Administrative Law and Regulation

What Will the Government Do With Your Confidential Pricing Information Once You Enter Into a Federal Contract?

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It comes as no surprise that doing business with the federal government raises many unique business and legal considerations. For instance, although a company and its employees can be fined and/or prosecuted for disclosing any of the government's "secrets," the government may not be equally protective of contractors' trade secrets. In fact, the government may consider itself obligated to disclose companies' secrets, even to competitors.

I. Overview of FOIA

The Freedom of Information Act (FOIA) was enacted in 1966 to provide transparency regarding the actions of the federal government.[1] FOIA thus was one of the early federal government "sunshine" provisions. Under FOIA, any person may obtain information from the federal government by submitting a written request if the information is: (1) kept in a system of records; (2) retrievable; and (3) not legally exempt from release. If information does not fall within any exemption, it will be provided to the requester. One such exemption is Exemption 4 of FOIA.[2] Exemption 4 was established to protect "trade secrets and commercial or financial information [that is] obtained from a person and [is] privileged or confidential."[3] Unfortunately, over the years, courts have eroded some of this protection through decisions in various FOIA request and "Reverse-FOIA" cases.

II. The "Reverse FOIA" Process

Litigation involving FOIA Exemption 4 has arisen (1) in response to objections by a requester to the government's refusal to provide certain requested records and (2) where the entity that initially submitted the requested information to the government objects to its release to a third party in response to a FOIA request.

Since third parties may request information under FOIA that can include a company's proprietary information, the government has established a process by which it will solicit and consider the original submitter's position regarding disclosure.[4] Specifically, when a FOIA request is filed for information that is potentially exempt from release under Exemption 4, the government must notify the original submitter that its information has been requested and identify the particular information at issue, e.g., unit prices in a contract. The government then must invite the submitter to provide its views as to whether the information sought should be released.

If the government decides to release the information over the objection of the submitter, the submitter may file suit against the government under the Administrative Procedure Act (APA) to enjoin the release. Such an action is known as a "Reverse-FOIA" suit. The term "Reverse-FOIA" is used to distinguish these FOIA cases from actions filed by parties contesting government decisions to withhold records that have been requested under FOIA. The term "Reverse-FOIA" was defined by the D.C. Circuit Court of Appeals in *CNA Fin. Corp. v. Donovan*.[5] The court stated that:

> "Reverse-FOIA" actions are now a common species of FOIA litigation. Jurisdiction over these cases is conferred by 28 U.S.C. § 1331(a) (1982), while § 10(a) of the Administration Procedure Act (APA), 5 U.S.C. § 702 (1982), supplies the cause of action. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 & n.47, 99 S. Ct. 1705, 1725 & n.47, 60 L. Ed. 2d 208, 234 & n.47 (1979). Typically, a submitter of information—usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products—seeks to prevent the [government] agency that collected the information from revealing it to a third party in response to the latter's FOIA request. The agency's decision to release the data normally will be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.[6]

III. Framework for this Article

The simple objective of transparency regarding government actions has grown to potentially endanger private entities and their trade secrets because of the approach taken by agencies and the development of FOIA case law. This article examines how the courts in "Reverse-FOIA" cases reviewed agency efforts to release contract information and, at times, have contorted the basic concept of transparency to the detriment of private parties and their trade secrets. This discussion provides guidance as to what safeguards (if any) a submitter can rely upon to protect its trade secrets and proprietary commercial or financial information, if it provides such data to the federal government. Furthermore, we will examine how government policies have or have not reflected the law in this area.

In order to understand the current state of law and policy regarding the release of confidential commercial information, it may be helpful to review the evolution of both the judicial interpretation and the Department of Justice (DOJ) interpretation of FOIA Exemption 4. The latter is reflected in guidance to agencies. Accordingly, we first will review the

historical interpretations of FOIA Exemption 4. We then will assess the current state of FOIA case law from the perspective of the District of Columbia Circuit, which has developed the majority of the "Reverse-FOIA" case law.

FOIA Exemption 4 applies to two distinct types of information: (1) trade secrets and (2) commercial or financial information that is privileged and confidential. Both types of information are routinely requested, expected, and even required by the federal government in many circumstances. For example, contractors may be required to provide this type of information in the course of competition, performance, and related administration (e.g., Defense Contract Audit Agency audits) of their government contracts. All government contracts include contractor pricing information in some form. Even if detailed cost information is not included, there will always be some price information in the contract, such as the unit price for an item, weapon system, hourly rate for services, or at least the total contract price. Depending on the circumstances, such as other competitions in the private or public marketplace where the prices would be relevant, a company may fear that disclosure of its price information to its competitors will compromise important proprietary information and result in competitive harm. Contractors often fear that their competitors will obtain significant proprietary and competitively sensitive information simply by submitting a FOIA request to the government.

Exemption 4 appears intended to allay business fears that FOIA would permit or even encourage the government to disclose proprietary information to the public.[7] Furthermore, as discussed above, there is a process by which the government normally notifies contractors of requests for their information and enables them to provide their opposition, if any, to release of sensitive information. If that is the case, why then are many contractors nonetheless concerned that their sensitive information will not be protected? These concerns stem from the fact that information intended to be protected from mandatory public disclosure by Exemption 4 has been released by the federal government pursuant to FOIA requests during the past two decades. Our review will show how this occurred, and address what the case law signifies in regard to the current balance between transparency and the protection of sensitive contractor information under FOIA, particularly because the government has pressed for release of such information.

IV. Background

Prior to addressing the case law, it is worth noting some policy issues underlying the application of FOIA and Exemption 4 to information that pertains to contractual relationships between the government and private parties. Before FOIA, and even for the first few decades after FOIA was enacted, the federal government generally took the position that if a contractor gave the government proprietary information (particularly contract prices), the company ceded control of such information as a "cost of doing business" with the government.[8] Although the government might be said to act in a commercial capacity when it enters the marketplace via government contracting, the view that contractors are deemed to cede rights simply by virtue of entering a contractual relationship runs counter to the government's commercial persona and harkens backs to its regulatory or sovereign role.

Accordingly, for many years when a FOIA request was received, the government policy was that the information was releasable. Courts supported the release of unit prices. Typically, the courts supported release because they did not believe that the submitters of the information could show that unit prices disclosed specific cost or profit information that could be used by competitors to the competitive harm of the submitter. *See*, *e.g.* TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087 (E.D. Mo. 1998); Martin Marietta Corp. v. Dalton, 974 F. Supp. 37 (D.D.C. 1997); McDonnell Douglas Corp. v. NASA, 895 F. Supp. 319 (D.D.C. 1995), *vacated as moot*, 88 F.3d 1278 (D.C. Cir. 1996); Comdisco, Inc. v. GSA, 864 F. Supp. 510 (E.D. Va. 1994); Pac. Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345 (9th Cir. 1990); Acumenics Research & Tech., Inc. v. United States Dep't of Justice, 832 F.2d 800 (4th Cir. 1988).

In cases such as those cited above, both courts and the government viewed the prospect of disclosure as a cost of doing business with the federal government, as if there was some type of implied consent on the contractor's part by virtue of entering the contract relationship. It sometimes has been stated that the government is subject to the same general rights and obligations when it contracts as any other party. This concept was discussed by the Supreme Court in detail in *United States v. Winstar Corp. et al.,*[9] although that case did not involve government handling of contractor information. One might argue, therefore, that if the government obtained information in its commercial capacity as a contracting party, it should analyze release from that role as well—with a greater eye toward its status as a party to the contract relationship (in which it may have obtained information in confidence, such as in proposals that were submitted with restrictive legends) rather than as the sovereign.

V. Balance of Competing Interests

Even apart from its commercial capacity, the government has an interest in protecting contract information. FOIA and its Exemptions establish a balance of competing interests. On the one hand, the Act promotes transparency in government operations. On the other, the exemptions recognize that legitimate governmental and other interests may mitigate against the disclosure of particular categories of records.

Exemption 4 safeguards trade secrets and confidential commercial or financial information. To the extent the information is commercially sensitive, the private entity that submitted such information obviously has a substantial interest in protecting the information from public disclosure. At the same time, the government may have a separate,

discrete interest in protecting the information from disclosure. For example, where disclosure may impair the government's ability to obtain similar information in the future, disclosure could result in harm to the government in a broader, programmatic context. The government thus could suffer harm in ways that are independent of any commercial harm that the submitter of the information might suffer. Exemption 4 thus encompasses a variety of interests that mitigate against disclosure. We will review the historical analysis of each element of Exemption 4 separately.

A. First Element of Exemption 4 of the FOIA—Trade Secrets

Of the two types of information protected by Exemption 4 of FOIA (trade secrets and privileged or confidential commercial or financial information), one might anticipate that trade secrets would be the portion that would be more easily understood because that term is used in other statutes, the common law, and in private transactions. Although FOIA uses the term "trade secrets," the Act does not define it. Court decisions reflect significant efforts to interpret the scope of this element of Exemption 4.

The Restatement of Torts contained a broad definition that was used for many years to define this element of Exemption 4.[10] In 1983, the District of Columbia Circuit took a more narrow view of what the term "trade secrets" encompassed. Specifically, in the pivotal case of *Public Citizen Health Research Group v. FDA*,[11] the D.C. Circuit rejected the more encompassing Restatement definition in favor of a narrower definition of "trade secrets" for purposes of FOIA Exemption 4.[12] This case involved a FOIA request by Public Citizen for clinical studies of intra-ocular lenses that various manufacturers had submitted to the FDA. The FDA withheld some of the requested studies on the basis that they constituted trade secrets. Public Citizen filed suit to compel release.[13] The district court granted summary judgment against Public Citizen, which then appealed.

Upholding the district court's decision, the court of appeals defined a "trade secret" as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[14] Rather than rely on other definitions in statutes that used the term, the D.C. Circuit tailored the definition specifically for purposes of Exemption 4 of FOIA. In doing so, the court opened up the second type of protected information under Exemption 4, the commercial and financial information element, to separate legal interpretation. The court reasoned that if the two elements did not have distinct meanings, it would have been difficult (as it was for government counsel at oral argument)[15] to identify any commercial or financial information from the second element of Exemption 4 that would not also be considered a trade secret under the old, broad definition of the first element, thereby rendering superfluous the separate reference to "commercial or financial" information. The court reasoned that its newly tailored definition was more true to congressional intent. In order to make sense of a statute that specifically referenced both trade secrets and a separate category of "commercial or financial information," the court thus read trade secrets more narrowly than it had prior to this decision.

The development of the interpretation of this first element of Exemption 4 also grew to involve the Trade Secrets Act.[16] This criminal statute expressly prohibits government employees from disclosing trade secrets. Once information is found to be a trade secret, not only is it exempt from mandatory release under FOIA, but its release is prohibited by the Trade Secrets Act, which makes disclosure a criminal offense.[17] However, since the courts had interpreted a distinction between the two elements (i.e., trade secrets and commercial or financial information), their application theoretically could be quite different. Unlike trade secrets, if commercial or financial information was found to be exempt from mandatory disclosure under FOIA, there was some prospect that the government nonetheless had discretion to release it because release was not prohibited.[18]

This prospect was short-lived. Exemption 3 authorizes withholding of information when its release is specifically exempted from disclosure by statute. The court in *CNA Financial Corp. v. Donovan,* 830 F.2d 1132 (D.C. Cir. 1987) found that the Trade Secrets Act did not fulfill the role of a withholding statute under Exemption 3 of FOIA. However, the court also determined that the Trade Secrets Act was at least coextensive with Exemption 4 of FOIA. Within three years, therefore, the court closed off the option for any discretionary release by an agency where Exemption 4 applies. Later, in *McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162,1164 (D.C. Cir. 1995), the court found that "whenever a party succeeds in demonstrating that its materials fall within Exemption 4, the government is precluded from releasing the information by virtue of the Trade Secrets Act." Thus, the bulk of Reverse-FOIA case law centers on interpretation of the second element of Exemption 4, the privileged or confidential commercial or financial information.

B. Second Element of Exemption 4 of the FOIA—Commercial or Financial Information Obtained from a Person [that is] Privileged or Confidential

1. National Parks & Conservation Ass'n v. Morton

The seminal case interpreting the second element of Exemption 4 is *Nat'l Parks & Conservation Ass'n v. Morton*.[19] In this FOIA case, the Conservation Association sought to compel the Department of the Interior to release information regarding its park concession contracts. The district court granted summary judgment for the government on the basis that the information was exempt from release under Exemption 4. Because the parties agreed that the information at issue was financial information that was not privileged, the only issue on appeal was whether the information was "confidential."[20] The appellate court determined that for the commercial and financial information element of Exemption 4 to apply, the concessionaires would have to show that disclosure would impair the government's ability to obtain the information in the future and/or would cause substantial harm to the competitive position of the

submitter. The court did not see how the record in the case justified withholding the information. Therefore, the court reversed and instructed the lower court to further develop the record. This gave the agency an opportunity to develop the record to show how the concession contractors would be harmed by disclosure. The court saw evidence of such potential harm as necessary to support exempting the information from FOIA release.

In *National Parks*, the D.C. Circuit established a two-prong test for determining when commercial or financial information received from a person is "confidential" within the context of Exemption 4. The court took into account the dual purpose nature of Exemption 4—to balance the interests of both the government and the requester.[21] Typically, this balance weighs the interest in disclosure against the harms likely to be caused by such disclosure. As established by *National Parks*, to be considered confidential under Exemption 4, the agency or a reviewing court must find that disclosure of the commercial or financial information is likely to have either of the following effects: (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.[22]

The court in *National Parks*, almost as an aside, stated that because the concessionaires at the parks were required to provide the government the financial information at issue, there was "presumably no danger that public disclosure w[ould] impair the ability of the government to obtain this information in the future."[23] As discussed below, this prospect of impairment was used by later courts to raise an important distinction.

2. Public Citizen Health Research Group v. FDA

In the 1983 *Public Citizen* decision, the D.C. Circuit refined the *National Parks* test.[24] The court stated that it had consistently held that the terms "commercial" and "financial" should both be given their ordinary meanings.[25] Then, in addition to narrowing the definition of trade secrets in the first element (as discussed above), the court described the level of "competitive harm" evidence needed to establish that information qualifies as commercial or financial information within the scope of Exemption 4.[26] The court stated that to oppose disclosure, a party did not have to show "actual competitive harm."[27] To the contrary, the court concluded that evidence showing "actual competition and the likelihood of substantial competitive injury" was sufficient to establish that the information was confidential.[28]

> The D.C. Circuit went on to emphasize that the important point for competitive harm in the FOIA context. . . that it be limited to harm flowing from the affirmative use of proprietary information *by competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws.[29]

The harm has to be commercial and competitive in nature. The next significant development in the interpretation of Exemption 4 by the D.C. Circuit was an affirmation of the *National Parks* test coupled with a significant clarification of its scope and application. *Critical Mass*[30] gave more life to a consideration referenced in the *National Parks* case but not really developed earlier—the impact of the nature of the original submission on the impairment analysis.

C. Critical Mass Energy Project v. Nuclear Regulatory Commission

In the early 1990s, the D.C. Circuit began to focus on the circumstances under which the information at issue was provided to the government. In *Critical Mass*, the court developed the distinction (alluded to in the above discussion regarding the *National Parks* test) based on whether information was submitted to the government on a voluntary basis or in response to a requirement.[31] The court concluded that if commercial information was voluntarily provided to the government, but was normally not made public, it would be considered confidential. There would be no need for any further assessment of the harm to the submitter that likely would result from disclosure. Exemption 4 protection from mandatory disclosure would apply since disclosure would impair the government's ability to obtain such information in the future because submitters who were not required to submit it might decline to do so. If the information at issue, however, had been submitted to the government in response to a requirement (*i.e.*, on a mandatory basis), submitters could not decline to submit it and the assessment of its confidential nature thus would involve application of the *National Parks* test. In this circumstance, the prospect of competitive harm would have to be assessed.

Evaluating the confidentiality piece of the commercial element, therefore, courts now apply the voluntary versus mandatory distinction from *Critical Mass*. Based on *Critical Mass*, to find commercial or financial information confidential when the submitter was required to submit it to the government, disclosure of the information would have to be likely to either: (1) impair the government's ability to get the information in the future (government interest) or (2) cause substantial harm to the competitive position of the person from whom the information was obtained (private interest). This is the *National Parks* test.

Prior to *Critical Mass*, courts in various cases had commented about how difficult it might be for the government to obtain certain commercial information from other contractors in the future if they knew it would be released. In fact, there already had been a presumption that if submission of the information was required then, even if it were released, companies would continue to provide the information. Following *Critical Mass*, however, courts began to examine

the issue more intently, particularly when the information had been voluntarily submitted to the government. Courts realized that in assessing the public and private interests, the type of submission could influence the ultimate finding of confidentiality.[32] As discussed below, however, just like the basis for submission, the type of information provided (such as price information) can impact the protection afforded by Exemption 4.

VI. Protection of Contract Price Information

The D.C. Circuit clarified the standard to protect price information in its 1999 decision in *McDonnell Douglas Corp. v. NASA*.[33] In this case, NASA had decided to release certain contract line-item prices pursuant to a FOIA request. The district court upheld the agency's decision. McDonnell Douglas filed a Reverse-FOIA suit to prevent release of its contract prices. The D.C. Circuit, rejecting various government arguments supporting release, held that the price information at issue was protected by Exemption 4 of FOIA and reversed the district court. The government had argued that the price information at issue could be considered unit prices, which the government for years had presumed was releasable and, in fact, had adopted release of unit prices as its established policy.[34]

The D.C. Circuit strongly rejected that policy as contrary to the law: "NASA's response to appellant's concern that its customers' bargaining leverage will be enhanced is rather mystifying. The agency said that publication of line item prices is the 'price of doing business' with the government, which either assumes the conclusion, or else assumes a legal duty or authority on the government to publicize these prices, which, as we have noted, the government does not assert."[35]

The court of appeals also dismissed other arguments advanced by the government:

> • If commercial or financial information is likely to cause substantial competitive harm to the person who supplied it, that is the end of the matter, for the disclosure would violate the Trade Secrets Act. The court did not limit this conclusion to the McDonnell Douglas unit prices, but used far broader language (*e.g.*, "commercial or financial information," "the person who supplied it").
>
> • [T]he agency "reasoned" that underbidding due to the disclosure would not occur because price is only one of the many factors used by the government in awarding contracts. That response seems too silly to do other than to state it, and pass on.[36]

The DOJ summary of the case describes the sweeping nature of the *McDonnell Douglas v. NASA* decision, stating that it "reject[ed] a longstanding federal agency disclosure practice . . ."[37]

Although courts previously had held that unit prices could be released where they did not reveal elements of a contractor's costs or profit,[38] the D.C. Circuit rejected that position and instead analyzed the extent to which disclosure of the prices themselves were likely to result in competitive harm to the submitter (McDonnell Douglas in that case). The D.C. Circuit found that these unit prices were confidential because the contractor established that release would allow competitors to underbid the prices and also enable the contractor's customers to "ratchet down" the prices they were charged.[39] The court found that "[b]oth of the reasons McDonnell Douglas advanced for claiming its line item prices were confidential information or financial information [were] indisputable" and that under present law a submitter has "every right to insist" that confidential information be withheld from disclosure.[40] To the extent there was any doubt, the court also reiterated that there was no longer any prospect of discretionary release by an agency where Exemption 4 applies.

VII. A Balancing Act

In 2001, the D.C. Circuit further clarified the distinction between voluntary and mandatory submissions. At issue was how to determine whether a submission was mandatory. The court in *Center for Auto Safety v. NHTSA* held that "actual legal authority, rather than parties' beliefs or intentions, governs judicial assessments of the character of submissions."[41] The court went on to state that "linking enforceability and mandatory submissions creates an objective test; regardless of what the parties thought or intended, if an agency has no authority to enforce an information request, submissions are not mandatory."[42] Information submitted voluntarily would be exempt from disclosure if the submitter could establish that it was the kind of information that was not customarily released to the public. To determine what was "customary," the D.C. Circuit reasoned that a court needed to look at the submitter's customary treatment of the type of information, rather than how the industry as a whole treated such information.[43] In addressing the issue of whether disclosure was customary, the D.C. Circuit held that the district court had misstated the appropriate legal standard. "The trial court appeared to indicate that the [requestor] Center for Auto Safety was required to prove that intervenor-defendants have previously released *identical* information."[44]

In a 2002 FOIA case, where the sole issue was whether the commercial information in dispute was "confidential" under the *National Parks* test, the district court summarized its job well: "The court is therefore charged with balancing the public interest in disclosure against the private interest in withholding the information."[45] This case was interesting in that it more clearly viewed the government acting in its role as a commercial entity; the case involved release of information regarding royalties on inventions stemming from Cooperative Research and Development Agreements (CRADAs), i.e., joint development efforts by government and industry.

With FOIA's presumption of release, this balancing test represents the most protection a contractor could hope for in a general scheme. The next real challenge to private interests was the handling of specific scenarios, particularly involving price data. This would prove to be the next tug-of-war between public and private interests in Exemption 4 case law.

VIII. Recent Status of Law Regarding Pricing Information

Soon after the 1999 *McDonnell Douglas* decision, the government FOIA authorities took a new approach in order to continue their longstanding policy of release of unit pricing. Prior to that decision, unit prices routinely had been released. The government realized that release of prices can result—at least in the short run— in lower prices. The only real dilemma is that at some point entities might become deterred from providing the information in the first case or from contracting with the government if it always releases prices.

Instead of relying only on FOIA interpretation, government officials turned to the Federal Acquisition Regulation (FAR) as new support for the long espoused policy that unit prices should be released on the basis that it required (or at least authorized) release of such prices. Relying on a rewrite of FAR Part 15 (which had occurred almost two years earlier), DOJ led the way in interpreting the FAR to mandate release of awarded contract prices in the notifications and debriefings provided to unsuccessful offerors.[46] This was disturbing since, even after the revision of Part 15, the FAR continued to limit its instructions regarding disclosure with the caveat that disclosure could not violate FOIA or the Trade Secrets Act.[47]

By releasing information in these non-FOIA request situations (such as in debriefings), the government purported to circumvent the protections otherwise accorded to private interests in the context of FOIA requests. Specifically, Executive Order No. 12,600[48] provides certain safeguards to a submitter of information. It requires the government to notify the submitter that it has received a request for the information and provide the submitter an opportunity to respond. However, this process is only triggered by submission of a FOIA request. To the extent the government intended to, and did, release information during a debriefing, prior to submission of any FOIA request, the safeguards of the Executive Order were not even triggered.

Furthermore, the government began to assert this purported FAR requirement for disclosure as a basis for release under FOIA on the basis that the information was already "public" in some sense. Specifically, to the extent the FAR required or at least authorized release and the government released the information, there was no point or purpose served by subsequently notifying the submitter in response to a later FOIA request because the information already was deemed to be in the public domain.

This conflict took center stage in *MCI Worldcom Inc. v. GSA*.[49] In an opinion just before *MCI*, the district court in the District of Columbia had opined that the government's reliance on the FAR Part 15 provisions was misplaced.[50] In *Mallinckrodt Inc. v. West*, the court analyzed whether the *National Parks* test applied—first determining whether the information was provided voluntarily or not. Then it found that the rebate and incentive information in an existing blanket purchase agreement was not "unit pricing data" as the government alleged, and thus was not covered by the cited FAR provisions. *Mallinckrodt* was decided based on the harm or impairment caused by release, not the FAR Part 15 alleged mandate—but judicial sights had been set on the government's new policy to release prices.

A. MCI Worldcom Inc. v. GSA

In *MCI*, a court had the opportunity to evaluate the merits of the government's new policy that FAR Part 15 mandated release of "unit prices." The court held it did not set such a mandate. First, the *MCI* court disagreed with the government's contention that the information at issue constituted unit prices. Judge Gladys Kessler determined that the relevant information, (B-Tables)—which are "complex matrices in computer data base format that contained detailed line item pricing information,"[51]—are more akin to cost breakdowns, which the FAR expressly stated should not be released to any other offeror.[52] If the information did not constitute "unit prices," it could not be within the scope of the FAR Part 15 provision. GSA's stated basis for releasing the information apart from the FOIA, therefore, would fail of its own accord.

Judge Kessler continued, however, noting that even if the information at issue constituted unit prices, the government's assertion that FAR Part 15 required the information be released was wrong. Judge Kessler stated:

> Contrary to GSA's reading, the revised regulations do not permit GSA to disclose 'unit price' information regardless of its confidential nature . . . any such reading is contrary to the express language of the FAR and its authorizing statute, [Federal Acquisition Streamlining Act] FASA, which explicitly prohibits disclosure of confidential information.[53]

The court then conducted a detailed analysis of the information at issue pursuant to Reverse-FOIA law developed to this point *i.e.*, an assessment of the likelihood that competitive harm would result from release.

The court found that the contractor was required to include the information in its proposal for the contract, but the information nonetheless was protected from disclosure under Exemption 4 because it was confidential commercial or financial information per the *National Parks* test. The court conducted a thorough assessment of whether there was a likelihood of substantial competitive harm if the information was released.

Judge Kessler found that the telecommunications companies had presented evidence of "precisely the injuries

that led this Circuit to declare that line item pricing was confidential information and not disclosable."[54] Based on the facts, the court granted summary judgment for the telecommunications companies—thereby protecting the price information from release on the basis that disclosure likely would result in harm.

B. McDonnell Douglas Corp. v. USAF

The next significant case in the Reverse-FOIA realm is *McDonnell Douglas Corp. v. USAF*.[55] The Air Force issued a request for proposals in 1997 for repair and maintenance work on the KC-10 line of aircraft in its fleet. McDonnell Douglas submitted detailed pricing data as part of its proposal. McDonnell Douglas was awarded the contract, consisting of a base year and eight option years. The contract incorporated the pricing information that McDonnell Douglas had submitted in its proposal.

After the award, a competitor filed a FOIA request for a copy of the contract. The Air Force notified McDonnell Douglas that it had received the request. McDonnell Douglas promptly objected to release of some of the pricing information, pointing to at least the option year prices and prices for certain contract line items (CLINs) as confidential. More specifically, the court ended up reviewing whether the Vendor Pricing CLINs and the Over and Above Work CLINs, in addition to the option year prices, were exempt from disclosure under FOIA per Exemption 4.

The court's analysis cleanly stepped through the above-described *National Parks* standard test as it had evolved over the years. The *McDonnell Douglas* appeal was a review of the lower court's grant of summary judgment in support of the USAF's release of the information. The D.C. Circuit determined that because disclosure of the Vendor Pricing CLINs and the option year pricing likely would cause substantial competitive harm to McDonnell Douglas, the information should be protected as confidential commercial information.

However, the D.C. Circuit rejected the company's arguments regarding the Over and Above Work CLINs. Contrary to McDonnell Douglas' claim, the court was not convinced that competitors would be able to calculate McDonnell Douglas' Labor Pricing Factor from a combination of the information for Over and Above pricing and the recent public media disclosures about what an "average blue collar worker" was earning in that locale. The majority in this 2-1 decision was deliberate in its balancing of the public and private interests as the case law, particularly for the second element of Exemption 4, had developed.

Responding to a partial dissent by Judge Garland,[56] the majority wrote that the core purpose of FOIA is not disclosure of vendor prices, but simply to provide the public insight into the operation and activities of its government, so the public can better understand its operation.[57] In the case at issue, the total contract price already had been properly released. As a result, the vendor pricing did not contribute in any significant way to the public's understanding of how its government operates. To the contrary, disclosure would only provide insight into the contractor's workings at that private party's expense.[58]

After *McDonnell Douglas* was decided in 2004, DOJ sought rehearing *en banc*. Explaining its decision to petition for rehearing, DOJ cited what is characterized as the "extraordinary split decision on an issue of great importance to the adjudication of 'reverse FOIA' cases under the APA."[59] Further, DOJ pointed to the fact that other circuits, such as the 4th (coincidentally citing a DOJ case involving release under FOIA) and 9th Circuits, when faced with this issue, had upheld agency decisions to disclose contractors' price information. These other Circuits had held that the unit price information was not protected by Exemption 4. DOJ argued that various Circuits having differing holdings on this issue presented "practical difficulties and uncertainties" that it sought to alleviate by requesting rehearing. On December 16, 2004, the D.C. Circuit denied DOJ's requests for rehearing and rehearing *en banc*.

C. MTB Group, Inc., v. United States

Interestingly, one of the most recent cases to utilize the FOIA Exemption 4 analysis was not even a FOIA case. The United States Court of Federal Claims issued a decision on June 7, 2005 which relied on Exemption 4 analysis to determine if the release of contractors' price information in a competitive auction scenario was improper.[60] In that decision, Judge Christine Miller recognized that Exemption 4 case law provided comparable reasoning that she could use to evaluate the release of information being complained of in the case before her. This case involved a protest to enjoin HUD's Reverse Auction Program (RAP). According to the protester, RAP disclosed too much confidential pricing information. The protestor filed suit because it believed the disclosure of the prices would allow competitors to figure out protected contractor bid and proposal information.

Because her case involved an auction scenario, the contractor was clearly required to provide the pricing information.[61] Thus, Judge Miller stepped through the test balancing of the competing public and private interests in disclosure that has been used in FOIA Exemption 4 cases. Ultimately, Judge Miller was not convinced based on the facts that the information to be released was confidential commercial information. Judge Miller stated that "the standards for determining whether Exemption 4 applies in a particular [FOIA] matter offer a legitimate tool to establish whether HUD or another agency has violated the FAR through a reverse auction procedure."[62] It thus appears that FOIA Exemption 4 analysis may find its way into other areas of government contracting law.

IX. Contractors and Their Price Information Today

DOJ's current guidance to government FOIA officers shows that DOJ still takes the position that the D.C. Circuit was incorrect in the latest *McDonnell Douglas* case in regard to the appropriate analysis of the releasability of unit prices under FOIA. DOJ's policy guidance states that, as in "comparable circumstances when government policy is under

judicial review," agencies should continue existing administrative practices. In fact, DOJ cites its 2002 "Treatment of Unit Prices Under Exemption 4" as still being the current guidance on which to rely.[63] This guidance was issued when DOJ was still petitioning for a rehearing of *McDonnell Douglas*. However, as of more than six months after its rehearing petitions were denied, the DOJ Office of Information and Privacy has not modified or removed this guidance from its website.

The 2004 *McDonnell Douglas* case, however, set the controlling standard in the D.C. Circuit with regard to disclosure of price information in response to a FOIA request. This is an important development for companies seeking to protect their price information from public release. The D.C. Circuit has rejected the argument that FAR Part 15 mandates release and instead has continued to apply the *National Parks* test.[64] In fact, the D.C. Circuit has not made any distinction about the type of information sought to be released; the analysis applies to all information on a case-by-case basis.

Contract pricing information typically is considered information that has been submitted on a mandatory basis within the meaning of *Critical Mass*, but often is considered "confidential" within the scope of *National Parks*. The current state of the law in the D.C. Circuit thus is favorable to protecting contractors' price information. Yet the government's policy guidance has not been comparably updated. Accordingly, there is a significant risk that a company may still have to resort to the court system to protect its unit prices from release. There is, then, a risk that a court might not be convinced that a company's substantial competitive harm outweighs the benefits of disclosure.

Contractors should not have to continue turning to the courts to apply the *National Parks* balancing test to prevent disclosure of their price information. It is in a contractor's best interest to convince the government agency itself not to release its price information. While case law is supportive, the challenge is that government policy has not been brought in line with the state of the law. So, to make the information less likely to be released, it has to be greatly detailed, thereby exacerbating the potential harm from release. However, if a company tries to compile the information in a manner such that competitors are less likely to decipher the more competitively sensitive elements, the risk of an agency releasing the information under DOJ's outdated policy guidance grows.[65]

X. Going Forward: A New Policy?

The best solution is politically the most difficult one. Like FOIA policies issued post-9/11 protecting information for homeland security reasons, the government should adopt a clear FOIA policy—modeled on the D.C. Circuit's view. Apart from the overall contract price—which could be disclosed in most cases to foster the interests of transparency to which FOIA is directed, this guidance should acknowledge a presumption of confidentiality when the information sought involves underlying cost or pricing information under a federal government contract, such as unit prices and CLIN and sub-CLIN structure. Such a policy would set a bright line test that (1) would be consistent with the state of the law with regard to contractors' pricing information and (2) reduce uncertainty on the part of contractors and the government with regard to the protections that may and will be accorded to pricing. Such a policy would also be consistent with the precept that government, in its commercial capacity, should act in a way that befits a contractual relationship, rather than one that imposes the sovereign demands as a "cost of doing business." To the extent information was submitted with a reasonable expectation of confidentiality, the government should take all permissible steps to protect it from release. And at least in the D.C. Circuit, there would be a good chance that such a policy could withstand judicial scrutiny.

The government's policy should be updated to provide these protections without a company having to file suit for a court determination on an already settled judicial issue. Companies should not have to rely on costly court battles against the agency with which they do business, to protect their price information, especially since the law seems relatively settled.

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Footnotes

[1] *See* 5 U.S.C. § 552, which was substantially amended in 1974 and 1986.

[2] 5 U.S.C. § 552(b) includes a total of 9 such exemptions.

[3] 5 U.S.C. § 552(b)(4).

[4] *See* Exec. Order No. 12,600, 3 C.F.R. 235 (1988), *reprinted in* 5 U.S.C. § 552 note (2000). This Executive Order requires agencies to notify the original submitters of information and solicit their input regarding release of information when a request for information is received from a third party.

[5] 830 F.2d 1132 (D.C. Cir. 1987).

[6] *Id.* at 1134 n.1.

[7] *See generally* S.1160 (Before the Subcommittee. on Administrative Practice and Procedure of the Senate Committee on the Judiciary) 89th Cong. §§ 6-8 (1965); H.R. Rep. No. 89-1497 at 10 (1966).

[8] *See* Racal-Milgo Gov't Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981).

[9] *See* 518 U.S. 839 (1996)(citing Horowitz v. United States, 267 U. S. 458 (1925)).

[10] Until 1983, a part of the Restatement of Torts definition of trade secrets had been widely accepted for FOIA purposes. This broad definition stated that a "trade secret may consist of 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 or use it." RESTATEMENT OF TORTS §757 cmt. b (1939).

[11] 704 F.2d 1280 (D.C. Cir. 1983).

[12] *Id.* at 1288.

[13] *Id.* at 1283.

[14] *Id.*

[15] *Id.* at 1289.

[16] 18 U.S.C. § 1905. In relevant part, the Act states:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, 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 or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, 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; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[17] *Id.*

[18] The prospect that the government might have discretion to release, notwithstanding applicability of Exemption 4, was raised by *Nat'l Org. for Women, Washington D.C. Chapter v. Social Sec. Admin. of Dep't of Health & Human Services*, 736 F.2d 727 (D.C. Cir. 1984), but the D.C. Circuit did not decide this issue due to the procedural posture of the case. The case went to the Court of Appeals based on an appeal of a preliminary injunction against disclosure while the merits were still before the District Court. As noted in the text, *CNA* later completely closed off this possibility to agencies.

[19] 498 F.2d 765 (D.C. Cir. 1974).

[20] *Id.* at 766. Typically, FOIA and Reverse-FOIA cases have not involved disputes regarding the definition of "a person outside the government." *See* 5 U.S.C. 552(b)(4). Scrutiny instead has focused on what constitutes "commercial or financial information" which is "privileged" or (more typically) "confidential" within the meaning of Exemption 4.

[21] *Id.* at 767.

[22] *Id*. at 770. As noted in *CNA*, *supra* n.4 at 1153 n.147 in 1976, Congress expressed its approval of this test for Exemption 4 of FOIA.

[23] *Id.*

[24] *See* Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983).

[25] *Id*. at 1289.

[26] *Id.* at 1291.

[27] *Id. (*quoting Gulf & Western Indus., Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)).

[28] *Id.*

[29] *Id.* at n.30 *(*quoting Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data,* 1981 Wis. L. Rev. 207, 235-36).

[30] Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992). The public interest group, Critical Mass Energy Project, requested various safety reports that had been voluntarily provided by industry to the Nuclear Regulatory Commission ("NRC"). The NRC withheld the reports under FOIA. The District Court upheld the NRC decision not to disclose the information, but the Court of Appeals reversed. Before the information was released, the NRC and an industry group petitioned for rehearing *en banc*. The case discussed here is the *en banc* decision of the court.

[31] *Id.*

[32] As the D.C. Circuit stated in *Critical Mass*:

> Thus, when information is obtained under duress, the government's interest is in ensuring its continued reliability; when that information is volunteered the government's interest is in ensuring it continued availability. A distinction between voluntary and compelled information must also be made when applying the "competitive injury" prong. In the latter case, there is a presumption that the government's interest is not threatened by disclosure because it secures the information by mandate; and as the harm to the private interest (commercial disadvantage) is the only factor weighing against FOIA's presumption of disclosure, that interest must be significant. Where, however, the information is provided to the government voluntarily, the presumption is that its interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation. In those cases, the private interest served by Exemption 4 is the protection of information that, for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained'—to use the formation adopted by this court in *Sterling Drug*, 450 F.2d at 709 (quoting Senate Report at 9). *Critical Mass* at 878.

[33] 180 F.3d 303 (D.C. Cir 1999).

[34] *See supra* pp. 5-6.

[35] McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 306.

[36] *Id.*

[37] U.S. Dept. of Justice, Significant New Decisions, FOIA Update, Vol. XX, No. 1, *available at* http://www.usdoj.gov/oip/foia_updates/Vol_XX_1/page2.htm.

[38] *See supra* pp 5-6.

[39] *McDonnell*, 180 F.3d 303, 305 (D.C. Cir 1999).

[40] *Id*. at 307.

[41] Center for Auto Safety v. NHTSA, 244 F.3d 144, 149 (D.C. Cir 2001).

[42] *Id.*

[43] *Id.* at 147-148.(emphasis added).

[44] *Id.* at 146.(emphasis in original).

[45] Pub. Citizen Health Res. Group v. NIH, 209 F. Supp. 2d 37, 46 (D.D.C. 2002).

[46] *See* U.S. Dept. of Justice, Office of Information and Privacy, Memorandum for the Unit Price Officers Conference (February 24, 2000). Various federal agencies followed DOJ, interpreting FAR Part 15 to mandate releases of this type. As noted later, GSA was one such agency.

[47] *See generally* FAR 15.503 and FAR 15.506.

[48] *Supra* note 4.

[49] MCI Worldcom Inc. v. GSA, 163 F. Supp. 2d 28 (D.D.C. 2001). (This case was a consolidation of two reverse-FOIA actions. Telecommunications companies filed suit against GSA to enjoin disclosure of the pricing data in connection with contracts that were still active and had option years still ahead. Both the MCI and Sprint cases were consolidated in this opinion. Hereafter, we refer only to MCI as representing both cases.).

[50] *See* Mallinckrodt Inc. v. West, 140 F. Supp. 2d 1 (D.D.C. 2000).

[51] *MCI* at 30.

[52] *Id.* at 34.

[53] *Id.* at 35-36.

[54] *Id.* at 36 (citing *McDonnell*, 180 F.3d at 306).

[55] McDonnell Douglas Corp. v. USAF, 375 F.3d 1182 (D.C. Cir. 2004).

[56] Judge Garland was concerned that the court's majority opinion came "perilously close to a per se rule that line-item prices.... may never be revealed to the public through a FOIA request." *Id.* at 1194. He thought that barring release of prices should be the exception, not the rule.

[57] *Id.* at 1193.

[58] *Id. (*quoting Dep't. of Defense v. FLRA, 510 U.S. 487, 495 (1994)).

[59] Office of Information and Privacy, U.S. Dept. of Justice, Full Court Review Sought in McDonnell Douglas Unit Price Case (October 7, 2004) *available at* http://www.usdoj.gov/oip/foiapost/2004foiapost31.htm.

[60] MTB Group, Inc. v. United. States, 65 Fed. Cl. 516, (2005).

[61] *Id.* at 17.

[62] *Id.* at 22.

[63] *See supra* note 37.

[64] The test applies if the commercial or financial information was required to be provided to the government and is not the type of information customarily made public by the submitter.

[65] To the extent that the contractor provides information to the government which is more detailed or extensive than what the government required, that information can still be treated as voluntarily submitted. *See Critical Mass* at 878. However, the information at issue cannot merely be subsumed within the concept of the total price. *See generally* Cortez III Service Corp. v. NASA, 921 F. Supp 8 (D.D.C. 1996) making a distinction between required G&A rates and voluntarily included G&A rate caps.