive process.[50]

Exemption 4's second clause covering "commercial or financial information" has caused much confusion among courts and scholars.[51] This clause only exempts "information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential."[52] If the information is not a trade secret, then all three of these elements must be

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45. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, §§ 1–11, 110 Stat. 3048, 3048–54 (codified as amended at 5 U.S.C. § 552 (2006 & Supp. III 2009)). These amendments clarified that FOIA applied to electronic and digitized information. Halstuk, *supra* note 31, at 454. Additionally, they provided easier public access by requiring agencies to make available on the Internet commonly requested information such as "agency annual reports, statements of agency rules and policy, agency adjudicative opinions, and FOIA handbooks." *Id.*

46. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, 2524 ("To promote accessibility, accountability, and openness in Government . . . .").

47. OPEN FOIA Act of 2009, Pub. L. No. 111-83, sec. 64, § 552(b)(3), 123 Stat. 2141, 2184 (codified as amended at 5 U.S.C. § 552(b)(3) (Supp. IV 2010)).

48. 5 U.S.C. § 552(b)(4). Notably, this language denotes only *two* categories of exempt information: (1) trade secrets and (2) commercial or financial information that is both obtained from a person and privileged or confidential. *See* Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787–88 (1967). Although it is possible to view "commercial or financial information obtained from any person" and "privileged or confidential" as distinct categories, such an interpretation stretches the language and does violence to the statute. *Id.* ("Congress could not have intended to exempt all commercial or financial information obtained from any person."); *see also* Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983) (interpreting Exemption 4 to require proof of confidentiality when attempting to withhold commercial information that does not constitute trade secrets).

49. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1288.

50. *Id.*

51. *See, e.g.*, Davis, *supra* note 48, at 787 (referring to Exemption 4 as "probably the most troublesome provision in the Act"); Note, *Freedom of Information: The Statute and The Regulations*, 58 GEO. L.J. 18, 34 (1967) ("Exemption (b)(4) is probably the most confusing of the nine."); *Exemption 4, Freedom of Information Act Guide*, U.S. DEP'T JUSTICE (May 2004), http://www.justice.gov/oip/exemption4.htm (stating that the "overwhelming bulk of Exemption 4 cases focus on whether the withheld information" falls with its second, much larger category).

52. Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971) (quoting Consumers Union of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 802 (S.D.N.Y. 1969)).

satisfied for Exemption 4 to apply.[53] The interpretation of each element has evolved from both FOIA's legislative history and judicial interpretation.[54]

1. Commercial or Financial Information

Neither FOIA's statutory language, nor its legislative history defines "commercial" or "financial."[55] Consequently, courts have used the ordinary meaning of the terms when conducting Exemption 4 analysis.[56] However, even after adopting the ordinary meaning of "commercial," courts have failed to provide a clear definition of what that term means.[57] Although the Senate and House reports offer examples of commercial or financial information, such as "business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations," the reports provide no bright-line definition.[58] Therefore, information is evaluated on a case-by-case basis, rather than using a clear formula.[59]

2. Obtained from a Person

The APA, although not using language like "commercial or financial," did provide a definition of "person," which applies to Exemption 4's requirement that information be "obtained from a person."[60] Courts have broadly interpreted this phrase in conjunction with "commercial or financial information,"[61] and have concluded that the exemption is not limited to commercial or financial information about the provider of the information; rather, it extends to protect such information about a third party even where the

53. *Id.*

54. *See infra* Part I.C.1-3.

55. *See* 5 U.S.C. § 551 (2006 & Supp. IV 2010) (defining terms applicable to § 552); *see also* Davis, *supra* note 48, at 789 (commenting that the legislative history fails to explain the use of the terms "commercial" or "financial").

56. *See, e.g.*, Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); Wash. Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 266 (D.C. Cir. 1982); *see also* Bd. of Trade of Chi. v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980); Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978).

57. *See, e.g.*, *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290 (finding that information can qualify as commercial if the provider of the information has a "commercial interest" in it).

58. H.R. REP. NO. 89-1497, at 10 (1966); *see also* S. REP. NO. 89-813, at 9 (1965).

59. *See, e.g.*, *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290 (finding that health and safety information regarding a person's products is commercial because it is "instrumental in gaining market approval" for the products); Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (noting upon review of the business information submitted by the defendant that information relating to "business decisions and practices regarding the sale of power" was commercial); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 28–29 (D.D.C. 2000) (holding export-insurance applications to be commercial).

60. *See* 5 U.S.C. § 551(2) ("'[P]erson' includes an individual, partnership, corporation, association, or public or private organization other than an agency.").

61. *See, e.g.*, *Bd. of Trade of Chi.*, 627 F.2d at 405.

government obtained the information from someone other than that third party.[62]

3. Privileged or Confidential

Determining whether the information at issue is privileged or confidential is the most challenging element of Exemption 4.[63] Unlike the other components, FOIA's legislative history informs the meaning of "confidential" and "privileged."[64] As revealed in the language of the Senate and House reports, Congress envisioned two primary situations in which Exemption 4 protects confidential information: (1) where the government has promised to keep the information confidential, and (2) where the information customarily would not be made public.[65]

a. Promises of Confidentiality

In 1969, the Ninth Circuit dealt with the first situation—promises of confidentiality—in *General Services Administration v. Benson*.[66] The district court held that Exemption 4 applies to information that an individual desires to

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62. *Id.* In *Board of Trade of City of Chicago v. Commodity Futures Trading Commission*, the D.C. Circuit rejected the Board of Trade's argument that Exemption 4 was limited to commercial or financial information that was obtained from the Trading Commission, which was the "source of the information." *Id.* The D.C. Circuit noted that the legislative history was "sufficiently broad to encompass financial and commercial information concerning a third party," and there was no indication that Congress meant to limit the exemption to the extent urged by the Board of Trade. *Id.*

63. *See Exemption 4, Freedom of Information Act Guide*, *supra* note 51 ("By far, most Exemption 4 litigation has focused on whether or not requested information is 'confidential' . . . .").

64. *See* S. REP. NO. 89-813, at 9 (1965); *see also* H.R. REP. NO. 89-1497, at 10 (1966). These two reports are the most instructive in regard to legislative history and are relied on extensively. *See* Davis, *supra* note 48, at 762 ("[P]robably more than ninety-five per cent of the useful legislative history is found in a ten page Senate committee report and in a fourteen page House committee report." (citing H.R. Rep. No. 89-1497 at 10; S. REP. NO. 89-813 at 9)). The Senate report provides little insight into confidentiality except for explaining that the exemption protects information "which would customarily not be released to the public by the person from whom it was obtained." S. REP. NO. 89-813, at 9. However, the House report elaborated further that it exempts "information which is given to an agency in confidence." H.R. REP. NO. 89-1497, at 10. The House report added that "where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." *Id.* Both reports identify privileged information as information that is "customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges." S. REP. NO. 89-813, at 9 (providing as an example any commercial, technical, and financial data provided by a person seeking a loan to a lending agency in connection with a loan); *see also* H.R. REP. NO. 89-1497, at 10.

65. *See supra* note 64.

66. 415 F.2d 878, 881 (9th Cir. 1969). A partnership, of which Benson was a member, purchased property from the General Services Administration (GSA). *Id.* Benson requested records from the transaction, which the GSA refused to disclose based on several FOIA exemptions, including Exemption 4. *Id.*

keep confidential, and only provides "under the express or implied promise by the government that the information will be kept confidential."[67] The Ninth Circuit agreed with the district court's reasoning and affirmed its decision.[68]

b. Not Customarily Released to the Public

The D.C. Circuit has decided the leading cases regarding the second situation—information that is customarily not released to the public.[69] In *Sterling Drug, Inc. v. FTC*, the D.C. Circuit held that that the information was confidential because it was of the type "which would customarily not be released to the public by the person from whom it was obtained."[70]

The U.S. District Court for the District of Columbia adopted a more narrow interpretation of confidentiality in *M.A. Schapiro & Co. v. SEC*.[71] The court maintained that Exemption 4 requires more than a "bare claim of confidentiality" by the provider of the information or the agency seeking to withhold the information.[72] Rather, courts have a duty to independently assess a purported claim of confidentiality to determine objectively whether the information at issue is of the type that an individual would not customarily reveal to the public.[73] The court synthesized two prior holdings of the D.C. Circuit to suggest that allowing agencies to withhold information based on

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67. Benson v. Gen. Servs. Admin., 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d at 878.

68. *Gen. Servs. Admin.*, 415 F.2d at 881–82.

69. *See* Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971) (agreeing with the district court's assessment that the documents concerning business sales would customarily not be released to the public, and were therefore exempt from disclosure); *see also* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) (explaining that although the determination of whether information would customarily be released to the public is an important inquiry for determining when information is confidential, it is not the only inquiry); Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (applying the *National Parks* two-part inquiry).

70. *Sterling Drug*, 450 F.2d at 709 (quoting S. REP. NO 89-813, at 9 (1965)). Sterling Drug sought documents related to a competitor's acquisition of a company after the Federal Trade Commission (FTC) had challenged Sterling Drug's attempted acquisition of another company, a merger which Sterling Drug thought to be similar in nature to its competitor's acquisition. *Id.* at 701–02. Sterling Drug sought detailed documents related to its competitor's purchase of the recently acquired company, and brought suit following the FTC's nondisclosure of certain documents. *Id.* at 702.

71. M. A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 470–71 (D.D.C. 1972). The plaintiff requested a Securities and Exchange (SEC) study and all documents the agency received during its investigation related to the study. *Id.* at 468–69. The SEC refused to disclose the information on Exemption 4 grounds, arguing for the protection of the privacy interests of those who provided the information. *Id.* at 469. The SEC also argued that the information requested was exempt under Exemptions 3, 5, 7, and 8. *Id.*; *see also* 5 U.S.C. § 552(b)(3), (5), (7), (8) (2006 & Supp. IV 2010).

72. *M. A. Schapiro & Co.*, 339 F. Supp. at 470 (quoting Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. 1970)).

73. *Id.* at 470–71.

unchecked assertions of confidentiality would create serious potential for abuse.[74]

c. The National Parks *Test: A Two-Part Confidentiality Analysis*

In 1974, the D.C. Circuit significantly altered its confidentiality analysis through its holding in *National Parks & Conservation Association v. Morton*.[75] Breaking from its holding in *Sterling Drug*, the D.C. Circuit held that determining confidentiality required more than merely assessing whether the provider of the information would disclose that information to the public.[76] The court found that, to satisfy judicial scrutiny, the withholding of information must comport with the legislative intent underlying whichever exemption is at issue.[77] The court noted that altogether the exemptions serve two purposes: (1) protecting the interests of the government in efficiency, and (2) protecting the interests of persons providing information in maintaining confidentiality.[78] The court distinguished between two separate interests that FOIA exemptions were created to protect: those of the federal government, and those of the people who had provided information to the government.[79] Notably, Exemption 4 has the "dual purpose" of protecting both interests, whereas other exemptions usually only serve one.[80]

Following a thorough examination of FOIA's legislative history, the D.C. Circuit created a two-part test for evaluating confidentiality under Exemption 4 to ensure that these twin interests are properly protected:

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74. *Id.* at 471 (citing Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 425 F.2d 578, 582 (D.C. Cir. 1970); *Bristol-Myers Co.*, 424 F.2d at 938). In *Grumman*, the D.C. Circuit ordered that the district court review the documents at issue to determine whether they contain information that the provider would not reveal to the public. *Grumman*, 425 F.2d at 582. In *Bristol-Myers Co.*, the D.C. Circuit similarly ordered that the district court review the documents at issue because FOIA "does not permit a bare claim of confidentiality" and the courts have "the responsibility of determining the validity and extent of the claim." *Bristol-Myers Co.*, 424 F.2d at 938.

75. 498 F.2d 765, 770 (D.C. Cir. 1974). *National Parks* is the leading case concerning Exemption 4 issues. *See* OSHA Data/CIH, Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 162 n.24 (3d Cir. 2000). The National Parks and Conservation Association (Association) requested information regarding concession operations from the Director of the National Park Service. Nat'l Parks & Conservation Ass'n v. Morton, 351 F. Supp. 404, 405 (D.D.C. 1972), *rev'd*, 498 F.2d at 771. The Park Service released the majority of the requested information, but refused to release audit and other financial information related to several businesses operating concessions within the national parks. *Id.* The Association then brought suit to compel the release of the information, but the Park Service maintained that it had properly withheld the information under Exemption 4. *Id.* at 405–06. Because both parties agreed that the information was financial, obtained from a person, and not privileged, the only question before the court was whether the information was confidential. *Id.* at 406.

76. *Nat'l Parks*, 498 F.2d at 767.

77. *Id.*

78. *Id.* (citing S. REP. NO. 89-813, at 9 (1965)).

79. *Id.*

80. *Id.*

> [C]ommercial 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 position of the person from whom the information was obtained.[81]

The two-part test, which has become known as the "*National Parks* test," has been used by the majority of circuit courts.[82] However, legal scholars have criticized the test as being inconsistent with the language and the legislative intent of Exemption 4, which confine the intended analysis to whether the information would be customarily released to the public.[83]

d. Critical Mass *Categories: Continued Availability and Reliability*

The D.C. Circuit refined the *National Parks* test in *Critical Mass Energy Project v. NRC*.[84] Petitioned to reconsider the *National Parks* holding, the D.C. Circuit determined that the NRC had failed to overcome the principle of stare decisis when arguing for the abandonment of the *National Parks* test.[85] The court cited three reasons supporting its refusal to overturn *National*

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81. *Id.* at 770 (emphasis added) (footnote omitted). The court recognized that the first part protects the governmental interest because "unless persons having 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." *Id.* The second part protects the private interest of those providing information who would experience competition disadvantages if financial or commercial data was made public. *Id.* at 768.

82. *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 876 (D.C. Cir. 1992); Pac. Architects & Eng'rs Inc. v. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990); Anderson v. Dep't of Health & Human Servs., 907 F.2d 936, 946 (10th Cir. 1990); Acumenic Research & Tech. v. Dep't of Justice, 843 F.2d 800, 807 (4th Cir. 1988); Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398–99 (5th Cir. 1985); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402–03 (7th Cir. 1984); 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 7–10 (1st Cir. 1983); Am. Airlines, Inc., v. Nat'l Mediation Bd., 588 F.2d 863, 871 (2d Cir. 1978).

83. *See, e.g.*, Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the* National Parks *Test*, 61 GEO. WASH. L. REV. 1430, 1468–71 (1993) (arguing not only that the *National Parks* test has no statutory basis, but positing that statutory language and congressional intent clearly show that the "would not be customarily released" test is the appropriate analysis); *see also* Thomas L. Patten & Kenneth W. Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 ADMIN. L. REV. 193, 196 (1977) ("It is probably accurate to say that Congress did not have anything like the *National Parks I* test for confidentiality in mind when that term was inserted.").

84. 975 F.2d at 880. Critical Mass Energy Project (Critical Mass), a nonprofit organization, requested from the Nuclear Regulatory Commission (NRC) reports, which the NRC refused to disclose. *Id.* at 872. The NRC claimed Exemption 4 protection applied because the NRC had received the reports from a separate business, the Institute of Nuclear Power Operations, on the condition that the reports be kept confidential. *Id.*

85. *Id.* at 875–76.

Parks: (1) the "widespread acceptance" of the test in other circuits,[86] (2) Congress's recognition of the test's appropriateness in subsequent legislation,[87] and (3) the "workability" of the test in practice.[88] Although it did not find the test problematic enough to overturn precedent, the court acknowledged that applying the test has its difficulties.[89] Thus, the court felt it could "greatly simplify the application of Exemption 4 in a significant number of cases"[90] by confining application of *National Parks* to information that the provider was *required* by law or otherwise to submit to the government.[91] For voluntarily provided information, Exemption 4 would still apply if the provider would not customarily release it to the public.[92]

The D.C. Circuit left the *National Parks* test intact regarding *compelled* information, but the court recognized an additional consideration affecting the governmental interest protected by the first part of the *National Parks* test.[93] Although disclosure of information might not impair the government's ability to obtain information in the future when production of the information is *mandatory*, disclosure could negatively impact the quality of information because persons fearing disclosure might provide less reliable information.[94] Because the first part of the *National Parks* test protects the government's ability to obtain *necessary* information for efficient operation,[95] protecting the continued reliability of compelled information is implicit in the test.[96] In other words, the court realized that the routine disclosure of compelled information could lead individuals and businesses to provide false or unreliable data in an

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86. *Id.* at 876 (citing decisions from seven different circuits that accept the *National Parks* test).

87. *Id.* at 876 (citing CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152–53 & n.146 (D.C. Cir. 1987) (citing 5 U.S.C. § 552b (2006)). In the legislative history of the § 552(b) open-meeting rules, Congress acquiesced to the *National Parks* test as the appropriate standard for interpreting the confidentiality exemption under that section, which protects Exemption 4. *See Donovan*, 830 F.2d at 1152–53 & n.146.

88. *Critical Mass*, 975 F.2d at 877. The court observed that the precedent will be adhered to so long as it does not amount to "a 'positive detriment to coherence and consistency in the law' or a 'direct obstacle to the realization of important objectives embodied in other laws.'" *Id.* (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989), *superseded by statute,* Civil Rights Act of 1991, Pub. L. No. 102-166 § 3(a), 105 Stat. 1071).

89. *Critical Mass*, 975 F.2d at 877.

90. *Id.*

91. *Id.* at 880.

92. *Id.*

93. *Id.* at 878.

94. *Id.*

95. *See supra* note 78 and accompanying text.

96. *See Critical Mass*, 975 F.2d at 878; *see also* 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 10 (1st Cir. 1983) (finding that the *National Parks* test was intended to protect the government's ability to "make intelligent, well informed decisions"—an intention that the "*necessary* information implies (quoting Ntn'l Parks & Conservation Ass'n v. Marton, 498 F.2d 765, 767 (D.C. Cir. 1979))).

effort to protect themselves from the repercussions of an agency's disclosures.[97]

Regarding the application of Exemption 4 to information *voluntarily* provided to the government, the court reverted to an earlier understanding of "confidential."[98] Returning to *Sterling Drug*, the court held that voluntarily provided information will be deemed confidential if it "would customarily not be released to the public by the person from whom it was obtained."[99] Whereas the government's interest in exempting *compelled* information is continued reliability of the information it receives, the government's interest in exempting *voluntary* information is ensuring that persons continue to make such information available to the government.[100] Criticism once again followed the D.C. Circuit's decision.[101] Although eight circuits have accepted the *National Parks* test, not one has incorporated the *Critical Mass* categorical approach—choosing instead to defer the issue.[102]

D. The Public Domain: When Do Agencies Waive The Exemptions?

Asserting an exemption is not always successful, even when an exemption may appear to be applicable. An agency's prior disclosure of the information may waive the protection under a FOIA exemption.[103] *Black's Law Dictionary* defines waiver as "the voluntary relinquishment or abandonment of a legal right."[104] Courts have held that a prior disclosure waives an exemption only

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97. *Critical Mass*, 975 F.2d at 878.

98. *See supra* Part I.C.3.b. *Compare id.* at 879 (finding "that financial or commercial information provided to the Government on a voluntary basis is 'confidential' . . . if it is of a kind that would customarily not be released to the public by the person from whom it was obtained), *with* Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971) (holding that information "which would customarily not be released to the public by the person from whom it was obtained" qualified as "confidential" for the purposes of Exemption 4 (quoting S. REP. NO. 89-813, at 9 (1965))).

99. *Critical Mass*, 975 F.2d at 879; *see also infra* note 108.

100. *Critical Mass*, 975 F.2d at 878.

101. *See, e.g.*, Scott Raber, *Reinventing a Less Vigorous Freedom of Information Act: The Aftermath of* Critical Mass Energy Project v. Nuclear Regulatory Commission, 1994 ANN. SURV. AM. L. 79, 109 (1994) (commenting that the legislative history of Exemption 4 never distinguished between voluntary and involuntary submissions); G. Branch Taylor, Comment, *The* Critical Mass *Decision: A Dangerous Blow to Exemption 4 Litigation*, 2 COMMLAW CONSPECTUS 133, 143 (1996) (concluding that through *Critical Mass* the D.C. Circuit has created a new loophole for agencies to withhold more information from the public).

102. *See, e.g.*, Wickwire Gavin, P.C. v. U.S. Postal Serv., 356 F.3d 588, 597 (4th Cir. 2004) (declining to decide whether *Critical Mass* applies); *see also* OSHA DATA/CIH, Inc. v. Dep't of Labor, 220 F.3d 153, 166 n.30 (3d Cir. 2000); Frazee v. U.S. Forest Serv., 97 F.3d 367, 372 (9th Cir. 1996); Nadler v. Fed. Deposit Ins. Corp. 92 F.3d 93, 96 n.1 (2d Cir. 1996).

103. *See* Carson v. U.S. Dep't of Justice, 631 F.2d 1008, 1015–16 & n.30 (D.C. Cir. 1980) (stating that the extent to which prior agency disclosure constitutes waiver depends on the circumstances and the exemption that is claimed).

104. BLACK'S LAW DICTIONARY 1717 (9th ed. 2009). The same definition applies in the context of waiving protection under FOIA exemptions. *See, e.g.*, Fla. House of Representatives

for those documents that were already disclosed.[105] Moreover, whether an agency's prior disclosure waives an exemption requires a case-by-case analysis dependent on the factual circumstances of the case and the specific exemptions implicated.[106] Once the agency has met its burden of proof satisfying a particular exemption, the burden shifts to the party seeking disclosure to prove that the exemption has been waived by a prior disclosure and the exemption can no longer serve its purpose.[107]

The public-domain test—the prevailing test for determining waiver of FOIA exemptions—focuses on whether the information had already entered the public domain when the agency attempted to withhold it.[108] To be in the public domain, the information must have been disclosed in a permanent public record.[109] Additionally, the prior agency disclosure in a permanent

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v. U.S. Dep't of Commerce, 961 F.2d 941, 946 (11th Cir. 1992) (applying the same definition when determining whether the Secretary of Commerce waived protection under Exemption 4). The court subsequently found no waiver because the disclosure was involuntary. *Id.*

105. *See, e.g.*, Mobil Oil Corp. v. EPA, 879 F.2d 698, 701 (9th Cir. 1989) ("[T]he release of certain documents waives FOIA exemptions *only for those documents released*."); *see also* Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[D]isclosure of a similar type of information in a different case does not mean the agency must make its disclosure in every case.").

106. *Carson*, 631 F.2d at 1015–16 & n.30.

107. *See* Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (requiring the party asserting a prior disclosure claim to highlight the specific information that duplicates the information being withheld); *see also* Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999) ("Under our public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.").

108. *See, e.g.*, Herrick v. Garvey, 298 F.3d 1184, 1193 (10th Cir. 2002) ("Waiver doctrine stands for the proposition that the government cannot rely on an otherwise valid exemption [to FOIA] to justify withholding information that has been officially acknowledged or is in the public domain." (alteration in original) (quoting Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992)) (internal quotation marks ommitted)); Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001) (stating that the government may not rely on a FOIA exemption if the information is in the public domain); *Cottone*, 193 F.3d at 554–55 (applying the public-domain test to a withholding under Exemption 3); *Davis*, 968 F.2d at 1279–80 (acknowledging that the public-domain test applies to determining if waiver occurred); Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (explaining that disclosure is required despite an otherwise valid exemption claim when the specific information has already been made public in an official document (citing *Afshar*, 707 F.2d at 1130)); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("To 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."); *Afshar*, 702 F.2d at 1130 (stating that the plaintiff must point to specific information in the public domain to waive a FOIA exemption). This standard evinces that whether an official disclosure has occurred determines what is in the public domain. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174 (2004) (noting that "once there is disclosure, the information belongs to the general public").

109. *See Students Against Genocide*, 257 F.3d at 836; *Cottone*, 193 F.3d at 554; *Davis*, 658 F.2d at 1279–80.

public record must have been an *official* disclosure.[110] Thus, absent an official disclosure in a permanent public record, an agency will not have waived the protection of a FOIA exemption.[111] For example, prior disclosure of information to an opposing party in litigation in accordance with the law does not constitute waiver so long as the information was not presented in open court.[112]

E. The Ninth Circuit's Departure From the Public-Domain Test: Can There Truly Be Waiver When the Government Has Not Made an Official Disclosure of Information to the Public?

1. Center for Auto Safety*: Exemption 4 Is Not Waived by Limited Disclosure*

In 1997, the National Highway Traffic Safety Administration (NHTSA) requested information from nine automakers regarding the air-bag systems installed in their vehicles.[113] All manufacturers responded and the NHTSA posted portions of the requested information on the Department of Transportation's website.[114] In early 1999, the Center for Auto Safety (CAS) submitted a FOIA request for the remaining air-bag system information that NHTSA had not already made available online.[115] The Agency first cited to Exemption 4 and denied the entire request, but later released redacted reports

110. *Compare* Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007) (recognizing that the particular information at issue must have been already disclosed to the public in an *official disclosure* in order to constitute waiver), *with* Kimberlin v. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998) (determining that vague references to a conclusion of an investigation do not constitute waiver). In *Wolf v. CIA*, the court found the congressional testimony of the CIA director to be an official disclosure due to the public nature of the testimony. 473 F.3d at 379.

111. *See* Judicial Watch, Inc. v. U.S. Dep't of Treasury, 802 F. Supp. 2d 185, 205–06 (D.D.C. 2011); *see also* Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 80 (D.D.C. 2001); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 (D.D.C. 1997).

112. *See Cottone*, 193 F.3d at 556 ("[A] constitutionally compelled disclosure to a single party simply does not enter the public domain."); *see also* Jones v. FBI, 41 F.3d 238, 249–50 (6th Cir. 1994) (noting that discoverability of certain information in litigation does not entitle a FOIA plaintiff to disclosure of that information). In a recent Tenth Circuit decision, the court further limited the public-domain test for waiver by permitting the withholding of certain information presented in open court under Exemption 7. *See* Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1252–53 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 473 (2011). The court held that the public-domain test only applies when the public disclosure renders the applicable exemption ineffective at serving its purpose. *Id.* at 1253 (finding that exemption under § 552(b)(7)(C) could still serve its purpose of protecting the family's privacy interests even after the video and audio evidence were presented in open court).

113. Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 2 (D.D.C. 2000).

114. *Id.* at 2–3.

115. *Id.* at 3. The information CAS requested fell into six categories: "air bag deployment, air bag cover, air bag system components, seatbelts, crash sensors, and system performance." *Id.*

to CAS after an administrative appeal.[116] CAS then filed suit in the U.S. District Court for the District of Columbia in an effort to compel production of the redacted information.[117]

All manufacturers who provided the information to the NHTSA intervened in the case before the district court and argued that Exemption 4 protected the requested information for two reasons: the information constituted trade secrets and it was confidential commercial information obtained by a person.[118] In addressing the confidential-commercial-information prong of Exemption 4, the court followed *Critical Mass* by analyzing whether the parties had voluntarily provided the information to the government or if production had been compelled by the NHTSA.[119] Under the voluntary prong, Exemption 4 would protect the information if it was "not customarily disclosed to the public."[120] In explaining the *Critical Mass* holding, the court went on to note that determining whether information is customarily disclosed is an objective analysis that "allows the submitter to make protected disclosures of the information, provided that such disclosures are not made to the general public."[121] Under the mandatory prong, originally developed in *National Parks*, Exemption 4 would protect the information if it was not customarily disclosed to the public *and* disclosure would impair the government's ability to obtain the information in the future or would cause substantial harm to the competitive position of the person who provided the information.[122]

The main debate between CAS and the automakers turned on whether the information at issue was confidential.[123] The district court held that the information was voluntarily submitted to the NHTSA; thus, the information could be considered confidential if it was not customarily disclosed to the public.[124] The court went on to note 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."[125] Although CAS attempted to argue that the information had been disclosed in other materials,[126] the court made clear that the past "discrete disclosures to persons

116. *Id.*

117. *Id.*

118. *Id.* at 14, 16.

119. *Id.* at 9.

120. *Id.*; *see also* Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992).

121. *Center for Auto Safety*, 93 F. Supp 2d at 10 (citing *Critical Mass*, 975 F.2d at 880).

122. *Id.* (citing Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767, 770 (D.C. Cir. 1974)); *see also Critical Mass*, 975 F.2d at 878.

123. *Center for Auto Safety*, 93 F. Supp 2d at 16.

124. *Id.* at 16–17.

125. *Id.* at 17–18. (citing *Critical Mass*, 975 F.2d at 880).

126. *Id.* at 18 ("Plaintiff's . . . argument is that the manufacturers have revealed this information in . . . service manuals, specifications sent to suppliers . . . , in litigation, in publicly-available crash test films, in prior voluntary submissions to the NHTSA, and in press releases, annual reports, and other . . . disclosures to the general public.").

or agencies who require[d] the information" were not customary disclosures and typically included confidentiality notices; therefore, the past disclosure did not establish that the information was no longer confidential.[127]

On appeal, the D.C. Circuit generally approved of the district court's holding regarding customary disclosure, but it found that the district court had misapplied earlier precedent by mistakenly claiming that CAS could not obtain disclosure unless it had proven that the information was customarily released *and* identical information had been disclosed in the past.[128] To correct this error, the circuit court remanded the case to resolve remaining questions regarding the customary disclosure of certain pieces of information, but indicated that most of the district court's holding would remain intact.[129]

2. Watkins*: Exemption 4 Is Waived When No Limits Are Placed on a Prior Disclosure*

In *Watkins v. United States Bureau of Customs & Border Protection*, the Ninth Circuit adopted a more liberal test for determining whether Exemption 4 had been waived.[130] Samuel Watkins, an intellectual-property attorney, submitted eight FOIA requests to the U.S. Bureau of Customs and Border Protection (CBP) for disclosure of notices of seizure of infringing merchandise (notices)[131] from several ports within the United States.[132] When CBP seizes goods bearing markings considered to infringe on registered trademarks, then CBP will provide notices, which contain information generally kept confidential, to the affected trademark owners only.[133] CBP does this to give trademark owners an opportunity to take expeditious action against the alleged counterfeiter.[134] Although the Agency only discloses this information to the

127. *Id.*

128. *Id.* at 151–52. The D.C. Circuit initiated its analysis by recognizing that the case was not one of a "typical voluntary information submission" because the NHTSA did not have authority to compel the automakers to provide the information requested. Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 148 (D.C. Cir. 2001). The D.C. Circuit, nonetheless, continued to analyze the case as one involving a voluntary disclosure to the NHTSA. *Id.* at 150.

129. *Id.* at 152–53.

130. 643 F.3d 1189, 1197–98 (9th Cir. 2011).

131. 19 C.F.R § 133.21(c) (2011) (requiring that notice be given to a trademark owner when merchandise is seized at customs for infringement). These notices of seizure include the following information: "(1) the date the merchandise was imported; (2) the port of entry; (3) description of the merchandise; (4) quantity of the merchandise; (5) country of origin of the merchandise; (6) name and address of the exporter; (7) name and address of the importer; and (8) the name and address of the manufacturer." *Watkins*, 643 F.3d at 1192.

132. *Watkins*, 643 F.3d at 1192.

133. *Id.*

134. Copyright/Trademark/Trade Name Protection; Disclosure of Information, 58 Fed. Reg. 44,476, 44,476 (proposed Aug. 23, 1993); *see also* Copyright/Trademark/Trade Name Protection; Disclosure of Information, 60 Fed. Reg. 36,249, 36,250 (proposed July 14, 1995) (explaining the

trademark owner, it places no condition or limit the trademark owner's use or distribution of the notices.[135] Watkins eventually received copies of the notices,[136] but CBP had heavily redacted them on the basis that Exemptions 2, 4, 6, and 7 applied.[137]

Watkins sued to obtain copies of the unredacted documents, arguing that CBP had waived Exemption 4 by sending the notices to the trademark owners.[138] Both parties moved for summary judgment,[139] and the district court found in favor of CBP.[140] The district court rejected Watkins's argument that

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purpose of this notification is to streamline trademark owners' remedies in place of the cumbersome FOIA procedure).

135. *Watkins*, 643 F.3d at 1196–97.

136. *Id.* Watkins encountered several issues after submitting his original requests. *Id.* at 1192. Initially, he received no response or acknowledgement of the requests sent to several of the ports. *Id.* Additionally, other ports required FOIA processing fees in advance, with some fee totals reaching $30,000. *Id.* To reduce costs, Watkins modified his requests to cover a shorter period of time. *Id.*

137. *Id.* at 1192–93. Exemption 2 covers information "related solely to the internal personal rules and practices of an agency." 5 U.S.C. § 552(b)(2) (2006). Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(6). Exemption 7 covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." *Id.* § 552(b)(7).

138. Watkins v. U.S. Bureau of Customs & Border Prot., No. CV08-1679JLR, 2009 WL 3633893, at *6 (W.D. Wash. Oct. 30, 2009), *aff'd in part*, 643 F.3d 1189 (9th Cir. 2011).

139. *Id.* at *1. Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Indeed, "FOIA cases typically and appropriately are decided on motions for summary judgment." Defenders of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). Summary judgment in favor of nondisclosure is appropriate when the agency's supportive evidence describes "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate[s] that the information withheld logically falls within the claimed exemption, and [is] not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Id.* (quoting Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981)). Generally, courts use a two-step inquiry to asses a motion for summary judgment in FOIA cases: (1) "whether the agency has met its burden of proving that it fully discharged its obligations under FOIA," and (2) "whether the agency has proven that the information that it did not disclose falls within one of the nine FOIA exemptions." *See* L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d, 880, 893–94 (C.D. Cal. 2006) (citing 5 U.S.C. § 552(a)(4)(B) (2006); Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985)).

140. *Watkins*, 2009 WL 3633893, at *1. Applying the Ninth Circuit's test to determine the applicability of Exemption 4, the court found consensus with regard to the satisfaction of the first two elements of Exemption 4—"commercial or financial information" and "obtained from a person." *Id.* at *6. The heart of the dispute centered on whether the information was "confidential." *Id.* The district court recognizing that the Ninth Circuit had adopted the *National Parks* test, and found that it controlled in this case. *Id.* at *7 (citing Frazec v. U.S. Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996); GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1112–13 (9th Cir. 1994)). Under the *National Parks* test, material is confidential if it is likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2)

the disclosure of the notices to trademark owners constituted a waiver of Exemption 4, holding instead that the "limited disclosure to interested third-parties [did] not operate to disqualify the information from protection under Exemption 4."[141]

On appeal, the Ninth Circuit agreed with the district court's determination that the notices were commercial and that Exemption 4 normally applies to such notices.[142] However, the court held that, in this case, "CBP waived the confidentiality of the notices by disclosing them to trademark owners without any limits on further dissemination."[143] While acknowledging that the public-domain test constituted one method of determining waiver of confidentiality, the court concluded that it should not be the *only* test.[144] The court reasoned that the public-domain test did not adequately address the concerns associated with the "no-strings-attached" disclosure because information so disclosed might still be made widely available to the public without being officially disclosed in a permanent public record.[145] Thus, the court created a new "unlimited disclosure" test, which provided that waiver occurs when the government has disclosed information to any third party without placing limits on that person's ability to further distribute the information.[146]

II. *CENTER FOR AUTO SAFETY* ADHERES TO PRECEDENT WHILE *WATKINS* IS A MYSTERIOUS DEPARTURE

In *Critical Mass*, the D.C. Circuit outlined several factors to consider when applying the principle of *stare decisis* to follow or abandon precedent.[147] The D.C. Circuit's holding in *Center for Auto Safety* comports with precedent and holds true to both the general purposes of FOIA, and the specific purposes of Exemption 4.[148] In contrast, the Ninth Circuit's holding in *Watkins* is contrary

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to cause substantial harm to the competitive position of the person from whom the information was obtained." Nat'l Parks & Conservation Ass'n v. Martin, 498 F.2d 765, 770 (D.C. Cir. 1974). The district court ruled that the information in the notices was confidential because disclosure would create a risk of substantial competitive harm to the importers; therefore, the information was exempt under Exemption 4. *Watkins*, 2009 WL 3633893, at *9–10.

141. *Id.* at *10. The court also noted that a statute required the limited disclosure, and compliance therein did not constitute waiver. *Id.*

142. *Watkins*, 643 F.3d at 1195–96.

143. *Id.* at 1196.

144. *Id.* at 1197.

145. *Id.*

146. *Id.* at 1198.

147. *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 875–76 (D.C. Cir. 1992) (describing when it is appropriate for a court to abandon established precedent). The D.C. Circuit focused on the widespread acceptance of its *National Parks* test, the subsequent acquiescence by Congress, and the lack of evidence to show that the test did not work. *Id.* at 867–77.

148. *See supra* Part I.D (recognizing the public-domain test as the prevailing test to determine waiver of a FOIA exemption); *infra* Part II.A (arguing that *Center for Auto Safety*

to prior case law and Exemption 4's underlying intent.[149] Additionally, none of the factors considered by the D.C. Circuit in *Critical Mass* for observing *stare decisis* were present or acknowledged in *Watkins*, rendering the Ninth Circuit's departure from the public-domain test unjustifiable.[150]

A. Center for Auto Safety*: A Proper Use of the Waiver Doctrine*

The D.C. Circuit's *Center for Auto Safety* decision is well grounded in logic, and the court's reasoning accorded with other cases relying on the public-domain test.[151] Although the court did not explicitly acknowledge the waiver doctrine or the public-domain test, both the district court and circuit court opinions analyzed whether the information at issue was customarily disclosed to the general public and whether prior limited disclosures of that information waived exemption protection.[152] CAS attempted to argue that the automakers' prior disclosures destroyed any claims of continuing confidentiality, but the court disagreed, characterizing the releases as "discrete disclosures to persons or agencies who require the information . . . [that had] generally been accompanied by confidentiality agreements . . . ."[153] Consistent with other judicial precedent applying the public-domain test to find waiver when information is officially disclosed in a permanent public record,[154] the D.C. Circuit correctly concluded that Exemption 4 protection still applied to the air-bag system information and had not been waived by prior

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accords with precedent). The underlying purpose of FOIA is to allow the general public to obtain information from the government and to ensure that certain items are protected from disclosure. *See* S. REP. NO. 89-813, at 3 (1965) (acknowledging that despite the policy of broad disclosure, some information should remain confidential); *see also supra* note 4 (describing Exemption 4 and explaining that the public-domain test is the primary test for determining waiver).

149. *See supra* Part I.C–D; *infra* Part II.B (explaining why the Ninth Circuit decided *Watkins* improperly).

150. *Compare Critical Mass Energy Project*, 975 F.2d at 876–77 (following the *National Parks* test because it is widely accepted, Congress has acquiesced to the test, and it is workable), *with* Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1197–98 (9th Cir. 2011) (concluding that the public-domain test should not be the only test for waiver).

151. *See supra* Part I.D (discussing the history of the waiver doctrine and the prevailing test for waiver); *supra* Part I.E.1 (discussing the court's holding in *Center for Auto Safety*). Although *Center for Auto Safety* focused on the auto manufacturer's past disclosures and *Watkins* focuses on the agency's disclosure, both equally focus on past disclosures and concern the continuing confidentiality of the information at issue. *See* Judicial Watch, Inc. v. U.S. Dep't of Treasury, 802 F. Supp. 2d 185, 206 (D.D.C. 2011) (citing to *Center for Auto Safety* and applying the limited-disclosure analysis to past disclosures by a government entity).

152. *See* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 150 (D.C. Cir. 2001); *see also* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 18 (D.D.C. 2000), *rev'd in part on other grounds,* 244 F.3d 144.

153. *Ctr. for Auto Safety*, 93 F. Supp. 2d at 18.

154. *See supra* Part I.D.

disclosures.[155] A recent D.C. district court case has echoed the *Center for Auto Safety* holding by finding that no waiver occurred when information was previously disclosed in a limited fashion.[156]

B. Watkins*: An Improper Interpretation of the Waiver Doctrine*

The Ninth Circuit's use of the waiver doctrine to justify disclosure in *Watkins* is problematic.[157] The court's expansion of the doctrine compels a finding of a waiver whenever an agency freely discloses information to a private party without restricting further dissemination of the information.[158] Although the court considered whether the information qualified for Exemption 4,[159] it only briefly discussed its departure from prevailing waiver doctrine.[160] The lack of detailed discussion regarding waiver doctrine is peculiar given that the court's holding broadened the waiver doctrine by

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155. *See Ctr. for Auto Safety*, 244 F.3d at 152–53 (noting that the district court found that the majority of the information at issue was not customarily disclosed in spite of earlier limited disclosures).

156. *See Judicial Watch*, 802 F. Supp. 2d at 205–06.

157. *See* Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1196–98 (9th Cir. 2011) (failing to follow the public-domain test when holding that a non-public disclosure to a private third party waived any exemption).

158. *Id.* at 1197.

159. *Id.* at 1194–96 (discussing whether Exemption 4 applied to the notices). The court first addressed whether the information was "commercial or financial." *Id.* at 1194–95; *see also supra* Part I.C.1 (discussing the "commercial or financial" prong of Exemption 4). Recognizing that "commercial" and "financial" are to be given their ordinary meaning, the court readily dismissed Watkins's argument that the information was not commercial, as illegal dealings in counterfeits is not a "legitimate commercial activity." *Watkins*, 643 F.3d at 1194–95; *see also* Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (finding that information can qualify as commercial if the provider of the information has a "commercial interest" in it). The court found that the relevant inquiry is whether the importation of goods in general qualifies as commercial because the seizure of goods was not a final determination that the goods were actually counterfeit. *Watkins*, 643 F.3d at 1195. The notices contained plainly commercial information, such as supply chains and demand fluctuation. *Id.* The second prong of Exemption 4 analysis was not in dispute, as indicated by a complete lack of discussion in the court's opinion regarding whether the information was "obtained from a person." *See id.* at 1194–95; *see also supra* Part I.C.2 (discussing the "obtained from a person" prong of Exemption 4). The second prong was clearly satisfied because the information was obtained from an importing company, which is included in the definition of "person." *Watkins*, 643 F.3d at 1195; *see also* 5 U.S.C. § 551(2) (2006). The final step for the court was applying the *National Parks* test to determine if disclosure of the information is likely to either: "(1) impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); *see also* supra Part I.C.3.c (discussing the *National Parks* test). The Ninth Circuit limited the issue in *Watkins* to the second *National Parks* factor. *Watkins*, 643 F.3d at 1194. The court found that CBP had demonstrated substantial harm because the evidence established actual competition in the market for imports and the likelihood that disclosure would risk substantial injury to the importers in that market. *Id.* at 1196.

160. *Watkins*, 643 F.3d at 1196–98.

significantly departing from prevailing law.[161] The bulk of the court's reasoning focused on the *potential* for further disclosure by a third party, rather than *actual* disclosure in the public domain.[162] Accordingly, the court ruled that as a "no-strings-attached disclosure," the release of notices to trademark owners constituted waiver.[163]

Contrary to the court's decision, a review of the circumstances surrounding the disclosure in *Watkins* demonstrates that the notices provided to private parties do not in fact qualify as disclosures to the public so as to constitute a waiver.[164] Instead, the release of the notices is a limited disclosure, made pursuant to a statute that requires notice be provided *only* to legitimate trademark owners whose intellectual property has been potentially infringed so that they can take action against the counterfeiters if they so desire.[165] The disclosure in *Watkins* is remarkably similar to the disclosure in *Center for Auto Safety* in that the release in *Watkins* was limited to only "certain parties at interest," rather than the public as a whole.[166] Although the *Watkins* court focused on the potential for further dissemination of the notices due to the lack of confidentiality restrictions—a concern not at issue in *Center for Auto Safety*—there was still no "permanent public record" of the notices disclosed. This determination should end the inquiry when waiver doctrine is correctly applied.[167]

Characterizing the notices as an official disclosure runs contrary to what other courts have recognized as official disclosures in other circumstances.[168] Although the Ninth Circuit attempted to distinguish *Watkins* from cases protecting limited disclosure from the waiver doctrine because of the "overriding concerns for public safety and national security,"[169] the court made no mention of prior case law in which the public-domain test was used in the context of Exemption 4.[170] Much like the information released in *Judicial*

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161. *See id.*

162. *Id.* at 1196–97 ("[The third party] *can* freely disseminate that information in ways that would compromise the purportedly sensitive information . . . ." (emphasis added)).

163. *Id.* at 1197.

164. *See supra* Part I.D (discussing the prevailing waiver test of whether information can be found in the public domain).

165. *Watkins*, 643 F.3d at 1197 (citing 19 U.S.C. § 1526(e) (2006)); *see also supra* note 152 and accompanying text.

166. Copyright/Trademark/Trade Name Protection; Disclosure of Information, 60 Fed. Reg. 36,249, 36,250 (proposed July 14, 1995) (noting that the seizure notices were to be provided "to certain parties at interest"); *see also Watkins*, 643 F.3d at 1192 (explaining that the information is only provided to the owner of the potentially infringed trademark); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 18 (D.D.C. 2000), *rev'd in part on other grounds,* 244 F.3d 144 (D.C. Cir. 2001).

167. *See supra* Part I.D.

168. *See supra* note 110.

169. *Watkins*, 643 F.3d at 1197.

170. *See infra* note 180.

Watch, the notices provided to trademark owners are similarly intended to keep interested parties apprised of information that concerns them.[171] As the court recognized, requiring disclosure of the information in the notices under FOIA could cause the trademark owners the substantial competitive harm that Exemption 4 was intended to prevent.[172] The limited disclosure of information relating to the seizure of allegedly counterfeit goods should not require universal disclosure of the confidential and commercial or financial information contained in the notices.[173] The Agency did not distribute the notices in the public domain because they were not officially disclosed in a permanent public record; thus, protection from disclosure was not waived under the traditional understanding of the waiver doctrine.[174] The Ninth Circuit's departure from past precedent could not have been anticipated by CBP. As such, CBP had no notice that their "no limits" disclosure to trademark owners would constitute waiver when the existing requirements of the public-domain test were not satisfied.[175]

Not only does the *Watkins* decision contradict the law in other circuits, but it conflicts with the Ninth Circuit's previous holding in *Bowen v. Food & Drug Administration*, in which the court asserted that an agency's prior disclosure does not necessarily waive future claims of exemption for information related to the disclosed information.[176] The *Watkins* opinion does not mention *Bowen* in its waiver analysis, only briefly citing to the case in a general discussion of Exemption 4, and fails to acknowledge *Bowen*'s concern about the government's ability to obtain information in the future if the documents requested were disclosed.[177] In *Bowen*, the Agency placed no restrictions on the information that had been released, just as the Agency in *Watkins* placed no restrictions on the trademark owners regarding further dissemination.[178]

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171. *See* Copyright/Trademark/Trade Name Protection; Disclosure of Information, 60 Fed. Reg. at 36,250.

172. *See Watkins*, 643 F.3d at 1196.

173. *Compare* Cottone v. Reno, 193 F.3d 550, 556 (D.C. Cir. 1999) (finding no waiver for wiretapped recordings that were only provided to counsel and not played in open court), *with Watkins*, 643 F.3d at 1192 (stating that the information in the notices remains confidential except when disclosed to only those trademark owners whose trademarks may have been infringed).

174. *See supra* Part I.D (discussing the public-domain test and explaining that it is the prevailing test for waiver); *see also Cottone*, 193 F.3d at 555 (stating that the court "must be confident that the information sought is truly public and that the requester receive no more than what is publicly available before [it] find[s] a waiver").

175. Thus, although there was no confidentiality agreement attached to the notices, as had been attached to the information disclosed in *Center for Auto Safety*, CBP expected such confidentiality to be kept as a result of previous customary action. *See generally* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144 (D.C. Cir. 2001).

176. 925 F.2d 1225, 1228 (9th Cir. 1991).

177. *See Watkins*, 643 F.3d at 1195.

178. *Compare Bowen*, 925 F.2d at 1228 (noting that the FDA had provided documents to Bowen with no apparent restrictions), *with Watkins*, 643 F.3d at 1198 (finding that the

Additionally, the prior disclosure in *Bowen* was not considered official, just as the notices were not an official disclosure in *Watkins*.[179]

More troublesome, the Ninth Circuit did not rely on any prior Exemption 4 case law to reach its decision regarding waiver, instead distinguishing past cases in which the public-domain test was used for other exemptions.[180] Without any precedential support, the court determined that the public-domain test "should not be the only test for government waiver."[181] The court's reasoning for applying a new rule in this case is flawed.[182] Additionally, the court's reasoning notably lacks a supported explanation for why the well-recognized public-domain test does not adequately balance the underlying purposes of FOIA and its exemptions in this context while the unlimited-disclosure test does.[183]

The Ninth Circuit stated that "[t]aken to its logical extreme, the 'public domain' test would still shield commercial information under Exemption 4 even if CBP or an aggrieved trademark owner opened up the phonebook and faxed a copy of the seizure notice to every importer in the region."[184] This statement turns the waiver doctrine on its head because it ignores that *government* action in a prior disclosure is the focus of the waiver doctrine, rather than what any individual might do with the information.[185] Here, the limited release of the notices to the trademark owners is quite distinguishable from an official release to the entire public.[186] Furthermore, nothing in *Watkins* indicated that the information at issue was ever disseminated beyond

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government does not impose any restriction on the information's dissemination when disclosure is made to a trademark owner).

179. *Compare Bowen*, 925 F.2d at 1228–29 (describing the release to Bowen as "erroneous" and "inadvertent[]"), *with Watkins*, 643 F.3d at 1197 (describing the release of the notices as a "disclosure to a third party," but not as an official disclosure to the public).

180. *See Watkins*, 643 F.3d at 1196–98 (citing to cases that applied the public-domain test in the context of "requests for sensitive information involving high-level criminal investigations or matters of national security"); *see also Bowen*, 925 F.2d at 1228–29 (explaining that prior Agency disclosures do not automatically nullify subsequent exemption claims). The *Watkins* decision fails to mention any Exemption 4 case law that has applied the public-domain test. *See, e.g.*, Mobil Oil Corp. v. U.S. E.P.A., 879 F.2d 698, 700–01 (9th Cir. 1989) (stating that *voluntary* disclosures have "sometimes been held to waive FOIA exemptions" and noting that "[t]he policy underlying the exemption of certain categories of documents from FOIA disclosure requirements is that 'legitimate governmental and private interests could be harmed by the release of certain types of information'" (quoting FBI v. Abramson, 456 U.S. 615, 621 (1982))).

181. *See Watkins*, 643 F.3d at 1197.

182. *Id.*

183. *See id.* at 1197–98.

184. *Id.* at 1197.

185. *See* Carson v. U.S. Dep't of Justice, 631 F.2d 1008, 1015–16 & n.30 (D.C. Cir. 1980) ("[T]he extent to which prior *agency* disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed." (emphasis added)).

186. *See supra* Part I.D.

the trademark owners themselves,[187] a burden that Watkins had to meet to prevail on the claim that an exemption has been waived.[188] Had CBP moved for a protective order, the Ninth Circuit could have made efforts to remedy their concerns by prohibiting the trademark owners from disclosing the notices.[189] This solution seems much simpler than creating an entirely new test for the situation at hand.

The Ninth Circuit expressed concerns about the "logical extreme" of the public-domain test, but failed to consider the "logical extreme" of its new test.[190] The unlimited-disclosure test states that "when an agency freely discloses to a third party confidential information covered by a FOIA exemption without limiting the third-party's ability to further disseminate the information then the agency waives the ability to claim an exemption to a FOIA request for the disclosed information."[191] This test opens the door for a deluge of litigation surrounding the meaning of the Ninth Circuit's holding because the court failed to define key terms such as "freely discloses," "limiting," and "third party."[192] If the agency's disclosure to trademark owners is done "freely" even though such disclosure is mandated by statute,[193] what is a coerced or involuntary disclosure? Does an independent contractor who works with the agency qualify as a third party? What sort of limit on the third party's further dissemination of the information is sufficient to rebut an argument for waiver? The court answered none of these questions, creating the need for guesswork in future cases.[194] As noted in *Critical Mass*, governmental disclosure of confidential information provided by persons may result in the collection of less reliable information in the future.[195] Additionally, CBP sometimes seizes legitimate goods due to suspicion of

187. *Watkins*, 643 F.3d at 1197 (providing that the trademark owner *could* compromise the information by freely dissemination the information to third parties, but failing to identify any *actual* further dissemination).

188. *See* Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989) (noting the unfairness that would result if the party arguing against disclosure "would have to identify all of the public sources in which the information contained in its documents is *not* reproduced"); *see also supra* note 109 and accompanying text.

189. *See, e.g.*, Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 80 (D.D.C. 2001) (stating that "inadvertent disclosure does not render . . . information publicly available for the purposes of future FOIA requests" and that the court could arguably issue a protective order to prevent further disclosures).

190. *See Watkins*, 643 F.3d at 1197.

191. *Id.* at 1198.

192. *See id.*

193. *Id.* at 1197–98 (determining that disclosure under 19 U.S.C. § 1526(e) was a "no strings attached" disclosure); *see also* 19 U.S.C. § 1526(e) (2006) (providing that the secretary shall notify the trademark owner when a good bears a counterfeit mark resembling the owner's trademark).

194. *See id.* at 1199 (Rymer, J., dissenting) (stating that unlike the new test, the public-domain test is a clear rule that can be applied without guesswork).

195. Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992).

trademark infringement, in which case the importer has done nothing wrong.[196] The eventual disclosure of the information in the notices would cause exactly the competitive harm Exemption 4 was designed to prevent because others will become aware of the importer's trading partners, supply chains, and the manufacturers with whom they are dealing.[197] Fear of this harm will make those providing the information in the notices reluctant to provide accurate information to the government in the future.[198]

III. A SOLUTION: PUBLIC DOMAIN FOR ALL

The public-domain test has been and continues to be effective in deciding whether a waiver has occurred.[199] The issue of waiver is particularly important with regard to Exemption 4 because, unlike other exemptions, Exemption 4 protects information "obtained from a 'person' rather than information generated by the government."[200] Therefore, the government must ensure that such information is protected to avoid competitive harm to others who entrust the government with their confidential information.[201] Up until *Watkins*, the public-domain test had effectively served this purpose.[202]

The Ninth Circuit's new unlimited-disclosure test enables disclosure of confidential information under FOIA in circumstances in which the information is not otherwise accessible to the public.[203] The mere chance that trademark owners could disseminate the information to others should not be sufficient to show that confidentiality has been waived because the information has not actually been disclosed in a public fashion.[204] The new test would require agencies and the courts to speculate as to whether a *third party* may

196. *See Watkins*, 643 F.3d at 1195 (acknowledging that "importers sometimes acquiesce in the Agency's seizure and forfeiture of legitimate goods," and therefore the notices do not necessarily document counterfeit merchandise).

197. *See id.* at 1196.

198. *Cf. id.* (providing that less reliable information may be provided in the future if confidentiality is not maintained).

199. *See id.* at 1199 (Rymer, J., dissenting) (arguing that the public-domain test should be adopted by the Ninth Circuit); *see also* Part I.D.

200. *See* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974) (reasoning that if information is disclosed, people may decline to cooperate in the future, which will impair government decision making).

201. *See id.*

202. *See supra* Part I.D (discussing the public-domain test as used to determine the applicability of FOIA's waiver doctrine).

203. *See supra* Part II.B (arguing that the Ninth Circuit improperly focused on *potential* disclosures, rather than actual disclosures).

204. *See supra* Part I.D (explaining that a waiver occurs when information is *actually* disclosed and preserved in a permanent public record).

make further disclosures, rather than focusing on whether the *government* has made such disclosures and under what circumstances.[205]

By creating a new test, the Ninth Circuit fashioned a rule inconsistent with both the core purpose of Exemption 4, which Congress intended to protect confidential commercial information provided by others,[206] and the overall purpose of FOIA to "establish a general philosophy of full agency disclosure."[207] If the *Watkins* holding stands, the concerns voiced by the court in *Critical Mass* regarding the continued availability and reliability of useful information may come to fruition.[208] Individuals who provide commercial information to the government, will be less willing to do so, and if compelled to do so, will provide less reliable information for fear that any government disclosure of the information—even a limited one—will subject the information to FOIA disclosure.[209] Although the *Watkins* test might appear to accord with FOIA because it provides greater access to information,[210] the increase in disclosure will result in a decrease in both the quality and quantity of information provided to the government in the future[211]—a result directly at odds with the interest sought to be protected under Exemption 4.[212]

Moreover, the *Watkins* holding has created variance among federal courts in an area where uniformity is essential.[213] Access to information through FOIA should not vary based on the jurisdiction within which the documents are located; yet, this is the exact effect of the Ninth Circuit's decision.[214] Information that would typically be protected by Exemption 4 in jurisdictions

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205. *See* Carson v. U.S. Dep't of Justice, 631 F.2d 1008, 1015 n.30 (D.C. Cir. 1980) ("[T]he extent to which prior agency disclosure may constitute a waiver of FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed."). In looking at the specific facts of the prior release of the notices, the court should have focused on what actually happened, not the possibility of other scenarios.

206. *See* S. REP. NO. 89-813, at 9 (1965).

207. *Id.* at 4.

208. *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (observing that when information is compelled, persons fearing a likelihood of disclosure will be more likely to provide less reliable information, and when information is not compelled, persons will be less likely to provide any).

209. *See id.* (describing how people will be less likely to trust the government to maintain confidentiality).

210. *See* Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1197–98 (9th Cir. 2011).

211. *See Critical Mass*, 975 F.2d at 878.

212. *Id.* (exempting confidential commercial information to further the government's interest in obtaining reliable information); *see supra* Part I.C.3.iv.

213. *See supra* Part II.B.

214. *Cf.* S. REP NO. 89-813, at 5 (1965) (stating that FOIA eliminates the test for who gets access to different information); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (stating that requesters' rights under FOIA do not increase or decrease because they claim a greater interest in the information than others); United Tech. Corp. v. Fed. Aviation Admin., 102 F.3d 688, 692 (2d Cir. 1996) ("[T]he test outlined in *National Parks* does not appear to contemplate its application on a requester-specific basis.").

following the public-domain test will likely be disclosed through the unlimited disclosure test in the Ninth Circuit.[215]

A. A Supreme Court Holding: Solidifying the Public-Domain Test

In the fall of 2011, the Supreme Court denied a petition for certiorari in *Prison Legal News v. Executive Office for U.S. Attorneys*, a case involving the scope of the public-domain test.[216] The petition raised the question of whether the government can invoke a FOIA exemption when it has disclosed the same records "by placing them in the public domain as unsealed evidence in a public trial."[217] Because the Supreme Court decided not to grant certiorari, the *Prison Legal News* holding that the government could still invoke the exemption prevails and suggests that even those disclosures made in a relatively public setting, such as at trial, do not automatically result in the waiver of a FOIA exemption.[218] The *Prison Legal News* holding highlights the weakness of *Watkins*.[219] If documents such as those requested in *Prison Legal News* are exempt from disclosure,[220] then limited release of the notices to trademark owners cannot constitute a waiver when the release is both less public and less of an official disclosure.[221]

Following the *Prison Legal News* denial of certiorari and given the Ninth Circuit's departure from the well-established test for waiver, a Supreme Court ruling on the validity of the *Watkins* test would be the best solution, given that the waiver doctrine has evolved through the common law and is not prescribed by statute.[222] A grant of certiorari in *Watkins*, and a subsequent reversal, would allow the Supreme Court to directly address the Ninth Circuit's finding that the public-domain test "should not be the *only* test for government

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215. *Compare supra* Part I.D (describing the public-domain test and the requirement that information be officially disclosed and preserved in a permanent public record), *with supra* Part I.E.2 (describing the broader test established in *Watkins*).

216. *See* Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1252–53 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 473 (2011).

217. Petition for Writ of Certiorari at i, *Prison Legal News*, 132 S. Ct. 473 (No. 10-1510), 2011 WL 2421269.

218. *See Prison Legal News*, 628 F.3d at 1252–53 (explaining that the applicable exemption can still serve its purpose because the pictures were displayed to a limited group of people and not physically disseminated).

219. *See supra* Part II.B.

220. *See Prison Legal News*, 628 F.3d at 1253 (determining that specific images used in a trial were not publically disclosed).

221. *See supra* Part II.B. Although there was physical dissemination of the notices to the trademark owners in *Watkins*, a factor not present in *Prison Legal News*, the notices were obtained by a limited group of people directly interested in the information provided. As courtrooms and trials are typically open to the public, the images displayed in *Prison Legal* are arguably more "public" than the privately mailed notices in *Watkins*, even when the physical dissemination factor is present.

222. *See supra* Part I.D.

waiver."[223] Alternatively, the Supreme Court could bring the unlimited-disclosure test within the scope of the public-domain test by expanding its definition of what is "public." This would allow for a uniform approach to the waiver doctrine. In either case, the information at issue in *Watkins* should be shielded from disclosure due to the uniform understanding of the waiver doctrine at the time the notices were released.

B. A Legislative Solution: Amending FOIA

Congressional action provides an alternative to Supreme Court review. Congress has amended FOIA several times in the past,[224] and is in a position to establish a prevailing test for waiver by creating, for example, a new § 552(c) immediately following the nine exemptions detailed in § 552(b).[225] The amendment could establish that an agency would waive the exemptions enumerated above if the materials requested were: (1) released in a prior official disclosure, or (2) could be found in the public domain.[226] Because the courts have already made attempts to define both official disclosure and when information is public,[227] Congress could defer to those definitions unless there was a strong desire to solidify the definitions within the statute itself.

Additionally, Congress could amend the statute governing the notices of seizure to specifically exempt their context from disclosure,[228] which would bring the notices within the protection of Exemption 3.[229]

C. An Executive Response to Watkins*: Amending the Seizure Regulations*

In the absence of a legislative amendment, the executive branch could limit the holding of *Watkins* by amending the regulations governing the notices of seizure. The amendment could require that the notices contain a confidentiality statement[230] or limit the type of information included in the notices so as to avoid the disclosure of confidential commercial or financial information altogether.[231] In fact, prior to the current version of the regulation,

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223. *See* Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1197 (9th Cir. 2011) (emphasis in original).

224. *See supra* Part I.B (discussing FOIA's enactment and subsequent amendment).

225. *See* 5 U.S.C. § 552(b) (2006 & Supp. IV 2010).

226. *See supra* Part I.D.

227. *See supra* note 110 and accompanying text.

228. *See* 19 U.S.C. § 1526(e) (2006) (providing that the secretary should give notice to aggrieved trademark owners when a design replicates their trademark).

229. *See* 5 U.S.C. § 552(b)(3) (Supp. IV 2010) (exempting information that has been "specifically exempted from disclosure by statute").

230. *See* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d. 1, 18 (D.D.C. 2000) (highlighting that the prior disclosures included confidentiality notices), *rev'd in part on other grounds,* 244 F.3d 144 (D.C. Cir. 2001).

231. *See* 19 C.F.R § 133 (2011) (setting forth the information required to be included in the notices).

the agency satisfied the notice requirements by simply informing the trademark owner that a seizure occurred.[232]

In the meantime, courts should continue to apply the well-established public-domain test while agencies should attempt to distinguish *Watkins* where possible and make efforts to affix a confidentiality notice to documents that are disclosed. In doing so, the precedential effect of *Watkins* will be limited, thus protecting the underlying purposes of Exemption 4.[233]

IV. CONCLUSION

The Freedom of Information Act's waiver doctrine is an area in which uniformity is crucial. Finding that an exemption has been waived based on the potential for third parties to disseminate the information will result in inconsistent decisions. Consistent with FOIA, information should be disclosed to those requesting it based on the *government*'s actions.[234] Varying levels of access to information based on a document's location are contrary to the goals of FOIA, which seeks to permit any person to obtain information from the federal government.[235] Although the main purpose of FOIA is the disclosure of information, [236] recognition of legitimate confidential interests for commercial information is one of the recognized goals reflected in Exemption 4.[237] As stated in *Critical Mass*, agencies *must* consider the future reliability of information obtained if commercial entities are under the impression that their confidential information may be released through a future FOIA request.[238]

The public-domain test has thus far functioned successfully in striking a suitable balance between the public's interest in disclosure and third parties' interests in keeping their information confidential;[239] the same cannot be said of the unlimited-disclosure test. A true loss of confidentiality requires more than just the *potential* for further dissemination. Without an appropriate balancing of these competing interests, the quantity and quality of information received will surely be reduced.

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232. *See* Appellant's Reply Brief at 16, Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189 (9th Cir. 2011) (No. 09-35996), 2010 WL 894744 (explaining that before 19 C.F.R. § 133.21 only notice of the fact of a seizure had to be disclosed).

233. *See supra* Part I.C.

234. *See supra* Part I.B.

235. *See supra* Part I.B.

236. *See supra* Part I.B.

237. *See* S. REP. NO. 89-813, at 9 (1965); *see also* H.R. REP. NO. 89-1497, at 10 (1966).

238. *See* Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992).

239. *See supra* Part I.D.