# THE FREEDOM OF INFORMATION ACT EXEMPTION 4: PROTECTING CORPORATE REPUTATION IN THE POST-CRASH REGULATORY ENVIRONMENT

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## I. INTRODUCTION

The global financial meltdown was a crisis of both confidence and credit that caused the public to lose faith in the financial industry's ability to self-regulate.[1] Assertive government regulators risk compounding that crisis by placing confidential corporate records within the scope of the Freedom of Information Act (FOIA), unless courts can better distinguish information the public needs to assess government regulators from the private corporate information collected by those regulators.

[1] *See* Ben Bernanke, Chair, Bd. of Governors of the Fed. Reserve Sys., Reflections on a Year of Crisis (Aug. 21, 2009), http://www.federalreserve.gov/newsevents/speech/bernanke20090821a.htm ("We have seen during the past two years that the complex interrelationships among credit, market, and funding risks of key players in financial markets can have far-reaching implications, particularly during a general crisis of confidence."); *see also* EDELMAN, EDELMAN TRUST BAROMETER: THE TENTH GLOBAL OPINION LEADERS SURVEY 16–17 (2009), http://www.edelman.com/trust/2009 (noting that in a global survey of 4475 "informed publics" in 20 countries between Nov. 5 and Dec. 14, 2008, respondents held government and business equally accountable for causing the financial credit crisis, at 81% and 84%, respectively, and that, when asked which one entity should be most responsible for *solving* the crisis, 53% answered government, 24% business, and just 2% NGOs).

In 2008, as the financial crisis continued to unfold, the Southern District of New York heard a pair of cases challenging the government's ability to manage consumer confidence and commercial reputation in an era of increasing government and corporate interdependence.[2] Bloomberg L.P. and Fox News Network brought separate claims against the Board of Governors of the Federal Reserve Board ("the Fed") after the agency denied their FOIA requests for information they would use to evaluate the Fed's emergency bank lending program.[3] The agency's denial of the media requests focused largely on the often used—and misused—FOIA Exemption 4, which allows an agency to deny disclosure of information found to be either (1) a trade secret; or (2) privileged or confidential commercial information.[4] The Fed's argument exemplifies the challenge presented to courts when FOIA disclosure turns not on traditional notions of competitive commercial harm, but on more nuanced reputational considerations.[5] Here, the Fed claimed that disclosure would result in reputational harm to the financial institutions that participated in its lending programs, which in turn would threaten the government's interest in the stability and security of the U.S. financial markets.[6]

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[2] *See Timeline of a Crisis*, WALL ST. J. ONLINE, Mar. 17, 2008, http://online.wsj.com/article/SB120576387418941803.html (pegging June 8, 2007—the date on which the Dow dropped 1.5% "amid growing concern about the housing market's reliance on subprime loans"—as the opening salvo to the financial crisis).

[3] Bloomberg L.P. v. Bd. of Governors of the Fed'l Reserve Sys., 649 F. Supp. 2d 262, 265 (S.D.N.Y. 2009), *aff'd*, No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010); Fox News Network v. Bd. of Governors of the Fed'l Reserve Sys., 639 F. Supp. 2d 384, 388 (S.D.N.Y. 2009), *vacated and remanded*, No. 09-3795-cv, 2010 WL 986665, at *4 (2d Cir. Mar. 19, 2010).

[4] 5 U.S.C. § 552(b)(4) (2006) (indicating that the disclosure requirements of FOIA do not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential"); *see also infra* Parts II.B., II.C.

[5] *See infra* Part III.B.

[6] *See infra* Part III.B.

On appeal, the Second Circuit rejected the Fed's argument that disclosure of the requested loan records would result in competitive harm to the *Federal Reserve Banks* without addressing the underlying question of whether it would result in competitive or reputational harm to the *financial institutions* that sought loans through the Fed's emergency lending program.[7] As such, the Second Circuit's decision deferred a challenging question that is likely to last well beyond the immediacy of the current financial crisis: Is it possible under FOIA for agencies and courts to appropriately account for corporate reputational harm in an era of increased government regulation without undermining FOIA itself?

To that end, Part II of this note examines the evolving balance embodied in FOIA Exemption 4 between private interests, the government interest, and the public's "right to know." Part III considers the issue of reputational harm and FOIA jurisprudence in the context of the ongoing financial crisis. Part IV argues that reputational harm can and should be accounted for in FOIA litigation, and evaluates three possible solutions for incorporating reputational harm into judicial analysis:

> (1) Incorporate a balancing test into Exemption 4;
> (2) Allow reputational harm as a category of competitive harm only when it is established by an intervening defendant or reverse-FOIA plaintiff; or
> (3) Allow agencies to directly assert qualified reputational harm as a category of competitive harm.

[7] *See Bloomberg*, 2010 WL 986527, at *3 (framing the question as whether the Federal Reserve Banks would suffer competitive harm, having held earlier that the records sought were not "obtained from" the borrowing banks but prepared by the Federal Reserve Banks though the information was derived from the borrowing banks' loan requests); *Fox*, 2010 WL 986665, at *1 (incorporating the *Bloomberg* opinion regarding Exemption 4).

As the financial crisis and regulatory fallout continues, a better understanding of reputational harm may help to alleviate the competing concerns of government regulators, financial institutions, and the public.

## II. FOIA EXEMPTION 4 EMBODIES AN UNSTEADY BALANCE BETWEEN PRIVATE INTERESTS, GOVERNMENT INTERESTS, AND "THE RIGHT TO KNOW"

The Freedom of Information Act is more than a call for government accountability; it was drafted to address a delicate balance between transparency and privacy.[8] FOIA requires government agencies to make all records available to the public, subject to nine enumerated exemptions.[9] By

[8] *See infra* Part II.A.

[9] 5 U.S.C. § 552(b) (2006), *amended by* Open FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat. 2142 (2009):

> (b) This section does not apply to matters that are—
> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
> (2) related solely to the internal personnel rules and practices of an agency;
> (3) specifically exempted from disclosure by statute specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

combining blanket disclosure with specific exemptions for withholding information, the drafters attempted to strike a balance between public, private, and government interests.[10] But that balance has been challenged by the increasing use of FOIA, not as a tool of government accountability, but as a means for businesses to obtain competitor information.[11] Nowhere is this balance more challenging than Exemption 4, which allows agencies to withhold information that constitutes "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[12] The bulk of litigation under Exemption 4

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
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> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
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> (9) geological and geophysical information and data, including maps, concerning wells.

[10] *See infra* Part II.A.

[11] *See infra* Part II.B.

[12] 5 U.S.C. § 552(b)(4) (2006).

turns on the definition of "confidential" information, yet one issue raised repeatedly by both agencies and corporations fighting disclosure has received surprisingly little judicial review: claims of reputational harm to information submitters arising from disclosure.[13]

## A. History of FOIA Exemption 4 Presents a Balancing Act Between Openness and Confidentiality

When FOIA was enacted in 1966, it constituted a nearly unprecedented codification of "the right to know."[14] The bill was introduced with lofty rhetoric linking an open government to a healthy democracy.[15] For the media interests who led the fight for the bill, it was to become a key

[13] *See infra* Part II.C.

[14] *See* H.R. REP. NO. 89-1497, at 2 (1966), *reprinted in* SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE S. COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 23 (1974) [hereinafter FOIA SOURCE BOOK] ("Inherent in the right to speak and the right to print [is] the right to know." (quoting James S. Pope)); *see also* David C. Vladeck, *Information Access: Surveying the Current Legal Landscape of Federal Right-To-Know Laws*, 86 TEX. L. REV. 1787, 1795–96 (2008) ("First enacted in 1966, FOIA was truly an experiment in open government. It was one of the first right-to-know statutes that guaranteed the public a window into the activities of its government. At the time of its passage, only two countries—Sweden and Finland—had open record laws resembling FOIA, and neither law was as comprehensive as FOIA.").

[15] *See* S. REP. NO. 89-813, at 2–3 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 37–38 ("In introducing S. 1666, the predecessor of the present bill, Senator [Edward V.] Long quoted the words of [James] Madison . . . : 'Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.'"); *see also* Nat'l Labor Relations Bd. v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978) (holding that documents sought by respondent were properly withheld by the agency under exemption 7(a), as disclosure prior to the completion of the board's hearings on allegations of labor abuse would interfere with the board's enforcement duties, stating, "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

tool for bringing openness and accountability to government.[16]

The FOIA bill was an attempt to close loopholes in existing legislation that allowed government agencies to withhold information if it was (1) in the public interest; (2) for good cause; or, (3) because the requestor "was not properly and directly concerned."[17] In contrast, FOIA established a default position of disclosure, in which an agency's ability to withhold information was carefully limited to nine specific exemptions.[18] The Supreme Court has held that while the exemptions are to be construed narrowly, FOIA does not require agencies to organize their affairs to maximize the information available through FOIA.[19] Nevertheless, the burden is on the agencies to establish that records are covered by one of the exemptions; otherwise, requests are to be granted without consideration of the requestor's identity or purpose.[20] As such, the

[16] Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 660 (1984) ("Leading the fight for 'open government' was the press, which cited numerous instances of government agencies' random, unexplained denials of access to information about crucial decisions, denials which had covered up the mistakes or irregularities of the time . . . . For the press and public interest groups, the FOIA became the Fourth Musketeer."); *see also* Nationwide Mut. Ins. Co. v. Friedman, 451 F. Supp. 736, 740 (D. Md. 1978) ("The basic purpose of Congress in enacting the FOIA was to promote broad public access to information within the control of the government." (citing EPA v. Mink, 410 U.S. 73 (1973))).

[17] S. REP. NO. 89-813, at 5 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 40 (referencing section 3 of the Administrative Procedure Act).

[18] *See supra* note 9.

[19] *See* U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 152 (1989) ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass."); *see also* Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc) ("We know of no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act.").

[20] *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5:3 (5th ed. 2010).

exemptions reflect a Congressional intent to balance the public's right to know against competing concerns of privacy, confidentiality, and government efficacy.[21]

Though media organizations were the driving force behind FOIA, the statute makes no distinction among requestors, except with respect to the fee schedule for processing requests.[22] Instead, it requires that agencies "shall make the records promptly available to *any person*" unless subject to one of the enumerated exemptions.[23] Four

[21] *See* H.R. REP. NO. 89-1497, at 6 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 27 ("It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. . . . This bill strikes a balance considering all these interests."); S. REP. NO. 89-813, at 3 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 38 ("At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files. . . . Success [of FOIA] lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.").

[22] *See* 5 U.S.C. § 552(a)(4)(A)(i) (2006) (providing that agencies establish a three-tiered fee schedule for FOIA requests that distinguishes between (1) commercial requestors; (2) educational, noncommercial scientific, and news media requestors; and (3) all other requestors).

[23] *See* 5 U.S.C. § 552(a)(3)(A) (2006) ("Except with respect to the records made available under paragraphs (1) and (2) of this subsection [regarding records which agencies must proactively publish or make available in reading rooms], and except as provided in subparagraph (E) [excluding requests by foreign entities for intelligence information], each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available *to any person*.") (emphasis added); *see* PIERCE, *supra* note 20, at § 5.3 ("Agency records not exempted from disclosure must be disclosed to anyone, whether the requestor is an investigative reporter trying to uncover incompetence or corruption, a citizen trying to determine how a particular part of government functions, a litigant against an agency, a criminal trying to identify a government agent or informant, a firm trying to obtain its competitors' trade secrets, or an agent of a foreign government engaged in espionage. . . . Neither the identity of the requestor nor the reasons for her request are relevant in applying FOIA.").

decades after its enactment, the dominant use of FOIA is by business interests, rather than media or non-governmental organizations.[24]

Corporations quickly discovered the possibilities of using FOIA for information gathering, particularly information about their competitors. The resulting acceleration of FOIA requests increased costs for the agencies, which became bogged down processing the mountain of associated paperwork.[25] Financial costs have exploded from Congressional estimates of $100,000 per year in 1974 to more than $240 million in 2006 alone.[26] Meanwhile, other requesters suffer delays as agencies cope with a perpetual backlog of requests.[27]

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[24] COALITION OF JOURNALISTS FOR OPEN GOVERNMENT, FREQUENT FILERS: BUSINESSES MAKE FOIA THEIR BUSINESS (JULY 3, 2006), http://www.cjog.net/documents/Who_Uses_FOIA.pdf (finding that commercial interests accounted for more than sixty percent of FOIA requests, while media accounted for just six percent).

[25] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FREEDOM OF INFORMATION ACT: AGENCIES ARE MAKING PROGRESS IN REDUCING BACKLOG, BUT ADDITIONAL GUIDANCE IS NEEDED 4 (Mar. 2008), *available at* http://www.gao.gov/new.items/d08344.pdf ("Median times to process requests varied greatly. These ranged from less than 10 days for some agency components to more than 100 days at others (sometimes much more than 100).").

[26] *See* PIERCE, *supra* note 20, at § 5.4 ("The House Committee in 1974 estimated additional cost of FOIA amendments for all agencies at $50,000 for 1974 and $100,000 for each of the succeeding five years."); *compare* COALITION OF JOURNALISTS FOR OPEN GOVERNMENT, STILL WAITING AFTER ALL THESE YEARS (PART I): AN IN-DEPTH ANALYSIS OF FOIA PERFORMANCE FROM 1998 TO 2006, at 15 (Aug. 8, 2007), http://www.rcfp.org/newsitems/cjog/documents/Still_Waiting_Narrative_and_Charts.pdf [hereinafter CJOG 2007] (finding that in 2006, the government spent $241,614,994 to process FOIA requests).

[27] *See* CJOG 2007, *supra* note 26, at 2 ("Because of the way the government reports FOIA data, it's impossible to determine just how long the average person has to wait for a response and then for the requested information. The information that is reported—the median number of days it takes an agency to respond—suggests most people are waiting longer [since reporting began in 1998].").

The degree to which private commercial information has been swept into FOIA was not intended by FOIA's drafters.[28] The legislative history makes clear that Exemption 4 serves a dual purpose: to encourage private entities to voluntarily provide reliable information to the government, while protecting submitters from the competitive risk of disclosure.[29] As such, Exemption 4 is intended to promote accountability by providing access to government records while protecting the personal and corporate information collected by the government.[30]

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[28] *See* S. REP. NO. 88-1219, at 6 (1976), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 91 ("This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from which it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges."); *see also* JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE §§ 14:1, 14:2 (West Group, 3d ed. 2009) ("[F]ounders of FOIA had not called for private data to be released, and agencies when FOIA was created were unanimous in their expectation that private data would continue to be protected. . . . The intent of the drafters of exemption (b)(4) was that these accountability goals should be harmonized with legitimate private sector concerns.").

[29] *See, e.g., Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 88th Cong. (1964) (statement Sen. Quentin N. Burdick, Member, Subcomm. on Administrative Practice and Procedure) ("I am thinking of a situation, for example, where the company couldn't qualify for funds, and they have exposed their predicament to the world and it might give competitors unfair advantage to know their weak condition at that time. I wonder if there might be some cases where it might be in the public interest if all the facts about a company were not made public."), *quoted in* Nat'l Parks & Conservation Ass'n v. Morton (National Parks I), 498 F.2d 765, 767 (D.C. Cir. 1974) , *aff'd en banc sub nom*; Nat'l Parks and Conservation Ass'n v. Kleppe (National Parks II), 547 F.2d 673 (D.C. Cir. 1976).

[30] *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 774 (1989) ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various

The FOIA exemptions are permissive rather than mandatory; there is nothing in the FOIA statute to prevent the government from releasing information, only allowances that disclosure may be denied pursuant to the nine exceptions.[31] Where a person or entity believes that improper disclosure is imminent, the Supreme Court in *Chrysler Corp. v. Brown* recognized an indirect means to prevent disclosure through "reverse FOIA" suits.[32] A reverse-FOIA plaintiff may prevent disclosure by showing that the agency's pending release of the information would constitute a violation of the Trade Secrets Act.[33] For the business community, reverse FOIA suits were only a partial solution, as FOIA does not require an agency to confer with the submitter prior to disclosure.[34] To close this gap, President Reagan signed an executive order eight years after *Chrysler* requiring, with some exceptions, predisclosure notification to submitters when an agency believes that disclosure might trigger a FOIA exemption.[35] This, of course, also adds to the FOIA backlog.[36]

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governmental files but that reveals little or nothing about an agency's own conduct. . . . In other words . . . the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.").

[31] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) ("Congress did not design the FOIA exemptions to be mandatory bars to disclosure.").

[32] *Chrysler*, 441 U.S. at 281 (holding that, while FOIA provides no private right of action enjoining disclosure, a private party may seek judicial review of an agency decision to disclose where disclosure would violate the Trade Secrets Act, 18 U.S.C. § 1905).

[33] *Id.*

[34] *See* 5 U.S.C. § 552 (2006) (prohibiting federal employees and contractors from disclosing or permitting the disclosure of any information received in the course of employment which "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus," subject to fines and/or imprisonment).

[35] *See* Exec. Order No. 12,600, 52 F.R. 237813, 3 C.F.R. 1987 Comp., 235 (1987), *available at* http://www.archives.gov/federal-register/codification/executive-order/12600.html.

[36] *See* U.S. GAO, FREEDOM OF INFORMATION ACT: AGENCIES ARE MAKING PROGRESS IN REDUCING BACKLOG, BUT ADDITIONAL GUIDANCE IS

FOIA did more than establish standards for government disclosure; the act established that requestors could seek judicial review in the event that a request was denied pursuant to the enumerated exemptions.[37] Requestors have had many opportunities to do so; as the number of requests has increased over the four decades of FOIA, so too has agency use of the exemptions.[38] A 2007 report revealed that use of exemptions to deny FOIA requests increased greatly from 1998 to 2006, particularly after 2002 under President George W. Bush.[39] Over that time period, the report found that use of Exemption 4 rose forty-nine percent government-wide.[40] While an analysis of the substantive basis of agency assertions of FOIA exemptions is beyond the scope of this Note, additional analysis in this area would be highly

NEEDED, *supra* note 25, at 43 ("Agencies may need to notify submitters of information before disclosure. Before releasing information under FOIA, federal agencies are generally required to provide predisclosure notifications to submitters of confidential commercial information. Officials stated that when agencies receive requests for proprietary, acquisition, or procurement records, the submitter notification process can delay closure of these cases.").

[37] *See* 5 U.S.C. § 552(a)(4)(B) (2006) (providing for federal jurisdiction to review *de novo* agency decisions to withhold records under the nine FOIA exemptions and to enjoin the agency from withholding and order disclosure; the court may also order production of records for *in camera* review to determine whether the information properly qualifies for exempt status).

[38] *See* CJOG 2007, *supra* note 26, at 4 ("In the last several years, agencies have made creative use of the nine FOIA exemptions to deny requests for information. Overall, the number of exemptions cited to support the withholding of information has increased 83% since 1998, even as the number of requests processed fell 20%."). Note that the administration's posture of secrecy can drive the extent to which media and watchdog organizations must turn to FOIA, in addition to the agencies' use of the exemptions.

[39] *See id.* at 15 ("Thanks to a surge that began in 2002, the use of the exemptions to withhold information has increased 83% since 1998. The use of Exemption 2 is up 344%. Along with Exemptions 4 and 5, it was cited by former Attorney General John Ashcroft and then-White House Chief of Staff Andrew Card in memos urging greater restraint in handling FOIA requests.").

[40] *Id.* at 14.

relevant to better understand the rationale behind agency denials and the challenges faced by the courts in balancing FOIA's competing goals.[41]

## B. Framework for Exemption 4 Analysis: *National Parks* and *Critical Mass*

Exemption 4 provides that information which constitutes "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is exempt from disclosure.[42] The majority of Exemption 4 cases concern the meaning of "confidential" commercial information.[43] The fact-specific nature of Exemption 4 inquiries has resulted in a jurisprudence dominated more by "eclectic patterns . . . [than by] consistent norms."[44] However, two en banc decisions from the D.C. Circuit have come to dominate judicial analysis of this question: *National Parks & Conservation Ass'n v. Kleppe* (*National Parks*) and *Critical Mass Energy Project v. Nuclear Regulatory Commission* (*Critical Mass*).[45] This framework sets the stage for analysis of reputational harm under Exemption 4, and contextualizes the challenge presented by the financial crisis suits.

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[41] In particular, it would be helpful for such an analysis to review the relative denial and litigation rates of Exemption 4 denials based on the identity of the requestor (public interest versus private competitor) and the nature of the information sought (whether it is more akin to public interest or to competitive usage).

[42] 5 U.S.C. § 552(b)(4) (2006).

[43] *See* O'REILLY, *supra* note 28, at §§ 14:20, 14:26 ("Very few FOIA cases have involved information which was not a commercial confidential record or a trade secret. . . . The definition of 'confidential' commercial information is the key to the great majority of FOIA cases involving business submissions.").

[44] O'REILLY, *supra* note 28, at § 14.1.

[45] *See* Nat'l Parks & Conservation Ass'n v. Kleppe (*National Parks II*), 547 F.2d 673 (D.C. Cir. 1976) (en banc); Critical Mass Energy Project v. Nuclear Regulatory Comm'n (*Critical Mass III*), 975 F.2d 871 (D.C. Cir. 1992) (en banc).

### 1. *National Parks* Defines "Confidential" Under Exemption 4

The D.C. Circuit established the test for whether information that a business or individual was compelled to provide to the government, either by statute or to participate in a government program, constitutes "confidential" commercial or financial information under Exemption 4.[46] Under the *National Parks* test, information is "confidential" for the purposes of Exemption 4 if disclosure is likely to either (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.[47] Every circuit has adopted the D.C. Circuit's two-prong definition for Exemption 4 analysis. [48]

The D.C. Circuit in *National Parks* took an expansive view: the agency or reverse FOIA plaintiff need not prove an "actual adverse effect on competition" but rather "the court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances" in which the submitter does business to trigger Exemption 4.[49] Applying this rule, district courts have denied competitive harm protection where the risk of harm is not shown to be imminent, or where the agency's claim is found to be "unduly

[46] *See infra* Part II.C.2 regarding the distinction between voluntary and compelled disclosure.

[47] Nat'l Parks & Conservation Ass'n v. Morton (*National Parks I*), 498 F.2d 765, 770 (D.C. Cir. 1974), *aff'd en banc National Parks II*, 547 F.2d 673.

[48] *See* ELECTRONIC PRIVACY INFORMATION CENTER, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 2008 at 123 ("All other circuits have accepted *National Parks* as the appropriate test for Exemption 4.").

[49] *National Parks II*, 547 F.2d at 683; *see also* Gulf & Western Indus., Inc. v. U.S., 615 F.2d 527, 530 (D.C. Cir. 1979) ("In order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown.").

speculative and conclusory."[50] One court declined to find competitive harm arising from the possibility that disclosure would lead to the public impression of financial instability.[51]

In addition to the two established prongs of *National Parks*, the D.C. Circuit's panel opinion expressly reserved the question of whether a potential third prong might exist to account for "program effectiveness" or other governmental interests.[52] In doing so, the court referenced similar concerns in the Congressional record.[53] The First Circuit explicitly adopted this third prong of the *National Parks* test in *9 to 5 Organization for Women Office Workers v. Board of Governors for the Federal Reserve System* by finding a government interest in administrative efficiency and effectiveness.[54] The D.C. Circuit later affirmed en banc that the two stated interests of the *National Parks* test are not exclusive, but did not further articulate what that third

[50] Iglesias v. Central Intelligence Agency, 525 F. Supp. 547, 559 (D.D.C. 1981) (rejecting assertion of Exemption 4 applicability where agency where agency has not shown that competitive harm is "imminent"); Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996) (rejecting as "unduly speculative and conclusory" the agency's argument that requested documents should be withheld as confidential because investor confusion might lead to competitive loss).

[51] *See* Buffalo Evening News, Inc. v. Small Bus. Admin., 666 F. Supp. 467, 470–71 (W.D.N.Y. 1987) (granting disclosure despite agency's claim that disclosure taken out of context could "create an impression with the general public of the business's financial instability," as that possibility did not establish the *likelihood* of competitive harm required by *National Parks*).

[52] *See National Parks I*, 498 F.2d at 770 n.17 ("We express no opinion as to whether other governmental interests are embodied in this exemption.").

[53] *See id.* (referencing Hearings on S. 1666 before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 88th Cong., 1st Sess. 1–2 (1964), "where the problems of compliance and program effectiveness are mentioned as governmental interest possibly served by this exemption").

[54] *See* 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 10–11 (1st Cir. 1983) (allowing the Fed to withhold salary survey data on the grounds that disclosure would frustrate the agency's "effective execution of its statutory responsibilities" including "[e]ffective personnel policies and salary structures").

prong might include.[55] District courts have applied the rule to find a recognized agency interest in promoting the sale of U.S. treasuries, to promote or control export promotion, or to maximize profits on the assets held by agencies in receivership.[56] Though no circuit other than the First has explicitly adopted this third prong, agencies continue to urge that they do so.[57]

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[55] *See* Critical Mass v. Nuclear Regulatory Comm'n (*Critical Mass III*), 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc):

> [T]he two interests identified in the *National Parks* test are not exclusive. Although we overrule our decision [in the first hearing of this case], we note that the panel there adopted the First Circuit's conclusion that the exemption also protects a governmental interest in administrative efficiency and effectiveness. And today, of course, we recognize a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis. We offer no opinion as to whether any other governmental or private interest might also fall within the exemption's protection.

(citing *9 to 5*, 721 F.2d at 11).

[56] *See, e.g.*, Clarke v. U.S. Dep't of Treasury, 1986 WL 1234, at *3 (E.D. Pa. Jan. 28, 1986) (rejecting FOIA request under Exemption 4 where disclosure of data regarding U.S. Treasury bondholders "would threaten to eliminate or reduce the pool of investors willing to purchase Government securities and, in turn, reduce the pool of money from which the Government borrows."); Comstock Int'l. (U.S.A.), Inc. v. Export-Import Bank of the U. S., 464 F. Supp. 804, 808 (D.D.C. 1979) (upholding Bank's Exemption 4 assertion as disclosure of loan agreement materials would impair operations of the bank, an interest of the type "expressly left open" by *National Parks*); Africa Fund v. Mosbacher, No. 92 Civ. 289, 1993 WL 183736, at *7 (S.D.N.Y. May 26, 1993) (finding that Exemption 4 applies under the program effectiveness test where plaintiff fails to refute government's claims that disclosure would "interfere with the export control system," and that "[p]recedent exists for finding that documents of this type fall within Exemption 4" (citing Durnan v. U.S. Dep't of Commerce, 777 F. Supp. 965 (D.D.C. 1991))); Nadler v. FDIC, 899 F. Supp. 158, 162 (S.D.N.Y. 1995) (finding that the agency's interest in effective receivership constituted a valid exercise of Exemption 4), *affd on other grounds*, 92 F.3d 93 (2d Cir. 1996).

[57] *See infra* Part III.B.

### 2. *Critical Mass* Distinguishes Between Voluntary and Compelled Information

Twelve years after the D.C. Circuit established the widely-accepted *National Parks* test, it substantially revisited the issue.[58] In another en banc ruling, the court in *Critical Mass* modified *National Parks* with a new categorical rule: information submitted voluntarily will be considered "confidential" for the purpose of Exemption 4 if the submitter would not customarily release such information to the public.[59] For information which was required by the government, including information required for participation in government programs or contracts, the court upheld the general rule of *National Parks* on the basis of *stare decisis*.[60]

No other circuit has explicitly adopted the *Critical Mass* rule, though the Second and Tenth Circuits have suggested they approve of the rule.[61] As such, *National Parks* remains the rule in at least all cases involving compelled information,

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[58] *See Critical Mass III*, 975 F.2d at 871.

[59] *Id.* at 879.

[60] *Id.* at 877, 879 (concluding that none of the arguments in favor of overturning *National Parks* are sufficient to overcome the presumption of *stare decisis*, but limiting application of the rule to information "submitted under compulsion" to the agency).

[61] *See* ELECTRONIC PRIVACY INFORMATION CENTER, *supra* note 48, at 118 ("Although the D.C. Circuit's en banc decision in *Critical Mass* []may eventually influence the Exemption 4 jurisprudence in the other circuits that have endorsed the *National Parks* test, no other circuit has adopted it explicitly."); *cf.* Nadler v. FDIC, 92 F.3d 93, 96 (2d Cir. 1996) ("The [National Parks] interpretation of Exemption Four is now confine[d] to information that persons are required to provide to the Government . . . [but the records in question here] were not provided by the Bank voluntarily, and accordingly . . . the *Critical Mass* amendment of the [*National Parks*] test is irrelevant to the issue presented on this appeal."); Utah v. U.S. Dep't of the Interior, 256 F.3d 967, 969 (10th Cir. 2001) (stating "[t]he first step in an Exemption Four analysis is determining whether the information submitted to the government agency was given voluntarily or involuntarily," but applying *National Parks* as the information in question was a required submission).

and in most jurisdictions with regard to voluntary information.

### 3. Balancing Public and Private Interests in Exemption 4

While FOIA as a whole carries an implicit balance between competing goals, it does not necessarily imply a judicial balancing test. Just two exemptions explicitly call for agencies and reviewing courts to balance public and private interests prior to disclosure: Exemption 6 and Exemption 7(C).[62] Exemption 6 provides that FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a *clearly unwarranted* invasion of personal privacy."[63] Similarly, Exemption 7(C) exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could *reasonably* be expected to constitute an unwarranted invasion of personal privacy."[64] With a few exceptions, courts have declined to read-in a similar balancing test to Exemption 4, instead holding that Exemption 4 itself encompasses the balance Congress intended to confer to business and public interests.

The Supreme Court first applied a balancing test to Exemption 6 to find that names and identifying characteristics in Air Force personnel and medical files were exempt from disclosure.[65] In *Department of Air Force v. Rose*, the Court rejected the government's argument that such files should be held per se exempt, as a blanket rule would

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[62] *See* PIERCE, *supra* note 20, at § 5:12 ("[Exemption 6] differs from all others except (C) of exemption seven in that it invites judicial balancing of the public interest in disclosure versus an individual's interest in privacy.").

[63] 5 U.S.C. § 552(b)(6) (2006) (emphasis added).

[64] 5 U.S.C. § 552(b)(7) (2006) (emphasis added).

[65] *See* Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976) (holding that Congress intended Exemption 6 to require courts to balance an individual's right of privacy against the public's right in government accountability).

contradict Congress's intent that courts weigh individual privacy against the public interest in disclosure under Exemption 6.[66] In doing so, the Court relied heavily on the Senate and House reports accompanying the bill which spoke of balancing these competing interests.[67] Similar concerns were highlighted when the Court later elaborated a similar balancing test for Exemption 7(C).[68]

In contrast to Exemptions 6 and 7(C), the text of Exemption 4 does not call for a balancing of public versus private interests. Instead, it provides that records may be withheld so long as the information is either a trade secret or (1) commercial or financial which was (2) obtained from a person and (3) privileged or confidential.[69] In order to interpret the scope of Exemption 4, the courts have grappled with whether or how to balance the particular interests implicated by disclosure. The D.C. Circuit has held that application of the impairment prong of *National Parks* requires "a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure."[70] The 9th Circuit has also adopted this view.[71]

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[66] *Id.*

[67] *Id.* at 372. ("But Congress also made clear that nonconfidential [sic] matter was not to be insulated from disclosure merely because it was stored by an agency in its 'personnel' files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.' The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy." (quoting H.R. REP. NO. 1497, at 11 (1966))).

[68] *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989) ("Both the general requirement that a court 'shall determine the matter de novo' and the specific reference to an 'unwarranted' invasion of privacy in Exemption 7(C) indicate that a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect.").

[69] *See* Gulf & Western Indus. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1979) (articulating a commonly-cited recitation of the scope of Exemption 4).

[70] Wash. Post Co. v. Dep't of Health & Human Svcs., 690 F.2d 252, 269 (D.C. Cir. 1982), *aff'd* 865 F.2d 320, 326–27 (1989) (affirming that

However, this "rough balancing" does not equate with a traditional balancing test, as the D.C. Circuit clarified in an opinion by then-Judge Ginsburg.[72] Rather, the balance intended by Congress is that reflected in the exemptions themselves, and is properly determined by applying the *National Parks* test, according to the D.C. Circuit.[73]

## C. Analysis of Reputational Harm in Exemption 4 Jurisprudence

Although the overwhelming balance of Exemption 4 litigation has concerned the definition of competitive harm, the issue of reputational harm remains largely unanswered.[74] That is not to say that the question has not

information may be withheld under Exemption 4 "only when the affirmative interests in disclosure on the one side are outweighed by the factors identified in *National Parks I*" of impairment and substantial competitive harm, though allowing other interests can be considered as factors weighing against disclosure).

[71] *See* GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994) (agreeing with D.C. Circuit that Exemption 4 requires the court to "balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information" and finding that the general presumption of disclosure trumps the submitters' right to privacy in this case, though not explicitly weighing the public and private interests implicated by disclosure of the records at issue).

[72] *See* Pub. Citizen Health Research Group v. FDA, 185 F.3d 898, 904 (D.C. Cir. 1999) (rejecting plaintiff's proposal that court weigh the competitive harm of disclosure against the specific public interest in the requested information "because a consequentialist approach to the public interest in disclosure is inconsistent with the '[b]alanc[e of] private and public interests' the Congress struck in Exemption 4." (quoting Critical Mass Energy Project v. NRC, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc))).

[73] *Public Citizen*, 185 F.3d at 904 ("In other words, the Congress has already determined the relevant public interest: if through disclosure 'the public would learn something directly about the workings of the *Government*,' then the information should be disclosed unless it comes within a specific exemption." (quoting Nat'l Ass'n of Retired Fed. Emp. v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989))).

[74] *See* U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 305 (2009) ("The great majority of Exemption 4 cases have involved the

been asked: this Note reviews twenty-three cases in which the issue of reputational harm was raised, and generally dismissed.[75] However, a close reading of the judicial analysis

competitive harm prong of the test for confidentiality established in *National Parks* . . . .").

[75] The cases reviewed here include all of those referenced on the subject in the latest edition of the DOJ FOIA Guide, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 305, 311–12, 329 (2009), and others referencing *Public Citizen*, *CNA,* and other primary cases on the subject. The Court of Appeals decisions reviewed here are:

(1) Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 248 (2d Cir. 2006) (finding that disclosure would trigger the impairment prong of *National Parks* and thus the agency could withhold the names of subprime lenders contained in a merger application from Wachovia and SouthTrust under Exemption 4; finding the impairment prong satisfied, the court did not reach the agency's "substantial competitive harm" argument that disclosure would result in negative publicity and reputational harm to the lenders).
(2) Utah v. U.S. Dept. of Interior, 256 F.3d 967, 970–71 (10th Cir. 2001) (finding that disclosure of nuclear waste storage agreement records would satisfy traditional competitive harm definition under Exemption 4, while noting that competitive harm might also arise from political opposition flowing from disclosure (citing Nadler v. F.D.I.C., 92 F.3d 93, 96–97 (2d Cir.1996))).
(3) Nadler v. F.D.I.C., 92 F.3d 93, 97 (2d Cir. 1996) (affirming trial court's finding that disclosure would result in substantial competitive harm in the form of political opposition and resulting economic loss imposed by community groups, and therefore declines to decide whether the trial court properly applied the third prong "program effectiveness" exemption under *National Parks*).
(4) Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341–42 (D.C. Cir. 1989) (declining to decide whether harm arising solely from reputational costs would preclude disclosure in reverse FOIA suit, remanding for further administrative proceedings due to the inadequacy of the administrative record).
(5) CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (rejecting reverse FOIA plaintiff's claim that Exemption 4 precluded disclosure of affirmative action records which might harm the company's reputation or

employee morale (citing Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983))).
(6) Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (rejecting reverse FOIA suit to preclude agency disclosure of company's internal report on nuclear reactor as embarrassment does not trigger Exemption 4).
(7) Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (remanding to consider confidentiality of records concerning ongoing clinical studies consistent with view that competitive harm in FOIA is limited to that "flowing from the affirmative use of proprietary information by competitors") (quoting *Connelly*, *infra* note 78, at 235)).
(8) American Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 865 (2d Cir. 1978) (rejecting airline's FOIA request to disclose the number of union authorization cards submitted to the agency, finding such information to be both commercial and confidential according to the *National Parks* test, as disclosure would adversely affect the union's bargaining position relative to other unions and the employer).

The District Court decisions reviewed here are:

(9) Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve, 649 F. Supp. 2d 262, 279–80 (S.D.N.Y. 2009), *appeal docketed*, No. 09 Civ. 4083 (2d Cir. 2009) (rejecting agency's claim that reputational harm to banks by disclosure of loan information was grounds for Exemption 4), *aff'd*, No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010).
(10) Fox News Network v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 399–400 (S.D.N.Y. 2009), *appeal docketed*, No. 09-3795 (2d Cir. 2009) (upholding agency's assertion of Exemption 4 as disclosure might lead to competitive harm including reputational harm to the loan program participants, and might frustrate the agency's purpose in providing liquidity and financial stability).
(11) In Def. of Animals v. U.S. Dep't of Agric., 656 F. Supp. 2d 68, 81 (D.D.C. 2009) (rejecting Exemption 4 claim arising from negative client perception, but suggesting it was because the testimony by intervening information provider was too conclusory and thus did not carry the defendant's burden to establish a likelihood that disclosure would cause competitive harm).

(12) Judicial Watch, Inc. v. FDA, 407 F. Supp. 2d 70, 75 (D.D.C. 2005) (finding that information regarding abortion drug safety tests was properly withheld under Exemption 4 suggesting, among other reasons, that disclosure might lead to "abortion-related violence which would, or could, cause substantial competitive harm" to the drug sponsor who intervened in the action).

(13) City of Chicago v. U.S. Dep't of the Treasury, 2002 WL 370216, at *2 (N.D. Ill. March 8, 2002) (suggesting that harm to the reputation of gun dealers from disclosure of ATF reports might constitute competitive disadvantage under Exemption 4, but only if the data was linked to the carrier names).

(14) Center to Prevent Handgun Violence v. United States Dep't of the Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997) (rejecting agency argument that disclosure of gun dealer data "would subject licensees to unwarranted criticism and harassment" as "the harm contemplated by Exemption 4 is that which may flow from competitors' use of the released information, not from any use made by the public at large or customers." (citing Public Citizen Health Research Group. v. FDA, 704 F.2d 1280 (D.C.Cir.1983))).

(15) Inter Ocean Free Zone, Inc. v. U.S. Customs Serv., 982 F. Supp. 867, 872 (S.D. Fla.1997) (upholding agency's application of Exemption 4 on the grounds that disclosure of customs information including invoice pricing and quantities would constitute competitive harm, while also noting that disclosure of confidential customer information could "give rise to objections from customers and disrupt customer relationships.").

(16) Daisy Mfg. Co., Inc. v. Consumer Prod. Safety Comm'n, 1997 WL 578960, at *4 (W.D. Ark. Feb. 5, 1997) (rejecting reverse FOIA claim as FOIA cannot be used to shield submitters against possible negative or inaccurate publicity, or the possibility that disclosed records will be "misused" by the requestor ABC News or other media).

(17) Pub. Citizen Health Research Group v. FDA, 964 F. Supp. 413, 415 n.2 (D.D.C. 1997) (finding that intervenor's argument that disclosure of protocol for diabetes treatment study would "allow competitors to raise 'alarmist' safety concerns is too broad and too speculative" to preclude disclosure, and unlikely to come under the protection of Exemption 4 (citing *CNA Fin. Corp.*, 830 F.2d at 1154)).

(18) Lee v. FDIC, 923 F. Supp. 451, 455–56 (S.D.N.Y. 1996) (rejecting Exemption 4 argument that substantial

competitive harm might arise from disclosure as investors might be misled by speculative elements taken out of context of agency documents relating to a proposed U.S. Trust-Chase Manhattan Bank merger).

(19) Martech USA, Inc., v. Reich, 1993 WL 1483700, at *2 (N.D. Cal. Nov. 24, 1993) (rejecting reverse FOIA plaintiff's claim that disclosure of an agreement between the company and agency was precluded under Exemption 4 as release of the information would "damage its reputation and so harm its competitive position in seeking government contracts," as such harm is not cognizable under Exemption 4 (citing *CNA Fin. Corp.*, 830 F.2d at 1154)).

(20) Silverberg v. Dep't of Health and Human Services, 1991 WL 633740, at *4 (D.D.C. June 14, 1991) (rejecting agency's assertion of Exemption 4 to deny disclosure of documents relating to private laboratory certification to perform urine drug testing of federal employees, as Exemption 4 does not allow an agency to withhold information that might cause embarrassment to the provider (citing *CNA Fin. Corp.*, 830 F.2d at 1154; *Pub. Citizen*, 704 F.2d at 1291 n.30)).

(21) Buffalo Evening News, Inc. v. Small Bus. Admin., 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (rejecting, with no further analysis, agency claim that Exemption 4 covers disclosure of loan information which "may create an impression with the general public of the [submitter's] financial instability.").

(22) Badhwar v. U.S. Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (rejecting without further analysis the Air Force argument that disclosure of reports, if "misunderstood, misquoted or misused, could conceivably have a negative effect on the contractor, the contractor's personnel, as well as the contractor's competitive position in U.S. Government procurements" because the argument was made in a "conclusory and speculative manner" insufficient to sustain an Exemption 4 claim), *aff'd in part and rev'd in part on other grounds*, 829 F.2d 182 (D.C. Cir. 1987).

(23) Burroughs Corp. v. Brown, 501 F. Supp. 375, 381 (E.D. Va. 1980) (finding substantial competitive harm sufficient to satisfy Exemption 4 in reverse FOIA suit where disclosure of promotional materials might result in loss of employee morale), *vacated sub nom.* G.M. v. Marshall, 654 F.2d 294 (4th Cir. 1981) (remanding for consideration

on the topic reveals the conclusory nature with which courts have adopted this approach.

In the cases reviewed here, reputational harm has been raised by agencies, intervening defendants, and reverse-FOIA plaintiffs to argue that disclosure would trigger substantial competitive harm under Exemption 4 (prong two of the *National Parks* test).[76] While a rule regarding reputational harm might be derived from a reasoned analysis that it was too speculative or inconsistent with legislative intent of Exemption 4, a review of the judicial holdings on this topic reveals that no court has taken a serious look at the issue. In fact, most quote either directly or indirectly a single D.C. Circuit case on the topic.[77] In turn, this case seems to draw inspiration from a single article written in 1981 in which reputational harm is addressed only in passing.[78]

The roots of the accepted judicial view of reputational harm and Exemption 4 arise from a 1981 article by Mark Q. Connelly. According to this article:

> The important point for competitive harm in the FOIA context, however, is that it be limited to harm flowing from the affirmative use of proprietary information *by competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws.[79]

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under *Chrysler* rule; no discussion of Exemption 4 analysis).

[76] *See infra* Part II.C.1 regarding the *National Parks* test.

[77] Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

[78] *Id.* (citing Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WIS. L. REV. 208, 235 (1981)).

[79] Connelly, *supra* note 78, at 235–36 (emphasis in original).

The above quote is the only comment in the entire sixty-seven page article related to reputational harm.[80] The author cites no cases or authority for this statement, nor does he provide any data or reference to social-science research on reputational effects.[81] There is no other context given to his assertion of what competitive harm does or does not include.[82] And yet it is this quote to which the D.C. Circuit refers two years later in what has become a widely-cited—if purely dicta—comment regarding reputational harm.[83]

The Connelly article was first cited by the D.C. Circuit in *Public Citizen Health Research Group v. FDA*, in which the FDA refused to disclose clinical study records regarding the safety of intraocular lenses.[84] The agency and manufacturers argued that the information was properly withheld under Exemption 4 as either a trade secret or confidential commercial information, claiming that disclosure would cause substantial competitive harm by allowing competitors to benefit from the fruits of the submitters' research and development.[85] The court rejected the agency's finding that the information constituted trade secrets, but found that most of the information was properly construed as confidential.[86] The D.C. Circuit's opinion makes no reference to arguments from either party regarding the possible reputational harm from the disclosure of records related to

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See* Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (rejecting FDA's claim that release of clinical study information requested by Public Citizen regarding the safety and efficacy of intraocular lenses was precluded by either statute or as a "trade secret" under Exemption 4, but remanding for further consideration of whether the information was "confidential" in light of claims that competitors would benefit unfairly from information about the submitters' research; there is no reference in the opinion to any reputational harm claims by the agency).

[84] *Id.* at 1283.

[85] *Id.* at 1284.

[86] *Id.* at 1282.

clinical studies of intraocular lenses.[87] However, in reviewing the scope of the exemption, the court quoted Connelly to assert that reputational harm would not be cognizable under Exemption 4.[88] This passing reference is the only mention of reputational harm in the entire opinion, yet it lays the groundwork for the next twenty years of analysis.

Since *Public Citizen*, the federal courts have routinely rejected reputational-harm claims under Exemption 4 without further analysis. In 1987, a panel of the D.C. Circuit rejected a corporation's reverse-FOIA claim that the possibility of negative publicity or employee demoralization from disclosure of affirmative-action data constituted competitive harm under Exemption 4, quoting *Public Citizen* and Connelly without additional discussion.[89] The D.C. Circuit seemed to leave the door open in a later case by declining to address whether reputational harm alone might be sufficient to establish "competitive harm" under *National Parks*. [90] In the same case, however, it then instructed the district court on remand that the "right to an exemption, if

[87] *See id.* at 1284 (noting instead that the FDA's claim turned on the traditional notion of competitive harm to the submitters as "their competitors would be receiving, free of charge, the benefits of [their] costly research and testing" (quoting Pub. Citizen Health Research Group v. FDA, 539 F. Supp. 1320, 1327 (D.D.C.1983))).

[88] *See id.* at 1291 n.30 (quoting Connelly, *supra* note 78, at 235–36).

[89] *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("CNA has protested, for example, that release of information on the number of women and minorities hired might result in unfavorable publicity. It also fears that its employees may become 'demoralized' following disclosure of data showing the percentage of individuals promoted. We have previously found such complaints unrelated to the policy behind Exemption 4 of protecting submitters from external injury. These proffered objections simply do not amount to 'harm flowing from the affirmative use of proprietary information by competitors." (citing *Pub. Citizen*, 704 F.2d at 1291 n.30; Connelly, *supra* note 78, at 235–236)) (footnotes omitted).

[90] Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir. 1989) (affirming the district court's remand of case to the SEC to flesh out administrative record in reverse FOIA suit (citing *Pub. Citizen*, 704 F.2d at 1291 n. 30)).

any, depends upon the *competitive significance* of whatever information may be contained in the documents, not upon whether its motive is to avoid embarrassing publicity."[91] Subsequent cases from the D.C. District Court adopted this position with no further analysis or reference to the initial source of the prohibition—Connelly's article.[92]

Other federal courts have followed suit, rejecting reputational-harm claims and citing the Connelly quote in *Public Citizen* without additional analysis. For example, the Seventh Circuit explicitly rejected harm from "embarrassing disclosure," echoing the language from Connelly and *Public Citizen* without citing either for this proposition.[93] Several district courts have adopted a similar stance.[94]

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[91] *Id.* (emphasis added).

[92] *See* Badhwar v. U.S. Dep't of the Air Force, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (rejecting without further analysis the Air Force's argument that disclosure of reports, if "misunderstood, misquoted or misused, could conceivably have a negative effect on the contractor, the contractor's personnel, as well as the contractor's competitive position in U.S. Government procurements," as the argument was made in a "conclusory and speculative manner" insufficient to sustain an Exemption 4 claim); Silverberg v. Dep't of Health and Human Serv.'s, Civ. A. No. 89-2743, 1991 WL 633740, at *4 (D.D.C. June 4, 1991) (rejecting agency's assertion of Exemption 4 to deny disclosure of documents relating to private laboratory certification to perform urine drug testing of federal employees, observing that "the case law is clear that the government can not [sic] withhold confidential information under Exemption Four of FOIA on the grounds it may cause embarrassment." (citing *CNA Fin. Corp.*, 830 F.2d at 1154 ; *Pub. Citizen*, 704 F.2d at 1291 n.30)); Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997) (rejecting argument by ATF that disclosure of gun-dealer data "would subject licensees to unwarranted criticism and harassment" as "the harm contemplated by Exemption 4 is that which may flow from competitors' use of the released information, not from any use made by the public at large or customers" (citing Public Citizen Health Research Group, 704 F.2d 1280)); In Def. of Animals v. U.S. Dep't of Agric., 656 F. Supp. 2d 68, 81 (D.D.C. 2009) (citing Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997)).

[93] Gen. Elec. Co v. Nuclear Regulatory Comm'n, 750 F.2d 1394, 1402–03 (7th Cir. 1984) (reverse-FOIA suit) ("While General Electric's competitors in the nuclear-reactor business would no doubt be delighted to be able to flag around to their customers a report in which General Electric criticizes its own reactor design, the competitive harm that

Other courts have taken a more expansive view of Exemption 4, but even then they have stopped short of analyzing whether reputational harm should or should not be considered grounds for non-disclosure. For example, the Second Circuit in *Nadler v. FDIC* found that the agency properly withheld records concerning a hotel development which the agency assumed when it was appointed receiver for the financing bank, as disclosure would have hindered the commercial success of the project.[95] The court rejected the plaintiff's argument that such harm was merely "political" not competitive, as opposition to the project came from community groups and not commercial competitors, suggesting a somewhat broader reading of "competitive."[96] However, the court took pains to characterize the potential loss as "commercial" and avoided affirming any argument that mere political or reputational harm would suffice.[97]

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attends any embarrassing disclosure is not the sort of thing that triggers exemption 4. There must be substantial competitive harm to the firm that owns the information sought to be made public, though of course the firm need not make its case of substantial competitive harm with anything like the rigor that would be demanded of a plaintiff in an antitrust suit.") (citations omitted).

[94] *See* Martech USA, Inc., v. Reich, No. C-93-4137 EFL, 1993 WL 1483700, at *2 (N.D. Cal. Nov. 24, 1993) (holding in a reverse-FOIA suit that plaintiff's claim that disclosure of information by the Department of Labor would "damage its reputation and so harm its competitive position in seeking government contracts" did not constitute " 'harm flowing from the affirmative use of proprietary information by competitors' " and thus Exemption 4 did not apply (citing CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987))); *Gen. Elec. Co.*, 750 F.2d at 1402 (holding in a reverse-FOIA suit that "embarrassing disclosure is not the sort of thing that triggers exemption 4"); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, 1997 WL 578960 (W.D. Ark. Feb. 5, 1997) (denying without further analysis manufacturer's reverse-FOIA suit to prevent disclosure of accident records relating to its air-gun product following request by ABC News, observing that "[t]he relative lack of business-related information in these files leads the court to believe that Daisy's chief concern about these records is that they will be misused by the intervenor or other media.").

[95] Nadler v. FDIC, 92 F.3d 93, 94–95 (2d Cir. 1996).

[96] *Id.* at 96–97.

[97] *Id.* at 97.

The Tenth Circuit later cited *Nadler* to suggest that political opposition might constitute competitive harm, but found that disclosure of nuclear waste storage agreement records would satisfy traditional competitive harm standards and so did not consider further the parties' reputational arguments.[98] A few district courts have broken with the pack to suggest that reputational harm is grounds for Exemption 4, but even there they stopped short of a full examination of the issue. [99] In short, in none of the twenty-three cases reviewed for this Note has a court provided a substantive analysis of why reputational harm should or should not trigger Exemption 4.

The scant judicial consideration of reputational harm within Exemption 4 is both surprising and concerning, given the number of times such concerns have been raised.[100] More importantly, the near-consensus that such concerns are not valid under Exemption 4 is incongruous with the Congressional intent giving rise to the exemption.[101] The

[98] *See* Utah v. U.S. Dep't of the Interior, 256 F.3d 967, 970–71 (10th Cir. 2001).

[99] *See, e.g.*, City of Chicago v. U.S. Dep't of Treasury, No. 01 C 3835, 2002 WL 370216, at *2 (N.D. Ill. Mar. 8, 2002) (rejecting the ATF's bid to deny release of records concerning lost or stolen firearms, but suggesting that reputational harm constituted competitive harm: "These carriers state that they would suffer adverse competitive consequences . . . . [But they] do not address how they would suffer a competitive disadvantage if they were not identified as having reported the information. The City does not seek information identifying who reported thefts or losses of firearms, and the requested information regarding the dealers is not otherwise linked in any way to the carriers who provide the information. Accordingly, there would be no reason for the carriers to suffer harm to their reputation for security, and thus a competitive disadvantage, as a result of the disclosure of the requested information. . . . ATF therefore has failed to meet its burden of showing that the information requested by the City falls within exemption 4.").

[100] *See, e.g.*, *supra* note 75.

[101] *See* S. REP. NO. 89-813, at 9 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 44 (Exemption 4 "would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the . . . lender–borrower . . . privilege. Specifically, it would include any commercial, technical, and financial data, submitted by an applicant or a

Congressional record regarding FOIA articulates a legislative intent to prevent agencies from withholding information that might be embarrassing to the government; in contrast, the record is clear that the legislation was intended to protect the privacy and confidentiality concerns of individuals and businesses which provide information to the government.[102] More than forty years later, as the financial crisis highlights the challenging balance of regulatory accountability and reputational harm, it is time for the courts to take a more serious look at the issue.

## III. FINANCIAL CRISIS UNDERSCORES NEED TO RECONSIDER REPUTATIONAL HARM WITHIN FOIA ANALYSIS

Despite the nearly complete judicial rejection of reputational harm within Exemption 4, two suits arising from the global financial crisis cast the need for a more rigorous judicial consideration of the issue into sharp relief: *Bloomberg L.P. v. Board of Governors of the Federal Reserve System* and *Fox News Network v. Board of Governors of the Federal Reserve System*.[103] The two cases proceeded separately and resulted in opposing views in the district court about the proper role of competitive harm, governmental interests, and reputational damage in FOIA.[104]

borrower to a lending agency in connection with any loan application or loan."); *see also* H.R. REP. NO. 89-1497, at 5 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 26 (incorporating the same language).

[102] *Id. See also* Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787 (1967) ("Even though the records of the various hearings over a ten year period are voluminous, probably more than ninety-five per cent of the useful legislative history is found in a ten page Senate committee report and in a fourteen page House committee report." (citing S. REP. NO. 89-813 (1965); H.R. REP. NO. 89-1497 (1966))).

[103] Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 265 (S.D.N.Y. 2009), *aff'd*, No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010); Fox News Network v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 388 (S.D.N.Y. 2009), *vacated and remanded*, No. 09-3795-cv, 2010 WL 986665, at *4 (2d Cir. Mar. 19, 2010).

[104] *See infra* Part III.B.

While the Second Circuit's recent ruling may have resolved this particular case on appeal, the panel's opinion sidestepped the issue of reputational harm.[105] The district court's divergent rulings on this issue illustrate why courts need to better account for reputational harm within Exemption 4.

## A. FOIA and the Financial Crisis

The global financial crisis began to unfold in 2007 with early reports of major financial-institution losses linked to subprime mortgages.[106] In August 2007, the Federal Reserve responded with the first of many emergency measures, expanding its discount window lending program to allow for increased borrowing under longer terms by financial institutions.[107] Over the next year, the Fed created three new facilities to lend to depository institutions: the Primary Dealer Credit Facility, the Term Securities Lending Facility, and the Term Auction Facility.[108] As the financial system

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[105] *See Bloomberg*, 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010); *Fox News Network*, 2010 WL 986665, at *4 (2d Cir. Mar. 19, 2010).

[106] *See* Timeline of a Crisis, *supra* note 2.

[107] *See* Press Release, Bd. of Governors of the Fed. Reserve Sys. (Aug. 17, 2007), http://www.federalreserve.gov/newsevents/press/monetary/20070817a.htm (reporting that the Board approved a reduction in the primary credit rate and a change in the primary credit discount window facility to allow financing up to 30 days, renewable by the borrower; both changes were cast as "temporary" measures "to promote the restoration of orderly conditions in financial markets"); *see generally* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS (9th ed. 2005) ("The Federal Reserve's lending at the discount window serves two primary functions. It complements open market operations in achieving the target federal funds rate by making Federal Reserve balances available to depository institutions when the supply of balances falls short of demand. It also serves as a backup source of liquidity for individual depository institutions."); Archit Shah, *Emergency Economic Stabilization Act of 2008*, 46 HARV. J. ON LEGIS. 569 (2009) (providing an overview of the government response to the economic crisis).

[108] *See* Press Release, Bd. of Governors of the Fed. Reserve Sys. (Mar. 16, 2008), http://www.federalreserve.gov/newsevents/press/monetary/20080316a.htm (announcing creation of a new lending facility for primary dealers and a reduction in the primary credit rate in order to increase

sunk deeper into crisis, the amount of outstanding discount window loans ballooned from a pre-August 2007 average of approximately $1 million to over $400 billion for the week ending October 8, 2008.[109] By this time, the U.S. Government had initiated a series of efforts to respond to the financial crisis: taking control of mortgage giants Fannie Mae and Freddie Mac, coordinating with other central banks to inject billions into international money markets, bailing out insurance giant American International Group (AIG), enacting a $700 billion bailout of the financial industry, and acquiring equity interests in U.S. banks.[110]

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liquidity); Press Release, Bd. of Governors of the Fed. Reserve Sys. (Mar. 11, 2008), http://www.federalreserve.gov/newsevents/press/monetary/20080311a.htm (announcing coordinated activity by the Bank of Canada, the Bank of England, the European Central Bank, the Federal Reserve, and the Swiss National Bank to address liquidity problems, and the creation of new Term Securities Lending Facility); Press Release, Bd. of Governors of the Fed. Reserve Sys. (Dec. 12, 2007), http://www.federalreserve.gov/newsevents/press/monetary/20071212a.htm (announcing the creation of a new temporary Term Auction Facility).

[109] *See* Answer ¶ 18, Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (No. 08 Civ. 9595) (averring that statistical releases from the Fed showed primary credit discount window lending of approximately $1 million for the week ending Aug. 8, 2007, and approximately $420 billion in aggregate loans for the week ending Oct. 8, 2008), *aff'd*, No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010).

[110] *See* Henry M. Paulson, Jr., Secretary of the U.S. Dep't of the Treasury, Statement on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2007), *available at* http://www.treas.gov/press/releases/hp1129.htm (announcing plans for increased Treasury oversight of Fannie Mae and Freddie Mac); Matt Moore, *ECB, Fed Inject Cash to Ease Fears*, ASSOCIATED PRESS, Aug. 10, 2007, *available at* http://www.usatoday.com/money/economy/2007-08-10-274019294_x.htm (reporting Fed's action to inject $24 billion in money markets); Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J., Sept. 16, 2008, at A1, *available at* http://online.wsj.com/article/SB122156561931242905.html (reporting that the Fed would lend up to $85 billion to AIG effectively giving the U.S. government control over the insurer); Deborah Solomon et al., *U.S. Seals Bailout Deal*, WALL ST. J., Sept. 29, 2008, at A1, *available at* http://online.wsj.com/article/SB1222576

The unprecedented government action in response to the financial crisis led to calls for accountability from the press and Congress.[111] The reaction from the two primary government financial institutions—the Fed and the Treasury—was predictably mixed. Officials spoke loudly of the need for government transparency and accountability with regard to these lending programs, while declining media requests for information about the newly expanded lending programs.[112] In fact, one of the Federal Reserve

82963083173.html (reporting on the $700 billion bank bailout program would, saying it would "effectively nationalize an array of mortgages" and mortgage-backed securities); Deborah Solomon et al., *U.S. to Buy Stakes in Nation's Largest Banks*, WALL ST. J., Oct. 14, 2008, at A1, *available at* http://online.wsj.com/article/SB122390023840728367.html (reporting that the U.S. government would buy equity stakes in nine U.S. banks amounting to $250 billion).

[111] *See, e.g.*, Henry Kaufman, *Opinion: Who's Watching the Big Banks?* WALL ST. J., Nov. 13, 2007, at A25; Ron Paul & Jim DeMint, *Americans Deserve a Transparent Fed*, WALL ST. J., Nov. 19, 2009, at A21, *available at* http://online.wsj.com/article/SB10001424052748704782304574542280971009044.html (at the time the op-ed was published, Paul was a Republican congressman from Texas, and DeMint a Republican senator from South Carolina); News Release, Senators Call on Fed to Release Emergency Assistance Information (July 31, 2009), *available at* http://sanders.senate.gov/newsroom/news/?id=BB127E30-B666-4FF3-8EC9-02C0CA040A04 (the bipartisan letter was signed by five Democratic senators, five Republicans, and one Independent).

[112] *See* David Stout, *Two Senate Panels to Investigate Bear Stearns Deal*, NYTIMES.COM, Mar. 26, 2008, http://www.nytimes.com/2008/03/26/business/26cnd-paulson.html ("Mr. Paulson said Wall Street investment banks must provide more information about their financial condition if they are occasionally allowed to borrow money from the Federal Reserve [discount window] as commercial banks do. But he did not call for investment banks to be regulated in the same manner that commercial banks now are. Mr. Paulson acknowledged that the Fed's decision to lend to investment banks creates a contradiction between how commercial banks and investment banks are being treated, and he implied that investment banks ought to be subject to the 'same type of regulation.'"); *but see* Plaintiff's Memorandum in Support of Motion for Summary Judgment 5, Fox News Network v. Bd. of Governors of the Fed. Reserve Sys. 639 F. Supp. 2d 384 (S.D.N.Y. 2008) (09 Civ. 272) ("However, despite the circumstances leading up to the dramatic expansion of the Federal Reserve's intervention in the banking system, as well as persistent

Banks sought to classify documents relating to the financial bailout as a matter of national security in an effort to evade disclosure.[113] Among other tools to investigate and disseminate news about the government's expanding financial programs, journalists turned to FOIA.[114]

## B. Media Organizations Sue to Compel Disclosure of Federal Reserve Loans

On November 7, 2008, Bloomberg L.P. filed suit against the Board of Governors of the Federal Reserve System after the Fed failed to respond to Bloomberg's FOIA request seeking information on the Fed's expanded lending programs.[115] The Fed answered that it possessed 231 documents responsive to Bloomberg's request but asserted that such documents were properly withheld under Exemption 4.[116] Moving for summary judgment, the agency

questions regarding the quality of the collateral that the borrowers may have pledged, the Board has steadfastly refused to disclose the identities of the borrowers, the amounts borrowed and the nature and quality of the collateral that secures the loans.").

[113] *See* Matthew Goldstein, *SEC Mulled National Security Status for AIG Details*, REUTERS, Jan. 24, 2010 http://www.reuters.com/article/idUSTRE60N1S220100124 (reporting that emails disclosed by the New York Fed to the House Committee on Oversight and Government Reform reveal a request by the New York Federal Reserve and the American International Group (AIG) to classify details on the AIG bailout as matters of national security, which was granted for a time by the SEC).

[114] *See, e.g.*, Alan Feuer, *Battle over the Bailout*, N.Y. TIMES, Feb. 11, 2010, at MB1, *available at* http://www.nytimes.com/2010/02/14/nyregion/14fed.html (reporting that Bloomberg has more than 165 FOIA requests currently pending).

[115] *See* Complaint ¶¶ 1–4, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (08 Civ. 9595) (seeking disclosure information on Fed's lending programs as well as its financing of the JPMorgan Chase acquisition of Bear Stearns after the Fed failed to respond to a May 2008 FOIA request for the information), *aff'd*, No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010).

[116] *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment 15–17, *Bloomberg*, 649 F. Supp. 2d 262. The Fed offered two alternative arguments for denying

argued not only that the details of the loan agreements were confidential, but also that even disclosing the program participants' identities would likely lead to substantial competitive harm.[117] Moreover, unless the Fed could guarantee the confidentiality of such loan agreements, its ability to act as a lender of last resort to increase liquidity and stabilize the financial markets would be impaired.[118]

In addition, the agency asserted that many of the records responsive to the media request were held by the Federal Reserve Bank of New York (FRBNY), which it argued was not an "agency" subject to FOIA.[119]

Properly, the Fed did not assert Exemption 8 of the FOIA, which protects information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the

disclosure. In addition to Exemption 4, the Fed argued that the relevant documents qualified for Exemption 5, which does not require agencies to disclose documents which constitute "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *See id.* (quoting 5 U.S.C. § 552(b)(5) (2006)).

[117] *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, *supra* note 116, at 19, 21; *see also* Defendant's Reply and Opposition to Plaintiff's Cross Motion for Summary Judgment at 18–19, *Bloomberg*, 649 F. Supp. 2d 262 ("[B]ecause Reserve Banks are the 'lenders of last resort,' the fact that an institution is borrowing at the [discount window], if publicly disclosed, can fuel market speculation and rumors that the entity's liquidity strains stem from a financial problem at the institution that is not publicly known. . . . This 'stigma' . . . can rapidly lead to a loss of public confidence in the institution . . . likely resulting in substantial competitive harm.").

[118] *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, *supra* note 116, at 26 (citing 12 U.S.C. § 225a); *see also* U.S. FEDERAL. RESERVE SYSTEM., THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 15 (9th ed. 2005), *available at* http://www.federalreserve.gov/pf/pf.htm ("[T]he Federal Reserve Act [12 U.S.C. § 225a] . . . specifies that the Board of Governors and the Federal Open Market Committee should seek 'to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.'").

[119] Memorandum of Points and Authorities in Support of Defendant's Motion for Summary, *supra* note 117, at 34–40.

regulation or supervision of financial institutions."[120] While on its face this exemption might appear applicable to information gathered by or prepared for the Fed in relation to these loans, the exemption has been construed narrowly by the government and by courts to apply only to bank examination records.[121]

Just two months after Bloomberg filed its complaint, Fox News Network filed a substantially similar suit against the Fed, again seeking relief from the Fed's denial of two FOIA requests. These two requests were made in November 2008 and sought information on the identities and the collateral of borrowers at the expanded discount window.[122] After Fox moved for summary judgment to compel disclosure of responsive records, the Fed reiterated its arguments from the *Bloomberg* case.[123]

The media organizations challenging the Fed's FOIA denials advanced similar counterarguments in each case.[124] The organizations argued that the alleged competitive harm was too speculative, particularly to the extent it was feared to arise from reputational harm.[125] More specifically, they

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[120] 5 U.S.C. § 552b (2006).

[121] *See* U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE, EXEMPTION 8, 659–65 (2009).

[122] *See* Complaint ¶ 1, Fox News Network v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384 (S.D.N.Y. 2008), *vacated and remanded*, No. 09-3795-cv, 2010 WL 986665, at *4 (2d Cir. Mar. 19, 2010). Unlike Bloomberg, Fox had received a response to its second, though not to its first, FOIA request: the Fed denied access to all unpublished documents, again citing Exemptions 4 and 5. *See* Complaint at ¶ 3.

[123] *See* Defendant's Reply Motion Opposing Summary Judgment at 16–18, *Fox News Network*, 639 F. Supp. 2d 384 (quoting 12 U.S.C. § 225a).

[124] *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment at 21–36, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. Apr. 15, 2009) (No. 08 Civ. 9595) [hereinafter Bloomberg Memorandum]; Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 12–17, *Fox News Network*, 639 F. Supp. 2d 384 (S.D.N.Y. 2009) (No. 09 Civ. 00272) [hereinafter Fox Memorandum].

[125] *See* Bloomberg Memorandum, *supra* note 124, at 23 ("[T]he Board's argument is based on speculation . . . [and] imaginary concerns about

argued that stigma and reputational harm are not encompassed by the *National Parks* competitive-harm prong.[126] Addressing the Fed's assertion of a third prong within *National Parks*, the organizations argued that the concerns about market stability and the reputation of the banking industry did not satisfy "program effectiveness theory," even were the court to adopt this more controversial prong.[127]

## C. Second Circuit Sidesteps Divergent Rulings Regarding Reputational Harm

Judge Alvin K. Hellerstein first ruled in *Fox*, granting the Fed's motion for summary judgment and holding that the agency had met its burden to establish that disclosure was likely to result in substantial competitive harm to borrowers.[128] The opinion referred to the "competitive and *reputational harm*" that borrowers would suffer upon disclosure, stating that such concerns "cannot be dismissed."[129] Judge Hellerstein also accepted the Fed's argument that Exemption 4 allows an agency to deny disclosure where such disclosure would interfere with the agency's "effective execution of its statutory responsibilities" (the third prong under *National Parks*) and found that the agency had sufficiently established that disclosure would

potential injury due to adverse publicity, and not from the use of proprietary information by competitors."); Fox Memorandum, *supra* note 124, at 9.

[126] *Id.* at 27 ("The exemption does not apply where the alleged harm would flow from adverse publicity, an adverse or alarmist public reaction, adverse customer reaction, or embarrassment.").

[127] *Id.* at 36 ("But even if the Court were inclined to recognize that theory, which has not been adopted by the Second Circuit, it would not apply here because the Board's evidence of impairment to its ability to fulfill its statutory obligation is speculative at best.").

[128] Fox News Network v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 400 (S.D.N.Y. 2009), *vacated and remanded*, No. 09-3795-cv, 2010 WL 986665, at *4 (2d Cir. Mar. 19, 2010).

[129] *Id.* at 401 (emphasis added).

undermine the Fed's ability to provide market stability in the midst of a financial crisis.[130]

The following month, Judge Loretta A. Preska reached the opposite conclusion in *Bloomberg*, in which she granted the media organization's motion to compel disclosure of the requested documents.[131] Judge Preska found that the Fed had not demonstrated that disclosure would cause substantial competitive harm, rejecting the agency's argument that reputational harm resulting from disclosure of individual banks' participation in the program was within the scope of Exemption 4.[132] Her opinion also rejected the third prong "program effectiveness" test.[133]

Both cases were appealed to the Second Circuit, with the Clearing House Association joining the Fed as an intervenor in *Bloomberg*.[134] Ruling in tandem on the two cases, the

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[130] *Id.* at 401–402 (quoting 9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 10 (1st Cir. 1983)).

[131] Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve, 649 F. Supp. 2d 262 (S.D.N.Y. 2009), *aff'd*, No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010).

[132] *Id.* at 280 ("[T]he risk of looking weak to competitors and shareholders is an inherent risk of market participation; information tending to increase that risk does not make the information privileged or confidential under Exemption 4. The Board would seemingly sweep within the scope of Exemption 4 all information about borrowers that anyone throughout the entire marketplace might consider to be *negative*. The Exemption cannot withstand such inflation.")

[133] *Id.* at 278 n.15 ("In light of the strong presumption in favor of interpreting FOIA exemptions *narrowly*, not to mention the Court of Appeals's [sic] guidance that the program effectiveness test constitutes 'speculation,' this Court will not import or apply the program effectiveness test in this action.") (citing Nadler v. FDIC, 92 F.3d 93, 96 n.2 (2d Cir. 1996) (emphasis in original)).

[134] *See* Brief of Intervenor-Appellant The Clearing House Association L.L.C., *Bloomberg*, No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010); *see also* The Clearing House Association, About Us @ The Clearing House, http://www.theclearinghouse .org/about/000211f.php (noting that the Clearing House Payments Company L.L.C. is owned by the following banks: Bank of America, N.A., The Bank of New York Mellon, Branch Banking and Trust Company, Capital One, Citibank, N.A., City National Bank, Comerica Bank, Deutsche Bank Trust Company Americas, Fifth Third Bank, First Citizens

Second Court sidestepped the issue of reputational harm.[135] The panel first affirmed the ruling in *Bloomberg* that Exemption 4 did not apply, holding that the requested records were not "obtained" from the borrowing banks but rather were generated by the Federal Reserve Banks based on information provided by the borrowers.[136] As such, the court did not need to reach the question of whether the records might be "privileged or confidential" as to the borrowers, and whether such confidentiality might derive from reputational harm.[137] The panel further held that, even if the Federal Reserve Banks were found to be "persons" under FOIA, the harm asserted by the Fed—a loss of confidence in the banking system—would require the court to adopt the "program effectiveness" test.[138] The court rejected such a test as applied in this case, stating that adopting such a test would amount to "impermissible deference to the agency."[139]

Writing a separate opinion in the *Fox* appeal, the same panel incorporated the holding of *Bloomberg*, and further held that records at the Federal Reserve Banks constituted "agency records" subject to FOIA, and therefore remanded to the district court to order a search of those records for documents responsive to Fox's request.[140]

The Fed has stated that it is considering an appeal to the Supreme Court, but for the moment, the issue as to disclosure of the bank records may be settled in favor of the

Bank & Trust Company, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., KeyBank, N.A., Manufacturers and Traders Trust Company, PNC Bank, N.A., RBS Citizens, N.A., UBS AG, Union Bank, N.A., U.S. Bank, N.A., and Wells Fargo Bank, N.A.) (last visited Mar. 26, 2010).

[135] Bloomberg L.P. v. Bd. of Governors of the Fed'l Reserve Sys., No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010).

[136] *Id.* at *2.

[137] *Id.* at *2.

[138] *Id.* at *5.

[139] *Id.*

[140] Fox News Network v. Bd. of Governors of the Fed'l Reserve Sys., No. 09-3795-cv, 2010 WL 986665, at *3–*4 (2d Cir. Mar. 19, 2010).

press.[141] However, the larger issue of whether reputational harm should trigger Exemption 4 remains unresolved. The divergent holdings in these cases in the same district court follow from the lack of rigorous analysis to date by either courts or scholars in this area. In the absence of clear judicial guidance on this issue, there is no easy solution for the unique alignment of purported reputational harm and a defined government interest.[142] Such concerns are a particular worry for financial corporations in today's economic environment.[143] The government's increasingly active role in the financial markets in response to the financial crisis presents unique challenges related to the security of financial institution records.[144] Unfortunately, the Second Circuit's opinion leaves those records vulnerable when disclosure would trigger reputational, rather than more traditional, competitive harm.

## IV. ACCOUNTING FOR REPUTATIONAL HARM IN EXEMPTION 4

In light of these challenges and the growing body of scholarship on reputational harm in a variety of contexts, it is time for courts to revisit the issue of reputational harm within FOIA. While the Second Circuit did not do so in *Bloomberg* or *Fox*, the opportunity remains for further judicial or academic consideration of the issue in light of the

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[141] *See* Jeannine Aversa, *Fed Must Reveal Data on Loans to Firms, Court Says*, ASSOCIATED PRESS, Mar. 19, 2010, *available at* http://www.nytimes.com/aponline/2010/03/19/business/AP-US-FOIA-Federal-Reserve-Banks.html (quoting Fed. spokeswoman Michelle Smith: "We are reviewing the decision and considering our options for reconsideration or appeal.").

[142] *See infra*, Part IV.

[143] *See supra* notes 108, 110 (referencing the Fed's new and expanded lending programs, and other government programs addressing the financial crisis).

[144] *See* EDELMAN, EDELMAN TRUST BAROMETER: THE TENTH GLOBAL OPINION LEADERS SURVEY, *supra* note 1, at 4 ("With only 38% of informed publics in the United States trusting business today, levels are the lowest they have been in the Barometer's tracking history—even lower than in the wake of Enron and the dot-com bust.").

policy considerations embodied by FOIA. A review of those policies and the scenario presented by *Bloomberg* and *Fox* suggests three possible approaches to the challenge of reputational harm within Exemption 4.

## A. FOIA Policy Considerations

FOIA's drafters repeatedly cited three distinct interests embodied within the Act: the public's right to know, the need for government efficacy, and the right to privacy.[145] Any attempt to articulate a consistent analysis for reputational harm must therefore take into account these three varied and often competing interests. In addition, the cases on reputational harm under Exemption 4 raise an additional concern: any approach must provide a means to distinguish between harm to submitters and harm to government agencies.

As the Supreme Court has recognized, government openness and accountability are the primary objectives of FOIA.[146] While the courts often use "public interest" or simply "disclosure" as shorthand for these goals, the Supreme Court has made clear that the relevant public interest to be weighed against privacy interests in the FOIA

[145] *See* H.R. REP. NO. 89-1497, at 6 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 27 ("It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. . . . This bill strikes a balance considering all these interests."); S. REP. NO. 89-813, at 3 (1965); *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 38 ("At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files. . . . ").

[146] *See* U.S. Dep't of Air Force v. Rose, 425 U.S. 352, 373 (1976) ("To make crystal clear the congressional objective in the words of the Court of Appeals, 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny,' Congress provided in § 552(c) that nothing in the Act should be read to 'authorize withholding of information or limit the availability of records to the public, except as specifically stated . . . .'" (quoting Rose v. U.S. Dep't of Air Force, 495 F.2d. 261, 263 (2d Cir. 1974); 5 U.S.C. § 552(c) (1970 ed. and Supp. V)).

context is not disclosure in general, but only that disclosure which "contribut[es] significantly to the public understanding of the *operations or activities of the government*."[147]

Against that public interest, Congress and the courts weigh a two-fold privacy interest: the privacy of individual submitters or subjects of requested information, and the privacy interests of government officials in their decision-making capacities.[148] As discussed above, the FOIA exemptions may either directly embody a Congressional determination of the appropriate balance between these two interests (as in Exemption 4) or may call on the courts to apply a balancing test with regards to the particular concerns at issue (as in Exemptions 6 and 7(C)).[149]

Courts traditionally define the government's interest in FOIA as ensuring a consistent and reliable flow of information and minimizing resistance by private entities to providing agencies with needed information.[150] The D.C.

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[147] U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii) (1982 ed., Supp. V) (regarding fee waivers for FOIA requests) (emphasis added)). Though *Reporters Committee* concerned Exemption 7(C) exclusively, the Court later extended its holding to Exemption 6 as well. *See* U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 496 n.6 (1994) (holding that, while Exemption 7(C) provides greater protection of privacy than does Exemption 6, and thus requires a different degree of public interest to overcome those privacy interests, the identity of the public interest is the same as that in *Reporters Committee*); *see also* PIERCE, *supra* note 20, at § 5:12.

[148] *See* Whalen v. Roe, 429 U.S. 589, 598–600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") (footnotes omitted).

[149] *See supra*, Part II.C.3.

[150] *See, e.g.*, Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 149 (D.C. Cir. 2001) ("[T]here is an important policy interest in minimizing resistance by a manufacturer to an agency's request for information."); *see generally* U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 280 (2009).

Circuit addressed this concern directly in *Critical Mass*, adopting a separate, more lenient standard for Exemption 4 when the information in question was provided voluntarily to the government, as the flow of voluntary information is more likely than involuntary information to dry up in the face of increased disclosure requirements.[151]

Reputational harm raises a fourth concern. FOIA was never meant to protect the government from embarrassing disclosure; in fact, one of the legislative goals of the Act was to close existing loopholes that allowed agencies to avoid embarrassing disclosure.[152] To that end, any judicial test regarding reputational harm must provide a means to determine whose reputation is actually in question: the submitter or the government.

At the same time, the analysis should consider the extent to which Exemption 4 has previously resulted in inappropriate disclosure—if at all. At least one commentator has observed that FOIA has produced few cases of competitive harm resulting from improper disclosure.[153] This lack of evidence may in part be due to prudent damage control by the submitters, who may choose to accept the negative outcome rather than draw additional attention to

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[151] *See supra* Part II.C.2.

[152] *See* H.R. REP. NO. 89-1497, at 5–6 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 26–27 (discussing ongoing agency "abuse" of the current Administrative Procedure Act, the committee observes "Improper denials occur again and again. . . . Historically, Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy."); *see* S. REP. NO. 89-813, at 3 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 38 ("[The current law] is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities . . . .").

[153] Russell Stevenson, Jr., *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 ADMIN. L. REV. 207, 218 (1982) ("Notwithstanding the vociferousness of the criticism of the FOIA by representatives of business, there are to be found in the public record very few documented instances of the improper disclosure of competitively significant information as a result of the operation of the Act.").

the unwanted disclosure through public protest.[154] But the lack of documented problems similarly suggests that courts should proceed with caution lest they overcorrect.

## B. Three Approaches to Analyzing Reputational Harm Within Exemption 4

Given the dearth of serious judicial consideration of reputational harm within FOIA, *Bloomberg* and *Fox* presented an opportunity for the Second Circuit to take the lead and finally provide agencies, corporations, and the public with a well-reasoned consideration of the role of reputational harm within Exemption 4 analysis. While the Second Circuit opinion did not reach this issue, this Note suggests three possible solutions to the vexing problem of reputational harm within Exemption 4: (1) incorporating a balancing test into Exemption 4; (2) allowing reputational harm as a category of competitive harm under *National Parks* only when it is established by an intervening defendant or reverse-FOIA plaintiff; or (3) allowing agencies to assert qualified reputational harm as a category of competitive harm under *National Parks*. These three approaches are offered as a starting point for additional judicial and academic consideration. Regardless of which approach courts follow, an explicit judicial analysis of the issue will provide additional clarity and guidance to submitters and agency FOIA programs alike.

### 1. Incorporate a Balancing Test into Exemption 4

The first approach to accounting for reputational harm in Exemption 4 is that suggested by the amici curiae in *Bloomberg*: incorporating an explicit balancing test in

[154] *Id.* at 218–19 ("[This lack of public record] may be due in part, at least, to the operation of the principle of damage-limitation according to which it is better to remain silent about lost information than to draw attention to it by complaining publicly. . . . Another possibility is that the FOIA does not function as badly in this area as its critics charge.").

Exemption 4.[155] The amici argued that the reputational-harm concerns asserted by the Fed were insufficient to counter the public interest in knowing about loan agreements submitted to the Fed during the financial crisis.[156] Under the test proposed by the amici, the court would weigh the reputational harm that might arise from disclosure against the public interest in having access to the particular information in question.[157] When the public's right to know outweighed the potential harm to the submitter, Exemption 4 would not apply.[158]

Though the amici cite then-Judge Ginsburg's opinion in *Public Citizen Health Research Group v. FDA* as supporting this test, the particularized balancing the amici propose is in fact the type of "consequentialist" test that Ginsburg and the D.C. Circuit opposed in that case.[159] In *Public Citizen*, the

[155] *See* Brief for Advanced Publications, Inc., et al. as Amici Curiae Supporting Plaintiff-Appellee at 8–9, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010), *available at* http://www.rcfp.org/newsitems/docs/20091215_145241_bloombergamicus.pdf (urging the Second Circuit to adopt a balancing test under Exemption 4 and arguing that the Fed fails to meet its burden under such a test).

[156] *Id.* at 13–14 ("While the potential harm in disclosing the information sought by Bloomberg is entirely speculative, the public benefits could not be more concrete. Disclosure will allow the public to know whether the lending accomplished its objectives and to hold the Board accountable. . . . And without disclosure, there is no way to guard against collusion, corruption, fraud or abuse.").

[157] *Id.* at 9 ("Exemption 4 requires a court to 'balance [the] pros and cons of disclosure in any particular case.'" (citing Wash. Post Co. v. U.S. Dep't of Health and Human Servs., 865 F.2d. 320, 327 (D.C. Cir. 1989))).

[158] Brief for Amici Curiae, *supra* note 155, at 10 ("This Court should construe Exemption 4 to recognize that FOIA's 'strong presumption in favor of disclosure' will in some situations 'trump[]' a commercial entity's right to confidentiality." (citing GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994))).

[159] *See* Pub. Citizen Health Research Group v. FDA, 185 F.3d 898, 904 (D.C. Cir. 1999) (rejecting Public Citizen's proposal to competitive harm of disclosure against the specific public interest in the requested information "because a consequentialist approach to the public interest in disclosure is inconsistent with the '[b]alanc[e of] private and public interest' the

D.C. Circuit clarified its prior holding in *Washington Post*, stating that the balance embodied in Exemption 4 itself was all that Congress intended.[160]

Although a balancing test approach would provide courts with the flexibility to respond to the particular public and private interests implicated in a given case, such an approach is difficult to reconcile with both the text of Exemption 4 and the policies behind FOIA. Unlike Exemptions 6 and 7(C), Exemption 4 does not include any language indicating that Congress intended for courts to apply a balancing test.[161] As the D.C. Circuit stated in *Public Citizen*, Congress considered this balance when it adopted Exemption 4, and that exemption fully embodies the intended balance.[162] Nevertheless, an explicit balancing test would offer courts an opportunity to evaluate reputational harm in a way that the implicit balancing of *National Parks* may preclude.[163]

### 2. Allow Reputational Harm as a Category of Competitive Harm Under *National Parks* only When Asserted by an Intervening Defendant or Reverse-FOIA Plaintiff

A second approach is to limit consideration of reputational harm to cases in which the information-submitters intervene or bring reverse-FOIA suits to prevent

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Congress struck in Exemption 4." (quoting Critical Mass III, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc))).

[160] *See Pub. Citizen*, 185 F.3d at 904 ("Congress has already determined the relevant public interest: if through disclosure 'the public would learn something directly about the workings of the *Government*,' then the information should be disclosed unless it comes within a specific exemption. . . . the public interest side of the balance is not a function of the identity of the requester or of any potential negative consequences disclosure may have for the public . . . ." (quoting National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir.1989); citing DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 772–73 (1989); Washington Post Co. v. HHS, 865 F.2d 320, 327–28 (D.C. Cir.1989))).

[161] *See supra* Part II.C.3.

[162] *See Pub. Citizen*, 185 F.3d at 904.

[163] *See supra* Part II.D.

disclosure of confidential information. The advantages of such an approach are two-fold. First, a rule requiring the submitter to directly argue the case for reputational harm would allow for a clearer articulation of the relevant concerns. Second, by requiring the submitter to shoulder the burden and cost of such litigation, this approach would limit the possibility that an agency would cite reputational harm as a mere smokescreen to cover its own embarrassing conduct.

Of the twenty-three reputational harm cases reviewed for this Note, six were brought by the submitter directly as reverse-FOIA suits.[164] In another four cases, the submitter joined as an intervening defendant to argue its reputational-harm concerns directly.[165] In at least four additional cases, the submitter is referenced by name in the opinion but did not directly intervene.[166] By intervening or bringing the claim directly, the submitter may eliminate the court's concern that it is only the agency's reputation that is at risk—one of

[164] *See* cases cited *supra* note 75; *see also* Occidental Petroleum Corp. v. SEC, 662 F. Supp. 496 (D.D.C. 1987), *aff'd*, 873 F.2d 325, 342 (D.C. Cir. 1989); CNA Fin. Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987); Gen. Elec. Co v. NRC, 750 F.2d 1394 (7th Cir. 1984); Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n, No. 96-5152, 1997 WL 578960 (W.D. Ark. Feb. 5, 1997); Martech USA, Inc., v. Reich, No. C-93-4137 EFL, 1993 WL 1483700 (N.D. Cal. Nov. 24, 1993); Burroughs Corp. v. Brown, 501 F. Supp. 375 (E.D. Va. 1980), *vacated on other grounds*, 654 F.2d 294 (4th Cir. 1981).

[165] *See* Utah v. U.S. Dep't. of Interior, 256 F.3d 967 (10th Cir. 2001) (Private Fuel Storage intervened as defendant-appellee); Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863 (2d Cir. 1978) (Int'l Brotherhood of Teamsters, Airline Division, intervened as appellant); In Def. of Animals v. U.S. Dep't of Agric., 656 F. Supp. 2d 68, 81 (D.D.C. 2009) (Life Sciences Research, Inc., intervened as defendant); Pub. Citizen Health Research Group v. FDA, 964 F. Supp. 413 (D.D.C. 1997) (Bristol-Meyers Squibb intervened as defendant).

[166] *See* Inner City Press/Community on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239 (2d Cir. 2006); Nadler v. FDIC., 92 F.3d 93, 97 (2d Cir. 1996); Inter Ocean Free Zone, Inc. v. U.S. Customs Serv., 982 F. Supp. 867, 872 (S.D. Fla. 1997); Lee v. FDIC, 923 F. Supp. 451 (S.D.N.Y. 1996).

the primary concerns of FOIA.[167] While Exemption 4 provides no cover for concerns about the agency's reputation, there is no FOIA interest in disclosing confidential private information. Thus, where the intervenor or plaintiff can satisfactorily establish that disclosure would constitute reputational harm akin to substantial competitive harm, the court would allow Exemption 4 to stand.

Though this approach has appeal, the situation presented by *Bloomberg* and *Fox* shows why it cannot be the complete solution. In each of those cases, the Fed argued that reputational harm would arise not only from disclosure of the details of the loan agreements, but also from releasing the identity of the loan participants themselves.[168] While an industry association did join the Fed on appeal in *Bloomberg,* no individual bank ever did so.[169] If the Fed were not permitted to make this argument on behalf of the borrowers, it would amount to de facto disclosure of the identities of the program participants. Thus, while this approach provides

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[167] *See supra* Part IV.A.

[168] *See* Defendant's Reply and Opposition to Plaintiff's Cross Motion for Summary Judgment at 18–19, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262 (S.D.N.Y. 2009) (No. 08 Civ. 9595) ("[B]ecause Reserve Banks are the 'lenders of last resort,' the fact that an institution is borrowing at the [Discount Window], if publicly disclosed, can fuel market speculation and rumors that the entity's liquidity strains stem from a financial problem at the institution that is not publicly known. . . . This 'stigma' . . . can rapidly lead to a loss of public confidence in the institution . . . likely resulting in substantial competitive harm."), *aff'd* No. 08-4083-cv, No. 09-4097-cv (CON), 2010 WL 986527, at *6 (2d Cir. Mar. 19, 2010); Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 19, Fox News Network v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384 (S.D.N.Y. 2009) ("The reason that the Board did not provide declarations from borrowers at the DW and SCLFs is obvious: the identity of those borrowers is one of the items of information being withheld under exemptions 4 and 5, and by identifying itself as a borrower by filing a declaration, a financial institution could bring upon itself the very competitive harm, described in the Board's SJ Brief at 22–25, that the Board is seeking to prevent."), *vacated and remanded,* No. 09-3795-cv, 2010 WL 986665, at *4 (2d Cir. Mar. 19, 2010).

[169] *See* Brief of Intervenor-Appellant The Clearing House Association L.L.C., *supra* note 134.

some protection against disingenuous agency assertion of reputational harm, it may not go far enough to protect individual and corporate privacy.

### 3. Allow Agencies to Assert Qualified Reputational Harm as a Category of Competitive Harm Under *National Parks*

A third approach would allow agencies to assert reputational harm as a category of competitive harm under *National Parks*, but only where the agency can establish that (a) disclosing the identity of the submitter would itself constitute reputational harm; and (b) the reputation in question is that of the submitter and not of the agency itself. This additional layer of scrutiny would satisfy the four policy goals articulated above, and would account for situations such as *Bloomberg* and *Fox*, in which the identities of the submitters themselves are at issue.

Under this approach, courts would consider an agency's reputational-harm argument only after the agency satisfied two threshold questions. First, the agency would have to show that public disclosure of the submitter's identity would itself result in reputational harm. While the Fed asserted as much in *Bloomberg* and *Fox*, the Fed could also have drawn the court's attention to Exemption 8, which evinces a specific congressional concern in FOIA for financial institutions.[170] Both the House and Senate reports accompanying FOIA articulated a specific concern for disclosure touching the financial services industry.[171] Though Exemption 8 applies

[170] *See* 5 U.S.C. § 552(b)(8) (2006) (excluding from FOIA information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions").

[171] *See* H.R. REP. NO. 89-1497, at 11 (1966), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 35 ("[E]xemption [8] is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm."); S. REP. NO. 89-813, at 10 (1965), *reprinted in* FOIA SOURCE BOOK, *supra* note 14, at 45 ("Exemption No. 8 is directed specifically to insuring the security of our financial

only to bank evaluation reports—which were not at issue in either *Bloomberg* or *Fox*—it suggests a particular Congressional concern for the reputation of financial institutions which courts could consider in these cases, even if Congress did not want to go so far as to provide the same blanket exclusion for all financial records.

Second, even if the agency could show good cause for raising reputational-harm claims itself, as opposed to deferring to the submitter as an intervenor or reverse-FOIA plaintiff, courts should still ask the agency to establish with specificity that it is the reputation of the submitter and not that of the agency itself which is at issue. This distinction strikes at the heart of FOIA's intent to open government records to public scrutiny while denying agencies the ability to hide embarrassing disclosure.[172] Only if it satisfies such a burden should the agency be allowed to assert Exemption 4 on the basis of reputational harm.

This third approach is both more restrictive and more permissive than the current judicial analysis, which provides courts with no guidance for assessing reputational harm arguments under Exemption 4. The two threshold questions would generally limit reputational harm claims to those raised by submitters either as intervening parties or as reverse-FOIA plaintiffs. At the same time, this approach would provide agencies and submitters with a "safety valve" mechanism, addressing the particular concerns raised in *Bloomberg* and *Fox* with regard to the financial crisis.[173] That is not to say that the agency would necessarily prevail, but only that such an approach would allow courts to better evaluate whether such claims were made in good faith. In those cases where good faith is shown, courts might be more willing to consider reputational harm, having been satisfied that the reputational-harm arguments were not a cloak to

institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by on behalf of, or for the use of such agencies.").

[172] *See supra* Part II.A.

[173] *See supra* Part III.B.

hide agency embarrassment. Moreover, this approach is faithful to the text of FOIA, which suggests that the exemption itself incorporates the full extent of the balance between public and private interests intended by Congress.[174]

## V. CONCLUSION

After four decades of conclusory judicial analysis, the time is ripe for courts to reevaluate the role of reputational harm under FOIA Exemption 4.[175] Of the three possible approaches to a more robust judicial consideration of reputational harm—(1) incorporating a balancing test into Exemption 4; (2) allowing reputational harm as a category of competitive harm under *National Parks* only when it is established by an intervening defendant or reverse-FOIA plaintiff; or (3) allowing agencies to assert qualified reputational harm as a category of competitive harm in *National Parks*[176]—the third may be the most faithful to the varied policy considerations embodied in FOIA. This third approach provides an avenue for agencies to raise reputational-harm concerns on behalf of submitters, but only under limited circumstances.[177] Regardless of the specific test courts ultimately adopt, any effort by the courts to provide a more reasoned analysis of reputational harm within Exemption 4 will be an important first step to bringing reputational harm out of the dark and ensuring that enhanced regulatory efforts in response to the financial crisis do not trigger their own crisis of confidentiality.

[174] *See supra* Part II.C.3.

[175] *See supra* Part III.

[176] *See supra* Part IV.

[177] *See supra* Part IV.B.3.