Steven L. Beshear
Governor

Leonard K. Peters
Secretary
Energy and Environment Cabinet

Commonwealth of Kentucky
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David L. Armstrong
Chairman

James Gardner
Vice-Chairman

Charles R. Borders
Commissioner

March 31, 2010

PARTIES OF RECORD

Re: Case No. 2009-00459

Attached is a copy of a memorandum which is being filed in the record of the above-referenced case. If you have any comments you would like to make regarding the contents of the informal conference memorandum, please do so within five days of receipt of this letter. If you have any questions, please contact Jeff Shaw of the Commission staff at 502/564-3940, extension 237.

Sincerely,

on behalf of
Jeff Derouen
Executive Director

Attachment

INTRA-AGENCY MEMORANDUM

KENTUCKY PUBLIC SERVICE COMMISSION

TO: Main Case File - Case No. 2009-00459

FROM: Jeff Shaw, Team Leader

DATE: March 31, 2010

RE: Informal Conference of March 29, 2010

Pursuant to Commission Staff notices issued on March 25 and 26, 2010, an informal conference ("IC") was held at the Commission's offices on March 29, 2010. The purpose of the IC was to discuss issues related to Kentucky Power Company's ("Kentucky Power") February 26, 2010 Motion for Confidential Treatment of limited portions of its responses to Items 47 and 51 of the initial data request submitted by the Attorney General's Office ("AG") and the AG's objection thereto. The attendance list for the IC is attached hereto.

At the start of the IC, Staff asked whether all the participating parties had signed confidentiality agreements with Kentucky Power. The two that had not, Pike County Senior Citizens and Community Action Kentucky, agreed to sign such agreements. Staff then asked Kentucky Power several questions about its responses to AG 1-47 and AG 1-51. Some of the questions concerned non-confidential portions of the responses that were not included in the hard copies of the responses that had been filed with the Commission. Kentucky Power agreed to refile and serve on all parties its responses to AG 1- 47 and AG 1-51, to reveal certain 2009 numbers that were previously redacted.

The rest of the IC primarily dealt with whether the request for confidentiality and the objection thereto was an issue of fact or an issue of law. The AG maintained there were factual issues and that an evidentiary hearing was necessary to resolve them. Kentucky Power argued that there were no factual issues in dispute, only legal issues: in any event it was appropriate for the Commission to decide all issues without an evidentiary hearing since due process did not require that a hearing be held. Kentucky Power distributed copies of two court decisions (attached) which it characterized as supporting its position that the issues could be decided without a hearing.

It was agreed that the AG would file his final argument on the matter not later than Wednesday, April 7, 2010. Kentucky Power would have one week to prepare and file its response, with it being due by Wednesday, April 14, 2010. With that being the understanding of the parties and the Staff, the IC was then adjourned.

Attachments:
attendance list to all parties
court decisions w/original only

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

CASE NO. 2009-00459

APPLICATION OF KENTUCKY POWER COMPANY FOR A GENERAL ADJUSTMENT OF ELECTRIC RATES

SIGN IN

March 29, 2010

PERSON	REPRESENTING
RICHARD RAFF	PSC-LEGAL
Quang D. Nguyen	PSC
JEFF SHAW	PSC - FIN. ANALYSIS
Errol K Wagner	KPCo
MARK R. OVERSTREET	STITES & HARBISON for KPCo.
Ben Crittender	Stites and Harbison For Ky Power
Daryl Newby	PSC F/A
Chris Whelan	PSC F/A
Paul Adams	AG
Larry Cook	AG
Tim Mosher	Kentucky Power
Dainth Burns	PSC - Legal
Quita Mitchell	PSC - legal.

Case No. 2009-00459
March 29, 2010

PERSON	REPRESENTING
Joe Childers	CAK
Steve Sanders	Pet. County Senior Citizens
Matt Satterwhite	AEP Columbus SG.

LEXSEE

Analysis
As of: Mar 28, 2010

AHMAD E. ABUL-ELA, M.D., APPELLANT v. KENTUCKY BOARD OF MEDICAL LICENSURE, APPELLEE

NO. 2004-CA-001783-MR

COURT OF APPEALS OF KENTUCKY

217 S.W.3d 246; 2006 Ky. App. LEXIS 361

December 8, 2006, Rendered

SUBSEQUENT HISTORY: [**1]
Released for Publication April 18, 2007.

PRIOR HISTORY: APPEAL FROM JEFFERSON CIRCUIT COURT. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE. ACTION NO. 03-CI-001395.

DISPOSITION: AFFIRMING.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant doctor sought review of an order of the Jefferson Circuit Court, (Kentucky), which affirmed an order of appellee, the Kentucky Board of Medical Licensure, denying the doctor's application for licensure by endorsement.

OVERVIEW: The doctor had applied for a license by endorsement to practice medicine in Kentucky. The doctor disclosed on the application that he had been named in 11 medical liability claims. After receiving the supporting documentation and conducting its own inquiry, the Board sent a letter advising the doctor that his application would be considered at the next regularly scheduled Board meeting, which was later postponed. The doctor attended the postponed meeting and the Board thereafter denied the application, pursuant to Ky. Rev. Stat. Ann. § 311.595(9) and (21) and Ky. Rev. Stat. Ann. § 311.597(3). The trial court affirmed the denial. The court held that the specific provisions of the medical licensure requirements before the Board, including the denial of an application without a hearing under Ky. Rev. Stat. Ann. § 311.571(8), prevailed over the general statutes regulating administrative processes. It was undisputed that the doctor clearly had notice of the meeting and actually attended the meeting. Further the doctor had notice that his earlier malpractice history was an area of concern and that this issue would be addressed at the meeting.

OUTCOME: The court affirmed the order of the trial court, which upheld the order of the Board.

CORE TERMS: notice, licensure, malpractice, license, hearing procedures, training program, evidentiary hearing, process rights, medicine, license application, practice medicine, administrative hearing, private interest, erroneous deprivation, reasonable notice, meaningful opportunity, adequate notice, osteopathy, exempted, prevail, prong, letter dated, endorsement, attend

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > De Novo Review
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence
Governments > State & Territorial Governments > Licenses
[HN1]Judicial review of actions by the Kentucky Board of Medical Licensure is limited. The courts may only disturb the Board's actions if they: (1) constitute a clear abuse of its discretion; (2) are clearly beyond its delegated authority; or (3) violate the procedure for discipli-

nary action as described in Ky. Rev. Stat. § 311.591, Ky. Rev. Stat. § 311.555. This standard is a codification of the test for review of administrative actions set forth in American Beauty Homes Corp. On factual issues, a court reviewing the agency's decision is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence. On the other hand, the court is authorized to review issues of law on a de novo basis.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > General Overview
Governments > State & Territorial Governments > Licenses
[HN2]Ky. Rev. Stat. Ann. § 311.571(8) allows the Kentucky Board of Medical Licensure to deny an application for licensure without a prior evidentiary hearing. The administrative hearing procedures set out in Ky. Rev. Stat. Ann. ch. 13B apply to all administrative hearings conducted by an agency except those which are specifically exempted. Ky. Rev. Stat. Ann. § 13B.020(1). Furthermore, an administrative hearing means any type of formal adjudicatory process conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person. Ky. Rev. Stat. Ann. § 13B.010(2). Proceedings before the Board are not among those exempted under Ky. Rev. Stat. Ann. § 13B.020.

Governments > Legislation > Interpretation
[HN3]There are three established rules of statutory construction which analyze conflict between statutes. These rules are: (1) that it is the duty of the court to ascertain the purpose of the General Assembly of Kentucky, and to give effect to the legislative purpose if it can be ascertained; (2) that conflicting acts should be considered together and harmonized, if possible, so as to give proper effect and meaning to each of them; and (3) that as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand the specific shall prevail over the general.

Governments > State & Territorial Governments > Licenses
[HN4]Ky. Rev. Stat. Ann. § 311.555 sets out the legislature's declaration of policy. It is the declared policy of the General Assembly of Kentucky that the practice of medicine and osteopathy should be regulated and controlled as provided in Ky. Rev. Stat. Ann. §§ 311.530 to 311.620 in order to prevent empiricism and to protect the health and safety of the public. To carry out this intention, the General Assembly has created an independent Board, the majority of whose members are licensed physicians, with the intent that such a peer group is best qualified to regulate, control and otherwise discipline the licensees who practice medicine and osteopathy within the Commonwealth of Kentucky. The legislature's clearly stated policy, therefore, is that the Kentucky Board of Medical Licensure should function independently of other state regulatory agencies.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > General Overview
Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Statutory Right
Governments > State & Territorial Governments > Licenses
[HN5]Ky. Rev. Stat. Ann. § 311.571(8) allows the Kentucky Board of Medical Licensure to deny a license application without a hearing. An evidentiary hearing is only required when the Board issues an order directing an applicant for a license to show cause why he should be granted a license. Ky. Rev. Stat. Ann. § 311.572. Thus, Chapter 13B's hearing procedures do not apply to all proceedings before the Board. The specific medical licensure provisions prevail over the general statutes regulating administrative process.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN6]Procedural due process does not always require a full-blown trial-type hearing. To determine the sufficiency of due process provided in an administrative setting, the Kentucky Supreme Court has adopted a three-prong analysis. The test requires consideration of the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; the probable value, if any, of additional or substitute procedural safeguards; and the government's interest that any additional procedural requirement would entail.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Governments > State & Territorial Governments > Licenses
[HN7]While the private interest in obtaining a license to practice medicine is substantial, the state has a compelling interest in providing its citizens with quality health

care. Ky. Rev. Stat. Ann. § 311.571(8) satisfies sufficient due process guarantees by requiring the Kentucky Board of Medical Licensure to provide the applicant with reasonable notice of its intended action and a reasonable opportunity to be heard. The risk, therefore, of erroneous deprivation of a license under Ky. Rev. Stat. Ann. § 311.571(8) is unlikely given its notice provisions. Finally, a more formal evidentiary hearing would not give a doctor any greater protection. Consequently, the Court of Appeals of Kentucky concludes that Ky. Rev. Stat. Ann. § 311.571(8) affords a medical licensure applicant with sufficient due process.

Administrative Law > Agency Adjudication > Hearings > Right to Hearing > Due Process
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Governments > State & Territorial Governments > Licenses
[HN8]Due process includes, at a minimum, reasonable notice of the intended action of the Kentucky Board of Medical Licensure and a meaningful opportunity to be heard. Ky. Rev. Stat. Ann. § 311.571(8) requires the Board to provide both before it denies a license application.

COUNSEL: BRIEF FOR APPELLANT: J. Fox DeMoisey, Louisville, KY.

BRIEF FOR APPELLEE: L. Chad Elder, Louisville, KY.

JUDGES: BEFORE: JOHNSON AND WINE, JUDGES; MILLER, [1] SPECIAL JUDGE. ALL CONCUR.

1 Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

OPINION BY: WINE

OPINION

AFFIRMING

[*249] WINE, JUDGE: Ahmad E. Abul-Ela, M.D. (Dr. Abul-Ela) appeals from an order of the Jefferson Circuit Court which affirmed a January 17, 2003 order by the Kentucky Board of Medical Licensure (the Board) denying his application for licensure by endorsement. Dr. Abul-Ela argues that the Board improperly denied his application without a formal evidentiary hearing, and that the Board's procedures violated his procedural due process rights. We conclude that the Board was within its statutory authority to deny the application without a hearing. And while we have concerns about [**2] the sufficiency of the Board's notice to Dr. Abul-Ela, we conclude that any deficiencies did not affect his substantial rights. Hence, we affirm.

On March 27, 2002, Dr. Abul-Ela filed an application for a license by endorsement to practice medicine in Kentucky. At the time of the submission, he had been practicing medicine in Pennsylvania for twenty-five years. On his application, Dr. Abul-Ela disclosed that he had eleven medical liability claims against him, two of which resulted in jury verdicts against him, three of which were settled, four of which were currently pending, and two of which were withdrawn by the plaintiffs.

After receiving all supporting documentation and conducting its own inquiry, the Board sent a letter on April 24, 2002, advising Dr. Abul-Ela that his application would be presented "as a special licensure item due to your malpractice." The Board informed Dr. Abul-Ela that the application would be considered at the next regularly scheduled meeting on June 20, 2002.

That meeting was rescheduled for December 19, 2002. The Board states that it sent Dr. Abul-Ela notice of the re-scheduled meeting by letter dated November 20, 2002. No copy of that letter appears [**3] in the record and Dr. Abul-Ela denies that he received it. However, Dr. Abul-Ela advised the Board by letter dated November 26, 2002, that he planned to attend and address the Board at its December 19 meeting. The record also shows that Dr. Abul-Ela did, in fact, attend that meeting.

On January 17, 2003, the Board issued an order denying the application for licensure. The Board found that Dr. Abul-Ela's malpractice history, along with his dismissal from a training program in 1969, constituted grounds for denial of his application under KRS 311.595(21), 311.595(9), and 311.597(3). The Board's minutes reflect that one member opposed the motion to deny the application.

Dr Abul-Ela filed an appeal from the Board's order pursuant to KRS 311.593(2). He argued that the Board's procedures violated the requirements of KRS Chapter 13B and his due process rights. After considering the record and arguments of counsel, the circuit court affirmed the Board's order. The court found that the specific procedures set out in KRS Chapter [*250] 311 control over the more general provisions of Chapter 13B, [**4] and that the Board afforded Dr. Abul-Ela all the due process to which he was entitled. This appeal followed.

[HN1]Judicial review of actions by the Board is limited. The courts may only disturb the Board's actions if

they: (1) constitute a clear abuse of its discretion; (2) are clearly beyond its delegated authority; or (3) violate the procedure for disciplinary action as described in KRS 311.591. KRS 311.555. This standard is a codification of the test for review of administrative actions set forth in American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450 (Ky. 1964). On factual issues, a court reviewing the agency's decision is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence. Commonwealth, Transportation Cabinet v. Cornell, 796 S.W.2d 591, 594 (Ky.App. 1990). On the other hand, this Court is authorized to review issues of law on a *de novo* basis. Aubrey v. Office of Attorney General, 994 S.W.2d 516, 519, 46 8 Ky. L. Summary 19 (Ky.App. 1998). [**5]

Dr. Abul-Ela first argues that the Board's hearing procedures are inconsistent with the requirements of KRS Chapter 13B. [HN2]KRS 311.571(8) allows the Board to deny an application for licensure without a prior evidentiary hearing. Dr. Abul-Ela points out that the administrative hearing procedures set out in KRS Chapter 13B apply to all administrative hearings conducted by an agency except those which are specifically exempted. KRS 13B.020(1). Furthermore, an administrative hearing means "any type of formal adjudicatory process conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person." KRS 13B.010(2). Because proceedings before the Board are not among those exempted under KRS 13B.020, Dr. Abul-Ela argues that the hearing procedures set out in KRS Chapter 311 are superseded by the later-enacted hearing procedures set out in Chapter 13B.

[HN3]There are three established rules of statutory construction which are relevant to analyze the apparent conflict between these statutes. These rules are: [**6] (1) that it is the duty of the court to ascertain the purpose of the General Assembly, and to give effect to the legislative purpose if it can be ascertained; (2) that conflicting Acts should be considered together and harmonized, if possible, so as to give proper effect and meaning to each of them; and (3) that as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand the specific shall prevail over the general. City of Bowling Green v. Board of Education of Bowling Green Independent School District, 443 S.W.2d 243, 247 (Ky. 1969).

With regard to the first prong,[HN4] KRS 311.555 sets out the legislature's declaration of policy. "It is the declared policy of the General Assembly of Kentucky that the practice of medicine and osteopathy should be regulated and controlled as provided in KRS 311.530 to KRS 311.620 in order to prevent empiricism and to protect the health and safety of the public." To carry out this intention, the General Assembly has created an independent Board, "the majority of whose members are [**7] licensed physicians, with the intent that such a peer group is best qualified to regulate, control and otherwise discipline the licensees who practice medicine and osteopathy within the Commonwealth of Kentucky . . . ." The legislature's clearly [*251] stated policy, therefore, is that the Board should function independently of other state regulatory agencies.

With regard to the second prong, we find no inherent conflict between the procedures set out in Chapter 311 and those in Chapter 13B. We agree with Dr. Abul-Ela that the procedures set out in Chapter 13B broadly apply to all administrative hearings. However, [HN5]KRS 311.571(8) allows the Board to deny a license application without a hearing. An evidentiary hearing is only required when the Board issues an order directing an applicant for a license to show cause why he should be granted a license. KRS 311.572. Thus, Chapter 13B's hearing procedures do not apply to all proceedings before the Board. And finally, we agree with the circuit court that the specific medical licensure provisions prevail over the general statutes regulating administrative process.

Dr. Abul-Ela next argues that [**8] KRS 311.571(8) violates his procedural due process rights by allowing the Board to deny his application without a hearing. Dr. Abul-Ela has a constitutionally protected interest in his professional license. DeSalle v. Wright, 969 F.2d 273, 277 (7th Cir. 1992). Therefore, he has a right to procedural due process before the Board may deny his application.

However,[HN6] procedural due process does not always require a full-blown trial-type hearing. Kentucky Central Life Insurance Co. v. Stephens, 897 S.W.2d 583, 590, 42 05 Ky. L. Summary 37 (Ky. 1995). To determine the sufficiency of due process provided in an administrative setting, the Kentucky Supreme Court adopted the three-prong analysis from Mathews v. Eldridge, 424 U.S. 319, 333-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976) in Division of Driver Licensing v. Bergmann, 740 S.W.2d 948, 951 (Ky. 1987). That test requires consideration of the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; the probable value, if any, of additional or substitute procedural safeguards; and [**9] the government's interest that any additional procedural requirement would entail. Mathews, 424 U.S. at 335, 96 S.Ct. at 903.

[HN7]While the private interest in obtaining a license to practice medicine is substantial, the state has a compelling interest in providing its citizens with quality health care. KRS 311.571(8) satisfies sufficient due process guarantees by requiring the Board to provide the applicant with reasonable notice of its intended action and a reasonable opportunity to be heard. The risk, therefore, of erroneous deprivation of a license under KRS 311.571(8) is unlikely given its notice provisions. Finally, a more formal evidentiary hearing would not give Dr. Abul-Ela any greater protection. Consequently, we conclude that KRS 311.571(8) affords a medical licensure applicant with sufficient due process.

The central issue in this case concerns the adequacy of the due process which the Board provided in considering Dr. Abul-Ela's application.[HN8] Due process includes, at a minimum, reasonable notice of Board's intended action and a meaningful opportunity to be heard. See Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970). [**10] As previously noted, KRS 311.571(8) requires the Board to provide both before it denies a license application.

We have some concerns about the sufficiency of the notice which the Board provided to Dr. Abul-Ela. Unfortunately, the Board failed to keep a record of all of the notices which it provided prior to the December 19, 2002, meeting. While the earlier notice from April of 2002 is included in the record, the letter which the Board [*252] claims it sent on November 20, 2002, is not in the record. Had the Board kept a copy of the letter, this dispute likely never would have arisen.

Nevertheless, Dr. Abul-Ela clearly had notice of the December 19, 2002 meeting, as evidenced by his letter to the Board on November 26 and by the fact that he actually attended the meeting. The Board's earlier letter of April 24, 2002, was sufficient to notify Dr. Abul-Ela that his malpractice history was an area of concern. Furthermore, Dr. Abul-Ela does not indicate that he would have presented any additional evidence to explain or mitigate the previous malpractice claims against him. Therefore, we agree with the circuit court that Dr. Abul-Ela had sufficient notice that the Board [**11] would address this subject at its December 19, 2002, meeting.

However, we find no indication that the Board ever gave Dr. Abul-Ela notice regarding its concerns about his dismissal from a training program in 1969. This information was reported to the Board in the course of its investigation of the application. At the December 19 hearing, Dr. Abul-Ela verbally disputed this evidence and he continues to assert that the information was reported in error. However, the Board apparently rejected his testimony.

We conclude that the Board has failed to establish that it gave Dr. Abul-Ela adequate notice regarding his dismissal from the training program. And since Dr. Abul-Ela did not have adequate notice regarding this matter, the Board also failed to afford him with a meaningful opportunity to present evidence in rebuttal. Furthermore, while the dismissal from the training program does not appear to be determinative of the Board's decision, the Board relied on this information, at least in part, in its conclusion that the dismissal would constitute a violation of KRS 311.595(21). However, while we find that the Board's notice was insufficient to protect Dr. Abul-Ela's [**12] procedural due process rights on this issue, we also conclude that the error was harmless.

Given Dr. Abul-Ela's more recent history of malpractice claims, we question whether his dismissal from a training program more than thirty years ago (and after which he successfully completed a residency program) was the deciding factor in the Board's decision. Moreover, Dr. Abul-Ela's malpractice history, standing alone, would have been a sufficient basis for the Board's denial of his application. Consequently, the Board's failure to afford Dr. Abul-Ela with notice of all of the matters to be addressed at the meeting was not prejudicial and is not a basis to set aside the Board's ultimate decision.

Accordingly, the order of the Jefferson Circuit Court upholding the order of the Kentucky Board of Medical Licensure is affirmed.

ALL CONCUR.

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*830 F.2d 1132, *; 265 U.S. App. D.C. 248;*
*1987 U.S. App. LEXIS 13001, **; 44 Fair Empl. Prac. Cas. (BNA) 1648*

CNA Financial Corporation, et al., Appellants, v. Raymond J. Donovan, Secretary of Labor, et al.

No. 81-2169

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

830 F.2d 1132; 265 U.S. App. D.C. 248; 1987 U.S. App. LEXIS 13001; 44 Fair Empl. Prac. Cas. (BNA) 1648; 44 Empl. Prac. Dec. (CCH) P37,424; 34 Cont. Cas. Fed. (CCH) P75,389

December 8, 1981, Argued
September 29, 1987, Decided

PRIOR HISTORY: [1]** Appeal from the United States District Court for the District of Columbia, Civil Action No. 77-00808.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants sought review of a judgment of the United States District Court for the District of Columbia that affirmed appellees' decision to release appellants' affirmative action information under the Freedom of Information Act.

OVERVIEW: Appellants filed affirmative action programs and Equal Employment Opportunity-1 reports, and a third party requested copies of that information from appellees. Appellees notified appellants that they intended to honor third party's request. Appellants sought, and the district court granted, an order restraining release of the information pending completion of the administrative appeal process. Appellees decided to release the requested information, and the district court affirmed that decision. The appellate court affirmed the judgment because the Trade Secret Act, 18 U.S.C.S. § 1905 did not fall within 5 U.S.C.S. § 552(b)(3), and appellees' decision that the information requested was not protected from disclosure under § 552(b)(4) was not arbitrary, capricious, or an abuse of discretion. The appellate court held that the administrative procedure was adequate because 41 C.F.R. § 60-60.4(d) (1986) did not require a hearing, and appellees were entitled to withhold their expert's report.

OUTCOME: The court affirmed the district court's judgment that affirmed appellees' decision because the Trade Secret Act did not fall under the exemptions from the Freedom of Information Act,; appellees' decision to release the information was not arbitrary, capricious, or an abuse of discretion; and the proper administrative procedures were followed.

CORE TERMS: exemption, disclosure, SECRETS ACT, legislative history, trade secrets, competitive, confidential, revision, affirmative action, codification, withholding, contractor, withheld, deposition, privileged, consultant, Freedom of Information Act, evidentiary hearing, recommendations, authorization, revelation, submitter, discovery, commerce, revisers, novo, accompanying text, public access, statistical, disclose

LEXISNEXIS® HEADNOTES Hide

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions
Administrative Law > Governmental Information > Public Meetings > Sunshine Legislation

HN1 See 5 U.S.C.S. § 552(b)(3). *Shepardize:* Restrict By Headnote

Administrative Law > Governmental Information > General Overview
Trade Secrets Law > Federal & State Regulation > Federal Trade Secrets Act

HN2 See 18 U.S.C.S. § 1905. *Shepardize:* Restrict By Headnote

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions

HN3 5 U.S.C.S. § 552(b)(3)(A) is too rigorous to tolerate any decisionmaking on the administrative level. It embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is "absolute and without exception."

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions
Trade Secrets Law > Federal & State Regulation > Federal Trade Secrets Act

HN4 To meet the "particular criteria for withholding" prong of 5 U.S.C.S. § 552(b)(3)(B), the statute must incorporate a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazards that Congress foresaw. *Shepardize:* Restrict By Headnote

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Statutory Exemptions

HN5 General applicability to anything that might happen to be encompassed within an array of information-gathering functions undermines any notion that the statute represents a congressional determination of the advisability of secrecy for any "particular type of matter" under 5 U.S.C.S. § 552(b)(3)(B), if for no other reason than that the agency has the power radically to expand the quantity and diversity of information in its files to intercept matter of a sort that Congress well might not have contemplated when considering the need for confidentiality.

Administrative Law > Governmental Information > Freedom of Information > General Overview
Evidence > Privileges > Trade Secrets > General Overview
Trade Secrets Law > Federal & State Regulation > Freedom of Information Act Exemptions

HN6 5 U.S.C.S. § 552(b)(4) excludes from mandatory disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential. *Shepardize:* Restrict By Headnote

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Trade Secrets & Commercial Information
Trade Secrets Law > Federal & State Regulation > Freedom of Information Act Exemptions

HN7 The controlling test for the interpretation and application of the legal standard summoned by 5 U.S.C.S. § 552(b)(4) is that commercial or financial information is "confidential" if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. This criterion has been interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury. *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion
Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

HN8 An agency's informal action may be set aside only if it is arbitrary, capricious, or an abuse of discretion. A court's inquiry must be "searching and careful," but it is

not empowered to substitute its judgment for that of the agency. *Shepardize:* Restrict By Headnote

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions > Trade Secrets & Commercial Information
Trade Secrets Law > Federal & State Regulation > Freedom of Information Act Exemptions

HN9 A sine qua non of 5 U.S.C.S. § 552(b)(4) is that to the extent that any data requested under Freedom of Information Act are in the public domain, the submitter is unable to make any claim to confidentiality. *Shepardize:* Restrict By Headnote

Administrative Law > Governmental Information > General Overview
Labor & Employment Law > Affirmative Action > Compliance

HN10 41 C.F.R. § 60-60.4(d) (1986) requires a contractor to identify the reasons why affirmative action information is not disclosable, and, after an initial determination by the Office of Federal Contract Compliance Programs (OFCCP) personnel, directs the agency to inform the contractor of its decision. The regulation also provides for appeal of that ruling to the director of OFCCP, who must then render a "final determination." The regulation makes no mention of an evidentiary hearing, or indeed of any review procedures at all. *Shepardize:* Restrict By Headnote

Administrative Law > Agency Adjudication > Prehearing Activity
Real Property Law > Property Valuation

HN11 A party must have an opportunity to refute evidence utilized by the agency in decisionmaking affecting his or her rights. *Shepardize:* Restrict By Headnote

Administrative Law > Agency Adjudication > Prehearing Activity

HN12 The general requirements of disclosure to a litigant of material to be considered by an agency in an adjudicative proceeding is modified where the agency asserts a privilege respecting material generated in the process of agency decisionmaking. When agency material is "deliberative" or "recommendatory" in character, and does not of itself inject new factual data into the calculus, the agency is privileged to withhold it. This privilege is designed to ensure the full measure of agency decisionmaking by removing the chilling effect of possible future disclosure, inhibitions on candid expression are dissolved. *Shepardize:* Restrict By Headnote

Administrative Law > Agency Adjudication > Prehearing Activity

HN13 A privilege attaches to reports of outsiders commissioned by an agency to perform agency work, when such reports would be protected if compiled within the agency itself. Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider. *Shepardize:* Restrict By Headnote

Administrative Law > Governmental Information > Freedom of Information > Reverse Actions
Administrative Law > Judicial Review > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review

HN14 De novo judicial review is authorized under the Administrative Procedure Act, 5 U.S.C.S. § 706(2)(F), only when the agency's factfinding procedures are inadequate. *Shepardize:* Restrict By Headnote

COUNSEL: Jeffrey S. Goldman, with whom Martin K. Denis and Deborah Crandall were on the brief and Andrew M. Kramer, for Appellants.

Michael J. Ryan, Assistant United States Attorney, with whom Charles F. C. Ruff, United States Attorney, Royce C. Lamberth, Kenneth M. Raisler, John H. E.Bayly, Jr., Assistant United States Attorneys, and James M. Kraft, Attorney, Department of Justice, were on the brief, for Appellees.

Ronald M. Green, Frank C. Morris, Jr., Robert E. Williams and Douglas S. McDowell were on the brief for Equal Employment Advisory Council, Amicus Curiae, urging remand.

JUDGES: Wald, Chief Judge, Robinson and Mikva, * Circuit Judges. Opinion for the Court filed by Circuit Judge Robinson.

* Circuit Judge Mikva replaced Circuit Judge Tamm, who died after oral argument in this case.

OPINION BY: ROBINSON

OPINION

[*1133] ROBINSON, Circuit Judge

This reverse-Freedom of Information Act (FOIA) case [1] features two important issues: **[*1134]** the exact scope of 18 U.S.C. § 1905, commonly referred to as the Trade Secrets Act, [2] and its relationship **[**2]** to FOIA Exemptions 3 [3] and 4. [4] In past cases, we have repeatedly touched upon these difficult questions, but never squarely decided them. [5] We resolve them definitively today.

FOOTNOTES

1 "Reverse-FOIA" actions are now a common species of FOIA litigation. Jurisdiction over these cases is conferred by 28 U.S.C. § 1331(a) (1982) [illegible] le § 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1982), supplies the cause of action. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 & n.47, 99 S. Ct. 1705, 1725 & n.47, 60 L. Ed. 2d 208, 234 & n.47 (1979). Typically, a submitter of information -- usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products -- seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request. The agency's decision to release the data normally will be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions. **[**3]**

2 The Trade Secrets Act is part of the 1948 revision and codification of Title 18, the Criminal Code. See Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683, 791, amended by Pub. L. No. 96-349, § 7(b), 94 Stat. 1158 (Sept. 12, 1980). The text of the Trade Secrets Act appears *infra* at text accompanying note 39.

3 5 U.S.C. § 552(b)(3) (1982). The text of Exemption 3, the withholding statute exemption, appears *infra* at text accompanying note 35.

4 5 U.S.C. § 552(b)(4) (1982). The text of Exemption 4, the trade secrets and confidential financial information exemption, appears *infra* at note 71.

5 We have acknowledged, and even indicated our views on, these questions in prior cases. See, e.g., *United States Int'l Trade Comm'n v. Tenneco West*, 261 U.S. App. D.C. 341, , & nn. 4-5, 822 F.2d 73, 77-78 & nn.4-5 (1987); *Webb v. Department of Health & Human Serv.*, 225 U.S. App. D.C. 19, 225 U.S. App. D.C. 19, 26 n.48, 696 F.2d 101, 108 n.48 (1982); *Goland v. CIA*, 197 U.S. App. D.C. 25, 36 n.61, 607 F.2d 339, 350 n.61 (1978), *cert. denied*, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980); *National Parks & Conservation Ass'n v. Kleppe*, 178 U.S. App. D.C. 376, 389-390, 547 F.2d 673, 686-687 (1976); *Charles River Park "A", Inc. v. HUD*, 171 U.S. App. D.C. 286, 292 n.7, 519 F.2d 935, 941 n.7 (1975); *Robertson v. Butterfield*, 162 U.S. App. D.C. 298, 300 n.6, 498 F.2d 1031, 1033 n.6 (1974), *rev'd sub nom. FAA v. Robertson*, 422 U.S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975); *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 138 U.S. App. D.C. 147, 149 n.5, 425 F.2d 578, 580 n.5 (1970). But we have been careful to note that these observations are dicta. See, e.g., *Worthington Compressors, Inc. v. Costle*, 213 U.S. App. D.C. 200, 210-211 & n.63, 662 F.2d 45, 55-56 & n.63 (1981); *Sears, Roebuck & Co. v. GSA*, 180 U.S. App. D.C. 202, 207-209, 553 F.2d 1378, 1383-1385, *cert. denied*, 434 U.S. 826, 98 S. Ct. 74, 54 L. Ed. 2d 84 (1977); *National Parks & Conservation Ass'n v. Kleppe, supra*, 178 U.S.App.D.C. at 389 n.46, 547 F.2d at 686 n.46.

[4]** I. BACKGROUND

We begin by reducing the background of this appeal to its essence. Appellant CNA [6] is an insurance company doing business with the Federal Government. [7] As a condition of receiving federal contracts, and by virtue of the mandate of Executive Order 11,246, [8] it must submit to the appropriate governmental agency various materials demonstrating its performance in hiring, promoting, and otherwise utilizing women and minorities, as well as its affirmative action goals for the future. [9] These materials take the form of EEO-1 reports and affirmative action programs. [10] In 1977, when the FOIA requests instigating **[*1135]** the present dispute were made, the agency charged with enforcing the insurance industry's compliance with Executive Order 11,246 was the Department of Health, Education and Welfare (HEW), which in turn had delegated this responsibility to the Insurance Compliance Staff (ICS) of the Social Security Administration. [11]

FOOTNOTES

6 There are actually three appellants -- CNA Financial Corporation, Continental Assurance Company, and Continental Casualty Company. The latter two are affiliates of CNA. See Brief for Appellants at ii-iii (D.C. Cir. Rule 8(c) Certificate). Their interests apparently being identical, these three have referred to themselves collectively as "CNA," see, e.g., *id.* at 1 n.1, and we will follow suit. **[**5]**

7 Complaint paras. 2-3, *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C.) (filed May 13, 1977), reproduced in Joint Appendix (J. App.) 34-35.

8 30 Fed. Reg. 12,319 (1965), *reprinted after* 42 U.S.C. § 2000e (1982). Executive Order 11,246 prohibits discrimination by government contractors on the basis of race, religion, or national origin. Executive Order No. 11,375, 32 Fed. Reg. 14,303 (1967), amended that order to include a prohibition on gender-based discrimination.

9 For a more detailed account of the substantive and procedural obligations imposed on federal contractors by the executive order and implementing regulations, see Brody, *Congress, the President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 60 B.U.L. Rev. 239, 269-281 (1980).

10 See generally 41 C.F.R. § 60-1.7 & pt. 60-2 (1986). "Employers' EEO-1 Reports set

forth the number of persons employed in nine broad occupational categories such as 'Officials and Managers,' 'Operatives,' and 'Laborers.' They also show the number of employees in five race/ethnic categories by sex." *CNA Finan. Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 877, 879 n.3 (OFCCP 1980), J. App. 144 n.3. One commentator has summarized the applicability and contents of the affirmative action programs as follows:

> Contractors with fifty or more employees who hold a federal contract with a value of at least $ 50,000 must formulate and file with OFCCP [Office of Federal Contract Compliance Programs] a written "Affirmative Action Program." OFCCP describes an Affirmative Action Program as "a set of specific and result oriented procedures to which a contractor commits itself to apply every good faith effort." The plan must contain a detailed analysis of job categories, hiring trends, and promotional patterns, through which the contractor must locate every point at which he is deficient in the utilization of minorities and women. In this search for problem areas, he must make an "in-depth analysis" of transfer practices, seniority provisions, formal and informal training programs, company sponsored social, recreational and educational events, and workforce attitudes. For every identified deficiency, the Executive Order requires the contractor to develop specific, numerical goals and timetables. These must be designed "to achieve prompt and full utilization of minorities and women, at all levels and in all segments of [his] workforce." They should be ambitious enough to reflect the "results which reasonably could be expected from putting forth every good faith effort to make [his] overall affirmative action program work." Goals and timetables must be predictive. They should take into account future alterations in both the contractor's workforce and the relevant labor pool, and they should be calculated according to anticipated response to a vigorous recruiting campaign. If the contractor fails to establish a goal in any area, he must prove to OFCCP's satisfaction that no improvement is needed there.

Brody, *supra* note 9, 60 B.U.L. Rev. at 276-277 (quoting OFCCP regulations) (footnotes omitted). **[**6]**

11 Originally, responsibility for monitoring compliance with Executive Order 11,246 was dispersed among various departments and agencies. On October 1, 1978, federal contract compliance authority was consolidated in OFCCP, an office within the Department of Labor. See Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978), *reprinted after* 42 U.S.C. § 2000e (1982). This transfer of function explains why the heads of OFCCP and the Department of Labor were named as defendants in this litigation.

In April of 1977, a group called Women Employed requested from ICS [12] copies of the 1976-77 affirmative action programs and EEO-1 reports for CNA's midwest regional office, the 1974-75 affirmative action programs and EEO-1 reports for CNA's home office, and several documents prepared by ICS concerning CNA's compliance with the executive order. [13] On being notified by ICS both of the FOIA request and of the agency's intention to honor it, [14] CNA sought and obtained from the District Court an order restraining release pending completion of the administrative appeal **[**7]** process. [15]

FOOTNOTES

12 Actually, some of the documents called for in 1977 had first been sought by Women Employed in 1975. At that time, ICS reviewed the request and was prepared to release

the material over CNA's objections when Women Employed declared that it was not certain that it wanted all the data initially identified. Matters were then held in abeyance pending Women Employed's clarification. On April 29, 1977, after almost eighteen months of silence, Women Employed filed a renewed and expanded request that included the documents originally sought as well as others of more recent vintage. See *CNA Finan. Corp. v. Donovan*, Civ. No. 77-0808 (D.D.C. Oct. 29, 1981) (memorandum opinion announcing grant of defendants' motion for summary judgment) at 2, J. App. 17; *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 878-879, J. App. 145-150.

13 *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 878-879, J. App. 144-145. The latter group included compliance review reports, which contained the agency's assessment of CNA's progress in meeting its equal employment obligations, and corrective action programs and conciliation agreements, which set forth actions that CNA promised to take to correct deficiencies cited in the compliance review reports. See generally 41 C.F.R. §§ 60-1.20, 60-1.26(e)(3), 60-1.33 (1986). **[**8]**

14 Complaint paras. 14-20, *supra* note 7, J. App. 37-38.

15 *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C. May 18, 1977) (memorandum order granting plaintiffs' motion for temporary restraining order); *id.* (D.D.C. June 29, 1977) (approval of stipulation extending duration of temporary restraining order).

Then began the long and tortuous journey of this case, in the course of which it **[*1136]** traveled back and forth between the District Court and the agency, with one fairly brief stop in this court. The specifics of this five-year odyssey are reserved for a later section of this opinion, wherein CNA's procedural challenges are discussed. [16] It is sufficient for the present to note that in determinations rendered in November, 1980, and July, 1981, [17] the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor -- which by then had assumed the enforcement responsibilities previously exercised by ICS [18] -- decided to release, pursuant to FOIA and regulations of OFCCP, all the material requested. [19]

FOOTNOTES

16 See Part IV *infra*. **[**9]**

17 *CNA Finan. Corp., supra* note 10; *CNA Finan. Corp.* (OFCCP July 17, 1981) (supplemental decision), J. App. 234-243.

18 See note 11 *supra*.

19 The documents, however, were not to be released unedited. In order to respect individual employees' privacy and to minimize any competitive utility of the information, OFCCP proposed to delete employee names, actual salary data, job codes, and post-1979 staffing projections. See *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885-887, J. App. 170-174, 196.

In thus discarding CNA's objections to disclosure, OFCCP decided that the Trade Secrets Act is not a withholding statute within the meaning of Exemption 3. [20] It then proceeded to consider whether the requested material fell within Exemption 4. Applying the test established by this court in *National Parks & Conservation Association v. Morton*, [21] OFCCP discounted CNA's claim that revelation of its affirmative action programs and EEO-1 reports would precipitate substantial competitive harm. [22] CNA had asserted, **[**10]** through various affidavits and depositions, that any such disclosure would, *inter alia*, facilitate raiding of its employees, with

a concomitant increase in recruiting and training costs; deleteriously affect employee morale; generate adverse publicity by virtue of public "misconstruction" of the data; and reveal to competitors CNA's plans to enter, expand, or contract different markets and product lines. [23] OFCCP dismissed these concerns as overstated and speculative; it concluded that the information in the affirmative action programs and EEO-1 reports was neither so detailed nor so specific to CNA that it would have any particular competitive value to a rival. [24] The agency's estimates in this regard were buttressed by its view that the data at issue, which were by then four to seven years old, were stale. [25] Having found no threat of competitive harm that would bring the requested material within Exemption 4, OFCCP concluded that FOIA mandated its disclosure. [26]

FOOTNOTES

20 *Id.* at 881-887, J. App. 155-158.

21 162 U.S. App. D.C. 223, 228, 498 F.2d 765, 770 (1974). **[**11]**

22 *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883-887, J. App. 160-174.

23 These claims parallel assertions made in recent reverse-FOIA cases by other government contractors. See, e.g., *United Technologies Corp. v. Marshall*, 464 F. Supp. 845, 853-855 (D. Conn.), *remanded*, 24 Fair Emp. Prac. Cas. (BNA) 1018 (2d Cir. 1979); *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 159-166 (D.D.C. 1976), *cert. denied*, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977), *aff'd and remanded for further proceedings sub nom. National Org. for Women v. Social Sec. Admin. (NOW)*, 237 U.S. App. D.C. 118, 736 F.2d 727 (1984); *Burroughs Corp. v. Brown*, 501 F. Supp. 375, 380-381 (E.D. Va. 1980), *vacated and remanded*, 654 F.2d 294 (4th Cir. 1981).

24 *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883-887, J. App. 160-174. As noted, *supra* note 19, OFCCP proposed deletions of certain segments to minimize whatever competitive threat release might otherwise pose. **[**12]**

25 See, e.g., *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885, 886, J. App. 168, 172.

26 *Id.* at 883, 886-887, J. App. 160, 174.

The District Court sustained OFCCP's final determination. [27] It agreed that the Trade Secrets Act is not an Exemption 3 withholding statute, and that substantial competitive harm was the appropriate standard **[*1137]** for resolving the Exemption 4 question. [28] After denying CNA's request for a de novo evidentiary hearing, the court held that OFCCP's determination was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." [29] Accordingly, it granted summary judgment for the agency and directed that the documents be released within fifteen days. [30] We granted a stay of this direction pending appeal. [31]

FOOTNOTES

27 *CNA Finan. Corp. v. Donovan, supra* note 12.

28 *Id.* at 10, J. App. 25.

29 5 U.S.C. § 706(2)(A) (1982). The District Court did not cast its holding in precisely

these terms, but, since it cited this section of the APA, see *CNA Finan. Corp. v. Donovan, supra* note 12, at 11, J. App. 26, we presume that this was the standard of review applied. Clearly, the court neither undertook de novo review, see 5 U.S.C. § 706(2)(F) (1982), nor applied the substantial evidence standard, see *id.* § 706(2)(E). **[**13]**

30 *CNA Finan. Corp. v. Donovan, supra* note 12, at 11, and accompanying order, J. App. 26.

31 *CNA Finan. Corp. v. Donovan*, No. 81-2169 (D.C. Cir. Nov. 13, 1981).

CNA now complains vigorously that it has not been afforded at any point -- either before the agency or in the District Court -- an evidentiary hearing on its claims of competitive harm. [32] CNA's procedural challenges were largely resolved by our holding in *National Organization for Women v. Social Security Administration (NOW)*, [33] and are discussed in Part IV of this opinion. Parts II and III address CNA's substantive claims respecting the scope and interrelationship of the Trade Secrets Act and Exemptions 3 and 4 of FOIA, and review CNA's contention that OFCCP improperly applied Exemption 4.

FOOTNOTES

32 CNA draws its asserted entitlement to this type of procedure from various sources: OFCCP's own regulations, set out in 41 C.F.R. pt. 60-30 (1986); § 10(e) of the APA, 5 U.S.C. § 706(2)(F) (1982); certain language about this section in *Chrysler Corp. v. Brown, supra* note 1; and, finally, the Due Process Clause of the Fifth Amendment, both in its general application and as specifically interpreted by this court in *Gray Panthers v. Schweiker*, 209 U.S. App. D.C. 153, 652 F.2d 146 (1980). These points were raised before the agency and in the District Court, and therefore are properly tendered on appeal. **[**14]**

33 *Supra* note 23. Our consideration of the instant case has awaited the decision in *NOW*.

II. THE TRADE SECRETS ACT AND EXEMPTION 3

The third exemption of FOIA, as amended in 1976, [34] excepts from mandatory disclosure material

> *HN1*specifically exempted from disclosure by statute (other than [the open meeting provisions of 5 U.S.C. § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. [35]

We have had occasion in the past to recount the events leading up to the 1976 amendment, and to explicate the legislative goals that must inform our resolution of Exemption 3 questions. [36] Without reiterating that now-familiar history, we note simply that Subsections (A) and (B) were designed to narrow the scope of the prior-existing exemption by excluding those broadranging statutes that give an agency "*cart blanche [sic]* to withhold any information **[**15]** [it] pleases." [37] The "unmistakable thrust" of Exemption 3 as amended is "to assure that basic policy decisions on governmental **[*1138]** secrecy be made by the Legislative rather than the Executive branch." [38]

FOOTNOTES

34 Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976).

35 5 U.S.C. § 552(b)(3) (1982).

36 See, e.g., *American Jewish Congress v. Kreps*, 187 U.S. App. D.C. 413, 416-420, 574 F.2d 624, 627-631 (1978).

37 H.R. Rep. No. 880, pt. 1, 94th Cong., 2d Sess. 23, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2183, 2205.

As discussed in note 70 *infra*, the amendment to Exemption 3 proposed in Part 1 of the House Report was modified at several subsequent points in the legislative process. However, the original intention to overrule the Supreme Court's decision in *FAA v. Robertson*, 422 U.S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975), which was expressed in that paragraph of the report from which the quoted phrase is taken, survived to engender the language finally enacted. See H.R. Rep. No. 1441 (Conf.), 94th Cong., 2d Sess. 25, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2244, 2261. **[**16]**

38 *American Jewish Congress v. Kreps, supra* note 36, 187 U.S. App. D.C. at 417, 574 F.2d at 628; accord *Irons & Sears v. Dann*, 196 U.S. App. D.C. 308, 313, 606 F.2d 1215, 1220 (1979), *cert. denied*, 444 U.S. 1075, 100 S. Ct. 1021, 62 L. Ed. 2d 757, 204 U.S.P.Q. (BNA) 1060 (1980).

CNA contends that the Trade Secrets Act qualifies under both Subsections (A) and (B) as an Exemption 3 withholding statute. That Act reads as follows:

> HN2 Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical **[**17]** data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $ 1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. 39

After careful consideration, we believe the Trade Secrets Act does not satisfy the strictures of either Subsection (A) or (B).

FOOTNOTES

39 18 U.S.C. § 1905 (1982).

We have heretofore explained that Subsection (A) HN3"is too rigorous to tolerate any decisionmaking on the administrative level. It embraces only those statutes incorporating a congressional mandate of confidentiality **[**18]** that, however general, is 'absolute and without exception.'" [40] CNA's insistence that the Trade Secrets Act is such a ban on disclosure of trade secrets and other business data ignores the crucial phrase confining the prohibition to only those revelations that are "*not authorized by law*." [41] If the sole possible source of disclosure-authorization were congressional enactment, we might agree that the Act contemplates no decisionmaking on the administrative level, and thereby satisfies Subsection (A) of Exemption 3. The Supreme Court has made clear, however, that duly promulgated agency regulations reasonably related to the purpose and scope of a statutory grant of substantive rulemaking authority can provide the requisite legal sanction for disclosure. [42] We think this potential for administrative authorization precludes the application of Subsection (A). [43] Whenever an agency has **[*1139]** power to adopt substantive regulations governing public access to its files, the decision whether the Trade Secrets Act is to bar divulgence of commercial and financial material contained therein ordinarily will be made by the agency, not by Congress. More specifically, disclosure will **[**19]** be "not authorized by law" [44] just to the extent that the agency elects not to endorse release.

FOOTNOTES

40 *American Jewish Congress v. Kreps, supra* note 36, 187 U.S. App. D.C. at 417, 574 F.2d at 628 (footnotes omitted) (quoting 122 Cong. Rec. 28,473 (1976)) (statement of Rep. Abzug, sponsor). Compare *Founding Church of Scientology v. National Sec. Agency*, 197 U.S. App. D.C. 305, 308, 610 F.2d 824, 827 (1979) (subsection (A) not satisfied by 50 U.S.C. § 402 note, relating to secrecy of information about the National Security Agency) with *Seymour v. Barabba*, 182 U.S. App. D.C. 185, 187, 559 F.2d 806, 808 (1977) (subsection (A) satisfied by 13 U.S.C. § 9, relating to confidentiality of census materials).

41 See text accompanying note 39 *supra* (emphasis added).

42 See *Chrysler Corp. v. Brown, supra* note 1, 441 U.S. at 301-316, 99 S. Ct. at 1717-1724, 60 L. Ed. 2d at 224-234.

43 The provision of administrative authorization is not merely a theoretical possibility. The Department of Health & Human Services (HHS) promulgated a public access regulation, 20 C.F.R. § 422.435 (1985), which several courts upheld as effective to sanction disclosure for purposes of the Trade Secrets Act. See *Parkridge Hosp., Inc. v. Califano*, 625 F.2d 719, 722-724 (6th Cir. 1980); *Humana of Va., Inc. v. Blue Cross*, 622 F.2d 76, 78-79 (4th Cir. 1980); *Saint Mary's Hosp., Inc. v. Harris*, 604 F.2d 407, 410 (5th Cir. 1979); *Cedars Nursing & Convalescent Center v. Aetna Life & Cas. Ins. Co.*, 472 F. Supp. 296, 298 (E.D. Pa. 1979). This regulation was repealed by HHS in 1985. 50 Fed. Reg. 28,569 (1985). We express no opinion on the question decided in those cases; rather we merely point out that the implications of *Chrysler* have not been lost on administrative agencies. **[**20]**

44 See text accompanying note 39 *supra*.

Of course, the fact that an agency possesses discretion to control the applicability of the Trade Secrets Act is fatal only to a Subsection (A) claim. Even statutes conferring considerable amounts of administrative discretion can fall within Subsection (B) of Exemption 3 if they either establish "particular criteria for withholding" or refer to "particular types of matters to be withheld." [45]

FOOTNOTES

45 See text accompanying note 35 *supra*. We have noted that Exemption 3 is written in the disjunctive, so that a statute need satisfy only one of the three standards set out therein. See *Washington Post Co. v. Department of State*, 222 U.S. App. D.C. 248, 301-302, 685 F.2d 698, 701-702 (1982), *vacated as moot*, 464 U.S. 979, 104 S. Ct. 418, 78 L. Ed. 2d 355 (1983); *Iron & Sears v. Dann, supra* note 38, 196 U.S. App. D.C. at 313, 606 F.2d at 1220; *American Jewish Congress v. Kreps, supra* note 36, 187 U.S. App. D.C. at 417, 574 F.2d at 628.

HN4

[21]** To meet the first prong of Subsection (B), the statute must "incorporate[] a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazards that Congress foresaw." 46 The Trade Secrets Act is patently deficient in this regard. As we have already explained, the Act, by prohibiting only *unauthorized* disclosures, leave at least some agencies in a position to opt out of its strictures. Yet nothing in the Act directs or guides an agency in deciding whether it ought to exercise its power to authorize revelation of officially collected commercial and financial data.

FOOTNOTES

46 *American Jewish Congress v. Kreps, supra* note 36, 187 U.S. App. D.C. at 417-418, 574 F.2d at 628-629.

Moreover, going a step beyond the agency's initial decision to permit some disclosure, the Trade Secrets Act in no way channels the discretion of agency decisionmakers in supplying authorization for specific cases. 47 Suppose, for example, an agency with **[**22]** substantive power to promulgate public access regulations duly adopts a rule stating:

> Disclosure of trade secrets and other business information will be deemed 'authorized' for purposes of the Trade Secrets Act only when the administrator determines that release is consistent with the public interest.

This hypothetical regulation embodies the kind of administrative *carte blanche* that Congress intended to curb by its amendment of Exemption 3, 48 yet nothing in the Trade Secrets Act suggests that such a wideranging regulation would be ineffective as a source of disclosure authority. Devoid of any normative content to steer the agency in determining when revelation of data would be deleterious, the Act is susceptible of invocation to bar disclosure at the whim of an administrator acting under such a regulation. Indeed, one of the fundamental difficulties with classifying the Trade Secrets Act as an Exemption 3 statute is that agencies conceivably could control the frequency and scope of its application through regulations adopted on the strength of statutory withholding authorizations **[*1140]** which do not themselves survive the rigors of Exemption 3. 49 **[**23]**

FOOTNOTES

47 Cf. *id.* at 418, 547 F.2d at 629 (statutes cited as examples in legislative history of the

1976 amendment "imply a congressional sense that the crucial distinction lay between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard") (emphasis in original).

48 The statute involved in *FAA v. Robertson, supra* note 37, provided that the appropriate officials "shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of [the person objecting to disclosure] and is not required in the interest of the public." 49 U.S.C. § 1504 (1976). See *Washington Post Co. v. Department of States, supra* note 45, 222 U.S. App. D.C. at 301, 685 F.2d at 701; see also *American Jewish Congress v. Kreps, supra* note 36, 187 U.S. App. D.C. at 420, 574 F.2d at 631 (rejecting "the national interest" as a sufficiently particularized criterion for purposes of Exemption 3). **[**24]**

49 The HHS regulation mentioned in note 43 *supra* presents just such a situation. It was promulgated pursuant to authority purportedly found in § 1106 of the Social Security Act, 42 U.S.C. § 1306 (1982), one of the two statutes that the Conference Report specifically identified as not qualifying under Exemption 3. See H.R. Rep. No. 1441 (Conf.), *supra* note 37, at 25, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2261. That the Secretary in that instance adopted a regulation that seems to provide for automatic disclosure of particular material upon receipt by HHS of a written request is beside the point; whatever power he may possess under § 1106 could be exercised to promulgate a regulation of the sort we hypothesized.

The Trade Secrets Act is no more successful in meeting the second prong of Subsection (B). The language of the Act is exceedingly broad. [50] Extending by its terms to information pertaining to "trade secrets," "processes," "style of work," "apparatus," "confidential statistical data," the amount or source of "income, profits, losses, **[**25]** or expenditures" and even the "identity" of "any person, firm, partnership, corporation, or association," [51] "encompasses virtually every category of business information likely to be in the files" of an agency. [52] The "oceanic" quality of the Act [53] is enhanced by the fact that it is addressed to every "officer or employee" of "any [federal] department or agency;" [54] moreover, it applies to any information discovered "in the course of [the employee's] employment or official duties or by reason of any examination or investigation made by, or return, report, or record made to or filed with" the department, agency, or employee. [55] In sum, the Trade Secrets Act appears to cover practically any commercial or financial data collected by any federal employee from any source in performance of the duties of his or her employment.

FOOTNOTES

50 In a subsequent section of this opinion, we consider the argument that the Trade Secrets Act should be construed to encompass a far more limited category of material than a literal reading of the statute would suggest. See Part III-A *infra*. Because we ultimately reject that thesis, we have no occasion to decide whether the Act would satisfy the requirements of Subsection (B) were it subject to this much narrower construction. **[**26]**

51 See text accompanying note 39 *supra*.

52 *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1186 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown, supra* note 1.

53 *Goland v. CIA, supra* note 5, 197 U.S. App. D.C. at 36 n.61, 607 F.2d at 350 n.61.

54 See text accompanying note 39 *supra*.

55 See text accompanying note 39 *supra*.

In determining in a prior case that Section 7(c) of the Export Administration Act [56] does not satisfy the second prong of Subsection (B), we explained that a nondisclosure statute's

> HN5 general applicability to anything that might happen to be encompassed within [an] array of information-gathering functions undermines any notion that [the statute] represents a congressional determination of the advisability of secrecy for any "particular type[] of matter[]," if for no other reason than that the agency has the power radically to expand the quantity **[**27]** and diversity of information in its files to intercept matter of a sort that Congress well might not have contemplated when considering the need for confidentiality. [57]

We think that reasoning is equally applicable here. Admittedly, the Trade Secrets Act lists several specific categories of data, but cumulation of the parts may at some point become so extensive that what have been described as parts are in fact the whole; and that is true here. The comprehensive catalogue of items in the Trade Secrets Act accomplishes essentially the same thing as if it had simply referred to "all officially collected commercial information" or "all business and financial data received." [58] Given this encyclopedic character, **[*1141]** and absent any limitation as to the agencies covered [59] or the sources of data involved, [60] we unhesitatingly conclude that the laundry list of information that the Act sets out does not specify "particular types of matters" for purposes of satisfying Subsection (B) of Exemption 3. [61]

FOOTNOTES

56 50 U.S.C. App. § 2406(c) (1982).

57 *American Jewish Congress v. Kreps, supra* note 36, 187 U.S.App.D.C. at 420, 574 F.2d at 631 (footnotes omitted). **[**28]**

58 Cf. 122 Cong. Rec. 24,212 (1976) (statement of Rep. McCloskey) (statute that "just says generally, 'all information received,' . . . does not set specific criteria as to what must be kept secret").

59 Cf., e.g., *Goland v. CIA, supra* note 5, 197 U.S.App.D.C. at 35-36, 607 F.2d at 349-350 (discussing 50 U.S.C. § 403g (1982), pertaining to information about activities of CIA); *Founding Church of Scientology v. National Sec. Agency, supra* note 40, 197 U.S.App.D.C. at 308-309, 610 F.2d at 827-828 (discussing 50 U.S.C. § 402 note (1982), pertaining to information about activities of National Security Agency); *Seymour v. Barabba, supra* note 40, 182 U.S.App.D.C. at 186-187, 559 F.2d at 807-808 (discussing 13 U.S.C. § 9 (1982), directed to officers and employees of Department of Commerce).

60 Cf., e.g., *Irons & Sears v. Dann, supra* note 38, 196 U.S.App.D.C. at 313-314, 606 F.2d at 1220-1221 (discussing 35 U.S.C. § 122 (1982), pertaining to information contained in patent applications); *Seymour v. Barabba, supra* note 40, 182 U.S.App.D.C. at 186-188, 559 F.2d at 807-809 (discussing 13 U.S.C. § 9 (1982), pertaining to information furnished in census). **[**29]**

61 See *National Parks & Conservation Ass'n v. Kleppe, supra* note 5, 178 U.S.App.D.C. at 389-390 & n.50, 547 F.2d at 686-687 & n.50. Compare *Washington Post Co. v.*

Department of State, supra note 45, 222 U.S.App.D.C. at 402-403, 685 F.2d at 702-703.

For these reasons, we hold that the Trade Secrets Act does not, by virtue of Exemption 3, erect a disclosure bar that is impervious to the mandate of FOIA. [62] Our view that this legislation is one of those prior-existing nondisclosure edicts that have been at least partially superseded by FOIA's newer public access mandate is reinforced by several general observations about the two statutes. [63] This court has had occasion to remark that the Trade Secrets Act is "merely a general prohibition against *unauthorized* disclosure." [64] This was perhaps a rather abbreviated way of noting that the Act seems to embody a congressional judgment that private commercial and financial information should not be revealed by agencies that gather it, absent a conscious choice in favor of disclosure **[**30]** by someone with power to impart the force of law to that decision. The Act attempts to forestall casual or thoughtless divulgence -- disclosure made without first going through a deliberative process -- with an opportunity for input from concerned parties. [65] If we are correct in this assessment **[*1142]** of the motivating force behind the Trade Secrets Act, then our holding, which effectively recognizes that FOIA can provide the requisite legal authorization to disclose agency-gathered commercial and financial data, does no violence to the legislative aim. FOIA is itself the product of a most thoughtful and deliberate weighing process, in which Congress considered the views of those who submit information, those who collect it, and those who desire it. Congress has twice since adjusted the balance in order more finely to tune the operation of FOIA to real-world concerns and constraints. [66] To the extent that commercial and financial data within the ambit of the Trade Secrets Act do not fall within one of the FOIA exemptions, particularly Exemption 4 or 6, [67] the decision has been made that on balance it ought to be unmasked in the interest of informing the public of the bases **[**31]** for governmental action. [68] To the extent that such data as trade secrets and confidential financial information are excepted from mandatory disclosure by one or more of the exemptions that Congress has incorporated into FOIA, the Trade Secrets Act will bar a discretionary release unless, after notice and comment, an agency, possessing delegated power to do so, promulgates, a contrary rule having the force of law. [69] Clearly, this resolution does not undermine the foundation of the Trade Secrets Act by throwing open the door to wholesale, haphazard revelation of private financial and business data in the possession of governmental agencies. [70]

FOOTNOTES

62 Our holding that the Trade Secrets Act is not an Exemption 3 statute is consistent with the conclusions of several courts that have considered the question. See, e.g., *General Elec. Co. v. United States Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1401-1402 (7th Cir. 1984); *General Dynamics Corp. v. Marshall*, 607 F.2d 234, 235-236 (8th Cir. 1979); *United Technologies Corp. v. Marshall, supra* note 23, 464 F. Supp. at 850-851; *Westchester Gen. Hosp., Inc. v. HEW*, 464 F. Supp. 236, 242-243 (M.D. Fla. 1979); *Saint Mary's Hosp., Inc. v. Califano*, 462 F. Supp. 315, 317 (S.D. Fla. 1978), *aff'd on other grounds*, 604 F.2d 407 (5th Cir. 1979); *Nationwide Mut. Ins. Co. v. Friedman*, 451 F. Supp. 736, 742-743 (D. Md. 1978); *Crown Cent. Petroleum Corp. v. Kleppe*, 424 F. Supp. 744, 752-753 (D.Md. 1976); *Westinghouse Elec. Corp. v. Brown*, 443 F. Supp. 1225, 1234 (E.D. Va. 1977).

The Fourth Circuit reached a contrary conclusion in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1201-1203 (1976), *cert. denied*, 431 U.S. 924, 97 S. Ct. 2199, 53 L. Ed. 2d 239 (1977). That decision was premised, however, on the Supreme Court's ruling in *FAA v. Robertson, supra* note 37, that Exemption 3 did not impliedly repeal any of the hundred-odd preexisting statutes which authorized withholding. Thus, the court reasoned, *Robertson* conclusively disposed of any argument that the Act is not an Exemption 3 statute. See 542 F.2d at 1202. Since the 1976 amendments to FOIA have

undermined that approach, several courts have regarded the *Westinghouse* holding as effectively overruled. See, e.g., *United Technologies Corp. v. Marshall, supra* note 23, 464 F. Supp. at 850-851; *Nationwide Mut. Ins. Co. v. Friedman, supra*, 451 F. Supp. at 743; *Crown Cent. Petroleum Corp. v. Kleppe, supra*, 424 F. Supp. at 752-753; *Westinghouse Elec. Corp. v. Brown, supra*, 443 F. Supp. at 1234. In a recent statement on the subject, the Fourth Circuit has implicitly suggested that it no longer regards the Trade Secrets Act as an Exemption 3 statute. See *General Motors Corp. v. Marshall*, 654 F.2d 294, 297 & n.9 (4th Cir. 1981). **[**32]**

63 See generally 1 K. Davis, Administrative Law Treatise § 5:31, at 396-397 (2d ed. 1978).

64 *National Parks & Conservation Ass'n v. Kleppe, supra* note 5, 178 U.S.App.D.C. at 390 n.50, 547 F.2d at 687 n.50 (emphasis in original).

65 By this observation we are not, of course, reviving the discredited theory that the Trade Secrets Act is merely an "anti-leak" statute. See *Chrysler Corp. v. Brown, supra* note 1, 441 U.S. at 298-300, 99 S. Ct. at 1716-1717, 60 L. Ed. 2d at 223-224. Rather, we mean disclosure, whether or not the result of official agency action, undertaken without the predicate of a duly authorized, well-considered, and properly undertaken exercise of quasi-legislative power.

66 In addition to the 1976 amendments to Exemption 3 that overruled *FAA v. Robertson, supra* note 37, see Pub. L. No. 93-502, 88 Stat. 1561 (1974) (*inter alia*, amending exemption 1 to overrule *EPA v. Mink*, 410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973), and Exemption 7 to overrule a line of cases decided by this court, see *FBI v. Abramson*, 456 U.S. 615, 621-623, 102 S. Ct. 2054, 2059-2060, 72 L. Ed. 2d 376, 383-384 (1982) (mandating release of reasonably segregable, nonexempt portions of records and modifying the fees provisions and establishing timetables for agency action)). The 1974 amendments were the result of several days of hearings by the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, *U.S. Government Information Policies & Practices Administration & Operation of the FOIA* (Parts 4-9): *Hearings*, 92d Cong., 2d Sess. (1972-73), and extensive hearings before subcommittees of the Senate Judiciary and Government Operations Committees, *Executive Privilege, Secrecy in Government, Freedom of Information: Hearings*, 93d Cong., 1st Sess. (1973). **[**33]**

67 Exemption 4 includes trade secrets and confidential commercial information, see note 71 *infra*, while Exemption 6 covers personnel, medical, and similar files. In some specialized business contexts, Exemption 8, dealing with reports prepared in the regulation of financial institutions, and Exemption 9, referring to geological maps and data concerning wells, may also be relevant.

68 We have in the past suggested that the presence of Exemption 4 in FOIA significantly undercuts the argument that the Trade Secrets Act was intended to qualify as a withholding statute under Exemption 3. See *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., supra* note 5, 138 U.S.App.D.C. at 149 n.5, 425 F.2d at 580 n.5.

69 *Chrysler Corp. v. Brown, supra* note 1, 441 U.S. at 295-316, 99 S. Ct. at 1714-1725, 60 L. Ed. 2d at 221-233; *Charles River Park "A", Inc. v. HUD, supra* note 5, 171 U.S.App.D.C. at 293-294, 519 F.2d at 942-943.

70 Our review of the legislative material, particularly the history of the 1976 amendment to Exemption 3, does not definitively answer the question whether the Trade Secrets Act was intended by Congress to be a qualifying withholding statute. It does show, however, that our conclusion is consistent with congressional understanding.

The House Report on the Government in the Sunshine Act consisted of two segments. Part I, authored by the Committee on Government Operations, set forth a version of Exemption 3 encompassing matters "required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information." H.R. Rep. No. 880, pt. 1, *supra* note 37, at 25. Parallel language was inserted as an exception to the open meeting requirement of what is now 5 U.S.C. § 552b (1982). See *id.* at 26. This language was intended to overrule the Supreme Court's decision in *FAA v. Robertson, supra* note 37. See H.R. Rep. No. 880, pt. 1, *supra* note 37, at 9-10, 22-23, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2191, 2204-2205. The Government Operations Committee's report went on to state that "similarly, the Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is 'not authorized by law,' would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since disclosure is there authorized by law." *Id.* at 23, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2205; see also *id.* at 10, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2191. The Report cited this court's decision in *Charles River Park "A", Inc. v. HUD, supra* note 5, and explained:

> Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information.

Id. at 23, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2205.

Part II of the House Report, reflecting the views of the Judiciary Committee, liberalized the Government Operations Committee's version by amending it to read: "Required or *permitted* to be withheld from the public by any statute establishing particular criteria or referring to particular types of information." H.R. Rep. No. 880, pt. 2, 94th Cong., 2d Sess. 7, 25, *partially reprinted in* [1976] U.S. Code Cong. & Admin. News 2216-2217 (emphasis added). The parallel open meeting exemption was amended in the same way. *Id.* at 26. The Judiciary Committee's portion of the report does not refer to the Trade Secrets Act, nor was that Act mentioned during floor debates in the House. In the course of those debates, Representative McCloskey introduced what he described as simply a clarifying amendment, which placed Exemption 3 in a form almost identical to the final version:

> (3) specifically exempted from disclosure by statute (other than [the open meeting provisions of section 522b]) provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

122 Cong. Rec. 24,211 (1976). This amendment was adopted as part of the House bill. *Id.* at 24,213.

The version of the Government in the Sunshine Act originally passed by the Senate did not undertake to amend Exemption 3 of FOIA. It did, however, contain an exemption from the open meeting requirement excepting meetings "required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information." S. Rep. No. 354, 94th Cong., 1st Sess. 57 (1975). There was neither committee report nor floor discussion on how the Trade Secrets Act might fit into this exemption.

The Conference Report settled on the version passed by the House, with the amendment that Subsection (A) would read, "requires that the matters be withheld from the public *in such a manner as to leave no discretion on the issue*." H.R. Rep. No. 1441 (Conf.), *supra* note 37, at 8 (emphasis added). The conferees voiced the expectation that this language would overrule *FAA v. Robertson. Id.* at 25, *reprinted in* [1976] U.S. Code Cong. & Admin. News 2260-2261. They did not allude to the Trade Secrets Act, nor was that statute mentioned in the brief floor discussions that preceded adoption of the conference version in both Houses.

The parties have expended considerable energy in debating whether the Government Operations Committee's understanding of the interaction of the Trade Secrets Act and FOIA remained accurate after that Committee's version metamorphosed into the current language of Exemption 3. We think this debate is ultimately misguided. The reasons the Committee gave for its views on the Trade Secrets Act -- that is, that the Act prohibited only unauthorized disclosures, and FOIA was by its very nature a disclosure authorization -- really had nothing to do with the specific language of the amendment it proposed. Rather, the Committee's conclusion, identical to that earlier expressed by this court in *National Parks & Conservation Ass'n v. Kleppe, supra* note 5, 178 U.S.App.D.C. at 389, 547 F.2d at 686, seems to have been the product of a general, morphological analysis of the two statutes independent of the particular changes then contemplated. As such, the Committee's observations are less like contemporaneous statements of the intent of those who drafted the legislation than they are like *ex post facto* opinions on the proper interpretation of FOIA expressed in subsequent congressional oversight reports. See, e.g., discussion of oversight committee's reaction to judicial interpretation of Exemption 4, note 73 *infra*.

This is not to say that such expressions are irrelevant to our deliberations. Congressional oversight of the operation of FOIA has led to responsive interaction between Congress and the courts as the body of law construing FOIA has developed. See note 66 *supra* and accompanying text. In these rather atypical circumstances, expressions of congressional approval of the course this court has taken in such cases as *Charles River Park "A"* provides some reassurance that we are on the right track. Cf. *FAA v. Robertson, supra* note 37, 422 U.S. at 267, 95 S. Ct. at 2148, 45 L. Ed. 2d at 174. Moreover as we earlier noted with respect to the report of the Government Operations Committee, "each House had an opportunity to object to interpretation contained in that report." *American Jewish Congress v. Kreps, supra* note 36, 187 U.S.App.D.C. at 418 n.36, 574 F.2d at 629 n.36. In sum, we regard Part I of the House Report as some confirmation of the holding we reach today, but we rely on the reasons we have articulated.

[34] [*1144]** III. THE TRADE SECRETS ACT AND EXEMPTION 4

Having determined that the Trade Secrets Act is not a withholding statute of sufficient rigor or particularity to satisfy Exemption 3, we next address the interrelationship of the Act and Exemption 4. [71] Specifically, we consider the position taken by some commentators, [72] and urged here by agency counsel, that, despite its apparent sweep, the Trade Secrets Act is no broader than its three predecessor statutes were combined. This is of much more than academic interest to federal agencies that currently do not have public access regulations qualifying as legal authorizations for disclosures otherwise prohibited by the Trade Secrets Act. If the range of the Act is narrower than the scope of Exemption 4, there will be some commercial and financial data that these agencies will be free to release in their discretion, though they are not required to do so by FOIA. If, on the other hand, the reach of the Act is at least coextensive with that of Exemption 4, a finding that requested material falls within that exemption will be tantamount to a determination that these agencies cannot reveal it. [73]

FOOTNOTES

71 Exemption 4 HN6 excludes from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b) (4) (1982). **[**35]**

72 E.g., Clement, *The Rights of Submitters to Prevent a Disclosure of Confidential Business Information: The Reverse FOIA Lawsuit*, 55 Tex. L. Rev. 587, 606-617 (1977); Note, *The Revitalization of Section 1905 of the Trade Secrets Act in Reverse Freedom of Information Act Suits*, 16 New Eng. L. Rev. 831, 862-870 (1981); see also Stevenson, *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 Admin. L. Rev. 207, 248 & n.175 (1982).

73 See, e.g., *Chrysler Corp. v. Brown, supra* note 1, 441 U.S. at 317-319 & n.49, 99 S. Ct. at 1725-1726 & n.49, 60 L. Ed. 2d at 234-235 & n.49.

A. *The Trade Secrets Act*

The Trade Secrets Act came as part of the 1948 revision and codification of the Federal Criminal Code. 74 In this process, a committee of legislators, judges, lawyers, and law book publishers 75 gathered together criminal provisions scattered throughout the United States Code and organized, edited, and consolidated them; 76 and the product was then enacted into **[**36]** positive law as Title 18. According to the Reviser's Notes, 77 the Trade Secrets Act was "based on" three preexisting provisions. 78 Section 216 of Title 18, which had made it a misdemeanor for any federal officer or employee to "divulge or make known in any manner whatever not provided by law" the "operations, style of work, or apparatus of any manufacturer or producer" visited by the employee in the course of his or her official duties, or "the amount or source of income, profits, losses, [or] expenditures" **[*1145]** disclosed in income tax returns; 79 Section 1335 of Title 19, also a misdemeanor statute, which had prohibited federal officers and employees from disclosing, "in any matter whatever not provided for by law . . . trade secrets or processes . . . embraced in any examination or investigation" of the Tariff Commission; 80 and Section 176a of Title 15, which had directed that "any statistical information furnished in confidence" to the Bureau of Foreign and Domestic Commerce was to be held confidential and used "only for the statistical purposes for which it [was] supplied." 81

FOOTNOTES

74 Act of June 25, 1948, ch. 645, 62 Stat. 791 (codified in Title 18, United States Code). **[**37]**

75 See *Hearing Before Subcomm. No. 1 of the House Judiciary Comm. on H.R. 1600 and H.R. 2055*, 80th Cong., 1st. Sess. 7-9 (1947) [hereinafter *Hearing Before Subcomm. No. 1*] (statement of Rep. Keogh, Chairman of Committee on Revision of the Laws), *reprinted in* United States Code Cong. Serv., 80th Cong., 2d Sess., *Official Legislative History of New Title 18, United States Code, Crimes and Criminal Procedure*, at 2692-2694 (1948) [hereinafter *Official Legislative History*]; *Hearing Before the House Comm. on Revision of the Laws on H.R. 5450*, 78th Cong., 2d Sess. 1-2 (1944) (statement of Rep. Keogh, chairman of committee, *reprinted in Official Legislative History, supra*, at 2661-2662; H.R. Rep. No. 304, 80th Cong., 1st Sess. 3-5 (1947), *reprinted in Official Legislative History, supra*, at 2436-2438; 92 Cong. Rec. 9,122 (1946) (statement of Rep. Keogh); 93 Cong. Rec. 5,049 (1947) (statement of Rep. (Robison);*Official Legislative History supra* at xxvi-xxvii (listing members of revision staff and advisory committee).

76 See generally H.R. Rep. No. 304, *supra note* 75, at 7-8, *reprinted in Official Legislative History, supra* note 75, at 2441-2442; 92 Cong. Rec. 9,122 (1946) (statement of Rep. Keogh). **[**38]**

77 The Reviser's Notes were appended to the House Report, H.R. Rep. No. 304, *supra* note 75, *reprinted in Official Legislative History, supra note* 75, at 2444-2660, and were specifically referred to in the Senate Report. S. Rep. No. 1620, 80th Cong., 2d Sess. 2 (1948), *reprinted in Official Legislative History, supra* note 75, at 2427.

78 H.R. Rep. No. 304, *supra note* 75, app. A127,*reprinted in Official Legislative History, supra* note 75, at 2587.

79 The complete text read:

> It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and shall be punished by a fine not exceeding $ 1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

18 U.S.C. § 216 (1940). **[**39]**

80 In its entirety it read:

> It shall be unlawful for any member of the [Tariff] commission, or for any employee, agent, or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by the commission, or by order of the commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and shall be punished by a fine not exceeding $ 1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment.

19 U.S.C. § 1335 (1940).

81 In full text it stated:

> Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be

> confidential and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual, corporation, or firm furnishing such data.
>
> 15 U.S.C. § 176a (1940).

[40]** It is apparent from a comparison of the provisions of the Trade Secrets Act with those of the three earlier statutes from which the 1948 recodification drew its language, that the resulting whole was considerably greater than the sum of its parts. The remarkably scant legislative history of the 1948 Criminal Code [82] is virtually silent on the Trade Secrets Act. Except for brief remarks on some purely editorial matters, the Reviser's Note to the Act merely lists the antecedent statutes and declares that "minor changes were made in translations and phraseology." [83] Neither the floor debates, the committee hearings nor the committee reports contain any reference to the new section embodying the Act.

FOOTNOTES

82 Floor discussion in both houses occupies fewer than a dozen pages of the Congressional Record.

83 H.R. Rep. No. 304, *supra* note 75, Appendix at A127-A128, *reprinted in Official Legislative History, supra* note 75, at 2587-2588.

It is contended that, in these circumstances, **[**41]** we should apply the canon of construction that absent a clear showing of legislative intent to work a change in the prior law, a codified provision is to be given the same substantive content as its source statute, despite any changes in phraseology. Resort to this principle, the argument continues, will demonstrate that the Trade Secrets Act prohibits disclosure only of the fairly limited kinds of material that were encompassed by the three antecedent statutes. **[*1146]** We think the question of statutory interpretation presented here is not nearly so simple.

Indubitably, when Congress enacted the 1948 revision and codification of Title 18, its understanding was that "the original intent of Congress is preserved." [84] But testimony by members of the drafting commission during two sets of House Committee hearings, as well as statements in the House Report, make clear that preservation of the "original intent" was not synonymous with absence of substantive change. The point was often made that the enactment represented a "revision" as well as a "codification," and that the former involved reconciling conflicts, harmonizing incongruities and inconsistencies traceable to piecemeal **[**42]** enactment, and omitting some superseded sections while updating others. [85] As Representative Keogh, sponsor of the legislation in the House and chairman of the Revision Committee, testified, "the policy that [the Revision Committee] adopted . . . was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive change of law." [86] This emphasis on avoidance of "controversial" change was reiterated during the hearings. [87]

FOOTNOTES

84 S. Rep. No. 1620, supra note 77, at 1, *reprinted in Official Legislative History, supra* note 75, at 2427; accord *Hearing Before Subcomm. No. 1,* supra note 75, at 38-39

(memorandum for Rep. Robsion), *reprinted in Official Legislative History, supra* note 75, at 2725; 94 Cong. Rec. 8,721 (1948) (statement of Sen. Wiley, Chairman, Judiciary Committee).

85 See, e.g., *Hearing Before Subcomm. No. 1, supra* note 75, at 19 (statement of Judge Maris), 38-39 (memorandum for Rep. Robsion), *reprinted in Official Legislative History, supra* note 75, at 2705, 2725; *Hearing Before Comm. on Revision of the Laws, supra* note 75, at 6 (statement of William Barron, Chief Reviser), 16 (statement of Judge Holtzoff, Special Consultant to Revisers), 17-18 (statement of George Kneip, Criminal Division, Department of Justice), *reprinted in Official Legislative History, supra* note 75, at 2667, 2677, 2678-2679; H.R. Rep. No. 304, *supra* note 75, at 2, *reprinted in Official Legislative History, supra* note 75, at 2435; 95 Cong. Rec. 8,721 (1948) (statement of Sen. Wiley); 93 Cong. Rec. 5,049 (1947) (statement of Rep. Robsion). **[**43]**

86 *Hearings Before Subcomm. No. 1, supra* note 75, at 6 (statement of Rep. Keogh), *reprinted in Official Legislative History, supra* note 75, at 2691.

87 *Id.* at 11 (statement of Rep. Keogh), *reprinted in Official Legislative History, supra* note 75, at 2696 ("we have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion"); *id.* at 19 (statement of Judge Maris), *reprinted in Official Legislative History, supra* note 75, at 2705 ("at the same time care has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval"); *id.* at 24 (statement of William Barron), *reprinted in Official Legislative History, supra* note 75, at 2710 ("all persons concerned in this work, have exercised extreme care to avoid any changes of substantive law, concerning which there might be any controversy"); see also 93 Cong. Rec. 5,049 (1947) (statement of Rep. Robsion) ("you will find no radical changes in the philosophy of our criminal law in this bill").

[44]** Thus, while we must not attribute to the 1948 enactment any substantial disruption in prior congressional purpose or policy without first discerning clear evidence that such a departure was intended, the mere fact that we are dealing with a revision-codification does not dictate slavish adherence to the predecessor statutes without regard to whether the new version is essentially compatible with what went before. We are mindful that several times in the last quarter-century the Supreme Court has had occasion to address variances between codified laws and their statutory antecedents, and has held that the meaning of the original statute survived changes in phraseology. We think, however, that close examination of those cases reveals a far more careful and thoughtful approach to interpretation than wooden citation of a canon of construction would suggest.

In *United States v. Cook*, 88 a defendant argued that consolidation of two statutes into a single anti-embezzlement provision 89 effectively excluded a class of employees from the reach of the law. The Court began its analysis by pointing out that this **[*1147]** class had been covered by one of the predecessor statutes; **[**45]** 90 indeed, it observed, Congress had emphasized that coverage just two years prior to the codification. 91 Noting that no "plausible reason" appeared for distinguishing between the class of employees at issue and all other groups of employees plainly subject to the statute, 92 the Court concluded that to accept the defendant's reading was to presume the occurrence in 1948 of a significant and seemingly illogical change in congressional thinking. 93 Nothing in the legislative history hinted at such a deviation; moreover, the language used in the codified version was, in the Court's view, capable of intercepting the disputed class. 94 In these circumstances, the Court held that the antecedent statutes furnished the appropriate measure of the codified provision.

FOOTNOTES

88 384 U.S. 257, 86 S. Ct. 1412, 16 L. Ed. 2d 516 (1966).

89 18 U.S.C. § 660 (1982).

90 *United States v. Cook, supra* note 88, 384 U.S. at 258-260, 86 S. Ct. at 1412-1413, 16 L. Ed. 2d at 517-518.

91 *Id.* at 259, 262, 86 S. Ct. at 1413, 1415, 16 L. Ed. 2d at 518, 520. **[**46]**

92 *Id.* at 262, 86 S. Ct. at 1414, 16 L. Ed. 2d at 519.

93 *Id.*, at 262, 86 S. Ct. at 1414-1415, 16 L. Ed. 2d at 519-520.

94 *Id.* at 260-262, 86 S. Ct. at 1414, 16 L. Ed. 2d at 519.

City of Greenwood v. Peacock, [95] a case decided contemporaneously with *Cook*, also saw the Court scrupulously assessing preexisting legislative intent and policy before determining that a change in phraseology did not work a difference in substance. At issue was a provision which, as codified, governed removal to federal courts of certain state criminal actions implicating civil rights. [96] The Court demonstrated at some length that the argued-for construction would divorce the removal provision from the specific historical and statutory context in which it had developed, and give it a tenor not responsive to the purpose for which it was enacted. [97] The proposed reading also would have expanded the scope of a statute which the Court was inclined to construe cautiously because of the obvious implications of federalism. [98] It therefore looked **[**47]** carefully for some sign of congressional intent to disturb the balance previously reached in this delicate area, and finding none, held that the codified language did not accomplish the modification suggested.

FOOTNOTES

95 384 U.S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966).

96 28 U.S.C. § 1443 (1982).

97 *City of Greenwood v. Peacock, supra* note 95, 384 U.S. at 815-824, 86 S. Ct. at 1805-1810, 16 L. Ed. 2d at 949-954.

98 See generally *id.* at 831-835, 86 S. Ct. at 1814-1816, 16 L. Ed. 2d at 959-961.

Two other cases reflect a similar pattern of analysis. Had the Court in *Fourco Glass Company v. Transmirra Products Corporation* [99] accepted a proposed interpretation of the codified venue provision there at issue, [100] the result would have been an effective overruling of one of its decisions, squarely on point, rendered just six years prior to codification. [101] As the legislative history gave no hint of congressional **[**48]** intent to reverse that ruling, the Court quickly concluded that the newer enactment had not modified the prior law. Contributing to this disposition was the Court's recognition that any other reading would have permitted a generic venue provision to supersede another provision specifically designed to set venue for the class of cases there involved. [102] The Court's reluctance to regard changed language in a codified statute of general applicability as evidence of a congressional policy shift in a specialized area of the law was also evident in *Tidewater Oil Company v. United*

States. [103] According to the petitioner's reading of the interlocutory appeal provisions **[*1148]** there involved, [104] the codification of Title 28 had effected a major transformation of appellate jurisdiction over governmentally-initiated civil antitrust cases. The Court reviewed the course of past legislative activity on that point [105] and concluded that it was a subject which consistently had been treated as "a peculiarly distinct matter." [106] The petitioner's position presupposed not only that Congress had intended to alter the law in this hitherto discrete area simply by modifying an across-the-board **[**49]** appeal provision, but also that in the process Congress had abandoned policies which for many years had guided legislative action on the subject. [107] The Court also perceived the potential for a host of practical problems were the statute to be read as the petitioner suggested. [108] Accordingly, instead of attributing to the codification so drastic a result, the Court searched the legislative history for some evidence of legislative intent, and found not only an absence of affirmative expression of congressional purpose to change existing law on the point, but also some material suggesting the opposite intention. [109]

FOOTNOTES

99 353 U.S. 222, 77 S. Ct. 787, 1 L. Ed. 2d 786 (1957).

100 28 U.S.C. § 1400(b) (1982).

101 *Fourco Glass Co. v. Transmirra Prods. Corp., supra* note 99, 353 U.S. at 224-225, 77 S. Ct. at 789-790, 1 L. Ed. 2d at 788-789.

102 *Id.* at 228-229, 77 S. Ct. at 791-792, 1 L. Ed. 2d at 790-791.

103 409 U.S. 151, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972).

104 28 U.S.C. § 1292 (1982). **[**50]**

105 *Tidewater Oil Co. v. United States, supra* note 103, 409 U.S. at 154-163, 93 S. Ct. at 411-416, 34 L. Ed. 2d at 380-386.

106 *Id.* at 163, 93 S. Ct. at 416, 34 L. Ed. 2d at 386.

107 *Id.* at 165, 93 S. Ct. at 416-417, 34 L. Ed. 2d at 387.

108 *Id.* at 170-173, 93 S. Ct. at 419-421, 34 L. Ed. 2d at 390-392.

109 *Id.* at 166-168, 93 S. Ct. at 417-418, 34 L. Ed. 2d at 387-389.

In two other cases, the Court declined to find in the language of codified statutes a legislative determination to alter time-honored legal principles. The fact that a phrase had been deleted during codification of provisions governing awards of costs [110] was held insufficient in *Alyeska Pipeline Service Company v. Wilderness Society* [111] to demonstrate that Congress meant to disturb the "longstanding rule" restricting recovery by victorious litigants of their attorneys' fees. [112] Similarly, in *Muniz v. Hoffman*, [113] the Court was reluctant to adopt an expansive reading of a section [114] that "created **[**51]** an exception to the historic rule that there was no right to a jury trial in contempt proceedings." [115] To have applied the codification provision literally in that case would have disturbed a preexisting interaction between various labor statutes [116] and upset a previously established legislative compromise [117] that had survived challenge just the year prior to codification. [118] In those circumstances, the Court insisted on some clear evidence of congressional intent to work "a substantial change in accepted practice" through the 1948 revision. [119]

FOOTNOTES

[110] 28 U.S.C. §§ 1920, 1923 (1982).

[111] 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).

[112] *Id.* at 255-256 n.29, 95 S. Ct. at 1621 n.29, 44 L. Ed. 2d at 152 n.29.

[113] 422 U.S. 454, 95 S. Ct. 2178, 45 L. Ed. 2d 319 (1975).

[114] 18 U.S.C. § 3692 (1982).

[115] *Muniz v. Hoffman, supra* note 113, 422 U.S. at 470, 95 S. Ct. at 2187, 45 L. Ed. 2d at 331.

[116] *Id.* at 458-468, 95 S. Ct. at 2181-2186, 45 L. Ed. 2d at 324-330. **[**52]**

[117] *Id.* at 458-459 n.3, 95 S. Ct. at 2181-2182 n.3, 45 L. Ed. 2d at 324-326 n.3.

[118] *Id.* at 464-467, 472, 95 S. Ct. at 2184-2185, 2188, 45 L. Ed. 2d at 328-329, 333.

[119] *Id.* at 470, 95 S. Ct. at 2187, 45 L. Ed. 2d at 331.

Another case meriting brief mention is *Cass v. United States*, 417 U.S. 72, 94 S. Ct. 2167, 40 L. Ed. 2d 668 (1974). Involved there was 10 U.S.C. § 687(a) (1976), which included a "rounding" provision to be applied in the computation of military readjustment pay. The Court refused to read the statute so as to affect *eligibility* for readjustment pay, noting that doing otherwise would introduce a computation formula that Congress had specifically rejected earlier by an amendment clarifying the prior statute. *Id.* at 79-81, 94 S. Ct. at 2171-2172, 40 L. Ed. 2d at 674-675.

Looking at these cases in their entirety, it seems to us that the Supreme Court has clearly expressed its distrust of phraseology born of the revision-codification process in **[**53]** situations where the new language, if **[*1149]** taken literally, would demonstrably conflict with settled precedent or policy, or significantly impede the operation of other, preexisting statutes. In other words, the Court's refusal to accept the purported facial meaning of recodified provisions has been the product, not of an automatic reaction to the mere fact that the language was different, but rather of a wariness to regard particular word-changes as indicative of intended changes of a substantive nature absent some evidence other than the language difference per se. By contrast, a case in which the codified version presents a rule worded differently from but not fundamentally inconsistent with what went before would seem to present far less reason for judicial hesitance to conclude that Congress meant exactly what it said.

At the same time, we recall that the Court has sometimes expressed its reasoning in codification cases in strong and unqualified terms. In *Muniz*, for example, it warned that "in view of the express disavowals in the House and Senate Reports on the revisions of . . . the Criminal Code . . ., it would seem difficult at best to argue that a change in **[**54]** the substantive law could nevertheless be effected by change in the language of a statute without any indication in the Reviser's Note of that change." [120] Of course, as earlier stated, [121] the Reviser's Note to the Trade Secrets Act contains nothing suggesting a conscious decision to criminalize disclosures not within the purview of any of the three predecessor provisions. Nevertheless, and realizing that the question is exceedingly difficult, we think the

Trade Secrets Act, as it emerged from the revision, did exactly that.

FOOTNOTES

120 422 U.S. at 472, 95 S. Ct. at 2188, 45 L. Ed. 2d at 332-333; see also *Hearing Before Comm. on Revision of the Laws, supra* note 75, at 11 (statement of William Barron), *reprinted in Official Legislative History, supra* note 75, at 2672; *Hearing Before Subcomm. No. 1, supra* note 75, at 8 (statement Rep. Keogh), *reprinted in Official Legislative History, supra* note 75, at 2693.

121 See text accompanying note 83 *supra*.

[55]** We base these conclusions partly on the view that a literal reading of the Act does not reflect a true conflict with the apparent original intent of the antecedent statutes. [122] For example, prohibiting federal employees from disclosing trade secrets obtained in the course of any of their official duties is obviously not the same as only prohibiting them from disclosing those trade secrets revealed in Tariff Commission proceedings, but surely this difference does not amount to such a conflict as would raise our suspicion that Congress did not really mean what it ultimately said. If anything, it might be argued that, as no reasonable basis appears for predicating the confidential status of trade secrets when they come into the possession of the Government, the Act expresses more perfectly the fundamental intent of Congress that such data be protected from unauthorized disclosure. [123]

FOOTNOTES

122 The legislative history of those statutes has been reviewed both by the Supreme Court, see *Chrysler Corp. v. Brown, supra* note 1, 441 U.S. at 296-298, 99 S. Ct. at 1714-1716, 60 L. Ed. 2d at 221-223, and by commentators, see, e.g., Clement, *supra* note 72, at 607-613; Note, *supra* 72, at 862-867. We do not reiterate it, for little emerges from that history to illuminate the question here. It does seem a fair generalization, however to say that Congress was motivated by recognition that increased governmental access to financial records and commercial operations of individuals and entities -- access needed to assist and enable enforcement of burgeoning federal regulatory and revenue-raising programs -- had to be accompanied by some restraint on the freedom of governmental employees to disseminate such data to third parties. **[**56]**

123 Indeed, it may be that the drafters, in the process of updating "archaic provisions," *Hearing Before Subcomm. No. 1, supra* note 75, at 19 (statement of Judge Maris), *reprinted in Official Legislative History, supra* note 75, at 2705, and harmonizing "incongruities and inconsistencies which, of necessity, exist when legislation is enacted piecemeal," *Hearing Before Comm. on Revision of the Laws, supra* note 75, at 18 (statement of George Kneip), *reprinted in Official Legislative History, supra* note 75, at 2678, considered it a logical, uncontroversial matter to safeguard the types of information protected by the predecessor statutes without regard to particular channels through which they happen to come into the possession of federal employees.

Our conclusion also rests in significant part on a perception of how much violence the sought-after construction would do to the language of the Trade Secrets Act. To **[*1150]** arrive at the "true" meaning of the Act, one would have to parse every significant phrase and qualify each **[**57]** segment with conditions not even faintly suggested by the words themselves. Thus, disclosure of information that "concerns or relates to" "trade secrets [or] processes"

would be prohibited only if it originated in Tariff Commission proceedings; [124] secrecy of "operations, style of work, or apparatus" would be mandated only if these facts were known to the employee because of a personal visit to the site of manufacture. [125] Similarly, "confidential statistical data" would be shielded if it was furnished in confidence to the Bureau of Foreign and Domestic Commerce, [126] while nondisclosure of the "amount or source of income, profits, losses or expenditures" of any person or business would be required only if the employee discovered that information from examination of a tax return; [127] and the proscription on revealing information about the "identity" of a person or corporation would apply only if its release were made in the course of publishing statistics on domestic commerce. [128]

FOOTNOTES

124 See note 80 *supra*.

125 See note 79 *supra*.

126 See note 81 *supra*. Indeed, there would be substantial question whether such disclosure would be a criminal violation, for the source statute said nothing about criminal liability. **[**58]**

127 See note 79 *supra*.

128 See note 81 *supra*.

We recognize that "'words are inexact tools at best,'" [129] but there is a vast difference between dissecting a statute to arrive at its essential meaning and butchering it. In the codification cases we have discussed, the Supreme Court was confronted with questions of meaning that turned on the addition or deletion of single words, or at most a phrase. In dealing with legislative projects the size of the 1948 revision and codification, we do well to bear in mind the danger of attaching too much significance to such small changes, for these may easily be the product of inadvertence or a failure to appreciate the full consequences of minute alterations. In the case at bar, however, the variation is on a much grander scale. To say that the drafters constructed the Trade Secrets Act as they did and yet thought and intended that it mean exactly what its statutory forerunners had meant is to charge them with a degree of carelessness or sheer blindness that is utterly inconsistent with everything the legislative history reveals about **[**59]** the high quality of the Revision Committee, [130] and that we are unwilling to do.

FOOTNOTES

129 *Tidewater Oil Co. v. United States, supra* note 103, 409 U.S. at 157, 93 S. Ct. at 413, 34 L. Ed. 2d at 382 (quoting *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479, 63 S. Ct. 361, 363, 87 L. Ed. 407, 410 (1943)).

130 See materials cited in note 75 *supra*, and accompanying text. Cf. *FBI v. Abramson, supra*, note 66, 456 U.S. at 635, 102 S. Ct. at 2066, 72 L. Ed. 2d at 391-392 (dissenting opinion) ("in approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation").

Quite importantly, it is a criminal statute that we are construing here. To be sure, the case

against a construction that substantially rewrites the statutory language is arguably weaker when the result narrows rather than expands the reach of the provision in question. **[**60]** Still, we are considerably more reluctant to engraft numerous and significant qualifications onto an apparently clear, unambiguous text where the provision is criminal rather than civil in nature. We realize, however, that the drafters of the 1948 revision and codification were relying on the normal disinclination of courts lightly to infer intentional changes in meaning from mere changes in phrasing. [131] We recognize, too, that one of the primary goals toward which the revisers labored in their years of study and reformulation was that of rendering the law more readily accessible and comprehensible. As Representative Keogh remarked when he introduced the bill that eventually was enacted,

> **[*1151]** it has been our aim in preparing this bill to furnish a modern, simple and understandable code of the Federal criminal law, in keeping with our motto, "making the laws understandable is as important as making the laws." [132]

FOOTNOTES

131 See, e.g., *Hearing Before Subcomm. No. 1, supra* note 75, at 40 (statement of Charles Zinn, Law Revision Counsel), *reprinted in Official Legislative History, supra* note 75, at 2726-2727. **[**61]**

132 92 Cong. Rec. 9,122 (1946).

For all of these reasons, then, we conclude that the scope of the Trade Secrets Act is not delimited by that of its three predecessor statutes. [133] To accept the facially unambiguous language of the Act as accurately expressing the congressional will does not require us to attribute to the 1948 enactment an abandonment of settled legal principles or an abrogation of preexisting precedent. [134] It does not force us to assume that Congress *sub silentio* adopted a position it had earlier considered and rejected. [135] It does not present us with a result that appears illogical or arbitrary in light of the general policies that have informed prior legislative action in the area, [136] nor does it compel us to attribute to Congress an intent to alter the law in a hitherto discrete and specialized area by modifying a provision of general applicability. [137] On the contrary, the changes wrought by the Trade Secrets Act represent a uniform, comprehensive, and reasonable though perhaps stringent approach to discouraging unauthorized disclosures of private commercial **[**62]** and financial data entrusted to the Government. It is our considered view, therefore, that the scope of the Act is at least co extensive with that of Exemption 4 of FOIA, [138] and that, in the absence of a regulation effective to authorize disclosure, the Act prohibits OFCCP from releasing any information in CNA's **[*1152]** affirmative action programs and EEO-1 reports that falls within Exemption 4. [139]

FOOTNOTES

133 This outcome receives at least oblique support from the Supreme Court's decision in *Chrysler Corp. v. Brown, supra* note 1, where the information at issue was of the same type of material -- affirmative action programs and EEOC-1 reports -- that is involved here. See 441 U.S. at 286-287, 99 S. Ct. at 1710, 60 L. Ed. 2d at 215-216. These written submissions obviously did not come to the agency through income tax returns, Tariff Commission or Commerce Bureau proceedings, or personal visits by agency employees. Thus, they would on their face appear to fall outside the reach of the three forerunning statutes. Of course, the Court did not purport to decide that the material was indeed

protected by the Trade Secrets Act, but it was well aware of the existence and scope of the three prior statutes, see *id.* at 296-298, 99 S. Ct. at 1714-1716, 60 L. Ed. 2d at 221-223, and surely would not have remanded for an inquiry that would be patently fruitless. See also *id.* at 319 n.49, 99 S. Ct. at 1726 n.49, 60 L. Ed. 2d at 235 n.49. **[**63]**

134 Cf. *United States v. Cook*, discussed at text accompanying notes 88-94 *supra; City of Greenwood v. Peacock*, discussed at text accompanying notes 95-98 *supra; Fourco Glass Co. v. Transmirra Prods. Corp.*, discussed at text accompanying notes 99-102 *supra; Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, discussed at text accompanying notes 111-112 *supra; Muniz v. Hoffman*, discussed at text accompanying notes 113-119 *supra*.

135 *Cf. Muniz v. Hoffman*, discussed at text accompanying notes 113-119 *supra; Cass v. United States*, discussed at note 119 *supra*.

136 Cf. *United States v. Cook*, discussed at text accompanying notes 88-94 *supra; Tidewater Oil Co. v. United States*, discussed at text accompanying notes 103-109 *supra*.

137 Cf. *Fourco Glass Co. v. Transmirra Prods. Corp.*, discussed at text accompanying notes 99-102 *supra; Tidewater Oil Co. v. United States*, discussed at text accompanying notes 103-109 *supra*.

138 See also, *AT&T Information Sys. v. GSA*, 627 F. Supp. 1396, 1404-1405 (D.D.C. 1986) (accepting parties' agreement that "Exemption 4 and section 1905 of the Trade Secrets Act are co-extensive"); *Canal Ref. Co. v. Corrallo*, 616 F. Supp. 1035, 1042 (D.D.C. 1985) (ample precedent "supports the conclusion that Exemption 4 and § 1905 are coextensive"); cf. *9 to 5 Org. for Women Office Workers v. Board of Governors of the Federal Reserve Sys.*, 721 F.2d 1, 12 (1st Cir. 1983) ("if the government cannot prove that the requested documents are within FOIA exemption 4, their disclosure will not violate section 1905").

The Seventh Circuit appears to have a somewhat different conception of the relative scopes of Exemption 4 and the Trade Secrets Act. In *General Elec. Co. v. United States Nuclear Regulatory Comm'n, supra* note 62, 750 F.2d at 1401-1402, the court stated rather broadly that "the Trade Secrets Act has no independent force in cases where the Freedom of Information Act is involved," and that if the requested document "is not protected by exemption 4, even more clearly it is not protected by section 1905 either." We understand the precise holding in *General Electric*, however, only to mean that the Trade Secrets Act is not more extensive than Exemption 4, a proposition not inconsistent with so much as we decide today. **[**64]**

139 Because FOIA would provide legal authorization for and compel disclosure of financial or commercial material that falls outside of Exemption 4 -- and, of course, any other relevant exemption -- we need not attempt in this case to define the outer limits of the Trade Secrets Act. Accordingly, we do not intimate any view on Professor Davis' suggestion that the Act really prohibits disclosures of the enumerated kinds of data only when they are truly confidential and not available from other sources. See 1 K. Davis, *supra* note 63, § 5:31, at 396.

B. *Application of Exemption 4*

We next consider CNA's contention that OFCCP erred in its interpretation and application of the legal standard summoned by FOIA Exemption 4. 140 The controlling test in this circuit was articulated more than a decade ago in *National Parks & Conservation Association v. Morton*, 141 and has since been consistently followed. 142 In pertinent part, 143 it states that HN7

commercial or financial information is "confidential" **[**65]** under Exemption 4 if disclosure of the information "is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained." [144] This criterion has been interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury. [145] Because OFCCP explicitly stated the proper standard to be applied, [146] our review of the agency decision **[*1153]** is confined to the question whether OFCCP correctly applied that standard to the facts of this case.

FOOTNOTES

[140] See Brief for Appellants at 36-44.

[141] *Supra* note 21.

[142] *Public Citizen Health Research Group v. FDA*, 227 U.S. App. D.C. 151, 161, 704 F.2d 1280, 1290 (1983); *Washington Post Co. v. U.S. Dep't of Health & Human Servs.*, 223 U.S. App. D.C. 139, 155, 690 F.2d 252, 268 (1982); *Worthington Compressors v. Costle, supra* note 5, 213 U.S.App.D.C. at 206, 662 F.2d at 51; *Board of Trade v. Commodities Futures Trading Comm'n*, 200 U.S. App. D.C. 339, 351, 627 F.2d 392, 404 (1980); *Gulf & W. Indus. v. United States*, 199 U.S. App. D.C. 1, 4, 615 F.2d 527, 530 (1979); *Exxon Corp. v. FTC*, 191 U.S. App. D.C. 59, 62 n.1, 589 F.2d 582, 585 n.1 (1978), *cert. denied*, 441 U.S. 943, 99 S. Ct. 2160, 60 L. Ed. 2d 1044 (1979); *National Parks & Conservation Ass'n v. Kleppe, supra* note 5, 178 U.S.App.D.C. at 380-381, 547 F.2d at 677-678; *Braintree Elec. Light Dep't v. Department of Energy*, 494 F. Supp. 287, 289 (D.D.C. 1980). **[**66]**

[143] The first part of the test for confidentiality prohibits disclosure of information likely to "impair the Government's ability to obtain necessary information in the future." *National Parks & Conservation Ass'n v. Morton, supra* note 21, 162 U.S.App.D.C. at 228, 498 F.2d at 770. Because submission of equal employment and affirmative action material is generally compulsory for those who contract with the Federal Government, see 41 C.F.R. § 60-1.7 (1986), this prong of the *National Parks* test, is not at issue here. See *NOW, supra* note 23, 237 U.S.App.D.C. at 128 n.97, 736 F.2d at 737 n.97; *Public Citizen Health Research Group v. FDA, supra* note 142, 227 U.S.App.D.C. at 162 n.29, 704 F.2d at 1291 n.29; *Washington Post Co. v. U.S. Dep't of Health & Human Servs., supra* note 142, 223 U.S.App. D.C. at 155-156, 690 F.2d at 268-269. Nor is the portion of Exemption 4 shielding "trade secrets" from disclosure under FOIA a concern here. See *Public Citizen Health Research Group v. FDA, supra* note 142, 227 U.S.App.D.C. at 157-161, 704 F.2d at 1286-1290 (adopting narrow definition of trade secrets).

CNA has contended briefly that the data at issue are "privileged" within the meaning of Exemption 4. See Brief for Appellant at 44-45. This argument was raised before neither the OFCCP nor the District Court and we therefore do not consider it here. **[**67]**

[144] *National Parks & Conservation Ass'n v. Morton, supra* note 21, 162 U.S.App.D.C. at 228, 498 F.2d at 770 (footnote omitted).

[145] See *Gulf & W. Indus. v. United States, supra* note 142, 199 U.S.App.D.C. at 4, 615 F.2d at 530; *National Parks & Conservation Ass'n v. Kleppe, supra* note 5, 178 U.S.App.D.C. at 382, 547 F.2d at 679.

[146] See *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883, J.App. 160-161.

We decline CNA's invitation to abandon the *National Parks* standard for identifying

Exemption 4 material, in favor of a test that focuses solely on whether the material is "customarily kept confidential" by the submitter. See Brief for Appellants at 35. CNA's assertion that this reassessment is somehow mandated by *Chrysler Corp. v. Brown, supra* note 1, is both an overstatement of the grounds of the Supreme Court's ruling and a misstatement of the grounds of ours.

We are aware that the *National Parks* standard -- which, as we have said, requires a showing that disclosure is likely either to impair the Government's ability to collect needed information or to cause substantial competitive harm to the submitter -- has been criticized. E.g., Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Admin. L. Rev. 193, 195-202 (1977). On the other hand, the *National Parks* interpretation of Exemption 4 has been accepted by numerous federal courts, see, e.g., *9 to 5 Org. for Women Office Workers v. Board of Governors, supra* note 138, 721 F.2d at 8-10; *Orion Research, Inc. v. EPA*, 615 F.2d 551, 554 (1st Cir.), *cert. denied*, 449 U.S. 833, 101 S. Ct. 103, 66 L. Ed. 2d 38 (1980); *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977); *Continental Oil Co. v. FPC*, 519 F.2d 31, 35 (5th Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976); *Martin Marietta Aluminum Inc. v. GSA*, 444 F. Supp. 945, 948 (C.D. Cal. 1977); *United Technologies Corp. v. Marshall, supra* note 23, 464 F. Supp. at 852-853; *Hustead v. Norwood*, 529 F. Supp. 323, 326-327 (S.D. Fla. 1981); *Parkridge Hosp., Inc. v. Blue Cross & Blue Shield*, 430 F. Supp. 1093, 1096-1097 (E.D. Tenn. 1977), *vacated and remanded on other grounds*, 625 F.2d 719 (6th Cir. 1980); *National Western Life Ins. Co. v. United States*, 512 F. Supp. 454, 461-462 (N.D. Tex. 1980); *Burroughs Corp. v. Brown*, 501 F. Supp. 375, 383 (E.D. Va. 1980), and the reliability of the legislative history offered in support of the "customarily kept confidential" standard has been questioned. See Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosure of Business Data*, 1981 Wis. L. Rev. 207, 233 n.134; see also the *1978 FOIA Oversight Report, House Comm. on Government Operations, Freedom Of Information Act Requests For Business Data In Reverse-FOIA Lawsuits*, H.R. Rep. No. 1382, 95th Cong., 2d Sess. 16-21 (criticizing "customarily withheld" test as having "a very insubstantial basis in the legislative history," and as "generally inconsistent with the language of the fourth exemption as well as the policy underlying FOIA"); *9 to 5 Org. for Women Office Workers v. Board of Governors, supra* note 138, 721 F.2d at 7.

We also note that the *National Parks* test became known to and acquiesced in by Congress. In 1976, when Congress was formulating the set of provisions that eventually became the open meeting rules of 5 U.S.C. § 552b, it looked to FOIA for assistance. Several of the exemptions that Congress then inserted to qualify the general mandate of public access were drawn directly from FOIA. See 122 Cong. Rec. 24,181 (1976) (statement of Rep. Abzug); *id.* at 24,212 (statement of Rep. McCloskey); *id.* at 28,473-28,474 (statement of Rep. Horton). The Senate version of the pertinent exemption permitted the closing of meetings where the discussion would

> disclose trade secrets, or financial or commercial information obtained from any person, where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality, or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom such information relates. . . .

S. Rep. No. 354, *supra* note 70, at 57. As is apparent from this language, the Senate bill essentially incorporated the *National Parks* criteria. The House bill reiterated exactly the language that now comprises Exemption 4 of FOIA. See H.R. Rep. No. 880, pt. 1, *supra*

note 37, at 26; pt. 2, *supra* note 70, at 26. When that bill was introduced by Representative Abzug, she explained that it exempted "information that would disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential, as interpreted in cases such as *National Parks & Conservation Ass'n v. Morton*." 122 Cong. Rec. 24,181 (1976) (citation omitted). Thus, when both Houses of Congress provided an exemption of trade secrets and confidential business information from the open-meeting requirement -- an exemption intended to parallel the comparable FOIA exemption -- they accepted the *National Parks* standard as appropriate. Accordingly, the Conference Report explained:

> The language of the House amendment regarding trade secrets and confidential financial or commercial information is identical to the analogous exemption in the Freedom of Information Act, 5 U.S.C. 522(b)(4), and the conferees have agreed to this language *with recognition of judicial interpretations of that exemption*.

H.R. Rep. No. 1441 (Conf.), *supra* note 37, at 15, *reprinted in* [1976] U.S. Code Cong. & Admin. News at 2251 (emphasis added).

This legislative history, while of course not shedding any light on the intent originally underlying enactment of Exemption 4 of FOIA, does reassure us that Congress was aware of *National Parks*, and thought well enough of its construction of FOIA's trade secrets exemption to incorporate it into the new open meeting legislation. Subsequently, the 1978 FOIA oversight report of the House Committee on Government Operations, although not giving unqualified approval to the *National Parks* test, discussed it in a generally positive fashion, and characterized it as a "significant stride in dealing with the problems of confidential business information." H.R. Rep. No. 1382, *supra*, at 19-24.

[68]** As an initial matter, we note that the scope of review of OFCCP's decision is governed by the Administrative Procedure Act. [147] Review of the informal agency action contested here does not involve the "substantial evidence" test, for no hearing on the record was required. [148] *HN8*Rather, **[*1154]** OFCCP's action may be set aside only on one or more of a limited number of bases, of which the relevant one is that it is "arbitrary, capricious [or] an abuse of discretion." [149] Our inquiry must be "searching and careful," [150] but "[a] court is not empowered to substitute its judgment for that of the agency." [151]

FOOTNOTES

147 See *Chrysler Corp. v. Brown, supra* note 1, 441 U.S. at 317, 99 S. Ct. at 1725, 60 L. Ed. 2d at 234.

148 See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-415, 91 S. Ct. 814, 822-823, 28 L. Ed. 2d 136, 152 (1971); see also *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106, 111 (1973). The adequacy of the procedures utilized by OFCCP is more comprehensively discussed in Part IV *infra*. **[**69]**

149 See *Worthington Compressors, Inc. v. Costle, supra* note 5, 213 U.S.App.D.C. at 205, 662 F.2d at 50.

150 *Citizens to Preserve Overton Park v. Volpe, supra* note 148, 401 U.S. at 416, 91 S. Ct. at 824, 28 L. Ed. 2d at 153.

151 *Id.*

CNA and OFCCP disagree on what material is within the purview of Exemption 4. The data that OFCCP proposes to release can be grouped into three principal types: statistics on the racial and sexual composition of the workforce within various CNA departments; goals developed for equal employment purposes; and "applicant flow information" showing the percentage, by race and sex, of applicants hired from without and employees promoted from within. [152]

FOOTNOTES

[152] *CNA Finan. Corp., supra* note 17, at 2, J. App. 235.

CNA's objections and the responses thereto by OFCCP may also be arranged in three occasionally **[**70]** overlapping categories. First, OFCCP says that much of the information sought by CNA to be confined is already publicly available, [153] and this assertion has not been contested before this court. HN9 To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality -- a *sine qua non* of Exemption 4. [154] We do not further consider CNA's arguments regarding these data.

FOOTNOTES

[153] See, e.g., *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 884, J. App. 164 (regulations requiring dissemination); *id.* at 886, J. App. 172 (Securities and Exchange Commission disclosures); *id.*, J. App. 173 (state filing requirement).

[154] See *Worthington Compressors v. Costle, supra* note 5, 213 U.S.App.D.C. at 206, 662 F.2d at 51 ("if the information is freely or cheaply available from other sources . . ., it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm to the submitter").

[71]** Second, several of CNA's claims with respect to other information relate not to alleged competitive harm but rather to anticipated displeasure of its employees or to adverse public reaction. CNA has protested, for example, that release of information on the number of women and minorities hired might result in unfavorable publicity. [155] It also fears that its employees may become "demoralized" following disclosure of data showing the percentage of individuals promoted. [156] We have previously found such complaints unrelated to the policy behind Exemption 4 of protecting submitters from external injury. [157] These proffered objections simply do not amount to "harm flowing from the affirmative use of proprietary information by competitors." [158]

FOOTNOTES

[155] *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 883, J. App. 162.

[156] *Id.* at 885, J. App. 168-169.

[157] See *Public Citizen Health Research Group v. FDA, supra* note 142, 227 U.S.App.D.C. at 162 n.30, 704 F.2d at 1291 n.30; Connelly, *supra* note 146, at 235-236. OFCCP expressed the same concern in its decision. See *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 884, J. App. 163. **[**72]**

158 *Public Citizen Health Research Group v. FDA, supra* note 142, 227 U.S.App.D.C. at 162 n.30, 704 F.2d at 1291 n.30 ("'competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to governmental officials or violations of civil rights, environmental or safety laws'") (quoting Connelly, *supra* note 146, at 235-236).

The remaining disagreements between CNA and OFCCP concern the long-range consequences of the release of the data at issue. CNA submitted affidavits predicting a number of harmful effects; OFCCP, **[*1155]** while offering no independent evidence, has answered these contentions with its own predictions of the repercussions of disclosure. One noteworthy objection by CNA to revelation of applicant flow data is that it would enable competitors more easily to direct their recruiting efforts to the best sources of potential employees. [159] OFCCP **[**73]** counters with the logical rejoinder that these data will not be of any particular help to competitors since the employee-source and employee-position categories are broad, and the applicant pool is a function of the labor market and beyond an individual competitor's control. [160]

FOOTNOTES

159 See *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885, J. App. 167.

160 *Id.*

These and other similar contentions [161] presented no more than two contradictory views of what likely would ensue upon release of information that CNA sought to protect. In each case, OFCCP retorted with reasonable and thorough prognoses of its own. We thus are confronted by the type of judgments and forecasts courts traditionally leave largely to agency expertise, with judicial review limited by the narrow standard sanctioned. [162] After careful consideration of OFCCP's decision, we are satisfied that it cannot in any way be characterized as arbitrary, capricious, or an abuse of discretion. **[**74]** CNA's objections were answered fully, and OFCCP's explanations of anticipated effects were certainly no less plausible than those advanced by CNA. Each of OFCCP's explanations is well reasoned, logical and consistent, and predictive judgments are not capable of exact proof. We find OFCCP's application of Exemption 4 entirely rational, and therefore legally permissible.

FOOTNOTES

161 For example, CNA insisted that an outside recruiter armed with information supplied in its affirmative action and EEO-1 filings would be able to persuade CNA employees to leave for greener pastures. *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 885, J. App. 169-170. OFCCP sensibly responded that the employees themselves are likely to have the more accurate knowledge of the potential for advancement. *Id.* CNA further argued that use of the staffing figures set forth in its disclosures would allow competitors to observe subtle changes in CNA's allocation of personnel and thereby deduce its marketing strategies. *Id.* at 886, J. App. 171-172. After pointing out that much of this information was stale, *id.*, OFCCP observed that "the most a rival could gain from the staffing information . . . is some vague, indefinite insight into the firm's priorities . . . which would not be of significant competitive value." *Id.* **[**75]**

162 See notes 147-151 *supra* and accompanying text.

We find support for these conclusions in the deference the Supreme Court has accorded agency forecasts in other contexts. In a typical example, *FPC v. Transcontinental Gas Pipe Line Corp.*, [163] the Court upheld action by the Federal Power Commission based in part on a prediction that widespread, unrestricted direct sales of natural gas would probably result in price increases. [164] This prediction was grounded solely on the agency's expertise, and not on any material in the administrative record. [165] The Court specifically rejected the argument that the Commission "should have adduced testimonial and documentary evidence to the effect that this forecast would come true." [166] More recently, in *FCC v. National Citizens Committee for Broadcasting*, [167] the Court held that an agency's "judgmental or predictive" determinations [168] need not be supported by **[*1156]** record evidence. [169] The Court upheld, in the context of formal rulemaking regulations, barring initial licensing and transfer of broadcast facilities when a station **[**76]** and a daily newspaper in the same community shared common ownership. [170] The Court explained that "'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" [171]

FOOTNOTES

163 365 U.S. 1, 81 S. Ct. 435, 5 L. Ed. 2d 377 (1961).

164 *Id.* at 29, 81 S. Ct. at 450, 5 L. Ed. 2d at 395.

165 The Court also found solace in the "common sense" of the argument accepted by FPC. See *id.* at 30, 81 S. Ct. at 450, 5 L. Ed. 2d at 395.

166 *Id.* at 29, 81 S. Ct. at 450, 5 L. Ed. 2d at 395.

167 436 U.S. 775, 98 S. Ct. 2096, 56 L. Ed. 2d 697 (1978).

168 *Id.* at 813, 98 S. Ct. at 2121, 56 L. Ed. 2d at 726. The Court characterized the questions determined as

> whether a divesture requirement would result in trading of stations with out-of-town owners; whether new owners would perform as well as existing crossowners, either in the short run or in the long run; whether losses to existing owners would result from forced sales; whether such losses would discourage future investment in quality programming; and whether new owners would have sufficient working capital to finance local programming.

Id. at 813-814, 98 S. Ct. at 2121, 56 L. Ed. 2d at 726. **[**77]**

169 *Id.* at 814, 98 S. Ct. at 2121, 56 L. Ed. 2d at 726; see also *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241, 66 S. Ct. 75, 77, 90 L. Ed. 38, 42 (1945); *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548, 560-561, 65 S. Ct. 770, 776-777, 89 L. Ed. 1171, 1181-1182 (1945); 3 K. Davis, *supra* note 63, § 15.9, at 168-171.

170 *FCC v. National Citizens Comm. for Broadcasting, supra* note 167, 436 U.S. at 779, 98 S. Ct. at 2104, 56 L. Ed. 2d at 704.

171 *Id.* at 814, 98 S. Ct. at 2121, 56 L. Ed. 2d at 726 (quoting *FPC v. Transcontinental Gas Pipe Line Corp., supra* note 163, 365 U.S. at 29, 81 S. Ct. at 450, 5 L. Ed. 2d at

395).

We are aware that FOIA applies to all executive agencies subject to its requirements, and that no agency is charged singly with its enforcement. [172] OFCCP, however, stands out in its endeavor to acquire additional expertise by hiring a consultant to evaluate the data submitted by CNA. [173] The report submitted by OFCCP's outside **[**78]** expert served as a fair substitute for agency experience and, when coupled with OFCCP's own evaluation of CNA's objections, produced a well-supported agency forecast. Given the Supreme Court's recognition of agencies' freedom to make predictive determinations in more formal settings without additional evidence, we conclude that the same discretion must be indulged to OFCCP's evaluations of the effect of release of the documents in dispute.

FOOTNOTES

172 See *NOW, supra* note 23, 237 U.S.App.D.C. at 126 n.79, 736 F.2d at 735 n.79.

173 See Part IV(C) *infra*.

IV. PROCEDURAL ISSUES

In addition to the substantive questions we have discussed, CNA presents procedural challenges to the manner in which OFCCP and the District Court undertook to adjudicate its claims of serious competitive harm. A review of the procedural course by which this case arrived in this court will assist explanation of these claims.

A. *Procedural History*

After obtaining from the District Court, **[**79]** in April, 1977, an order restraining release pending completion of the administrative appeal process, [174] CNA filed with OFCCP a five-volume index specifying its objections to FOIA disclosure. [175] CNA supported its factual allegations with affidavits or depositions of its director of employment, [176] its vice-president for personnel, [177] an outside personnel recruiter -- or "headhunter" [178] -- and a consultant with a doctorate in business administration. [179] No oral presentation was made. In October, 1978, OFCCP issued its first decision, which ordered release of the affirmative action programs and EEO-1 reports, with wage and certain identifying data deleted. [180] CNA **[*1157]** promptly returned to the District Court seeking an injunction against any disclosure pending completion of judicial review.

FOOTNOTES

174 See note 15 *supra* and accompanying text.

175 In format and content this index was similar to the type of document we prescribed in *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974). **[**80]**

176 Affidavit of Gerald C. Hoglund, J. App. 56.

177 Deposition of George L. Reichert, J. App. 98; Affidavit of George L. Reichert, J. App. 244.

178 Deposition of Joseph Johnson, J. App. 81.

179 Affidavit of Dr. Marcus Cook Bogue, III, J. App. 44. Apparently, Dr. Bogue also gave a deposition that was tendered to the agency, but that deposition is not incorporated into the appeal record.

180 This decision was issued in the form of a letter dated October 4, 1978, from the Director of OFCCP to counsel for CNA. The letter was appended to a filing in which the agency defendants notified the District Court that administrative proceedings had terminated. See Attachment to Notice of Final Agency Decision, *CNA Finan. Corp. v. Donovan*, Civ. No. 77-0808 (D.D.C.) (filed Oct. 19, 1978).

On the District Court's refusal to impose the requested restraint, [181] CNA applied to this court and was granted an interim injunction. [182] We also stayed all proceedings in the case in order to benefit from the Supreme Court's impending decision in *Chrysler Corporation v. Brown*. [183] **[**81]** When *Chrysler* issued, we remanded the case to the District Court with directions to "order the appropriate agenc[y] to make new administrative determinations in accordance with [its] normal rules of practice and in light of the Supreme Court's opinion in *Chrysler Corporation v. Brown*." [184] Thus, in November, 1979, the matter was again before OFCCP.

FOOTNOTES

181 See *CNA Finan. Corp. v. Donovan*, Civ. No. 77-0808 (D.D.C. Nov. 7, 1978) (order denying plaintiffs' motion to amend temporary restraining order); *id.* (D.D.C. Nov. 9, 1978) (order denying plaintiffs' motion for injunction pending appeal).

182 *CNA Finan. Corp. v. Marshall*, No. 78-2168 (D.C. Cir. Nov. 29, 1978).

183 *Id.*

184 *CNA Finan. Corp. v. Marshall*, No. 78-2168 (D.C. Cir. Oct. 5, 1979), J. App. 125.

At this juncture, CNA asked the agency to afford it an evidentiary hearing, [185] at which CNA presumably would have presented expert testimony and examined witnesses on whose opinions OFCCP intended to rely. **[**82]** By letter from the director of OFCCP, such a hearing was denied; [186] instead, the agency offered to accept any written submissions CNA cared to make. [187] In November, 1980, OFCCP issued its second and most detailed decision. [188] As we stated at the outset, the agency rejected CNA's legal arguments on the scope of FOIA Exemptions 3 and 4 and the Trade Secrets Act, and, as well, its factual assertions of competitive harm that allegedly would be precipitated by disclosure. [189] Returning once again to the District Court, CNA filed an opposition to the agency's decision. [190] It tendered four supplemental affidavits aimed at controverting OFCCP's conclusions about staleness of the requested data, and attacking several other elements of the agency's reasoning. [191]

FOOTNOTES

185 Letter from Jeffrey L. Berger, counsel for CNA, to Weldon J. Rougeau, Director of OFCCP (Jan. 4, 1980), J. App. 127.

186 Letter from Weldon J. Rougeau to Jeffrey L. Berger (Feb. 15, 1980), J. App. 129.

187 The record does not reflect what form this offer took. In its second decision, issued November 28, 1980, OFCCP recounts that "on May 28, 1980 [the Department of Labor]

advised CNA that it would consider any written arguments and supporting documents submitted by CNA Financial Corp. as to why the records should not be disclosed." *CNA Finan. Corp., supra* note 10, 24 Fair Empl. Prac. Cas. (BNA) at 881, J. App. 154. **[**83]**

188 *CNA Finan. Corp., supra* note 10.

189 See notes 20-26 *supra* and accompanying text.

190 Memorandum in Opposition to an Administrative Decision to Disclose Data, *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Mar. 11, 1981).

191 The affiants were John H. Hinrichs, a professor holding a doctorate in industrial and labor relations; David T. Rutenberg, a professor holding a doctorate in business administration; Patricia M. Higgens, CNA's equal employment opportunity compliance officer; and Philip L. Engel, CNA's vice-president of marketing. Appendix to Memorandum in Opposition to an Administrative Decision to Disclose Data, *supra* note 190, J. App. 197-225.

At this point, some collateral procedural problems arose. It appeared that the agency, in forwarding the administrative record to the District Court, omitted three depositions CNA had submitted at the onset of the controversy. [192] More significantly, CNA discovered that OFCCP had engaged its own outside expert, Professor Boyd Fjelsted, to review CNA's submissions and render **[**84]** an opinion on the substantiality of the competitive threat they described. [193] **[*1158]** CNA demanded the opportunity to review and respond to Fjelsted's reports; [194] OFCCP adamantly refused to reveal them; [195] and the District Court ordered *in camera* inspection. [196] After reviewing the reports, the court sustained OFCCP's refusal to disclose them on grounds that they constituted privileged "deliberative materials" of an "agency decisionmaker." [197] The court agreed with CNA, however, that the three omitted depositions should have been made a part of the record upon which the agency rested its decision. [198] It therefore remanded the matter to OFCCP with directions that the agency consider the depositions. [199]

FOOTNOTES

192 These were the depositions of George L. Reichert, Joseph Johnson, and Dr. Bogue, see notes 177-179 *supra*. Plaintiff's Motion to Complete the Administrative Record, *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Mar. 2, 1981).

193 This revelation apparently came through affidavits filed in the District Court by the director and the chief of special studies of OFCCP subsequent to our remand for reconsideration in light of *Chrysler*. In the course of completing its court-ordered review, OFCCP requested several extensions of time; these affidavits, which sought to explain why extensions were warranted, referred to OFCCP's attempts to obtain the opinion of an outside economist, Dr. Fjelsted, on CNA's submissions and arguments. See Affidavit of Weldon J. Rougeau (filed Feb. 27, 1980) [hereinafter Rougeau Affidavit] and Affidavit of Robert E. Gelerter (filed July 1, 1980) [hereinafter Gelerter Affidavit], *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C.), J. App. 135-136, 137-139. **[**85]**

194 See Plaintiff's First Request for Production of Documents (filed Jan. 27, 1981) and Plaintiff's Motion to Compel Discovery and Filing of the Entire Administrative Record, *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Jan. 30, 1981).

195 Defendants' Motion for Protective Order and Opposition to Motion to Compel Discovery and Filing of the Entire Administrative Record, *CNA Finan. Corp. v. Marshall*, Civ. No. 77-

0808 (D.D.C.) (filed Feb. 9, 1981).

196 *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C. Mar. 10, 1981) (order directing submission of documents for *in camera* inspection).

197 *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C. May 29, 1981) (order granting defendants' motion for protective order) at 2, J. App. 226-227 [hereinafter Protective Order].

198 *Id.* at 3, J. App. 228.

199 *Id.* at 4, J. App. 229.

On remand, CNA again requested an evidentiary hearing, [200] which again was denied. At the same time, it tendered to OFCCP the four supplemental affidavits it had presented to the District Court. **[**86]** OFCCP's third decision, issued in July, 1981, reaffirmed its earlier conclusions. [201] It found the depositions either merely cumulative of other material it had already reviewed, or, in some instances, actually inconsistent with that material. [202] The agency refused to take the four supplemental affidavits into account on grounds that they were beyond the scope of the District Court's remand order. [203] OFCCP represented nonetheless that it had looked at the affidavits and found them insufficient to change its views. [204]

FOOTNOTES

200 Letter from Jeffrey S. Goldman, counsel for CNA, to Ellen Shong, Director of OFCCP, with attached motion (June 17, 1981), J. App. 230-233.

201 *CNA Finan. Corp. supra* note 17.

202 See, e.g., *id.* at 3-4, 7-8, J. App. 236-237, 240-241.

203 *Id.* at 9, J. App. 242.

204 *Id.*

Back in the District Court again, CNA requested alternatively a remand to OFCCP with directions to hold an evidentiary hearing, or resolution of the factual issues **[**87]** de novo in the District Court. [205] The court turned down the plea for remand. It held that, contrary to CNA's interpretation, OFCCP regulations did not contemplate an evidentiary hearing in order to evaluate a contractor's opposition to FOIA-release of its affirmative action materials. [206] The **[*1159]** court also denied CNA's demand for consideration of the issues de novo. It reasoned that the Administrative Procedure Act fixed the standard and scope of review at determination whether OFCCP's decision was arbitrary or capricious on the basis of the administrative record. [207] Accordingly, the court granted judgment for the agency without independently receiving any evidence.

FOOTNOTES

205 Plaintiff's Motion to Remand Case, or, in the Alternatve, to Obtain a De Novo Trial, *CNA Finan. Corp. v. Marshall*, Civ. No. 77-0808 (D.D.C.) (filed Aug. 17, 1981).

206 *CNA Finan. Corp. v. Donovan, supra* note 12, at 6-7, J. App. 21-22.

The regulations upon which CNA relied are set out in 41 C.F.R. pt. 60-30 (1986). In rejecting CNA's argument, the District Court reasoned:

> The hearing rules set out in Part 60-30 are expressly limited to proceedings concerning the enforcement of the Executive Order's equal opportunity goals. [41 C.F.R.] § 60-30.1. Although the [affirmative action program] materials at issue here were prepared in connection with the OFCCP's responsibility to enforce the presidential directive, a dispute over whether they are protected from disclosure under the Trade Secrets Act does not involve enforcement of equal opportunity.

CNA Finan. Corp. v. Donovan, supra note 12, at 6, J. App. 21. See notes 208-216 *infra* and accompanying text. **[**88]**

207 *CNA Finan. Corp. v. Marshall, supra* note 12, at 10-11, J. App. 25-26.

B. *Adequacy of OFCCP Procedures*

CNA's broadest challenge is to the procedure employed by OFCCP in evaluating the competitive effect of releasing CNA's filings. CNA maintains that the agency's refusal to afford an evidentiary hearing violated its rights under the Due Process Clause, the Administrative Procedure Act, and OFCCP's own regulations. [208] CNA apparently believes that such a hearing is essential at the agency level to assure an adequate resolution of factual issues. We cannot agree.

FOOTNOTES

208 See Brief for Appellants at 16, 19-29.

We note initially, as did the District Court in its opinion, [209] the regulation governing contractors' objections to disclosure of affirmative action materials. [210] *HN10*It requires a contractor to identify **[**89]** "the reasons why such information is not disclosable" [211] and, after an initial determination by OFCCP personnel, directs the agency to inform the contractor of its decision. [212] The regulation also provides for appeal of that ruling to the director of OFCCP, who must then render a "final determination." [213] The regulation makes no mention of an evidentiary hearing, or indeed of any review procedures at all. We can hardly take issue with the District Court's finding that OFCCP did not transgress its own skeletal constraints.

FOOTNOTES

209 *CNA Finan. Corp. v. Donovan, supra* note 12, at 6-7, J. App. 21-22.

210 41 C.F.R. § 60-60.4(d) (1986).

211 *Id.*

212 *Id.*

213 *Id.*

Hardly more substantial is CNA's claim that the agency factfinding procedures ran afoul of Section 10 of the Administrative Procedure Act [214] and impinged on the full spectrum of review assured by the Due Process Clause. This court recently entertained a nearly identical complaint in *NOW*, [215] in which **[**90]** we found the OFCCP review sufficient to allay concerns about fairness to the submitters of information. [216] The holding in *NOW* is dispositive on this issue, and we dismiss without further discussion CNA's claim in that regard.

FOOTNOTES

214 5 U.S.C. § 706(2)(1982).

215 *Supra* note 23.

216 237 U.S.App.D.C. at 135-138, 736 F.2d at 744-747.

C. *OFCCP's Expert's Report*

CNA registers an additional objection predicated upon OFCCP's refusal to produce Dr. Fjelsted's report for CNA's examination and rebuttal. [217] CNA believes that the information contained in this report weighed heavily in OFCCP's assessment of competitive effect, and that CNA's inability to respond specifically to the expert's conclusion constituted reversible error. [218] The agency, for its part, asserts that the report was a deliberative, predecisional document privileged against disclosure through discovery. [219] We discuss this issue separately because it demands careful balancing **[**91]** of the competing interests of both sides.

FOOTNOTES

217 Brief for Appellants at 19-21.

218 *Id.* at 16, 20-21.

219 Brief for Appellees at 14-23.

Our analysis begins, as it must, with a guarantee attending agency adjudication. A precept fundamental to the administrative **[*1160]** process is that HN11 a party must have an opportunity to refute evidence utilized by the agency in decisionmaking affecting his or her rights. [220] A decade ago, in *Ralpho v. Bell*, [221] we declined to uphold a property valuation by the Micronesian Claims Commission that was based in part on evidence unavailable to Ralpho. A "value study," conducted and used by the Commission in assessing property claims, was actually an assemblage of interviews, records, and other data relating the average price of goods and services in Micronesia. [222] We held that, the Commission, by denying Ralpho an opportunity to inspect and counter the factual **[**92]** information compiled in the study, impermissibly truncated even the minimal procedures required of an agency. [223]

FOOTNOTES

220 *Morgan v. United States*, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129,

1132-1133 (1938); *Ohio Bell Tel. v. Public Utils. Comm'n*, 301 U.S. 292, 302-303, 57 S. Ct. 724, 729-730, 81 L. Ed. 1093, 1100-1101 (1937); *Ralpho v. Bell*, 186 U.S. App. D.C. 368, 389-390, 569 F.2d 607, 628-629 (1977); *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568, 585, 188 Ct. Cl. 644, 671-672 (1969).

221 *Supra* note 220.

222 186 U.S.App.D.C. at 374-375, 569 F.2d at 613-614.

223 *Id.* at 389-390, 569 F.2d at 628-629.

HN12 The general requirements of disclosure to a litigant of material to be considered by an agency in an adjudicative proceeding [224] is modified where the agency asserts **[**93]** a privilege respecting material generated in the process of agency decisionmaking. [225] When agency material is "deliberative" [226] or "recommendatory" [227] in character, and does not of itself inject new factual data into the calculus, the agency is privileged to withhold it. This privilege is designed to ensure the full measure of agency decisionmaking; [228] by removing the chilling effect of possible future disclosure, inhibitions on candid expression are dissolved. [229]

FOOTNOTES

224 See also Fed. R. Civ. P. 26(b)(1) (providing that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action").

225 See, e.g., *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 149 U.S. App. D.C. 385, 463 F.2d 788, *cert. denied*, 404 U.S. 917, 92 S. Ct. 242, 30 L. Ed. 2d 191 (1971); *Freeman v. Seligson*, 132 U.S. App. D.C. 56, 405 F.2d 1326 (1968); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 128 U.S. App. D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952, 88 S. Ct. 334, 19 L. Ed. 2d 361 (1967). FOIA Exemption 5 embodies the privilege by excepting from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1982). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S. Ct. 1504, 1515-1516, 44 L. Ed. 2d 29, 46-47 (1975); *EPA v. Mink, supra* note 66, 410 U.S. at 86-89, 93 S. Ct. at 835-837, 35 L. Ed. 2d at 131-133. As the Supreme Court stated in *Mink*:

> It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies. And . . . that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

EPA v. Mink, supra note 66, 410 U.S. at 91, 93 S. Ct. at 838, 35 L. Ed. 2d at 134; see also *NLRB v. Sears, Roebuck & Co., supra*, 421 U.S. at 150, 95 S. Ct. at 1516, 44 L. Ed. 2d at 47; *McClelland v. Andrus*, 196 U.S. App. D.C. 371, 380 n.54, 606 F.2d 1278, 1287 n.54 (1979). **[**94]**

226 E.g., *EPA v. Mink, supra* note 66, 410 U.S. at 89, 93 S. Ct. at 837, 35 L. Ed. 2d at

133.

227 E.g., *Coastal States Gas Corp. v. Department of Energy*, 199 U.S. App. D.C. 272, 284, 617 F.2d 854, 866 (1980).

228 E.g., *Jordan v. Department of Justice*, 192 U.S. App. D.C. 144, 163, 591 F.2d 753, 772 (1978).

229 See *McClelland v. Andrus, supra* note 225, 196 U.S.App.D.C. at 380, 606 F.2d at 1287 ("the purpose of this privilege is to foster freedom of expression among governmental employees involved in decisionmaking and policy formulation"); *Carl Zeiss Stiftung v. V.E.B. Zeiss, Jena, supra* note 225, 40 F.R.D. at 324-325 ("the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those obtained by other privileges more ancient and commonplace in character") (footnotes omitted).

[95]** The materials at issue here consist solely of Dr. Fjelsted's information **[*1161]** already submitted by CNA to OFCCP and his recommendations as to the course he felt it should follow. [230] Dr. Fjelsted did not provide any new data of his own. The District Court conducted an *in camera* inspection [231] of Dr. Fjelsted's reports and concluded:

> A review of the reports and the affidavit by Kenneth G. Patton, acting director of the OFCCP, demonstrates that . . . [Fjelsted's reports] contain document-by-document recommendations to the agency as to how it should act on CNA's claims that disclosure would lead to competitive harm. These recommendations were part of the agency give-and-take by which its final determination was made. [232]

FOOTNOTES

230 See Rougeau Affidavit, *supra* note 193, J. App. 135-136; Gelerter Affidavit, *supra* note 193, J. App. 137-139.

231 Cf. *United States v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953); *Black v. Sheraton Corp.*, 184 U.S. App. D.C. 46, 59, 564 F.2d 531, 544 (1977).

232 Protective Order, *supra* note 197, at 2, J. App. 227.

[96]** It is clear enough to us that OFCCP was entitled to shield from discovery reports consisting solely of analyses of data and recommendations of agency action predicated thereon. Unlike the appellant in *Ralpho v. Bell*, [233] CNA was not confronted with an unascertainable store of knowledge which it was called upon haphazardly to rebut. The factual information relied on by Dr. Fjelsted was, of course, available to CNA; indeed, much of it was supplied by CNA itself. [234] Furthermore, Dr. Fjelsted's analysis, though perhaps influential in OFCCP's appraisal of the commercial impact of the contested material, was in no sense binding, for OFCCP was free to modify or even reject these analyses and recommendations. We conclude that CNA has no legally cognizable basis for complaining of OFCCP's decision to withhold Dr. Fjelsted's report.

FOOTNOTES

233 *Supra* note 220.

234 See Protective Order, *supra* note 197, at 1-3, J. App. 226-228.

It likewise is clear that the agency's privilege to withhold the reports **[**97]** is unaffected by the fact that they were prepared by a consultant from outside the agency. In *Ryan v. Department of Justice*, [235] we recognized that

> in the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions. [236]

Thus, in that case we held exempt from production those nonfactual portions of responses by Senators to questionnaires propounded by the Attorney General. [237] Any material that might reveal decisionmaking or policymaking activity was considered privileged. [238]

FOOTNOTES

235 199 U.S. App. D.C. 199, 617 F.2d 781 (1980).

236 *Id.* at 207-208, 617 F.2d at 789-790.

237 *Id.* at 209, 617 F.2d at 791.

238 *Id.*

[98]** Similarly, courts have repeatedly found that HN13 a privilege attaches to reports of outsiders commissioned by an agency to perform agency work, when such reports would be protected if compiled within the agency itself. [239] Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character it is privileged from **[*1162]** disclosure, notwithstanding its creation by an outsider. [240]

FOOTNOTES

239 See, e.g., *Soucie v. David*, 145 U.S. App. D.C. 144, 155 n.44, 448 F.2d 1067, 1078 n.44 (1971); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Hoover v. Department of Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980); *Wu v. National Endowment for the Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972), *cert. denied*, 410 U.S. 926, 93 S. Ct. 1352, 35 L. Ed. 2d 586 (1973).

240 See Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1063-1066 (1973).

[99]** A moment's reflection will reveal the reason why. Professor Davis, in discussing the difficulty of the task confronting agency decisionmakers, has commented that "able administrators . . . have almost uniformly concluded that deciding officers should have the assistance both of reviewing staffs and of agency specialists." [241] Moreover, it is clear that "deciding officers need the special strength that comes from ready access to staff specialists." [242] Then, too, federal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unravelling their knotty complexities. [243]

FOOTNOTES

241 3 K. Davis, *supra* note 63, § 17:8, at 306.

242 *Id.* § 17:10, at 309.

243 See *Soucie v. David, supra* note 239, 145 U.S.App.D.C. at 155 n.44, 448 F.2d at 1078 n.44 (agencies frequently have "a special need for the opinions and recommendations of temporary consultants"); *Hoover v. Department of Interior, supra* note 239, 611 F.2d at 1138 (such advice from intermittant consultants often "plays an integral function in the government's decision").

[100]** This is not to say that any material derived from an outside expert is inviolable; factual data, for example, are still susceptible to discovery. [244] But where, as here, a consultant is retained to evaluate information and submit recommendations as to decisions thereon, the advice or opinion transmitted to the agency is subject to privileged withholding. To force an exposure is to "stifle honest and frank communication" [245] between agency and expert by inhibiting their free exchange of thought.

FOOTNOTES

244 See, e.g., *EPA v. Mink, supra* note 66, 410 U.S. at 87-88, 93 S. Ct. at 836, 35 L. Ed. 2d at 132-133; *Ralpho v. Bell, supra* note 220, 186 U.S.App.D.C. at 389-390, 569 F.2d at 628-629; *Montrose Chem. Corp. v. Train*, 160 U.S. App. D.C. 270, 273-274, 491 F.2d 63, 66-67 (1974).

245 *Coastal States Gas Corp. v. Department of Energy, supra* note 227, 199 U.S.App.D.C. at 284, 617 F.2d at 866.

D. **[**101]** *Proceedings Before the District Court*

CNA's final procedural challenge is to the level of scrutiny afforded in the District Court. CNA believed that it was entitled to de novo review, replete with testimony and cross-examination. [246] The District Court disagreed, confining itself to an examination of the record compiled before OFCCP. [247] Our reading of the Supreme Court's teachings in *Camp v. Pitts* [248] and *Citizens to Preserve Overton Park, Inc. v. Volpe*, [249] together with our own conclusion in *NOW*, [250] convinces us that the District Court behaved entirely correctly.

FOOTNOTES

246 Brief for Appellants at 21-29.

247 See *CNA Finan. Corp. v. Donovan, supra* note 12, at 11, J. App. 26.

248 *Supra* note 148.

249 *Supra* note 148.

250 *Supra* note 23.

Both *Camp* and *Overton Park* HN14 authorize de novo judicial review under the Administrative Procedure Act [251] only **[**102]** when the agency's "factfinding procedures are inadequate." [252] Our decision in *NOW* [253] upheld the procedures employed by the OFCCP in reverse-FOIA actions -- procedures which have largely been replicated here. [254] We thus sustain the District Court in its refusal to review the case de novo.

FOOTNOTES

251 See 5 U.S.C. § 706(2)(F) (1982).

252 *Camp v. Pitts, supra* note 148, 411 U.S. at 141-142, 93 S. Ct. at 1243-1244, 36 L. Ed. 2d at 111; *Citizens to Preserve Overton Park, Inc. v. Volpe, supra* note 148, 401 U.S. 415, 91 S. Ct. at 823, 28 L. Ed. 2d at 153.

253 *NOW, supra* note 23, 237 U.S.App.D.C. at 135-138, 736 F.2d at 744-747.

254 See notes 174-204 *supra* and accompanying text.

V. CONCLUSION

We agree with the District Court that "the agency's decision thoroughly discusses CNA's objections and presents 'a reasoned **[*1163]** and detailed basis for its decision.'" [255] **[**103]** Because the agency's decision to release the documents found to be outside Exemption 4 must be upheld, and because the procedures employed by OFCCP were legally sufficient, the stay instituted pending appeal [256] is dissolved and the decision of the District Court is

FOOTNOTES

255 *CNA Finan. Corp. v. Donovan, supra* note 12, at 10-11, J. App. 25-26 (quoting *General Motors Corp. v. Marshall, supra* note 62, 654 F.2d at 300).

256 *CNA Finan. Corp. v. Donovan*, No. 81-2169 (D.C. Cir. Nov. 13, 1981).

Affirmed.

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