MANAGING THE RISKS OF FOIA-ABLE TRADE SECRETS

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I. INTRODUCTION ................................................................. 316

II. THE LEGAL FRAMEWORK ..................................................... 318
A. THE FREEDOM OF INFORMATION ACT .............................. 318
B. THE FEDERAL TRADE SECRETS ACT ................................. 321
C. STATE TRADE SECRETS LAW AND PUBLIC POLICY ...... 322

III. ANALYSIS AND RECOMMENDATIONS ............................. 328
A. PRE-FOIA PROCESS ............................................................. 329
1. Whether to submit a bid .................................................. 329
2. Whether to resist the submission of trade secrets .......... 331
3. Clearly mark or identify submitted trade secrets ....... 332
4. Segregate trade secrets from all other
   information and documents ............................................ 332
B. EXEMPTION 4 PROCESS ..................................................... 335
1. Administrative Hearings ............................................... 335
2. Judicial Review ............................................................. 339

IV. CONCLUSION ................................................................. 343

ABSTRACT
The primary purpose of the Federal Freedom of Information Act (FOIA) is to provide federal agency records and information to the public and thereby open the inner workings of the federal government to public review. Although the goal of open government is certainly laudable, it can have unintended consequences when businesses

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dealing with the government have their trade secrets revealed to a competitor pursuant to a FOIA request. It is, therefore, the aim of this article to synthesize the legal framework created by the intersection of FOIA and trade secret law and to apply this framework to the strategic and tactical decisions businesses pursuing a federal government contract would likely face. The resulting reference point in these areas of diverging law and the proposed recommendations are intended to assist business executives and legal counsel in their decision-making processes and thereby limit their own personal liability under the business judgment rule.
I. INTRODUCTION

Confidential pricing information, trade secrets, and federal government contracts: if this list sounds like an inventory of your business’s most important assets, you may be surprised to find that a federal law may be misused by a rival to strip your business of its competitive advantages.

In 1966, the Federal Government enacted the Freedom of Information Act (FOIA). Their purpose was to increase government transparency and accountability. Congress was intent on providing the public with broad access to records – records which were both created and obtained by federal administrative agencies – in order to create transparency and increase the public’s knowledge of, and trust in, governmental policies, procedures, and actions.

While the goal of open government and transparency is certainly a laudable public aim, the policies and procedures used to implement these seemingly worthy goals may have negative consequences under certain circumstances. One of the most troubling of these negative consequences occurs when a government agency discloses a contractor’s trade secrets to one of the contractor’s competitors in response to the competitor’s FOIA request. Once it is disclosed, the information loses its status as a trade secret and is no longer afforded protection under any of the various trade secret laws.

This negative consequence is clearly unintended under the FOIA. There is no evidence in the statute or congressional record that Congress intended such a subversive role for the FOIA. In fact, the FOIA has enumerated provisions specifically designed to protect such proprietary information.

In light of the current trend toward a “new era of open government,” however, the FOIA request has become powerful

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7 Presidential Memorandum for Heads of Executive Departments and Agencies continued . . .
enough, through executive policymaking and judicial interpretations, to function in this unintended and coercive way. Businesses, through a simple written request, may obtain their competitor’s secret information, and thereby irreparably destroy the information’s value and, in turn, their competitor’s competitive advantages in the marketplace.  

In order to protect their company’s assets and to avail themselves of the limitations on personal liability that the business judgment rule provides, executives seeking government contracts must make deliberate and informed decisions concerning the potential risk of a FOIA disclosure of their company’s trade secrets. It is, therefore, the aim of this article to synthesize the legal framework created by the intersection of FOIA and trade secret law and to apply this framework to the strategic and tactical decisions a business pursuing a federal government contract would likely face. The resulting reference point in these diverging areas of law and the proposed plan of tactical and strategic decision-making are intended to assist business executives and legal counsel in their decision-making processes.

In pursuit of this aim, Section II of this article begins with a descriptive analysis of the legal framework of the divergent bodies of the Freedom of Information Act and trade secret law. Section II’s synthesis of these bodies of law will form the foundational framework for the recommendations found in Section III. Section III advances the literature in this area through a prescriptive application of the business judgment rule to executive decision making in (1) submitting trade secrets to government agencies and (2) protecting those trade secrets once submitted. Section III’s recommendations will focus on informed executive decision-making at both the strategic and tactical levels of government contracting, but will not deal with the patchwork of differing agency policies regarding FOIA submissions and requests. Lastly, Section IV concludes this article with a brief recap of the synthesis of the law and the recommendations that were provided.


8 See Avtel Servs., Inc. v. U.S., 70 Fed. Cl. 173, 228 (Fed. Cl. 2006).

II. The Legal Framework

In this section, we will develop a legal framework by providing a descriptive analysis and synthesis of the following three areas of the law: (1) the Federal Freedom of Information Act, (2) the Federal Trade Secrets Act, and (3) state trade secret laws and public policy. This examination will not only provide us with the legal framework of the statutes and common law, but will also provide a foundational background by briefly fleshing out this framework within the context and public policy goals supporting these laws. This section will then lead us into our analysis by beginning to draw connections and highlight tensions between these areas of the law.

A. The Freedom of Information Act

The FOIA was enacted with the ambitious and unambiguous Congressional intent to provide the public with access to federal government documents and promote full administrative agency disclosure. The Executive Branch, which houses the government’s administrative agencies, has not only supported this Congressional goal of open government, but has expanded its interpretation in the application of the law within the administration. In a 2009 memoranda to all federal agencies, the President of the United States declared that:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of

disclosure should be applied to all decisions involving FOIA.\textsuperscript{11}

The first instance in which an agency, under the mandates of the FOIA, may be excused from disclosing information is if the agency demonstrates that the requested records are not agency records and are, therefore, not subject to a FOIA request in the first place.\textsuperscript{12} The burden of such a demonstration would require the agency to prove that the agency (1) neither created nor obtained the requested materials and (2) that the agency was not in control of the requested materials at the time the FOIA request is made.\textsuperscript{13} While the analysis to determine whether the agency created or obtained the information is seemingly straightforward, the determination of whether an agency has “control” of the records is a bit more complicated. The scope of the control prong of the above test has been defined using the following elements:

\begin{enumerate}
\item The intent of the document’s creator to retain or relinquish control over the records;
\item the ability of the agency to use and dispose of the record as it sees fit;
\item the extent to which agency personnel have read or relied upon the document; and
\item the degree to which the document was integrated into the agency’s record system or files.\textsuperscript{14}
\end{enumerate}

The second instance in which an agency, under the mandates of the FOIA, may be excused from disclosing information is if the information falls within one of the nine categories of information that are explicitly exempt from disclosure under the statute.\textsuperscript{15} While disclosure is the means to the clearly stated objective of transparency at the heart of the FOIA, Congress recognized that there were classifications of information that required exceptions to this general rule of disclosure.

As a result, information and documents subject to a FOIA request (i.e., information and documents created or obtained by the agency and that the agency was in control of at the time of the FOIA request) are allowed to be withheld by a government agency if, and only if,

\begin{itemize}
\item \textsuperscript{11} Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).
\item \textsuperscript{12} Missouri ex rel. Garstang v. U.S. Dep’t of Interior, 297 F.3d 745, 749 (8th Cir. 2002) (citing U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989)).
\item \textsuperscript{13} Id. at 749-50.
\item \textsuperscript{14} Burka v. U.S. Dep’t of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting Tax Analysts v. Dep’t of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988)).
\item \textsuperscript{15} See 5 U.S.C. § 552(b) (2012).
\end{itemize}
such information and documents are found to fit within one or more of the nine statutory exemptions.\textsuperscript{16} These statutory exemptions are: (1) classified records relating to national defense and foreign policy, (2) internal agency personnel rules and practices, (3) information exempt under other statutes, (4) trade secrets and other confidential commercial or financial information, (5) “interagency or intra-agency memoranda or letters” containing internal advice and recommendations, (6) personnel, medical, and similar files concerning individuals, (7) limited categories of law-enforcement investigatory files, (8) information concerning the regulation of financial institutions, and (9) “geological and geophysical information” relating to wells.\textsuperscript{17}

The burden of proof rests upon the government agency to demonstrate that it was justified in determining that any such requested information falls within one or more of these nine exemptions.\textsuperscript{18} All claimed FOIA exemptions must be narrowly construed pursuant to the clear federal policy favoring disclosure.\textsuperscript{19}

Specifically addressing the FOIA’s fourth exemption from disclosure (hereinafter “Exemption 4”), there are two distinct categories: (1) trade secrets and (2) confidential commercial and financial information.\textsuperscript{20} For both agencies and any subsequent reviewing courts, the first step of an Exemption 4 analysis is to determine whether the requested information qualifies as a trade secret. If the agency or reviewing court finds that the requested information falls within the scope of trade secrets subject matter, that determination will be dispositive of the issue and will render all further inquiry unnecessary and the information exempt from disclosure.\textsuperscript{21} If the information does not qualify as a trade secret, the agency or reviewing court must then proceed to the confidential commercial and financial information prong of the Exemption 4 analysis.

In order to fully understand the scope of the protections Exemption

\textsuperscript{16} See id.
\textsuperscript{17} Id.
\textsuperscript{18} Becker v. I.R.S., 34 F.3d 398, 402 (7th Cir. 1994) (citations omitted); Solar Sources, Inc. v. U.S., 142 F.3d 1033, 1037 (7th Cir. 1998) (citing Patterson v. I.R.S., 56 F.3d 832, 836 (7th Cir. 1995)).
\textsuperscript{19} Becker, 34 F.3d at 402; Solar Sources, 142 F.3d at 1037.
\textsuperscript{20} See generally Nancy J. White, \textit{FOIA and the Crying Contractor: Confidential Information or Substantial Competitive Harm?}, 32 \textit{The Const. L.} 29 (2012) (discussing and analyzing the confidential commercial and financial information prong).
4 offers to companies who submit trade secrets to administrative agencies (hereinafter referred to individually and collectively as “Submitters”) or the scope of a FOIA request in general, we must look to both the Federal Trade Secrets Act\(^\text{22}\) and state trade secret laws. Therefore, we now turn our examination to the Federal Trade Secrets Act.

**B. The Federal Trade Secrets Act**

The Federal Trade Secrets Act\(^\text{23}\) is a narrowly drafted law with a very limited purpose. It does not grant intellectual property rights in certain information to persons or businesses or offer recourse to those whose information has been misappropriated, and like its fellow federal law the FOIA, it too fails to provide a clear and definitive definition of the term “trade secret.”

Instead, the Federal Trade Secrets Act prohibits federal officers and employees from “publishing, divulging, or making known” a trade secret that they have in their possession as a result of their official duties.\(^\text{24}\) This act is enforced through the imposition of criminal liability, including a fine or imprisonment for not more than one year, or both, and termination of employment.\(^\text{25}\) The closest the act comes to defining a trade secret is the following wording:

> Whoever, being an officer or employee of the United States or of any department or agency thereof . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; . . . shall be fined under this title or imprisoned not more than one year, or both; and shall


\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id.
be removed from office or employment.26

Thus, while state trade secret laws 27 are actual grants of intellectual property rights in certain information, the Federal Trade Secrets Act is intended for a different purpose entirely: to regulate how federal employees handle such information when it comes into their possession by prohibiting them from disclosing the information “to any extent not authorized by law.”28

When Exemption 4 is read in the context of the Federal Trade Secrets Act, we see that this act strengthens Exemption 4’s protections regarding trade secrets. Unlike the other eight FOIA exemptions and the second clause of Exemption 4 (confidential commercial information), which “simply permit, but do not require, [agencies] to withhold exempt information from [the] public,”29 the trade secrets category of Exemption 4 is deemed by some courts to be “co-extensive [with the Federal Trade Secrets Act] for disclosure purposes.”30 This means that agencies are required to withhold trade secret information by the Federal Trade Secrets Act, while agencies are simply permitted to withhold information falling within the other FOIA exemptions.31 The Federal Trade Secrets Act, therefore, has the potential to greatly strengthen the trade secrets clause of Exemption 4.

Before we can apply the Federal Trade Secrets Act to an Exemption 4 analysis, we must first define the scope of trade secrets subject matter (i.e., what is a trade secret). Considering the dispositive effect the classification of information as a trade secret has on the protection from disclosure found in Exemption 4, it is surprising that neither the FOIA nor the Federal Trade Secrets Act defines what constitutes a trade secret. Therefore, it is necessary to look to state law for the definition of the scope of trade secrets subject matter.

C. State Trade Secrets Law and Public Policy

Trade secret law is a subset of the more general body of law known as intellectual property law, which also includes patents, copyrights, and trademarks.32 Intellectual property can be broadly defined as government grants of limited monopolies over the

26 Id.
27 See infra Part II(c).
28 Id.
29 Bartholdi Cable Co., Inc. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997).
32 BLACK’S LAW DICTIONARY 368 (9th ed. 2009).
intangible results of certain narrowly defined types of intellectual and creative endeavors.\(^{33}\) Unlike the federal patent and copyright law, however, the granting of legal rights in trade secrets was first bestowed through the common law rulings of the various state and territorial court systems.\(^{34}\) Indeed, it was not until 1984 that the federal courts finally settled the question, for federal purposes, that trade secrets were property.\(^{35}\)

Currently forty-seven states,\(^{36}\) two territories,\(^{37}\) and the District of Columbia have codified and standardized this body of common law through the passage of the Uniform Law Commission’s Uniform Trade Secrets Act (UTSA).\(^{38}\) As of this writing, only three states – Massachusetts, New York, and North Carolina – have not enacted some form of the UTSA.\(^{39}\) While New York remains steadfast in its reliance on its common law for the establishment and enforcement of trade secret rights, North Carolina\(^{40}\) and Massachusetts\(^{41}\) have trade secrets statues that differ somewhat significantly from the UTSA. Massachusetts, which currently has two pending UTSA bills in its legislature, could become the forty-eighth state to enact the UTSA if

\(^{33}\) Id.

\(^{34}\) This is one important way to distinguish trade secrets from patents and copyrights. Congress is vested with jurisdiction over patents and copyrights from the Intellectual Property Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 8, which states that “Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .” The federally-enacted Patent Act can be found at 35 U.S.C. § 101 (2013), and the federally-enacted Copyright Act can be found at 17 U.S.C. § 101 (2013).

\(^{35}\) Ruckelshaus v. Monsanto Co, 467 U.S. 986, 1003-04 (1984) (holding that trade secrets qualified as property within the meaning of the Takings Clause of the 5th Amendment).


\(^{37}\) Id. The two U.S. territories that have enacted some version of the UTSA are Puerto Rico and the U.S. Virgin Islands.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) N.C. GEN. STAT. § 66-152 (2011).

\(^{41}\) MASS. GEN. LAWS ch. 93, § 42 (2011); MASS. GEN. LAWS ch. 266, § 30 (2011).
either bill is passed and signed into law.\textsuperscript{42}

With so many points of origin, it is little wonder that the term “trade secret” is defined so many different ways by many different legal authorities. A trade secret is often broadly described as a state grant of legal rights in “[a]ny information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”\textsuperscript{43} This broad view sets out three elements of the scope of this class of intellectual property: (1) proprietary information, (2) value, and (3) secrecy. In other words, a trade secret has to be comprised of proprietary information that is able to be leveraged to gain a favorable competitive position in the marketplace because it has been concealed by its owner through the employment of reasonable security measures and personnel practices.\textsuperscript{44}

Historically, the broadly defined scope of trade secrets subject matter comes from two sources: (1) The Restatement of Torts, § 757, \textit{Comment b} (hereinafter “\textit{Comment b}”) and (2) the UTSA.\textsuperscript{45} These important authorities have been drawn upon by the courts and administrative agencies to establish the elements of what constitutes a trade secret in broad and unrestricted terms.

For instance, \textit{Comment b} defines a trade secret as:

\begin{quote}
... any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the
\end{quote}


\textsuperscript{43} \textsc{Restatement (Third) of Unfair Competition} § 39 (1995).

\textsuperscript{44} Id.; see also \textsc{Paul Goldstein, Intellectual Property: The Tough New Realities That Could Make or Break Your Business} 130 (2007) (stating that companies use these measures to protect trade secrets from competitors).

\textsuperscript{45} \textsc{Restatement (First) of Torts} § 757 (1939); \textsc{Unif. Trade Secrets Act} (1985); see also Michael W. Eady, \textit{A Practitioner’s Guide for the Use of Protective Orders and Confidentiality Agreements}, 27 \textsc{Advoc.} 42, 43 (2004) (discussing three secondary sources that can provide guidance in determining what constitutes a trade secret, including The Restatement of Torts, § 757 and the USTA, and mentioning that more recently the American Law Institute published the Restatement of Unfair Competition, which also provides guidance).
business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.\textsuperscript{46}

From the above definition, a six-factor test has been derived by the courts, which both the executive branch\textsuperscript{47} and the courts\textsuperscript{48} have, at times, utilized to analyze whether information qualifies as a trade secret. The six factors are:

(1) The extent to which the identity of the [information] is known outside petitioner’s business;

(2) The extent to which the identity of the [information] is known by employees and others involved in petitioner’s business;

(3) The extent of measures taken by the petitioner to guard the secrecy of the information;

(4) The value of the information about the identity of the claimed trade secret to the petitioner and to its competitors;

(5) The amount of effort or money expended by petitioner in developing the information; and

(6) The ease or difficulty with which the identity of the [information] could be properly acquired or duplicated by others.\textsuperscript{49}

The UTSA defines trade secrets more concisely, but in equally

\textsuperscript{46} \textit{RESTATEMENT (FIRST) OF TORTS} § 757 cmt. b (1939).
\textsuperscript{47} 21 C.F.R. § 720.8(b) (2013).
\textsuperscript{49} \textit{Id.}
broad and unrestricted terms:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

The fact that trade secret rights derive from multiple sources of state common and statutory law and not from the federal Constitution’s intellectual property clause is significant. This significance is apparent in the heavy reliance on public policy arguments and the resulting conflicts in the adjudication of trade secrets in administrative hearings and court proceedings as will be discussed below. Because trade secret disputes are often waged at this public-policy level, it is helpful for our analysis to now provide a brief description of the underlying public policy arguments that support state exercises of power in granting such property rights.

There are two main public policies that state trade secret laws serve. The first public policy goal is utilitarian in nature and has the objective of advancing innovation by incentivizing certain intellectual endeavors, which, in turn, allows creators the potential to reap monetary rewards for the results of those endeavors. This public policy goal advances not only trade secrets law, but is also the cornerstone justification for federal patent and copyright laws.

50 UNIF. TRADE SECRETS ACT § 1 (1985).
51 See U.S. CONST. art. I, § 8, cl. 8.
53 Id.; Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480-81 (1974). See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-423, INTELLIGENT PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS, GAO-10-423 (2010), available at http://www.gao.gov/new.items/d10423.pdf (tracking and explaining the long-established reasoning and nature of this public policy). Trademarks are the exception to this foundational public policy supporting intellectual property laws in the United States. Trademarks are more often supported by the same public policies that support consumer protection laws than the other areas of intellectual property. For an in-depth discussion of trademark law, see J. THOMAS MCCARTHY, MCCARTHY ON
The second public policy goal supporting trade secrets is unique to trade secrets law and has been stated by the U.S. Supreme Court as the maintenance of standards of commercial ethics.\textsuperscript{54} Indeed, trade secrets law has a unique purpose in establishing a framework for the enforcement of behavioral business norms. This public policy purpose requires flexibility and a case-by-case application in this area of the law. With this in mind, it is little wonder that the UTSA spans a scant three pages that lends the courts and administrative agencies the utmost flexibility, and conversely very little guidance, while the copyright and patent acts span hundreds of pages each, and set out the law in somewhat rigid detail.\textsuperscript{55}

On the other side of the public policy analysis is the aforementioned public policy of FOIA transparency.\textsuperscript{56} It is not just the legislative and executive branches of the Federal Government that have recognized and supported this pursuit of a transparent and open government. The Federal Judiciary has also recognized a “strong presumption in favor of disclosure”\textsuperscript{57} as a “general philosophy of full agency disclosure”\textsuperscript{58} that is prevalent in American law. As Justice Black noted in his concurring opinion in \textit{Barr v. Matteo}:\textsuperscript{59} “[t]he effective functioning of a free government like ours depends largely on the force of an informed public opinion.”\textsuperscript{60} This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.”\textsuperscript{61}

With the limited monopolistic control over certain information granted by the states and territories, the regulation of federal employees’ handling of such information granted by the federal trade secrets law,\textsuperscript{62} and competing public policies driving any resultant disputes, one can easily anticipate the difficulties such disconnected laws could possibly create for a government that strives for even a modicum of transparency in governing.

\textsuperscript{54} \textit{Kewanee Oil Co.}, 416 U.S. at 481 (emphasis added).
\textsuperscript{55} \textit{Id.} at 481–82.
\textsuperscript{56} See discussion supra Part II.A.
\textsuperscript{58} United States Dep’t of Defense v. FLRA, 510 U.S. 487, 494 (1994) (quoting Dep’t of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976)). \textit{See also} EPA v. Mink, 410 U.S. 73, 79–80 (1973) (arguing that when the Senate enacted the Freedom of Information Act, it was motivated by a desire for full and responsible disclosure of information previously kept secret).
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 577.
\textsuperscript{62} 18 U.S.C. § 1905; \textit{See infra} Part II(B).
III. Analysis and Recommendations

When administrative agencies and courts hear disputes regarding FOIA requests and the adversarial lines are drawn in the conflicting public policies of trade secrets law and the FOIA, the resulting case-by-case treatment of disputes is unpredictable. This lack of predictability substantially increases the risk for executives who are attempting to exercise business judgment in the delicate balancing act of protecting and leveraging their companies’ trade secrets.

To protect their company and avail themselves of the business judgment rule’s protections, officers and directors should attempt to manage risk at each point in which they have some level of control. With the legal framework developed and the difficulties created by this framework foreshadowing our recommendations, we now turn our focus to a prescriptive analysis. This section will provide a prescriptive application of the foregoing legal framework and the business judgment rule to executive decision making in (1) submitting trade secrets to government agencies (hereinafter “pre-FOIA process”) and (2) protecting those trade secrets once submitted (hereinafter “Exemption 4 process”). The resulting recommendations focus on improving executive decision making at both the strategic and tactical levels of government contracting.

One issue that will focus our analysis and recommendation is worth highlighting at this point. Much like the difficulties encountered in the state patchwork of trade secret laws, our analysis here could be hindered by the “… patchwork of agency regulations and practices [that] could pose risks to company trade secrets in the hands of the government ….”

Indeed, each agency has its own specific procedures and forms that Submitters must use when making a claim that information is a trade secret. Furthermore, each agency has its own specific set of procedures for handling Requesters’ FOIA requests. Consequently, it is quite beyond the

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63 Rowe, supra note 9, at 796.
64 As used herein, a “Submitter” is any person or entity who provides trade secrets to a federal administrative agency.
65 For example the Environmental Protection Agency regulation, 40 C.F.R. § 350.7 (2011), states “(a) Claims of trade secrecy must be substantiated by providing a specific answer including, where applicable, specific facts, to each of the following questions with the submission to which the trade secrecy claim pertains. Submitters must answer these questions on the form entitled ‘Substantiation to Accompany Claims of Trade Secrecy’ in § 350.27 of this subpart.”
66 For the purposes of this article, a “Requester” is any person or entity who submits a FOIA request to a federal administrative agency seeking the disclosure of information.
scope of this article to provide a complete roadmap to navigate this vast patchwork of administrative rules and procedures. Instead, we will focus on the substantive business decisions that could plague the decision-making process and cause the loss of trade secret assets and the possible imposition of personal liability on decision-making officers and/or directors.

A. Pre-FOIA Process

Competent business executives pursue new opportunities with a mixture of exuberance and trepidation; the latter of which motivates them to conduct their business with reasonable due care, while the former provides the ability to tolerate calculated risks. The substantive and procedural pitfalls described in the section above should provide enough pause to effectively temper any irrational exuberance at this initial stage of bidding for a government contract.

1. Whether to submit a bid

Farsighted executives will begin managing their company’s risk before trade secrets are ever submitted. The first variable these executives will likely address is whether or not to submit a bid for a federal contract in the first place. It is here that the business judgment rule first comes into play.

The business judgment rule protects corporate officers and directors from personal liability for the decisions they make as long as they act on an informed basis, in good faith, and in the honest belief that their actions are in the company’s best interest. To defeat the protections offered by the business judgment rule, and thereby hold

68 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). While some jurisdictions allow corporations—with shareholder approval—to adopt charter provisions that exculpate directors from personal liability for certain breaches of the duty of care, bad-faith acts or omissions, intentional misconduct or illegal acts, and self-dealing are usually excluded from such protections. See Del. Code Ann. tit. 8, §102(b)(7) (West 2011). It is still in the best interests of the corporation, the corporation’s Directors, and the corporation’s Officers to act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation’s best interests. There are many reasons this is the case—one such reason that should convince any businessperson that has experienced litigation is the fact that such exculpation-clause defenses are affirmative defenses and, therefore, may not be sufficiently robust to bar an action from proceeding to trial and costing all interested parties increased litigation expenses. O’reilly v. Transworld Healthcare, Inc., 745 A.2d 902, 914–16 (Del. Ch. 1999).
corporate officers and/or directors personally liable for their decisions, a shareholder/plaintiff would have to prove that “in reaching their challenged decision, [the executives] breached any one of the triad of their fiduciary duties—good faith, loyalty or due care.”\textsuperscript{69} Regarding the last of this triad of fiduciary duties, due care, the executive must act in an informed manner.\textsuperscript{70} The courts have stated that whether an executive acts in an informed manner is determined by examining whether “the directors [or officers] have informed themselves ‘prior to making a business decision, of all material information reasonably available to them.’”\textsuperscript{71}

Therefore, if a business is going to invest in an open-bidding process, provide a federal administrative agency with valuable trade secrets to comply with bidding requirements, and risk the loss of their intellectual property simply to be able to bid on a government contract, the officers and/or directors making the final decision must make an informed decision that was reached in good faith and in the honest belief that their actions were in the company’s best interest. For executives to do otherwise would be to not only improperly manage the company’s risks, but to also needlessly expose themselves to potential personal liability.

Therefore, executives should – within the scope of the reasonable constraints on resources, information, and time – engage in a cost-benefit analysis that is supported by the most current and relevant information reasonably available. This cost-benefit analysis is impossible without a formal intellectual property audit that will result in a reasonable valuation of the trade secrets that could be required to be submitted to an administrative agency. There are four generally accepted methods in which intellectual property may be valued:

1. **Transactional or Market-Based Method** – Conducted by comparing previous sales of similar intellectual property rights to the intellectual property right being examined to establish a fair market value of the latter.

2. **Cost-Based or Replacement-Cost Method** – Conducted by taking into consideration both how much


\textsuperscript{70} Cede & Co., 634 A.2d at 367.

\textsuperscript{71} Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (citing Aronson, 473 A.2d at 812); see also Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000).
it cost to create the asset historically and how much it would cost to recreate it given current rates.

(3) Income-Based Method – Conducted by examining the stream of income attributable to the intellectual property based on the historical earnings and expected future earnings.

(4) Binomial/Option – A two-step process where the probability of a favorable event occurring that increases the value of the intellectual property is first calculated and then, using one of the above three methods, a valuation is calculated.  

There are advantages and disadvantages to each of these methods and independent professional advice should be sought in determining which method best serves the decision-making process. Regardless of the method, however, the audit and subsequent valuation should be directed at providing the officers and/or directors with “all material information reasonably available to them,” so that they may act on an informed basis, in good faith, and in the honest belief that their actions are in the company’s best interest.

2. Whether to resist the submission of trade secrets

If, after all due care, the company decides to submit a bid for the government contract, it next needs to decide whether or not to resist submitting the company’s trade secrets to the government agency. Avoiding submitting a trade secret to the government is undoubtedly the most effective strategy. This strategy is not, however, always available because in certain circumstances a company has to reveal trade secrets to do business in the United States or with the United States.


Smith, 488 A.2d at 872 (citing Aronson, 473 A.2d at 812).

Aronson, 473 A.2d at 812.

See Rowe, supra note 9, at 796.


See e.g., 48 C.F.R. § 227.7102-1 (2012) (the Department of Defense regulations state that the DoD will acquire only the technical data customarily provided to the public with a commercial item or process but follows with a list of continued...
3. Clearly mark or identify submitted trade secrets

If submission of the company’s trade secrets cannot be avoided, then the trade secrets should be clearly marked or labeled as “Trade Secrets.” An agreement with the agency should also be obtained. This agreement should clearly acknowledge that the agency agrees to the trade of secret classification for all information and documents submitted and so marked or labeled as “trade secrets.” While this type of agreement is not binding because “agencies cannot alter the dictates of the [FOIA] by their own express or implied promises of confidentiality,”78 it can be persuasive to any agency or subsequent reviewing court.

For instance, in the case of Diamond Ventures, LLC v. Barreto, the court considered that the documents contained a legend that stated that the documents would be kept confidential as one factor.79 This case involved a discovery request sent to the United States Small Business Administration (SBA). Through civil discovery, the plaintiff sought documents turned over to the SBA that contained detailed descriptions of the successful applicants’ proposed operations, investment strategies, expertise, and proposed sources of income. The documents contained a notice that clearly stated that the information contained therein “will be kept confidential to the extent permitted by law.”80 This notice was cited by the appeals court to support the court’s decision not to order the disclosure of the information.81

Therefore, even if an agreement between the Submitter and the agency may not alter the FOIA, it may still provide rebuttable evidence of the classification of the information as a trade secret and support a finding at both the administrative level and the judicial review level that the information is not subject to FOIA disclosure under Exemption 4.

4. Segregate trade secrets from all other information and documents

If procedurally allowed, another important tactic a Submitter should employ is to segregate their trade secrets from other

79 Diamond Ventures, LLC v. Barreto, 452 F.3d 892,899 (D.C. Cir. 2006) (addressing the second prong of Exemption 4: confidential commercial information).
80 Id. at 899.
81 Id.
information that will be disclosed in an attempt to keep that information from becoming subject to a FOIA request by being classified as documents created or obtained and controlled by the agency. As you will recall from Section II(A), the first instance in which an agency may legally refuse to disclose information is if the agency demonstrates that the requested records are not agency records and, therefore, are not subject to a FOIA request in the first place.83

One example of the successful application and procedural hurdles of this approach can be found in Missouri ex rel. Garstang v. United States DOI.84 In Garstang, the Attorney General for Missouri, on behalf of the State’s Director of the Department of Natural Resources, attempted to obtain records through a FOIA request sent to the U.S. Fish and Wildlife Services (“Service”) relating to a certain nonprofit corporation “formed in 1988 by the Missouri River Basin States to promote and facilitate the preservation, conservation and enhancement of the natural resources of the Missouri River.”85 A full-time employee of the Service, Mr. Mike LeValley (“LeValley”), was assigned to be the coordinator between the Service and the nonprofit corporation (“MRNRC”).

The Service argued that the records sought through the FOIA request were not agency records and were, therefore, not subject to the FOIA request. As stated in Section II(A) above, under the FOIA “[a]n agency may be excused from disclosing information … if it demonstrates that the requested records are not agency records.”86 Missouri argued “that, because the Service had created, obtained, and controlled the requested records through its employee LeValley, the records should be considered agency records as a matter of law.”87 Missouri fleshed out this argument with the following facts: “(1) LeValley, whose salary was paid by the federal government, was officially an employee of the Service, (2) the records were housed at a Service facility, and (3) the records were used by the Service during the course of its official duties.”88

The dispositive issue for the court, however, became whether the Service had control of the records. In analyzing the four elements of the control test – “… an agency controls records when (1) the

83 Id. at 747.
84 Id.
85 Id.
86 Id. at 749.
87 Id. at 750.
88 Id.
document’s creator intended an agency to have control over the records, (2) the agency was not restricted in any way from using and disposing of the records as it pleased, (3) agency personnel read or relied upon the requested records to some extent, and (4) the documents were integrated into the agency’s record system”—the court found that “the records [were] kept in a separate filing system, LeValley [reported] to the MRNRC Chair for all substantive employment issues, and no Service employee other than LeValley ever worked on or accessed the requested records.” The court went on to state,

[T]o the extent that the Service did rely on MRNRC documents, those documents would have been in Service files, not MRNRC files, and as such were offered to Missouri. Although the MRNRC and the Service did have a mutually beneficial relationship, that relationship alone does not transform the private entity of MRNRC into a federal agency. To the contrary, the Service was merely an ex-officio member of the MRNRC and the MRNRC Constitution expressly forbade federal employees participating in the MRNRC to vote in MRNRC proceedings. We therefore conclude that the Service satisfied its burden of showing that the requested records were not agency records within the meaning of the FOIA.

What can be gleaned from this case is that the documents being requested were not created, obtained, or controlled by the Service employee. Instead, they were segregated from such records and simply made available for limited inspection by the Service. The requested documents, having been segregated from the documents relating to the relationship between the Service and the MRNRC’s relationship, were clearly not intended by the MRNRC to be in the control of the Service. Furthermore, the Service was restricted in the use of the records due to this method of segregation, which also leads to the finding that the information and documents were not integrated into the Service’s record system. Indeed, the requested records were kept in a separate filing system outside of the control of the Service.

89 Id. at 751.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
and no other Service employees had access to the requested records other than LeValley. The court thus found that the records at issue were outside the reach of a FOIA request.

Following a segregation protocol such as this is a strong defense against disclosure from a FOIA request because it keeps a company’s information and documents from becoming “agency records” and thereby keeps them outside the reach of the FOIA.

B. Exemption 4 Process

In this section, we will examine the process and procedure that administrative agencies and courts follow in FOIA adjudications, with a focus on the Exemption 4 defense against disclosure of trade secrets. Our analysis will continue to be prescriptive in order to further address how a company may protect its trade secrets from unwanted disclosure once a FOIA request has been made. It is, however, imperative that the recommendations from above be implemented to the extent practicable to lay the groundwork for any subsequent Exemption 4 defense.

1. Administrative Hearings

The conflicts that arise between companies as a result of the tension between trade secrets law and the FOIA are first addressed at the administrative agency level. In this process, an administrative agency responds to one company’s attempt to FOIA another company’s trade secrets. Once the administrative agency has rendered its ruling either disclosing or withholding the requested information and documents, that ruling becomes subject to possible judicial review by an Article III court. These two levels are inextricably intertwined. The Submitter should always aggressively attempt to protect its trade secret material at the agency level because it is there that the record the courts will examine in exercising their judicial review obligations is created.

Each agency has different procedures for handling FOIA requests, and the agency will inform a government contractor if their information has been FOIAed. A Submitter’s failure to competently

95 Id.
96 Id.
98 Id.
and zealously argue their case to prevent disclosure at the agency level will jeopardize any subsequent attempt to obtain relief from the courts.\textsuperscript{100}

In \textit{General Dynamics v. Department of the Air Force}, a Submitter attempted, at the federal district court, to supplement the administrative record with additional affidavits \textit{not} submitted during the agency proceedings.\textsuperscript{101} The court stated that the only way that an administrative record may be supplemented is “if the record is so inadequate as to frustrate judicial review.”\textsuperscript{102} With this in mind, it is easy to see why it is critical to proactively and zealously present the Submitter’s case at the agency level so that a complete record is created and preserved for judicial review.

Subsequent to an unfavorable agency appeal, the Submitter may sue under both the FOIA and the Federal Trade Secrets Act.\textsuperscript{103} This action is called a “reverse FOIA suit,” and is an attempt by the Submitter to obtain relief in the form of an injunction from a federal court that will order the agency not to release the information.\textsuperscript{104} The court, however, will give deference to the agency’s decision, and the Submitter has a difficult burden of proof at this level.\textsuperscript{105}

Directly addressing the protection of trade secrets, the courts have clearly stated that “mere embarrassment or reputational harm is not


\textsuperscript{101} See \textit{id.} at 805 n.1.

\textsuperscript{102} \textit{Id.} at 805.

\textsuperscript{103} Some authority exists that the FOIA only provides a remedy to Requestors of information and not to Submitters of information. See 5 U.S.C.S. § 552(a)(4)(B); Sears, Roebuck & Co. v Eckerd, 575 F.2d 1197, 1203 (7th Cir. 1978).

\textsuperscript{104} \textit{Gen. Dynamics Corp.}, 822 F. Supp. at 805.

\textsuperscript{105} A contractor claimed that its competitor, who became the successful bidder on a new contract solicitation, obtained the contractor's sensitive and proprietary data, which gave the competitor an unfair advantage. Avtel Servs., Inc. v. United States, 70 Fed. Cl. 173, 178 (Fed. Cl. 2005). The Army’s contracting officer decided not to take action against the competitor based on the contractor's allegations. \textit{Id.} at 178-179. The court found that (1) the contracting officer's decision was not biased, arbitrary, capricious, or unreasonable under 5 U.S.C.S. § 706(2) (2000) and (2) the contractor did not prove with clear and convincing evidence, that the agency officials had failed to act in good faith and with honesty. \textit{Id.} at 183-84, 221. See also Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979) (Marshall, J., concurring); Morton v. Ruiz, 415 U.S. 199, 231 (1974); NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 327 (1951) (Frankfurter, J., dissenting); NLRB v. Hearst Publ’n, Inc., 322 U.S. 111, 130 (1944), \textit{overruled in part by} Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).
sufficient to trigger Exemption 4\textsuperscript{106} of the FOIA. There must be evidence of the potential for “substantial competitive harm” for a company to prevail at both the agency and judicial levels.\textsuperscript{107} In other words, the courts will examine the information sought to be excluded to see if that information qualifies as a trade secret, paying particular attention to the fourth prong of the six-part test laid out in Section II(C) above: “the value of the information about the identity of the claimed trade secret to the petitioner and to its competitors.”\textsuperscript{108}

In a situation where the agency favors disclosure – as is highly possible in light of the clearly stated federal policies in that regard – the agency must explain in its written order “why substantial competitive harm is not likely to result if the information is disclosed.”\textsuperscript{109} The courts will not simply “defer to the agency’s conclusory or unsupported suppositions” that such harm is not likely to result.\textsuperscript{110}

So how exactly is the Submitter to demonstrate to the agency “substantial competitive harm” in its supporting declarations or affidavits? Furthermore, how is the Submitter to protect against judicial review overturning a successful result at the administrative level?

It is at this stage that it is critical for Submitters to refresh their understanding of the two competitive advantages and how these two advantages impact their company in relation to their trade secrets. These concepts should function as the framework for the Submitter’s supporting declarations or affidavits and will be much easier to produce if the pre-FOIA cost-benefit analysis was performed in accordance with the recommendations found in Section III(A)(1) above.

Each and every successful company operating in a competitive marketplace must have a strategy “to establish a profitable and sustainable position against the forces that determine industry competition.”\textsuperscript{111} There are two competitive advantages that can accomplish this goal: (1) cost advantage and (2) differentiation

\textsuperscript{107} Id.
\textsuperscript{108} Zotos Int’l, Inc. v. Young, 830 F.2d 350, 352 (D.C. Cir. 1987); See supra Part II(C).
\textsuperscript{109} United Techs. Corp., Pratt & Whitney Div., 601 F.3d at 564.
\textsuperscript{111} MICHAEL E. PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE 1 (1998).
advantage.\textsuperscript{112}

Cost advantage is the ability of a firm to produce similar goods or services more efficiently than its competitors and thereby pass those cost-savings onto the customer. Some of the major ways to gain a cost advantage is for a company to “adopt a different and more efficient way to design, produce, distribute, or market the product.”\textsuperscript{113} The only way to maintain this advantage is to keep one’s competitors from adopting these methods and techniques.

Differentiation advantage is the ability of a company to produce unique or superior goods or services “that more than offset a higher price.”\textsuperscript{114} Simply producing a product or service that is distinctive in the marketplace does not lead to differentiation for the company.\textsuperscript{115} The product or service must be of some discernible value to a buyer in the marketplace.\textsuperscript{116} This value creation by the producing company is what justifies the premium that is charged over competitors.\textsuperscript{117}

Specifically for an Exemption 4 defense, the Submitter must show that their information is a trade secret by providing evidence of: (1) how the information provides their company with either a cost advantage and/or a differentiation advantage over their competitors; and (2) how disclosure of the information would eliminate the company’s cost and/or differentiation advantage. If the Submitter conducted a formal intellectual property audit and subsequent cost-benefit analysis in the pre-FOIA process as recommended above, the documents generated in that process would be the foundational basis for such claims of Exemption 4 protections. The documents would also create a clear and comprehensive written explanation at the agency-review level that would be supported by supplementary documentation (including affidavits) and allow the agency to invoke Exemption 4 protections for the Submitter’s information.

As long as the agency is able to demonstrate that it conducted a reasonable search pursuant to a FOIA request and that it withheld documents or information that properly fall within a specifically enumerated FOIA exemption, a district court can elect to award summary judgment in favor of the government agency without the need for discovery.\textsuperscript{118} Accordingly, whether a document or

\textsuperscript{112} Id. at 11.
\textsuperscript{113} Id. at 99.
\textsuperscript{114} Id. at 3.
\textsuperscript{115} Id. at 130.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} See Becker v. I.R.S., 34 F.3d 398, 406 (7th Cir. 1994) (holding that district court did not abuse its discretion in denying discovery prior to granting agency's motion for summary judgment when judge concluded agency affidavit and index continued \ldots
information fits within the claimed FOIA exemption(s) “is a matter of law, upon which the district court is entitled to no deference.” Therefore, summary judgment generally tends to be the appropriate vehicle to determine a plaintiff’s claims brought pursuant to the FOIA. For these reasons, it is critically important to zealously present a clear and comprehensive written explanation at the agency-review level that allows the agency to invoke Exemption 4 protections for the Submitter’s information.

The resulting litigation savings and risk avoidance from a successful agency ruling and summary judgment at the judicial review stage will far outweigh the expense of providing clear and complete evidence to assist the agency in creating a complete record upon which to make their final ruling.

2. Judicial Review

Once a final ruling has been rendered by the administrative agency, the parties have the option to petition the federal courts for judicial review of the administrative ruling. An agency that withholds information from a Requester pursuant to a FOIA exemption bears the burden of justifying its decision if and when such decision is reviewed by the federal courts. Therefore, as was recommended directly above, the Submitter must zealously present a clear and comprehensive written explanation at the agency-review level that not only allows the agency to invoke Exemption 4 protections for the Submitter’s information, but makes it as easy as possible for the agency to meet its burden of proof at the judicial review level.

The administrative agency process is detailed and creates a record that follows a common format aimed at justifying the agency’s decision for the purpose of judicial review. Administrative agencies rely on demonstrative evidence, supporting declarations, and affidavits from the Submitter, which collectively are referred to as a “Vaughn Index,” named after the 1973 case, Vaughn v. Rosen.

The courts have attempted to define what type and how much

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information a *Vaughn* Index should contain or whether the agency made a good faith or reasonable attempt to find such documents.\(^{123}\) One recent court stated that a *Vaughn* Index should satisfy the following requirements:

(1) The index should be contained in one document, complete in itself;

(2) The index must adequately describe each withheld document or deletion from a released document; and

(3) The index must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant.\(^{124}\)

If an adequate *Vaughn* Index exists, courts will pay deference to administrative agency action. The courts are reticent to overturn administrative agency decisions that are based on interpretations of statutes that govern the agency’s actions.\(^{125}\) This hesitation to substitute the judge’s own interpretation for that of the administrative agency has a longstanding tradition in American law. The United States Supreme Court has repeatedly stated that the task of interpreting

\(^{123}\) SafeCard Servs. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (discussing the standard for determining whether an agency has made a good faith effort to find documents in response to an FOIA request); Trentadue v. F.B.I., 572 F.3d 794, 807 (10th Cir. 2009) (quoting Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 547 (6th Cir. 2001)) (“In discharging this burden [to show the adequacy of its search], the agency may rely on affidavits or declarations that provide reasonable detail of the scope of the search. In the absence of countervailing evidence or apparent inconsistency of proof, such affidavits will suffice to demonstrate compliance with the obligations imposed by the FOIA.”); Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (discussing the extent an agency must search for documents to satisfy FOIA request); Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (discussing standard for exempting documents from disclosure as part of record); Nat'l Inst. of Military Justice v. U.S. Dep't of Def., 404 F. Supp. 2d 325, 333-34 (D.D.C. 2005); White v. FBI, No. 1:09-CV-421-RLV, 2010 U.S. Dist. LEXIS 144716, *12 (N.D. Ga. May 7, 2010).


\(^{125}\) In *Avtel Servs. v. United States*, a trade secret holder claimed that its competitor, which became the successful bidder on a new contract solicitation, obtained the trade secret holder’s sensitive and proprietary data, which gave the competitor an unfair advantage. *Avtel Servs. v. United States*, 70 Fed. Cl. 173, 178 (2006). The Army’s contracting officer decided not to take action against the competitor based on the trade secret holder’s allegations. *Id.* at 178-79. The court found that (1) the contracting officer’s decision was not biased, arbitrary, capricious, or unreasonable under 5 U.S.C.S. § 706(2) (2000) and (2) the trade secret holder did not prove with clear and convincing evidence, that the agency officials had failed to act in good faith and with honesty. *Id.* at 183-84, 221.
ambiguous statutory provisions and filling statutory gaps left implicitly or explicitly by Congress is primarily the responsibility of the agency that must administer the act.\textsuperscript{126}

In the landmark Supreme Court case of \textit{Chevron U.S.A., Inc. v. NRDC, Inc.},\textsuperscript{127} Justice John Paul Stevens, writing for the majority, held that the federal courts must defer to administrative agency interpretations of the authority granted to them by Congress where (1) the intent of Congress was unambiguous and (2) the interpretation was reasonable or permissible.\textsuperscript{128} Justice Stevens established a two-part analysis that became known as the “Chevron Two-Step Test”\textsuperscript{129} to assist federal courts in reviewing administrative agency rulings.

According to the \textit{Chevron} two-step test, when a court is confronted with a challenge to an agency’s construction of a statutory provision, the court must first analyze Congress’s intent. If Congress’s intent is clear on the face of the statute (i.e., Congress has directly spoken to the precise question at issue), then this first step is dispositive, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”\textsuperscript{130} As we have discussed above, a strong argument can be made that this is not the case when dealing with the conflicting congressional intent of the FOIA (open government) and the Federal Trade Secrets Act (protection of trade secrets).

If, however, the court determines Congress has not directly addressed the precise question at issue – as can be argued in the circumstances at issue in Exemption 4 disputes – the court “does not simply impose its own construction on the statute.”\textsuperscript{131} Instead, \textit{Chevron}’s second step requires courts to analyze “whether the agency’s answer is based on a permissible construction of the statute.”\textsuperscript{132}

This two-part test has resulted in the expression “\textit{Chevron}}


\textsuperscript{128} \textit{Id.} at 843.

\textsuperscript{129} Evan J. Criddle, \textit{Chevron’s Consensus}, 88 B.U. L. REV. 1271, 1276 (2008). The article discusses the \textit{Chevron Two-Step Test}, also known as “\textit{Chevron Deferece},” in light of the longstanding jurisprudential and political tension surrounding the proper relationships between the branches of government in the modern American administrative state. \textit{Id.} at 1277.

\textsuperscript{130} \textit{Chevron}, 467 U.S. at 842-843.

\textsuperscript{131} \textit{Id.} at 843.

\textsuperscript{132} \textit{Id.}
Deference.” While the courts and commentators disagree on the scope of *Chevron* Deference,\(^{133}\) it is important to note that such judicial deference to administrative actions has been applied broadly when addressing FOIA disputes. As Justice Stevens stated in the *Chevron* case, “federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do.”\(^{134}\)

*Chevron* Deference has limits – a court need not “defer to the agency’s conclusory or unsupported suppositions.”\(^{135}\) In the case of *United Techs. Corp., Pratt & Whitney Div. v. United States Dep’t of Def.*,\(^{136}\) a court was faced with reviewing an agency’s ruling on an Exemption 4 dispute. The agency ruled that the requested information was not exempt from disclosure under Exemption 4. The Submitter then took its reverse-FOIA action to the federal courts for judicial review of the agency ruling. The court found that the documents appeared to contain sensitive proprietary information about the Submitter’s manufacturing and quality control processes.\(^{137}\) The competitors would thus have the ability to use the information to improve their own manufacturing and quality control systems and thereby damage the Submitter’s competitive advantage in the marketplace.

This is the exact type of situation Exemption 4 was meant to prevent. The agency’s decision to reveal the information was not sufficiently supported by evidence to withstand judicial review even under *Chevron* Deference.

Therefore, it is clear that at the judicial review level, it is the record that was compiled in the administrative hearing that will likely carry the day, unless that record is so seriously deficient as to hinder judicial review. Submitters must, then, create a Vaughn Index that explains why Exemption 4 is relevant by demonstrating how their trade secrets create either a cost or differentiation competitive advantage in the marketplace. Such a Vaughn Index is easily created if the Submitter has already followed the pre-FOIA process recommendations found in Section III(A) above.

\(^{133}\) *Criddle, supra* note 130, at 1281-90.

\(^{134}\) *Chevron*, 467 U.S. at 866.


\(^{137}\) *Id.* at 564.
IV. Conclusion

This article has attempted to provide corporate officers and directors with a clear synthesis of the legal framework created by the intersection of FOIA and trade secret law and to apply this framework to the strategic and tactical decisions businesses pursuing a federal government contract would likely face. The resulting reference point in these areas of diverging law and the proposed plan of tactical and strategic decision making are intended to assist business executives and legal counsel in their decision-making process and thereby limit their own personal liability under the business judgment rule.