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WHEN UNCLE SAM CALLS DOES MA BELL HAVE TO ANSWER?: RECOGNIZING A CONSTITUTIONAL RIGHT TO CORPORATE INFORMATIONAL PRIVACY

The accessibility of stored information through state-of-the-art telecommunications systems has greatly increased corporate fear of the government's ability to acquire and disseminate confidential information. This ability to obtain sensitive corporate information has naturally generated concern over protectable corporate privacy interests. In light of these concerns and because protection of corporate information has traditionally been limited to information that falls within the narrow confines of "trade secrets,"[1] the question whether corporations are entitled to broader privacy protections under the Constitution has taken on new and increased significance. Notwithstanding legitimate corporate interests, only one court has ruled that corporations have a constitutional privacy right to nondisclosure of confidential information.[2]

Unless information relates to an area of fundamental importance it is not entirely clear whether a right to nondisclosure of confidential information exists absolutely in the individual.[3] Hence, this comment will first discuss whether this privacy concept inheres in the individual. It follows that if there is no such recognizable personal right, it cannot be attached to corporations. After examining whether there is a right to nondisclosure in the individual, the focus will then shift to the issue whether the existing individual right can be extended to artificial persons, such as corporations. Case law focusing on fourth and fifth amendment corporate privacy interests will be relied upon in demonstrating that such an exten-

1. There is no absolute definition of what material constitutes a trade secret. State trade secret laws primarily protect information such as processes, formulas, and devices, the secrecy of which gives the owner an advantage over competitors. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). *See also* RESTATEMENT OF TORTS § 757 comment b (1939) (listing factors to be considered in determining whether certain information should be protected as a trade secret).

2. Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984), *vacated on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc). For purposes of this comment, the term "informational privacy" is used as a synonym for the "constitutional right to nondisclosure of confidential information."

3. The aspect of privacy which the Supreme Court has given the most protection to is the right to make autonomous decisions in areas of fundamental importance such as "marriage, procreation, contraception, family relationships, and child rearing and education." Whalen v. Roe, 429 U.S. 589, 600 n.26 (1977) (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).

sion is reasonable. Finally, because the Freedom of Information Act (FOIA)[4] is a primary source through which corporate information is obtainable, the potential impact that a corporate right to privacy would have on the dissemination of corporate information under the FOIA will be explored.[5]

THE INDIVIDUAL'S RIGHT TO NONDISCLOSURE OF CONFIDENTIAL INFORMATION

The United States Supreme Court first recognized the individual's privacy interests as a constitutional right in *Griswold v. Connecticut*.[6] One source of the individual's privacy interests was identified in the penumbras cast by the Bill of Rights.[7] In *Roe v. Wade*,[8] the Court further recognized the right to privacy as a sub-

4. Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552 (1976)).

5. Under the FOIA, any citizen can request information from the federal government. If the government possesses the information it must release it unless it falls under one of the Act's nine exemptions. Agencies receive thousands of FOIA requests per year. *See, e.g.*, Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 609 (D.C. Cir. 1976) (at time of plaintiffs' FOIA request to FBI, 5,137 requests were already on file); Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F. Supp. 576, 579 (D.D.C. 1976) (FOIA requests to FDA average 1500 to 1800 per month). *See also Business Record Exemption of the Freedom of Informational Act: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. 8-9, 73-74 (1977) (statements of Michael A. James and Donald Kennedy).

6. 381 U.S. 479 (1965). Samuel Warren and Louis Brandeis first advocated the recognition of a right to privacy. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). After the publication of that article, courts and legislatures began recognizing those legitimate privacy interests. Dean Prosser helped create a unified view as to the elements of the tort. Prosser maintained that the tort was actually made up of four distinct torts: intrusion, false light in the public eye, public disclosure of private facts, and appropriation of name or likeness. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

7. *Griswold*, 381 U.S. at 483-84. Some members of the Court located different constitutional sources for the right to privacy. Justices Harlan and White found the right in the due process clause of the fourteenth amendment, *id.* at 500-02 (Harlan, J., and White, J., concurring), while Justice Goldberg located the right in the ninth amendment. *Id.* at 499 (Goldberg, J., concurring). *See Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965) (discussing several justices' rationales).

8. 410 U.S. 113 (1973). In Roe v. Wade, the Court held that a woman's right to decide whether to end her pregnancy in the first trimester without governmental interference was within the constitutional right to privacy. *Id.* at 163-64. This decision caused much popular and scholarly controversy. *See, e.g.*, B. WOODWARD & S. ARMSTRONG, THE BRETHERN 238-39 (1979) ("[t]housands of letters poured into the Court. . . . Some letters compared the Justices to the Butchers of Dauchau, child killers, immoral beasts and Communists"). *Compare*, Heymar & Berzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973) (opinion in *Roe* is amply justified by precedent); Tribe, *The Supreme Court, 1972-Term-Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (problems with decision, but defensible as choice among alternative decisionmaking authority); *with* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J.

stantive due process right because it affected a liberty interest protected by the fourteenth amendment due process clause.[9] In its recognition of a right to privacy, the Supreme Court has essentially protected individual privacy interests where autonomous decisions of fundamental importance are involved, such as "marriage, procreation, contraception, family relationships, and child rearing and education."[10] Because these interests are so peculiar to the individual, it does not necessarily follow that these privacy interests should be extended to the corporation, an artificial person. Therefore, the question whether corporations maintain a constitutional right to privacy must be determined according to some other recognized aspect of privacy, such as the right to nondisclosure of personal information.[11]

The constitutional right to nondisclosure of personal information was first acknowledged by the Supreme Court in *Whalen v. Roe*.[12] While the Court observed that the right to nondisclosure of

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920, 943 (1973) (problem with *Roe* is Court "sets itself a question the constitution has not made the Court's business"); O'Mara, *Abortion: The Court Decides a Non-Case*, 1974 SUP. CT. REV. 337 (the *Roe* Court yielded to the pressure of a pro-abortion minority).

9. *Roe*, 410 U.S. at 153 ("[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and the restrictions on state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights of the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"). *See also* Whalen v. Roe, 429 U.S. 589, 599 n.23 (1977) (the *Roe* Court expressed the opinion that the "right of privacy" concept is founded in the fourteenth amendment's principal of personal liberty).

10. *Whalen*, 429 U.S. at 600 n.26 (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)). For cases protecting the right to make autonomous decisions, see Roe v. Wade, 410 U.S. 113 (1973) (decision to end pregnancy); Loving v. Virginia, 388 U.S. 1 (1967) (decision to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (decision to use contraceptives); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (decision on how to educate one's children); Meyer v. Nebraska, 262 U.S. 390 (1923) (decision to marry, raise family, and worship God according to one's own conscience).

11. The *Whalen* Court stated that the "privacy" cases involved at least two different kinds of interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." 429 U.S. at 599-600.

12. 429 U.S. 589 (1977). In *Whalen*, the Court upheld a New York statute which required the state to obtain from physicians the names and addresses of all patients who were prescribed certain dangerous, but lawful drugs. *Id.* at 591-93. Once the information was obtained it was to be stored on a centralized computer file. *Id.* at 591. The appellees, users of the drugs, alleged that the statute violated their privacy rights. *Id.* at 600. The Court found that the appellees' privacy interests were not unconstitutionally invaded because the statute required that heavy security precautions be taken to assure minimal risk of disclosure. For example, the statute imposed criminal liability on any government employee who publicly disclosed a patient's identity. *Id.* at 595. Because the statutory provisions themselves did not permit disclosure outside of a few government employees, and because there was no indication that the provisions would be improperly administered, the minimal invasion of privacy was justi-

personal information was a protectable interest within the scope of privacy, it subsequently appeared to withdraw from its recognition of that right.[13] Consequently, the apparent ambiguity of the *Whalen* opinion has created inconsistent decisions in the lower federal courts.

Whether the *Whalen* Court recognized a constitutional right to nondisclosure of confidential information was considered by the United States Court of Appeals for the Sixth Circuit in *J.P. v. DeSanti*.[14] The *DeSanti* court interpreted *Whalen* as holding only that the required disclosure in *Whalen* had not violated any *possible* right to keeping certain information private.[15] A majority of

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fied by the state's interest in preventing the misuse of certain drugs. *Id.* at 596-98.

13. The Court noted that the government's duty to not disclose private information was only "arguably" constitutional, and that the Court need not and did not decide any constitutional questions that might be presented by unwarranted disclosure of information in government computer banks. "We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment." *Whalen*, 429 U.S. at 605-06.

Justice Brennan wrote separately in an attempt to clarify that the Court had recognized a right to nondisclosure:

> The Court recognizes that an individual's interest in avoiding disclosure of personal matters is an aspect of the right of privacy . . . but holds that in this case, any such interest has not been seriously enough invaded by the state to require a showing that its program was indespensible to the state's effort to control drug abuse . . . . Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.

Id. at 606 (Brennan, J., concurring).

Justice Stewart also wrote separately to disagree with Brennan:

> Mr. Justice Brennan's concurring opinion states that '[b]road dissemination by state officials of [the information collected by New York State] . . . would clearly implicate constitutionally protected privacy rights. . . . The only possible support in his opinion for this statement is its earlier reference to two footnotes in the Court's opinion . . . . The footnotes, however, cite to only two court opinions, and those two cases do not support the proposition advanced by Mr. Justice Brennan.

Id. at 608 (Stewart, J., concurring).

14. 653 F.2d 1080 (6th Cir. 1981). In *DeSanti*, a procedure was upheld whereby county probation officers compiled a social history of juveniles brought before the county's juvenile court. Following adjudication of the juvenile's case the county was then free to make the information available to various private and governmental agencies. *Id.* at 1081-82.

15. *Id.* at 1089. After finding that *Whalen* did not recognize a constitutional right to nondisclosure of confidential information, the *DeSanti* court followed a case decided prior to *Whalen*, Paul v. Davis, 424 U.S. 693 (1976). The *Paul* Court seemed to limit the scope of privacy to the right to make autonomous decisions in areas of fundamental importance. In *Paul*, a police department had circulated the plaintiff's name and photograph to merchants on a flyer naming active shoplifters. *Id.* at 694-95. The Court held that there was no violation of the plaintiff's constitutional right to privacy, even though the plaintiff had never been convicted of shoplifting. In arriving at this decision, the Court reviewed cases in which there had been an invasion of the right to privacy and reasoned that "the activities detailed as being within this definition were ones

courts, however, have interpreted *Whalen* as recognizing a right to nondisclosure of personal information.[16] In *Plante v. Gonzales*,[17] for example, the United States Court of Appeals for the Fifth Circuit disagreed with the Sixth Circuit's interpretation of *Whalen* and found that the *Whalen* Court did recognize a constitutional right to informational privacy.[18] The United States Court of Appeals for the Third Circuit, in *United States v. Westinghouse Electric*[19] also found that *Whalen* established a constitutional right to nondisclosure of confidential information.[20]

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very different from that for which respondent claims constitutional protection - matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 713.

16. *See* Johnson v. Dept. of Treasury, I.R.S., 700 F.2d 971, 976 (5th Cir. 1983) (*Whalen* recognized individual interest in avoiding disclosure of personal matter); Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981) (*Whalen* recognized two strands of privacy, one being the right to confidentiality of personal information); Slevin v. City of New York, 551 F. Supp. 917, 928 (S.D.N.Y. 1982) (follows *Plante* view that *Whalen* recognized informational right to privacy); McKenna v. Peckskill Housing Auth., 497 F. Supp. 1217, 1224 (S.D.N.Y. 1980) (*Whalen* identified nondisclosure as major element of constitutionally protected privacy), *modified on other grounds*, 647 F.2d 332 (2d Cir. 1981); Roe v. United States Civil Serv. Comm'n., 483 F. Supp. 539, 566 (S.D.N.Y. 1980) (*Whalen* identified at least two strands of constitutional privacy, one being the right to avoid disclosure of personal matters); Hawaii Psychiatric Soc'y., Dist. Branch v. Ariyoshi, 481 F. Supp. 1028, 1043 (D. Hawaii 1979) (*Whalen* identified right to nondisclosure but not applicable standard of review); Service Mach. & Shipbuilding Corp. v. Edwards, 466 F. Supp. 1200, 1203 (W.D. La. 1979) (*Whalen* recognized right to avoid disclosure of personal matters), *rev'd on other grounds*, 617 F.2d 70 (5th Cir. 1980), *aff'd without opinion*, 449 U.S. 913 (1980); Robinson v. McGovern, 27 Fed. R. Serv. 2d (Callaghan) 1372, 1375 (W.D. Pa. 1979) (*Whalen* recognized plaintiffs' had valid privacy interests at stake). *But see* St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369, 1374-75 (9th Cir. 1981) (following *Paul v. Davis*, government release to public of plaintiff's cost information implicates no constitutional right to privacy); Brown v. Duff Truck Lines, Inc., 557 F. Supp. 194, 197 (S.D. Ohio 1983) (follows *DeSanti* view that *Whalen* did not recognize right to nondisclosure); Crain v. Krehbiel, 443 F. Supp. 202, 208 (N.D. Cal. 1977) (constitutional right to informational privacy as distinguished from right of autonomy does not exist).

17. 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

18. *Id.* at 1132. In *Plante*, a state constitutional amendment required state and local officials to publicly disclose their personal finances. Five state senators alleged that the requirement violated their constitutional right to nondisclosure of personal information. The *Plante* court determined that under *Whalen*, the senators' contentions did fall within the constitutional right to nondisclosure of personal information. *Id.* The court then applied a balancing test. While recognizing that "[f]inancial privacy is a matter of serious concern, deserving strong protection," the court found that "[t]he public interests supporting public disclosure for these elected officials are even stronger." *Id.* at 1136. Therefore, the court ruled that the state's interest in disclosure outweighed the senators' interests in nondisclosure and that there was no violation of the senators' informational right to privacy. *Id.*

19. 638 F.2d 570 (3d Cir. 1980).

20. *Id.* at 577. In *Westinghouse*, the National Institute for Occupational Safety and Health directed an employer to reveal his employee's medical records. *Id.* at 573. The employer refused, urging that such conduct would violate his employee's privacy interests. *Id.* at 576. While the court found such

The United States Supreme Court's decision in *Nixon v. Administrator of General Services*[21] lends support to the reasoning of the federal courts that have interpreted *Whalen* to recognize an informational right to privacy. In *Nixon*, the Court upheld the constitutionality of the Presidential Recordings and Materials Preservation Act. Pursuant to the provisions of the Act, President Nixon was forced to turn over the custody of his official records for examination. Nixon challenged the Act's constitutionality on the ground that it violated his right to personal privacy. Although the Court acknowledged the right to nondisclosure of confidential information,[22] it concluded that Nixon's legitimate privacy interests in the information were outweighed by a great public interest in the documents, by his status as a public figure subject to public examination, and by the provisions of the Act itself which prohibited complete disclosure.[23]

The Court's weighing of the public interests against Nixon's privacy interests in determining whether disclosure was appropriate is significant. If Nixon had no informational right to privacy, then the balancing process carried on by the Court would have been unnecessary. The Court used the same balancing approach in *Whalen*.[24] Accordingly, the Supreme Court's use of a balancing test makes it evident that the Court has recognized some measure of an individual's constitutional right to nondisclosure of confidential information.[25]

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information to be "well within the ambit of materials entitled to privacy protection," the material was not highly sensitive in nature. *Id.* at 577. Moreover, because there were effective security precautions to prevent unauthorized disclosure, the interest in disclosure outweighed the minimal privacy intrusion. *Id.* at 580.

21. 433 U.S. 425 (1977).

22. In discussing Nixon's claim the Court repeated the nondisclosure language from *Whalen*: "[o]ne element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters . . . . '" *Nixon*, 433 U.S. at 457 (quoting *Whalen*, 429 U.S. at 599).

23. *Nixon*, 433 U.S. at 465.

24. As one scholar noted:

> If the Court's denial that Paul v. Davis involved any substantively protected interest had been truly authoritative, the Court's careful canvassing of the procedural safeguards provided by New York to the patients whose drug prescriptions were retained for five years in computer banks would have been quite unnecessary in Whalen v. Roe. . . .

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 971 (1978). Paul v. Davis is the decision which seemed to strictly limit the constitutional right to privacy to the right to make autonomous decisions in areas of fundamental importance. *See supra* note 15. *See also* Fadjo v. Coon, 633 F.2d 1172, 1176 (1981) (*Paul* must be read in light of subsequent *Whalen* and *Nixon* decisions where privacy interest in confidentiality found to extend beyond autonomous decision making).

25. *See* Slevin v. City of New York, 551 F. Supp. 917, 929 (S.D.N.Y. 1982) ("any doubt about the constitutional standing of the interest in avoiding disclosure of personal matters remaining after Whalen v. Roe . . . was removed by Nixon v. Administrator of General Services").

THE CONSTITUTIONAL RIGHT TO CORPORATE PRIVACY

In determining that the right to nondisclosure of confidential information is vested in the individual, the Supreme Court has not addressed the question whether this right of privacy is extended to corporations. Because the concept and scope of privacy seems inextricably intertwined with the needs and expectations of the individual as a natural person, it is not immediately evident how a right to privacy can be extended to a corporation as an artificial person. For example, the violation of an individual's privacy interests may cause feelings of humiliation or outrage, whereas a corporation is practically incapable of manifesting such an injury. Two reasons, however, have been proposed as grounds for granting corporations privacy protections. First, because the individual is closely involved with his corporate employer, his privacy interests cannot be fully protected unless the privacy interests of the corporation are protected.[26] Second, as a practical consequence, disclosure of confidential corporate information can adversely affect corporate profit.[27]

The only case in which a court extended the right of nondisclosure of confidential information to corporations was a panel decision of the United States Court of Appeals for the District of Columbia in *Tavoulareas v. Washington Post*[28] Although *Tavoulareas* was recently vacated on rehearing, it is important to discuss the decision for two reasons. First, because it is the only decision which attempted to extend an informational right of privacy to corporations, an analysis of the case will provide valuable insight into whether such an extension can be reached constitutionally. Second, an analysis of the case is necessary in order to determine whether the decision was vacated on the ground that corporations have no right to informational privacy.

In *Tavoulareas*, the president of Mobil Oil filed an action for

26. Corporate and noncorporate associations have been given standing to assert the constitutional association rights of their members. *See* California Bankers Ass'n v. Schultz, 416 U.S. 21, 55 (1974) (organizations, corporate or noncorporate, may have standing to assert that constitutional rights of members be protected from governmentally compelled disclosure of membership); NAACP v. Button, 371 U.S. 415, 428 (1963) (corporation may assert on own behalf first amendment associational rights of members); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-59 (1958) (association may assert members' right of associational freedoms).

27. Disclosure of confidential financial information can harm a corporation's business interests just as easily as it can harm the interests of an individual. *See* Wright, *The Protection of Corporate Privacy*, 11 INT'L BUS. LAW. 119 (1983).

28. Tavoulareas v. Washington Post Co., 724 F.2d 1010 (D.C. Cir.), *vacated on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc).

libel against the Washington Post.[29] The Post served broad discovery requests on Mobil and, after completing the trial on the libel claim, Mobil moved for the return of its confidential documents. When the Post then moved to unseal all the documents, including 3,800 deposition pages not used at trial, Mobil claimed that this material contained confidential information, the disclosure of which would cause competitive harm.[30] The *Tavoulareas* court ordered the material sealed, holding that the corporation had a constitutional interest in the nondisclosure of the 3,800 deposition pages.[31]

In determining that corporations have a constitutional privacy interest in the nondisclosure of such information, the *Tavoulareas* court relied upon *G.M. Leasing v. United States*,[32] and *Civil Aeronautics Board v. United Airlines*.[33] Those decisions held that corporations possess legitimate fourth amendment expectations of confidentiality in internal commercial information. Although the *Tavoulareas* court found that corporations are protected from unlawful demands made in the name of public investigation, the court recognized *California Bankers v. Schultz*[34] as establishing that "corporations can claim no equality with individuals in the enjoyment of a right to privacy."[35] Regulatory agencies have a legitimate right to insure that corporate behavior is consistent with the law and public interest.[36] Although the *Tavoulareas* court concluded

29. The libel claim was based on two articles published by the Post which stated that the son of the president had obtained business benefits from Mobil through nepotism. *Tavoulareas*, 724 F.2d at 1012.

30. *Id.* at 1011-12. Mobil claimed that protection of the material was essential not only to avoid impairing its competitive position, but also to prevent the possibility of harming its business relationship with the Kingdom of Saudi Arabia. *Id.* at 1012.

31. *Id.* at 1029.

32. 429 U.S. 338 (1977). In *G.M. Leasing*, corporate books were seized without a warrant by the IRS. The United States Supreme Court held that the business premises were protected by the fourth amendment and that the seizure of the corporate books without a warrant was a violation of the corporation's fourth amendment rights. *Id.* at 353.

33. 542 F.2d 394 (7th Cir. 1976). In *United Airlines*, the Seventh Circuit denied the Civil Aeronautics Board's petition for immediate and unconditional access to United Airlines' buildings and records. The court emphasized that agency demands for corporate documents must be "reasonably definite and reasonably relevant to some proper legislative purpose" to avoid fourth amendment challenges. *Id.* at 399.

34. 416 U.S. 21 (1974).

35. *Tavoulareas*, 724 F.2d at 1022 (quoting *California Bankers*, 416 U.S. at 65-6).

36. *Tavoulareas*, 724 F.2d at 1022.

> [N]either incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact on society, from which they derive the privi-

that corporations do have informational privacy protections under the fourth amendment, those protections were qualified to allow adequate policing of corporate conduct.[37]

The *Tavoulareas* court's identification of fourth amendment corporate informational privacy is suspect. On rehearing,[38] the en banc court did not arrive at a different result on the ground that corporations do not have an informational right to privacy. Rather, the court based its decision, in part, on a finding that legitimate fourth amendment privacy interests did not mandate a protective order under the particular circumstances of *Tavoulareas*.[39] Although the court did not elaborate on the reasons for its finding, the result reached by the court was sound.[40]

The privacy interest protected by the fourth amendment is a reasonable expectation of privacy which is not to be violated by unreasonable governmental searches and seizures.[41] The right to nondisclosure of confidential information is distinguishable from the fourth amendment right to privacy because the former encompasses invasions of privacy where no unreasonable search or seizure has occurred. In *Tavoulareas*, there was no fourth amendment question because the information was obtained through legitimate discovery procedures, not through an unreasonable search and seizure. The sole question was whether the corporation had a right to informational privacy which would have been invaded if the information was disclosed to the public. By finding an informational right to privacy in the fourth amendment, the *Tavoulareas* court established a universal right to privacy that contained the right to nondisclosure of confidential information. Such a broad interpretation of the fourth amendment, however, has already been rejected. In *Katz v. United States*,[42] the United States Supreme Court observed that "the Fourth Amendment cannot be translated into a

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> lege of acting as artificial entities . . . . [L]aw-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Tavoulareas, 724 F.2d at 1022 (quoting *California Bankers*, 416 U.S. at 65-6).

37. *Tavoulareas*, 724 F.2d at 1022. The court reasoned that since discovery is not conducted to police or regulate a litigant, a corporation's privacy interest in the discovery context is essentially identical to that of an individual and should be recognized and protected. *Id.*

38. 737 F.2d 1170 (D.C. Cir. 1984) (en banc).

39. *Id.* at 1172.

40. The court based its finding on the United States Supreme Court decision of Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984), which addressed an issue similar to that addressed in *Tavoulareas*. The en banc court noted that the *Seattle Times* Court had in no way indicated that fourth amendment privacy interests mandated a protective order under circumstances similar to *Tavoulareas*. *Tavoulareas*, 737 F.2d at 1172.

41. Terry v. Ohio, 392 U.S. 1, 9 (1968).

42. 389 U.S. 347 (1967).

general constitutional 'right to privacy.' "[43]

Although the *Tavoulareas* court was incorrect in relying on the fourth amendment to establish a corporate right to informational privacy, it remains significant that corporations are recognized as maintaining legitimate fourth amendment expectations of privacy. The development of a corporate right to fourth amendment privacy is significant because it provides valuable insight in determining how a corporate right to informational privacy is constitutionally feasible. Before discussing corporate fourth amendment privacy considerations, however, the Supreme Court's treatment of a corporate fifth amendment right against self-incrimination will be examined. By comparing these two developments in the area of corporate privacy, the methodology by which the Supreme Court may grant or deny corporate informational privacy rights will emerge. This methodology can then be used to determine whether an individual's right to nondisclosure of personal information should be extended to corporations.

The United States Supreme Court addressed the question whether corporations have a fifth amendment right against self-incrimination in *Hale v. Henkel*.[44] In *Hale*, an officer of a corporation was ordered to testify before a grand jury and to produce corporate documents. The officer refused to do either and was consequently held in contempt. On appeal, the officer argued that he should have been allowed to assert the right against self-incrimination on behalf of the corporation.[45]

In determining whether corporations maintain a fifth amendment privacy right against self-incrimination, the *Hale* Court recognized that an individual and a corporation are different in that a corporation is a creature of the state and is presumed to be incorporated for the benefit of the public. Because it receives special privileges and holds them subject to the laws of the state, there is a reserved power of the state to investigate and determine whether a corporation has exceeded its authority. The Court found that it would be inconsistent to hold that a state in the exercise of its powers to investigate corporate activity could not demand the production of corporate records.[46] Accordingly, the Court held that corporations maintain no fifth amendment right against self-incrimination.[47]

Subsequent Supreme Court decisions concerning a corporate right against self-incrimination have reaffirmed the *Hale* reason-

43. *Id.* at 350.
44. 201 U.S. 43 (1906).
45. *Id.* at 69.
46. *Id.* at 75.
47. *Id.* at 75-6.

ing.[48] This is not to suggest that a state's visitatorial power is the only reason for denying corporations a right against self-incrimination. More recent Supreme Court decisions have also pointed to the openness of corporate records, among other factors, as indicating a lack of the requisite degree of privacy necessary for the fifth amendment privilege to attach to corporations.[49] It remains significant, however, that corporations are denied this right largely due to the state's right to police corporate behavior, and not because corporations have no legitimate privacy interests in their corporate records or because they do not suffer from the effects of self-incrimination.

It is evident from the foregoing discussion that the corporate right to fifth amendment privacy and the government's right to ensure corporate compliance with the law are mutually exclusive. To effectively grant one right is to deny the other. As will be illustrated, however, a corporate right to fourth amendment privacy is not mutually exclusive with the government's visitatorial power. It is not surprising, therefore, to find that corporations have fared much better with respect to the development of a fourth amendment right of privacy.

Additionally, the Supreme Court addressed the issue whether corporations have a fourth amendment right against unreasonable searches and seizures in *Hale v. Henkel.* The Court noted that a corporation is no less than an association of natural persons under an assumed name with a distinct legal identity.[50] The Court further noted that a corporation, "[i]n organizing itself as a collective body . . . waives no constitutional immunities appropriate to such [a] body."[51] In holding that corporations are entitled to fourth amendment protections, the *Hale* Court found that, otherwise, the government could broadly draft a search warrant or subpoena without regard to whether the information requested was relevant to the investigation. If such all-inclusive seizures were constitutionally permissible, the business of a corporation would come to a complete stop.[52]

In *United States v. Morton Salt*,[53] the Supreme Court more clearly defined the fourth amendment privacy rights of corporations. In discussing a company's fourth amendment claim, the

48. *See Bellis v. United States*, 417 U.S. 85, 90 (1974) (granting corporations or corporate officers fifth amendment privilege would frustrate government's legitimate regulation of corporations); *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 55, 71 (1974) (citing *Hale* to deny privilege to corporations).

49. *See Bellis v. United States*, 417 U.S. 85, 91-2 (1974).

50. *Hale*, 201 U.S. at 76.

51. *Id.*

52. *Id.* at 77.

53. 338 U.S. 632 (1950).

Court noted that "corporations can claim no equality with individuals in the enjoyment of a right to privacy."[54] The Court acknowledged the public attributes of corporations and held that, although corporations have a fourth amendment right to privacy, it was qualified by the government's right to ensure that corporate behavior was consistent with the law and the public interest.[55]

It seems clear then that corporations have not been denied privacy protection on the ground that corporations lack legitimate privacy interests nor on the ground that they do not suffer from invasions of privacy. Rather, corporations are granted constitutional privacy protections as long as those protections are consistent with the governmental right to police corporate behavior, and, to a lesser extent, with the reduced expectation of privacy in a publicly-created entity. When these traditional qualifications are applied to a corporate right to nondisclosure of confidential information, they do not operate to deny privacy protections as they did in the case of a fifth amendment right against self-incrimination. For example, the government can collect corporate information and satisfy its regulatory privilege without disclosing the information to the public. It follows, therefore, that under a Supreme Court corporate privacy analysis, corporations are entitled to a right to informational privacy which is qualified by a government's regulatory power and by the public nature of corporations.

THE IMPACT OF A CORPORATE RIGHT TO PRIVACY ON THE FOIA

The FOIA[56] was enacted in response to public concern over secrecy in the government.[57] Under this Act, any citizen can request information from the federal government. If the government pos-

54. *Id.* at 652.

55. *Id.* The *Morton* Court's holding, that a corporation's fourth amendment right to privacy is qualified by a government's right to investigate corporate behavior, was reaffirmed in California Banker's Ass'n v. Schultz, 416 U.S. 21, 65-66 (1974). Although it is clear that corporate fourth amendment privacy is qualified, recent decisions have emphasized that corporations have strong and legitimate expectations of privacy inside their enclosed facilities and in their internal corporate information. *See Dow Chemical Co. v. United States*, 749 F.2d 307, 314 (6th Cir. 1984) (corporations have "strong expectations of privacy" within physical structure of facilities); *United States v. New Orleans Pub. Serv.*, 734 F.2d 226, 228 (5th Cir. 1984) (unauthorized inspection of corporate documents invades corporations privacy expectations); *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1022 (D.C. Cir. 1984), *vacated on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc) (corporations possess legitimate fourth amendment expectations of privacy in internal corporate material).

56. Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. section 552 (1976)).

57. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978).

sesses the information, it must release it unless it falls under one of the Act's nine exemptions.[58] The vast amount of corporate information available to the government, along with the FOIA's broad disclosure policy, has caused corporations to have increased concern for their privacy interests.[59] While corporations have not responded to the FOIA by seeking protection under a constitutional right to nondisclosure, American industries have filed a great number of reverse-FOIA suits.[60]

Prior Treatment of Reverse-FOIA Suits

While the FOIA does provide a cause of action to force disclosure of information, the Act does not expressly provide a cause of action to prevent disclosure.[61] Consequently, submitters of information have been confused as to the appropriate theory on which to

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58. The nine exemptions are listed in section 552(b) of the Act. 5 U.S.C. § 552(b) (1976). *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 291-92 (1979) (FOIA is disclosure statute whose exemptions do not rule out disclosure, but only limit agency's obligation to disclose information); Department of Air Force v. Rose, 425 U.S. 352, 260-61 (1976) (FOIA's limited exemptions from disclosure do not obscure basic policy of Act that disclosure is Act's primary goal).

59. Agencies obtain corporate information through a number of means. Private firms must often submit corporate information in order to acquire government benefits such as licenses. *See, e.g.*, 10 C.F.R. §§ 50.30-36a, 70.21-.22 (1979) (Nuclear Regulatory Commission: reactor licenses and construction permits, and government contracts); 41 C.F.R. §§ 60-1.3, 60-1.7 (1979) (Office of Federal Contract Compliance Programs). In addition, some regulatory programs require the submission of data as a prerequisite for undertaking various business activities. *See, e.g.*, 15 U.S.C. § 18a(d)(1) (1976); C.F.R. §§ 803.1-.30 (1979) (FTC; premerger notification program); 15 U.S.C. §§ 77g, 77aa (1976) (SEC; issuance of securities). Some regulatory programs also require periodic reports on ongoing activities. *See, e.g.*, 15 U.S.C. § 78m (1976) (SEC; period financial reports). *See also* Superior Oil Co. v. FERC, 563 F.2d 191 (5th Cir. 1977) (FPC; annual reports on natural gas exploration and developmental expenditures).

In addition to receiving voluntary submissions, agencies are often capable of obtaining information through compulsory processes. *E.g.*, 15 U.S.C. § 49 (1976) (FTC); 15 U.S.C. § 77v(a) (1976) (SEC). Agency subpoena powers extend to all data relevant to an investigation. *E.g.*, United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). An agency having subpoena powers enjoys a "power of inquisition;" it can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950). *See also* SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047 (2d Cir. 1973).

60. A reverse-FOIA suit is an action by an individual or corporation which has submitted information to a government agency and later seeks to prevent that agency from disclosing the information. *See* Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103 (1978); 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, 589-90 (1977).

61. 5 U.S.C. § 552(a)(4)(B) (1976). Agencies commonly have ten days to determine whether to disclose the particular records requested. 5 U.S.C. § 552(a)(6)(A)(i) (1976). If an agency refuses to disclose requested information,

base their reverse-FOIA suits.[62] Prior to the United States Supreme Court's decision in *Chrysler v. Brown*,[63] most reverse-FOIA theories relied on 5 U.S.C. section 552(b)(4) which states, in part, that the FOIA requirements of mandatory disclosure do not apply to "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential."[64] The *Chrysler* Court held, however, that this exemption did not prohibit disclosure of confidential business information, but merely gave federal agencies the discretion to withhold it.[65] The Court, nonetheless, did employ the trade secrets exemption in section 552(b)(4) of the FOIA, section 1905 of the Trade Secrets Act (TSA),[66] and section 702 of the Administrative Procedure Act (APA),[67] to hold that judicial review of an agency's decision to disclose business information is available under the APA.[68]

The *Chrysler* Court reasoned that disclosures made in violation of section 1905 can be enjoined under APA section 10(e)(2)(A) as an agency action not in accordance with the law.[69] Because the language of the FOIA trade secrets exemption and section 1905 of the TSA are nearly identical, it follows that most, if not all, disclosures of information which fall within the FOIA exemption can be enjoined under the APA as a violation of section 1905.[70] Section 1905

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the requester can sue for disclosure and the court must make a *de novo* determination as to whether the agency's refusal is justified. 5 U.S.C. § 552(a)(4)(B).

62. *See* Note, *Chrysler Corp. v. Brown: Seeking a Formula For Responsible Disclosure Under the FOIA*, 29 CATH. L. REV. 159, 167 (1979) (three different theories discussed).

63. 441 U.S. 281 (1979). *Chrysler* involved a contractor's attempt to block disclosure of manning tables by the Office of Federal Contract Compliance Programs. The tables gave a detailed analysis of the contractor's workforce and he feared that disclosure would allow competitors to recognize his costs, sales, and key minority personnel which competitors could then entice away.

64. 5 U.S.C. § 552(b)(4) (1976).

65. *Chrysler*, 441 U.S. at 290-94.

66. 18 U.S.C. § 1905 (1976). An officer or employee of the United States who discloses a corporation's trade secrets, except as provided by law, shall be removed from office or employment. *Id.*

67. 5 U.S.C. § 702 (1976). If a person suffers a legal wrong due to an agency action, or is adversely affected by an agency action, the person is entitled to judicial review of the action under section 702. *Id.*

68. *Chrysler*, 441 U.S. at 317-18.

69. *Id.*

70. *Chrysler*, 441 U.S. at 319 n.49. "Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905 . . . that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905." *Id.* Most courts have found the fourth exemption and § 1905 to be co-extensive. *See* General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981) (any information falling within trade secrets exemption is within scope of § 1905); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1204 n.38 (4th Cir. 1976) (scope of trade secrets exemption and § 1905 co-extensive), *cert. denied*, 431 U.S. 924 (1977); Pharmaceutical Mfr's Ass'n v. Weinberger, 401

does not prohibit disclosures which are authorized by the law, however, and the Court noted that, in addition to statutes, properly promulgated agency regulations can have the force and effect of law.[71] Accordingly, agencies can circumvent violations of section 1905 by creating their own rules which permit disclosures of confidential business information. Information which would otherwise be protected under the FOIA trade secrets exemption and section 1905, therefore, can be subject to disclosure indirectly.

The *Chrysler* Court pointed out, however, that for the rules to have the necessary binding effect to authorize disclosures under section 1905, they must derive from a congressional grant of power.[72] Unfortunately, the Court created some uncertainty as to the required degree of relation between the promulgated rule and the congressional grant of power for the rule to have binding effect. The Court seemed to apply two different standards. One standard required that for a rule to be binding, it need only be consistent with a statutory scheme.[73] The other standard required a careful examination of the statute to identify a specific congressional intention to allow the creation of such a rule.[74]

Because most federal agencies are given great deference to create regulations which carry out their particular regulatory schemes, and because few statutes address the matter of disclosure, the choice of which standard to apply becomes significant.[75] Where the more restrictive "specific intention" standard is selected, very few disclosure regulations will be given binding effect because it is rare that Congress specifically allowed for the creation of such regulations. Alternatively, if the "consistency" standard is applied, most disclosure regulations will be given binding effect because disclosure of confidential business information is conceivably consistent with a number of regulatory purposes.[76]

F. Supp. 444, 446 (D.D.C. 1975) (scope of § 1905 and trade secrets exemption coextensive for purpose of case).

71. "It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'" *Chrysler*, 441 U.S. at 295 (*quoting* Atchinson, T & S.F.R. Co. v. Scarlett, 300 U.S. 471, 474 (1937)).

72. *Chrysler*, 441 U.S. at 302.

73. *Id.* at 306-08.

74. *Id.* In contradiction to the less rigorous "consistency" standard, the Court scrutinized the legislative history and purpose of section 301 to determine that 301 did not confer the power to establish disclosure regulations. *Id.* at 309-11.

75. Enabling statutes often give agencies the power to promulgate regulations "necessary and appropriate" to effectuate the purpose of the statutes. *E.g.*, 15 U.S.C. § 77s(a) (1976) (SEC); 42 U.S.C. § 77s(a) (1976) (SEC); 42 U.S.C. § 1302 (1976) (Department of HEW); 42 U.S.C. § 2201(p) (1976) (Nuclear Regulatory Commission); 47 U.S.C. § 303(r) (1976) (FCC).

76. For example, permitting disclosure of confidential business information may enhance public understanding of the agency's regulatory mission and its

Since *Chrysler*, most courts have applied the "consistency" standard.[77] In *Humana of Virginia v. Blue Cross of Virginia*,[78] for example, a group of hospitals sought to enjoin the Blue Cross of Virginia from publicly disclosing their cost reports.[79] The hospitals argued that the information would cause substantial harm to the hospitals' competitive positions, and therefore it came under the protection of section 1905. The court permitted disclosure, however, on the ground that it was reasonable to find that the legislature's grant of authority contemplated the agency's disclosure regulation.[80] Accordingly, the application of the "consistency" standard resulted in the ability of an agency to circumvent the prohibition of section 1905 by creating its own regulation which allowed disclosure of confidential business information.[81]

Agency Disclosure Regulations in Light of a Corporate Right to Informational Privacy

In order to determine whether corporate informational privacy interests are invaded when agencies regulate the disclosure of confidential business information, the applicable constitutional standard need first be delineated. The answer to the question of which standard should be applied is not readily apparent for two reasons. First, although *Whalen* and *Nixon* both applied a balancing of interests analysis, neither opinion expressly adopted a balancing test as the appropriate tool for informational privacy analysis. Second, *Whalen* and *Nixon* involved a governmental collection of confidential information, thus the question remains as to whether the

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internal processes. Note, *Protecting Confidential Business Information From Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109, 121 (1980). Further, the disclosure of confidential business information arguably is consistent with a congressional grant of authority to collect the information. *See* 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, 623 (1977).

77. *See* General Motors Corp. v. Marshall, 654 F.2d 294, 296 (4th Cir. 1981) (exemption in § 1905 for disclosures "authorized by law" may be grounded either on an express statute or on regulations issued in accordance with a congressional grant of legislative authority); Humana of Virginia v. Blue Cross of Virginia, 622 F.2d 76, 78 (4th Cir. 1980) (to give disclosure regulation binding effect, it is only necessary that it is reasonabe to conclude that grant of authority contemplates regulation issued); St. Mary's Hospital, Inc. v. Harris, 604 F.2d 407, 410 (5th Cir. 1979) (since legislative authority can be reasonably construed to contemplate disclosure regulation, regulation binding for purposes of § 1905).

78. 622 F.2d 76 (4th Cir. 1980).

79. *Id.* at 77.

80. *Id.* at 79.

81. This is not to suggest that agencies may regulate disclosure of confidential business information without reason. Everytime they regulate disclosure, their ability to obtain complete and accurate information from business is diminished since it becomes a disincentive for business to submit information in the first place.

same standard should apply to the public dissemination of such information.

The leading case that explored the proper standard was *Plante v. Gonzales*.[82] In *Plante*, the United States Court of Appeals for the Fifth Circuit noted that more scrutiny was required than a mere rationality test because, otherwise, public disclosure requirements could be extended to anyone in virtually any situation.[83] Likewise, a strict scrutiny analysis was inappropriate because "the Supreme Court has warned against giving heightened attention to cases involving new 'fundamental interests.' "[84] The *Plante* court held that when government disclosure of private information is challenged, a balancing test is the appropriate standard of review. The constitutionality of the government act will be determined by comparing the interests it serves with those it hinders.[85]

An analysis of the circumvention of section 1905 and the FOIA trade secrets exemption has focused on whether Congress granted the agency the power to regulate disclosure. In light of a corporate right to informational privacy, the question of disclosure power becomes preliminary and the focus shifts to whether the invasion of corporate privacy is outweighed by the government interest in disclosure. Because the government already has the information, the government interest in ensuring that corporate behavior is consistent with the law and the public interest is satisfied. Accordingly, under these circumstances, a corporation's informational right to privacy closely parallels that of the individual.[86]

In *Whalen* and *Nixon*, the Supreme Court found that a relatively minimal invasion of privacy was outweighed by the government's interest in obtaining the information. In both cases the privacy intrusions were considered minimal primarily because any private information was viewed by only a few government officials

82. 575 F.2d 1119 (5th Cir. 1978).

83. *Id.* at 1134. The mere rationally standard requires only that the law uses means which are rationally related to a legitimate state purpose. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1 (1973); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

84. *Plante*, 575 F.2d at 1134 (citing San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 33-34 (1973)).

85. *Plante*, 575 F.2d at 1134. Most courts have followed the *Plante* court's lead in applying a balancing of interests analysis to informational privacy questions. *See* Fadjo v. Coon, 633 F.2d 1172, 1176 (5th Cir. 1981) (*Plante* recognized that balancing test appropriate for informational privacy analysis); Duplantier v. United States, 606 F.2d 654, 670 (5th Cir. 1979) (balancing test rather than strict scrutiny to be used in cases involving nondisclosure privacy right); Schacter v. Whalen, 581 F.2d 35, 37 (2d Cir. 1978) (balancing test applied to question of invasion of informational privacy).

86. Of course, even under these circumstances, a corporate right to informational privacy will still be somewhat less than an individual's because corporations have public attributes and are in the public eye.

and was not subject to public disclosure.[87] It follows from these decisions, therefore, that the public disclosure of confidential business information constitutes a significant invasion of corporate privacy, and is subject to a serious constitutional challenge. Due to this challenge, the possibility of agencies publicly disclosing confidential business information decreases because the interest in disclosure will often not outweigh the significant invasion of corporate informational privacy. In effect, an agency's prior discretion to regulate disclosure is removed unless there is a substantial government interest in disseminating the information.

Other Disclosure Problems Under the FOIA

The ability of regulatory agencies to circumvent the FOIA trade secrets exemption and section 1905 of the TSA is not the only disclosure problem that corporations face. A concomitant problem is that courts have given a very narrow interpretation as to the type of information that is protected under these two sections. The FOIA exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential"[88] from mandatory disclosure. In determining whether information falls within the FOIA exemption, almost all litigation has focused on the confidential nature of the information.[89]

The accepted test for confidentiality under the FOIA was established in *National Parks and Conservation v. Morton*.[90] Confidentiality of commercial information is established where disclosure of the information would "impair the Government's ability to obtain necessary information in the future" or where disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained."[91] Resolu-

87. *See also* United States v. Westinghouse Electric Corp., 638 F.2d 570, 580 (3d Cir. 1980) (because adequate statutory and security precautions to prevent unauthorized disclosure existed, interest in disclosure outweighed minimal privacy intrusion); Louisiana Chemical Ass'n v. Bingham, 550 F. Supp. 1136 (W.D. La. 1983) (employees' privacy rights adequately protected under *Whalen* since security measures circumscribing use of personal information and no indication that security measures will not be enforced), *aff'd*, 731 F.2d 280 (5th Cir. 1984).

88. 5 U.S.C. § 552(b)(4) (1982).

89. *See* Comment, *Confidential Treatment and the FOIA*, 18 N. ENG. L. REV. 783, 797 (1983) (almost all exemption 4 litigation centered on definition of "confidential").

90. 498 F.2d 765 (D.C. Cir. 1974).

91. *Id.* at 770. *Accord* Worthington Compressors v. Costle, 662 F.2d 45 (D.C. Cir.), *opinion sub nom.*, Worthington Compressors v. Gorsuch, 668 F.2d 1371 (D.C. Cir. 1981); Volz v. United States Dept. of Justice, 619 F.2d 49 (10th Cir. 1980); Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314 (5th Cir. 1980); Gulf & Western Indus. v. United States, 615 F.2d 527 (D.C. Cir. 1979); American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863 (2d Cir. 1978); Continental Stock Transfer & Trust Co. v. SEC, 566 F.2d 373 (2d Cir. 1977); Sears Roebuck & Co. v. General Serv. Admin., 553 F.2d 1378 (D.C. Cir. 1977),

tion of the economic harm issue requires the difficult burden of proving that *substantial* competitive injury would *likely* result from disclosure.[92] Where a specific request is made for the information, a failure to establish either point requires disclosure.[93]

If corporations are entitled to a constitutional right to informational privacy, the foregoing test for confidentiality is too narrow. The requirement of such a high standard of confidentiality permits the disclosure of information that may cause competitive harm even where the government's interest in disclosure is minimal. This standard has the potential to violate the corporation's informational privacy interests. Even if the competitive harm caused by disclosure is neither substantial nor likely, it may still be of significant importance to outweigh a poor reason for disclosure. To avoid this potential invasion of corporate informational privacy, the confidentiality test should be expanded to include information where there is a reasonable basis to believe that disclosure of the information would harm the submitter's commercial interests.[94]

It can be argued that this more encompassing definition of confidentiality will result in the nondisclosure of virtually all corporate material because there is a reasonable basis to believe that the disclosure of most corporate information will cause competitive harm. This argument fails, however, because if a request for information is denied, the requester can sue for disclosure and the court must make a *de novo* determination whether the agency had a reasonable basis for concluding that disclosure would cause competitive

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cert. denied, 434 U.S. 826 (1978); Stone v. Export-Import Bank of United States, 552 F.2d 132 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976); Charles River Park "A", Inc. v. Department of Hous. & Urban Dev., 519 F.2d 935 (D.C. Cir. 1975); Continental Oil Co. v. Federal Power Comm'n, 519 F.2d 31 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); First Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 426 F. Supp. 454 (W.D. Ark. 1977), *aff'd*, 570 F.2d 693 (8th Cir. 1978).

92. National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976).

93. *Id.* Under the two prong test, the information will also be classified as confidential if disclosure is likely to impair the government's ability to obtain such information in the future. If an agency chooses to not classify information as confidential, however, it is difficult for a corporation to argue that the agency is unable to guard its best interests. Stated alternatively, to classify the information as confidential, the corporation has to argue that the agency failed to realize that disclosure of the information will impair its ability to obtain such information in the future.

94. The ABA, at its mid-winter 1982 meeting, approved a resolution which called for a similar definition of confidential information under the FOIA. *National Security, Law Enforcement and Business Secrets Under the Freedom of Information Act*, 38 BUS. LAW. 707, 726 (1983). Under this broader definition, agencies can still often regulate disclosure of information which is only marginally confidential since the interest in disclosure will usually outweigh the minimal invasion of privacy.

harm.[95] If the court finds that the agency made a proper determination, it can still order disclosure if the public interest in disclosure outweighs any invasion of informational privacy. Accordingly, this revised definition of confidentiality is appropriate because it is broad enough to protect a corporation's informational privacy interests, and yet it will not prevent disclosure when disclosure should legitimately be granted.[96]

CONCLUSION

The fourth amendment right to be free from unreasonable searches and seizures and the fifth amendment privilege against self-incrimination were recognized from their inception to inhere in the individual. It was not until these rights matured in the individual that they were applied to corporations. In contrast to the long-standing fourth and fifth amendment areas of privacy, the individual right to informational privacy is in its infancy.[97] This

95. *See supra* note 61 and accompanying text.

96. Another problem under the FOIA is where an agency fails to classify information as confidential which should be so classified. There are several reasons why an agency may hesitate to classify information as confidential. First, sometimes an agency will disclose information despite the fact it should be classified as confidential, believing that the submitter's confidentiality interests are outweighed by the public interest in disclosure. Second, agencies usually gain little by withholding information as confidential, and therefore often do not wish to assume the risk of litigation with a disappointed requestor. Third, it is often not apparent that particular information is confidential because the test of causing competitive harm requires knowledge of the submitter's circumstances which few agencies possess. *See* Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109, 112 (1980).

Under the FOIA, there are no procedures which give a submitter notice and an opportunity to object before business information is disclosed. This allows an agency to classify confidential information as non-confidential, and disclose it before a corporation has a chance to act. Such a possibility is unacceptable in light of a corporate right to privacy because once the information is disclosed, a corporation's privacy interests are destroyed. Therefore, in order to give a corporate right to privacy substance and protection under the FOIA, pre-disclosure procedures will need to be established. *Cf.* Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (those affected by administrative action must receive hearing "at a meaningful time and in a meaningful manner"). These procedures should take the form of notice and an opportunity to seek judicial review of the agency's decision to disclose.

97. In the recent decision of Press-Enterprise Co. v. Superior Court of California, the Supreme Court of the United States once again declined to clearly hold that the constitutional right to nondisclosure of confidential information exists in the individual:

> Certainly, a juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he is called to do his public duty. We need not decide, however, whether a juror, called upon to answer questions posed to him in court during *voir dire*, has a legitimate expectation, rising to the status of a privacy right, that he will not have to answer those questions.

104 S. Ct. 819, 826 (1984) (Blackmun, J., concurring).

privacy interest also needs to mature and withstand review as an individual right before it can be applied to corporations. When this progression occurs, however, an informational right to privacy will be extended to corporations, subject both to the legitimate demands of public disclosure and the governmental right to ensure that corporate behavior is consistent with the public interest. Rather than act to put corporate activity beyond government and public view, this new corporate right to informational privacy will operate to give corporations fair and legitimate protections of confidential information.[98]

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98. For example, eighty-five percent of the FDA requests for information under the FOIA are made by other competitive drug companies and it is this kind of invasion of corporate privacy which an informational right to privacy will help eliminate. Comment, *Business and the Freedom of Information Act*, 38 BUS. LAW. 707, 727 (1983). It is both interesting and paradoxical that perhaps the last "person" who wants a corporate right to privacy, at least in the FOIA context, are corporations themselves because the FOIA is the pipeline through which many corporations draw information on their competitors.