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CHRYSLER CORP. v. BROWN: GREATER PROTECTION FOR CORPORATE SECRECY

The United States Supreme Court recently handed down its long awaited decision in *Chrysler Corp. v. Brown*,¹ the first “reverse” Freedom of Information Act (FOIA)² case to be heard by the Court. A reverse FOIA lawsuit is an action in which a private party—usually a business entity—sues to enjoin a government agency from disclosing information that the private party has submitted to the agency. The FOIA is primarily intended to provide public access to government records.³ Thus, the FOIA explicitly confers jurisdiction upon federal district courts to review agency decisions to withhold information.⁴ A reverse FOIA lawsuit plaintiff, however, has no explicit statutory basis for relief under the FOIA because the Act does not grant to the courts the jurisdiction to review agency decisions to *disclose* information.

1. 441 U.S. 281 (1979), *rev'g* Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3d Cir. 1977).

2. 5 U.S.C. § 552 (1976).

3. The FOIA was signed into law by President Johnson on July 4, 1966, as Public Law 89-487, codified at 5 U.S.C. § 552, effective on July 4, 1967. It was enacted as a revision of § 3 of the Administrative Procedure Act (APA) of 1946. Section 3 was the first general statute providing for public disclosure of government records. But, as enacted, § 3 contained disabling loopholes due to vague provisions, such as “matters of official record shall in accordance with published rule be made available to *persons properly and directly concerned* except information held confidential for *good cause found*.” 60 Stat. 238 (1946) (formerly codified at 5 U.S.C. § 1002) (emphasis added). Section 3 also excluded the disclosure of information requiring secrecy in the public interest. In fact, agencies relied on § 3 to withhold information. It was “cited as statutory authority for the withholding of virtually any piece of information that an official or any agency . . . [did] not wish to disclose.” S. REP. NO. 89-813, 89th Cong., 1st Sess. 4 (1965).

The FOIA, which replaced § 3, was enacted for the purpose of establishing “a general philosophy of full agency disclosure.” *Id.* at 3. The 1974 amendments to the FOIA were “designed to facilitate freer and more expeditious public access to government information, to encourage more faithful compliance with the terms and objectives of the FOIA.” S. REP. NO. 93-854, 93d Cong., 2d Sess. 1 (1974). The 1976 amendments were intended to restrict the broad provisions of pre-existing nondisclosure statutes that contravened the policy of the FOIA. Exemption 3 of the FOIA was amended to include only matters required to be withheld by a statute establishing “particular criteria for withholding” or “particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3) (1976), the text of which is set forth in note 6 *infra*. The 1978 amendments were minor, specifying the Special Counsel for the Civil Service Commission as an organ to investigate an agency’s wrongful withholding of information. *See* 5 U.S.C.A. § 552(a)(4)(F) (West Supp. 1979).

4. 5 U.S.C. § 552(a)(4)(B) (1976) provides, in part, that “on complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”

Nevertheless, the courts have opened their doors to reverse FOIA lawsuits, the overwhelming majority of which involve corporations seeking to protect the confidentiality of their business information submitted to government agencies.⁵

As grounds for reverse FOIA lawsuits, corporate plaintiffs have relied primarily on three legal theories: an implied cause of action under the FOIA on the ground that the FOIA *mandates* nondisclosure of information falling within its nine exemptions,⁶ particularly, exemption four; secondly, an implied right to enjoin disclosure based upon the Trade Secrets Act, section 1905 of the Criminal Code,⁷ which im-

5. See *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979) and other reverse FOIA cases cited in Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103, 107-108 n.28 (1978) [hereinafter cited as Campbell]. See also C. MARWICK, *LITIGATION UNDER THE AMENDED FEDERAL FREEDOM OF INFORMATION ACT 161-70 apps.* (4th ed. 1978).

6. The nine exemptions from mandatory disclosure set forth in the FOIA are material:

- (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute (other than section 552b of this title [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;
- (4) *trade secrets and commercial or financial information obtained from a person and privileged or confidential*;
- (5) 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;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological or geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b)(1)-(9) (1976) (emphasis added).

7. The Trade Secrets Act in the Criminal Code provides:

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

poses criminal sanctions on government employees who release certain information and trade secrets; and finally, a right to a judicial review based upon the Administrative Procedure Act (APA),⁸ which permits courts to set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁹ Courts have differed as to the validity of these three legal theories.¹⁰ Despite the conflicting decisions of the federal circuits over the last five years, the Supreme Court did not address the issues raised by reverse FOIA litigation until *Chrysler*.¹¹

Chrysler was an excellent test case. In its reverse FOIA action,

made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (1976) (emphasis added).

8. Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (1976).

9. Section 10(e) of the APA states, in pertinent part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

5 U.S.C. § 706(2)(A) (1976).

10. See notes 58, 112, & 141-143 *infra* and accompanying text.

11. The reason the Supreme Court did not hear a reverse FOIA case before *Chrysler* is because these lawsuits are a recent development. Although the Act was first passed in 1966, the first FOIA case, *Charles River Park "A", Inc. v. HUD*, 360 F. Supp. 212 (1973), *rev'd and remanded*, 519 F.2d 935 (D.C. Cir. 1975), was not decided until 1973. Only after the 1974 amendments to the Act did reverse FOIA lawsuits begin to appear in significant numbers. The purpose of the 1974 amendments was to encourage prompt and full disclosure. The amendments provided that any person could request the information, shortened the time for processing requests, and tightened sanctions for unduly withholding requested information. 5 U.S.C. § 552(a)(2), 552(a)(4)(F)-(G), 552(a)(6)(A)-(B) (1976). The amendments consequently caused a flood of FOIA requests. In response, an increasing number of reverse FOIA actions were filed to enjoin disclosure of the requested information. According to the Department of Justice, 76 reverse FOIA cases were filed in 1976, 63 in 1977, and 7 through May 1978, with 104 cases pending. H.R. REP. NO. 95-1382, 95th Cong., 2d Sess. 54, *reprinted in* [April 1979] U.S. CODE CONG. & AD. NEWS [56], [hereinafter cited as H.R. REP. NO. 95-1382] (quoting the letter from Barbara Allen Babcock, Assistant Attorney General, Department of Justice, to Richardson Preyer on May 19, 1978).

Chrysler relied on all three legal theories. The Supreme Court rejected the first theory, that the FOIA bars disclosure of information falling within its exemptions. The Court held that, as the exemption provisions of the FOIA do not mandate nondisclosure, the FOIA does not provide, even implicitly, a cause of action to plaintiffs who seek to enjoin disclosure.¹² The Court also repudiated the second theory, that section 1905 of the Criminal Code creates a private right of action to reverse FOIA lawsuit plaintiffs.¹³ The Supreme Court did, however, uphold the third theory, that the APA affords a right to a judicial review of an agency disclosure decision, and it added that under APA review a court can block a disclosure that would violate section 1905.¹⁴

By limiting the ground for a reverse FOIA action exclusively to reliance upon the APA, the *Chrysler* decision might appear to have narrowed the path for future reverse FOIA litigants.¹⁵ The limitation in the course to be taken by future reverse FOIA plaintiffs is, however, more than amply offset by the Court's holding, which allows section 1905 to be reached through APA review. Prior to the Supreme Court's decision in *Chrysler*, section 1905 was of little use to corporate plaintiffs seeking to enjoin disclosure of trade secrets and business information submitted to government agencies. Before *Chrysler*, even after establishing that the submitted information fell within exemption four of the FOIA dealing with trade secrets and commercial records, corporate plaintiffs still had the task of overcoming the general agency policy of disclosing even the exempt information.¹⁶ Corporate plaintiffs had been unable to utilize section 1905 in challenging the agency's decision to disclose exemption-four information because, prior to *Chrysler*, courts generally had held that agency regulations could *authorize* disclosure of information prohibited by section 1905.¹⁷ A recent House Report had also viewed agency regulations as "law" that "authorizes" disclosure of information within the scope of section 1905.¹⁸ But in *Chrysler*, the Supreme Court held that the particular agency's regula-

12. 441 U.S. at 293-94. See text accompanying notes 62-69 *infra*.

13. 441 U.S. at 316. See text accompanying notes 86-96 *infra*.

14. 441 U.S. at 318. See text accompanying notes 127-130 *infra*.

15. One article reporting the *Chrysler* case is entitled *Reverse Information Suits Curbed*, 39 FACTS ON FILE 345 (1979).

16. A regulation of the Office of Federal Contract Compliance (OFCC) implementing the 1974 amendments to the FOIA provides that even the FOIA-exempt information "shall be made available . . . if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC or the Compliance Agencies." 41 C.F.R. § 60-40.2(a) (1978).

17. See note 112 *infra* and accompanying text.

18. See note 111 *infra* and accompanying text.

tions in question lacked the force of law and therefore could not be the "authoriz[ation]" by law required by section 1905.¹⁹

The purpose of this note is to examine the Supreme Court's holdings in *Chrysler* by analyzing how the *Chrysler* Court resolved the federal circuits' conflicting interpretations of the FOIA, section 1905, and the scope of review. This note also discusses the Court's decision regarding the relationship between section 1905 and agency disclosure regulations, and how its interpretation may affect the course of future reverse FOIA litigation.

I. FACTS OF THE CASE

Chrysler, as a government contractor with fifty or more employees and a contract valued at \$50,000 or more,²⁰ was required by Executive Order 11,246²¹ to take affirmative action to eliminate discrimination in employment. Pursuant to the Order and agency regulations promulgated thereunder,²² Chrysler had to submit annual reports on its affirmative action programs²³ and equal employment opportunity forms²⁴ to its compliance agency,²⁵ the Defense Logistics Agency (DLA) (formerly the Defense Supply Agency). Non-compliance would have resulted in the cancellation, termination, or suspension of existing contracts and debarment from future awards.²⁶

19. 441 U.S. at 295-316. See text accompanying notes 99-121 *infra*.

20. See 41 C.F.R. § 60-1.7(a)(1) (1978).

21. Executive Order 11,246 was issued by President Johnson in 1965; it delegated the responsibility for equal employment opportunity compliance by federal contractors to the Secretary of Labor. 3 C.F.R. § 339 (1967). The administration of the Order was delegated to the Director of the Office of Federal Contract Compliance who in turn delegated the enforcement responsibility of the Order to sixteen federal agencies.

22. 41 C.F.R. §§ 60-1.4(a)(5) & -1.7(a)(1) (1978).

23. 41 C.F.R. § 60-2.10 (1978) provides:

An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

24. See *id.* § 60-1.7. Standard Form 100 (EEO-1) contained "statistical information with respect to the total number of persons employed, and the number of minority and female persons employed, by [Chrysler] in nine general job categories." *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 173 (D. Del. 1976).

25. "'Compliance Agency' means the agency designated by the Director [of OFCC] on a geographical, industry or other basis to conduct compliance reviews and to undertake such other responsibilities in connection with the administration of [Executive Order 11,246] as the Director may determine to be appropriate." 41 C.F.R. § 60-1.3 (1978).

26. See *id.* § 60-1.26.

In May 1975, the DLA notified Chrysler by telephone²⁷ that FOIA requests had been made for Chrysler's affirmative action documents that had been submitted to the agency. Despite the letters Chrysler had sent to DLA objecting to the disclosure of such documents, the DLA notified Chrysler by letter²⁸ of its decision to release the documents the following week based upon the DLA's determination that the material was subject to disclosure under the FOIA and agency regulations.²⁹ Chrysler immediately brought an action in the Delaware District Court, seeking to enjoin the disclosure.³⁰

The district court conducted a trial de novo³¹ and found that certain documents, namely the manning tables,³² fell within the provisions of the FOIA's fourth exemption.³³ The court held that, being exempt

27. OFCC disclosure regulations, *id.* § 60-40.1 to -.8, do not require its compliance agencies to provide formal notice to submitters in advance of scheduled disclosure of submitters' business information. Chrysler had initially complained that its right to due process of law had been violated by the FOIA and agency regulations because predisclosure notice was not required. The district court and the appellate court had rejected Chrysler's due process claim on the ground that Chrysler had been afforded a sufficient hearing by virtue of 41 C.F.R. § 60-60.4(d), which provides an opportunity to submitters to assert claims of confidentiality at the time of submission of information. A recent House Report has recommended that "it is consistent with basic notions of fairness that a submitter be given some form of notice about the release of information." H.R. REP. NO. 95-1382, *supra* note 11, at [33]. For example, the proposed Regulations on Confidential Business Information of the National Highway Traffic Safety Administration contain the following provision: "No information is disclosed . . . unless the submitter of information is given written notice of the Administrator's intention to disclose information. . . . Written notice is given at least ten working days before the day of intended release." 43 Fed. Reg. 22,414 (1978).

28. See note 27 *supra*.

29. 41 C.F.R. § 60-40.1 to -40.8. An OFCC regulation provides that "all contract compliance documents with the OFCC and the Compliance Agencies shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein." *Id.* 60-40.2(b).

30. Chrysler had ten days in which to appeal the agency disclosure decision to the Director of OFCC. Chrysler, however, had to resort to an immediate court action because of the agency's decision that the FOIA, as amended in 1974, prohibited the agency from withholding disclosure while Chrysler sought an administrative appeal. The Third Circuit held that it could reach the merits of Chrysler's claim despite Chrysler's failure to exhaust its administrative remedy. The court stated: "Judicial review of agency action must be available at a meaningful time. . . . Since disclosure would render moot any judicial review, the nature of the subject matter demands that the action of . . . [DLA] be regarded as the final agency action to which such review is directed." *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1192-93 (3d Cir. 1977).

31. See note 139 *infra* and accompanying text.

32. The manning tables consisted of lists of Chrysler's job titles used internally and the number of people performing each job.

33. 5 U.S.C. § 552(b)(4) (1977), the text of which is set forth in note 6 *supra*. The Delaware District Court relied on the "substantial competitive harm" test of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), in determining that Chrysler's manning tables were confidential information within the meaning of the FOIA's fourth exemption. From the testimony of Chrysler's witnesses, the district court found that disclosure

from the FOIA's mandatory disclosure provisions, the manning tables' release was not controlled by the FOIA, but by agency regulations promulgated under a housekeeping statute.³⁴ One regulation³⁵ mandated the agency to abide by section 1905.³⁶ The court found that Chrysler's manning tables also fell within the ambit of section 1905. The court permanently enjoined the DLA from disclosing the manning tables because such disclosure, violating section 1905 and an agency regulation as well, was clearly "not in accordance with law" and had to be set aside under the APA.³⁷

Chrysler appealed from the denial of injunctive relief for disclosure of material other than the manning tables and from the denial of a declaratory judgment regarding any future disclosure of similar material. The government cross-appealed.³⁸ The Third Circuit agreed with the district court that no reverse FOIA claim can be implied under the FOIA and that judicial review must proceed only under the APA.³⁹ The Third Circuit, however, disagreed with the district court's position on the scope of the APA review. It held that an APA review should not be held *de novo* because "to conduct a trial *de novo* in reverse FOIA cases would transfer primary decisional responsibility for agency dis-

of the manning tables could cause Chrysler "substantial competitive harm," because the manning tables "could aid another corporation in its practice of employee raiding . . . to determine the exact use of [Chrysler's] labor force, and thus the technology being applied by [Chrysler], . . . [and] allow [Chrysler's] competitors to reduce their risk-taking." 412 F. Supp. at 176.

34. 5 U.S.C. § 301 (1976) provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

35. 29 C.F.R. § 70.21(a) (1978) provides:

Pursuant to the provisions of 18 U.S.C. 1905, every officer and employee of the Department of Labor is prohibited from publishing, divulging, disclosing, or making 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 the Department or any agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. No officer or employee of the Department of Labor shall disclose records in violation of this provision of law.

36. 18 U.S.C. § 1905 (1976), the text of which is set forth in note 7 *supra*.

37. 412 F. Supp. at 177-78. See note 9 *supra* for the text of § 10(e) of the APA, 5 U.S.C. § 706(2)(A) (1976).

38. 565 F.2d at 1175.

39. *Id.* at 1185, 1190-92.

closure from the administrative agencies to the federal courts."⁴⁰

The Third Circuit also held that the agency's proposed disclosure was not contrary to law because it did not violate section 1905.⁴¹ The court ruled that the nondisclosure provision of section 1905 applied only to disclosures "not authorized by law" and that a disclosure pursuant to agency regulations promulgated under the housekeeping statute⁴² is authorized by law.⁴³ The Third Circuit remanded the case on the ground that the agency record under review was inadequate in that it failed to indicate whether the proposed disclosure was based on "a determination that disclosure is mandated by the FOIA or is in the public interest and thus permissible"⁴⁴ under the agency's disclosure regulations.

On certiorari, the Supreme Court agreed with the Third Circuit and rejected the two legal theories of relief based on the FOIA itself and section 1905, while accepting the third theory of relief under the APA.⁴⁵ The Court, however, held that the disclosure regulations of the Office of Federal Contract Compliance⁴⁶ lacked the "force and effect of law" to authorize disclosure prohibited by section 1905.⁴⁷ It, therefore, remanded the case to the appellate court for a determination of whether the proposed disclosure would violate section 1905 and thus become enjoined under the APA, which requires a reviewing court to set aside agency action "not in accordance with law."⁴⁸

II. ANALYSIS OF THE CASE

A. *No Basis for Reverse Claim in the FOIA*

Chrysler contended that the FOIA's nine exemptions *require* an agency to withhold exempt information because "the nine exemptions in general, and Exemption 4 in particular reflect a sensitivity to the privacy interest of private individuals and nongovernmental entities."⁴⁹ In a unanimous decision delivered by Justice Rehnquist, the Supreme Court rejected Chrysler's contention as being unsupported by the "lan-

40. 565 F.2d at 1191.

41. *Id.* at 1188.

42. 5 U.S.C. § 301 (1976), the text of which is set forth in note 34 *supra*.

43. 565 F.2d at 1187.

44. *Id.* at 1192.

45. 441 U.S. at 293-94, 316, 318.

46. *See, e.g.*, regulations cited in note 29 *supra*.

47. 441 U.S. at 295-316. *See* text accompanying notes 99-123 *infra*.

48. 5 U.S.C. § 706(2)(A) (1976), the text of which is set forth in note 9 *supra*.

49. 441 U.S. at 291.

guage, logic or history of the [FOIA]."⁵⁰ The Court noted⁵¹ that it had already intimated its stance on this theory in its first decision concerning the FOIA, *EPA v. Mink*.⁵² In *Mink*, the Supreme Court had stated: "Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material *may* be withheld or *must* be disclosed."⁵³

In *Chrysler*, the Supreme Court reiterated this view when it stated that the language of subsection (b)⁵⁴ simply "demarcates the limits of the agency's obligation to disclose; it does not foreclose disclosure."⁵⁵ The Court indicated that the lack of explicit provision in the FOIA for judicial relief to enjoin disclosure demonstrates that the Act is "exclusively a disclosure statute."⁵⁶ The Court also examined the legislative history of the FOIA and concluded that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure."⁵⁷

In the past, the great majority of the courts determined that the FOIA exemptions were merely permissive.⁵⁸ Commentators generally supported the view that the exemptions do not restrict an agency's disclosure decision.⁵⁹ The House Committee on Government Operations

50. *Id.*

51. *Id.* at 290 n.9.

52. 410 U.S. 73 (1973).

53. *Id.* at 79 (emphasis added).

54. 5 U.S.C. § 552(b), the text of which is set forth in note 6 *supra*.

55. 441 U.S. at 292.

56. *Id.*

57. *Id.* at 293.

58. The Third Circuit in *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *vacated and remanded sub nom.* *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Fifth Circuit in *Pennzoil Co. v. Federal Power Comm'n*, 534 F.2d 627 (5th Cir. 1976), the Eighth Circuit in *General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979), and the District of Columbia Circuit in *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975), held that the FOIA exemptions are permissive. Only the Fourth Circuit, in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* *Brown v. Westinghouse Elec. Corp.*, 431 U.S. 924 (1977), held that the FOIA exemptions, particularly the fourth exemption, absolutely bar disclosure of information within their terms. The Ninth Circuit in *Union Oil Co. v. Federal Power Comm'n*, 542 F.2d 1036, 1045 (9th Cir. 1976), adopted the same view but had subsequently withdrawn that holding as premature.

59. See 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 5:8 (2d ed. 1978); Campbell, *supra* note 5, at 132-33; Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587, 597-602 (1977) [hereinafter cited as Clement]; Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 AD. L. REV. 1, 2 (1976) [hereinafter cited as Drachsler]; Note, "Reversing" the Freedom of Information Act: Congressional Intention or

also expressed a similar opinion in a recent report.⁶⁰ The *Chrysler* Court's holding that the FOIA exemptions are *discretionary* exceptions to the general disclosure obligations is in line with the FOIA's basic philosophy of the fullest possible disclosure: "The purpose . . . [of the FOIA] is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public."⁶¹

Unfortunately, the Court did not elaborate on how it reached its next conclusion, that a reverse FOIA claim cannot be based on the FOIA. The Court merely stated: "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure."⁶² The Third Circuit had viewed the issues of whether the exemptions made nondisclosure mandatory and whether they created an implied right of action as separate but "interdependent."⁶³ The Supreme Court seemed to agree with the reasoning of the Third Circuit that "it would obviously be difficult to imply a cause of action under the FOIA to bar government officials from releasing information the disclosure of which Congress intended to leave to agency discretion."⁶⁴

In *Westinghouse Electric Corp. v. Schlesinger*,⁶⁵ the Fourth Circuit, while interpreting the exemptions to be discretionary,⁶⁶ held that the FOIA "carries with it an implied right in the private party to invoke the equity powers of a court."⁶⁷ The Supreme Court had denied the gov-

Judicial Invention?, 51 ST. JOHN'S L. REV. 734, 736 (1977) [hereinafter cited as "*Reversing the Act*"].

60. "Nothing in the language of FOIA directly supports the argument that the exemptions are mandatory, and the legislative history of the original law and the 1974 amendments clearly reflects the intention of the Congress that the exemptions are permissive." H.R. REP. NO. 95-1382, *supra* note 11, at [58]-[59].

61. S. REP. NO. 89-813, 89th Cong., 2d Sess. 10 (1965) (emphasis in original).

62. 441 U.S. at 294.

63. 565 F.2d at 1185.

64. *Id.*

65. 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., 431 U.S. 924 (1977). The facts in that case were identical to those in *Chrysler*; the plaintiffs were government contractors seeking injunctive relief against the disclosure of information they had submitted to the agency.

66. *Id.* at 1197.

67. *Id.* at 1211. The Fourth Circuit reached this conclusion from an analysis of the legislative history of the FOIA's fourth exemption:

The protection from disclosure given such information by Exemption 4 was stated in the legislative hearings to have been granted to such information "*not only as a matter of fairness, but as a matter of right*, and as a matter basic to our free enterprise system." (Italics added [by Fourth Circuit]) In enacting such exemption the Congress had balanced the right to public disclosure against the right of the private party to protection and had opted for the right to privacy in favor of the private

ernment's petition for certiorari in *Westinghouse*.⁶⁸ In *Chrysler*, the Supreme Court did not rule directly on whether there exists an implied right under the FOIA. Nevertheless, given the Court's holding that the FOIA does not afford "any right to enjoin agency disclosure,"⁶⁹ the implied right theory no longer seems viable.

The Third Circuit supported its decision to reject the implied right theory with the argument that recognizing an implied right to enjoin agency disclosure of exempt information would "place in the hands of interested submitters of information, rather than those of presumably disinterested governmental officials, the authority to take steps which might impede the dissemination of information of public importance."⁷⁰ This argument may not always be applicable because governmental officials often lack sufficient knowledge to assert properly the submitters' right to confidentiality.⁷¹ In *Chrysler* the Supreme Court stated that "the congressional concern was with the *agency's* need or preference for confidentiality."⁷² Congress, however, intended the fourth exemption to be "for the benefit of persons who supply information as well as the agencies which gather it."⁷³ A recent House Report

interest. This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of *private* information furnished government agencies, the disclosure of which might be harmful to *private* interests. It was manifestly intended to protect that private interest. And when a statute, whether phrased in the form of an exemption or not, grants a private party protection [from disclosure], it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection.

Id. (footnotes omitted) (emphasis in original). For an article reviewing the Fourth Circuit's holding concerning the implied right theory, see "*Reversing*" *the Act*, *supra* note 59, at 744-52.

68. 431 U.S. 924 (1977).

69. 441 U.S. at 294. (emphasis added). See text accompanying note 62 *supra*.

70. 565 F.2d at 1185.

71. Several commentators have expressed views contrary to the opinion of the Third Circuit that governmental officials are more suitable than private parties to invoke the right to protection from disclosure. In Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 AD. L. REV. 193, 203 (1977) [hereinafter cited as Patten & Weinstein], the authors noted:

Sanctions may be imposed against the government or its employees if a record is unreasonably withheld. This institutional bias may be an appropriate means for loosening the government's hold on its own internal records but is of questionable propriety where the government must decide whether to release private business records. Disclosure is the path of least resistance to the agency. Biasing the decisionmaker in favor of disclosure, where there is neither the incentive, knowledge nor time needed to determine whether secrecy is truly justified, practically insures that business data will not receive any degree of protection at the administrative level.

72. 441 U.S. at 292-93. (emphasis in original).

73. H.R. REP. NO. 95-1382, *supra* note 11, at [27].

cited approvingly a two-fold test for confidentiality set forth by the District of Columbia Court of Appeals in *National Parks and Conservation Ass'n v. Morton*:⁷⁴

Commercial or financial information is confidential under exemption 4 if disclosure is likely to have either of the following effects:

(1) to impair the Government's ability to obtain necessary information in the future; or

(2) to cause substantial harm to the competitive position of the person from whom the information was obtained.⁷⁵

The House Report also noted that the first test, compared to the second test, became less significant when information was submitted as a mandatory condition for obtaining a government contract.⁷⁶ As a government contractor, Chrysler had no choice but to submit its business information; therefore, the Supreme Court in *Chrysler* should have stressed the congressional concern for the *submitter's* need for confidentiality.

In *Chrysler*, the Supreme Court also stated that "the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."⁷⁷ This statement would allow an agency to issue regulations mandating nondisclosure of information exempt under the FOIA. The *Chrysler* Court cited to such a statute promulgated by the Federal Aviation Administration, which prohibits disclosure of information covered by the FOIA's fourth exemption.⁷⁸ The Food and Drug

74. 498 F.2d 765 (D.C. Cir. 1974).

75. H.R. REP. NO. 95-1382, *supra* note 11, at [22] (citing National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974)).

76. The need for agencies to guarantee confidentiality is particularly significant in the field of statistical or research activities, where the Government must generally rely on the cooperation of the private sector to obtain comprehensive and reliable data. Where mandatory collection authority exists or where business entities submit information in order to qualify for some Government benefit, such as a license, grant, or contract, it is obviously not as significant a factor.

H.R. REP. NO. 95-1382, *supra* note 11, at [22] n.52 (quoting COMMISSION ON FEDERAL PAPERWORK, CONFIDENTIALITY AND PRIVACY 100 (1977)). If information is *required* to be submitted to the government, there is little danger that disclosure will impair the ability of the government to obtain such information in the future.

77. 441 U.S. at 293.

78. 49 U.S.C. § 1357(d)(2) (1976) provides:

Notwithstanding [the FOIA], the Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained . . . if, in the opinion of the Administrator, the disclosure of such information—

. . . .

(B) would reveal trade secrets or privileged or confidential commercial or financial information obtained from any person

Administration (FDA) has promulgated a similar regulation, which provides that the agency may not make any discretionary release of exemption-four material.⁷⁹

A recent House Report, however, opposed the issuance of such nondisclosure regulations as being inconsistent with the FOIA's basic policy of full agency disclosure.⁸⁰ It recommended that "[a]gencies such as FDA that have issued nondisclosure rules should review the utility and legality of the rules."⁸¹ Even if the agencies' nondisclosure regulations are valid, the only relief still available does not come from the FOIA itself but from the APA, because an agency's decision contrary to its regulations could be enjoined only by invoking the "not in accordance with law" provision of the APA.⁸² Nevertheless, if the agencies could *mandate* nondisclosure of FOIA-exempt information by their regulations, as intimated by the *Chrysler* Court,⁸³ then, even without invoking section 1905, reverse FOIA litigation could proceed under the more definite standard of "not in accordance with law" rather than the vague and uncertain standards of "arbitrary, capricious, an abuse of discretion" set forth in the APA.⁸⁴

B. *The Applicability of Section 1905*

1. Section 1905 Creates No Private Right To Enjoin Disclosure

Relying on its prior decisions⁸⁵ and finding no evidence of legislative intent to create a civil cause of action under the criminal disclosure statute of section 1905,⁸⁶ the *Chrysler* Court held that section 1905 does not afford a private right of action to enjoin disclosure in violation of the statute.⁸⁷ A recent House Report reiterated that "[o]ne of the neces-

79. 21 C.F.R. § 20.61(c) (1979) provides: "Data and information submitted or divulged to the Food and Drug Administration which fall within the definitions of a trade secret or confidential commercial or financial information are not available for public disclosure."

80. "No rules should be issued providing that business documents are absolutely not releasable." H.R. REP. NO. 95-1382, *supra* note 11, at [48]. Although the *Chrysler* case was decided about nine months after this report by the Committee on Government Operations was presented to the House, the Supreme Court did not make any reference to the report. This is puzzling because the report is entitled *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*.

81. *Id.*

82. 5 U.S.C. § 706(2)(A) (1976), the text of which is set forth in note 9 *supra*.

83. 441 U.S. at 293.

84. 5 U.S.C. § 706(2)(A) (1976), the text of which is set forth in note 9 *supra*.

85. *Cort v. Ash*, 422 U.S. 66 (1975); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916).

86. 18 U.S.C. § 1905 (1976), the text of which is set forth in note 7 *supra*.

87. 441 U.S. at 316-17.

sary prerequisites [for implying a private cause of action under a federal *criminal* statute] is the unavailability of alternative avenues of redress."⁸⁸ Similarly, finding an adequate remedy under the APA, the Court saw no reason to imply a private right to relief under section 1905.⁸⁹

The *Chrysler* Court did not address the issue of whether section 1905, taken in conjunction with exemption three of the FOIA,⁹⁰ implies a private right of action to enjoin disclosure. The preliminary question of whether section 1905 is an exempting statute within the terms of exemption three after the 1976 amendment⁹¹ remains unresolved.⁹² The Committee on Government Operations recently stated that it "has never considered that section 1905 qualified under exemption 3, and since the [1976 amendment] only narrowed the scope of the exemption, it is not possible for section 1905 to qualify under the amended exemption."⁹³ Qualifying section 1905 as an exemption-three statute, however, would not afford an implied right to enjoin disclosure because, as the Committee on Government Operations observed in a previous report, "[t]he Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information 'not authorized by law,' would not permit the withholding of information otherwise required to be disclosed by the [FOIA], since the disclosure is there authorized by law."⁹⁴

In conjunction with exemption four of the FOIA, section 1905 might imply a private right to equitable relief because the FOIA does not explicitly authorize disclosure of exempt information. Although the *Chrysler* Court did not "attempt to determine the relative ambits of Exemption 4 and § 1905,"⁹⁵ the Court did intimate that exemption four and section 1905 are coextensive.⁹⁶ The Court's interpretation indi-

88. H.R. REP. NO. 95-1382, *supra* note 11, at [60].

89. The Court stated that "most importantly, a private right of action under § 1905 is not 'necessary to make effective the congressional purpose,' . . . for we find that [the agency's review of the decision] to disclose Chrysler's employment data is available under the APA." 441 U.S. at 317 (footnote omitted).

90. 5 U.S.C. § 552(b)(3) (1976), the text of which is set forth in note 6 *supra*.

91. *See* note 3 *supra*.

92. The Supreme Court stated: "We, of course, do not here attempt to determine . . . whether § 1905 is an exempting statute within the terms of the amended Exemption 3." 441 U.S. at 319 n.49.

93. H.R. REP. NO. 95-1382, *supra* note 11, at [60] n.211.

94. H.R. REP. NO. 94-880, 94th Cong., 2d Sess. 23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205.

95. 441 U.S. at 319 n.49.

96. The *Chrysler* Court noted "the similarity of language between Exemption 4 and the substantive provisions of § 1905." *Id.* Courts that have considered the scope of exemption four and § 1905 have all found them to be coextensive. *See, e.g.,* Charles River Park "A",

rectly provides that nondisclosure of exemption-four information is mandatory, because no agency would determine to disclose exemption-four information, knowing that such disclosure would also mean a violation of the criminal statute of section 1905.

2. Section 1905's Applicability Not Limited by Agency Regulations

In *Chrysler*, the Government contended that, even if section 1905 provided equitable relief to a private party like Chrysler, section 1905 was not applicable to the disclosure Chrysler sought to enjoin. The Government's argument was that the DLA's proposed disclosure did not fall within the prohibition of section 1905 because the disclosure, pursuant to the agency's regulations,⁹⁷ was "authorized by law" within the meaning of the statute.⁹⁸ The Supreme Court responded that "in order for such [agency's] regulations to have the 'force and effect of law,' it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress."⁹⁹

Addressing the issue of whether there had been some delegation of legislative authority, the Supreme Court first looked to and rejected the FOIA itself. The Court stated that "the Government cannot rely on the FOIA as congressional authorization for disclosure regulations that permit the release of information within the Act's nine exemptions."¹⁰⁰ Taken alone, this statement seems inconsistent with the Court's interpretation that agencies have discretion to release the FOIA-exempt information. As explained by Justice Marshall in his concurring opinion, the Court did not mean by this statement that regulations permitting disclosure of the FOIA-exempt information are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."¹⁰¹ The Court's holding that the FOIA does not mandate nondisclosure of exempt information allows agencies to issue regulations providing for disclosure of exempt information. The FOIA, however, cannot be the source of congressional authorization for regulations providing for disclosure of exempt information that falls within section 1905 as well.

Inc. v. HUD, 519 F.2d 935, 941-42 & n.7 (D.C. Cir. 1975). See also Clement, *supra* note 59, at 605 & n.79.

97. See regulations cited in notes 16 & 29 *supra*.

98. 18 U.S.C. § 1905 (1976), the text of which is set forth in note 7 *supra*.

99. 441 U.S. at 304.

100. *Id.* at 303-04. The Court's conclusion is based on the rationale that disclosure of exempt information is not controlled by the FOIA. *Id.* It suggests that there is authority in the FOIA for agencies to issue regulations that provide for disclosure of nonexempt information collected by the agencies.

101. *Id.* at 320 (Marshall, J., concurring).

Section 1905 contains a specific exception of disclosure "authorized by law,"¹⁰² but the regulations, lacking congressional authorization, cannot supply that "law." The *Chrysler* Court did note that the FOIA itself could supply that "law," if the information to be disclosed is outside the FOIA exemptions yet within section 1905.¹⁰³

In *Chrysler*, the Court also repudiated the Government's contention that the agency's disclosure regulations had the force of law by virtue of Executive Order 11,246.¹⁰⁴ The Government relied on section 201 of the Executive Order, which confers authority upon the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes [of the Order]."¹⁰⁵ The Supreme Court found that the purpose of the Order was to put "an end to discrimination in employment."¹⁰⁶ The Court concluded that an Order, which does not manifest any concern for the disclosure of information to the public, cannot be the source of delegation of disclosure authority to an agency.¹⁰⁷ Once again, the conclusion of the Court is misleading because it suggests that the Secretary of Labor lacks the authority to promulgate regulations for disclosure of information concerning companies' affirmative action programs. Such disclosure regulations issued pursuant to Executive Order 11,246 are valid, but they lack the force and effect of law to authorize disclosure

102. 18 U.S.C. § 1905 (1976), the text of which is set forth in note 7 *supra*.

103. The Court stated in a footnote that "there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary 'authoriz[ation] by law' for purposes of § 1905." 441 U.S. at 319 n.49.

104. *See* note 21 *supra*.

105. 30 Fed. Reg. 12,319 (1965).

106. 441 U.S. at 307.

107. *Id.* In *Chrysler*, the Government argued that the disclosure policy of the OFCC's regulations was to further the purpose of the Executive Order, *i.e.*, to combat discrimination in employment. One disclosure regulation provides that "[i]t is the policy of the OFCC to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 C.F.R. § 60-40.1 (1978). Another OFCC subsection, however, provides that its compliance agencies will make all information available to "any person" regardless of motives. *Id.* § 60-40.2. FOIA-exempt information will also be released if it "furthers the public interest," but there is no qualification in the regulation that the interest must be to end discrimination in employment. *Id.* The Court had to conclude:

Were a grant of legislative authority as a basis for Executive Order 11246 more clearly identifiable, we might agree with the Government that this "compatibility" gives the disclosure regulations the necessary legislative force. But the thread between these regulations and any grant of authority by the Congress is so strained that it would do violence to established principles of separations of powers to denominate these particular regulations "legislative" and credit them with the "binding effect of law."

441 U.S. at 307-08.

that is prohibited by section 1905 and not mandated by the FOIA. In his concurring opinion in *Chrysler*, Justice Marshall explained the rationale behind this conclusion of the Court: "In imposing the authorization requirement of § 1905, Congress obviously meant to allow only those disclosures contemplated by congressional action. . . . Otherwise the agencies Congress intended to control could create their own exceptions to § 1905 simply by promulgating valid disclosure regulations."¹⁰⁸

In *Chrysler*, the Supreme Court also rejected the Government's argument that the housekeeping statute, section 301 of Title 5,¹⁰⁹ is a grant of legislative authority to government agencies' disclosure regulations.¹¹⁰ Prior to *Chrysler*, Congress¹¹¹ and the courts¹¹² in general had interpreted section 301 as providing agencies with the authority to promulgate regulations for the disclosure of FOIA-exempt information. In *Chrysler*, the Supreme Court held that the "regulations pursuant to § 301 could not provide the 'authoriz[ation] by law' required by § 1905."¹¹³ Relying upon the legislative history and the terms of section 301, the Court found that the statute was "simply a grant of authority to the agency to regulate its own affairs."¹¹⁴

The Court also relied upon the legislative history of the 1958 amendment to section 301 in reaching this conclusion.¹¹⁵ The Court looked to the statement, made by Congressman Moss during the debates on the 1958 amendment, that the amendment would "not affect the confidential status of information given to the Government and

108. 441 U.S. at 320. (Marshall, J., concurring).

109. 5 U.S.C. § 301 (1976), the text of which is set forth in note 34 *supra*.

110. 411 U.S. at 309-10.

111. The Committee on Government Operations had recently stated: "If agencies may release exempt information . . . then section 1905 is not applicable. . . . Regulations authorizing disclosure may be issued . . . under 5 U.S.C. 301, the 'housekeeping' statute." H.R. REP. NO. 95-1382, *supra* note 11, at [61].

112. *See, e.g.,* General Dynamics Corp. v. Marshall, 572 F.2d 1211, 1217 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979) (holding "disclosure pursuant to the OFCC regulations is 'authorized by law' and not within the prohibition of 18 U.S.C. § 1905"); Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1200 (7th Cir. 1978) (holding "regulations valid under 5 U.S.C. § 301 satisfy the 'authorized by law' exception of Section 1905"), *vacated and remanded sub nom. Sears, Roebuck & Co. v. Dahm*, 441 U.S. 918 (1979). *But see* Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 942-43 (D.C. Cir. 1975) (holding § 301 "does not authorize regulations limiting the scope of section 1905").

113. 441 U.S. at 311.

114. *Id.* at 309.

115. The 1958 amendment to § 301, *supra* note 34, added the following portion to the original provision: "This section does not authorize withholding information from the public or limiting the availability of records to the public." Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547.

carefully detailed in title 18, United States Code, section 1905.'"¹¹⁶ It rejected the Government's and the Third Circuit's interpretation that Congressman Moss' statement had been made only with reference to the amendment.¹¹⁷ In *Chrysler*, the Court was not concerned with whether "the amendment eliminated disclosure authority," as the Third Circuit had been.¹¹⁸ The Supreme Court did not doubt that section 301 is a source of an agency's authority for the promulgation of certain disclosure regulations; it merely held that "[s]ection 301 does not authorize regulations limiting the scope of section 1905."¹¹⁹ Chrysler's compliance agency's disclosure regulations themselves explicitly exempted "records disclosure of which is *prohibited by law*."¹²⁰ To hold that these regulations could limit the applicability of the federal law of section 1905 seems illogical. In contrast, the Court's conclusion is very sound. The Supreme Court's interpretation of the nexus between the agency's regulations promulgated pursuant to section 301 and the nondisclosure statute of section 1905 should be welcomed. To allow any agency's regulations to overrule the specific language of section 1905 would give government officials "the unbridled freedom to redefine the scope of [their own] illegal conduct under section 1905."¹²¹

Finally, the Supreme Court pointed out a procedural defect in the disclosure regulations of the Office of Federal Contract Compliance.¹²² The Court found that these regulations were not properly promulgated as legislative or substantive rules and were merely interpretative rules.¹²³ As interpretative rules, these disclosure regulations lack the

116. 441 U.S. at 311 (quoting 104 CONG. REC. 6550 (1958)).

117. A commentator has expressed the same view as that of the Government in *Chrysler*: Mr. Moss never stated that the housekeeping statute itself was not intended to affect information encompassed by section 1905—only that *the amendment* to the housekeeping statute would not affect the prohibitions against disclosure contained in section 1905 It is a vast distortion to interpret this statement . . . to mean that the 1958 amendment limited the broad disclosure power originally conferred upon agencies by the housekeeping statute in 1789.

Clement, *supra* note 59, at 622. In *Chrysler*, the Supreme Court interpreted the purpose of the 1958 amendment as limiting agencies' tendency to invoke § 301 as a source of authority to withhold information from the public, and not as granting authority for limiting the scope of § 1905. 441 U.S. at 310.

118. 565 F.2d at 1187.

119. 441 U.S. at 312 (citing *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975)).

120. 41 C.F.R. § 60-40.2 (1978) (emphasis added).

121. This was the argument presented by the plaintiff in *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197, 1201 (7th Cir. 1978), a reverse FOIA case similar to *Chrysler*. See note 112 *supra*. The case was recently remanded, *sub nom. Sears, Roebuck & Co. v. Dahm*, by the Supreme Court for further consideration in light of *Chrysler*. 441 U.S. 918 (1979).

122. 441 U.S. at 312.

123. *Id.* at 315. In reaching this conclusion, the Court relied on the following statement

effect of law and thus cannot authorize disclosure that is prohibited by section 1905.¹²⁴ But as Justice Marshall noted in his concurring opinion, "the agency could rectify this shortcoming"¹²⁵ by promulgating its disclosure regulations in strict compliance with section 4 of the APA.¹²⁶

C. *The APA as the Only Basis for a Reverse FOIA Claim*

In *Chrysler*, the plaintiff and the defendant agreed on the availability of APA review of the agency's disclosure decision.¹²⁷ The Court agreed, too. It held that under the APA Chrysler was entitled to judicial review of the agency's decision to disclose its business information.¹²⁸ Chrysler alleged that the agency's proposed disclosure would harm Chrysler's competitive position in business. Thus, Chrysler was "a person" who would be "adversely affected or aggrieved by agency action" within the terms of section 10(a) of the APA.¹²⁹

APA review is not available to the extent that "agency action is committed to agency discretion by law."¹³⁰ The Court stated that this exception does not apply unless " "statutes are drawn in such broad terms that in a given case there is no law to apply." ' "¹³¹ In *Chrysler*, the Court found that section 1905 and the regulation¹³² imposed on the agency to comply with section 1905 place substantive limits on the agency's disclosure decision to make the decision a reviewable action.¹³³ Section 1905, which imposes criminal sanctions on government employees who disclose information within its ambit, apparently precludes discretion with respect to such disclosure. The Court indicated that, if the disclosure challenged by Chrysler was found to be within

of the Secretary of Labor at the time of the publication of the disclosure regulations: "As the changes made by this document relate solely to *interpretive rules*, general statements of policy, and to rules of agency procedure and practice, neither notice of proposed rule making nor public participation therein is required by 5 U.S.C. 553." 441 U.S. at 314-15 (quoting 38 Fed. Reg. 3192, 3193 (1973)) (emphasis added).

124. 441 U.S. at 315-16.

125. *Id.* at 320 n.1 (Marshall, J., concurring).

126. Section 4 of the APA, 5 U.S.C. § 553, provides that before a substantive rule is promulgated, agencies must afford interested persons general notice of proposed rulemaking. The OFCC regulations were promulgated without the issuance of such notice.

127. The circuits that have considered this issue have all decided that reverse FOIA claims can be based on the APA. *See* cases cited in note 58 *supra*.

128. 441 U.S. at 317-18.

129. 5 U.S.C. § 702 (1976), the text of which is set forth in note 8 *supra*.

130. *Id.* § 701(a)(2).

131. 441 U.S. at 317 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945))).

132. 29 C.F.R. § 70.21, the text of which is set forth in note 35 *supra*.

133. 441 U.S. at 317-18 & n.48.

section 1905, the disclosure should be enjoined.¹³⁴ Any decision that violates both section 1905 and an agency regulation is "not in accordance with law" within the meaning of section 10(e) of the APA and must be set aside.¹³⁵

The *Chrysler* Court noted that "[j]urisdiction to review agency action under the APA is found in 28 U.S.C. § 1331."¹³⁶ The Court referred to *Califano v. Sanders*,¹³⁷ a case in which the Court made it clear that the APA does not independently confer subject-matter jurisdiction on federal courts.¹³⁸

In *Chrysler*, the Government and Chrysler disagreed on the proper scope of APA review. Chrysler contended that there should be a de novo review, while the Government argued that the review should be limited to the administrative record of the agency unless it was an "extraordinary" case.¹³⁹ In the past, the courts had differed on the scope of APA review. The FOIA is silent on the scope of judicial review in reverse FOIA cases, while explicitly mandating de novo review for normal FOIA cases.¹⁴⁰ While some courts have held that judicial review of reverse FOIA cases should be limited to the agency's administrative record to determine whether an abuse of discretion had occurred,¹⁴¹ several courts have maintained that de novo review is appropriate for

134. *Id.* at 1726.

135. 5 U.S.C. § 706(2)(A), the text of which is set forth in note 9 *supra*.

136. 441 U.S. at 317 n.47. Section 1331 of title 28, U.S.C., provides in pertinent part:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against . . . any agency

28 U.S.C. § 1331(a) (1976).

137. 430 U.S. 99 (1977).

138. Until *Califano v. Sanders*, *id.*, the circuits had disagreed as to whether the APA establishes jurisdiction. Compare, e.g., *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 939 (D.C. Cir. 1975) (holding jurisdiction proper under APA) with *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1206 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Elec. Corp.*, 431 U.S. 924 (1977) (holding jurisdiction not proper under APA). For an article dealing extensively with the jurisdictional issue of reverse FOIA litigation, see Campbell, *supra* note 5, at 160-88.

139. 441 U.S. at 318. Reverse FOIA lawsuit plaintiffs would prefer de novo review because it allows the court to take evidence anew and can be a more severe review of the agency's exercise of discretion.

140. 5 U.S.C. § 552(a)(4)(B) (1976).

141. *General Dynamics Corp. v. Marshall*, 572 F.2d 1211, 1214 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979); *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1192 (3d Cir. 1977), *rev'd and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

reverse FOIA cases as well.¹⁴² Other courts had concluded that whether the information is exempt should be determined *de novo*, but whether it may nonetheless be disclosed should be determined only on the basis of the agency's own record.¹⁴³

In *Chrysler*, the Supreme Court did not settle the issue conclusively and limited its holding to a very narrow one: "*De novo* review by the District Court is *ordinarily not necessary* to decide whether a contemplated disclosure runs afoul of § 1905."¹⁴⁴ Because whether the challenged disclosure violates section 1905 or some other nondisclosure statutes must necessarily be the first determination to be made in an APA review, the Court's statement proposes that judicial review need not be *de novo* in reverse FOIA cases. The House Committee on Government Operations shares this view. According to the Committee, the "existing law requires a court in a reverse-FOIA case to review the agency record and determine only whether the agency has acted arbitrarily or capriciously under the standard of the [APA]."¹⁴⁵ Because the Supreme Court did not resolve this issue "with sufficient clarity,"¹⁴⁶ an amendment to the FOIA specifying the scope of review for reverse FOIA cases can be expected in the near future. The amendment will most likely limit the scope of such review to that which is not *de novo*.¹⁴⁷

142. See, e.g., *Westinghouse Elec. Corp. v. Schlesinger*, 524 F.2d 1190, 1215 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Elec. Corp.*, 431 U.S. 924 (1977).

143. *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378, 1380-81 (D.C. Cir. 1977); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 939-42 (D.C. Cir. 1975).

144. 441 U.S. at 318 (emphasis added).

145. H.R. REP. NO. 95-1382, *supra* note 11, at [65].

146. *Id.* at [6]. The Committee on Government Operations has recently proposed: "In the event that the decision of the Supreme Court in [*Chrysler*] does not resolve this issue *with sufficient clarity*, the committee recommends that FOIA be amended to specify the scope of review for reverse-FOIA cases." *Id.* (emphasis added). In *Chrysler*, the Supreme Court did not indicate what cases would be so extraordinary as to require a *de novo* review. The Court also did not consider what record is proper for the APA review. The Court's stance toward this issue was so vague that in a later case, *GTE Sylvania, Inc. v. Consumer Product Safety Comm'n*, 598 F.2d 790, 799 n.4 (3d Cir. 1979), the Third Circuit noted: "In *Chrysler Corp. v. Brown* the Supreme Court did not reach the question whether Chrysler was entitled to a trial *de novo* on its claim that the agency disclosure at issue exceeded the bounds of statutory authority."

147. 5 U.S.C. § 706 (1976). For a discussion of the reasons why judicial review in a reverse FOIA case should be narrower in scope than that in a FOIA case, see Campbell, *supra* note 5, at 135-42 (one main reason given by the author is that "[i]n reverse FOIA cases, . . . the submitter is familiar with the information and should be able to present the argument against disclosure at the agency level without requiring further evidentiary proceedings in the district court"). Cf. Patten & Weinstein, *supra* note 71, at 206 ("Such review [that is not *de novo*] is virtually meaningless since the administrative decision to disclose business records is not based on a 'record' as that term is used in the [APA], but rather on an abbre-

Furthermore, in *Chrysler* the Supreme Court did not comment on the statement by the Third Circuit that the remedy for an inadequate record of the agency is not a trial de novo but remand of the case to the agency for an additional explanation of its decision.¹⁴⁸ This statement, however, was formulated by relying on an earlier Supreme Court decision, *Camp v. Pitts*, which involved the judicial review of a decision by the Comptroller of the Currency.¹⁴⁹ Thus the Court's silence in *Chrysler* might indicate that it approves of this procedure in reverse FOIA cases as well. Consequently, when the administrative record fails to establish a clear basis for the agency's disclosure decision, the procedure to be taken by the reviewing court is remand to the agency for additional explanation of the reasons for its decision.¹⁵⁰

When providing de novo review for FOIA cases, Congress indicated that such a review is "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and to prevent it from becoming meaningless judicial sanctioning of agency discretion."¹⁵¹ De novo review should be provided for reverse FOIA cases as well, so that the truly aggrieved submitters will be afforded adequate injunctive relief.

III. CONCLUSION

The approach to a reverse FOIA case proposed by the Supreme Court in *Chrysler* is similar to that recommended by the 1976 House Report of the Committee of Government Operations: "if material is within the trade secrets exemption of the [FOIA] and therefore subject to disclosure if the agency determines that disclosure is in the public

viated review of the requested records by an agency official, without the benefit of any other comments or information."). In its prior decision, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1970), the Supreme Court stated that the "[APA] standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." A bill has been recently introduced by Senator Dale Bumpers of Arkansas to broaden the scope of APA review. The bill, currently known as S. 111, would amend § 10(e) of the APA by providing explicitly for a de novo review. S. 111, 96th Cong., 1st Sess. (1979). See Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979).

148. 565 F.2d at 1192.

149. 411 U.S. 138 (1973).

150. Courts have so frequently taken such a procedure that, in an article intended as a guidance to agency lawyers, the author recommends: "[At] trial, the government should assert that the injunction sought by the submitter is inappropriate because the judicially preferred remedy is to remand to the agency for perfection of the administrative record." English, *Protecting the Stakeholder: Defense of the Government Agency's Interests During Reverse FOIA Lawsuits*, 31 AD. L. REV. 151, 174 (1979).

151. S. REP. NO. 89-813, 89th Cong., 1st Sess. 8 (1965).

interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information."¹⁵² The Court rejected the view of the more recent 1978 House Report that, by virtue of their regulations, federal agencies have discretion concerning the release of section 1905 information.¹⁵³ It held that the disclosure regulations of the Office of Federal Contract Compliance lack "the force and effect of law" to authorize disclosure of FOIA-exempt information falling within the prohibition of section 1905. The Third Circuit feared that such an interpretation "would transmogrify § 1905 into a weapon for those parties who advocate *government* secrecy."¹⁵⁴

In fact, the *Chrysler* Court's holding provides a powerful weapon for protection of *corporate* secrecy.¹⁵⁵ Corporate plaintiffs who can show that an agency's proposed disclosure of their business information will cause "substantial harm to [their] competitive position,"¹⁵⁶ thus falling within exemption four of the FOIA, can now challenge such disclosure by invoking section 1905 through APA review. They no longer need to yield to the agency's policy requiring disclosure of all information, FOIA-exempt or not, that "furtheres the public interest."¹⁵⁷ Instead of the nebulous task of showing that no legitimate public interest in the proposed disclosure exists, the task is now more manageable. Disclosure of FOIA-exempt information can now be enjoined by showing that it violates section 1905 and therefore, being clearly "not in ac-

152. H.R. REP. NO. 94-880, 94th Cong., 2d Sess. 23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205.

153. H.R. REP. NO. 95-1382, *supra* note 11, at [61]. See also note 111 *supra*.

154. 565 F.2d at 1187 (emphasis added).

155. The majority of FOIA requests for information, submitted by corporations, have been made by business competitors rather than by individuals, public interest groups, or news media reporters. NEWSWEEK, June 19, 1978, at 85-86. Commentators have noted that the "FOIA administrative scheme fails to recognize the important differences between requests for government records and requests for private business records." Patten & Weinstein, *supra* note 71, at 202. In its statement before a House Subcommittee, the Machinery and Allied Products Institute expressed a similar concern:

Are confidential private documents converted into "Federal documents" merely by the fact of government possession and which, incidentally, may have resulted from a government requirement imposed upon the supplier of information? We believe that a private document remains a private one even though information taken therefrom may be used confidentially by government for its purposes or combined with similar information from other private documents to constitute a wholly new "Federal document."

Machinery and Allied Products Institute's testimony of October 4, 1977 before House Subcommittee on Government Information and Individual Rights, 5636 MACHINE & ALLIED PRODUCTS INST. BULL. 4 (1977).

156. National Parks & Conservation Ass'n v. Morton, 498 F.2d at 770. See text accompanying notes 74-75 *supra*.

157. 41 C.F.R. § 60-40.2(a). See note 16 *supra* and accompanying text.

cordance with law," must be set aside under the APA. By allowing section 1905 to be reached through APA review, the *Chrysler* decision has definitely made it less burdensome for corporate plaintiffs to protect the confidentiality of their business information in reverse FOIA litigation.

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