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Constitutional Limitations on Government Disclosure of Private Trade Secret Information

Richard W. Young

Indiana University School of Law

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Constitutional Limitations on Government Disclosure of Private Trade Secret Information

The value of trade secret information arises from the competitive advantage associated with a competitor's ignorance. Once disclosed to a competitor, the information cannot be recalled and substantive law does not protect it from further dissemination. Consequently, a business may expend considerable resources to protect its trade secret information from theft or unauthorized disclosure and to prevent the resulting harm to its competitive advantage.

The power of the federal government to demand and obtain valuable private trade secret information is awesome. In some instances, the information mandatorily submitted to administrative agencies is the most valuable property a business owns. While submission of trade secret information to an administrative agency does not in itself destroy the owner's property, it undermines the business' efforts to maintain

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1 The phrase "trade secret information" will be used in this note to mean "trade secrets and commercial or financial information." See 5 U.S.C. § 552(b)(4) (1976). For other possible definitions of "trade secret information," see notes 26-27 infra.

2 The essence of trade secret information is secrecy. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475 (1974); Restatement of Torts § 757, comment b (1939). As the United States Court of Claims stated in E.I. du Pont de Nemours & Co. v. United States, 288 F.2d 904, 911 (Ct. Cl. 1961): "[A] trade secret, as a tool for commercial competition, derives much of its value from the fact of its secrecy. It is truly valuable only so long as it is a secret, for only so long does it provide an advantage over competitors."


7 "[T]he necessary element of secrecy is not lost . . . if the holder of the trade secret reveals the trade secret to another 'in confidence, and under an implied obligation not to use or disclose it.'" Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475 (1974); see Restatement of Torts § 757, comment b at 6 (1939) (limited disclosure not incompatible with trade secret protection).
secrecy by subjecting that property to careless handling and to the significant possibility of public disclosure.  

The basic objective of the Freedom of Information Act (FOIA) is disclosure.  

When he signed the Act into law, President Lyndon B. Johnson emphasized "the people's right to know."  

Throughout the fifteen years it has been in existence, however, the FOIA has been utilized chiefly as a tool of business; businesses regularly use the FOIA to uncover competitors' trade secret information.  

One company's experience

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8 See generally Brief for Appellees, Wearly v. FTC, 616 F.2d 662 (3d Cir. 1980).

Appellee Wearly sought to enjoin enforcement of an FTC subpoena duces tecum because, according to Wearly, its confidential information might be disclosed to competitors in violation of its fourth and fifth amendment rights. Wearly alleged 18 instances of the FTC's failure to protect confidential information through carelessness or outright refusal. For example, the Secretary of the FTC sent 15 notices to his staff requesting information on the "whereabouts of numerous document binders," Brief for Appellees, supra, at 36-37. The FTC was twice ordered to remove in camera documents from the public record. Id. at 36. Pursuant to a Freedom of Information Act (FOIA) request from a party engaged in litigation, with Coca-Cola Bottling Co., the FTC decided to release Coca-Cola's sales and marketing data, disregarding two protective orders and the specific objections of an administrative law judge. Id. at 34. The FTC, ignoring its prior confidentiality grant, released various cigarette manufacturers' data on sales and advertising expenditures admittedly exempt from disclosure, notifying the manufacturers only after it had released the information. Id. at 33; cf. FTC, ORGANIZATION, PROCEDURES, RULES OF PRACTICE, AND STANDARDS OF CONDUCT 93 (1971) ("Assurances of confidentiality given by Commission staff are not binding upon the Commission."); N.Y. Times, Nov. 30, 1975, § 3, at 8, col. 1 ("And what are the lawyers getting for their business clients? The common assumption is that trade secrets are flowing out of Washington like government directives, that in every industry 'Coca-Cola formulas' are being revealed.").


12 See Hearings on Oversight of the Freedom of Information Act Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 4 (1977) [hereinafter cited as Oversight Hearings] (statement of Sherwin Gardner, Deputy Commissioner, FDA) ("[M]ore than 80 percent [of the FDA's FOIA requests] in 1976 ... originated from industry or persons working on their behalf."); id. at 14 (statement of Gerald P. Norton, Deputy General Counsel, FTC) ("In the first half of 1977,... of the 375 Freedom of Information Act requests received by the Commission, 273 came from businesses or corporations or their lawyers."); id. at 29 (testimony of Michael A. James, Deputy General Counsel, EPA) (estimating that 80% of the FOIA requests received by the EPA come from commercial interests); Arnold, Who's Going Fishing in Government Files?, Judis DOCTOR, April, 1976, at 17, 18 (estimating that over % of all FOIA requests come from business).

13 Says Barbara Keehn, the FTC Freedom of Information Chief [of the constant efforts by firms to acquire trade secrets of competitors]: "It's a form of industrial espionage, except that they do it under the law. We get very few requests from journalists and consumer groups. That's too bad, because that's who the law was written for."

with the Federal Aviation Administration (FAA) exemplifies the scenario which those who submit trade secret information fear most. Air Cruisers Company designed and, in August, 1975, obtained FAA approval for a forty-two person inflatable life raft—the largest raft ever to gain FAA approval. As part of its application, Air Cruisers submitted performance tests and design information to the agency. In February, 1976, Air Cruisers learned only at the last moment that the FAA intended to release that information in response to a FOIA request from Air Cruisers’ competitor, Switlik Parachute Company. Air Cruisers maintained that release of the information could damage its competitive advantage by allowing Switlik to build and certify a comparable raft without expending the effort and incurring the expense that Air Cruisers had in meeting the cumbersome certification procedures. While Air Cruisers succeeded in forcing the FAA to withhold some of the information, the documents released to Switlik helped that company design its own raft and outbid Air Cruisers for a valuable European contract.

Air Cruisers’ experience is neither unique nor unusual. The inequities arising from government release of confidential documents have received considerable judicial attention. The United States Supreme Court, in Chrysler Corp. v. Brown, recognized that those who submit trade secret information to an agency have a right to judicial review of the agency’s decision to disclose that information in response to a FOIA request. The Chrysler opinion, however, left open a number of issues and did not consider the constitutional limitations on disclosure which may be imposed by the fifth amendment. The Court did not reach the question of what steps must be taken prior to the disclosure of information in order to satisfy the requirements of pro-

15 “‘It’s amazing what a $2 telex message will do,’ says Mr. Switlik of the company’s request to the FAA for the information.” Id.
16 See generally Kiplinger Wash. Letter, Mar. 30, 1979 (“Misuse of the Freedom of Information Act is getting out of hand. Businesses are being hurt, their secrets revealed to competitors. Data given to govt under various other laws are open to anyone who asks.”) (emphasis omitted); Tuthill, The Problems of Privacy, Nation’s Bus., Mar., 1979, at 39 (“[S]avvy business people have flooded government agencies with FOIA requests to learn competitors’ trade secrets.”); Freedom of Information Act Windfall, CHEM. WEEK, Jan. 4, 1978, at 37 (“The great majority [of the 25,000 FOIA requests received by the FDA per year] involve what one FDA official terms ‘industrial espionage’—efforts to get a fix on competitors’ activities.”).
18 The petitioner, Chrysler, specifically raised fifth amendment questions concerning the taking of private property for private use and the taking of private property without compensation. Brief for Petitioner at 24 n.26.
cedural due process. Instead, it recognized a statutory limitation on certain disclosures and thereby avoided the need to consider more pervasive constitutional restraints on a broader class of disclosures.

Trade secret information is property.\textsuperscript{9} A trade secret owner threatened with the release of his information therefore merits the procedural due process safeguards of clear and timely notice and the opportunity to be heard. In addition, the fifth amendment prohibition against governmental takings of private property for public use without compensation should completely bar the disclosure of certain trade secret information.

THE FOIA AND \textit{CHRYSLER CORP. v. BROWN}

The FOIA was enacted to more fully inform the electorate about its government.\textsuperscript{20} While emphasizing that the successful implementation of the Act requires the fullest responsible disclosure of information,\textsuperscript{21} the Act also recognizes the need to observe "principles of confidentiality and privacy."\textsuperscript{22} Protection of these principles is ensured by nine exemp-

\textsuperscript{9} See text accompanying notes 43-52 infra.

\textsuperscript{20} 441 U.S. at 290 n.10.

As was stated by the Court of Appeals for the Second Circuit:

The broad legislative intent behind the enactment of the Freedom of Information Act . . . was to give the electorate greater access to information concerning the operations of the federal government. The ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities.

Frankel \textit{v. SEC}, 460 F.2d 813, 816 (2d Cir.), cert. denied, 409 U.S. 889 (1972) (citing S. Rep. No. 813, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418; accord, H.R. Rep. No. 1419, 92d Cong., 2d Sess. 1 (1972) (FOIA emerged "from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits") (quoting President Lyndon B. Johnson at the signing of the FOIA on July 4, 1966); Freedom of Information and Secrecy in Government Hearings on S. 186 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. 10 (1959) (statement of William H. Fitzpatrick) ("[A]n uninformed people must, in the end, become a misinformed people. And a misinformed people, while they may be told that they are safest and happiest in their servitude to secrecy, are not a free people.").

\textsuperscript{21} S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (successful implementation of the Act "lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure").

\textsuperscript{22} See U.S. Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at iv (June, 1967). Attorney General Ramsey Clark counseled all executive agencies that the Act gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.

\textit{Id.}
tions. Exemption four, the "trade secrets exemption," was intended to "assure the confidentiality of information obtained by the Government . . . [which] would not customarily be made public by the person from whom it was obtained." Under the common law, business or technical information which potentially confers a competitive advantage on its owner is recognized as a trade secret. This common law definition of a trade secret has been adopted by the courts to delineate the scope of FOIA exemption four. Business information comes within the exemption if it is "(1) commercial or financial, (2) obtained from a person outside the government and (3) privileged or confidential." Information is privileged or confidential if it is of the type that is not generally disclosed to the public.

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24 "Trade secret" is defined in Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), as "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." Id. at 474-75 (quoting RESTATEMENT OF TORTS § 757, comment b, at 5 (1939)); accord, UNIFORM TRADE SECRETS ACT § 1(4); cf. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 266 (1979) ("most commonly accepted definition of trade secrets is restricted to confidential information which is not disclosed in the normal process of exploitation") (citing RESTATEMENT OF TORTS § 757, comment b, at 5 (1939)); H.R. REP. No. 1382, 95th Cong., 2d Sess. 15-16 (1978) (distinguishing "trade secret" from "commercial or financial information" and finding the distinction a nullity for FOIA purposes). See generally 1 R. MILGRIM, supra note 4, § 2.01.

25 See, e.g., Union Oil Co. v. FPC, 542 F.2d 1036, 1044 (9th Cir. 1976); Washington Research Project, Inc. v. HEW, 504 F.2d 238, 245 (D.C. Cir. 1974).

Generally, in FOIA exemption four cases courts adopt the common law rule stated in RESTATEMENT OF TORTS § 757, comment b, at 5 (1939): "The subject matter of a trade secret must be secret." See cases cited in 1 R. MILGRIM, supra note 4, § 2.01 n.2. For a discussion of the scope of the definition, see Note, Would Macy's Tell Gimbel's: Government-Controlled Business Information and the Freedom of Information Act, Forwards & Backwards, 6 LOY. CHI. L.J. 594, 598-602 (1975); notes 44-52 & accompanying text infra.

Courts in FOIA cases have included a variety of things within the definition of trade secret information. See, e.g., Gulf & W. Indus., Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979) (profit rates); Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976) (customer and supplier lists); Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975) (profit-oriented research work), cert. denied, 425 U.S. 971 (1976); Washington Research Project Inc. v. HEW, 504 F.2d 238, 246 n.6 (D.C. Cir. 1974) (business sales statistics); Sterling Drug v. FTC, 450 F.2d 698 (D.C. Cir. 1971) (business sales statistics); Thrifty Drug Stores Co. v. FTC, 1976-2 Trade Cas. 70,408 (D.D.C. Cir. 1976) (overhead and operating costs); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359 (N.D. Ohio 1976) (manufacturing data); Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 380 F. Supp. 630 (N.D. Ind. 1974) (applied industrial technology); Fisher v. Renegotiation Bd., 355 F. Supp. 1171 (D.D.C. 1973) (business sales statistics).

and that, if disclosed, would "cause substantial harm to the competitive position of the person from whom the information was obtained."

Despite the substantial harm which could result from the disclosure of trade secret information, the Supreme Court in *Chrysler Corp. v. Brown* held that the FOIA trade secret information exemption is discretionary and creates no mandatory bar to disclosure. Writing for a unanimous court, Justice Rehnquist concluded that the exemption standing alone guarantees the confidentiality of information only to the extent that the agency possessing the information is willing not to disclose it. By finding that the FOIA left agencies unlimited discretion to disclose or not to disclose information, even though specifically within one of the nine exemptions, *Chrysler* established that the Act does not afford those who submit information a direct private cause of action to enjoin agency disclosure.

The Supreme Court did not, however, leave submitters of trade secret information without any available means to protect assertedly confidential information from disclosure. It recognized that the Trade Secrets Act places "substantive limits" on agency action for information. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); accord, Gulf & W. Indus., Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979).

441 U.S. 281 (1979). Chrysler, as a government contractor, was required to submit information concerning its affirmative action program (AAP) and work force composition. In May of 1975, Chrysler learned that the Defense Logistics Agency (DLA), the agency responsible for monitoring its employment practices, intended to release Chrysler's 1974 AAP report together with other employment information pursuant to an FOIA request. Chrysler sought to enjoin DLA's intended disclosure of the information. The district court held that the Trade Secrets Act, 18 U.S.C. § 1905 (1976), required the withholding of some of the information. 441 U.S. at 286-89. The Court of Appeals for the Third Circuit established that § 1905 only bars disclosures "not authorized by law." *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1186 (3d Cir. 1977), vacated sub nom. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). Finding that certain regulations authorized the disclosure, the appellate court rejected the district court's conclusion. 565 F.2d at 1186-88.

"Congress did not limit an agency's discretion to disclose information when it enacted the FOIA.")

441 U.S. at 294 (holding that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure").

"Id. at 291-93 (holding that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure")."

"Id. at 292-93. A review of the legislative history revealed that "the congressional concern was with the agency's need or preference for confidentiality." Id.


441 U.S. at 317-18.
tion disclosures "not authorized by law." Although it refused to read that Act, a criminal statute, as providing civil remedies, the Court found that a disclosure which violates the Trade Secrets Act is "not in accordance with law" and is therefore proscribed by section 10(e) of the Administrative Procedure Act (APA) which does establish an independent civil cause of action. Therefore, although the Trade Secrets Act

38 Chrysler claimed that the Trade Secrets Act, 18 U.S.C. § 1905 (1976), established a private right to injunctive relief. 441 U.S. at 294. Applying the test of Cort v. Ash, 422 U.S. 66, 79-80 (1975), the Court searched for some statutory basis to infer a civil cause of action. Not finding one, it rejected § 1905 as an independent ground to enjoin disclosure. 441 U.S. at 316-17.

Chrysler had claimed that disclosure of trade secret information pursuant to agency regulations was not equivalent to disclosure "authorized by law" and that, absent a specific authorization by Congress, release of its information would violate the Trade Secrets Act. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1186 (3d Cir. 1977), vacated sub nom. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Justice Rehnquist rejected that argument by reiterating that "properly promulgated, substantive agency regulations have the 'force and effect of law.'" 441 U.S. at 295 (citing Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Foti v. Immigration & Naturalization Serv., 375 U.S. 217, 223 (1963); United States v. Mersky, 381 U.S. 437-38 (1966); Atchison, T. & S.F. Ry. v. Scarlett, 300 U.S. 471, 474 (1937)). To have the force and effect of law, a regulation must meet three requirements. First, it must be a substantive rule. That is, it must affect "individual rights and obligations." 441 U.S. at 301-02. Second, the regulation must have been promulgated in accordance with the procedural limitations imposed by Congress. Id. at 303. Third, the regulation must have been promulgated pursuant to a congressional grant of rulemaking authority. Id. at 303-16. While Chrysler does not explicitly so state, the congressional grant of authority must also be constitutional. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949); Atchison, T. & S.F. Ry. v. Scarlett, 300 U.S. 471, 474 (1937). A disclosure made pursuant to a regulation which does not satisfy those three requirements is not authorized by law and, therefore, violates § 1905. The FOIA is, by itself, insufficient authority to permit release of confidential information. 441 U.S. at 303-04. See generally St. Mary's Hosp., Inc. v. Harris, 604 F.2d 407, 409-10 (6th Cir. 1979) (finding that § 1106 of the Social Security Act, 42 U.S.C. § 1306 (1976), authorized HEW disclosure regulations in satisfaction of § 1905); Cedars Nursing & Convalescent Center, Inc. v. Aetna Life & Cas. Ins. Co., 472 F. Supp. 296 (E.D. Pa. 1979) (same); Brookwood Medical Center v. Califano, 470 F. Supp. 1247, 1249-50 (N.D. Ga. 1979) (same).


4 441 U.S. at 317-18.

441 U.S. at 318. A right to judicial review of agency action extends to persons "adversely affected or aggrieved by agency action." 5 U.S.C. § 702 (1976). A court will set
alone does not create a private civil cause of action, the Court found that the Act is subsumed pro tanto into the APA which provides for judicial review of an agency's decision to disclose trade secret information.\(^2\)

**CONSTITUTIONALLY COMPELLED LIMITATIONS ON DISCLOSURE**

A claim alleging abuse of discretion based on the APA and arising out of the failure to adequately protect trade secret information requires some standard of protection against which to measure proper agency discretion. The ultimate protection afforded property rights arises from the fifth amendment imperative that "[n]o person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."\(^3\) Central to the two clauses and to the scope of protection they establish is the concept of property. An analysis of the problematic concept of property is necessary to the recognition of trade secret owners' substantive rights.

Full comprehension of the property nature of trade secret informa-

\(^2\) In response to the *Chrysler* decision, the Department of Justice has recommended, and itself adopted, guidelines for federal agencies to follow in evaluating the propriety of disclosing specific exempt information pursuant to an FOIA request. See Justice Dep't Memorandum: Current and Future Litigation Under *Chrysler v. Brown* (June 21, 1979), reprinted in 435 PAT., T.M. & COPYRIGHT J. D-1 (1979); Justice Dep't Memorandum: Statement Concerning the Supreme Court's Decision in *Chrysler v. Brown* (June 15, 1979) [hereinafter cited as Justice Dep't Statement]. Specifically, the Department suggests that prior to disclosure of trade secret information an agency should first determine whether the information falls within both the FOIA exemption four and the substantive scope of the Trade Secrets Act, 18 U.S.C. § 1905 (1976). (The Department declines to distinguish the relative scopes of § 1905 and exemption four.) If the information does fall within both, the agency must withhold it unless disclosure is authorized by a statute or regulation having the force and effect of law. Even if an agency regulation or a statute authorizes disclosure of specific FOIA-exempt material, the Department of Justice suggests that the likely harm to the provider should be balanced against the public interest in disclosure before any decision to disclose is made. According to the Department, the unjustified release of information governed by § 1905 "would be an abuse of discretion and, as such, contrary to law." Justice Dep't Statement, supra, at 6. While the Justice Department test does not adopt the constitutional limitations on trade secret disclosure imposed by the fifth amendment takings clause, see notes 91-149 & accompanying text infra, it approaches that standard. By withholding information when the likely harm to the provider exceeds the public interest in disclosure, agencies will satisfy the constitutional limitations more often than not. The Justice Department standard fails, however, to the extent that it considers only the public interest in disclosure. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); accord, Note, Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Compensation, 54 WASH. L. REV. 315, 317 (1979) ("[b]alancing private loss against public gain should be used only to test for a violation of due process and not for a taking without compensation."); see id. at 333-36.

\(^3\) U.S. CONST. amend. V.
tion necessitates its division into two categories: first, inventive ideas, formulas, processes, plans and technological information; and second, commercial, confidential and financial information. Courts have had little difficulty finding property rights in cases challenging the disclosure of trade secret information falling within the first category. The precise nature of rights attaching to the second category is less clear, however. Where the secrecy of commercial, confidential and financial information is critical to the continued existence of a business, an agency's decision to disclose such information, failing to acknowledge its value as property, may destroy the property interest in the "going concern." Although the courts have recognized the importance of commercial

4 For an excellent discussion of the distinction between the two categories and the kinds of information falling into each, see 2 R. CALLMANN, THE LAW OF UNFAIR COMPETITION: TRADEMARKS AND MONOPOLIES § 52 (3d ed. 1988).


4 See note 6 supra. Callmann argues that it is anomalous to deny trade secrets protection as property while granting such protection to goodwill, an intangible essential to the value and existence of a business. 2 R. CALLMANN, supra note 44, § 51.1(b). See also Aloi &
cial, confidential and financial data, and have generally protected it under a variety of theories, they have not usually done so under the property rubric. Significantly, the bulk of exemption four litigation has concerned data outside the well recognized category of technical information, and, as a result, has established a "new federal category of protectible proprietary data." Identifiable commercial, confidential and financial information, as part of the "secret sphere" of a business, is integral to the going concern and, like the business itself, should be.


See, e.g., Clark v. Bunker, 453 F.2d 1006, 1009 (9th Cir. 1972) (damages awarded for misappropriation of trade secrets consisting of detailed plan for creation, promotion, financing and sale of contracts for "prepaid" funeral services); Tlapek v. Chevron Oil Co., 407 F.2d 1129 (8th Cir. 1969) (confidential information may not be disclosed by one who received it in confidence);


The states have considered category two financial information only rarely, but generally have protected it. See, e.g., People ex rel. Better Broadcasting Council, Inc. v. Keane, 17 Ill. App. 3d 1090, 1094-97, 309 N.E.2d 362, 366-67 (1973) (finding government disclosure of confidential financial information severely limited by the Illinois constitution); William Kaufman Assocs. v. Levy, 74 Misc. 2d 209, 214-17, 345 N.Y.S.2d 836, 845 (1973) (noting that, while no trade secrets were contained in the submitted information, highly confidential financial information may not be disclosed "to the possible advantage of competitors").

1 R. MILGRIM, supra note 4, § 6.02A[2]. A protectible interest must be recognized in state law in order to characterize that interest as property. See text accompanying note 54 infra.

2 R. CALLMANN, supra note 44, § 51.1(b).

The secret sphere includes "information which, for the advancement of a particular business, should be kept concealed and [is], by nature, intangible and incapable of transfer..., inventive ideas... [and] secrets licensed to the business owner." Id.
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recognized as property. As property, trade secret information, both technical and commercial, deserves fifth amendment due process and compensation safeguards.

Trade Secret Information as Property Worthy of Procedural Due Process Safeguards

Although the fifth amendment refers to "property," the scope of interests it protects differs from that protected under common law. In determining whether particular interests are worthy of fifth amendment protection as property, the Supreme Court has recognized that property rights ordinarily arise from "existing rules or understandings that stem from an independent source such as state law." Where such interests are in fact recognized by an existing body of law, the Court has reasoned that the owners of those interests have a justifiable expectation that they will not be deprived of the interest without due process. Owners of trade secret information have been led to such an expectation. Exactly one-half of the states and a majority of the courts addressing the issue have recognized "substantive property rights" in trade secret information.

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52 See id.
55 See, e.g., Perry v. Sindermann, 408 U.S. 593, 601 (1972); Board of Regents v. Roth, 408 U.S. 564, 577 (1972); accord, Amchem Prods., Inc. v. Costle, 481 F. Supp. 195, 197 (S.D.N.Y. 1979). The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. J. BENTHAM, THEORY OF LEGISLATION 112 (R. Hildreth trans. 4th ed. 1882).
56 See 1976 ABA SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW 212-14 (also finding an additional 13 states affording some kind of trade secret protection); Epstein, Criminal Liability for the Misappropriation of Trade Secrets, reprinted in 2 R. MILGRAM, supra note 4, app. B-5 (surveying federal and state criminal statutes protecting trade secrets).
57 Courts which refuse to adopt the property analysis generally protect trade secrets under a tort or contract theory. F. DESSEMONTET, LEGAL PROTECTION OF KNOW-HOW IN THE UNITED STATES OF AMERICA 337-53 (2d rev. ed. 1976); P. GOLDSTEIN, LAW OF COPYRIGHT, PATENT AND TRADEMARK 165 (1973); E. KINTNER, INTELLECTUAL PROPERTY LAW PRIMER 193-204 (1975); E. KITCH & H. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 368-69 (1972); see, e.g., Conmar Prods. Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (2d Cir. 1949); Morison v. Moat, 68 Eng. Rep. 492 (1851). See also Stedman, Trade Secrets, 23 OHIO ST. L.J. 4, 22 (1962) (recognizing six theories upon which to base trade secret protection). The theory—property, tort or contract, for example—which states use to protect a par-
Substantial authority, then, both legislative and judicial, supports the proposition that trade secrets deserve protection. The Supreme Court's expansive definition of property interests together with its recognition of the independent sources of those interests supports the conclusion that trade secret information is property entitled to procedural due process. After recognizing that an agency decision to disclose trade secret information, thereby depriving a person of his trade secret property rights, entitles the property owner to due process, the question arises, "what process is due?" In Mathews v. Eldridge, the Supreme Court recognized that "the essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it.'"

Notice

Without clear and timely notice of the proposed action, the trade secret information owner is helpless to protect his property interests. The FOIA, which focuses on disclosure and is unresponsive to the submitter's interests, does not compel predisclosure notice. Similarly, most agencies lack regulations mandating formal notice prior to disclosure. Those regulations which do provide for notification gen-
ally leave it to the discretion of the agency. Before Chrysler, administrative agencies lacked any incentive either to withhold information or to notify the submitter of a decision to disclose. Agency personnel, frequently unaware of the value of a trade secret to its owner, often disclosed information without any prior notice to the provider. The Chrysler decision creates a somewhat higher standard for discretionary disclosures of exempt information by federal agencies. Unfettered discretion is replaced by the necessity of finding a statute or agency regulation which specifically authorizes disclosure and, more importantly, by the recognition that exempt trade secret information merits protection not afforded nonexempt information. As courts, commentators and even some agencies have noted, most agencies lack the necessary expertise to determine whether disclosure of exempt information would cause competitive injury to the information submitter. The possible harmful consequences of disclosure balanced against the


67 The need for private parties to have an opportunity to present arguments for non-disclosure is obvious. In many cases government personnel may have no expertise enabling them to predict the possible harm that could result from disclosure. Moreover, without prompting by the affected interests, agency personnel may have no incentive to maintain the confidentiality of the private business information obtained by them under government authority. Unless adequately apprised of the dangers of disclosure, there may be a natural tendency for agency personnel to adopt the path of least resistance and release information on request.


[There is always the real risk that the agency itself will be delinquent in asserting the right of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have . . . in most instances, sufficient knowledge to assert properly the private party's right to confidentiality.]

68 441 U.S. at 303-16. The focus of this note is on agency regulations authorizing disclosure and not on statutes. For an example of a statute authorizing disclosure, see Securities Act of 1933, 15 U.S.C. § 77aa (1976) (mandating disclosure of financial information concerning securities offered for public sale).


71 See, e.g., Oversight Hearings, supra note 12, at 13 (statement of Gerald P. Norton, Deputy General Counsel, FTC); id. at 17-18 (statement of Michael A. James, Deputy General Counsel, EPA).
minimal burden imposed on agencies by requiring that they notify potentially aggrieved submitters of the decision to disclose dictates that notice be given so that an agency may make a reasoned determination founded on an understanding of the business and industry.

The realization that those who have submitted trade secret information will not be notified of any threatened disclosure has led trade secret owners either to refuse agency requests for trade secret information\textsuperscript{2} or to seek preliminary injunctive relief to protect their property rights. The Federal Trade Commission (FTC), which has refused to be bound by its own assurances of confidentiality\textsuperscript{4} and serves notice only at its own discretion,\textsuperscript{5} has been plagued by this "pre-enforcement litigation."\textsuperscript{6} The Environmental Protection Agency (EPA), meanwhile, has ef-


\textsuperscript{3} See, e.g., Weary v. FTC, 462 F. Supp. 589 (D.N.J. 1978), vacated on other grounds, 616 F.2d 662 (3d Cir. 1980) (district court lacked jurisdiction to hear pre-enforcement suits).


\textsuperscript{6} FTC, supra note 8, at 93. The unique nature of FTC functions necessitates use of trade secret information in court, potentially creating disclosure problems. Nevertheless, documents revealing trade secret information may, under FTC rules, receive in camera treatment in adjudicative proceedings. See 16 C.F.R. § 3.45 (1980). But such treatment may be denied where it effectively bars litigation of the issues, if "[t]he material is not only relevant, but essential to the trial of [the] action." United States v. Lever Bros., 193 F. Supp. 254, 256 (S.D.N.Y. 1961). See also Service Liquor Distribs. v. Calvert Distillers Corp., 16 F.R.D. 507 (S.D.N.Y. 1954). To foreclose review of its information gathering authority, the FTC unsuccessfully sought to remove from the federal courts subject matter jurisdiction to hear pre-enforcement actions, perhaps the only available remedy for submitters unable to extract binding assurances of confidentiality or notice. See H.R. Rep. No. 1557, 95th Cong., 2d Sess. (1978) (rejected by the House, 124 CONG. REC. H11, 019-031 (daily ed. Sept. 28, 1978)). But see H.R. Rep. No. 181, 96th Cong., 1st Sess. (1979) (accompanying H.R. 2313, 96th Cong., 1st Sess., which was passed by the House, 125 CONG. REC. H11, 189-206 (daily ed. Nov. 27, 1979)). According to the FTC, the airing of pre-enforcement challenges in the courts does "violence to the congressionally mandated scheme for resolution of [agency] disputes" and is wasteful of agency and judicial resources. Brief for Appellees, supra note 8, at 55-56. According to the FTC, the infusion of pre-enforcement challenges resolves in multiple proceedings what should have been resolved in a single subpoena enforcement proceeding. Id. at 54-55. The resulting multiplicity of challenges, the FTC argued, breaks the "very backbone of an administrative agency's effectiveness" by stalling investigations, while issuance of relief disrupts the congressionally provided means for judicial review. Id. at 55-56.
fectively mitigated the burden of providing notice, while guaranteeing those making FOIA requests timely access to records.\textsuperscript{77} By requiring owners to assert trade secret claims at the time of submission and by furnishing the opportunity to substantiate those claims on threat of disclosure,\textsuperscript{78} the EPA balances the two objectives without substantially impairing either. This presubmission designation procedure successfully eliminates the need for agency review of all the submitted information which might possibly merit consideration within section 1905 or exemption four of the FOIA before making a disclosure. The EPA solution, then, provides the submitter effective procedural safeguards while requiring only a minimum commitment of resources by the agency and while still maintaining a reasonably expeditious handling of FOIA requests.\textsuperscript{79}

Whether or not an agency follows the EPA procedure, basic notions of fairness demand that administrative agencies give submitters some form of notice prior to disclosure. While the nature of records kept and the FOIA caseload may vary among the agencies, some form of notice procedure suited to each particular agency is both possible and necessary. It is essential both to a reasoned disclosure determination and continued cooperation between the agency and information submitters, and to effectuate Chrysler's recognition of APA actions.\textsuperscript{80} Moreover, fundamental fairness and constitutional due process compel it.

Hearing

Absent an opportunity to be heard, notice of impending disclosure


\textsuperscript{78} When the EPA requests information, the submitter is notified that it must assert any trade secret claim at that time or risk disclosure without further notice. For information provided voluntarily, the submitter merits notification only upon a FOIA request or an agency decision to disclose the material. In deciding whether or not to disclose assertedly exempt trade secret information, the EPA affords the submitter an opportunity to substantiate his claim. Failure to successfully pursue that opportunity results in disclosure. Submitters aware of this substantiation requirement, and EPA procedure generally, have limited their claims of trade secret status to information that is most likely entitled to confidential treatment. Oversight Hearings, supra note 12, at 17-19 (statement of Michael A. James, Deputy General Counsel, EPA). Following a review of the data, the submitter's assertions of confidentiality and the likelihood of competitive harm on disclosure, the EPA's general counsel makes a final disclosure determination. 40 C.F.R. § 2.205 (1980). See generally Note, Protection for Trade Secrets Under the Toxic Substances Control Act of 1976, 13 U. Mich. J. Legal Rep. 329 (1980).

\textsuperscript{79} For a discussion of the treatment afforded trade secrets by the FDA, see Spence, FDA Trade Secret Procedures and Standards, 35 Food Drug Cosm. L.J. 362 (1980).

\textsuperscript{80} See text accompanying notes 30-42 supra.
provides no more than knowledge without relief. The submitter must have an opportunity to present reasons why his trade secret information should not be disclosed." Some providers of trade secret information argue that "an opportunity to be heard" means the right to call witnesses in a formal hearing with an administrative law judge before the government can deprive them of their trade secret information property. Supreme Court authority indicates otherwise, however. Such oral presentations are costly and time-consuming, "impede the congressional goal of expediting FOIA requests and may not serve the need for complete understanding of the complicated ideas, theories and facts inherent in trade secret release challenges." Full comprehension of such complex information often would be best achieved through a written, rather than a spoken, medium.


Since a determination of whether trade secret information should be disclosed focuses in part on whether the information qualifies as property, i.e., whether the information is a trade secret, the hearing will necessarily consider the property issue. The assertion of a property interest, then, invokes the right to a hearing in order to establish that interest as well as to determine whether disclosure is authorized by law. This question differs somewhat from the traditional due process cases, such as Mathews v. Eldridge, 424 U.S. 319 (1976), and Goldberg v. Kelly, 397 U.S. 254 (1970), where the interest is recognized as fifth amendment property prior to invocation of due process rights. The line of Supreme Court cases considering due process in the debtor-creditor relationship context is instructive for this new approach. There, the per garnishment or preattachment hearing focuses in part on whether property rights exist and, if so, in whom they inhere. See generally Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). In addition, traditional due process cases involve hearings similar to those used to determine probable cause, whereas a decision to disclose information is a final deprivation.

82 Oversight Hearings, supra note 12, at 301 (statement of Burt A. Braverman).


84 See id. at 347-49.

85 Since the commissions are constantly absorbed with cases that are presented to them, they lack the time and opportunity to establish and further regulatory priorities. . . . Agency staff has frequently become occupied with legalistic solutions to problems to the exclusion or deemphasis of other valuable input from economists, engineers, environmentalists, and persons trained in related disciplines. Equally important is the fact that the industry and the public in general are required to shoulder excessive costs in the search for clear expression of regulatory policy.

86 "It is not a major sacrifice for submitters to rely upon written affidavits instead of expert testimony, especially since the alternative—providing administrative hearings for submitters—would thwart the congressional goal of expediting FOIA requests."
The requirements of due process are not inflexible. Rather, they should reflect "the precise nature of the government function involved as well as ... the private interest that has been affected by governmental action."8 The interests of both agency and submitter necessitate that a decision to disclose exempt information not be arbitrary or capricious. A reasoned decision, then, requires that the agency ascertain whether the information is confidential and therefore exempt from disclosure. In so doing, the agency must consider the effect of disclosure on, "[first,] the government's ability to obtain necessary information in the future; [and second,] the competitive position of the person from whom the information was obtained."87 The agency's need for deliberative decisionmaking based on a thorough evaluation of those effects and the submitter's interest in protecting his trade secret information merit "some kind of hearing."88 The congressionally mandated expeditious response to FOIA requests requires that the hearing be timely. Litigation concerning the effects of disclosure is likely to be technologically complex, economically sophisticated and abstract. The evaluation of that kind of information in a hearing is challenging at best. A formal hearing would be inappropriate since its only real advantage—the opportunity to observe witness credibility and veracity—is of minimal benefit in this context.89 Accordingly, a written rather than oral presentation will ordinarily satisfy both the submitter and the agency by extending to the submitter an opportunity to present his case for nondisclosure effectively while providing the agency information essential to a swift, reasoned determination. In addition, under such a system, the FOIA requester would receive the timely response Congress intended. Therefore, written pleadings and affidavits provide an adequate, perhaps superior, opportunity for submitters to vindicate their rights.

In Mathews v. Eldridge, 414 U.S. 319 (1976), the Supreme Court restated and elaborated on those criteria:

Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

88 Friendly, supra note 81.
before an administrative agency while still satisfying due process requirements.\footnote{See Friendly, supra note 81, at 1281 n.79 ("Allowing such written direct testimony affords great savings in time and money and often permits relatively complicated ideas, theories, or facts to be transmitted in a form best suited to complete understanding in situations where the value of observing demeanor is minimal."). This note does not suggest, nor is it the case, that an agency may not, in its discretion, order a hearing.}

**TRADE SECRET INFORMATION AS COMPENSABLE PROPERTY**

Disclosure destroys the value of a trade secret. Thus, disclosure to FOIA requesters appropriates the private value of trade secret information for the public gain embodied in the FOIA or the disclosure-authorizing regulation. Procedural due process, although a prerequisite to disclosure, does not bar the deprivation of property.\footnote{See Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions.").} The fifth amendment prohibition against taking private property "for public use, without just compensation,"\footnote{U.S. Const. amend. V.} however, requires that the owner be compensated for the trade secret information upon its disclosure, unless the disclosure is a valid exercise of the police power.\footnote{For a discussion of the distinction between taking and regulation, see Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964).} More significantly, where sovereign immunity forecloses the availability of just compensation, a taking will be enjoined.\footnote{Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949); see text accompanying note 147 infra. See generally Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 29-39 (1963).} Therefore, the fifth amendment command that the government compensate submitters imposes substantive limits on an agency's discretion to disclose.\footnote{The judicial policy of avoiding constitutional questions by statutory construction, see NLRB v. Catholic Bishop, 440 U.S. 490, 504-07 (1979); Rescue Army v. Municipal Court, 331 U.S. 549, 568-74 (1947), dictates that, to the extent constitutional limitations are subsumed into the APA, the discussion here be devoted to the statutory perspective.} While the United States Supreme Court has employed a variety of tests for ascertaining which expropriations require compensation, it "quite simply, has been unable to develop any 'set formula.'"\footnote{See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); accord, Harns v. United States, 205 F.2d 765, 767 (10th Cir. 1953) ("A compensable taking under the federal constitution . . . is not capable of precise definition. And the adjudicated cases have steered a rather uneven course.").} The Court most recently has retreated to a "fairness" standard\footnote{See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978).} wherein those persons who would otherwise be forced to bear a public burden "which, in all fairness and justice, should be borne by the public as a
whole" are compensated. This standard, in addition, subsumes all the previously established tests for a compensable taking. When a thing previously understood to be privately owned is permanently occupied or regularly used or encroached upon by agents of the government or the public generally, the fairness standard recognizes fifth amendment property requiring compensation. A compensable taking also results when a regulation or expropriation produces a "sufficiently great" diminution in the value of the property. Where a property owner creates a public hazard through the use of his property right so as to require regulation, however, the Court finds no taking.

The fairness theory avoids broad classifications, favoring instead a case by case analysis. As noted in *Penn Central Transportation Co. v. New York City*, only the fairness theory offers some rational construct for the fifth amendment taking problem. The theory rejects any single factor, employing instead a host of equitable considerations. Physical invasion, diminution in value and noxious use are accordingly proper factors to be considered when determining whether a particular government action constitutes a taking. Additionally, "reciprocity of advantage" considerations are appropriate in the trade secret information disclosure context.

Traditionally, the physical invasion theory has been adopted in taking analysis. Under the physical invasion theory, the government is obligated to compensate when it makes regular or permanent use of a property interest irrespective of whether it formally transfers title in the

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100 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-16 (1922).
104 Id. at 123-24.
The vibrations [from jet airplane operations] which cause the windows and dishes to rattle, the smoke which blows into the homes in the summer months . . . and the noise which interrupts ordinary home activities do interfere with the use and enjoyment by the plaintiffs of their properties. Such interference is not a taking.
property to itself.\textsuperscript{107} A federal agency which discloses private trade secret information and thereby permanently devotes the information to public use could, therefore, obligate the government to compensate the information provider for the taking. The likely existence of some residuum of use available to the submitter does not negate that requirement.\textsuperscript{108}

The diminution in value theory, by contrast to the physical invasion theory, largely ignores the nature of the government act, focusing instead on the degree of harm inflicted on the claimant's property. In Pennsylvania Coal Co. \textit{v. Mahon},\textsuperscript{109} Justice Holmes announced that where the value diminution caused by expropriation of property becomes "sufficiently great," there will be a taking requiring compensation.\textsuperscript{110} "[I]f all or substantially all of the value of the property is destroyed as a result of the government's act,"\textsuperscript{111} compensation must be paid.

When the value loss is less than total, courts and commentators have had difficulty distinguishing compensable from noncompensable takings.\textsuperscript{112} Since everyone can be expected to surrender minimal property


\textsuperscript{109} 260 U.S. 393 (1922).

\textsuperscript{110} Id. at 413-16.


\textsuperscript{112} No formula may be extracted from the cases for determining when a value diminution becomes impermissible and, in the absence of compensation, unconstitutional.

Examination of a representative group of cases in which the courts specifically mentioned proof of the value of the subject land if used for a permitted purpose, as compared with its value if used for a purpose outlawed by the ordinance, did not yield a precise formula for determining where regulation crosses the line and becomes confiscation. Of the cases examined, about
rights for the public good, the courts ask how much an individual should fairly be expected to sacrifice; and since no one should be expected to give up all his rights in a thing without being compensated, the necessity of compensation is undisputed when the value loss is total.

Disclosure of trade secret information effects a total value loss in the half approved and half disapproved the ordinance as applied. Moreover, the loss of use value in cases where the ordinance was approved was about the same as in those where an opposite conclusion was reached. If any conclusion is warranted by this sampling, it is that financial loss is a relevant consideration, but not a single decisive one.

1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.27, at 155-56 (2d ed. 1976). Compare United States v. Dickinson, 331 U.S. 745, 745-48 (1947), and United States v. Causby, 328 U.S. 256, 266-67 (1946), and Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922), and United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884), with New Haven Inclusion Cases, 399 U.S. 392, 489-95 (1970), and YMCA v. United States, 395 U.S. 85 (1969), and United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952), and Omnia Commercial Co. v. United States, 261 U.S. 502 (1926), and Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871). See Interstate Ry. v. Massachusetts, 207 U.S. 79, 86-87 (1907). Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The extent of diminution inquiry is central in inverse condemnation challenges, see, e.g., United States v. Dickinson, 331 U.S. 745, 748 (1947) (compensation required when the government flooded part of respondents' land); United States v. Causby, 328 U.S. 256, 266-67 (1946) (frequent military flights at low altitude over a commercial chicken farm destroyed the value of the farm and necessitated compensation for its value); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (the frequent firing of heavy guns across the grounds of a summer resort, thereby frightening the public off the premises, required compensation for the appropriation of the property); United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884) (claimants entitled to compensation for the appropriation of their water rights by the government), and zoning cases, see, e.g., Agins v. City of Tiburon, 447 U.S. 255 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915); Welch v. Swasey, 214 U.S. 91 (1909); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1871); cf. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (while not explicit, the determination that compensation was unnecessary probably hinged on the "transferable development rights" given Penn Central in return for historic landmark restrictions being placed on its Grand Central Terminal by New York City).

Professor Michelman suggests the utilitarian approach as an alternative to the "diminution-in-value" calculus. Michelman balances public costs against public benefits and concludes that property qualifies as fifth amendment property requiring compensation when the public loss from a failure to compensate exceeds the transactional costs of compensation. Michelman, supra note 93, at 1215. This approach is philosophically interesting, but not widely adopted.

property interest. Once disclosed, the information is in the public domain and no one has a claim to it superior to that of anyone else. The owner or developer of the information may still use it, but the law recognizes no value in it and ceases to protect it from theft or unauthorized use. Thus, to the extent that one had "a legitimate claim of entitlement" to trade secret information, giving rise to protection as property, disclosure of the information may compel compensation.

The noxious use theory, or "creation of the harm" test, creates a limitation on one's legitimate claim of entitlement to a thing. Under this theory, an individual whose conduct creates the need for public regulation has no claim to compensation for the diminution in value produced by the resulting regulation. If an individual is making a nuisance of himself through noxious, harmful or wrongful use of his property, he may properly be restrained without the need for government to pay compensation. Nevertheless, if the public realizes some positive good, the owner must be compensated.

The problem of delineating the property interest in land use cases, i.e., what constitutes the "whole" in measuring value loss, is avoided in the trade secret information context where the value loss is the value of all the information disclosed. The value of commercial, confidential and financial information, which is derived from the value of the ongoing business, is totally destroyed even though the business itself continues.


The trade secret owner is entitled to compensation for the loss in value of his trade secret occasioned by disclosure. He is not compensated for that which he has not lost—what some commentators have called "residuum of value" which he continues to enjoy. See, e.g., McGarity & Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 Harv. L. Rev. 837, 866 (1980) (suggesting that "[e]ven when disclosed, health and safety [trade secret] data still have a substantial residuum of value to the data producer" and, therefore, need not be compensated); Note, supra note 108, at 132 (finding that FOIA trade secret information disclosures are a regulation of property because the submitter continues to enjoy "some residuum of value" and, therefore, such disclosures are not compensable). That the trade secret owner is left with some residuum of use, however, does not imply that his property was not completely destroyed, for it was. The value of the use that survives the disclosure is without legal protection. Since property is that which the law protects, the disclosed trade secret information is not property and has no property value. When the residuum of value of a disclosed trade secret approaches the value of it undisclosed, the fairness standard may direct that compensation not be paid because the burden is neither unfair nor unjust.

See generally Sax, supra note 93, at 48-50. According to Sax, the test is "most explicitly articulated" in the grade-separation cases, e.g., Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346, 352-53 (1953); Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). Sax, supra note 93, at 48-50. Those cases concerned the intersection of railroad tracks and a highway at street level. As highway traffic increased, the legislature determined that public safety necessitated a grade separation. In upholding an assessment against the railroad for the improvement, the Court reasoned: "Having brought about the problem, the railroads are in no position to complain because their share of the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements." Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. at 353.

Michelman, supra note 93, at 1196.
The noxious use test suggests that when the continued secrecy of particular information creates a public hazard which disclosure will mitigate, such disclosure need not be compensated. Thus, for example, where a trade secret information owner exploits its property to further some harmful end such as monopolization or consumer fraud, government disclosure of the information may constitutionally be accomplished without the need to pay compensation. Nevertheless, while secrecy in government is a recognized public hazard which the FOIA seeks to abate and a danger which disclosure of trade secret information might arguably help to overcome, the rule denying compensation does not extend so far. Under the creation of the harm test, since the submitter did not create the danger, its property may not be sacrificed in order to alleviate the harm without just compensation.

While the idea of justifying an exercise of the police power by "an average reciprocity of advantage" between the public and the property owner has traditionally been applied in zoning cases, the notion is capable of a broader conceptual application. Under this theory, if the government confers a benefit upon the public by diminishing the value of an individual's property, it must confer some reciprocal, offsetting benefit upon the aggrieved individual. Such an offsetting private benefit in trade secret information disclosures may be found, if at all, in the "economic advantages of a license" obtained from the government.

To suggest, as has at least one commentator, that an aggrieved submitter of trade secret information, by having access to data submitted by others, gains a reciprocity of advantage, is to view the disclosure problem myopically. The FOIA does not, nor was it intended to, provide disclosure sufficient to fulfill reciprocal access demands of competitors. Were the Act to provide such free access to government held trade secret information, important technological development incentives would vanish. Even with free access, if the government possessed trade secret information from only one participant in a[

122 See note 20 supra.
126 See Note, supra note 108, at 131.
127 See note 11 supra.
128 [I]t is hard to see how the public would be benefited by disclosure of customer lists or advertising campaigns; in fact, keeping such items secret encourages businesses to initiate new and individualized plans of operation, and constructive competition results. This, in turn, leads to a greater variety of business methods than would otherwise be the case if privately developed marketing and other data were passed illicitly among firms involved in the same enterprise.

market, for example, no free accessibility advantage would inure to that participant's benefit since it could obtain no information complementary to its own. Less than free access, that is limited disclosure, however, would deny some submitters access to potentially compensating information. While reciprocity might be found if the submitter could obtain from the requesting competitor like information, the FOIA specifically forecloses such a consideration. Nevertheless, an agency which obtains standardized information from an entire industry may decide to make that line of information freely available. The costs and benefits of such an information exchange would inure to all competitors in an industry and reciprocity would be assured.

One who voluntarily submits trade secret information in exchange for a license or other economic advantage with the knowledge that the information may be disclosed has received the reciprocal benefit necessary to overcome fifth amendment taking objections. Unlike involuntary submission or submission with nondisclosure guarantees, such voluntary submissions effect a knowing abandonment of certain property rights in exchange for other property rights. The benefits, by flowing to the submitter prior to public disclosure, guarantee some certainty of reciprocity and thereby ensure constitutional approval. Moreover, the decision to disclose rests with the submitter and not the government. By permitting the submitter to decide whether or not to bear the burden of public disclosure the constitutional requisites of fairness are met.

Reciprocity of advantage suggests that an exercise of police power must not only benefit the injured property owner but must also benefit the public—that is, be "reasonably necessary to the effectuation of a

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120 Prior to disclosure, the agency must consider the nature of the information requested, but may not consider the identity of the requester. Agencies must respond to FOIA requests and "shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3) (1976) (emphasis added). "The Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein." NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149 (1975).


122 See note 53 supra.
substantial public purpose"—as well. Congress, in enacting the FOIA, recognized a substantial public interest in disclosure of information generally, but specifically denied any such interest in trade secret information disclosures because of the minimal public need for such information. Given that the vast majority of FOIA requests come from businesses, ostensibly to obtain competitively advantageous information, and that few, if any, of the requests for exempt trade secret information produce material which furthers the goal of a public educated in the operation of its government, it seems doubtful that many trade secret information disclosures are justifiable as being for the public good. While the FOIA is an expression of Congress' desire to promote

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134 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978). The question of compensation is mooted if the taking on its face benefits only a private interest. Courts, however, generally defer to the legislative determination of public purpose. See, e.g., Berman v. Parker, 348 U.S. 26, 32 (1954) ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."); United States ex rel. TVA v. Welch, 327 U.S. 546, 552 (1946) ("[W]hatever may be the scope of the judicial power to determine what is a 'public use'... this Court has said that when Congress has spoken on this subject its decision is entitled to deference until it is shown to involve an impossibility.") (quoting Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925)). See also Thompson v. Consolidated Gas. Utilis. Corp., 300 U.S. 55, 80 (1937) ("[O]ne person’s property may not be taken for the benefit of another private person without a justifying public purpose even though compensation be paid."). 

[A] law that takes property from A. and gives it to B., regardless of compensation, "cannot be considered a rightful exercise of legislative authority." Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion). At least one court has held that disclosure of private trade secret information held by the government is an unconstitutional taking of private property for private purposes. See Wearly v. FTC, 462 F. Supp. 589, 589-99 (D.N.J. 1978), vacated on other grounds, 616 F.2d 662 (3d Cir. 1980). The Wearly court reasoned that information released to a private requester is ipso facto for a private purpose. 462 F. Supp. at 589-99. The clear aim of Congress in enacting the FOIA, however, was public gain. See notes 11 & 20 supra. Congress sought a heightened public awareness "with respect to the nature, scope and procedure of federal governmental activities." Frankel v. SEC, 460 F.2d 813, 816 (2d Cir.) (citing H.R. REP. No. 1497, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418; S. REP. No. 813, 89th Cong., 1st Sess. (1965)), cert. denied, 409 U.S. 889 (1972). While no one suggests a total failure to achieve that aim, some commentators point to the unexpectedly high cost of administering the Act as an indication of the need for a "comprehensive restructuring" of it. Koch & Rubin, A Proposal for a Comprehensive Restructuring of the Public Information System, 1979 DUKE L.J. 1, 5-7. Nevertheless, the Act has facilitated generally free access to governmental information even though conferring some benefit, arguably an overwhelming portion of the ascertainable benefit, on private requesters. See notes 13-16 supra. Given the deference accorded legislative intent by the United States Supreme Court, Judge Biunno's opinion in Wearly is clearly inapposite to FOIA disclosures.


136 See Arnold, supra note 12, at 19 ("90 percent of all the information sought is probably of no interest to anyone except the party requesting it").

137 See note 12 supra.

138 See notes 11, 13-16 supra.

139 But see McGarity & Shapiro, supra note 119, at 840-48 (discussing the desirability of disclosing health and safety data submitted to the FDA and EPA as a prerequisite to licensing new drugs and pesticides).
openness in government, it fails to provide sufficient authority for a
taking of trade secret information.

Thus, if the disclosure of trade secret information does not restrain
its owner from a noxious use of the information or if there is no
reciprocal benefit, either at the time of the initial information submis-
sion or through a broad and accessible line of information, the disclosure
will likely result in a taking for which the fifth amendment directs com-
ensation. Money damages are available in the court of claims if Con-
gress has waived sovereign immunity by authorizing the disclosure.
In such a situation, the constitutional demand for compensation is satisfied
by the legal remedy and the equitable remedy of a declaratory judg-
ment or an injunction is, therefore, foreclosed. If Congress has not
authorized the disclosure, however, an equitable remedy is the only
available relief. Thus, if a government officer acts in excess of his
delegated powers or pursuant to an unconstitutional statute, "his ac-
tions are ultra vires his authority and therefore may be made the object
of specific relief." In the trade secret information context, if the
disclosure is authorized and is a valid exercise of administrative discre-
tion, Congress has impliedly authorized the exclusive remedy of com-
ensation. If, however, the disclosure is not authorized by law, is ultra
vires or is otherwise an abuse of discretion, the submitter may enjoin
the agency or officer from disclosing the information.

While Chrysler may indicate that a disclosure of information made
pursuant to a regulation having the "force and effect of law" is authoriz-
ed by law and therefore allowable under the APA, the broader limita-
tion imposed by the fifth amendment may dictate a different result.
Aencies should recognize that the fifth amendment compensation re-
quirement imposes a substantive limit on their discretion to disclose
trade secret information. In the absence of a showing of noxious use or

146 See note 20 supra.
W.A. Ross Constr. Co., 399 U.S. 18, 21 (1940). Money damages are also available if the
disclosure is a valid exercise of administrative discretion. 28 U.S.C. § 1346(b) (1976).
151 The submitter whose property is destroyed in violation of the fifth amendment also
has a right to recover damages against the official in federal court despite the absence of
any statute conferring such a right.” Carlson v. Green, 446 U.S. 14, 18 (1980). See also
152 The APA is as broad as the fifth amendment takings clause. See Hoffman v. HUD, 519
F.2d 1160 (5th Cir. 1975) (recognizing that the APA grants a claim for relief for an admin-
istrative agency’s taking of property assertedly in violation of the fifth and fourteenth
amendments).
reciprocity of advantage, disclosure of trade secret information constitutes an abuse of discretion voidable under the APA. The constitutional standard is a more stringent limitation on agency action with a broader application than that imposed by the *Chrysler* rule. This standard will produce both economic efficiency and social benefits. Moreover, it is constitutionally compelled.

**CONCLUSION**

The administrative treatment afforded trade secret information has failed to protect valuable property rights adequately and results in diminished productivity, innovation and cooperation with agencies requesting information. Application of constitutional standards to trade secret disclosure determinations will insure adequate protection of those rights, greater access to information for non-business requesters and continued cooperation between trade secret owners and administrative agencies. By guaranteeing procedural due process, especially adequate notice, agencies will expand their access to valuable and necessary information while stimulating, rather than discouraging, technological development. Use of the fifth amendment compensation requirement as a limit on agency discretion will acknowledge the substantial value inhering in private proprietary information and will encourage production and efficiency. Application of this heightened constitutional standard of appropriate administrative discretion for FOIA disclosure requests will further the important national policy of protecting confidential business information while leaving intact the design of the FOIA intended by Congress.181

RICHARD W. YOUNG

149 For an economic analysis of government disclosure of trade secret information and a suggested reform of the system based on economic—not legal—criteria, see Note, supra note 131.
150 See notes 22 & 128 supra.
151 See notes 20-25 & accompanying text supra.