

left unanswered and it is questionable whether its justifications outweigh either the doctrinal aberrations or the individual injustice to this defendant.

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**Freedom of Information Act—Exemption (4)—Research Designs Contained in Grant Applications—*Washington Research Project, Inc.***

***v. Department of Health, Education & Welfare***<sup>1</sup>—In 1966 Congress enacted the Freedom of Information Act<sup>2</sup> (FOIA) to “[open] administrative processes to the scrutiny of the press and general public . . . .”<sup>3</sup> The Act provided that federal agencies shall make information in their possession available to the public, in some cases through publication in the Federal Register,<sup>4</sup> and in others through availability for inspection and copying.<sup>5</sup> Exemptions were provided for certain types of information<sup>6</sup> as to which Congress apparently concluded that the government’s interest in non-disclosure outweighed the public’s interest in disclosure.<sup>7</sup> Jurisdiction was vested by the Act in the United States district courts to enjoin an agency from withholding records and to order the production of any records improperly withheld.<sup>8</sup> In such cases, the court shall determine the matter de novo and the burden is on the agency to sustain its action.<sup>9</sup>

In 1973, Washington Research Project, Inc. brought an action under the FOIA in the United States District Court for the District of Columbia against the Department of Health, Education, and Welfare (HEW), to compel disclosure of research designs contained in grant applications pertaining to several specifically identified research projects.<sup>10</sup> These projects had been approved and funded by the National Institute of Mental Health (NIMH), a unit of the Public Health Service of HEW.<sup>11</sup> HEW contended<sup>12</sup> that the information was ex-

<sup>1</sup> 504 F.2d 238 (D.C. Cir. 1974).

<sup>2</sup> 5 U.S.C. § 552 (1970), *as amended*, (Supp. IV, 1974). The Freedom of Information Act (FOIA) was first enacted in 1966. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, *amending* Administrative Procedure Act, ch. 324, §3, 60 Stat. 238 (1946). It was amended in 1967 by Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54. Pub. L. No. 90-23 was in turn amended by Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

<sup>3</sup> *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974).

<sup>4</sup> 5 U.S.C. § 552(a)(1) (1970).

<sup>5</sup> 5 U.S.C. § 552(a)(2) (1970), *as amended*, (Supp. IV, 1974).

<sup>6</sup> 5 U.S.C. § 552(b) (1970), *as amended*, (Supp. IV, 1974).

<sup>7</sup> *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

<sup>8</sup> 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. IV, 1974).

<sup>9</sup> *Id.*

<sup>10</sup> *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 931 (D.D.C. 1973).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 936.

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Since 1966 there has been considerable litigation over the appropriate scope of exemption (4) and over the procedures to be followed by a court in determining whether certain information fits within the exemption. This casenote will analyze the different requirements of exemption (4) and examine the extent to which the *Washington Research* interpretation of these statutory requirements is consistent with prior and subsequent case law. Next, policy aspects of *Washington Research* will be considered, with primary focus on the repercussions which the decision may have in the scientific community. Finally, this casenote will suggest a possible amendment to the Act necessary to bring the language of exemption (4), as interpreted in *Washington Research*, into closer harmony with the congressional policies behind the exemption.

Essential to a complete understanding of the *Washington Research* decision is a complete understanding of exemption (4). Exemption (4) protects from forced disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>22</sup> Information which qualifies may be withheld from disclosure to third parties by federal agencies. The most commonly accepted definition of "trade secret" is "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."<sup>23</sup> An element common to most definitions of "trade secret" is actual use of the secret in a trade or business.<sup>24</sup> The *Washington Research* court found, in effect, that a scientist doing research on a government grant rather than for the purpose of inventing a marketable device is not engaged in a trade or business, and held that a research design is not a trade secret in the hands of such a scientist because he or she does not have a trade or commercial interest in it.<sup>25</sup> The court apparently overlooked the similarity that such a scientist bears to an independent contractor: he competes with others like himself for the right to do research which the government believes needs to be done and is willing to pay him to do. Such a person may be viewed as engaged in a trade or business. However, the *Washington Research* court's interpretation of "trade secret" is in accord with that given to that phrase by most state courts,<sup>26</sup> and it is probably best that the state and federal definitions of "trade secret" be consistent, to avoid confusion.

Exemption (4) also protects "commercial or financial information

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<sup>22</sup> 5 U.S.C. § 552(b)(4) (1970).

<sup>23</sup> RESTATEMENT OF TORTS § 757, comment b at 5 (1939). See 12 BUSINESS ORGANIZATIONS, MILGRIM, TRADE SECRETS § 2.01 at 2-3 — 2-4 (1975), and cases cited therein.

<sup>24</sup> 12 BUSINESS ORGANIZATIONS, MILGRIM, TRADE SECRETS § 2.01 at 2-8.5 (1975).

<sup>25</sup> 504 F.2d at 244-45

<sup>26</sup> See cases cited in 12 BUSINESS ORGANIZATIONS, MILGRIM, TRADE SECRETS § 2.01 at 2-3 to 2-4 (1975).

obtained from a person and privileged or confidential."<sup>27</sup> The proper interpretation of this phrase has been the subject of frequent litigation.<sup>28</sup> One of the first questions to arise was whether the phrase created one classification for "commercial or financial information which is obtained from a person *and which is* privileged or confidential," or whether it created two classifications for "commercial or financial information which is obtained from a person" and for information which is "privileged or confidential." The first reading has been criticized as contrary to congressional intent;<sup>29</sup> however, given the actual arrangement of the words in the exemption, the first reading has been considered more logical.<sup>30</sup> While the second reading was endorsed by one of the first decisions under the Act,<sup>31</sup> this decision has not been followed. Indeed, it now seems well settled that items which are not trade secrets must be both commercial or financial *and* privileged or confidential in order to fall within the exemption.<sup>32</sup>

A second question under this phrase of the exemption concerns the interpretation of the words "commercial or financial."<sup>33</sup> Under prior case law, "commercial or financial" has been interpreted in its "trade," "commerce" or "business" aspects.<sup>34</sup> This is the manner in which "commercial or financial" was interpreted in *Washington Research*,<sup>35</sup> and to this extent the decision is consistent with prior law.

<sup>27</sup> 5 U.S.C. § 552(b)(4) (1970).

<sup>28</sup> See, e.g., *National Parks Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and cases cited therein; *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974).

<sup>29</sup> Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787-92 (1967); UNITED STATES ATTORNEY GENERAL, MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1968), reprinted in 20 AD. L. REV. 263, 300-02 (1968).

<sup>30</sup> Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787 (1967).

<sup>31</sup> *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967).

<sup>32</sup> *National Parks Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974).

<sup>33</sup> Another question which has arisen under the exemption concerns the meaning of the language "obtained from a person." It has been held that this phrase means that the document must have been received by the agency from a person outside the government. *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363, 1366 (2d Cir. 1971). Such an interpretation is necessary in order to prevent agencies from being able to withhold documents otherwise clearly subject to disclosure simply by passing them from agency to agency. *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, *supra* at 582; S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966). It should be pointed out, however, that once a document has been obtained from a person outside the government and is otherwise within the exemption, that document does not lose its protection from disclosure if it is passed from one agency to another. *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, *supra* at 582.

<sup>34</sup> See, e.g., *National Parks Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970).

<sup>35</sup> 504 F.2d at 244-45.

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However, two cases decided since *Washington Research* apply the exemption to create a non-business, individual right of privacy in financial information.<sup>36</sup> In *Rural Housing Alliance v. United States Department of Agriculture*,<sup>37</sup> the United States Court of Appeals for the District of Columbia Circuit stated that while the exemption exists primarily to protect trade secrets, it also protects individuals from the disclosure of privileged or confidential financial information.<sup>38</sup> The court went on to hold that a report of the United States Department of Agriculture on its investigation of governmental housing discrimination in Florida was excepted from forced disclosure by exemption (4), because it included intimate, detailed information given by, and with respect to, borrowers and applicants for loans that was "implicitly and unquestionably not the kind of information which would customarily be released to the public by the persons from whom it was obtained."<sup>39</sup> Some of the information was clearly financial in nature, but a large part of it was only tangentially so.<sup>40</sup> Nevertheless, the tenor of the opinion points to the application of exemption (4) to much of the information.<sup>41</sup>

Essentially the same result was reached in *Ditlow v. Schultz*,<sup>42</sup> in which it was held that almost the entire Customs Declaration form completed by designated persons entering the United States was excepted from forced disclosure by exemption (4).<sup>43</sup> The court reasoned that much of the information on the form "is confidential information that would not customarily be disclosed to the public by the person from whom it was obtained, and also that public disclosure of the information poses the likelihood of harm to legitimate private

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<sup>36</sup> *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 78 (D.C. Cir. 1974); *Ditlow v. Shultz*, 379 F. Supp. 326, 329 (D.D.C. 1974).

<sup>37</sup> 498 F.2d 73 (D.C. Cir. 1974).

<sup>38</sup> *Id.* at 78.

<sup>39</sup> *Id.* at 79.

<sup>40</sup> The report included information

regarding the marital status of such borrowers and applicants, the number and the legitimacy of their children, and grandchildren, and the identity of the fathers of their children; information as to their medical condition and history, including statements as to surgery and the possibility of future pregnancies; information as to their occupations and work history and the amounts and sources of their annual income, including the amount of welfare payments received; information as to their ownership of property; information as to their habits with respect to the consumption of alcoholic beverages; information as to family fights which had occurred; information from their employers as to their reliability as employees; information as to their reputation in the community; information as to the risks involved in extending credit to them; and other information of a clearly personal and confidential nature.

*Id.* at 75-76 n.4.

<sup>41</sup> *Id.* at 75-76, 78-79.

<sup>42</sup> 379 F. Supp. 326 (D.D.C. 1974).

<sup>43</sup> *Id.* at 329.

interests."<sup>44</sup> Again, not all of the information was financial,<sup>45</sup> but the court held that only the names and addresses of those who filled out the forms must be disclosed.<sup>46</sup> The holdings in these two cases arguably raise the implication that information about an individual, not financial in itself but of such a nature that its disclosure could have severe adverse consequences for the financial status of that individual, is "commercial or financial" and, as such, can be withheld under exemption (4).

If this interpretation is correct, these cases support the classification of research proposals as such financial information. The interest of the scientist in his information is not simply the same as the interest of any employee in professional recognition and reward, as the *Washington Research* court stated. While it is true that a grant-seeking scientist may be employed by a university, he receives the money with which he pays the costs of his research not from his nominal employer,<sup>47</sup> but from the government.<sup>48</sup> In his relationship with the government, as noted earlier, he can be said to be self-employed and in competition with other scientists<sup>49</sup> for what may be characterized as government contracts to do research. The awarding of these grants is based upon many factors, including *the potential of the research design*.<sup>50</sup>

<sup>44</sup> *Id.*

<sup>45</sup> The form contained spaces for (1) name, (2) date of birth, (3) vessel or airline and flight number, (4) citizenship, (5) residence, (6) permanent address, (7) address while in the United States, (8) name and relationship of accompanying family members, (9) whether declarant or anyone in his party is carrying agricultural or meat products or pets, (10) whether declarant or anyone else in his party is carrying more than \$5,000 in coin, currency or negotiable instruments, (11) certification that all of the above information is true, accurate and complete, (12) if a non-citizen, the place where declarant's visa was issued, (13) the date when it was issued, and (14) a detailed list of all articles acquired abroad which are now in declarant's possession, with price information. *Id.* at 328.

<sup>46</sup> *Id.* at 329.

<sup>47</sup> It is true that some federal government grant programs award grants to the college or university which employs the scientist rather than to the scientist himself, and require that the college or university contribute to the support of the project for which the grant is awarded. See generally ANNUAL REGISTER OF GRANT SUPPORT 1973/1974, 382, 386-87, 393, 399 (D. Sclar ed. 1973) [hereinafter cited as ANNUAL REGISTER]. However, many such grants including some of those which are most heavily funded, can also be made to individuals. *Id.* at 380-81, 399, 402, 424. Also, even where the grant is made to the educational institution, frequently it is made for the work of a specific scientist or group of scientists after consideration of the promise of the research proposal drawn up by the scientist or scientists. See, e.g., *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 934 (D.D.C. 1973). Thus it is still the scientists, rather than the universities, which are competing.

<sup>48</sup> Although there are many non-governmental sources of grants for scientific research, a comparison of the amounts of money available from the various sources reveals that the federal government is the largest source of such funding. See generally ANNUAL REGISTER, *supra* note 47, at 375-604.

<sup>49</sup> See generally Siegel, *Priority Assertion and Early Disclosure Through Author Abstracts*, 15 IDEA 268 (1971).

<sup>50</sup> See, e.g., *Washington Research Project, Inc. v. HEW*, 366 F. Supp. 929, 934 (D.D.C. 1973).

There is generally not enough money to go around,<sup>51</sup> so that misappropriation of a scientist's research design can have the same effect upon his competitive position that misappropriation of a trade secret can have upon a business. Thus, although research designs contained in grant proposals are not commercial or financial in themselves, their disclosure would have such an impact upon the competitive positions of scientists that such information should be exempted under the same rationale which apparently was applied in *Ditlow* and *Rural Housing Alliance*.<sup>52</sup>

The much narrower interpretation of "commercial or financial" in *Washington Research* may have been based on the rule that even if non-disclosure would serve the policies behind an exemption, the district courts do not have equitable jurisdiction under the FOIA to allow non-disclosure if the technical requirements of the exemption are not met.<sup>53</sup> This reading of the FOIA — one which forbids the use of equitable discretion to expand the exemptions of the Act — has been expressly adopted in several cases,<sup>54</sup> although there are decisions to the contrary.<sup>55</sup>

A comprehensive discussion of the argument against expansion of the exemptions through the use of equitable discretion is contained in *Soucie v. David*.<sup>56</sup> In that case, the United States Court of Appeals for the District of Columbia Circuit concluded that the legislative intent, as expressed in both the Act itself and in the Senate report, was clearly to exercise the power of Congress to limit, if not totally eliminate, the ordinarily discretionary boundaries to equitable relief.<sup>57</sup> The court pointed out that the FOIA was a reaction against prior case law which had enforced non-disclosure "in the public interest," "for good cause shown," or because the person seeking disclosure was "not properly and directly concerned."<sup>58</sup> The provision in the FOIA that disclosure is to be made "to any person" precludes a court from examining the "need" of the person seeking disclosure.<sup>59</sup> Further-

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<sup>51</sup> Compare figures for "Number of Applicants . . ." with figures for "Number of Awards" in ANNUAL REGISTER, *supra* note 47, at 375-604.

<sup>52</sup> See text at notes 36-46 *supra*.

<sup>53</sup> See, e.g., *Getman v. NLRB*, 450 F.2d 670, 677-78 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971).

<sup>54</sup> *Id.*

<sup>55</sup> *Therault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 806 (S.D. N.Y. 1969), *appeal dismissed*, 436 F.2d 1363, 1366 (2d Cir. 1971). The leading opinion in favor of the use of equitable discretion to broaden the coverage of the exceptions is *Consumers Union*, wherein the court held certain results of the V.A.'s hearing aid testing program to be exempt from disclosure pursuant to its equitable jurisdiction, even though the information did not fit any of the stated exemptions in the Act. 301 F. Supp. at 798.

<sup>56</sup> 448 F.2d 1067 (D.C. Cir. 1971).

<sup>57</sup> *Id.* at 1076.

<sup>58</sup> *Id.* The quoted language is from Act of Sept. 6, 1966, Pub. L. No. 89-554, § 1, 80 Stat. 383.

<sup>59</sup> 448 F.2d at 1077.

more, the inclusion in the Act of the language "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section," was read by the court as specifically limiting the discretion of the courts.<sup>60</sup> The *Soucie* court commented that the legislature, by providing specific exemptions, had struck "a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion,"<sup>61</sup> and any tinkering by the courts is likely to upset that balance.<sup>62</sup> The court also noted that the Senate report supports this view.<sup>63</sup> The contrary view contained in the House report<sup>64</sup> was discounted, on the ground that only the Senate report was considered by both houses of Congress.<sup>65</sup>

In addition to the specific statutory provision cited in *Soucie*, there is also the policy of the FOIA in favor of disclosure,<sup>66</sup> which militates against the use of equitable discretion to impede disclosure in FOIA cases, and particularly against the use of such discretion to broaden the exemptions. Indeed, a court interested in asserting its equitable discretion should consider the strong mandate of the Act in favor of disclosure as a mandate to use that discretion to narrow the exemptions. This is precisely what was done in *National Parks and Conservation Association v. Morton*.<sup>67</sup> There, the court required an agency to show not only that its records met the technical requirements of confidentiality and were commercial or financial, but also that non-disclosure of the records was consistent with the policies behind the Act.<sup>68</sup> If this theory of the use of equitable discretion in FOIA cases only to narrow the exemptions and not to broaden them is correct, then the expansive interpretations of *Ditlow* and *Rural Housing Alliance* are incorrect, and *Washington Research* is a proper decision under the Act as presently written.

It is useful to compare the positions of university and industry scientists under the narrow interpretation of "commercial or financial" adopted by the *Washington Research* court.<sup>69</sup> Some university scientists

<sup>60</sup> *Id.*, quoting 5 U.S.C. § 552(c) (1970).

<sup>61</sup> 448 F.2d at 1077.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, citing S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

<sup>64</sup> H.R. REP. NO. 1497, 89th Cong., 2d Sess. 9 (1966).

<sup>65</sup> 448 F.2d at 1077, n.39.

<sup>66</sup> See *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974).

<sup>67</sup> 498 F.2d 765 (D.C. Cir. 1974). The information sought in this case consisted of "audits conducted upon the books of companies operating concessions in national parks, annual financial statements filed by the concessioners with the National Park Service and other financial information." *Id.* at 770. The court remanded the case to the district court for consideration of whether this information was "confidential" under tests set forth by the court. *Id.* at 771. These tests are discussed in the text at notes 82-89, *infra*.

<sup>68</sup> *Id.* at 767.

<sup>69</sup> Many of the assertions about the workings of the scientific community which are to follow are derived in whole or in part from conversations with various members

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may be commercially oriented, and may set up businesses to exploit their ideas for profit. The research designs of such scientists would probably qualify as "commercial or financial" under *Washington Research*.<sup>70</sup> However, many scientists are not commercially oriented and have no intention of directly exploiting their ideas for profit. To secure protection under exemption (4), these scientists could assert only their interest as competitors with other grant-seeking scientists, an interest which was rejected as not "commercial or financial" in *Washington Research*.<sup>71</sup>

In some cases, university scientists may be required, as a condition of employment, to sign agreements which give to the universities all rights to inventions developed by the scientists while they are employed by the universities.<sup>72</sup> Under these agreements, the universities may be able to step in and prevent disclosure under *Washington Research*, due to their commercial interest created by the agreement. However, it is possible that even here, since research done by many university scientists is not oriented toward applications of technology suitable for immediate commercial exploitation, a court might hold a university's commercial interest to be too speculative to be worthy of protection.

In comparison, the research designs of many industry scientists are not in any way subject to the FOIA. Many industry scientists do not rely on government grants or contracts for their funding,<sup>73</sup> and thus their research designs are not submitted to the federal government, and are not subject to the FOIA, which reaches only information in the hands of federal agencies.<sup>74</sup> However, the research designs of some industry scientists are subject to the FOIA because their companies fund their research at least partially by applying for and obtaining government grants or contracts.<sup>75</sup> The research designs of these scientists may be protected from disclosure under *Washington Research*, because such scientists can assert the argument concerning

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of an atomic physics research group at the Massachusetts Institute of Technology in Cambridge, Massachusetts over the past three years.

<sup>70</sup> See 504 F.2d at 244 n.6.

<sup>71</sup> *Id.* at 244.

<sup>72</sup> See, e.g., INVENTION AND COPYRIGHT AGREEMENT For M.I.T. Academic Staff and Students Engaged on Sponsored Research or Using Institute Facilities, obtained from the Division of Sponsored Research, Patent Section, Massachusetts Institute of Technology, Cambridge, Massachusetts. A copy of this agreement is on file at the offices of the Boston College Industrial and Commercial Law Review.

<sup>73</sup> Many of the most heavily funded governmental grant programs are available only to non-profit organizations, such as colleges and universities and research organizations whose primary purpose is scientific research. See, e.g., ANNUAL REGISTER, *supra* note 47, at 380, 382, 386-87, 393, 416, 428. Others are available to profit-making organizations only under exceptional circumstances. See, e.g., *id.* at 399.

<sup>74</sup> 5 U.S.C. § 552(a)(3) (1970).

<sup>75</sup> There are some governmental grant programs which are open to profit-making companies. See, e.g., ANNUAL REGISTER, *supra* note 47, at 381, 402, 424. Other programs make only contracts, and not grants, available to profit-making companies. See, e.g., *id.* at 380, 381, 387, 426.



their own competitive position within the scientific community which was rejected in *Washington Research* for their academic counterparts. More importantly, however, the company employing the scientist can make two arguments against disclosure, both of which are likely to succeed under *Washington Research*. The first of these concerns any interest which the company may have under its government grant or research contract in the commercial exploitation of scientific processes and results which grow out of work under that contract. This interest is clearly protected, since these items are likely to be trade secrets, which are expressly protected under exemption (4).<sup>76</sup>

The second company argument concerns the need for the company to maintain its competitive position as against other companies which contract with the government or receive government grants to do research. Any grant or contract-receiving company will probably have this interest, but it will be most significant with respect to any profit-making companies which agree with the government *not* to make any commercial use of their research results, and thus are able to make a profit only through continued success in obtaining research contracts. This argument is analagous to the scientist's asserted interest in his individual competitive position. However, within this context the argument is more likely to be accepted by the courts, simply because it is being asserted by a profit-seeking company rather than by an individual.<sup>77</sup>

The final requirement for information to be protected under exemption (4) is that the information must be "privileged or confidential."<sup>78</sup> Because the court in *Washington Research* found neither a trade secret nor a commercial or financial interest, it did not have occasion to consider this requirement of privilege or confidentiality. However, to ensure a complete understanding of exemption (4), a discussion of this requirement is necessary.

Under prior case law, the test for confidentiality turned on whether the document contained information which would not customarily be released to the public by the person from whom it was obtained.<sup>79</sup> The fact that the information was revealed to the government under the express promise by the government that the information would be kept confidential had been held to be another factor to be considered by courts,<sup>80</sup> but insufficient in itself to create confidentiality under the exemption.<sup>81</sup>

<sup>76</sup> 5 U.S.C. § 552(b)(4) (1970).

<sup>77</sup> 504 F.2d at 244 n.6.

<sup>78</sup> See text at note 32, *supra*.

<sup>79</sup> See, e.g., *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970).

<sup>80</sup> *General Serv. Administration v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 803-04 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363, 1366 (2d Cir. 1971).

<sup>81</sup> *Petkas v. Staats*, 501 F.2d 887, 889 (D.C. Cir. 1974); *Geuman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971).

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In 1974, however, the United States Court of Appeals for the District of Columbia Circuit in *National Parks and Conservation Association v. Morton*<sup>82</sup> expanded the test to be used in determining confidentiality. In addition to proving that, objectively, the provider of information to the government would not customarily reveal that information to the public,<sup>83</sup> the court held that an agency seeking to prevent disclosure under exemption (4) must also establish that non-disclosure is justified by one of the legislative purposes underlying the exemption,<sup>84</sup> thus opening the door to use of its equitable discretion to narrow the exemption. The court discussed two such legislative purposes. The first of these concerned the fact that government policy-makers need access to commercial and financial data, and recognized that assurances of confidentiality are often necessary in order for businesses to allow such access voluntarily.<sup>85</sup> To justify non-disclosure under this policy, an agency must demonstrate that disclosure would impair the government's ability to obtain similar information in the future.<sup>86</sup> The second legislative purpose concerned the protection of those who are obligated by law to submit information to the government.<sup>87</sup> The court stated that an agency could justify non-disclosure under this policy if it could demonstrate that disclosure would cause "substantial harm" to the competitive position of such a person.<sup>88</sup> The court left open the possibility that there might be other governmental interests which would qualify as such legislative purposes, for example, encouragement of compliance with laws requiring disclosure of data to the government, or "program effectiveness."<sup>89</sup>

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<sup>82</sup> 498 F.2d 765 (D.C. Cir. 1974).

<sup>83</sup> *Id.* at 766.

<sup>84</sup> *Id.* at 767.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 770. The *National Park* court presumed that such impairment could not exist in that case, since the provider of the information to the government in *National Parks* was required by law to provide it. *Id.*

<sup>87</sup> *Id.* at 768.

<sup>88</sup> *Id.* at 770.

<sup>89</sup> *Id.*, n.17. One of the other major issues with which the courts have had to deal in exemption (4) cases, as well as under other sections of the FOIA, concerns the nature of proof required of an agency which desires to withhold a document under the exemption. Initially, an agency prevailed by coming into court in an FOIA case with affidavits containing only broad and sweeping conclusory allegations that a single document, or a huge mass of documents, came within the exemption. See, e.g., *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970), *rev'd* 284 F. Supp. 745 (D.D.C. 1968).

However, to permit non-disclosure solely on the basis of conclusory affidavits of the agency arguing for non-disclosure would effectively place disclosure totally within the discretion of the agency, since the party seeking disclosure cannot know the contents of the documents and thus cannot contest the conclusions of the affidavits. Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895, 950 (1974). Such a result would read out of the Act the requirement that the district court "shall determine the matter de novo" and also the requirement that "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(3) (1970), *as amended*, (Supp. IV, 1974).

In 1973, in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), it was held that in-

It is submitted that, in general, research designs, proposed methods and specific goals of scientific research proposals included in grant applications, which were the type of information at stake in *Washington Research*, clearly meet the test of confidentiality enunciated in *National Parks*. Such information is not customarily revealed, either to the public or to competing scientists, before work on the experiments is begun.<sup>90</sup> Even after work is in progress, such information is not generally revealed in the detail with which it is submitted in grant applications and progress reports.<sup>91</sup> Only after he has completed enough of his experiment to be ready to present his results to his colleagues and collect the credit which is his reward does the scientist reveal the details of his work.<sup>92</sup> Such partial and temporary professional secrets should come within the protection of the exemption, in the same way that trade secrets do. Trade secrets often consist not of an entire project, but rather of some particular process or ingredient in the project.<sup>93</sup> Furthermore, trade secrets often do not remain trade secrets forever; they are protected only as long as they are not revealed by the owner or as long as similar processes or ingredients are not developed independently by others in the same field.<sup>94</sup> Trade secrets obviously are protected under exemption (4) only to the extent that, and for as long as, they remain secret. The same could be and should be done for the scientific information at stake here.

In addition, information such as that involved in *Washington Research* meets the policy tests enunciated in *National Parks*. Scientists are obligated to supply extremely detailed research designs to the appropriate governmental agencies in order to obtain the government's financial backing for their research,<sup>95</sup> and there is relatively little

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stead of providing conclusory and generalized allegations, agencies must specify in detail which portions of a document or group of documents are exempt and which are disclosable, and must itemize and index the documents and correlate this indexing with the various justifications for the refusal to disclose. *Id.* at 826-28. This decision is in accord with the general policy of the Act to encourage disclosure, since the requirement of such specificity and detail and the verification of all such claims will encourage agencies to claim exemptions only when it is at least arguable that they are justified. *But see* Environmental Protection Agency v. Mink, 410 U.S. 73, 93 (1973) (detailed affidavits alone held sufficient under exemption (5)). In 1974, in *Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd.*, 505 F.2d 383 (D.C. Cir. 1974), the court applied *Vaughn* and enunciated standards for the extremely detailed allegations required in support of a claim of confidentiality under exemption (4). *Id.* at 385.

<sup>90</sup> This assertion is based upon private conversations with members of an atomic physics research group at the Massachusetts Institute of Technology in Cambridge, Massachusetts.

<sup>91</sup> *Id.*

<sup>92</sup> See generally Merton, *Behavior Patterns of Scientists*, 38 AM. SCHOLAR 197 (1969).

<sup>93</sup> 12 BUSINESS ORGANIZATIONS, MILGRIM, TRADE SECRETS § 2.09(2) (1975).

<sup>94</sup> R. ELLIS, TRADE SECRETS §§ 24, 26, 27 (1953); RESTATEMENT OF TORTS § 757 comment a, at 4 (1939).

<sup>95</sup> See, e.g., ENVIRONMENTAL PROTECTION AGENCY MANUAL: GRANTS ADMINISTRATION, 5700.1, Pt. 1, ch. 2, ¶ 2(b)(13) (April 7, 1972).

non-governmental backing available.<sup>96</sup> Therefore, under *National Parks*, if the disclosure of this information would cause "substantial harm" to the competitive position of the scientist,<sup>97</sup> in addition to meeting the traditional test of confidentiality enunciated above, the governmental agency concerned would be justified in not disclosing the information under the additional policy requirement of *National Parks*. Furthermore, it was contended by HEW in *Washington Research* that such substantial harm would result from disclosure because

"ideas are a researcher's 'stock-in-trade.'" Their misappropriation, which, it is claimed, would be facilitated by premature disclosure, deprives him of the career advancement and attendant material rewards in which the academic and scientific market deals, in much the same way that misappropriation of trade information in the commercial world deprives one of a competitive advantage.<sup>98</sup>

This contention finds support in the writings of one of the leading historians of science in the area of competition among scientists.<sup>99</sup> There is at least a possibility of such harm to competitive advantage in cases such as *Washington Research*, and parties opposing disclosure in such cases ought to be allowed to prove such harm. They should not have to overcome a presumption, best expressed by the party seeking disclosure in *Washington Research*, that "secrecy is antithetical to the philosophical values of science."<sup>100</sup>

However, the policy considerations enunciated in *National Parks* only help to define one test of exemption (4), namely, confidentiality. With respect to the other requirements of the exemption, it appears that the *Washington Research* decision was correct as a matter of pure statutory interpretation, given the present wording of the Act, in spite of the fact that the decision is in conflict with the Attorney General's Memorandum on the FOIA.<sup>101</sup> First, research designs are clearly not

<sup>96</sup> See note 48 *supra*.

<sup>97</sup> It should be noted that *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974), discussed in text at note 37 *supra*, and *Didow v. Schultz*, 379 F. Supp. 326 (D.D.C. 1974), discussed in text at note 42 *supra*, were concerned with the individual rather than corporate versions of "substantial harm" to competitive position.

<sup>98</sup> 504 F.2d at 244. See *Misani v. Ortho Pharmaceutical Corp.*, 83 N.J. Super. Ct. 1, 198 A.2d 791 (1964), *rev'd*, 44 N.J. 552, 210 A.2d 609 (1965), in which the Superior Court recognized the right of a scientist to claim intellectual credit for her work, but the state supreme court reversed on this issue. See also *Hearings on United States Government Information Policies and Practices Before a Subcomm. of the House Comm. on Gov't Operations*, 92d Cong., 2d Sess. 3620 (1972) (testimony of Dr. John F. Sherman, Deputy Director of the Nat'l Institute of Health).

<sup>99</sup> Merton, *Behavior Patterns of Scientists*, 38 AM. SCHOLAR 197 (1969).

<sup>100</sup> See 504 F.2d at 244.

<sup>101</sup> UNITED STATES ATTORNEY GENERAL, MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967), *reprinted in* 20 AD. L. REV. 263 (1968) [hereinafter cited as ATTORNEY GENERAL'S MEMORANDUM], which

traditional trade secrets in the hands of scientists.<sup>102</sup> Secondly, they are clearly not commercial or financial information in the narrow business/manufacturing context.<sup>103</sup> Finally, a narrow reading of the Act is required by the rule concerning the use of equitable discretion,<sup>104</sup> the general policy of the Act in favor of disclosure<sup>105</sup> and by the proviso at the end of the Act that the Act does not authorize the withholding of records except for the reasons specifically stated.<sup>106</sup>

It is submitted, however, that as a matter of social and economic policy the *Washington Research* decision is misguided. While it is true that the FOIA is a mandate for disclosure, exemptions protect important governmental or private interests which would be irreparably harmed by disclosure.<sup>107</sup> It is submitted that the full disclosure of research designs mandated by *Washington Research* will cause irreparable

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was published shortly after the passage of the FOIA, states:

In view of the specific statements in both the Senate and House reports that technical data submitted by an applicant for a loan would be covered, and the House report's inclusion of "scientific or manufacturing processes or developments," it seems reasonable to construe this exemption as covering technical or scientific data or other information submitted in or with an application for a research grant or in or with a report while research is in progress.

20 AD. L. REV. at 302. See also Saloschin, *Science and secrecy - the impact of Federal Law*, 10 IEEE SPECTRUM 68 (1973). It should also be noted that several agencies gave the same broad reading to exemption (4) in their regulations setting forth the manner in which each of them would implement the FOIA, perhaps in reliance on the ATTORNEY GENERAL'S MEMORANDUM, *supra*. See, e.g., 45 C.F.R. § 5.71(c) and § 5 Appendix (1974) (HEW); 32 C.F.R. § 701.1(h)(4)(ii), (iv) (1974) (Navy); 32 C.F.R. § 518.10(d)(2), (4) (1974) (Army); 32 C.F.R. § 286.8(b)(4)(ii), (iv) (1974) (Department of Defense). The ATTORNEY GENERAL'S MEMORANDUM could be criticized for depending too much on the House report, which read the exclusion more broadly but was not considered by both houses of Congress, and for depending too little on the Senate report, which read the exclusion more narrowly and was considered by both houses. See, *Soucie v. David*, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971). It should be noted that since *Washington Research*, some of these agencies have rewritten their regulations. Compare, 32 C.F.R. § 701.1 (h)(4)(ii), (iv) (1974) with 32 C.F.R. § 701.24(d)(1) (1975) (Navy); 32 C.F.R. § 518.10(d)(2), (4) (1974) with 32 C.F.R. § 518.14(d) (1975) (Army); 32 C.F.R. § 286.8(b)(4)(ii), (iv) (1974) with 32 C.F.R. § 286.6(c)(4) (1975) (Department of Defense).

<sup>102</sup> See text at notes 23-24 *supra*.

<sup>103</sup> See text at notes 33-35 *supra*. Compare the facts of *Washington Research*, discussed in text at note 10, *supra*, with those of *National Parks Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), discussed in note 67, *supra*, and with those of *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 579, 581 (D.C. Cir. 1970).

<sup>104</sup> See text at notes 53-68 *supra*.

<sup>105</sup> See, e.g., *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974).

<sup>106</sup> See text at notes 60-61 *supra*.

<sup>107</sup> For example, exemption (5), 5 U.S.C. § 552(b)(5) (1970), which protects "inter-agency or intra-agency memorandums or letters," has been held to be concerned with the governmental and public interest in protecting "deliberative or policy-making processes." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 89 (1973), under the theory that without such protection, officials will not feel free to be candid, and government policy makers will not have the benefit of a truly free exchange of ideas upon which to base a choice of action. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

harm to the progress of scientific research.

The scientific community is competitive. Secrecy may be "antithetical to the philosophical values of science,"<sup>108</sup> but it is not antithetical to customary practice in the scientific field. Many, if not most, scientists used to keep not only their plans but even their experimental results secret for years out of fear that someone else would find out about their work, copy it, and claim the credit for doing it first.<sup>109</sup> Even today there are some scientists who, while willing to publish preliminary results of experiments, publish such results in a manner which reveals little to potential competitors, and wait to publish full details until their experiments are completely finished and the results are clear, for fear that otherwise someone else will beat them to the final result.<sup>110</sup> The system of scientific conferences and journals was established at least in part as a mechanism through which scientists could be assured of receiving credit for their work by prompt publication under controlled conditions to all of their peers at once.<sup>111</sup> If the decision in *Washington Research* is allowed to stand, it is submitted that the present system by which scientific research is carried out could very well be destroyed.<sup>112</sup> Under this system, scientists who have relatively little money and manpower at their disposal have at least a chance to become successful with a good idea, even though it may take them longer to complete an experiment than it would take someone with more money and manpower.

Under *Washington Research*, any scientist could have access to the government-backed brainstorm of his fellows. The scientist with more money and manpower, who can do an experiment more quickly can turn these ideas to his own advantage by publishing his results first. This could have the long-range effect of making it much more difficult for new scientists, who have not yet had the chance to develop contacts and professional reputations for good, interesting, successful,

<sup>108</sup> See 504 F.2d at 244.

<sup>109</sup> Merton, *Behavior Patterns of Scientist*, 38 AM. SCHOLAR 197, 209 (1969); Siegel, *Priority Assertion and Early Disclosure through Author Abstracts*, 15 IDEA 268, 271-72 (1971).

<sup>110</sup> Siegel, *Priority Assertion and Early Disclosure through Author Abstracts*, 15 IDEA 268, 271 (1971).

<sup>111</sup> Merton, *Behavior Patterns of Scientists*, 38 AM. SCHOLAR 197, 209-10 (1969).

<sup>112</sup> For a scientist's view of the negative impact of *Washington Research* on scientific research, see Letter from Edward M. Korn, Inter-Assembly Counsel NIH-NIMH, National Institutes of Health, to Editor, in 190 SCIENCE 736 (Nov. 21, 1975). The letter stated, in part:

This decision raises important questions for the scientific community. For example, if scientists generally avail themselves of their legal right to obtain copies of their colleagues' grant applications, will applicants include less information in their applications, thus making it more difficult for study sections to evaluate them? Will colleagues with shared scientific goals tend to become secretive competitors, and will meaningful scientific exchange be reduced?

Korn noted that NIH has received several hundred requests for copies of grant applications, "including recently two from the NIH intramural scientific staff." *Id.*