THE CRITICAL MASS DECISION: A DANGEROUS BLOW TO EXEMPTION 4 LITIGATION

G. Branch Taylor

In the late 1960s, the American public grew increasingly wary of the unchecked power of the federal government and demanded the opportunity to monitor the actions of its officials. Responding to this demand, Congress enacted the Freedom of Information Act ("FOIA"), which set forth "a policy of broad disclosure of Government documents in order to ensure ‘an informed citizenry, vital to the functioning of a democratic society.’" 4

Congress understood, however, that "legitimate governmental and private interests could be harmed by release of certain types of information." 8 Therefore, nine categorical exemptions were enacted to prevent such harm. 4 The exemptions enacted function in two ways: they afford the government flexibility to operate more efficiently and they preserve the secrecy interests of information submitters. 5

Under Exemption 4 of the FOIA, "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," is afforded protection from public disclosure. 4 The purpose of this exemption is to "protect [the] interests of both the Government and the individual." 7

In a recent en banc decision, Critical Mass Energy Project v. Nuclear Regulatory Commission, ("Critical Mass II"), 6 the United States Court of Appeals for the District of Columbia Circuit reconsidered its longstanding interpretation of Exemption 4. Previously, in the 1974 National Parks & Conservation Association v. Morton 8 decision, the D.C. Circuit Court applied a two-prong test to determine whether commercial or financial business information met the confidentiality standard under Exemption 4. In National Parks, the court declared that the term "confidential" should be read to protect governmental interests as well as private interests, according to the following test:

[C]ommercial or financial matter is "confidential" for the 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. 10

3 Id. The possible harm that could result from disclosure of certain information is explained in the following Senate committee report: "This exception is necessary to protect the confidentiality which is obtained by the government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained." S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1964). Also, the court in Critical Mass II pointed out that there are circumstances where disclosure could affect the "reliability" of data and also the "quality." Critical Mass II, 975 F.2d at 878.
4 5 U.S.C. § 552(b)(1988). The nine categorical exemptions, often called the b(4) exemptions, refer to information that falls under the general headings of (1) National Security, (2) Internal Agency Rules, (3) "Catch-All" Exemption, (4) Trade Secrets, (5) Internal Agency Memoranda, (6) Personal Privacy, (7) Law Enforcement Records, (8) Bank Reports, and (9) Oil and Gas Well Data. Id.
5 National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974). S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1964), sets forth both of these legislative goals:
   At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material such as the investigatory files of the Federal Bureau of Investigation.
7 498 F.2d at 767. However, the court has interpreted the definition of "government interest" protected by Exemption 4: "[t]his exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose." (Emphasis added). Id. at 768 (citing Soucie v. David, 448 F.2d 1067, 1078 (1971)).
9 National Parks, 498 F.2d 765.
10 Id. at 770.
Although the Critical Mass II court reaffirmed the National Parks test, it also expanded the applicability of the second prong of Exemption 4. In Critical Mass II, the D.C. Circuit held that the National Parks test applied to “required” submissions of information and established an entirely new standard for determining the confidentiality of “voluntarily” submitted information. “Voluntary” submissions are protected if they are not “customarily” made available to the public by the business submitter. Under the new standard enunciated in Critical Mass II, the court held that the voluntarily submitted records, concerning safety related events occurring at nuclear facilities, fell under Exemption 4 protection.

Following the Critical Mass II decision, the President of the United States and the Attorney General issued a joint FOIA policy memorandum to all federal departments and agencies. The Attorney General’s memorandum stated:

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

The new policy rescinded the Department of Justice’s 1981 FOIA guidelines used for the defense of agency actions in FOIA litigation. Attorney General Reno’s FOIA memorandum incorporated President Clinton’s FOIA memorandum to establish “a strong new spirit of openness in government . . .” Following the Critical Mass II decision and prior to President Clinton’s memorandum, the Federal Communications Commission (“FCC” or “Commission”) denied a telecommunications company’s FOIA request. Allnet Communications sought disclosure of information submitted to the FCC by various telecommunications companies as part of a cost justification for proposed service rates. The FCC, acting in its regulatory capacity, could have required the information to be submitted by the companies, but instead accepted it “voluntarily.” On appeal, the D.C. Circuit, in Allnet Communications Services, Inc. v. FCC, held that the confidential commercial information exemption of the Freedom of Information Act applied to information supplied to the FCC by the telecommunications companies.

An analysis of the evolution of the law surrounding Exemption 4 of the FOIA, particularly the National Parks and the Critical Mass decisions, is important to understanding recent trends on the right to access information under the FOIA. This analysis, combined with an examination of the new FOIA policy guidelines laid out by the Clinton administration, provides insight into future FOIA litigation under Exemption 4. Specifically, discussion related to the Allnet decision and other information supplied to the FCC will show a distinct judicial trend of undermining the spirit of the FOIA. At issue is the public’s right to gather and communicate information and to hold the government accountable within the principles of democracy.

This Comment will analyze the impact of recent Exemption 4 decisions on the dissemination of information acquired by the FCC. Specifically, Part I discusses the FOIA’s Exemption 4 criteria and application of these criteria in litigation. Part II analyzes how the Critical Mass II decision further expands the confidentiality prong of the National Parks test. Part II also sets forth the Clinton administration’s new FOIA policy. Part III examines the

---

11 Critical Mass II, 975 F.2d at 880.
12 Id. at 872. The terms “voluntarily” and “customarily” are to be given their ordinary dictionary meanings. Id. Webster’s Third New International Dictionary of the English Language (Unabridged) defines voluntarily as “in a voluntary manner; of one’s own free will.” Customarily is defined as “by custom; in customary manner.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY 559, 2564 (1991).
13 Critical Mass II, 975 F.2d at 880.
15 Attorney General Memorandum, supra note 14.
16 Id. In connection with the repeal of the 1981 guidelines, the Attorney General requested that the Assistant Attorneys General for the Department’s Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them according to the standards articulated in the policy memo. Id.
17 Id.
19 Id. The information sought was contained in a report submitted by Arthur Anderson & Co. to the FCC explaining and analyzing in detail the Switching Cost Information System and Switching Cost Model used by the Bell Operating Companies to apportion joint and common costs between multiple switch functions used to provide unbundled service features. These models are used to implement Open Network Architecture. Id.
21 Id. at 986.
applicability of the new Exemption 4 category created in Critical Mass II in relation to the Allnet case and an FCC decision regarding Exemption 4. Part IV analyzes the conflict between the Critical Mass II standard and the Clinton administration's new FOIA policy. In conclusion, this Comment considers the purpose of the FOIA in comparison with the need for competitive privacy in the communications industry regarding the new Exemption 4 standard, and ends with predictions on future Exemption 4 litigation.

I. THE FREEDOM OF INFORMATION ACT: EXEMPTION 4

The federal Freedom of Information Act allows access to the records of all federal agencies, unless the requested records fall within one of the nine exemptions under which agencies are permitted, but not required, to withhold the requested information.最新 Once a FOIA request has been filed, the burden shifts to the government to either release the information promptly or to show the information is exempt.最新 The FOIA is applicable to every agency, department, regulatory commission, government controlled corporation, and other establishment in the Executive Branch of the federal government.最新

Exemption 4 provides that the Freedom of Information Act does not apply to matters that fall into either one of two categories. In the first category, matters involving trade secrets are exempt. In the second category, information that is commercial or financial, obtained from a person, and privileged or confidential, is also exempt..

The legislative history is not particularly helpful when attempting to ascertain the congressional intent behind the enactment of Exemption 4. The courts, however, in applying Exemption 4 in litigation, appear to glean congressional intent from an often cited Senate Report which states that "this exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained."最新 This broad language is specific to Exemption 4 and gives an indication of the purpose behind the exemption.

A. Prong I: Defining Trade Secrets

The D.C. Circuit, in Public Citizen Health Research Group v. FDA,最新 adopted a narrow definition of the term "trade secret." Departing from the broad definition used in the Restatement of Torts,最新 the court narrowly defined "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 that can be said to be the end product of either innovation or substantial effort."最新 This definition also required that a "direct relationship" exist between the trade secret and the productive process.最新 An example of how narrowly the definition of "trade secret" has been applied in conjunction with the "direct relationship" test can be seen in AT&T Information Systems v. GSA.最新 There, parties in a reverse FOIA ac-

98 Public Citizen Health Resource Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Public Citizen brought suit to compel disclosure of records produced during clinical studies of safety and efficacy of intraocular lenses. The D.C. Circuit Court of Appeals held that the records were not protected as "trade secrets."最新 Id. at 1287.

99 Restatement of Torts, § 757, cmt.(b)(1939), defines trade secret as: "any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know it or use it."

100 Public Citizen, 704 F.2d at 1288.

101 Id. The court held that: "In our opinion, the term 'trade secrets' in Exemption 4 of the FOIA should be defined in its narrower common law sense, which incorporates a direct relationship between the information at issue and the productive process."最新 Id.

102 AT&T Information Systems v. GSA, 627 F. Supp. 1396 (D.D.C. 1986), rev'd and remanded on other grounds, 810 F.2d 1233 (D.C. Cir. 1987). In this "reverse FOIA" action, the telecommunications company filed for declaratory judgment and preliminary and permanent injunction seeking to prevent GSA
tion agreed that this narrow definition excluded pricing information submitted by the plaintiff in a successful bid for a government contract. Narrowly defining "trade secret" for purposes of exempting information from disclosure appears to be consistent with the purpose of the FOIA, given that a narrow interpretation of trade secret ensures more information will fall outside of the scope of that which categorically would require exemption from disclosure.

B. Prong II: Commercial or Financial Information

The majority of Exemption 4 cases focus on whether the information to be withheld falls under the category of commercial or financial information. In order to be exempt from disclosure, the information in question must be either commercial or financial, held to be obtained from a person, and privileged or confidential.

The courts have consistently held that the terms commercial and financial should be given their ordinary meaning. The D.C. Circuit has rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them. Similarly, in Critical Mass Energy Project v. NRC ("Critical Mass I"), the court held that the non-profit status of an entity from which the information is obtained is a factor to be considered, but "is not determinative of the character of the information." In that case, nuclear industries' trade reports were held to be "commercial" because the information could have affected the profitability of constituent commercial utility companies.

The applicability of Exemption 4 to financial information has been interpreted to include both personal financial information and economic data generated by corporations or other business entities. Standard items generally regarded as financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition. Courts have noted that there is a strong public policy interest in releasing price information relating to aggregate prices in government contract awards. Courts have ordered the disclosure of such information, in part because "disclosure of prices charged the Government is a cost of doing business with the Government. It is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed."

The second prong of Exemption 4 encompassing confidential and financial information also requires that the information be obtained from a person and be privileged or confidential. "Person" in this context refers to a broad range of entities including corporations, associations, state governments, agencies of foreign governments and public or private organizations. The courts, however, have held that information that is generated by the federal government is
not "obtained from [sic] a person" and is therefore excluded from Exemption 4.\textsuperscript{44}

With regard to the last criteria under the second prong, the D.C. Circuit Court has ruled that the terms "privileged" and "confidential" are not the same. The court, citing to the legislative history regarding "particular privileges," held that "privileged" and "confidential" should not be treated as synonymous.\textsuperscript{46}

"Confidential" is a key term in Exemption 4 case law, because most litigation has focused on whether or not requested information was "confidential." Prior to 1974, tests for confidentiality focused primarily on whether the government made a confidential promise to the submitting party,\textsuperscript{48} or whether the information was normally the type the submitter would not release to the public.\textsuperscript{47}

Prior case law interpretation of "privileged" or "confidential" information was superseded by the 1974 National Parks Ass'n v. Morton decision.\textsuperscript{48} That decision established a bright line test by holding that the test for confidentiality was an "objective" one.\textsuperscript{49} The National Parks court adopted a two-prong test, finding information to be "confidential" for purposes of Exemption 4 if the disclosure would: (1) "impair the Government's ability to obtain necessary information in the future," or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained."\textsuperscript{50} This was a significant change from prior interpretations because whether the information would normally be disclosed to the public by the submitter was no longer considered dispositive in determining Exemption 4 status.\textsuperscript{51} Similarly, a government agency's promise not to release the information submitted was no longer a factor for Exemption 4 status.\textsuperscript{52}

In addition to adopting the two-prong test, the court in National Parks reserved decision on the issue of whether other government interests, such as compliance or program effectiveness, could constitute a third prong of the exemption.\textsuperscript{53}

In Critical Mass I,\textsuperscript{54} D.C. Circuit Court Judge Randolph, joined by Judge Williams, suggested that if this case was one of first impression then the "common" meaning of the term "confidential" would be applied, and the longstanding, widely accepted National Parks test would be rejected.\textsuperscript{55} While Judges Randolph and Williams conceded that they were not at liberty to apply their "common sense" approach due to the fact that the D.C. Circuit Court had established and applied the National Parks test on numerous occasions; they contended, nevertheless, that based on the unambiguous language in the statute, there was no reason to apply the court-made two-pronged "objective" test.\textsuperscript{56} The government's petition for a rehearing en banc was then granted to consider the theory articulated by Judges Randolph and Williams.\textsuperscript{57}

The Critical Mass proceeding stemmed from a 1984 FOIA request to the Nuclear Regulatory Commission ("NRC").\textsuperscript{58} The requestor was interested in obtaining a series of reports regarding construction and maintenance problems at nuclear facilities.\textsuperscript{59}

\textsuperscript{44} Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578, 582 (D.C. Cir. 1970). The court here cites section 551(2) of the Administrative Procedure Act, which excludes government agencies from the definition of "persons." Id. at 582 n.18.

\textsuperscript{45} Washington Post Co. v. HHS, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982). The court noted that at the time only two district court cases holding information to be privileged under Exemption 4 existed; both dealt with the attorney-client privilege, which is explicitly mentioned in the legislative history of Exemption 4. Id.

\textsuperscript{46} GSA v. Benson, 415 F.2d 878, 882 (9th Cir. 1969). This was an action taken by a member of a partnership to compel GSA to release records for tax purposes regarding property purchased by the partnership from GSA. The court noted that the government did not contend the appraisal reports to be kept confidential by the appraiser, and thus held that the reports were not "confidential" within the meaning of the statute. Id.

\textsuperscript{47} M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972). This was an action to compel disclosure of SEC staff study reports during the course of an investigation. The court ordered the records released (minus all individual-identifying information), noting that none of the parties could offer any substantive reason why the reports should not be made available to the public. Id.

\textsuperscript{48} National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

\textsuperscript{49} Id. at 767 (citing Bristol-Myers Co. v. FTC, 424 F.2d 935, 938, cert. denied, 400 U.S. 824 (1970)).

\textsuperscript{50} Id. at 770.

\textsuperscript{51} Id. at 767.

\textsuperscript{52} Washington Post Co., v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (citing National Parks, 498 F.2d at 766).

\textsuperscript{53} National Parks, 498 F.2d at 770 n.17.

\textsuperscript{54} Critical Mass Energy Project v. NRC, 931 F.2d 939, 948 (D.C. Cir. 1991) (Randolph & Williams, JJ., concurring), vacated and reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991).

\textsuperscript{55} Id. Justice Randolph cites as his "common" meaning of the word confidential "conveyed [and] acted on . . . in confidence" and "not publicly disseminated." Webster's Third International Dictionary 476 (1981).

\textsuperscript{56} Critical Mass I, 931 F.2d at 948.


\textsuperscript{58} U.S. DEPARTMENT OF JUSTICE, FOIA UPDATE, Vol. XIII, No. 4, Fall 1992 [hereinafter FOIA UPDATE].

\textsuperscript{59} Id.
The reports were prepared and submitted on a "voluntary" basis by the Institute for Nuclear Power Operations to the NRC. The NRC denied the request under Exemption 4 and the subsequent litigation ensued.60 It is important to emphasize that agencies such as the NRC are charged with overseeing or regulating a particular field or area. Consequently, the NRC, acting pursuant to its regulatory authority, could have required that the reports prepared by the Institute for Nuclear Power be submitted on a compulsory basis.61

II. CURRENT DEVELOPMENTS: THE CRITICAL MASS II DECISION

A. Reaffirmation of National Parks

In its en banc decision in Critical Mass II, the D.C. Circuit Court reconsidered, but did not overturn the two-prong objective test for confidentiality established in National Parks. Under the principle of stare decisis, the court reasoned it could not overturn the long-standing precedent.62 Nevertheless, in a seven to four decision, the court decided to revisit the National Parks test in order to "correct some misunderstandings as to its scope and application."63

B. New Standard Enunciated in Critical Mass II

In reexamining Critical Mass I, the D.C. Circuit reviewed the grounds for its decision in that case and the particular interests protected by Exemption 4.64 The court cited two primary protected interests noted in the holding of National Parks: "(1) the Government's need to have access to commercial and financial data and (2) the need to safeguard persons submitting such data to the Government from the competitive harms that might result from general publication."65 The court found that there was a "distinction" in those interests depending upon whether or not the information in question was submitted to the government on a "voluntary" or compulsory basis.66 Voluntarily submitted information is now categorically protected provided it is not "customarily" disclosed to the public by the submitter.67 Thus, the D.C. Circuit decisively has recognized a "third prong" under National Parks.

In order to reach this result, the D.C. Circuit Court was compelled to review the interests of both the government and the submitters of information that are protected by Exemption 4.68 The D.C. Circuit Court concluded that different interests are implicated depending upon whether the requested information was submitted voluntarily or under compulsion.69 Outlining the government's interest, the D.C. Circuit Court held that where the submission of information is "compelled" by the government, there is a strong interest in protecting the reliability of the information.70 Conversely, where the information is submitted on a voluntary basis, there is a strong interest in ensuring the continued availability of the information.71

Sitting en banc, the D.C. Circuit Court reiterated in Critical Mass II that the submitters' interest in protecting themselves from competitive injury, lent itself to analysis under the compelled versus voluntary submission analysis.72 Under the compelled submission test, the possible harm to the submitter is the "commercial disadvantage" laid out in the "competitive injury" prong of National Parks.73 Under the voluntary submission test, the interest at stake is protecting the information that "for whatever reason, would customarily not be released to the public by the person from whom it was obtained."74 After establishing this distinction, the D.C. Circuit Court noted that "[t]he Supreme Court has encouraged the development of categorical rules" under FOIA and it determined that "categorical treatment" is appropriate under Exemption 4.75

Based upon this analysis, the majority in Critical

---

60 Id.
63 Id. at 875.
65 Critical Mass II, 975 F.2d at 876.
66 Id. at 878.
67 Id. at 879.
68 Id. at 877-879.
69 Id.
70 Id.
71 Id.
72 Id. The competitive injury prong is the second of two prongs articulated in National Parks Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The two prongs are referred to disjunctively. A commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (Emphasis added) Id. at 770.
73 Critical Mass II, 975 F.2d at 878 (citing Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971)).
74 Id. at 879.
Mass II decided to reaffirm the National Parks test, but confined the test "to the category of cases to which it was first applied."76 The D.C. Circuit Court announced a new categorical rule for the protection of information submitted on a voluntary basis. Specifically, such information falls within Exemption 4 protection, independent of the protection of information submitted on a voluntary basis. Subsequently, it vacated both of its earlier decisions and affirmed the lower court ruling.79

The Supreme Court denied certiorari, thus the D.C. Court of Appeal's decision reflects the current status of the law regarding Exemption 4 in the D.C. Circuit.80 Because most FOIA cases are brought in this circuit, its decisions are given some deference by the other circuits.81 Thus, the Critical Mass II decision certainly will affect all decisions rendered in any circuit court involving Exemption 4 of the FOIA.

C. The Clinton Administration's Guidelines

President Clinton and Attorney General Reno have issued memoranda to all the federal government agencies and departments regarding the administration's policy on the Freedom of Information Act. Specifically, President Clinton instructed each department and agency to take steps to ensure compliance with both the letter and the spirit of the FOIA.82 Calling the FOIA "a vital part of the participatory system of government," President Clinton stated that in addition to responding to information requests, "each agency and department has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems."83

Under the new litigation policy outlined in the memorandum, Attorney General Reno stated that "[f]irst and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act."84 The Attorney General has gone even further by rescinding the Department of Justice's 1981 guidelines used for the defense of agency action in FOIA litigation.85 Under the new policy, a "presumption of disclosure" will be applied in determining whether or not to defend a nondisclosure decision.86 Attorney General Reno also stated that "the Department will no longer defend an agency's withholding of information merely because there is a 'substantial legal basis' for doing so."87

III. APPLICATION OF THE CRITICAL MASS II STANDARD TO ALLNET AND FCC FOIA REQUESTS

A. The Allnet Decision

Allnet Communication Services, Inc., filed a FOIA request with the FCC seeking disclosure of certain information submitted to the FCC by several telecommunications companies as part of a cost justification for proposed Open Network Architecture ("ONA") service rates.88

(D.D.C. 1992). The computer models and accompanying materials that were at issue in this case were filed with the FCC to allow review of the Bell Operating Companies' ("BOCs") tariffs implementing the ONA program. The Switching Cost Information System ("SCIS") is a computer model developed and maintained by Bell Communications Research ("Bellcore"). See Allnet FOIA Order, supra note 18, para. 5. SCIS allows users to estimate future costs of providing specific types of telecommunications services within a call routing network based on proprietary cost and engineering data provided by the switch vendors. See In re Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, Application for Review, Order, 9 FCC Rcd. 180, para. 2 (1993). The SCIS is used in conjunction with the FCC's ONA policies, which require the BOCs to "unbundle" their basic regulated telecommunications services. See In re Commission Requirements for Cost Support Material to be Filed with Open Network Architecture Access Tariffs, Application for Review, Memorandum Opinion and Order, 8 FCC Rcd. 422, para. 1 (1993). This procedure is designed to promote efficient use of the telephone network by providers of unregulated "enhanced ser-
On September 19, 1992, the FCC's Common Carrier Bureau ("Bureau") requested that the BOCs file computer models and associated data used to develop the ONA service rates in the first ONA tariffs. However, the FCC also stated that it would consider waiving the public filing requirement. The BOCs petitioned for waiver, arguing that public release of this information would cause harm to the competitive proprietary interests in their models. The FCC determined that the information would be exempted from mandatory disclosure under Exemption 4, but requested Bellcore to provide access to a redacted version of the SCIS program and documentation on a limited basis.88

Allnet, a participant in the ONA proceeding, received access to the redacted version.89 Unsatisfied, Allnet filed a FOIA request with the FCC seeking the information that was submitted to the FCC but not released to the public.90 On February 7, 1992, the Bureau denied this request.91 Allnet requested an administrative review of this decision.92 When the agency did not act upon the request in a timely fashion, Allnet filed for an appeal of the FCC decision on June 9, 1992, in the D.C. District Court.93 Allnet subsequently modified its request and all parties moved for summary judgment.94 The court concluded that Allnet's FOIA request was properly denied, thus granting defendant's and defendant intervenors'95 motion for summary judgment.96

B. The Impact of the Allnet Decision

In reaching its decision to deny the FOIA request, the Allnet court took a hard look at the nature of the information in question. The court stated, "[t]he critical question in this case is whether the materials sought are confidential or privileged."97 The Court analyzed the test developed in Critical Mass II, which stated that "[f]inancial or commercial information provided to the government on a voluntary basis is exempt under Exemption 4[sic] if it is of a kind that the provider would not customarily release to the public."98

Based on the language in the Allnet decision, it appears that the new criteria of voluntary versus compelled submission of information, although briefly discussed, was a factor in the court's decision.99 The court took the time to examine the information in question and then apply the tests depending on whether the information was "compelled" or provided "voluntarily."100 The court noted that the government had demonstrated that the input information provided by the switch vendors for use in the proposed service rates program was provided voluntarily, at least in part.101 The FOIA confidential commercial exemption still applies to information supplied to the FCC by the various telecommunications companies, although the test for voluntary submissions is much easier to satisfy than the test for required submissions. In Allnet, it was shown that the information was not customarily released to the public by the switch vendors.102 The switch vendors also indicated a reluctance to supply proprietary input data necessary for the functioning of computer models if such information would in fact be publicly disseminated.103 The Allnet case exemplifies how confusing FOIA litigation under Exemption 4 has become since the Critical Mass II decision. Further, when viewed in conjunction with the Clinton administration's new FOIA policy, the Critical Mass II court has diverged even further from the purpose of the FOIA.
C. FCC FOIA Requests After Critical Mass II: What Standard to Apply

U.S. West, Inc., submitted to the Commission an application to review a Bureau decision regarding the release of information contained in several leases involving U.S. West and some of its affiliates. The Bureau ruled that “although the leases probably contained some information that could be competitively damaging, some material in the leases was either publicly available or so general as to be of no competitive utility.” U.S. West challenged the decision arguing that the leases may be withheld pursuant to Exemption 4 of the FOIA. Citing Critical Mass II, the Commission identified “a pivotal question” relating to which Exemption 4 is applicable. The Commission focused on the distinction between “voluntary” and “required” submissions. U.S. West argued that the leases in question were voluntarily submitted to the FCC and therefore were exempt under the Critical Mass II test. The Commission, however, declined to take this issue into account in deciding that the leases were exempt from public disclosure. The Commission instead based its opinion and order solely on the competitive harm test established in National Parks. Agreeing with U.S. West that disclosure of such competitively sensitive information would cause substantial competitive harm, the Commission held that the requirements of Exemption 4 were satisfied. The order concluded that the factual issue of voluntary submission need not be addressed because “U.S. West has met its burden of establishing that Exemption 4 applies under the ‘competitive harm’ test.” This decision shows how the test created in Critical Mass II is confusing and unnecessary, demonstrated here by the FCC’s lack of interest in applying the test and attempting to address the issue of “voluntary” versus “compelled” submissions.

The need for competitive privacy, particularly in the communications industry, can be adequately preserved by the case law established prior to Critical Mass II. It is important to point out that if U.S. West were to appeal the Commission’s decision that the leases in question were exempt from public disclosure, the appeal would go before the D.C. Circuit Court, which decided Critical Mass II.

IV. IS THE EXECUTIVE OR THE JUDICIAL BRANCH CALLING THE SHOTS?

The Clinton administration’s new policy appears to be in direct conflict with the Critical Mass II decision. The Clinton administration favors the voluntary dissemination of more information to the public. The D.C. Circuit Court, however, has taken extraordinary measures to review a twenty-year-old policy in order to fashion a more restrictive test on disclosure of voluntarily submitted information. Quoting Vice President Gore, President Clinton called the American people “the federal Government’s customers.” Therefore, the American people should be entitled to receive more information with less barriers from agencies and departments. In fact, the President condemned the existence of “unnecessary bureaucratic hurdles,” as having no place in the FOIA implementation process. The D.C. Circuit Court appears to have gone in the opposite direction. In its Critical Mass II decision, the court created a new categorical test to expand Exemption 4 disclosure protection.

It should be noted that the memoranda from the President and the Attorney General came after the decision in Critical Mass II, and that owing to separation of powers, there is no reason that one policy has to follow the other. Yet, it remains interesting that two versions of the FOIA policy should emerge at roughly the same time and be in such sharp contrast. The language in the Attorney General’s memorandum, however, suggests that the two policies are not as distinctly juxtaposed as they first appear. Specifically, the Attorney General’s memorandum speaks of “maximum responsible disclosure of government information while preserving essential confidentiality.” Arguably, the test established in Critical Mass II, regarding voluntarily submitted in-

---

107 Id. “Because U.S. West had not identified those specific portions of the leases that might contain competitively valuable information, the Bureau denied confidentiality.” Id.
108 Id. U.S. West also supplied the additional information specifying which portions of the leases were competitively sensitive. Id.
109 Id.
110 Id. para. 4.
111 Id.
112 Id.
113 Id.
114 White House Memorandum, supra note 14, at 1.
115 Id.
116 Id.
118 Attorney General Memorandum, supra note 14.
formulation only preserves "essential" confidentiality. However, when one considers that the test is a further delineation of a standard, which, until the Critical Mass II decision, had served to preserve confidentiality for over twenty years, the Critical Mass II test seems too contrived. Moreover, when compared to the new "presumption of disclosure," the test in Critical Mass II appears even more anomalous. Indeed, in passing the FOIA, Congress observed the importance of an informed democracy. The executive branch shares the same concern of an informed public. The President called the FOIA a "vital part of the participatory system of government." The Attorney General stated that "the American public's understanding of the workings of its government is a cornerstone of our democracy." Yet, the judicial branch, particularly the D.C. Circuit, as exemplified in its Critical Mass II decision, does not share this spirit of openness. While it is not unusual for the three branches to reach differing opinions, it is unusual for one branch to be in such direct philosophical conflict with the other two. Although the Critical Mass II decision is a major reconstruction and expansion of Exemption 4 and certainly contrasts the new administration's FOIA policy mandates, the interpretation in Critical Mass II probably was suggested by the previous executive branch that actually litigated the case. Attorney General Reno's memorandum calls for the rescission of the Justice Department's 1981 FOIA guidelines. It should be noted that the 1981 guidelines were the result of a different administration that controlled the executive branch for twelve years.

The Critical Mass II court was obliged to further differentiate the bright line test articulated in National Parks, but the purpose of this distinction is unclear. The court in Allnet, acknowledging that the plaintiff was no longer seeking the "confidential" input data in dispute, nevertheless held that this information is essential to the information that was subsequently being sought. The court held, "[T]herefore, at least some of the information can be considered 'voluntarily' submitted." While this argument is tenuous at best, the court goes even further stating "[t]o the extent that the information sought was submitted voluntarily, the material was properly withheld, because, as previously set forth . . . it has been amply demonstrated that the switch vendors would not customarily release the information to the public." In the Allnet case, the defendant argues that disclosure of the information sought would impair the effectiveness of its ONA program. The court also held that "Exemption 4[sic] may be invoked where disclosure of the information would impair the effectiveness of a government program." The defendant has shown that the implementation of ONA is a "significant" FCC priority, and is part of the Commission's efforts to prevent unreasonable and discriminatory service rates. Without the voluntary, confidential flow of information between switch vendors and Bellcore, the ability of the FCC to administer the ONA program would be impaired. It is doubtful that the FCC would have the authority to compel the production of the information that the switch vendors currently provide voluntarily.

The court's conclusion follows from overlapping grounds. The court speaks in terms of "reluctance" on the part of the switch vendors in terms of supplying the necessary information to the FCC should such information not be kept confidential; and it being "doubtful" that the FCC would have the authority to compel disclosure of such information without the promise of confidentiality. The language the court uses is ambiguous, yet apparently sufficient to deny the plaintiff's request based on the merits. The court held that the requester's opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency in an action seeking disclosure under the FOIA, if the agency possessing relevant expertise has provided sufficiently detailed affidavits. There is no doubt that the agency's (and defendant intervenors') affidavits were sufficiently "detailed" to decide the case on the motions. The Allnet court, by granting summary judgment on behalf of the defendant and defendant intervenors, avoided the opportunity to clarify the decision regarding which part of the information was

---

119 Critical Mass II, 975 F.2d at 872.
120 White House Memorandum, supra note 14, at 1.
121 Id.
122 Attorney General Memorandum, supra note 14.
124 Id.
125 Id.
126 Id.
“voluntarily” submitted and how it was decided which information was “required.” Although the D.C. Circuit Court applied the proper tests to the information in question, the court is under no obligation to give more than a brief explanation for its conclusion. This is indicative of the confusion surrounding Exemption 4 litigation since Critical Mass II.

IV. CONCLUSION

The Supreme Court has denied certiorari in Critical Mass II. This has permitted the D.C. Circuit to create a situation where more opportunities exist for the government, through its agencies and departments, to withhold information from the public. In short, the D.C. Circuit has enhanced the ability of agencies to withhold information, thereby leading to more confusing litigation under Exemption 4. But, it was not intended that “in the process of closing loopholes in the requirement that the public not be denied legitimate information, that new loopholes be [sic] created.”131 Yet, the court in Critical Mass II has done just that. A new “loophole” now exists for more information to be withheld from the public. While the need for competitive privacy is great, particularly in the communications industry, that need must always be balanced against maintaining an informed public.

The question still remains, however, whether or not the standards in the Critical Mass II decision will stand. The Clinton administration’s new memorandum lends substance to the underlying policy that the FOIA was intended to serve and will, hopefully, dilute the damage done by the D.C. Circuit in its Critical Mass II decision. Future FOIA litigation, particularly Exemption 4, will be even more tedious and increasingly biased towards the withholding of information from public disclosure. The Supreme Court, by declining to grant certiorari, refuses to follow the “spirit of openness” the FOIA demands. Unless the President introduces his memorandum as legislation, thereby forcing Congress to take steps to ensure compliance with the letter and spirit of the Freedom of Information Act, it is conceivable that the FOIA will cease to serve a practical purpose. The courts may continue to fashion new tests for categorical exemptions, undermining the intention of the FOIA. The primary purpose of the Freedom of Information Act is “to increase the citizen’s access to government records.”132 If action is not taken to preserve this purpose, the tension that is created by the different approaches articulated above will affect all agencies and departments; and more importantly, the public’s access to information.
