Reverse FOIA Suits After Chrysler: A New Direction

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NOTES

REVERSE FOIA SUITS AFTER CHRYSLER: A NEW DIRECTION

INTRODUCTION

In an effort to promote open government and curb abuses of power caused by government secrecy, in 1966 Congress passed the Freedom of Information Act (FOIA).¹ A culmination of a ten year congressional effort,² the FOIA was enacted to amend section 3 of the Administrative Procedure Act of 1946 (APA),³ which had proved totally inadequate as a disclosure mechanism due to vague drafting and a grant of excessive discretion to government agencies.⁴ The purpose of the FOIA is to "establish a general philosophy of full agency disclosure . . . and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld."⁵ To achieve this purpose the FOIA mandates the disclosure of a wide range of information which is on file with government agencies⁶ and gives federal district courts jurisdiction to conduct a de novo review when it is alleged that an agency has refused to comply with a request to release information.⁷

At the same time, Congress recognized the need to insure the confidentiality of certain information and to protect the privacy rights of submitters.⁸ The FOIA, therefore, specifically exempts nine categories of information⁹ from its

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4. "Section 3 of the Administrative Procedures Act . . . is full of loopholes which allow agencies to deny legitimate information to the public." 1965 Senate Report, supra note 3,
6. 5 U.S.C. § 552(a) (1976). The FOIA is only applicable to agencies of the federal government, as defined in 5 U.S.C. § 551(1), which excludes Congress and the courts of the United States. See Assessment, supra note 2, at 898.
7. 5 U.S.C. § 552(a)(4)(B) (1976). In a de novo review, the court may examine the documents involved and any other relevant information. It need not give any deference to an agency's previous determination. J. O'Reilly, Federal Information Disclosure § 8.04 (1977); Assessment, supra note 2, at 910-11.
8. That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." 1965 Senate Report, supra note 3, at 8.
10. "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 of 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 any agency; (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires
broad disclosure mandate in an attempt to balance the public's right to obtain
information with the interests of privacy and confidentiality.10

Despite the laudable objectives of Congress in enacting the FOIA, it has
often been used by business entities as a device to obtain valuable and
otherwise unavailable information submitted to the government by their
competitors.11 This situation often arises in the case of government contractors.12 For example, in order for the government to monitor compliance with
Executive Orders prohibiting discrimination in employment practices,13 govern-
ment contractors are required to file extensive information concerning
their operations and work forces with various federal agencies.14 In the
possession of business competitors, this information could be an invaluable
tool for analysis of the submitter's business and for a comparative evaluation
of each party's operations.15 The submitter is thus faced with a dilemma. A
refusal to comply with an agency's reporting requirements may result in the

that the matters be withheld from the public in such a manner as to leave no discretion on the
issue, or (B) establishes particular criteria for withholding or refers to particular types of matters
to be withheld; (4) trade secrets and commercial or financial information obtained from a person
and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which
would not be available by law to a party other than an agency in litigation with the agency; (6)
personnel and medical files and similar files the disclosure of which would constitute a clearly
unwarranted invasion of personal privacy; (7) investigatory records compiled for law enforcement
purposes, but only to the extent that the production of such records would (A) interfere with
enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial
adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity
of a confidential source and, in the case of a record compiled by a law enforcement authority in
the course of a criminal investigation, or by an agency conducting a lawful national security
intelligence investigation, confidential information furnished only by the confidential source, (E)
disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law
enforcement personnel; (8) contained in or related to examination, operating, or condition reports
prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision
of financial institutions; or (9) geological and geophysical information and data, including maps,

(statement of Burt A. Braverman); Clement, The Rights of Submitters To Prevent Agency
Disclosure of Confidential Business Information: The Reverse Freedom of Information Act
12. J. O'Reilly, supra note 7, § 10.09.
14. 41 C.F.R. §§ 60-1.3, 60-1.7 (1979). These regulations require that government contractors
submit Employer Information Reports and Affirmative Action Programs. These reports contain
“extensive information on staffing patterns, pay scales, actual and expected shifts in employment,
promotions, seniority and related matters as well as forecasts of future employment, goals,
time-tables and future employment projections, promotion and utilization of minorities and
females . . . and an analysis of the employer's success in meeting such goals.” Westinghouse
Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1195 (4th Cir. 1976), cert. denied, 431 U.S. 924
15. Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176 (D. Del. 1976), vacated and
remanded, 565 F.2d 1172 (3d Cir. 1977), vacated and remanded sub nom. Chrysler Corp. v.
forfeiture of a lucrative government contract; compliance with these requirements may cause him competitive harm.\(^6\)

This development has created great alarm among submitters and their plight has been brought before the courts in litigation attempting to block the disclosure of confidential information.\(^7\) These suits have become known as "reverse FOIA suits." Although of fairly recent vintage,\(^8\) the reverse FOIA suit has become an extremely confused and complicated area of law. Perhaps the main reason for this confusion is Congress' failure to explicitly provide for any such suit in the FOIA.\(^9\) Government contractors and other parties submitting confidential information to federal agencies have therefore been forced to search for bases to bar the disclosure of requested information to their competitors. Numerous approaches have been taken and the circuits have split on the resolution of the various issues involved in a reverse FOIA suit. Some direction may be derived from the recent Supreme Court decision in *Chrysler Corp. v. Brown,*\(^10\) but many questions still remain.

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17. "Understandably, firms that submit confidential documents to Federal agencies have expressed concern about their release. While competitively harmful business information may be withheld under the Freedom of Information Act, other data may legitimately be sought and publicly released. Business's concern is not merely theoretical—numerous disputes and court cases have arisen over the release of such information." H.R. Rep. No. 1382, 95th Cong., 2d Sess. 1-2 (1978) [hereinafter cited as 1978 House Report].


20. 99 S. Ct. 1705 (1979). As a government contractor, Chrysler was required by Executive Orders not to discriminate in its employment practices. In order to insure compliance with these Orders, regulations required that Chrysler furnish the Defense Logistics Agency (DLA), the designated compliance agency, with Employer Review Reports and Affirmative Action Programs. These forms contain extensive information relating to the companies' work forces and employment goals. *See note 14 supra.* In May, 1975, the DLA informed Chrysler that third parties had made an FOIA request for this information. Although Chrysler objected to the release, the DLA determined that the materials were subject to disclosure under both the FOIA and relevant disclosure regulations. 99 S. Ct. at 1710.

The center of controversy in the *Chrysler* case was a regulation promulgated by the Department of Labor's Office of Federal Contract Compliance Programs which allowed the disclosure of information notwithstanding the fact that it fell within an FOIA exemption. 41 C.F.R. § 60-40.2(a) (1979). For the text of this regulation, see note 83 *infra.* The DLA also notified Chrysler that it was required by the FOIA to make a substantive decision concerning the release within 10 working days of the receipt of the request, 5 U.S.C. § 552(a)(6)(A)(i) (1976), and therefore could not withhold disclosure of the documents pending an administrative appeal by Chrysler. *Chrysler Corp. v. Schlesinger,* 565 F.2d 1172, 1179 & n.27 (3d Cir. 1977), *vacated and remanded sub nom.* *Chrysler Corp. v. Brown,* 99 S. Ct. 1705 (1979).

In an effort to block the imminent release of the information, Chrysler brought suit. The district court permanently enjoined the release of a portion of the material. 412 F. Supp. 171 (D. Del. 1976). On appeal, however, that decision was vacated. 565 F.2d 1172 (3d Cir. 1977). The Supreme Court granted certiorari and vacated and remanded. 99 S. Ct. 1705 (1979).
I. Bases for Reverse FOIA Suit

Due to the lack of any express provision in the FOIA for reverse FOIA suits, the grounds upon which submitters have attempted to base their claims have been numerous. By the time of the Chrysler suit, however, three substantive theories emerged as predominant. Submitters sought relief by suing under the APA, and by asserting implied causes of action under both the FOIA and section 1905, the Trade Secrets Act. Each theory, however, posed particular problems for reviewing courts and was the source of much litigation.

A. Implied Cause of Action Under the FOIA

Despite the failure of Congress expressly to provide for reverse FOIA suits, parties seeking to bar disclosure of information contended that such causes of action were implied in the statute. The implication was said to derive from the provision of exemptions from disclosure which, it was claimed, were mandatory prohibitions against disclosure. Therefore, if an agency released exempted information it would be violating the FOIA and the right to prevent such violations was implied in that statute. In a suit based on this theory, submitters would be entitled to a trial de novo, a procedure which is advantageous to them.

21. The Chrysler litigation is an excellent example of the various theories upon which submitters have sought to bar the release of information requested under the FOIA. In that case, challenges were raised under the FOIA, the Trade Secrets Act, 18 U.S.C. § 1905 (1976), the judicial review section of the Administrative Procedures Act, 5 U.S.C. § 702 (1976), the Civil Rights Act, 42 U.S.C. § 2000e-8(e) (1976), and the Federal Reports Act of 1942, 44 U.S.C. § 3508 (1976). Chrysler also raised a due process challenge. See note 22 infra. Although the focus of this Note is the substantive bases for reverse FOIA suits, problems also exist concerning jurisdiction. It is now settled that jurisdiction for reverse FOIA suits may be founded upon the general federal jurisdiction statute. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1725 n.47 (1979); 1978 House Report, supra note 17 at 55-56. Jurisdictional problems do arise, however, in cases of joinder, indispensable parties, and other more complex litigation. See GTE Sylvania, Inc. v. Consumer Prod. Safety Comm’n, 598 F.2d 790, 797-99 (3d Cir. 1979). For an in depth analysis of these jurisdictional problems see Campbell, Reverse Freedom of Information Act Litigation: The Need for Congressional Action, 67 Geo. L.J. 103, 160-88 (1978).

22. Chrysler raised three arguments before the Supreme Court. First it claimed that disclosure was in violation of the FOIA itself. Second, it asserted that § 1905 barred release of the materials. Finally, it claimed that disclosure of the documents would constitute an abuse of discretion, in violation of the APA. Chrysler also claimed that the disclosure was unlawful under the Civil Rights Act, 42 U.S.C. § 2000e-8(e) (1976), and the Federal Reports Act, 44 U.S.C. § 3508 (1976), but these sections were held inapplicable by the circuit court and were not raised before the Supreme Court. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1725 n.47. Likewise, Chrysler’s claim that it was denied due process of law in the agency proceedings was quickly dismissed by the district, 412 F. Supp. at 178, and circuit, 565 F.2d at 1193, courts and not reasserted before the Supreme Court.

26. See note 9 supra.
27. See cases cited note 25 supra.
because reviewing courts are not limited to the agency record and, furthermore, can substitute their judgment for that of the agency. The majority of courts have not accepted the theory that a cause of action is implied in the FOIA to bar agency disclosure. The Supreme Court in *Chrysler* has confirmed the majority view courts, a hearing that is no less broad and adequate than that given the merely curious who may seek disclosure.

29. *Reversing the FOIA*, supra note 28, at 737; see note 7 supra.

30. Originally this theory had received support from some decisions; see cases cited note 25 supra.


Although the majority of circuits concurred in this analysis, the matter was not free from controversy. For example, the Court of Appeals for the Fourth Circuit adopted a different view. In *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), that court, reasoned that "when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection." *Id.* at 1211. Accordingly, the court held an implied cause of action based on the FOIA to be proper.

32. Although there has been a tendency to view all the exemptions as permissive, care must be taken to avoid an improper application of this interpretation to exemption 3. The permissive nature of the exemptions cannot render an otherwise mandatory nondisclosure statute permissive. The following passage clarifies this reasoning: "Some confusion might arise from the permissive rather than mandatory character of the FOIA exemptions. Since agencies are permitted under the FOIA to disclose exempt information, arguably they have discretionary authority under exemption three to disclose information 'specifically exempted from disclosure by statute.' This line of reasoning, however, ignores the obligation of agencies to exercise their discretionary authority under the permissive exemptions 'to the extent permitted by other laws,' and since Congress specified that the FOIA did not modify in any way the statutes restricting agency disclosure, exemption three clearly is not permissive in the same fashion as the other exemptions. Instead, the third exemption may be interpreted as permissive only in the technical sense that it provides no cause of action for submitters in reverse FOIA cases. In cases in which agency release of information would violate nondisclosure statutes, submitters may rely only upon the applicable
that no such cause of action exists within the FOIA.  

B. Actions Under the APA

A second basis for reverse FOIA suits has been the APA. Pursuant to that statute, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." In an action under the APA, a submitter whose interests would be adversely affected by a release could challenge an agency's decision to disclose even if the FOIA's exemptions were construed as permissive. The standard of review in suits brought under this statute, however, is unclear. The APA limits judicial review so that agency action, findings and conclusions can be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Normally, an agency has abused its discretion if it fails to consider the appropriate factors in making its decision or makes a clear error in judgment. Although the APA provides for de novo review in two circumstances, neither has been held applicable to reverse FOIA actions.

33. 99 S. Ct. at 1714. Three factors prompted the Court's determination "[t]hat the FOIA is exclusively a disclosure statute" and that the exemptions are not designed to be "mandatory bars to disclosure." Id. at 1713. First, the Court looked to the organization of the statute. It recognized that subsection (a) places a general obligation of disclosure on the agencies while subsection (b) merely specifies materials which are not subject to this disclosure mandate. Id. at 1712-13. "By its terms," the Court concluded, "subsection (b) demarcates the limits of the agency's obligation to disclose; it does not foreclose disclosure." Id. at 1713. Second, the provisions for judicial relief in the FOIA were examined. While the statute gives federal courts jurisdiction to compel the disclosure of "improperly withheld" information—a direct FOIA suit—the Court noted that there is no similar provision to bar attempted disclosure. Id. Finally, the Court reviewed the legislative history of the FOIA and determined that it also supports the view that the purpose of the exemptions is to enable agencies to withhold certain materials rather than to forbid their release. Id. at 1713-14. The enactment of the FOIA, therefore, did not restrict the discretion of an agency to disclose information; hence, no cause of action was implied under the FOIA. Id. at 1714.


38. Section 10(e) of the APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706 (1976). The Supreme Court in Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), interpreted the phrase "unwarranted by the facts" to mean that de novo review of agency action was available only in
Nevertheless, in these cases, courts have circumvented the APA's strictures, at times going so far as to conduct a trial de novo. This practice has produced confusion. The source of much of the controversy is a decision by the District of Columbia Circuit, Charles River Park "A", Inc. v. HUD, in which novel reasoning was utilized to avoid the narrow review provisions of the APA. The court reasoned that if the materials did not fall within an FOIA exemption, they would be subject to mandatory disclosure and plaintiffs would have no right to challenge their release. Hence, the court concluded that inquiry into whether the materials fell within one of the FOIA exemptions was not a review of agency discretion, but "a threshold determination whether the [submitters had] any cause of action at all." Therefore, instead of applying the APA's limited standard of review to this question, the court remanded, instructing the district court to conduct an evidentiary hearing "to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure." In a suit brought to compel disclosure—a direct FOIA suit—the proper standard of review is a trial de novo. This result has been severely criticized by those who assert that due to the permissive nature of the exemptions, even this threshold determination constitutes a review of agency discretion. Despite criticism the Charles River Park rationale has been followed by some courts.

This result has been severely criticized by those who assert that due to the permissive nature of the exemptions, even this threshold determination constitutes a review of agency discretion. Two circumstances: first, "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate." Id. at 415. Second, "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." Id. Neither of these circumstances has been held applicable to reverse FOIA suits. Regarding the first circumstance, submitters have generally been unable to show inadequacies in agency factfinding procedures. Clement, supra note 11, at 629. Although inadequacies exist, they usually arise out of a failure of the agency to fully develop the record to support its decision. Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1192 (3d Cir. 1977), vacated and remanded sub nom. Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979); Campbell, supra note 21, at 137. As for the second circumstance, reverse FOIA actions are adjudicatory in nature and they are not proceedings to enforce. Campbell, supra note 21, at 137; see GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352, 367 n.65 (D. Del. 1973).


40. 519 F.2d 935 (D.C. Cir. 1975). In that case plaintiffs were required to submit financial reports to the Federal Housing Administration (FHA), an agency of the Department of Housing and Urban Development (HUD), in connection with certain mortgages. When plaintiffs learned that HUD had decided to comply with an FOIA request for disclosure of these reports they filed a reverse FOIA suit based on the APA. Id. at 940 n.4.

41. Id. at 940 n.4.

42. Id.

43. See note 7 supra and accompanying text.

44. Campbell, supra note 21, at 140; Clement, supra note 11, at 631 n.206.

C. Actions Under the Trade Secrets Act

Parties attempting to bar disclosure of information submitted to federal agencies have also attempted to base reverse FOIA suits on non-disclosure statutes. Under this approach, the submitters claimed that even if the FOIA permitted disclosure, other statutes barred the release. The statute relied upon in the vast majority of cases is 18 U.S.C. § 1905, the Trade Secrets Act, which imposes criminal sanctions on government employees who release trade secrets or other confidential business information unless such disclosure is "authorized by law." The relation between section 1905 and the FOIA, particularly in reverse FOIA litigation, has been a fertile source of controversy. Dispute developed concerning not only the appropriate procedure for raising a section 1905 challenge, but also concerning the application of the statute.

The section 1905 challenge has been raised in three ways, only one of which has survived. First, submitters claimed that section 1905, although a criminal statute, provided an implied private cause of action. Some early district court decisions recognized such a cause of action. Those decisions, however, were later rejected, and Chrysler clearly held that no private right of action exists.
under section 1905. Second, challenges were based on the assumptions that section 1905 was a statute "specifically exempt[ing] . . . disclosure" under exemption 3 of the FOIA and that disclosure was therefore barred by the FOIA itself. Because it is now settled that the FOIA does not provide a basis for such an action, the second approach can no longer stand. Finally, submitters have challenged an agency decision to disclose confidential information as a violation of section 1905's provisions and have sought relief under the APA. In Chrysler, the Supreme Court held that such an action was proper because a disclosure which violates section 1905 would be "not in accordance with law" under the APA and could therefore be set aside by the reviewing court.

As to the existing confusion regarding the scope of review under the APA, the Chrysler Court only briefly discussed the issue, merely stating that "[d]e novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905." Although this language is vague, it appears that de novo review should be limited to those situations established under the APA. Hence, unless submitters show that an agency's

52. 99 S. Ct. at 1725. The most important factor prompting the Court's determination that no cause of action exists under § 1905 was that relief was available under the APA. 1d.
54. See Reversing the FOIA, supra note 28, at 755-57.
55. See notes 32, 33 supra and accompanying text.
56. See note 34 supra and accompanying text.
57. The Court noted that section 1905 places sufficient substantive limitations on an agency's discretion to make review under the APA available. 99 S. Ct. at 1726. It also rejected the government's argument that § 1905 is essentially an "anti-leak" statute, and held that it addresses formal agency action. Id. at 1716. The government had claimed that § 1905 was inapplicable to formal agency action because its only purpose was to curtail the disclosure of trade secrets and other confidential information by government employees.

Under the APA, review is available "except to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1976). This phrase has been held applicable "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). The Chrysler court noted this language and found that § 1905 provides law to apply. 99 S. Ct. at 1725-26.
59. 99 S. Ct. at 1726. Because the Court of Appeals had not reached the issue of whether the materials in question fell within the scope of section 1905, the Court remanded. Id.
60. See pt. I(B) supra.
61. 99 S. Ct. at 1726.
62. See note 38 supra. In Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3d Cir. 1977), vacated and remanded sub nom. Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979), the Third Circuit developed a helpful analysis for courts to follow in reviewing reverse FOIA suits under the APA. Courts should determine whether the release of information contemplated by the agency would violate any nondisclosure statute or regulation. If so, the release should be enjoined. If no nondisclosure statutes or regulations are applicable, however, the reviewing court must then determine whether the disclosure was pursuant to the FOIA's mandate. If disclosure was mandatory, the court must merely determine "whether the agency applied the proper legal standards for the applicability of the FOIA exemptions." Id. at 1192. Conversely, if the agency determined that the material was exempt yet decided to release it, the inquiry is two fold. Not only must the reviewing court consider whether the agency applied the proper legal standards for the applicability of the FOIA exemptions, it must also
factfinding procedures are inadequate, a trial *de novo* would seem improper. In most cases, however, it is the agency record, rather than the factfinding procedure, which is inadequate because the agency fails to provide the basis for its decision in its report. It has been generally recognized that the remedy for an adequate record is not a trial *de novo*, but a remand to the agency for further development of the record or an explanation of its decision. Thus it appears that *de novo* review will normally not be available to submitters in reverse FOIA litigation.

In light of *Chrysler*, the viability of the “threshold determination” approach adopted in *Charles River Park* must be questioned. Critics of this approach have asserted that the mere determination that information is exempt does not compel the conclusion that submitters could bar agency disclosure because the agency has discretion as to material within an exemption. By finding, specifically, that the FOIA exemptions are in fact permissive, *Chrysler* has added impetus to this argument.

In addition to the problems encountered in determining the proper method for raising a section 1905 challenge, difficulties also arise concerning the application of the statute. This difficulty is due in part to the language of section 1905 because it bars only those disclosures not “authorized by law.” Hence, when a reverse FOIA suit is based on section 1905, it becomes essential to determine what constitutes the authorization of law necessary to allow disclosure. In cases where the section 1905 material does not also fall within one of the FOIA exemptions the determination is relatively simple. That is, if material covered by the FOIA is not exempted from the statute's mandatory disclosure requirement, there is general agreement that the FOIA's mandate to disclose provides the authorization of law. It is in cases in which the material falls not only within section 1905 but also within one of the FOIA exemptions that the determination becomes more complex.

Section 1905 material may fall within either or both of two FOIA exemptions. The first possibility is that section 1905 is an exempting statute within exemption 3 of the FOIA, which provides that the FOIA determine “whether the agency considered the proper factors in determining that disclosure was permitted under its own disclosure regulations.” *Id.*

Most agency regulations provide for the release of exempt materials when it is in the public interest. *See* note 83 *infra*. In *Pennzoil Co. v. Federal Power Comm’n*, 534 F.2d 627 (5th Cir. 1976), the Fifth Circuit enumerated three additional factors to be considered in determining whether disclosure is proper: “[1] whether disclosure of this type of detailed information will significantly aid the [agency] in fulfilling its functions, [2] the harm done to the [submitters] by releasing this information [and] the harm to the public generally, [3] whether there are alternatives to full disclosure that will provide [requestors] with adequate knowledge to fully participate in the [agency's] proceedings but at the same time protect the interests of the [submitters].” *Id.* at 632.

63. *See* note 38 *supra*.


65. 519 F.2d 935, 940 n.4 (D.C. Cir. 1975); *see* notes 41-43 *supra* and accompanying text.

66. *See* note 44 *supra* and accompanying text.


68. There is a possibility in a limited number of cases that § 1905 materials may fall within another exemption.
"does not apply to matters that are . . . specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."69

It is unclear, and the Supreme Court in <i>Chrysler</i> refused to decide, whether section 1905 falls within this exemption.70 The great weight of authority, however, especially in light of a 1976 amendment to the exemption limiting its applicability, is that section 1905 is not to be considered an exemption 3 statute.71

The second possible FOIA exemption under which section 1905 material may fall is exemption 4. This exemption removes "trade secrets and commercial or

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70. 99 S. Ct. at 1726 n.49.
71. As originally enacted, exemption 3 provided that the FOIA did not apply to matters that were "specifically exempted from disclosure by statute." Pub. L. No. 90-23, § 552(b)(3), 81 Stat. 55 (current version at 5 U.S.C. § 552(b)(3) (1976)). Courts were not in agreement as to what exactly constituted an "exemption 3 statute." FAA v. Robertson, 422 U.S. 255, 262 n.6 (1975); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977). Some argued that when Congress spoke of a statute "specifically" exempting information from disclosure, it did not mean to include § 1905 because of its broad language. Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529 (D.C. Cir. 1974); Robertson v. Butterfield, 498 F.2d 1031, 1033 n.6 (D.C. Cir. 1974), rev'd sub nom. FAA v. Robertson, 422 U.S. 255 (1975); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776 (D.D.C. 1974); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 470 (D.D.C. 1972). Other cases did not address the issue of whether § 1905 specifically bars disclosure. They simply held that the protection of trade secrets and other confidential information was already provided for in exemption 4 of the FOIA, and that § 1905 could not be read in conjunction with exemption 3 to expand that coverage. Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 425 F.2d 578, 580 n.5 (D.C. Cir. 1970). <i>See generally</i> Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1200-01 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977).

In 1975, the Supreme Court in <i>FAA v. Robertson</i>, 422 U.S. 255 (1975), took a broad view of the statutes encompassed by exemption 3. Though <i> Robertson</i> dealt with an FAA statute, Federal Aviation Act of 1958, § 1104, 49 U.S.C. § 1504 (1976), rather than § 1905, the Court stated that the term "specifically" did not require that a statute specify documents by name or category. 422 U.S. at 265. Rather, the Court found that the purpose of exemption 3 was to preserve the viability of confidentiality statutes. <i>Id.</i> at 266-67. Relying on the <i> Robertson</i> decision, the Fourth Circuit concluded that § 1905 fell within the provisions of exemption 3. Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1201-02 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977).

financial information obtained from a person and privileged or confidential" from the mandatory disclosure provisions of the FOIA. Due to the "lack of specificity in the language" of this exemption and the variety of materials submitted to government agencies, it has been difficult to determine what exactly is covered by exemption 4. In National Parks and Conservation Association v. Morton, the Court of Appeals for the District of Columbia formulated a two-part test:

Commercial or financial matter is 'confidential' for purposes of exemption 4 if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Although this test has provided courts with a general measure for exemption 4 material, the final determination is dependent upon the facts of the specific case.

Parties seeking to block disclosure of information have asserted that to the extent section 1905 material satisfies the criteria for exemption 4, that information is exempt from mandatory disclosure provisions of the FOIA. In the past, many courts found the scope of the two provisions to be the same. Although Chrysler did not rule on the "relative ammits of Exemption 4 and § 1905, the Court noted the similarity in the language of the two provisions.

Once it is established that section 1905 information is exempt from mandatory disclosure, it is no longer clear what can provide the authorization of law needed to allow disclosure of the materials. Courts often relied on agency regulations.

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73. Clement, supra note 11, at 594 n.24.
74. 498 F.2d 765, (D.C. Cir. 1974).
75. Id. at 770 (footnote omitted).
80. 99 S. Ct. at 1726 n.49.
81. Id.
82. Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197, 1200 (7th Cir. 1978), vacated and remanded
which specifically authorized release of materials exempted from the FOIA.\textsuperscript{83} It has been argued, however, that those regulations were not sufficient authorization of law to satisfy that requirement of section 1905.\textsuperscript{84} \textit{Chrysler} held that "authorized by law" in section 1905 has no special limited meaning and an agency regulation can provide the necessary authorization;\textsuperscript{85} however, in order for a regulation to have the "force and effect of law" necessary to authorize the disclosure of section 1905 materials, it must satisfy a high standard of review. \textit{Chrysler} indicated that such regulations "must have certain substantive characteristics and be the product of certain procedural requisites."\textsuperscript{86}

The regulation must, at a minimum, be substantive.\textsuperscript{87} The APA requires that, before the promulgation of substantive regulations, interested parties be given notice of, and an opportunity to participate in, the proposed rulemaking.\textsuperscript{88} Failure to comply with these prerequisites will render the regulation ineffective as a mechanism to release section 1905 material.\textsuperscript{89} Hence, after \textit{Chrysler}, if a reviewing court finds that these procedural requisites were not met in the promulgation of the regulation in question, the inquiry should end there. The regulation cannot provide the authority to release section 1905 materials.

There is a more important inquiry required of a reviewing court. It must examine the nature of and legislative authorization for such a regulation. The Supreme Court in \textit{Chrysler} described a substantive rule "as one 'affecting individual rights and obligations.'"\textsuperscript{90} It also indicated that a disclosure regulation satisfies this requirement because it "govern[s] the public's right to information sub nom. Sears, Roebuck & Co. v. Dahm, 99 S. Ct. 2024 (1979); General Dynamics Corp. v. Marshall, 572 F.2d 1211, 1217 (8th Cir. 1978), vacated and remanded, 99 S. Ct. 2024(1979); Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1186-87 (3d Cir. 1977), vacated and remanded sub nom. Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979); Westinghouse Elec. Corp. v. NRC, 555 F.2d 82, 94 (3d Cir. 1977); Westchester Gen. Hosp., Inc. v. HEW, 464 F. Supp. 236, 251 (M.D. Fla. 1979); Guerra v. Guajardo, 466 F. Supp. 1046, 1057-58 (S.D. Tex. 1978), aff'd mem., 597 F.2d 769(5th Cir. 1979). \textit{But see} Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 942-43 (D.C. Cir. 1975).

\textsuperscript{83}  See cases cited note 82 supra (submitters challenged sufficiency of agency regulations).
\textsuperscript{84}  5 U.S.C. § 552 (1976).
\textsuperscript{85}  99 S. Ct. at 1718-17.
\textsuperscript{86}  Id. at 1717.
\textsuperscript{87}  Id. at 1717-18; \textit{see} note 90 infra and accompanying text.
\textsuperscript{88}  Id. at 1727 n.1 (Marshall, J., concurring).
\textsuperscript{89}  99 S. Ct. at 1724; Id. at 1727 n.1 (Marshall, J., concurring).
\textsuperscript{90}  99 S. Ct. at 1718 (quoting Morton v. Ruiz, 415 U.S. 199, 232 (1974)).
[and] the confidentiality rights of those who submit information . . . ." 91 Although this characteristic is an “important touchstone” for determining whether regulations have the force and effect of law, it alone is not sufficient.92 The more important question is whether there is a “nexus between the regulations and some delegation of the requisite legislative authority by Congress.” 93 It is apparent, therefore, that even though a disclosure regulation—“substantive” in nature—is enacted in accordance with the procedural requirements of the APA, it cannot provide the authority to release section 1905 materials unless this legislative nexus is established.

One theory for establishing this legislative nexus had been that the overall disclosure mandate pervading the FOIA is sufficient to empower federal agencies under that statute to promulgate regulations authorizing disclosure of materials falling within an exemption.94 The majority of courts, including the Supreme Court in Chrysler, however, rejected this theory, reasoning that because the FOIA states that it “does not apply to matters that are”95 within an exemption, it cannot supply the authorization for the regulations.96

Other sources identified for this authorization were the enabling acts of federal agencies,97 and, in cases involving government contractors, Executive Order No. 11246.98 The enabling acts of federal agencies were not addressed in Chrysler; however, the Court found that Executive Order No. 11246 does not supply the requisite authorization of law. Section 201 of that Order empowers the Secretary of Labor to “adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.”99 Several statutes were cited as the congressional authority for the Order.100 The Court, however, without deciding which statute specifically supplied the authority, held that it was clear that when Congress enacted these statutes it was not concerned with the public disclosure of trade secrets and other confidential materials101 and that, therefore, the regulation lacked the required nexus.

Many courts and commentators had found that 5 U.S.C. § 301, the “housekeeping” statute, could supply the authorization. This statute empowers an agency to prescribe regulations for “the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”102 The Courts of Appeals for the Third,103 Seventh,104 and Eighth105

91. Id.
92. Id.
93. Id. at 1719.
94. Campbell, supra note 21, at 145, 150-51.
96. 99 S. Ct. at 1718-19; Charles River Park “A”, Inc. v. HUD, 519 F.2d 935, 942 & n.8 (D.C. Cir. 1975).
97. Westinghouse Elec. Corp. v. NRC, 555 F.2d 82, 85, 94 (3d Cir. 1977); see Campbell, supra note 21, at 154; Clement, supra note 11, at 623.
100. 99 S. Ct. at 1719-20.
101. Id. at 1720.
Circuits adopted this view and held that validly enacted agency regulations promulgated under section 301 had the force and effect of law and therefore disclosure pursuant to them was authorization of law within the meaning of section 1905. The D.C. Circuit, however, rejected this contention, stating that "to interpret section 301 in that way would be inconsistent with [its] legislative history." In *Chrysler* it was argued that the legislative authority for the disclosure regulation involved could be supplied by section 301. After examining the legislative history of the statute and recognizing its housekeeping nature, however, the Court rejected the majority interpretation and held that section 301 does not authorize regulations which would permit the release of section 1905 materials.

II. REVERSE FOIA SUITS—A PROSPECTIVE ANALYSIS

Although the Supreme Court in *Chrysler* eliminated the use of both FOIA and section 1905 as independent grounds upon which to base a reverse FOIA suit, it did recognize the need for some "balancing and accommodation" of the privacy interests of submitters. The Court hoped to achieve this balance by proposing a method whereby section 1905 could be used in conjunction with the APA to block the release of requested information. In the wake of the *Chrysler* decision, two important issues will have to be considered in order to determine if this method provides submitters with a viable basis for a reverse-FOIA suit. Courts will now have to determine the scope of section 1905 and its relation to the FOIA and its exemptions, and what constitutes the authorization of law needed to allow disclosure of section 1905 information. The degree of protection which submitters will have in the post-*Chrysler* era will depend on the positions courts adopt on each of these issues.

A. The Scope of Section 1905

The scope of section 1905—the range of commercial information which falls within its provisions—will be an important factor in determining the prote-
tion available to submitters. A narrow interpretation of this scope would afford them little protection and would leave agencies with wide discretion to release information. This interpretation could cause submitters competitive harm. A broad interpretation, however, could possibly bar the release of a great amount of commercial information, a result which would seem to conflict with the "general philosophy of full agency disclosure" embodied in the FOIA.

The language of section 1905 is broad and it has been recognized that a literal interpretation of the statute would encompass "virtually every category of business information likely to be in the files of any federal agency." Certainly, almost all the information contained in the various forms and reports submitted by government contractors "concerns or relates to the . . . operations [or] style of work [of a] corporation" and its disclosure would violate section 1905 under this interpretation. Nevertheless, courts have generally adopted this broad view because there was never a need to fully analyze the scope of section 1905. Prior to Chrysler, disclosure pursuant to validly enacted agency regulations was usually held to be authorization of law within the meaning of section 1905. Hence, any materials that fell within the ambit of that section could be released pursuant to agency regulations and no inquiry as to the scope of the statute was necessary. Because Chrysler restricts the availability of agency regulations to provide this authorization of law, it is evident that section 1905 can no longer be so easily set aside and inquiry into its proper scope is imperative.

In a number of cases the scope of section 1905 has been equated with that of exemption 4. There is no doubt that the similarity of the language of these two provisions supports this equation; however, if section 1905 is interpreted as having the same scope as exemption 4, the exemption in effect becomes completely non-permissive in the sense that information within that scope cannot be disclosed unless "authorized by law" pursuant to section 1905. Although this consequence is not novel, the availability of authoriza-

had a narrower scope than exemption 4 because disclosures authorized by law limited the scope of § 1905. Id. at 245-51.

111. A submitter would still be able to challenge an agency's decision to release information under the APA as improper pursuant to the agency's regulations. See note 62 supra. It appears, however, that the agency retains much more discretion over the disclosure of exempt materials in the absence of a nondisclosure statute or one narrowly construed. Id.

112. 1965 Senate Report, supra note 3, at 3.

113. See note 48 supra.


115. See note 14 supra.


117. See cases cited note 82 supra.

118. See pt. II(B) infra.

119. See note 79 supra and accompanying text.

120. See note 80 supra and accompanying text.

121. Although unlikely to occur, if the scope of § 1905 is interpreted more broadly than that of exemption 4, the discretion of agencies to release commercial materials would be further curtailed. In that situation, § 1905 would not only render exemption 4 completely nonpermissive, but would also prevent the disclosure of material beyond exemption 4's coverage unless such disclosure is authorized by law. In the case of materials beyond the scope of exemption 4 but within that of the FOIA it appears that the FOIA itself would provide the authorization of law required for the release of
tion of law has been greatly curtailed by *Chrysler*, and courts will no longer be able to allow disclosure of exempt material on the strength of the FOIA itself, section 301, or Executive Order 11246.122 Furthermore, when Congress enacted the FOIA, it provided for the protection of trade secrets and confidential information in the fourth exemption of the statute. These exemptions, as the *Chrysler* Court recognized, were intended to be permissive. Agencies have been left with the discretion to release information when, after having considered the appropriate factors, they deem such disclosure to be proper. A broad reading of the scope of section 1905 directly contradicts the notion that the FOIA exemptions are intended to be permissive. Courts, therefore, should be wary of adopting such a view.

A narrow interpretation of the scope of section 1905 appears to be the correct one. Section 1905 is a criminal statute and should therefore be narrowly construed.123 Further, it has been argued that because section 1905 is a consolidation of three non-disclosure statutes which were narrow in scope, despite its broad language, rules of statutory construction dictate that section 1905 be interpreted as no broader than the original statutes.124 In addition, this interpretation avoids undermining the philosophy of full disclosure implicit in the FOIA.

§ 1905 materials. If § 1905, however, were an exempting statute within exemption 3, then all § 1905 material, including that beyond exemption 4, would be exempt and the FOIA, or regulations promulgated thereunder, could not authorize the disclosure.

122. See notes 96, 101, 108 supra and accompanying text.

It is important to note that the District of Columbia Circuit stood alone in its holding that § 301, the “housekeeping” statute, does not authorize the release of § 1905 materials. 519 F.2d at 942. Hence, it was imperative there to instruct the lower court to construe § 1905 narrowly. *Id.* at 943. Nevertheless, this opinion has been cited for the proposition that the scope of § 1905 and exemption 4 are the same. *See, e.g.*, Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1204 n.38 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Clement*, supra note 11, at 605 n.79; *Corporate Dilemma*, supra note 16, at 103 n.52. But see Westchester Gen. Hosp., Inc. v. HEW, 464 F. Supp. 236, 247-48 (M.D. Fla. 1979). Reference has specifically been made to footnote 7 of the *Charles Park* opinion. 519 F.2d at 941-42 n.7. In that footnote, however, the court was merely saying that exemption 3 could not incorporate § 1905 so as to make the coverage for trade secrets and confidential material broader than exemption 4. When the court addressed the scope of § 1905 in the text of the opinion, it cautioned that “section 1905 is a criminal statute and should be narrowly construed.” *Id.* at 943; see *Clement*, supra note 11, at 613 n.111 (indicating that the circuit court amended its opinion to provide for this narrower interpretation).

124. Section 1905 is a consolidation of three early nondisclosure statutes, one involving income tax, Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, another involving the Tariff Commission, Revenue Act of 1916, ch. 463, § 708, 39 Stat. 756, 19 U.S.C. § 1335 (1940) (original version), and one involving the Department of Commerce, Act of Jan. 27, 1938, ch. 11, 52 Stat. 8, 15 U.S.C. 176a (1940) (original version). It has been asserted that because the scope of these statutes was narrow, according to rules of statutory construction, § 1905 should be construed as no broader than the three original statutes. *Clement*, supra note 11, at 602-13; see *Cavanagh*, *The Freedom of Information Act and Government Contractors-Problems in Protection of Confidential Information*, 2 Pub. Cont. L.J. 225, 234-35 (1969). This argument was made to the circuit court in *Chrysler*. The court stated, however, that its decision that § 301 authorized the release of § 1905 materials “precluded consideration of that contention.” *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172, 1187 n.73 (3d Cir. 1977), *vacated and remanded sub nom.* *Chrysler Corp. v. Brown*, 99 S. Ct. 1905 (1979).
Both these factors were considered in a House Report on reverse FOIA suits. The Committee on Government Operations concluded that “although the language of [section 1905] implies that broad categories of disclosures are prohibited, only a few are actually covered. . . . [T]he scope of section 1905 is extremely limited, and the section has no relevance to most reverse-FOIA cases.”125 In addition, when Congress enacted the FOIA it took into account the necessity of balancing the opposing interests of disclosure and confidentiality.126 This is a delicate balance, and, although it is not always achieved, it should not be completely upset by the incorrect interpretation of one statute.

B. Authorization of Law

Whether a disclosure is “authorized by law” within the meaning of section 1905 remains a critical issue after Chrysler. With the elimination of the FOIA, section 301, and Executive Order 11246 as possible bases for the promulgation of regulations authorizing the release of exempt materials, the utility of section 1905 as a device to bar disclosure may have been increased. Agency regulations will no longer be accorded the deference they were given by some courts in the pre-Chrysler era.127 The mere fact that the regulation was validly enacted would not be sufficient to support the proposition that disclosure of section 1905 materials is authorized by that regulation.128 There must, instead, be a close relationship between the regulation and the underlying legislative authority.129

It is unclear just how close this relationship must be. The Chrysler Court does seem to make clear, however, that the mere fact that a statute implies some authority to collect information does not mean it is a grant of legislative authority to disclose that information to the public.130 In view of the number of regulations and agencies involved, this determination will have to be made on a case by case basis depending upon the particular agency, regulation and statute involved.

It will be incumbent upon the agency, however, to establish this nexus, a task which may prove of particular difficulty for the government in cases involving government contracts—a frequent source of reverse FOIA suits. Because the Office of Federal Contract Compliance Programs has no statutory enabling act, unless there is legislative action, section 1905 may prove an insurmountable barrier in these cases. This barrier will be even greater if courts fail to construe section 1905 narrowly. It is precisely this result that courts had sought to avoid in holding that regulations promulgated under section 301 could authorize the release of section 1905 material. Courts reasoned that “requiring independent statutory authorization would impose a

125. 1978 House Report, supra note 17, at 58.
126. See notes 8-10 supra and accompanying text.
127. See cases cited note 82 supra.
128. Chrysler indicates that the inquiry into the validity of a regulation as provided for under the APA, 5 U.S.C. § 706(2)(c) (1976), is different from the inquiry to determine whether the regulation provides the authorization of law required by § 1905. 99 S. Ct. at 1722 n.40; Id. at 1727 (Marshall, J., concurring).
129. See notes 90-108 supra and accompanying text.
130. 99 S. Ct. at 1720.
Herculean task upon Congress [because it] would have to review, consider, and enact specific statutes to cover, all of the numerous kinds of business information contained in federal agency files.\footnote{131}

Meeting the legislative nexus requirement may not be as difficult in the case of other reverse FOIA suits based upon different regulations and statutes. One such example is litigation involving cost reports submitted by hospitals and other "providers of services" to Blue Cross in order to obtain Medicare reimbursements.\footnote{132} The Department of Health, Education and Welfare has promulgated regulations authorizing the release of such materials.\footnote{133} Section 1106 of the Social Security Act\footnote{134} has been identified as the legislative authority for the promulgation of these regulations. This section, which specifically provides for the disclosure of information pursuant to regulations,\footnote{135} has recently been held to satisfy the legislative nexus requirement of Chrysler.\footnote{136} Courts have noted that section 1106 is "specifically concerned with the disclosure of information pertaining to a discrete subject matter, and by its very terms contemplates the issuance of substantive regulations permitting such disclosure."\footnote{137}

It is unclear whether other enabling legislation of various federal agencies will satisfy the nexus requirement. Some enabling statutes, such as that of the Federal Trade Commission,\footnote{138} have specific provisions for the dissemination
of information to the public. Such a provision should satisfy the nexus requirement. When the enabling legislation, however, merely provides authorization for an agency to promulgate rules and regulations necessary to carry out its purposes,\textsuperscript{139} the nexus may not be so easily established. Such statutes are not directives to disclose information. \textit{Chrysler}, however, does not require specificity in the underlying legislative authority.\textsuperscript{140} Furthermore, these statutes do not suffer from the inadequacies which plagued section 301 and Executive Order No. 11246.\textsuperscript{141} They are not internal housekeeping statutes and are not far removed from congressional authorization in that they are direct congressional authority to carry out agency functions. Hence, an enabling statute of this type may provide the nexus which would allow a reviewing court to "reasonably . . . conclude that the grant of authority contemplates the regulations issued."\textsuperscript{142} If \textit{Chrysler} is interpreted as requiring a "disclosure" nexus, however, this type of legislation would probably be inadequate.

It is obvious, therefore, that the effect of section 1905 as a bar to disclosure will differ depending on the agency regulation involved. In light of \textit{Chrysler}, however, all of these regulations will be subject to closer judicial scrutiny.

\section*{Conclusion}

One decision cannot unravel an area of law so riddled by uncertainties and in need of legislative action as that involving reverse FOIA suits. The Supreme Court in \textit{Chrysler} has limited the bases for these actions and, in so doing, has lessened the confusion surrounding this type of litigation. At the same time, this decision has raised new issues to be confronted and problems to be resolved. The importance of section 1905 in reverse FOIA litigation has been greatly increased by the \textit{Chrysler} decision. Only if the scope of section 1905 is interpreted narrowly by the courts can the intent of Congress embodied in the FOIA to promote full disclosure be preserved.

\textit{Stephen F. Hehl}


\textsuperscript{140} 99 S. Ct. at 1721.

\textsuperscript{141} See notes 99-108 \textit{supra} and accompanying text.

\textsuperscript{142} 99 S. Ct. at 1721.