Chrysler Corporation v. Brown: Seeking a Formula for Responsible Disclosure Under the FOIA

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The federal government’s amassment of detailed financial and commercial information from individuals and corporations pursuant to its expanding regulatory activity has raised widespread concern about privacy infringement and potential government abuse. In response to these concerns, Congress enacted the Freedom of Information Act (FOIA) in 1966 to provide public access to information upon which the federal government bases its decisions. Because the FOIA necessarily focuses upon the release of information to the public, it is silent on the rights of persons other than requesters of information. There is evidence, however, that this broad disclosure policy has led to abuse of the FOIA, predominantly among corporate and industrial rivals. Consequently, despite the absence

2. Courts have interpreted the statute’s purpose consistently. See, e.g., Department of Air Force v. Rose, 425 U.S. 352, 360-61 (1976) (FOIA is expressly designed to make official information available for public inspection); EPA v. Mink, 410 U.S. 73, 80 (1973) (FOIA seeks to permit public access to official information shielded unnecessarily and attempts to create a judicially enforceable public right to secure such information); SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1119 (9th Cir. 1976) (FOIA embodies deep congressional concern over the ability of the American people to obtain information about the internal workings of government).
4. Suits have been initiated by submitters of information under a claim that the proposed release of information would harm their competitive positions and should be protected under the fourth exemption which states that the Act does not apply to “trade secrets and commercial and financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4) (1976). See, e.g., Planning Research Corp. v. FPC, 555 F.2d 970, 972 (D.C. Cir. 1977) (request made for release of detailed computer information that could provide competitors with a direct source of material for their own development of
of an express statutory basis, submitters of information have attempted to enjoin agency disclosure of proprietary documents in actions commonly referred to as "reverse FOIA" suits.\(^5\)

Although courts have permitted reverse FOIA actions,\(^6\) there has been no consensus regarding the legal theories underlying these suits.\(^7\) The Supreme Court recently resolved a conflict in the circuits\(^8\) over the validity of reverse FOIA actions in \textit{Chrysler Corp. v. Brown},\(^9\) finding the FOIA to be purely a disclosure statute providing no private right of action to enjoin similar computer systems upheld); Chevron Chem. Co. v. Costle, 443 F. Supp. 1024, 1026 (N.D. Cal. 1978) (release of submitter's test data compiled over 20 years would facilitate other firms' access to the market and would substantially reduce competitors' research costs at submitter's expense); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 160 (D.D.C. 1976) (release of submitter's work force analysis would provide an efficient and comprehensive method for "raiding" highly trained employees in the competitive insurance industry); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975) (unsuccessful bidder on government contract sought to enjoin release of information about automatic data processing equipment to a competitor).


6. See, e.g., Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191 (5th Cir. 1977) (gas and oil producers sought preenforcement judicial review of FPC order requiring them to submit annual detailed information on exploration and development expenditures); Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976) (natural gas producer sought to enjoin FPC from placing data concerning energy reserves on public record); Doctors Hospital, Inc. v. Califano, 455 F. Supp. 476 (M.D. Fla. 1978) (doctors sought to enjoin disclosure of Medicare "provider-cost" reports); Humana, Inc. v. Blue Cross, 455 F. Supp. 1174 (E.D. Va. 1978) (hospitals sought to enjoin disclosure of Medicare "provider-cost" reports); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976) (government subcontractor sought to enjoin Defense Department from releasing information included in an unsuccessful bid on a Navy contract). See also \textit{Office of Information Law and Policy, Freedom of Information Case List} 58-62 (March 1979). For an extensive compilation of reverse FOIA decisions, see Campbell, \textit{supra} note 5, at 107 n.28. In reverse FOIA actions, courts have found jurisdiction to exist under 28 U.S.C. § 1331 (1976). Campbell, \textit{supra} note 5, at 163-64.

7. See notes 45-92 and accompanying text infra.


agency disclosure.\textsuperscript{10} Rather, the Court concluded that Chrysler, as a submitter of information to the government, was entitled to judicial review of the agency disclosure decision under the Administrative Procedure Act (APA).\textsuperscript{11}

Chrysler, as a party to lucrative government contracts, was required by Executive Orders 11,246 and 11,375\textsuperscript{12} to comply with federal equal employment practices. The Department of Labor’s (DOL) Office of Federal Contract Compliance Programs (OFCCP) promulgated regulations requiring government contractors to furnish compliance reports\textsuperscript{13} to designated agencies.\textsuperscript{14} The Secretary of Labor also promulgated regulations providing for public disclosure of these records notwithstanding their possible exemption under the FOIA.\textsuperscript{15} After Chrysler was informed by its compliance agency\textsuperscript{16} that it had decided to release company employment data,

\begin{footnotes}
\item[10] Id. at 1713-14.
\item[11] Id. at 1725.
\item[12] Exec. Order No. 11,246, 3 C.F.R. § 339 (1964-1965 Compilation), prohibits discrimination in employment because of race, creed, color, or national origin. These proscriptions comprise a mandatory clause in any contract between the federal government and members of the private sector. \textit{Id.} The Secretary of Labor is charged with the administration of the Order, and the various contracting agencies are charged with enforcement of its provisions. Exec. Order No. 11,375, 3 C.F.R. § 684 (1966-1970 Compilation), extended these requirements to prohibit discrimination on the basis of sex. Recently, Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978) (amending Exec. Order No. 11,246, 3 C.F.R. § 339 (1964)), transferred the primary responsibility for enforcement functions relating to equal employment opportunity to the Department of Labor from the various contracting agencies.
\item[14] The Defense Logistics Agency (DLA) (formerly the Defense Supply Agency) of the Department of Defense was Chrysler’s compliance agency. However, Chrysler’s compliance agency is now the Department of Labor. \textit{See} note 12 supra.
\item[15] 41 C.F.R. § 60-40.2 (1978). This regulation seeks to implement Department of Labor disclosure policy by making available to “any person . . . identifiable records obtained or generated pursuant to Executive Order 11,246 . . . notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b) . . . [so long as such disclosure] furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies . . . .” 41 C.F.R. § 60-40.2 (1978).
\item[16] The regulations provide for agency discretion in releasing some information. \textit{See} id. § 60-40.3 exempting from mandatory disclosure confidential commercial or financial information only after receiving a satisfactory explanation from the submitter why the information should be withheld.
\item[17] The FOIA does not require an agency to notify a submitter that a request for information has been made. In fact, the strict 10-day deadline within which the agency must respond to an FOIA request can make notification difficult. \textit{See} 5 U.S.C. § 552(a)(6)(A)(i)
\end{footnotes}
including tables listing job titles and personnel assignments17 pursuant to a third party’s FOIA request, Chrysler sought to enjoin release under three alternative arguments: that the FOIA itself barred disclosure; that “confidentiality statutes” such as the Trade Secrets Act (section 1905)18 prohibited the proposed release; and that disclosure would be an abuse of agency discretion under the APA because release conflicted with OFCCP rules.19

The United States District Court for Delaware held that some of the requested information fell within the FOIA’s fourth exemption regarding confidential trade secrets and commercial information20 and that it may or must be withheld, depending upon the applicable agency regulation. After an examination of the DOL’s pertinent confidentiality regulation21 imposing criminal sanctions on government employees making any unauthorized disclosure of confidential business data, the district court concluded that disclosure would not be “authorized by law” and should be enjoined

(1976). Nonetheless, some agencies have promulgated regulations providing for notification of a submitter. See note 44 infra. For a thorough discussion of these regulations and of the procedural problems inherent in the FOIA, see Campbell, supra note 5, at 114-30.

17. These tables, known as “manning tables,” provide a detailed profile of an employer’s work force according to job classification, specifying the number, sex, and race of employees performing each job. See Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 175-76 (D. Del. 1976), vacated, 565 F.2d 1172 (3d Cir. 1977), vacated sub nom. Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979). Although Chrysler objected to the release of other information besides the manning tables, it failed to prove that any other category of information fell within the FOIA’s fourth exemption and, thus, was exempt from mandatory disclosure. Id. at 1712.

18. 18 U.S.C. § 1905 (1976). The Trade Secrets Act provides in pertinent part: Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes . . . or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment . . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . shall be fined not more than $1000 or imprisoned not more than one year, or both . . . .

Id. See notes 65-79 and accompanying text infra.


19. See id.

20. 412 F. Supp. 171, 175 (D. Del. 1979). Exemption four provides that:

(b) [FOIA] does not apply to matters that are —

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . .


as violative of the DOL regulation.\textsuperscript{22} Moreover, the district court found no conflict between the OFCCP disclosure and the DOL’s confidentiality regulations.\textsuperscript{23} The Court of Appeals for the Third Circuit agreed that exemption from the FOIA did not in itself compel withholding of information; however, the court concluded that since the OFCCP disclosure regulations provided the requisite “authorization by law,”\textsuperscript{24} the DOL’s confidentiality regulation was inapplicable.\textsuperscript{25}

A unanimous Supreme Court held that Congress did not design the FOIA exemptions to be mandatory bars to disclosure limiting agency discretion.\textsuperscript{26} The Court rejected the theory of a reverse FOIA suit, finding that neither the Act nor its legislative history provided grounds to infer the existence of a private right to enjoin agency action.\textsuperscript{27} The Court likewise rejected the argument that section 1905 provided a private cause of action to enjoin agency disclosure but alternatively decided that a submitter of information could seek judicial review of an agency’s disclosure decision under the APA.\textsuperscript{28} Furthermore, the Court refused to accept the government’s contention that the OFCCP’s regulations provided authorization by law as required by section 1905 and remanded the case to the court of appeals to determine whether the contemplated disclosure would violate the prohibitions of section 1905.\textsuperscript{30} Justice Marshall, in a concurring opinion, emphasized that he understood the holding to be limited to the finding that OFCCP regulations did not authorize disclosure within the meaning of section 1905.\textsuperscript{31}

\textsuperscript{22} 412 F. Supp. at 179.
\textsuperscript{23} Compare 41 C.F.R. § 60-40.2 (1978) with 29 C.F.R. § 70.21(a) (1978). See notes 15 supra & 31 infra.
\textsuperscript{24} The court of appeals concluded that 5 U.S.C. § 301, a so-called “housekeeping statute,” is a separate source of agency authority for promulgation of disclosure regulations and that disclosures pursuant to its regulations are “authorized by law” within the meaning of § 1905. See 565 F.2d at 1187-88.
\textsuperscript{25} Id. at 1191.
\textsuperscript{26} 99 S. Ct. at 1713-14.
\textsuperscript{27} Id. at 1712-14.
\textsuperscript{28} Id. at 1725. See 5 U.S.C. §§ 702, 706 (1976).
\textsuperscript{29} The Court observed that substantive regulations, that is, those having the force and effect of law, could not be promulgated pursuant to a “housekeeping statute,” authorizing only the promulgation of “rules of agency organization, procedure or practice” as opposed to substantive rules. See 99 S. Ct. at 1722.
\textsuperscript{30} Id. at 1726. Additionally, the Court did not resolve the question of whether de novo review is appropriate when the APA is used to review the validity of a disclosure decision claimed to be prohibited by § 1905. The Court thought it “unnecessary, and therefore unwise” to settle this question since the substantive issue remanded to the court of appeals — the scope of § 1905 — would necessarily affect this determination. Id. See also note 84 infra.
\textsuperscript{31} 99 S. Ct. at 1726-27 (Marshall, J., concurring). Justice Marshall stressed that the
A review of the FOIA's policy objectives and of the various reverse FOIA theories prior to the *Chrysler* decision demonstrates that the decision provided necessary clarification to a rapidly developing body of case law. The Court's refusal to find an implied right of action under either the FOIA or section 1905 was consistent with the purpose and legislative history of those statutes. Moreover, the Court's recognition of a submitter's right to a confidentiality review of an agency's disclosure decision under the APA can provide meaningful protection for sensitive business information.

I. FOIA: BALANCING THE PUBLIC INTEREST IN OPEN GOVERNMENT WITH A BUSINESS CONCERN FOR PRIVACY

Congress enacted the FOIA to replace the ineffective “Public Information” section of the APA. These APA disclosure provisions were vaguely drawn, leaving agencies virtually unlimited discretion to maintain secrecy if they perceived it to be “in the public interest,” for “good cause,” or if the requested records related “solely to the internal management of an agency.” Moreover, the APA provided disclosure only to “persons properly and directly concerned,” placing the burden of proving such a concern on the requesters. Consequently, these disclosure provisions encouraged improper denials of requested information and provided no adequate remedy to the public to force agency disclosure.

The FOIA was enacted to replace these blanket agency denials of public access to information with a statutory framework that would support the release of information. The Act was designed to end unnecessary government secrecy and to afford the electorate access to the information necessary for intelligent execution of the duties incumbent upon a democratic

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Court's narrow holding did not determine whether federal agencies, absent a congressional directive, may reveal information obtained during the exercise of their functions. He also understood the opinion to leave unquestioned the general validity of the OFCCP regulations or any other regulations promulgated under Executive Order 11,246. Furthermore, Justice Marshall emphasized that the Court did not consider whether an executive order must be founded on a legislative enactment. *Id.*


33. *See HOUSE REPORT 1497, supra note 32, at 2422.*

34. *Id.* at 2423.

35. *Id.* at 2422. *See also S. REP. NO. 813, supra note 3, 1974 SOURCE BOOK at 40. This Senate Report concluded that the “Public Information” section of the APA was of little or no value to the public in gaining access to government records and that it had, in fact, precisely the opposite effect of promoting secrecy.
society. The Act was not designed, however, to sacrifice all privacy rights in the process. Congress intended the FOIA to strike a balance between the public interest in access to the bases of government’s decision-making and the private interest in preserving the confidentiality of proprietary information submitted pursuant to government requirements.

To implement this goal of balancing the potentially conflicting interests of disclosure and privacy, the FOIA exempts from mandatory disclosure nine specific classifications of information. If the information is not within an exemption, the agency has no discretion and must release it upon request. If, however, the requested information does fall within one of the FOIA exemptions, the agency has discretion and is permitted to withhold the information. Thus, while a requester of information has a cause of action under the FOIA to compel agency release of nonexempt material, there is no explicit statutory provision regarding a submitter’s right to enjoin the release of exempt information.

In addition to providing for mandatory disclosure of nonexempt information, the FOIA replaces the restrictive APA requirement that a requester be “properly and directly concerned” with the provision that “any person” be granted access to identifiable agency records. The FOIA further increases the availability of information by placing the burden of jus-

37. See S. Rep. No. 813, supra note 3, 1974 Source Book at 38:
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 . . . .
It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests yet places emphasis on the fullest responsible disclosure.

See also House Report 1497, supra note 32, at 2423.
38. 5 U.S.C. § 552(b)(1)-(9) (1976). The Act provides that each agency "shall make available" to the public a wide range of enumerated classes of information. Id. § 552(a). It also states that the disclosure mandate does not apply to the release of information falling within the nine exemptions. Id. § 552(b).
40. Commentators also generally agree that the Act’s exemptions are permissive rather than mandatory. See Clement, supra note 5, at 597-602; Connolly & Fox, supra note 13, at 223-30.
42. Id. § 552(a)(3).
tifying a decision to withhold information on the agency rather than requiring the requesters to show cause for the records' release, as the APA did. Although these changes provide greater access to information, the FOIA contains no countervailing procedural requirement that an agency inform a submitter that an FOIA request has been made for information it has supplied.

Nevertheless, despite the absence of uniform procedural safeguards and an explicit FOIA cause of action, submitters of information have attempted to enjoin agency disclosure of exempt material under a variety of theories. Where the requested information contains sensitive business data arguably within the Act's fourth exemption, these theories have been readily employed in federal courts.

II. AN UNCERTAIN STATUTORY BASIS FOR CHALLENGING THE RELEASE OF BUSINESS RECORDS UNDER THE FOIA

Although both exemption four of the FOIA and the Act's legislative history demonstrate congressional intent to protect trade secrets and commercial or financial information from unnecessary and irresponsible disclosure, the Act contains no express private cause of action to prevent disclosure of exempt material. Consequently, parties interested in preserving the confidentiality of government-held information have used a vari-

43. Id. § 552(a)(4)(B). By placing the burden of proving exempt status on the agency, Congress created a procedural presumption in favor of disclosure. See Note, supra note 5, at 929.

44. This omission illustrates the FOIA's focus on disclosure. The FOIA does not provide a submitter with a right of notice or a hearing concerning the proposed disclosure. Each agency has the discretion to decide whether to provide notice. Some agencies have issued regulations providing for notification of the submitter. See 41 C.F.R. § 60-40.4(d) (1978) (OFCCP will allow a contractor to identify sensitive material and will inform it of a forthcoming disclosure, giving the contractor a chance to appeal); 21 C.F.R. §§ 20.44 to .46 (1979) (FDA provides submitter with a presubmission review for claiming confidentiality of records and provides for judicial review of proposed disclosure). Other agencies permit individuals submitting information to include a written statement explaining why the information should not be disclosed. See also 10 C.F.R. § 2.790(b)(1)(ii) (1979) (Nuclear Regulatory Commission); 16 C.F.R. § 1015.18 (1979) (Consumer Product Safety Commission); 17 C.F.R. § 240.24b-2 (1978) (Securities & Exchange Commission); 40 C.F.R. § 2.204(e) (1978) (Environmental Protection Agency).

45. See note 20 supra.

46. See note 37 supra.

47. It is often a federal contractor that seeks to prevent agency disclosure of information which the contractor was required to submit. See, e.g., Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979). Since there is no requirement that a requester identify itself or the nature of its interests, the requester's identity is sometimes unknown to both the agency and the submitter. See text accompanying note 42 supra. A requester may be a union or an employer seeking to discover the content of a witness's statement taken by the National Labor Rela-
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ety of approaches to enjoin allegedly unlawful administrative disclosures in reverse FOIA suits. Regardless of the theory under which submitters attempt to block disclosure, they must first establish that the information falls within one of the nine FOIA exemptions. Once this is established, submitters generally have advanced three theories to prevent the release of exempt information: that the FOIA's exemptions are mandatory, thus rendering disclosure of material falling within them a violation of the FOIA; that agency release of exempt material violates a nondisclosure statute such as section 1905; or that even if the applicability of an exemption merely permits nondisclosure rather than mandates it, an agency's decision to release exempt material is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and thus reviewable under the APA. These three theories have met with mixed success in federal courts.

A. Implied Right Arising from the FOIA Itself

The sharpest conflict in reverse FOIA suits has occurred in a dispute over the validity of a submitter's attempt to protect its information by implying a cause of action for injunctive relief under the FOIA itself. Under this theory, a submitter asserts that the applicability of an FOIA exemption does not permit but rather requires the agency to withhold the information because the exemptions are mandatory and, hence, disclosure would violate the statute.

The implied right theory was first accepted by the United States Court...
of Appeals for the Fourth Circuit in \textit{Westinghouse Electric Corp. v. Schlesinger}.\textsuperscript{51} Westinghouse sought to enjoin agency disclosure of its affirmative action compliance reports to an FOIA requester.\textsuperscript{52} The court accepted Westinghouse's contention that the FOIA itself conferred on the submitter an implied right to invoke equity jurisdiction to protect information falling within an FOIA exemption.\textsuperscript{53} The court reasoned that a statute granting a private party protection from disclosure, even if phrased in the form of an exemption, carries with it an implied right to invoke a court's equity jurisdiction to assure that protection.\textsuperscript{54} Additionally, the court noted that Congress acted to protect the confidentiality of private information by including exemption four to avoid such competitive harm that could undermine basic free enterprise principles.\textsuperscript{55} Thus, the Fourth Circuit held that the FOIA exemptions constituted mandatory bars to disclosure.

Other circuits, however, have expressed conflicting views regarding the mandatory nature of the FOIA exemptions. In \textit{General Dynamics Corp. v. Marshall},\textsuperscript{56} the Maritime Administration informed General Dynamics that it had decided to release its affirmative action compliance reports pursuant to an FOIA request. General Dynamics sought to enjoin disclosure of portions of these reports, arguing the existence of an implied cause of action under both the third and fourth FOIA exemptions and under section 1905.\textsuperscript{57} The United States Court of Appeals for the Eighth Circuit rejected the implied cause of action theory for a submitter under the FOIA exemptions. The court found the exemptions to be permissive rather than mandatory and stated that the "FOIA is simply not applicable in reverse cases."\textsuperscript{58} The court likewise found that section 1905 did not afford a submitter of information a cause of action for injunctive relief. The Eighth Circuit concluded, however, that section 1905's prohibitions did not apply


\textsuperscript{52} These reports were submitted by Westinghouse, a federal contractor, in compliance with Executive Orders 11,246 and 11,375. \textit{See} note 12 and accompanying text \textit{supra}. In \textit{Westinghouse}, the FOIA requesters were the Legal Aid Society of Alameda County and the Hill House Association, who intervened as party defendants prior to this appeal. \textit{See} \textit{Westinghouse Elec. Corp. v. Schlesinger}, 392 F. Supp. 1246, 1248 (E.D. Va. 1974), \textit{aff'd}, 542 F.2d 1190 (4th Cir. 1976), \textit{cert. denied}, 431 U.S. 924 (1977).

\textsuperscript{53} 542 F.2d at 1211. The court acknowledged the relationships between the FOIA exemptions and the applicability of a statute prohibiting disclosure of specified information such as § 1905.

\textsuperscript{54} \textit{Id}.

\textsuperscript{55} The court's use of the FOIA's legislative history in the case has been criticized as untenable. \textit{See} Drachsler, \textit{supra} note 50, at 6-7.

\textsuperscript{56} 572 F.2d 1211 (8th Cir. 1978), \textit{vacated}, 99 S. Ct. 2024 (1979). \textit{See} note 61 \textit{infra}.

\textsuperscript{57} \textit{Id}. at 1213-17. The Maritime Administration was General Dynamics' compliance agency. \textit{See} note 12 \textit{supra}.

\textsuperscript{58} \textit{Id}. at 1215-16.
because the OFCCP regulations provided the necessary authorization by law for disclosure as required by section 1905.\textsuperscript{59} Moreover, the court concluded that General Dynamics had a right to seek judicial review of the agency disclosure decision under the APA.\textsuperscript{60}

Under factual circumstances virtually identical to those in General Dynamics, the Seventh Circuit in Sears, Roebuck & Co. v. Eckerd\textsuperscript{61} rejected Sears' argument that both the third FOIA exemption and section 1905 prohibited release of affirmative action data and provided a basis for an implied cause of action. The Seventh Circuit held that neither of those statutory provisions provided any such basis.\textsuperscript{62} Rather, the court adopted the General Dynamics reasoning that the OFCCP disclosure regulations satisfied the "authorized by law" exception of section 1905.\textsuperscript{63} Finally, the Seventh Circuit likewise concluded that Sears was entitled to judicial review of the agency disclosure decision under the APA.\textsuperscript{64}

\textbf{B. Injunctive Relief Arising Under a Nondisclosure Statute Such as Section 1905}

Rarely did a reverse plaintiff proceed under a single cause of action theory in a reverse FOIA suit. As shown above, the claim of an implied right under an FOIA exemption was usually accompanied by an alternative argument that another statute, usually the Trade Secrets Act (section 1905), protected the claimed confidentiality of a submitter's information.

The current version of section 1905 was enacted in 1948 and was intended merely to consolidate three prior nondisclosure statutes.\textsuperscript{65} Section

\textsuperscript{59} Id. at 1217. Section 1905 prohibits disclosure of specific material unless that disclosure is "authorized by law." See note 18 supra. The OFCCP regulations cited as authorizing disclosure are 41 C.F.R. §§ 60-40.1 to .2 (1978). See General Dynamics Corp. v. Marshall, 572 F.2d 1211, 1215-16 (8th Cir. 1978).

\textsuperscript{60} Id. at 1217.

\textsuperscript{61} 575 F.2d 1197 (7th Cir. 1978), vacated, 99 S. Ct. 2024 (1979). This case, along with General Dynamics, was vacated and remanded for further consideration in light of the Chrysler decision.

\textsuperscript{62} Id. at 1202.

\textsuperscript{63} Although both courts concluded that the OFCCP regulations provided the requisite authorization, they did not agree on the identity of the source giving these regulations the force and effect of law. The General Dynamics court implied that the regulations were valid because they were promulgated pursuant to Executive Orders 11,246 and 11,375. See 572 F.2d at 1215. The Sears court, however, found the disclosure regulations to be clearly authorized under 5 U.S.C. § 301 (1976), a "housekeeping statute." See 575 F.2d at 1200.

\textsuperscript{64} Id. at 1200-01. Accord, Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976); Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975).

\textsuperscript{65} See Clement, supra note 5, at 607-13. These statutes were: a Commerce Department nondisclosure statute, Act of Jan. 27, 1938, ch. 11, 52 Stat. 8 (1938) (current version at 18 U.S.C. § 1905 (1976)) (statute applied only to employees of the Bureau of Foreign &
1905 imposes criminal sanctions on any government employee who, unless otherwise "authorized by law," permits the release of information that "concerns or relates to the trade secrets, . . . confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association."66

Reverse FOIA plaintiffs generally sought to use these prohibitions against disclosure under three theories: that section 1905's applicability implied in itself a private cause of action; that information included within the scope of section 1905 was exempt from mandatory disclosure because section 1905 was a nondisclosure statute within the scope of the FOIA's third exemption;67 and that information within section 1905 may not be disclosed because it fell under the FOIA's fourth exemption.

Because section 1905 is a criminal statute, courts have adhered to established principles of statutory interpretation and have been unwilling to imply a private cause of action.68 The principles enunciated in the Supreme Court's decision in *Cort v. Ash*69 serve as a guide to determine whether a private remedy can be implied in a statute otherwise lacking such a provision. One of these four principles requires an indication of legislative in-

Domestic Commerce and prohibited their release of statistical information furnished in confidence to the Bureau); an income tax nondisclosure statute, Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223 (1864) (current version at 18 U.S.C. § 1905 (1976)) (statute prohibited United States employees from disclosing "in any manner, whatever not provided by law" operations, style of work, or apparatus of any taxpayer visited by the federal employee pursuant to his official duties); and a Tariff Commission nondisclosure statute, Revenue Act of 1916, ch. 463, § 708, 39 Stat. 756 (1916) (current version at 18 U.S.C. § 1905 (1976)) (statute prohibited a federal officer's disclosure of any "trade secret or process" which was "embraced in" any examination or investigation undertaken by the Tariff Commission and whose disclosure was not "provided for by law").


67. Exemption three originally covered material specifically exempt from disclosure under other statutes. However, in 1976 Congress amended the exemption which now provides:

This section does not apply to matters that are —

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.


68. See *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197, 1202 (7th Cir. 1978); *General Dynamics Corp. v. Marshall*, 572 F.2d 1211, 1216-17 (8th Cir. 1978). *See also* notes 56-64 and accompanying text *supra*.

69. 422 U.S. 66 (1975). The Court found that four factors are relevant in determining whether a private remedy is implicit in a statute:

(1) Whether the plaintiff is one of the class for whose especial benefit the statute was enacted;
tent to imply a private cause of action. Since this requirement has not been found in the legislative history of section 1905, no private right of action has been implied.\textsuperscript{70}

The second argument raised under section 1905 maintains that this statute was one of those included within the scope of the FOIA's third exemption.\textsuperscript{71} This provision, formerly exempting from mandatory disclosure matters that were "specifically exempted from disclosure by statute," was used to enjoin the release of commercial and trade secret information. A submitter's objection to agency release of its business data based on a claim that such matters were exempt from the FOIA's provisions under the third exemption was strengthened by the Supreme Court decision in \textit{FAA v. Robertson}.\textsuperscript{72} The Court interpreted this exemption very broadly, reading it to encompass all preexisting nondisclosure statutes.\textsuperscript{73} In 1976, however, Congress amended exemption three with the express intent of overruling the \textit{Robertson} decision.\textsuperscript{74} The scope of the amended exemption was narrowed considerably by removing those preexisting nondisclosure statutes whose provisions for secrecy were so broad as to be incompatible with the FOIA's disclosure policy.\textsuperscript{75} Thus, more recent reverse FOIA litigation has arisen over the relationship between exemption four and section 1905.

In raising this final section 1905 argument to prevent disclosure, submitters claim that the information falls within the fourth FOIA exemption providing that the FOIA disclosure mandate does not apply to trade secrets and commercial or financial information that is privileged or confidential. In order to raise section 1905 to limit an agency's disclosure of a reverse plaintiff's documents successfully, a court made a dual determina-

\begin{itemize}
\item[(2)] Whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;
\item[(3)] Whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy;
\item[(4)] Whether the cause of action is one traditionally relegated to state law.
\end{itemize}

\textit{Id.} at 78.

70. \textit{See} Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1202 (7th Cir. 1978).
71. \textit{See} note 67 \textit{supra}.
73. \textit{Id.} at 265-66. \textit{See also} Campbell, note 5 \textit{supra}, at 146. The \textit{Robertson} decision was relied upon by two courts for the proposition that § 1905 was an exemption-three statute. \textit{See} Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1202 (4th Cir. 1976); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 601 (N.D. Ohio 1976).
tion. First, it determined whether the information fell within the substantive scope of the fourth exemption and/or section 1905. If the court determined that the information fell within both provisions, it then decided whether disclosure would nevertheless be "authorized by law" under section 1905 and was thus permissible. It has not been clear, however, whether the FOIA itself can be regarded as the authorization by law required for disclosure by section 1905. If the FOIA "does not apply" to exempt material, it cannot authorize disclosure of section 1905 material. Thus, submitters would argue that the FOIA does not apply to material specifically exempt under its own provisions, so that agency disclosure of FOIA exempt material falling within section 1905 is prohibited unless otherwise properly authorized by another source.

C. Judicial Review of an FOIA Disclosure Decision Under the APA

Some courts have attempted to balance the interest of public access to information with the need for business confidentiality under the provisions of the APA. Thus, where submitters have been unable to sustain an action directly under the FOIA or section 1905, courts have considered these statutes under the umbrella of the APA. Accordingly, if a submitter receives knowledge of a pending agency release and delays immediate disclosure by either stipulation of the parties, temporary restraining order, or preliminary injunction, it can seek a remedy by alleging that the agency disclosure decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In this situation, the submitter, as a person "aggrieved by agency action," is entitled to judicial review

77. See id. at 145. On the other hand, if a court determined that the information is not exempt under the FOIA, the FOIA requires its release, thereby supplying the authorization by law necessary for the release of information also covered by § 1905. Id.
78. Neither reverse FOIA plaintiffs nor courts hearing their arguments have been able to settle with any consistency the legal effect of the relationship between § 1905 and exemption four. See id. See, e.g., General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978); Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975).
80. A test interpreting the scope of exemption four to determine whether financial information is confidential was formulated by the United States Court of Appeals for the District of Columbia Circuit in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). This test, which has been applied by other courts, provides that matter is confidential if it is likely (1) to impair the government's ability to obtain information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id.
Under the APA, the reviewing court is authorized to "hold unlawful and set aside such agency action." Since the APA normally provides for review of the existing administrative record rather than for a de novo review, submitters must rely on the protection afforded them by the established record rather than having the latitude to defend their information's confidentiality de novo. Despite this perceived shortcoming, submitters seeking protection of such materials have sought APA review by the courts.

In Charles River Park "A", Inc. v. HUD, the United States Court of Appeals for the District of Columbia employed the APA "abuse of discretion" standard to review an agency decision to disclose information. The operators of multi-family housing projects whose mortgages were insured by the Federal Housing Administration sought to enjoin the Department of Housing and Urban Development (HUD) from disclosing financial reports revealing the project's gross income to Boston's Commissioner of Assessing. The court recognized the necessity of determining whether the FOIA's fourth exemption applied to the information since the government would be obligated to disclose the information if no exemption applied. Alternatively, however, if the exemption applied and if the information also fell within section 1905 prohibiting disclosure under threat of criminal sanctions, it would be an abuse of discretion under the APA for HUD to release the information.

Considering the FOIA and section 1905 under the APA, the court determined that the interests to be balanced were the

82. Id. § 702.
83. Id. § 706(2).
84. See Campbell, supra note 5, at 135-43. One problem surrounding reverse FOIA actions based on the APA is that of determining the appropriate standard of review. It is unclear whether or not the de novo review provided for by the FOIA, 5 U.S.C. § 552(a)(4)(B) (1976), should be applied to reverse FOIA actions under the APA.
86. 519 F.2d 935 (D.C. Cir. 1975).
87. Id. at 940-41.
88. Id. at 941-42.
public interest in accurate tax assessments and the housing project owners’ interest in keeping their income confidential. On remand, the District of Columbia Circuit directed the district court to consider these factors while determining whether the information fell within the fourth exemption and/or section 1905.89

Similarly, in General Dynamics Corp. v. Marshall,90 the Eighth Circuit conducted an APA review to determine from the administrative record whether the agency decision to disclose was an abuse of discretion or otherwise not in accordance with law.91 The district court had considered the agency’s factual judgment in light of the possible applicability of an FOIA exemption and the legal standards employed by the agency in its decision to exercise its discretion to disclose. The Eighth Circuit held that the court erred in construing the FOIA exemptions as mandatory and remanded for review of General Dynamics’ confidentiality claim on the basis of the existing administrative record in accordance with APA standards.92

III. CHRYSLER CORP. V. BROWN: ACKNOWLEDGMENT OF SUBMITTER’S RIGHT TO A CONFIDENTIALITY REVIEW

Although the recent Supreme Court decision in Chrysler Corp. v. Brown93 left a number of questions unresolved, it eliminated the prior uncertainty surrounding the statutory basis of reverse FOIA suits. Significantly, the Court was unanimous in its holding that Congress did not intend the FOIA exemptions to be mandatory bars to agency disclosure.94 The Court supported its holding with legislative history indicating that the exemptions were designed only to permit an agency to withhold certain information and were not intended to mandate nondisclosure.95 Further-

89. Id. at 943. The court added that if the public interest consideration supported disclosure, the fact that it was submitted in confidence would not be enough to establish the disclosure as an abuse of discretion. Id.
90. 572 F.2d 1211 (8th Cir. 1978). See text accompanying notes 56-60 supra.
91. Id. at 1217. The court stated that General Dynamics was not entitled to a de novo review under the APA. Id.
92. Id. at 1216-17.
94. Id. at 1713.
95. Id. at 1713-14. The Court cited legislative history that states:
   [The FOIA] sets up workable standards for the categories of records which may be exempted from disclosure . . .
   There may be legitimate reasons for nondisclosure and [the FOIA] is designed to permit nondisclosure in such cases . . .
   [The FOIA] lists in a later subsection the specific categories of information which may be exempted from disclosure.
Id. at 1714 (emphasis added by Court).
more, the Court determined that the FOIA is a disclosure statute exclusively since it explicitly gives federal courts jurisdiction to enjoin an agency's withholding of records but does not provide a companion provision to bar disclosure. Thus, a submitter of information has an enforceable interest to preserve confidentiality under the FOIA "only to the extent that this interest is endorsed by the agency collecting the information." By deciding that the FOIA does not afford a plaintiff any private right to enjoin disclosure, the Court extinguished the theory that reverse FOIA suits were implied under the FOIA exemptions.

The Chrysler decision further clarified two questions inherent in section 1905 reverse FOIA suits: whether a private right to injunctive relief can be implied under section 1905; and whether disclosure is barred by section 1905 or permitted because it is otherwise authorized by law. In the first instance, the Court rejected Chrysler's contention that section 1905 affords such a private right; in the second, the Court found that the disclosure regulations relied on by the compliance agency did not provide the requisite authorization by law to satisfy section 1905. In rejecting the theory that section 1905 provides a private right of action, the Court invoked its Cori v. Ash analysis, noting that a private right of action is rarely implied under a criminal statute. In those circumstances where it has been implied, the Court noted that there has been at least a statutory basis for making such an inference. The Court, however, was unable to find such a basis within section 1905.

In addressing the second issue of whether disclosure was barred or whether it was "authorized by law" under section 1905, the Court disagreed with the court of appeals' conclusion that section 1905 was inapplicable to the agency disclosure because such release was "authorized by law" under the OFCCP disclosure regulations. Failing to find the requisite authorization in these regulations, the Court stated that an agency regulation must be of the "substantive" or "legislative" type to have "the force and effect of law." The OFCCP disclosure regulations, promul-
gated pursuant to Executive Order 11,246, failed in this regard because
they lacked any identifiable “nexus” between the authority they purported
to grant and the delegation of legislative authority upon which they were
promulgated.104 Moreover, these regulations failed to meet the procedural
requirements of a regulation having the force and effect of law,105 thus
strengthening the Court’s conclusion that no legal authority existed to cir-
cumvent the disclosure prohibitions of section 1905.

Submitters of private business information, however, were not left with-
out a means to challenge an agency decision to release arguably confiden-
tial information under Chrysler. The Court recognized that while neither
the FOIA exemptions nor section 1905 provides an independent cause of
action, review is available under the APA.106 Thus, violations found
under these statutes would be dispositive on the outcome of a judicial re-
view of agency action.107 Under an APA review, section 1905 must be
considered because that statute places a substantive limit on agency action
prohibiting any disclosure that is not otherwise “in accordance with law”
within the meaning of APA.108

The Chrysler Court remanded the case to the court of appeals to deter-
mine whether the contemplated disclosures would violate the prohibition
of section 1905.109 In so doing, the Supreme Court expressly declined to
determine the relative ambits of the fourth exemption and section 1905 or

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104. The Court’s “nexus” test for discerning proper legislative authority imposes a de-
manding standard on agencies seeking to use regulations to satisfy § 1905’s “authorized by
law” exception. The Court found that the origins of the congressional authority for Execu-
tive Order 11,246 were “somewhat obscure,” and, thus, insufficient to give the OFCCP regu-
lations “the force and effect of law” as required for authorized disclosure under § 1905. Id.
at 1719. The Court also rejected the government’s argument that 5 U.S.C. § 301 (1976), a
housekeeping statute, could provide authority for limiting the scope of § 1905. 99 S. Ct. at
1721-22.

105. In order for a regulation to have the force and effect of law, it must be promulgated
in strict compliance with the APA 5 U.S.C. § 553 (1976). See United States v. Allegheny-
Ludlum Steel Corp., 406 U.S. 742, 758 (1972). In the case of the OFCCP regulations, they
were treated essentially as interpretative rules, and interested parties were not afforded the
99 S. Ct. at 1724.

106. 99 S. Ct. at 1725.
107. Id.
109. 99 S. Ct. at 1726.
to decide whether section 1905 is an exempting statute within the terms of the FOIA's third exemption. Since the decision regarding the substantive scope of section 1905 would necessarily have some effect on the proper scope of judicial review under the APA, the Court likewise declined to address that issue.

The Chrysler decision provided welcome clarification of the theories underlying reverse FOIA actions. The Court's elimination of reverse FOIA lawsuits based on an implied cause of action under either an FOIA exemption or section 1905 was an adoption of the majority view among the circuits. Moreover, the Court's conclusion is consistent with the FOIA's legislative history and its purpose as a disclosure statute. If Congress had intended to provide submitters with a cause of action through the exemptions, its emphasis on their permissive nature would be incongruous. Furthermore, Congress expressly set out the rights of requesters in the Act. Its failure to set out corresponding protective rights for submitters suggests strongly that none were intended, and there exists no reasonable basis for implying such a right.

Similarly, the Court adhered to sound principles of statutory construction in refusing to imply a private cause of action under the criminal statute, section 1905. The criteria for making such an implication under any federal statute, as delineated in Cort v. Ash, were not present in section 1905. Significantly, however, the Court accorded section 1905 an important role in defending the confidential status of business's proprietary information. Thus, this statute is now of critical importance in any defense of business data's confidentiality under the approach prescribed by the Supreme Court in Chrysler.

The Court's ultimate resort to an APA confidentiality review for determining the legitimacy of an agency's disclosure decision was a predictable adoption of the procedure employed by the majority of courts in reverse FOIA cases. Since these courts examined an agency's disclosure deci-

110. Id. at 1726 n.49. See notes 71-75 and accompanying text supra.
111. Id. at 1726. See note 84 supra.
112. See notes 56-64, 68-70 and accompanying text supra. In so doing, the Court rejected the conclusion of the Fourth Circuit in Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), that Congress' inclusion of the fourth exemption protecting the confidentiality of business information must necessarily suggest a congressional intent to provide a submitter with a private cause of action to preserve its interests.
113. See note 3 supra.
114. See note 95 supra.
116. See note 69 supra.
117. See notes 80-92 and accompanying text supra.
sion under the APA's "arbitrary, capricious, or not in accordance with law" standards, the *Chrysler* decision might well be regarded as acknowledging the propriety of commonly employed reviewing procedures. While submitters have been put on notice that their implied right theories are no longer viable, they are entitled to judicial review of the decision under the administrative safeguards of the APA. Nevertheless, *Chrysler* arguably affects the substantive "rights" of submitters since APA review of agency disclosure decisions does not provide submitters with a direct means to petition a court to prevent disclosure.

Moreover, the *Chrysler* decision does not purport to balance FOIA policy objectives in cases previously known as reverse FOIA actions. It is significant, however, that such a need has been articulated. Justice Rehnquist, acknowledging that increased public access to governmental information undoubtedly impacts upon the privacy concerns of nongovernmental entities, stated that "as a matter of policy some balancing and accommodation may well be desirable." The Court, however, stopped short of providing any solutions.

This shortcoming is indicative of the major failure of the *Chrysler* decision; that is, the Court's refusal to decide important questions inherent in any litigation over the rights of submitters under the FOIA. Although the Court did define the criteria under which agency regulations must be scrutinized to determine whether they provide the authorization by law needed for discretionary disclosure of FOIA-exempt material under section 1905, the Court refused to determine the proper scope of section 1905. Furthermore, the Court refused to settle the questions of whether section 1905 is an exempting statute under the FOIA's third exemption; whether exemption four and section 1905 are coextensive; or whether the scope of judicial review for section 1905 violations is *de novo* or limited to a review of the administrative record. Since the lower courts have once again been left to grapple with these questions, much activity and uncertainty in this area of law can be expected.

**IV. BEYOND CHRYSLER: A MORE PROMISING OUTLOOK FOR BUSINESS CONFIDENTIALITY**

Litigation after the *Chrysler* decision will most likely begin to clarify the

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118. 99 S. Ct. at 1725.
119. *Id.*
120. *Id.* at 1713.
121. *See* notes 103-05 and accompanying text *supra*.
122. 99 S. Ct. at 1726.
degree of accommodation to be expected and the methods to be used for balancing the public and private interests in government-held information. Since the Court held that the FOIA exemptions were not mandatory bars to disclosure, lower courts must balance these competing interests in determining whether information is exempt from mandatory disclosure under the FOIA and whether it also falls within section 1905, prohibiting disclosure unless "authorized by law."

As a criminal statute, the broad language of section 1905 must be narrowly construed. A broad reading of this statute would be undesirable and inconsistent with its legislative history since it could prohibit disclosure of virtually all business-related information. Thus, if the FOIA's fourth exemption and section 1905 are construed as coextensive, only material falling within both provisions must be withheld when disclosure is not otherwise authorized by law. In this situation, the fourth exemption becomes, in effect, mandatory because information falling within it is also within the protection of section 1905 and, thus, disclosure is prohibited. If section 1905 is interpreted more narrowly than exemption four, the agency has discretion to release information outside the ambit of section 1905 but nevertheless within exemption four.

An interesting issue for future litigation arises when section 1905 is construed more broadly than exemption four. One could argue that only information common to both is protected and that disclosure is prohibited as to such common information. Under this approach, material included in section 1905 but not included in exemption four must be disclosed under the provisions of the FOIA itself. However, one could also argue that information falling within the scope of section 1905 but outside the scope of exemption four must not be released because section 1905 is an independent bar to disclosure and, thus, disclosure is not authorized by law. The Chrysler decision leaves this issue unresolved.

Assuming section 1905 applies, reviewing courts can find that confiden-

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124. See note 65 and accompanying text supra. The Supreme Court has ruled on at least two occasions that the substantive scope of a present statute cannot exceed the combined scopes of its predecessor statutes without express legislative intent to expand their reach. See Muniz v. Hoffman, 422 U.S. 454, 470 (1975); United States v. Cook, 384 U.S. 257, 259-60 (1966).
125. See note 65 supra. It is difficult to imagine what business data could not theoretically be included under this sweeping language.
126. See notes 18, 20 supra.
128. See Campbell, supra note 5, at 145-51.
tiality must be preserved only if the disclosure is not otherwise "authorized by law." Such authorization may, for example, be provided by an agency regulation having the "force and effect of law." A report presented recently to the American Bar Association's Section of Public Contract Law in response to the *Chrysler* decision observed that the Supreme Court has "brought section 1905 out of the closet" in a significant step toward developing a meaningful method of protecting federal contractor data.\[129\]

Following the *Chrysler* decision, two courts that have examined an agency disclosure regulation in accordance with the *Chrysler* criteria have found the regulation to provide the proper authorization by law to permit disclosure. In *Brookwood Medical Center, Inc. v. Califano*,\[130\] several hospitals sought to enjoin the Secretary of HEW from releasing "provider cost reports" submitted by the hospitals pursuant to rules governing Medicare reimbursement. The agency contended that release of the reports pursuant to an agency regulation\[131\] was a disclosure "authorized by law." The United States District Court for the Northern District of Georgia examined the statutory authority for the regulation under the *Chrysler* criteria\[132\] and concluded that all the criteria had been satisfied, including the requirement of a "nexus" between the regulation and the delegation of legislative authority under which it was enacted.\[133\] The court, therefore, refused to enjoin release of the information that would otherwise have been prohibited by section 1905.

In an identical factual situation, the United States District Court for the Eastern District of Pennsylvania refused to enjoin the release of a nursing home's annual cost reports in *Cedars Nursing & Convalescent Center, Inc. v. Aetna Life & Casualty Insurance Co.*\[134\] The court held that a financial intermediary and agent of HEW was authorized to disclose information pursuant to the applicable agency regulation since it fulfilled the *Chrysler* criteria.\[135\]

In addition to agency regulations, a statute might also provide the au-

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131. The disclosure regulation cited by HEW was 20 C.F.R. § 422.435 (1979).

132. See note 103 supra.

133. 470 F. Supp. at 1249-50.


135. The regulation here, as in *Brookwood*, was 20 C.F.R. § 422.435 (1979). In both cases, the courts found that the agencies' disclosure regulation was of a type contemplated by Congress when it enacted the Social Security Act, 42 U.S.C. § 1306 (1976).
thorization by law required for disclosure under section 1905. In Martin Marietta Corp. v. FTC,\textsuperscript{136} another post-Chrysler decision, the plaintiff attempted to enjoin the FTC's proposed release to the Arizona Attorney General of the transcript of a deposition given by a Marietta officer, claiming it fell within the FOIA's third and fourth exemptions. The court, adopting the approach prescribed in Chrysler, considered both the plaintiff's FOIA argument and the possible applicability of section 1905's prohibitions and concluded that agency release would not be an abuse of discretion under the APA. The court held that it was unnecessary to consider whether the material was prohibited from disclosure by section 1905 because agency release was otherwise authorized by law under the Federal Trade Commission Act.\textsuperscript{137}

Not only have courts begun to reassess their positions in light of Chrysler, but agencies also have been forced to review their practices and procedures regarding submitters' rights under the FOIA. One positive step has already been taken by the Justice Department that should serve to implement the FOIA's policy objectives. In a memorandum circulated to all agency general counsels,\textsuperscript{138} an assistant attorney general in the Civil Division of the Justice Department has outlined recommended agency procedures and standards to deal with "reverse" cases. Due to the necessity for reasoned agency review in light of Chrysler, the Justice Department suggested that it is in the government's interest to seek immediate remand to the agencies of pending reverse FOIA cases for the creation of new administrative records. The memorandum directed that agencies, upon remand, should contact the original data requester to insure that there still exists an actual case or controversy and possibly require an updated expression of interest, solicit from the submitter any detailed written objections to disclosure, and insure that agency disclosure decisions include a full explanation and documentation of all reasons supporting the agency's acceptance or rejection of the submitter's objections.\textsuperscript{139} By including the submitter in the agency's decisionmaking process, these recommended procedures will serve to balance the FOIA's competing interests. Concomitantly, a thorough and well-documented administrative record

\textsuperscript{136} No. 79-0162 (D.D.C., filed July 13, 1979).
\textsuperscript{137} Id. at 12-13. The court found that the information was not a "trade secret" within the meaning of the Federal Trade Commission Act, 15 U.S.C. § 46(f) (1976), and thus, could be released.
\textsuperscript{139} Id. at D-1.
will be welcomed by reviewing courts and submitters as well.\textsuperscript{140}

In addition to judicial and agency reaction, there has also been a response to the \textit{Chrysler} decision on Capitol Hill.\textsuperscript{141} Senator Robert Dole announced his intention to introduce legislation to “insure that the FOIA serves the public’s need to know what Government is doing, not the private desire to know what competitors are doing.” He also contended that the FOIA “has been twisted into an instrument for industrial espionage.”\textsuperscript{142} Apparently dissatisfied with \textit{Chrysler’s} elimination of reverse FOIA suits allowing submitters to imply a cause of action directly under the FOIA or section 1905, Senator Dole stated that his legislation would give submitters of information standing and a statutory right to object to agency disclosure of their confidential information. Under this provision, submitters would be able to bring the type of reverse FOIA suit that Chrysler attempted to bring. Additionally, this proposal would expand the FOIA’s fourth exemption to prevent all disclosures of company documents which do not reflect “Government conduct” and are not the kind “normally released by the company.”\textsuperscript{143} Finally, provisions similar to those suggested by the Justice Department would be included, establishing a submitter’s right to identify documents it believes are confidential, to receive prompt notice of any FOIA request for this information, and to allow a submitter to comment on the requested disclosure.\textsuperscript{144}

\textbf{V. Conclusion}

The \textit{Chrysler} decision recognizes the fundamental tension between the policies of broad disclosure of government-held information under the FOIA and the protection of privacy interests recognized in the FOIA’s fourth exemption, as well as in section 1905. In rejecting the “reverse FOIA” theory as a private cause of action, the Court has denied the existence of an implied right of direct access to court for submitters to contest a pending agency disclosure of proprietary records. At the same time, however, the Court has recognized a submitter’s right to a confidentiality review under the APA to determine whether the agency violated the safeguards of section 1905 and, thus, acted either illegally or abusively.

It remains to be seen whether the \textit{Chrysler} decision will be an effective instrument in effectuating the balance between the FOIA and its exemp-

\begin{footnotesize}
\textsuperscript{140} See note 84 and accompanying text \textit{supra}.
\textsuperscript{141} For a discussion of the need for legislation to deal with “reverse FOIA” suits, see Campbell, note 5 \textit{supra}.
\textsuperscript{142} 125 \textit{Cong. Rec.} S4504 (daily ed. April 23, 1979).
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at S4505.
\end{footnotesize}
tions. Future litigation will most likely determine the validity of agency disclosure regulations and define the substantive scope of section 1905. Adjustments of agency policy and, most importantly, of agency procedures in handling FOIA requests for government-held business information have already begun to affect this balance. These adjustments should halt the abuse of the FOIA among corporate and industrial competitors where such abuse exists; however, the adjustments must also reflect a commitment to open government. Effective administrative enforcement of important national policy goals, such as commitment to equal employment opportunity, depends largely upon public scrutiny of those enforcement mechanisms.

Kevin R. Barry