TRANSPARENCY V. INTELLIGENCE: CORPORATE INFORMATION PRIVACY RIGHTS UNDER THE FREEDOM OF INFORMATION ACT AND WHETHER INQUIRING MINDS STILL HAVE A RIGHT TO KNOW

The public desire for a total information society has generated increased demand for all government activity. Struggling for a continued sense of autonomy, corporations contend with this gauge of government effectiveness by seeking to keep certain information private. Courts remain hedged in the middle, as submitters seek judicial assistance to compel agency withholdings. Maintaining balance has become considerably difficult as Congress has remained noticeably absent in terms of providing the balancing framework for these competing interests. This article explores the progression of jurisprudence regarding the burgeoning legal conflict between protecting corporate information privacy interests and safeguarding public access rights to government information under FOIA.

I. INTRODUCTION

The Freedom of Information Act (FOIA)[1] dictates that government agencies provide for public access to federal government records.[2] It exempts only nine categories of information agencies may withhold.[3] Of these, two specifically permit government agencies to withhold information in the interest of personal privacy.[4] Efforts continue to extend this protection to the corporate context, to supplement the broad reach of exemption four, which permits federal agencies to withhold trade secrets and confidential business information.[5] From a strictly legal perspective, this corporate undertaking highlights the current dilemma. Corporate personhood may

---

1. 5 U.S.C. § 552 (2006).

2. *See* H.R. REP. No. 89-1497, at 1 (1966); S. REP. NO. 89-813, at 3 (1965). The term "agency" includes any executive or military department, government corporation, government controlled corporation, and all establishments under the executive branch, including independent regulatory agencies. 5 U.S.C. § 552(f)(1). The term excludes federal courts, Congress, governments of U.S. territories, and the government of the District of Columbia. *Id.* § 551(1). The term "records" is not statutorily defined by the FOIA, but includes all information held by the agency in any format. *See id.* § 552(f)(2).

3. *See* 5 U.S.C. § 552(b)(1)-(9). Agencies can cite any of these nine exemptions, in whole or in part, when refusing to disclose records. *See* S. Rep. No. 93-854, at 158-59 (1974). However, the exemptions are narrowly construed. Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976); *see* H.R. Rep. No. 93-1380, at 228-29 (1974). The Act vests jurisdiction in federal courts to examine disputed documents *in camera* to decide whether they fall under any of the exemptions. *See* § 552(a)(4)(B); H.R. REP. NO. 93-1380, at 226 (1974).

4. 5 U.S.C. § 552(b)(6)-(7). The FOIA is not applicable to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* The Act also exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." *Id.* § 552(b)(7)(C).

5. *See id.* § 552(b)(4).

extend too far beyond the reach of FOIA protection.[6] Then again, maybe FOIA exists only to "terrorize American businesses at will."[7] Public sentiment notwithstanding, such an issue in the corporate context presents an opportunity for Congress to reaffirm its position regarding "the public's right to know."[8]

This article advocates neither for nor against the corporate right to information privacy. Rather, it underscores the vital need for Congress to reevaluate FOIA's core premises and respond with a law that clearly reflect the means by which agencies and courts should interpret its mandates. The next section chronicles the FOIA's extensive history, including its two significant revisions. The third section explores the notion of corporate information privacy from both an administrative and judicial perspective. Section four highlights the need for congressional action to rectify the statute's many obstacles to a proper balancing framework, while section five considers various solutions. Finally, this article concludes with optimism that Congress can extend corporate privacy interests and adhere to the FOIA's intended purpose.

II. HISTORY OF THE FREEDOM OF INFORMATION ACT

FOIA has a rather extensive history. Enacted from the remains of its defective predecessor, the Act grants unparalleled access to government records. Not without its own issues, however, it too has undergone significant reform to solidify the public right to information.

Deficiencies of the Administrative Procedure Act

Congress passed section 3 of the Administrative Procedure Act (APA) to quiet mounting tension over access to agency records.[9] Arguments against the APA cited inconsistencies flowing from nearly complete agency discretion in administrative proceedings.[10]

Operating as "miniature independent governments,"[11] agencies repeatedly refused to comply with requests for

---

6. *See, e.g.*, Joshua Trevino, *FCC v. AT&T: What's at Stake*, REDSTATE, Jan. 17, 2011, http://www.redstate.com/trevino/2011/01/17/fcc-v-att-whats-at-stake/.

7. *Id.*

8. *See* Bill Moyers, Address at the 20th Anniversary of the National Security Archive: In the Kingdom of the Half-Blind (Dec. 9, 2005). President Johnson signed the FOIA into law in 1966, describing it as guarding "the people's right to know." *Id.*

9. *See* Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 521 (2006).

10. *See* S. REP. NO. 79-752, at 3 (1945).

11. *Id.*

information.[12] Lacking oversight, two presidents allowed agencies to establish their own classification labels for records and deny requests accordingly.[13]

Influenced by its perception of public entitlement, Congress acted to "keep the public currently informed of [agencies'] organization, procedures, and rules."[14] Forcing agencies to follow uniform guidelines in disclosing organizational structure and administrative proceedings, the APA permitted agencies to withhold information only in the public or agency interest.[15] Agencies circumvented the law, as the Act's broad exceptions allowed them to withhold information.[16] Opponents complained that the law was vague, brief, and lacked enforcement mechanisms.[17] Failing to meet Congress' original intentions, Section 3 "came to be looked upon more as a withholding stature than a disclosure statute."[18]

---

12. Halstuk & Chamberlin, *supra* note 9, at 520. Government agencies refused to disclose information regarding public events, such as World War II. *Id.* Events were either not reported or were reported with a false positive spin. *Id.* at 518-19.

13. *See* Exec. Order No. 8,381, 3 C.F.R. 634, (1940) (President Roosevelt's order authorizing the military to establish information classification rules regarding disclosure of information); *see also* Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953 Comp.) (President Truman granting nonmilitary agencies the same power military agencies had regarding disclosure of information).

14. H.R. REP. No. 89-1497, at 3 (1966). This is the beginning of one of the FOIA's fundamental principles: that public bodies hold information on behalf of the public, which has an overriding interest in access unless public interest dictates otherwise. *See id.*

15. 5 U.S.C. § 1002 (1946). Specifically, it allowed for the withholding of information relating to "any function . . . requiring secrecy in the public interest" and for internal management. *Id.*

16. Halstuk & Chamberlin, *supra* note 9, at 522.

17. *See* S. REP. No. 88-1219 paras. 74-77 (1964). Congress itself noted, "[S]ection 3—along with the federal 'housekeeping' statute (5 U.S.C. § 301) allowing each agency head to 'prescribe regulations' for 'the custody, use, and preservation of records, papers, and property appertaining to' his agency—was becoming widely used as a basis for withholding information." S. REP. NO. 93-854, at 154 (1974). Congress' failure to define key terms in Section 3 caused problems for requesters as well. For example, section 3 allowed for government withholding of information "as a matter of public interest" and required that information seekers be "properly and directly concerned" with the information sought, but failed to shape these standards. JAQUELINE KLOSEK, THE RIGHT TO KNOW 14 (2009). Thus, agencies used these loopholes and others to prevent public scrutiny of requested records. *Id.* Requestors denied access to records had no legal remedy. *See* H.R. REP. NO. 89-1497 (1966).

18. *See* S. REP. NO. 89-813, at 3 (1965) (characterizing the APA as "full of loopholes which allow agencies to deny legitimate information from the public" and used to "cover up embarrassing mistakes or irregularities . . .").

A. *FOIA Enactment*

Amendments dictated that information be subject to public scrutiny with the exception of eight types of records.[19] Redaction clauses obligated agencies to excise information as necessary and provide written justification to the requestor.[20]

Despite Congress' best efforts, however, federal agencies refused to adhere to the measure, and testified as such.[21] Upon approval from both Houses, FOIA entered into force in 1967.[22]

The Act was fairly basic, including just three subsections. It first forced federal agencies to make information available to the public and included both an enforcement mechanism and remedies for noncompliance.[23] The second component contained the nine categories of exemptions to the general disclosure rule.[24] The last segment provided that only information "specifically stated" could be withheld, but not from Congress.[25]

Congress was optimistic that its creation of "workable standards" for disclosing records[26] would subject previously undisclosable documents to disclosure unless explicitly exempted. Further, the Act's application to the "public as a whole"[27] eliminated any guesswork regarding who was entitled to access government records. Lastly, its enforcement mechanism[28] meant that courts could effectively deter noncompliant agencies from ignoring its mandates. Despite Congress' best efforts, however, agency refusal to support the legislation transformed into outright hostility, as the "foot-dragging by the Federal bureaucracy" hindered its progress.[29]

---

19. 110 Cong. Rec. 17,668 (1964). The Act allowed agencies to withhold records that were exempted from disclosure by Executive order or statute, related to agency personnel records or procedures, trade secrets, inter- or intra-agency memoranda relating to legal or policy matters, personnel, medical, investigatory or files relating to personal privacy, and information relating to the "regulation or supervision of financial institutions." *Id.*

20. *Id.*

21. *Id.*

22. S. REP. NO. 93-854, at 157 (1974). The bill was codified in June 1967 and became effective in July 1967. *Id.*

23. 5 U.S.C. § 552(a) (2006).

24. *Id.* § 552(b). This set of exemptions included one relating to "geological or geophysical information." *Id.* § 552(b)(9).

25. *Id.* § 552(d).

26. S. REP. NO. 93-854, at 154 (1974).

27. *Id.*

28. *See* S. REP. NO. 89-813, at 8 (1965); H.R. REP. No. 89-1497, at 14 (1966).

29. H.R. REP. No. 104-795, at 8 (1996).

B. *Major FOIA Amendments*

The FOIA represented an improvement over the APA, yet it failed to meet Congress' expectations in two major areas: agency noncompliance and poorly written text.[30] Amending the Act on several occasions,[31] Congress' most significant efforts occurred in 1974 and 1996.

1. 1974 Amendment

Against the background of access to the Nixon tapes came the first efforts to amend FOIA.[32] Still lacking agency support, Congress sought "more efficient, prompt, and full disclosure of information."[33] To this end, Congress made considerable changes to the Act. Notably, it required that agencies publish indexes listing the specific types of available information.[34] It also delineated response timeframes for both initial and appeals requests.[35]

An attempt at congressional oversight induced a reporting standard, whereby agencies would file annual reports, detailing such information as denials of requests, appeals decisions, and fees.[36] Lastly, Congress expanded the definition of the term "agency" to include entities initially excluded from initial considerations.[37] These amendments became law in 1975.[38]

2. 1996 Amendments

Agency backlogs in processing FOIA requests prompted congressional action in 1996.[39] It had become common practice for agencies to store records electronically,[40] yet courts refused to

---

30. Halstuk & Chamberlin, *supra* note 9, at 532.

31. KLOSEK, *supra* note 17, at 15. The FOIA was amended at least four times since its original enactment. *Id.*

32. H.R. REP. NO. 104-795, at 9 (1996). Although not directly in response to the Watergate scandal, the 1974 Amendments "gained legislative momentum" as many in Nixon's administration were investigated for their roles in the incident. *See id.*

33. H.R. REP. NO. 93-876, at 125 (1974). Agencies believed that the amendments were too rigid to effectively solve the Act's administrative issues. *See id.* at 135, 141.

34. *Id.* at 125. Producing the indexes as opposed to merely having them available upon request was designed to alert requesters as to the types of information at their disposal. *Id.*

35. *Id.* at 126.

36. *See id.* at 128.

37. *Id.*

38. H.R. REP. NO. 104-795, at 9 (1996).

39. *See id.* at 13-14.

40. *See id.* at 11.

compel agency disclosure in this format.[41] Congress sought to reduce the volume of agency requests so that resources could be used in response to complex requests, creating the opportunity that they might be completed without delay.[42] It accomplished this goal by ordering that more information be published online.[43] Congress also pursued methods of improving agency response times to remaining requests.[44] To this end, multitrack processing enabled agencies to process simultaneous requests and prioritize those with a "compelling need."[45] Lastly, Congress sought to reinforce the principle of government transparency. Its affirmative decrees, that all records maintained in electronic format were subject to the FOIA[46] and a directive to agencies to make "reasonable effort" to comply with specific format requests,[47] accomplished this goal. Providing for agency notice regarding the location and extent of deleted or redacted information[48] and extended reporting deadlines ensured the appropriate levels of oversight.[49] Congress entitled its amendments Electronic FOIA, and with them ushered FOIA into the electronic age.

III. CORPORATE FOIA PRIVACY

Corporate interest in maintaining the confidentiality of certain information is not an individual privacy interest.[50] It is instead an interest protected under the broad contours of

---

41. *See id.* at 21.

42. *Id.* at 11, 13.

43. *See* 5 U.S.C. § 552(a)(2)(A)-(E), (e)(2) (2006). Congress required on-line access to indexes of "major information systems," instead of the prior three category requirement. *See* S. REP. NO. 104-272, at 11 (1996).

44. *See* S. REP. NO. 104-272, at 9-10 (1996).

45. *See* § 552(a)(6)(A)-(E) (2006). A requestor could demonstrate "compelling need" by showing that failure to obtain the requested information "could pose an imminent threat to life or physical safety" of the requestor or by showing that "a person primarily engaged in the dissemination of information" has a "compelling urgency to inform the public." H.R. REP. NO. 104-795, at 18 (1996); S. REP. NO. 104-272, at 18 (1996) (explaining the third basis being one where "failure to obtain such access would affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage").

46. *See* H.R. REP. NO. 104-795, at 18 (1996); S. REP. NO. 104-272, at 11 (1996).

47. *See* 5 U.S.C. § 552(a)(3)(B) (2006). Accordingly, agencies are obligated to produce electronic records even in new or different formats when no undue burden would be imposed. *See* S. REP. NO. 104-272, at 14 (1996); H.R. REP. NO. 104-795, at 21 (1996). Agencies were prohibited from denying requests based on backlogs. *See* H.R. REP. NO. 104-795, at 18-19 (1996).

48. *See* H.R. REP. NO. 104-795, at 18 (1996); S. REP. NO. 104-272, at 18 (1996).

49. *See* H.R. REP. NO. 104-795, at 19 (1996).

50. Fed. Commc'ns Comm'n v. AT&T, 131 S. Ct. 1177, 1185 (holding that corporations possess no personal privacy right pursuant to Exemption 7(C)).

Exemption 4.[51] Under the exemption, submitters are encouraged to voluntarily furnish information to the government for a predetermination of whether the agency considers the information confidential and thus subject to withholding.[52] The advantage here for corporations is the advance assurance that submissions will be kept safe from FOIA requests for disclosure.[53] The exemption also shields corporate submitters from the competitive disadvantages implicated from disclosure.[54] The major issues corporations face in submitting information to agencies are the procedures, or lack thereof, by which agencies decide whether to disclose confidential issues and the manner in which courts adjudicate such disputes.

A. *General FOIA Use*

Public requests of government information have increased substantially.[55] Largely based on the presumption that government business is public business and therefore subject to inquiry, citizens demand government justification for any perceived executive secrecy.[56] Corporations oppose such ever increasing parameters for public inquiry, since the government's files on corporate records are also subject to public scrutiny.[57] Tantamount to "tool[s] for commercial espionage," corporations recognize the competitive value of the requests.[58] The FOIA is purportedly an effective tool for anyone to find out information concerning corporations that is held by government agencies,[59] as

---

51. *See, e.g.*, Nat'l Parks & Conservation Ass'n, 498 F.2d 765, 770 (D.C. Cir. 1974) (concluding that the legislative history of the FOIA "firmly supports an inference that [Exemption 4] is intended for the benefit of the persons who supply information as well as the agencies who collect it").

52. *See* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 24 (Robert F. Bouchard & Justin D. Franklin, eds., 1980).

53. *See id.*

54. *Id.* at 22.

55. Jim D'Agostino & Andrew Belofsky, *FOIA: Protect Your Competitive Information*, NDIA'S BUSINESS AND TECHNOLOGY MAGAZINE (June 2009), http://www.nationaldefensemagazine.org/archive/2009/June/Pages/FOIAProtectYourCompetitiveInformation.aspx. *See also* WENDY R. GINSBERG, CONG. RESEARCH SERV., R40766, FREEDOM OF INFORMATION ACT (FOIA): ISSUES FOR THE 111TH CONGRESS 2 (2009) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-344, FREEDOM OF INFORMATION ACT: AGENCIES ARE MAKING PROGRESS IN REDUCING BACKLOG, BUT ADDITIONAL GUIDANCE IS NEEDED (2008) (http://www.gao.gov/new.items/d08344.pdf).

56. *See* S. Rep. No. 89-813, at 3 (1965).

57. Elaine English, *Corporate Secrecy v. The Right to Know: Business Paranoia Threatens FOIA*, 7 THE MULTINATIONAL MONITOR 12 para. 1 (1986).

58. *Id.*

59. 5 U.S.C. § 552(f)(2)(2006). *See* discussion *infra* Part I.A.1.

most of the information is considered a record and thereby releasable. The administrative process is an instructive place to begin this discussion.

1. Request

Generally, an individual makes an FOIA request by soliciting the agency that collected the information. To do so, the requester must reasonably describe the records sought[60] and otherwise comply with the collecting agency's published procedures.[61] Upon meeting both requirements, an agency must release any requested information not subject to withholding.[62] Requests need not be strictly complied with, as agencies must still honor incomplete requests.[63]

2. Agency Response

Agencies generally have twenty business days to decide whether to honor FOIA requests.[64] This timeframe is not the time in which the agency has to release the record, but is only the time period in which it must make a determination of whether to release the record.[65]

If the agency decides not to release the record, in part or in full, the agency must inform the requester within that same twenty days of its decision and the exemption upon which the agency bases its decision.[66] There is no requirement that the submitter be notified of an agency's consideration of disclosing information, for either due process requirements or otherwise.[67]

---

60. 5 U.S.C. § 552(a)(3)(A)(2006). The request must be sufficient to enable an agency employee to locate the record with reasonable effort. H.R. REP. NO. 93-876, at 5-6 (1974); Vest v. Dep't of Air Force, 793 F. Supp. 2d 103, 118 (D.C. Cir. 2011).

61. 5 U.S.C. § 552(a)(3)(2006).

62. 5 U.S.C. § 552(a)(3)(A).

63. *See, e.g.*, Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984) (stating that an agency is required to read a request as drafted, "not as either [an] agency official or [requester] might wish it was drafted").

64. 5 U.S.C. § 552(a)(6)(A)(i). Agencies may toll the twenty-day response period in two circumstances: (1) upon request for information from the requestor, and (2) as necessary to clarify fee-related issues with the requester. 5 U.S.C. § 552(a)(6)(A)(ii).

65. 5 U.S.C. § 552(a)(6)(A)(i); *see* 5 U.S.C. § 552(a)(6)(C)(i) (requiring that records be made available "promptly," but only upon determination to comply). The timeframe for responses and appeals is one of very few procedural requirements of the FOIA. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS, *supra* note 52, at 166.

66. *Id.* § 552(a)(6)(A)(i). For records released in part, the agency must show the amount of information withheld, the location of the withholding within the records, and the exemption being asserted, unless doing so would harm an interest protected by an applied exemption. *Id.* § 552(b) (paragraph immediately following exemptions).

67. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147 (Robert F. Bouchard & Justin D. Franklin eds., 1980).

A requester's receipt for denial enables submission of an administrative appeal for reconsideration to the agency.[68] The agency then has twenty days after receipt of appeal for final determination.[69] If the agency upholds its decision, the requester may then seek federal judicial intervention.[70]

3. Judicial Appeal

The FOIA vests in federal district courts jurisdiction to review requests to determine whether agencies should disclose or withhold records.[71] The courts conduct the reviews *de novo*[72] and *in camera*.[73] If the court orders disclosure, the requester receives the requested documents and may receive his reasonable attorney fees and litigation costs.[74] If the court determines that the information is subject to withholding, either in whole or part, the requester either receives nothing or the segregable portion of the documents.[75] The court's decision in such cases ends a requestor's attempt to gain the requested documents. It is not, however, the end for a corporation seeking to prevent disclosure of requested documents.

B. *Reverse FOIA*

A reverse FOIA action is one in which the "submitter of information—usually a corporation or other business entity" that has supplied an agency with "data on its policies, operations, or products—seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request."[76] A cause of action for a reverse FOIA arises not from the FOIA, but from the APA.[77] Such suits are a corporation's last resort in seeking to prevent disclosure of its confidential information.[78] The following is the legal process in this attempt.

---

68. 5 U.S.C. § 552(a)(6)(A).

69. *See id.* § 552(a)(6)(A)(ii).

70. *See id.*

71. *Id.* § 552(a)(4)(B).

72. *Id.*

73. *Id.*

74. 5 U.S.C. § 552(a)(4)(E) (2006).

75. *See* Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 880 (D.C. Cir. 1992) (ruling that the group's safety report is subject to Exemption 4 and thus exempt from disclosure).

76. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1134 n.1 (D.C. Cir. 1987).

77. *Id.*

78. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACT, *supra* note 67, at 129.

1. Request and Denial

The reverse-FOIA process begins with a request for corporate documents. If the agency decides to disclose the information, it must notify the submitter of its decision.[79] The submitter has a reasonable amount of time to object to disclosure.[80] Typically the submitter contends that the requested information falls within a FOIA exemption.[81] If unsuccessful in persuading the government to keep the requested information confidential, submitters seek judicial intervention by filing the reverse FOIA suit.[82]

2. Judicial Intervention

In a reverse FOIA suit, the party seeking to prevent the government's disclosure bears the burden of justifying the nondisclosure.[83] This suit is distinct from a normal FOIA action, which is brought by a requester seeking release of the requested information.[84] Judicial review of reverse FOIA suits is in light of FOIA's basic policy to "open government action to the light of public scrutiny" and in accordance with the "narrow construction" afforded to the FOIA's exemptions.[85]

FOIA provides for corporate information privacy several of its exemptions, with the broadest application of information privacy stemming from Exemption 4.[86] Thus, corporations utilize this exemption in reverse FOIA cases more than the others to prevent disclosure. However, the FOIA itself does not preclude agencies from disclosing records that fall within its exemptions; rather, an agency itself prevents such disclosures from that

---

79. Exec. Order No. 12,600, 52 Fed. Reg. 23,781 § 1 (June 23, 1987). There are certain circumstances under which the collecting agency is not required to notify the submitter of the request, such as if the information is already a matter of public record or the agency decides not to honor the disclosure request. *Id.* If the requestor sues to force disclosure, the agency must notify the submitter. *Id.*

80. *Id.*

81. *See* DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE: REVERSE FOIA, 2004 WL 3775108 at *1 (May 1, 2004).

82. *See* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACT, *supra* note 67, at 176.

83. *See* Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997).

84. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACT, *supra* note 67, at 128.

85. Martin Marietta Corp., 974 F. Supp. at 40 (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976)).

86. *See* 5 U.S.C. § 552(b)(4). The other exemptions applicable to corporations are limited to specialized types of business information. *See id.* at (b)(3), (8), (9).

agency.[87] An agency's decision to withhold records presents a problem within the reverse FOIA jurisprudence because there is no legal basis for them.[88] Thus, courts have no guidance from which to resolve disputes over agency decisions to disclose information.[89]

The landmark case in this area is *Chrysler Corp. v. Brown*, in which the Supreme Court held that jurisdiction for reverse FOIA actions are not based on the FOIA itself because "Congress didn't design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure."[90] Instead, the Court found that review of an agency's "decision to disclose" requested records can be brought under the Administrative Procedure Act (APA).[91] The standard of review of such cases is a review on the administrative record according to an arbitrary and capricious standard.[92]

The most recent effort to utilize an exemption in a reverse FOIA case occurred in *Federal Communications v. AT&T*, in which AT&T attempted to preclude government disclosure by asserting a personal privacy interest under Exemption 7(C).[93] *FCC* involved a FOIA request for records concerning AT&T in an

---

87. AT&T Inc. v. FCC, 582 F.3d 490, 495 n.2 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011) ("FOIA itself does not prohibit disclosure of information falling within its exemptions. When information falls within an exemption, no party can compel disclosure, but the FCC can still make a disclosure on its own accord unless some independent source of law prevents the agency from doing so. . . . Thus, the disclosure of information falling within an exemption does not violate the FOIA itself, but rather an independent source of law. Here FCC regulations provide this independent source.") (citing Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979)).

88. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 128.

89. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS, *supra* note 67, at 128.

90. Chrysler Corp. v. Brown, 441 U.S. 281, 293-94 (1979).

91. *Id.* at 318.

92. *Id.* "This deferential standard of review requires that a court examine whether an agency's decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment." McDonnell Douglas Corp. v. NASA, 981 F. Supp. 12, 14 (D.D.C. 1997) (citation omitted), *rev'd on other grounds*, 180 F.3d 303 (D.C. Cir. 1999).

93. *See infra* notes 98 and 124, and accompanying text. Exemption 7(C) prohibits the disclosure of information collected for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). While the exemption fails to define the phrase "personal privacy," courts have interpreted it to apply only to individuals. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 780 (1989) (emphasizing the propriety of broadly protecting the interests of *private citizens* whose names or identities are in a record that the government stores) (emphasis added); Wash. Post Co. v. Dep't of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988) (holding Exemption 7(C) inapplicable to "business judgments and relationships").

alleged government overbilling investigation.[94] Believing that it may have overcharged the government for its services, AT&T voluntarily reported this fact to the FCC, which administered the program.[95]

During its investigation, the FCC's Enforcement Bureau required AT&T to provide various documents relating to its overbilling allegation.[96] Sometime later, CompTel, "a trade association representing some of AT&T's competitors," submitted an FOIA request to the Enforcement Bureau for all the information relating to the AT&T investigation.[97] AT&T opposed this request, asserting a personal privacy interest in the requested documents.[98] CompTel took issue with AT&T's opposition, arguing that the personal privacy exemptions are inapplicable to corporations.[99] Citing Exemption 7(C) as its basis for withholding some of the requested information, the Bureau redacted some of the information and granted CompTel's request.[100] The Bureau refused a categorical exemption of all the information, concluding that the exemption does not protect corporations.[101] AT&T appealed the Bureau's decision regarding Exemption 7(C) to the FCC.[102] AT&T argued that it had privacy interests in the documents because the FCC obtained them through a "law-enforcement investigation."[103] AT&T further argued that there was no public interest in the documents because "they included no information about the Government that would shed any light on governmental activities."[104] The

---

94. AT&T, 582 F.3d at 492. AT&T participated in a program created to provide schools greater access to telecommunication services. *Id.*

95. *See id.*

96. *Id.* at 492-93. Requested documents included AT&T's assessment of whether any of its employees violated company policy in the alleged overbilling scheme and other billing information. *Id.*

97. *Id.* at 493.

98. *Id.* ("AT&T submitted a letter to the Bureau opposing CompTel's request, arguing that the FCC collected the documents that AT&T produced for law enforcement purposes and therefore that the FCC regulations implementing FOIA's exemptions prohibited disclosure.").

99. *Id.* at 497.

100. FCC v. AT&T, 131 S. Ct. 1177, 1180 (2011).

101. *FCC*, 582 F.3d at 493 (determining that Exemption 7(C) does "not apply to corporations because [they] lack 'personal privacy'").

102. *Id.*

103. Brief for Petitioner at 8-9, AT&T Inc. v. FCC, 582 F.3d 490 (3d Cir. 2009) (No. 08-4024), 2008 WL 5517352.

104. *Id.* at 9 (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772-73 (1989)). Under the *Reporters Committee* standard, the government is obligated to disclose information that provides insight on agency performance or government conduct. 489 U.S. at 772-73.

FCC disagreed,[105] and ordered that the Enforcement Bureau produce the documents.[106] On review to the Third Circuit, AT&T found favor.[107] Of the four issues presented to the court, the most relevant issue for purposes of this discussion was regarding whether Exemption 7(C) was applicable to corporations.[108] The court held that the FOIA explicitly grants corporations a personal privacy interest pursuant to Exemption 7(C)[109] for two main reasons. First, Congress would have specifically limited 7(C) to individuals if it had such a desire.[110] Drawing analogy from another FOIA exemption, the court explained,

> Exemption 7(F) . . . protects information gathered pursuant to a law enforcement investigation that, if released, "could reasonably be expected to endanger the life or physical safety of any *individual*." Yet, Congress, in Exemption 7(C), did not refer to "the privacy of any individual" or some variant thereof; it used the phrase "personal privacy."[111]

Moreover, Congress itself, in its FOIA definition of "person," included corporations.[112] "After all, 'personal' is the adjectival form of 'person,' . . . . It would be very odd indeed for an adjectival form of a defined term not to refer back to that defined term."[113] Based on this reasoning, the court held that Exemption 7(C) "unambiguously" protected corporate personal privacy rights.[114]

Oral arguments seemed to swing in the government's favor. Contending that the Third Circuit's holding is inconsistent with the FOIA,[115] the government's first point was a major one. Citing the Court's history of denying corporations personal

---

105. FCC v. AT&T, 131 S. Ct. 1177, 1181 (2011) (AT&T's argument as "a 'private corporate citizen' with personal privacy rights that should be protected from disclosure that would 'embarrass' it . . . within the meaning of Exemption 7(C) . . . at odds with established [FCC] and judicial precedent." As such, the Commission concluded that "Exemption 7(C) has no applicability to corporations such as [AT & T].") (citation omitted).

106. *See* Brief for Petitioner, *supra* note 103, at 11.

107. *FCC*, 131 S. Ct. at 1181.

108. AT&T v. FCC, 582 F.3d 490, 498-99 (3d Cir. 2009), *rev'd*, 131 S. Ct. 1177 (2011).

109. *Id.* at 498.

110. *Id.* at 497.

111. *Id.* (citation omitted).

112. *Id.*

113. *Id.* (citation omitted).

114. *Id.* at 498.

115. Transcript of Oral Argument at *3, Fed. Commc'n Comm'n v. AT&T, 131 S. Ct. 1177 (2011) (No.09-1279), 2011 WL 161902.

privacy rights,[116] the government argued that the Court should overturn the Third Circuit.[117] While Chief Justice Roberts toyed with the notion that personal privacy could extend "beyond the individual,"[118] Justice Alito seemed more willing to actually accept AT&T's principle argument that "personal" may refer to corporate interests.[119] Justices Scalia and Sotomayor, however, noted the Court's precedent of narrowly construing FOIA exemptions in favor of disclosure.[120]

The Court was more critical of AT&T's arguments that personal privacy should apply to corporations.[121] Justice Ginsberg wondered about the kind of information that falls within the corporate privacy exception that is not protected by the exemptions protecting trade secrets, confidential business information, and personal information about individual employees.[122] Justice Scalia conceded that the word "personal" can apply to corporations, but emphasized that "there are certain phrases where it certainly does not."[123] AT&T attempted to change strategy and explain that corporate competitors are increasingly using the FOIA as a tool for commercial espionage and not to uncover information regarding government activities.[124] The Justices were not persuaded. Justice Ginsburg seemed doubtful that this provided sufficient justification to change the scope of the exemptions.[125] Justice Sotomayor seemed concerned about the repercussions of expanding Exemption 7(C) to include corporations.[126]

The Supreme Court reversed the Third Circuit, holding that Exemption 7(C) does not extend to corporations.[127] In an argument based as much on statutory construction and interpretation as legal analysis, it discounted all of AT&T's entitlement arguments.[128] Responding to the appeals court's reasoning concerning the statutory definition of "person," the

---

116. *Id.* at *3-4.
117. *Id.* at *3.
118. *Id.* at *17.
119. *Id.* at *4-5.
120. *Id.* at *10-16.
121. *Id.* at *25-28.
122. *Id.* at *23.
123. *Id.* at *25.
124. *Id.* at *26-27.
125. *Id.* at *32.
126. *Id.* at *37-38 (stating that doing so would jeopardize the Court's current interpretation of the other exemptions).
127. *FCC*, 131 S. Ct. at 1186. The decision was unanimous, with one member abstaining. *Id.* at 1179.
128. *Id.* at 1185-86.

Court stated that adjectives and their corresponding nouns sometimes reflect different meanings.[129]

> The noun "crab" refers variously to a crustacean and a type of apple, while the related adjective "crabbed" can refer to handwriting that is "difficult to read[.]" "[C]orny" can mean "using familiar and stereotyped formulas believed to appeal to the unsophisticated," which has little to do with "corn," ("the seeds of any of the cereal grasses used for food"); and while "crank" is "a part of an axis bent at right angles," "cranky" can mean "given to fretful fussiness[.]"[130]

Instead, the Court adopted FCC's interpretation of Exemption 7(C), which retained a personal privacy protection,[131] supplying many reasons for doing so. First, common usage cuts against AT&T.

> Responding to a request for information, an individual might say, "that's personal." A company spokesman, when asked for information about the company, would not. In fact, we often use the word "personal" to mean precisely the *opposite* of business-related: We speak of personal expenses and business expenses, personal life and work life, personal opinion and a company's view.[132]

Further, dictionary definitions[133] and statutory context of the term "personal" supported the conclusion that it related to individuals.[134]

The Court's final primary point on this topic clarified the meaning of Exemption 7(C)'s "personal privacy" language with a contextual interpretation of pre-existing FOIA exemptions.[135] Exemption 6 covers "personal privacy" information that the Court, to that point, regularly referred to as involving personal privacy.[136] Congress specifically used the same "personal

---

129. *Id.* at 1181.

130. *Id.* (citations omitted).

131. *Id.* at 1182.

132. *Id.*

133. *Id.*

134. *Id.* at 1182-83 (conceding the fact that the term "person" can denote an artificial entity, yet finding "little support" to diverge from the term's common meaning to encompass corporations).

135. *Id.* at 1184.

136. *Id.*

privacy" phrase in a similar manner in Exemption 7.[137] On the other hand, Exemption 4, protects "'trade secrets and commercial or financial information'... [which] clearly applies to corporations."[138] Corporations typically possess privileged or confidential information, yet Congress failed to include any of Exemption 4's information in Exemption 7(C).[139] According to the Court, Exemption 7(C) is closer to and should be interpreted along the lines of Exemption 6, which applies to individuals and not Exemption 4, applicable to corporations.[140] With such a solid foundation to maintain the personal right to privacy, the Court held against such a right in the corporate context as conferred by Exemption 7.[141]

IV. DISCUSSION: CORPORATE RIGHT TO INFORMATION PRIVACY AND THE NEED FOR CONGRESSIONAL ACTION UNDER THE FOIA

"Congressional inaction cannot amend a duly enacted statute."[142] Members recognized this basic principle when amending the FOIA in 1974 and 1996.[143] At both times, Congress intended to remedy the Act's perceived deficiencies.[144] Today, corporations continually seek to enforce their rights to information privacy against the public that seeks to enforce their rights to information publicity.[145] The proper scope of a corporation's information privacy interest is a debate reignited by the Supreme Court's recent conclusion that corporate entities enjoy a First Amendment free speech right traditionally reserved for individuals.[146] While many have weighed in on this debate with equally convincing arguments, some question the

---

137. *Id.* at 1184-85.

138. *Id.* at 1185 (quoting 5 U.S.C. § 552(b)(4)).

139. *Id.*

140. *Id.*

141. *Id.*

142. Patterson v. McLean Credit Union, 491 U.S. 164, 175, n.1 (1989); Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 672 (1987); *see* Helvering v. Hallock, 309 U.S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.").

143. *See* Charles J. Wichmann, *Ridding FOIA of those "Unanticipated Consequences": Repaving A Necessary Road to Freedom*, 47 DUKE L.J. 1213, 1219, 1233 (1998).

144. *Id.*

145. *See* Fed Commc'ns Comm. v. AT&T, Inc., 131 S. Ct. 1177, 1181 (2010) (granting certiorari to determine whether corporate entities possess a privacy right under Exemption 7(C) of the FOIA).

146. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886, 917 (2010).

implications of such a decision.[147] The dichotomy of interests at stake in terms of the corporate right to information privacy implores legislative action to bring the principal FOIA business privacy exemption into the corporate age.

A. *Residual Effects of Current FOIA interpretation*

The FOIA defines the term "person" broadly, including "an individual, partnership, corporation, association, or public or private organization other than an agency" within its confines.[148] Prior to the *FCC* decision, there was, at minimum, a reasonable argument that the term "personal privacy," as used in Exemption 7(C), contemplated an equally broad scope. The Supreme Court's rejection of this argument, based upon the distinction between a noun and its adjective form and FOIA legislative history,[149] results in a seemingly artificial and somewhat arbitrary distinction between parties that can employ the exemption to thwart disclosure of information under FOIA. Although corporations and individuals generally are treated similarly throughout the FOIA, the Court drew a line, albeit a narrow one, between the term "person," which includes corporations, and the term "personal," which, it held, is inapplicable to corporations.

While the Court limited, to some degree, the transformation of artificial entities into full-fledged persons, the *FCC* decision is interesting in that it is rendered by the same conservative court that declared that corporations share the same free-speech rights as persons.[150] The Court rejected any argument that corporations should be treated differently under the First Amendment because they are not "natural persons."[151] Similarly, there is an entire line of cases wherein the Court

---

147. Dahlia Lithwick, *Privacy Rights Inc.: Your Right to Personal Privacy is Shrinking Even as Corporate America's is Growing*, SLATE (October 14, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/privacy_rights_inc.html ("This growing deference to trembling corporate sensitivity would be merely amusing were it not for the fact that,. . . basic notions of privacy and dignity for actual human beings seem to be on the wane."); Steven Aftergood, *Do Corporations Have Personal Privacy Rights?*, SECRECY NEWS, (November 18, 2010) http://www.fas.org/blog/secrecy/2010/11/corp_privacy.html (citing speech by Senator Patrick Leahy: "[i]f affirmed by the Supreme Court, the appeals court ruling "could vastly expand the rights of corporations to shield their activities from public view," . . . and it "would close a vital window into how our government works").

148. 5 U.S.C. § 551(2).

149. *FCC*, 131 S. Ct. at 1185-86.

150. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (holding that corporations have First Amendment rights).

151. *Id.* at 900.

occasions a system in which corporations enjoy many traditionally individual rights.[152] In *FCC*, however, the Court starts down an entirely different path with its reasoning that "[the Court] do[es] not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or artificial entities."[153] Such an ill-reasoned justification is reminiscent of that found in the personal privacy cases.[154] Fault here rests squarely with the legislature.

Implications are potentially grave without Congressional action. At one extreme, depending on the Court's predisposition, corporations could receive blanket information privacy protection regardless of the nature of the request and the purposes the request is meant to accomplish. The practical implications of extending the privacy exemption to corporations in such a fashion are that corporations would be completely shielded from the public's ability to monitor its activities. "It's not hard to imagine how documents on the BP oil spill, or coal mine explosions, or the misdeeds of Bernie Madoff's investment firm might be significantly harder to find if AT&T's misguided arguments prevail."[155] At the other extreme, the Court could effectuate a system in which virtually no corporate information is protected, other than trade secrets, financial information, and corporate employee privacy. "Companies are increasingly turning to teams of hired lawyers and analysts who request all data involving a competitor. . . . At stake are . . . sometimes more

---

152. *Id.* at 885 (protecting the corporate funding of non-profit corporations as political free speech); Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 396 (1886) (recognizing corporations as persons under the Fourteenth Amendment); Minneapolis & St. Louis R.R. v. Beckwith, 9 S. Ct. 207, 208-09 (1889) (granting a corporation the status of a person for both equal protection and due process challenges); Hale v. Henkel, 26 U.S. 370, 380 (1906) (holding that corporations have a Fourth Amendment protection against search and seizure), *overruled on other grounds by* Murphy v. Waterfront Comm'n of New York, 378 U.S. 52 (1964).

153. FCC v. AT&T, 131 S. Ct. 1178, 1182 (2011).

154. *See* Nat'l Archives and Records Admin. v. Favish, 541 U.S. 147, 173 (2004). An example that underscores this point involves the Court's reasoning in two Exemption 7(C) cases. *Id.* at 173-74. According to the *Reporter's Committee* Court, "the particular purpose for which [a] document is being requested" is of no consequence. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989). However, the *Favish* Court stated that the requestor's purpose in requesting the document must include a believable allegation of government impropriety before the Court can begin to balance the competing interests at stake. *Favish*, 541 U.S. at 174.

155. Rebecca Jesche, *EFF Brief: "Privacy" Protections for Corporations Undermine Government Transparency*, ELECTRONIC FRONTIER FOUNDATION, (Nov. 17, 2010), www.eff.org/deeplinks/2010/11/eff-brief-privacy-protections-corporations.

than 10,000 pages of detailed cost breakdowns."[156] Just as a majority conservative court may take one extreme, a liberal court could take it to the opposite extreme, creating a categorical disclosure or withholding standard. There is no question that Congress possesses power to prevent either of the above extremes from occurring. Obviously either situation potentially leads to absurd results. However, the mere fact that the Court debated whether a corporation could claim personal privacy rights shows that anything is possible without Congressional action.

In *FCC*, the Court failed to address whether a company's reputation is important enough to implicate Exemption 4. The two-prong tests courts utilize to determine whether information should be withheld under this exception is if disclosure is confidential, or likely to: (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.[157] Yet the decision is no indication that the Court considered limiting Exemption 4 to only those situations where release of a business's information would cause competitive injury. Instead, the Court emphasized that it "readily think[s] of corporations as having 'privileged or confidential' documents . . . ."[158] Therefore, it seems that corporations should be able to claim FOIA protection of non-public, commercial documents collected by the government based on their confidential and sensitive classification. Of course, this would depend on a company's effectiveness in characterizing information as commercial and explaining how the consequences of disclosure would affect the company's reputation. A corporation's ability to do so effectively would potentially affect its willingness to voluntarily submit information to federal agencies. After all, corporations cooperate with the government when it serves their interests.[159] A voluntary submission is in no way a moral or ethical decision, and certainly is not the result of agency pressure.[160] To maintain the mutually beneficial

156. Stephen Albainy-Jenei, *Are Your Competitors Spying on You Using FOIA?*, PATENT BARISTAS, (Mar. 16, 2005), www.patentbaristas.com/archives/2005/03/16/are-your-competitors-spying-on-you-using-foia/.

157. Nat'l Parks & Conservation Ass'n v. Kleppe, 498 F.2d 765, 770 (D.C. Cir. 1974), *aff'd en banc*, 542 F.2d 673 (D.C. Cir. 1976).

158. FCC v. AT&T, 131 S. Ct. 1178, 1185 (2011).

159. *See* Steven G. Brant, *The United Corporate States of America*, HUFF POST BUSINESS, (Jan. 26, 2010, 11:42 AM), http://www.huffingtonpost.com/steven-g-brant/the-united-corporate-stat_b_436937.html.

160. *See id.*

relationship between agencies and corporations under Exemption 4, Congress must adjust to legitimate corporate concerns.

B. *Current FOIA policy*

In 2009, President Obama issued orders designed to improve the federal government's efforts at transparency. He instructed all agencies to "adopt a presumption in favor" of Freedom of Information Act requests.[161] The memo also directed agencies to "renew their commitment to the principles embodied in the FOIA, and to usher in a new era of open Government . . . [without] specific requests from the public."[162] In addition, he ordered the Attorney General to "issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency."[163]

The Attorney General's response was to revise the Department of Justice's (DoJ) policy regarding FOIA requests. Specifically, he ordered agencies not to "withhold records merely because [they] can demonstrate, as a technical matter that the records fall within the scope of a FOIA exemption."[164] This directive represented a significant departure from the previous administration. Under the previous administration, an agency could deny a request unless the decision "lack[ed] a sound legal basis or present[ed] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[165] While both the president and Attorney General's directives reflected executive commitment to the FOIA, neither did anything in terms of addressing specific issues, especially not the issues that concern corporations. Such a mandate can only originate from Congress.

C. *Residual Effects of FOIA Creation*

Exemption 4 covers two distinct categories of corporate submissions: (1) trade secrets, and (2) information that is (a)

---

161. Memorandum on Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

162. *Id.*

163. *Id.*

164. U.S. Att'y Gen., Memorandum for Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf. The DoJ defends a FOIA denial only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the exemptions, or (2) the law prohibits the disclosure. *Id.*

165. *Id.*

commercial or financial, *and* (b) obtained from a person *and* (c) privileged or confidential.[166] The question for courts in this area "is not whether information is customarily withheld, but why information should be withheld."[167]

The exemption's text creates quite a few problems for courts attempting to adjudicate effectively.[168] Congress left the definition of the term "trade secret" undefined.[169] Courts, in turn, have narrowed the term's definition[170] from that used previously.[171] The difference between interpretations is significant, in that the Restatement's definition protects virtually all business information, providing a competitive advantage.[172] The revised definition, however, limits the definition to information directly related to the production process.[173] Another textual issue of Exemption 4 involves the following phrase: "commercial or financial information obtained from a person and privileged or confidential."[174] Apparently this phrase is so unclear that courts have resorted to independent interpretations to determine its "purpose, meaning, [and] application" to business information.[175] These issues pale in comparison to the exemption's major deficiency: its lack of a judicial balancing test.[176] Courts must determine how to balance competing interests on their own. A few circuits have adopted a

---

166. 5 U.S.C. § 552(b)(4) (2006).

167. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 138.

168. Pub. Citizen Health Research Grp. v. Food & Drug Admin., 704 F.2d 1280, 1288 (D.C. Cir 1983).

169. *See id.*

170. *Id.* (defining 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"); *see* Anderson v. Dep't of Health & Human Servs., 907 F.2d 936, 944 (10th Cir. 1990) (finding the D.C. Circuit's narrower definition "more consistent with the policies behind the FOIA than the broad Restatement definition").

171. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939) ("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 advantage over competitors who do not know or use it."), *quoted in Pub. Citizen*, 704 F.2d at 1284 n.7.

172. AMERICAN CIVIL LIBERTIES UNION FOUNDATION, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 78 (Allan R. Adler, ed., 18th ed. 1993).

173. *Id.*

174. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 138.

175. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 138.

176. *See* Wash. Post Co. v. Dep't of Health & Human Servs., 690 F.2d 252, 269 (D.C. Cir. 1982).

"rough balancing" test.[177] However, they concede that such a balance departs from that intended by Congress in enacting the exemption.[178]

The implications of Congress' failure to act are evident. Courts have moved away from the three basic FOIA principles: the public's right to know, government transparency, and the right to privacy.[179] The Supreme Court has underscored these objectives[180] and attempted to provide some context regarding the type of disclosure to be balanced.[181] Any attempts to articulate a balancing test that is inconsistent with these competing interests naturally violates FOIA purpose. Surely, Congress did not intend such an outcome.

V. SOLUTIONS AND SUGGESTIONS

The corporate right to information privacy justifiably remains largely unexplored territory.[182] The term in a personal context is itself elusive.[183] Coupled with the arguable notion that artificial entities can possess these rights,[184] one can easily

---

177. *Id.*, *aff'd* 865 F.2d 320, 326-27 (1989); *see* GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1115 (9th Cir 1994) ("[A]gree[ing] with the D.C. Circuit . . . [to] balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information.").

178. *See* Pub. Citizen Health Research Grp. v. Food & Drug Admin., 185 F.3d 898, 904 (D.C. Cir. 1999).

179. *See* H.R. REP. NO. 89-1497, at 6 (1966) ("It is vital to our way of life to reach a workable balance between the right of the public to know and the need of Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. . . . This bill strikes a balance considering all these interests."); S. REP. NO. 89-813, at 3 (1965) ("At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files . . . .").

180. *See* Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (stating that it is "crystal clear" that congressional objective was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny . . .").

181. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 775 (1989) (stating that the relevant public interest to be weighed against privacy interests in the FOIA context is only that disclosure which "contribut[es] significantly to the public understanding of the operations or activities of the government") (quoting 5 U.S.C. § 552(a)(4)(A)(iii)).

182. *See* Fed. Commc'ns Comm'n v. AT&T, 131 S. Ct. 1177 (2011).

183. Daniel J. Sokolove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088 (2002) ("Privacy is 'difficult to define because it is exasperatingly vague and evanescent.'") (citing Arthur R. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* 25 (1971)).

184. Tim Bowden, *Intel's Ridiculous Antitrust Defense*, AYN RAND CENTER FOR INDIVIDUAL RIGHTS (Sept. 20, 2009), http://blog.aynrandcenter.org/intels-ridiculous-antitrust-defense/ (arguing that corporations should have the same rights that its individual shareholders do, and deserve the same legal protections); Amandakathryn, *Should Unions and Corporations Have the Same Constitutional Rights that I Do as an Individual?*, RED MASS GROUP (Sept. 5, 2011, 1:00 AM),

understand the hands-off approach to this concept. However, its cumbersome nature is all the more reason for a non-evasive legislative course of action to clarify whether, and to what extent, the right exists.

FOIA is based on solid principles.[185] The problem, however, is that with its broad directives, Congress failed to provide a framework for courts to balance the harms arising from disclosure against the public right to know.[186] Thus, courts must employ a trial and error strategy in adjudicating corporate rights at large, often with unclear and arbitrary results.[187] To establish order, Congress must overhaul the law and create a new system for evaluating corporate privacy interests. Such an undertaking begins with the creation of a Corporate Freedom of Information Act, establishing a balancing test, clarifying undefined terms, and creating relevant exemptions for withholding. Once these parameters are set, agencies can establish clear procedures for FOIA administration, and courts can adjudicate FOIA and reverse FOIA actions in a uniform manner.

A. *Corporate Freedom of Information Act*

In addition to the overall presumption of disclosure, this new act must contain an explicit public interest in disclosure that overrides the private interest in withholding, whether submitted information is provided in confidence or not. The amendment should also include Congress' purpose, which should be to "require agencies of the federal government to make certain [confidential business] information available for public inspection and copying[,] and establish and enable enforcement of the right of any person to obtain access to [confidential business information collected by] agencies, subject to statutory exemptions, for any public or private purpose."[188] Both are essential in terms of bringing the CFOIA in line with the FOIA.

---

http://www.redmassgroup.com/diary/12839/should-unions-and-corporations-have-the-same-constitutional-rights-that-i-do-as-an-individual (debating whether corporations should have the same constitutional rights as individuals, but asserting that the vote should be left to the people); *Work in Progress: Corporations Should Not Have the Right to Remain Silent*, PENN LAW (June 3, 2009), http://www.law.upenn.edu/blogs/news/archives/2009/06/work_in_progress_corporations.html (arguing that corporations should not have First Amendment rights).

185. *See* Freedom of Information Act, 74 Fed. Reg. 4683 (2009).

186. *See* Pub. Citizen Health Research Grp. v. Food & Drug Admin., 704 F.2d 1280, 1288 (D.C. Cir. 1983).

187. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS, *supra* note 67, at 138.

188. *See* S. REP. NO. 104-272, at 2 (1996); H.R. REP. NO. 104-795, at 2 (1996).

Once the broad directive has been set, Congress can create statutory directives for information subject to disclosure. The first should the types of information subject to the FOIA. To do so, Congress must, for example, clarify such key terms as "trade secret" and avoid any mention of the phrase "personal privacy." Defining terms will necessitate instruction both regarding what information is included in the term as well as that excluded, as it did in defining the term "agency."[189] Abstaining from the use of potentially controversial phrasing will mean simplified phrases such that multiple interpretations are unlikely. Doing so will assist in preventing courts from drawing seemingly arbitrary lines between who is subject to protection and who is not.

Arguably, the most important section of this amendment will be the included exemptions. At the outset, this section must include an explicit judicial balancing test to provide courts some flexibility in terms of weighing the effects of disclosure on each party's interest. Indeed, the entirety of the FOIA includes an implicit balancing test.[190] However, the Act does not directly vest this obligation on the courts. Two of the current Act's exemptions, however, provide some guidance in this area. Exemption 6 provides for the withholding of "personnel and medical personnel files and similar files the disclosure of which could constitute a clearly unwarranted invasion of personal privacy.[191] Exemption 7 does the same for "records or information compiled for law enforcement purposes, but only to the extent that [its] production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[192] Both exemptions include a built-in judicial balancing test. Courts refuse to imply a similar obligation under Exemption 4, holding instead that the exemption encompasses the balance Congress intended.[193] Combining the balancing of the privacy exemptions with the class- and prejudice-based exceptions of Exemption 4 would be beneficial for opposing interests while remaining in keeping with the FOIA. While the exemptions would ensure that business interests are properly considered, the

189. 5 U.S.C. § 551(1) (2006).

190. *See id.* § 552(b)(1)-(9).

191. *Id.* § 552(b)(6).

192. *Id.* § 552(b)(7)(C).

193. Pub. Citizen Health Research Grp. v. Food & Drug Admin., 185 F.3d 898, 904 (D.C. Cir. 1999) ("Congress has already determined the relevant public interest: if through disclosure 'the public would learn something directly about the workings of the Government,' then the information should be disclosed unless it comes within a specific exemption.") (citation omitted).

judicial framework would properly consider the effects of disclosure in light of a clear presumption of withholding.

Along those lines, each exemption should be mandatory. The current discretionary nature of the exemptions gives little force to the FOIA, in that agencies may still release information even if it falls within one of the current nine exemptions. This does nothing to cultivate the government-corporation confidences discussed above. To give force to the exemptions would change this.

B. *Procedural Requirements*

The FOIA lacks guidelines for agency administration. Instead, it allows agencies to establish individual procedures for disclosure. As a result, corporations remain concerned "that their data will be secretly but lawfully leaked to their competition."[194] The following proposed procedures constitute efforts to mitigate a few of those fears while creating uniformity, clarity, and improvements to FOIA administration.

1. Prerequisites to filing

Current agency filing rules oftentimes create advantages for submitters. Requestors are barred from seeking judicial assistance until submission, decision, and appeal have been concluded.[195] However, submitters may file suit any time before receiving a final decision on appeal, which allows for potential forum shopping.[196] Fairness necessitates uniform filing requirements for both parties.[197] Just as requesters must fully exhaust administrative procedures, including submitting requests and waiting for final agency decision before being permitted to seek judicial intervention, so should a submitter.[198]

Additionally, the filing party should be allowed first choice for venue, which should default to the responding party upon the former party's failure to meet filing deadlines.[199] Such procedures would help alleviate the pervasive prejudice of the

---

194. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 147.

195. *Id.* at 182.

196. *Id.* Under the FOIA, the requester is limited in terms of venue. *Id.* at 183. In addition, the requester must exhaust all administrative procedures before filing suit. *Id.* The submitter is not bound by this requirement, and thus can choose to file the reverse FOIA action in a more favorable forum. *Id.*

197. *See id.*

198. *Id.* at 182.

199. *See id.* at 184.

current system. This suggestion is hindered only by the lack of notice requirements to the submitter that its information is being considered for disclosure.[200] However, a requirement obligating agencies to provide such notice would resolve both issues simultaneously.

2. Confidential classification

Identification of confidential information is the basis of an agency's decision to withhold or disclose information upon request. As such, it is naturally a hot-button topic for corporations. The mandatory classification of information either by the submitter or agency upon submission would likely alleviate some of this tension. The simplest and most practical way of implementing this process is to require the submitter to designate the information as confidential upon submission.[201] The submitter is most familiar with the information. Thus, it should cause no undue labor to separate those documents or portions of those documents as necessary.[202] This classification would be advisory,[203] but an accompanying explanation would provide valuable insight about the information the agency could not otherwise gain. Upon review of the information, classification, and explanation, the agency could then properly consider whether disclosure is appropriate.[204] Documents lacking a confidential label would be subject to typical agency review and, if subject to no exemptions, would be disclosed upon request.[205]

Admittedly, there are pros and cons to this option. Once records have been labeled, all parties have some indication of how they will be treated. However, disagreement regarding classification could lead to significant costs in defending information that may never be requested.[206] Also, if corporations were allowed to designate their own documents, they would likely classify all submissions as confidential, while agencies may have believed the opposite.

---

200. *See id.* at 147. Both submitters and requesters favor notice requirements. *Id.* However, courts are unwilling to extend the requirement to the FOIA process. *Id.* at 147-148 (citing Pharm. Mfr. Assoc. v. Weinberger, 411 F. Supp. 576, 578 (D.C. Cir. 1976).

201. *Id.* at 154.

202. *See id.*

203. *Id.*

204. *See id.*

205. *See id.* at 152.

206. *See id.* at 153.

Another option is to have agencies classify submitted documents.[207] Under this scenario, the agency reviews the documents marked confidential by the submitter.[208] Upon notice of its decision regarding labeling, the submitter may withdraw the documents if dissatisfied with agency designation.[209]

Difficulties here manifest in practical application. The potential for agency overload is imminent, as agencies would be required not only to review the documents, but also to notify the submitter of its decision regarding disclosure.[204] Burdening an already over-extended agency would likely spill over into the notice requirement, since the agency would have little time to explain to the submitter its reasons for rejecting the classification. Also, the effort exerted into making such advance determinations would be for naught if the information is never requested.[210]

3. Administrative and judicial proceedings

The FOIA provides for timeframes regarding initial determinations and appeals.[211] However, it lacks any requirements for administrative or adjudicative hearings.[212] The lack of any administrative remedy forces submitters and requesters to petition courts for assistance.[213] Submitters should be granted the opportunity to present, at minimum, oral arguments to agency directors via telephone arguments regarding why information should be withheld.[214] Such an argument should be permitted *in camera* to protect the nature of the information in question.[215] A similar right should be reserved for the requester to argue why the information should

---

207. *Id.* at 155.

208. *Id.*

209. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 155.

204 GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 155.

210. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 155.

211. 5 U.S.C. § 552(6)(A)(i)(ii).

212. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 166.

213. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 166-67.

214. *See* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 171.

215. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 170.

be disclosed.[216] While the administrative hearing would not be binding, the adjudicative hearing should be. At each, the submitter should bear the burden of proving why information should not be disclosed. Reverse FOIA cases "tend to be very complex and take a long time to resolve."[217] To allow for such hearings may "accomplish a major goal of agency proceedings: reducing the number of reverse-FOIA cases filed in Federal district court."[218]

4. Judicial Resolution of Reverse FOIA cases

Reverse-FOIA actions are relatively recent options for submitters seeking to prevent disclosure.[219] Most of these suits involve corporate submissions.[220] Because the FOIA does not provide for reverse FOIA litigation, courts have little guidance regarding proper scope of review determinations for agency decisions.[221] This presents a problem because reverse FOIA suits and FOIA suits are reviewed under different standards.[222] FOIA suits seeking disclosure are reviewed under a *de novo* standard.[223] On the other hand, reverse suits are based on review of the agency record.[224] These suits should be entitled to the same type of review.[225] Conducting a review on the agency record presumes that the agency has correctly determined the consequences of disclosure.[226] If such were the case, reverse FOIA cases would never arise. Perhaps most importantly, "many agencies are now characterized by an institutional bias in favor of disclosure which may render these agencies insensitive to

---

216. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 171.

217. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 174.

218. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 171.

219. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 173.

220. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 174.

221. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 174.

222. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989); *see also* Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3d Cir. 1977), *cert. granted sub nom.*, Chrysler v. Brown, 435 U.S. 914 (1978), *vacated*, Chrysler v. Brown, 441 U.S. 281, 290-91 (1979), *remanded to* 611 F.2d 439, (3d Cir. 1979).

223. *Reporters Comm. for Freedom of Press*, 489 U.S. at 755.

224. *Brown*, 441 U.S. at 289-90.

225. *See* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 178.

226. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 179.

business' claims of confidentiality and may well impair the agency's ability to develop a fair and adequate record of the administrative action."[227] Thus, an independent decision is more appropriate rather than deference.[228] This standard, however, may not be practical. A judge who lacks the experience to properly decide a complex litigation case could provide no effective legal remedy for either party.[229] On the other hand, an agency, which is familiar with such issues can navigate complex issues more smoothly and cheaply.[230] Thus, Congress should amend the FOIA to specify the scope of review in reverse FOIA cases.[231]

This article does not propose to have the exact solution to the current issues that exist with the FOIA in its current form. However, it is undeniable that Congress' initiative in implementing the above-mentioned solutions would assist in remedying the opinions of the Court, which lacked such a foundation on which to stand.

VI. CONCLUSION

Legislative history is clear regarding the intentions of the FOIA drafters. Courts have had to dredge their own paths in attempting to account for the increase in corporate attempts to protect confidential information. What has resulted is an area of law lacking uniformity and clarity. The time has come for Congress to, as it did when enacting the electronic amendments to the act, remedy the Act's deficiencies. The concerns it identified when enacting the law remain relevant and extend to the corporate context. Much remains to be done in this area, both to achieve government transparency and to protect corporate information privacy rights. Many remain hopeful that Congress will act to again amend the law, thereby contributing to a more effective government.

Nicole Washington

---

227. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 179 (citation omitted).

228. *See* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 179.

229. *See* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 180.

230. *See* GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 180.

231. GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 147, *supra* note 67, at 181.