Where's the Harm? Release Unit Prices in Awarded Contracts Under the Freedom of Information Act

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[G]iven that FOIA's primary purpose is to inform citizens about what their government is up to, it seems quite unlikely that Congress intended to prevent the public from learning how much the government pays for goods and services.[1]

I. Introduction

Standing in front of the stacks of breakfast cereal in your local grocery store, you are often presented with several different brands and sizes of cereal boxes. Each type of cereal, such as bran flakes, has a different sized box with a total price taped to the front for easy viewing. It is natural to assume that the flakes packed in the "giant" or "family" size may be the best buy. Or you may think that buying one large box of cereal is a better buy than the individually packed single serve boxes. But the bigger box may not present the best value. How can you determine the best value of bran flakes? You cannot tell by just looking at the item price tag on the box. Assuming the bran flakes are of similar and acceptable quality, the best way to determine the value of each cereal box is by looking at the shelf tag below the box displaying the unit price for the bran flakes. Comparing the unit price per ounce of the bran flakes in different sized containers allows you to determine which box provides the most flakes for your dollar. In this regard, comparison shopping in a grocery store mirrors the process a government contracting officer may use to analyze price in a procurement contract.[2]

Finding value in government contracts is not as easy as it is in a grocery store, however. In fiscal year 2009 alone, the United States Federal Government spent $523,901,729,866 on government contracts.[3] Government contract spending accounted for over 30% of federal funds spent in the same fiscal year.[4] As astounding as these numbers may sound, what is even more astonishing is that watchdog groups and the media report that government contractors routinely overcharge the government for goods and services.[5] This problem has recently received presidential attention when President Obama ordered a review of federal contracting procedures.[6] Specifically, the President wanted to add more accountability and competition to what some experts say is an already overwhelmed procurement system.[7] Perhaps one of the best ways to introduce accountability and competition is by making the procurement system open to the scrutiny of the American public.

With a large percentage of our federal budget going to procurement contracts, and fraud routinely found in those contracts, should not the American taxpayers know how much they pay for goods and services? Under the Freedom of Information Act (FOIA), anyone can request records of government contracts.[8] But as this article will show, over the last decade, government contractor-friendly decisions by the Court of Appeals for the District of Columbia (hereinafter D.C. Court of Appeals) have virtually ensured that taxpayers cannot find out the amount the government is paying for an individual unit of good or service. In other words, judicial precedent is preventing the government from disclosing unit price information without contractor consent.

This article explores how the D.C. Court of Appeal's legal precedent of limiting the release of unit prices is frustrating the FOIA's purpose and is hindering the efficiency of the federal procurement system. To rectify the D.C. Court of Appeal's harmful legal precedent, this paper will recommend that the legal precedent be changed through statutory reform. But to fully understand why this area of law needs to change, it is important to first understand all the background elements of unit price disclosures.

This article examines, in turn: (1) how businesses seek disclosure and non-disclosure of unit prices under the FOIA; (2) how the judiciary has created a legal precedent preventing disclosure of unit prices; and (3) how the

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[1] Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37 (D.C. Cir. 2008).

[2] Just as a private consumer can accurately compare prices of similar items by using the unit price of that item, so too can government contracting officers when comparing procurement contracts. Federal Acquisition Regulation, 48 C.F.R. § 4.1001 (2010) (requiring that contract bidders answer government solicitations for goods or services with bids that contain unit prices).

[3] Federal Spending FY 2009, http://www.usaspending.gov (last visited Feb. 22, 2010).

[4] *Id*.

[5] *See* Federal Contractor Misconduct Database, http://www.contractormisconduct.org (last visited Feb. 22, 2010). Some of the top offenders of overcharging the government are well known defense contractors, such as Lockheed Martin, Boeing Company, Northrop Grumman, and General Dynamics. *Id*.

[6] Scott Wilson & Robert O'Harrow, *President Orders Review of Federal Contracting System*, Washington Post.com, March 5, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/04/AR2009030401690.html.

[7] *Id*.

[8] Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2006).

judiciary's legal precedent is inconsistent with current policy and FOIA's purpose. After examining all these background factors, this article concludes that if Congress will change FOIA to promote disclosure of unit prices, America will reap not only the benefits of lower prices for goods and services, but also experience increased oversight on how the government spends taxpayer money. As a template for change, this article comparatively discusses a similar FOIA law in the United Kingdom. Before arriving at the argument for changing the FOIA, however, the paper first starts by examining what makes a unit price and how contractors use the current language of FOIA to both obtain unit prices and defend them from disclosure.

II. What's in a Unit Price? How Contractors use FOIA

A unit price is the specified amount a consumer pays for goods or services on a per unit basis.[9] Thus, a unit price is often understood to be a predetermined price for a quantity of goods or services.[10] Companies arrive at their unit price by determining a rate and unit of measure and then combining the two.[11] For example, if a contractor sells potatoes to the government at $2 for three pounds, the unit of rate would be dollars/pounds. To arrive at the unit price the company charges the government for potatoes, the government expresses the ratio of dollars to pounds in terms of one.[12] For our example of potatoes, the unit price would be $0.67 per pound of potatoes ($0.67/pound). In government contracting, a unit price is therefore the specified amount the government pays for the goods or services stated per unit. The contracting officer can use unit prices to compare contractor proposals and bids, just as a shopper can in a grocery store.

When comparing contractor proposals and bids, it is helpful to compare the unit prices found in the contract line item number. Unit prices for a stated government contract are located in the CLIN.[13] When a company submits its proposal or bid to the contracting officer, the contracting officer is able to look at the CLIN of each competing contract, and know the unit price of a particular item.[14] Therefore, the contracting officer can easily compare differences in prices for various quantities the competitors charge before choosing which contract presents the best value.[15]

Before the contracting officer awards the contract, only the contracting officer knows the unit price information.[16] This is for good reason. Obtaining the unit price of a particular item contained in a competitor's contract proposal may allow a competing business to determine a competitor's profit margin.[17] Knowing a competitor's profit margin may allow a rival competitor to undercut the competing contractor's bid for a government contract under consideration.[18] Even knowing the unit price in existing contracts is thought to allow a competitor to gain a competitive advantage for future government procurements.[19] The competing contractor can use the unit price knowledge to set its price just under the unit price of his competitor in the future.[20] It is therefore an established business tactic for potential government contractors to use FOIA as a means of obtaining a competitor's unit price and gaining a competitive edge.[21] The following sections will examine the procedure for how a business seeks to obtain unit price information in awarded government contracts.

A. Obtaining Unit Price Information

The FOIA provides procedures that allow any person to make a request for a federal agency document and for federal agencies to make the records promptly available to anyone who makes a proper request.[22] The FOIA is therefore a powerful tool for businesses and potential contractors to find out information concerning government procurements, as most paperwork gathered and produced by the procuring agency is a record, and thereby generally releasable.[23] This section will describe the process of how a person can make a proper records request for contract information with a federal agency, and the appeals process for a denied request.

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[9] Unit Price, http://www.businessdictionary.com/definition/unit-price.html (last visited Feb. 22, 2010).

[10] *Id*.

[11] Distance, Rate and Time, http://www.math.com/school/subject1/lessons/S1U2L3GL.html (last visited Nov. 20, 2009). A rate is a form of ration in which the two terms are in different units. *Id*.

[12] *Id*.

[13] Federal Acquisition Regulation, 48 C.F.R. § 4.1001 (2010).

[14] *Id*.

[15] *See id*.

[16] 48 C.F.R. § 24.202 (2010). The regulation states,

> A proposal in the possession or control of the Government, submitted in response to a competitive solicitation, shall not be made available to any person under the Freedom of Information Act. This prohibition does not apply to a proposal, or any part of a proposal, that is set forth or incorporated by reference in a contract between the Government and the contractor that submitted the proposal.

Id.

[17] McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004).

[18] McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 306 (D.C. Cir. 1999).

[19] *Id*.

[20] *Id*.

[21] Michael Hordell & Laura Hoffman, *The Freedom of Information Act: A Powerful Tool for Government Contractors*, Mar. 3, 2004, *available at* http://www.pepperlaw.com/pdfs/GC0204.pdf.

[22] Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2006).

[23] *See* discussion *infra* Parts II.A.1, III.

1. The Request

When a person wants to find out information concerning a procurement contract, all the person has to do is file a FOIA request with the agency for the records pertaining to the contract.[24] The FOIA request must satisfy only two requirements to be valid. First, the request must reasonably describe the records sought.[25] A *record* is any information maintained by an agency in any format, including electronic information.[26] The request must be sufficient to enable an agency employee, familiar with the subject of the request, to locate the record with a reasonable amount of effort.[27] Accurately describing the record sought only meets half of FOIA's requirements for a valid request. The requester must still comply with the requested agency's FOIA regulations.[28]

The second requirement for a valid FOIA request is that the requester must make the request in accordance with the agency's published procedural regulations.[29] The requesting person can easily find the federal regulations for a FOIA request as all federal agencies "must promulgate regulations informing the public of 'the time, place, fees (if any), and procedures followed' for making request."[30] Most federal agencies have published rules requiring FOIA requests to be (1) in writing, (2) addressed to the specific official or office, and (3) expressly identified as a FOIA request.[31] Even if the request fails to meet the agency's requirements for a proper FOIA request, the law charges the federal agency to liberally construe the FOIA request so that the request is effectuated.[32] Only upon receiving a proper request is the agency required to process the request for release and give the requester its response.[33]

2. Agency Response

Upon receipt of a proper records request under FOIA, agencies have twenty days to make a determination on the request.[34] The agency does not necessarily have to release the requested records within the twenty days, but it must segregate exempted material and release nonexempt information promptly.[35] If the agency decides not to release the requested record, in part or in full, the agency must inform the requester the amount of the information withheld and the exemption the agency asserts, unless to do so would undermine the exemption.[36] Upon receipt of the agency denial, the requester must first appeal to the agency for reconsideration before seeking judicial intervention.[37]

Once an agency receives the requester's appeal of the denial, the agency must make a determination on the appeal within twenty days after the receipt of such appeal.[38] If the agency upholds its denial in whole or in part, the agency must notify the requester that he may seek judicial review of the denial.[39] Of note, the FOIA requester cannot seek disclosure of the requested records through judicial means until the agency appeal process is exhausted.[40] Only then, can the requester appeal to the judiciary.[41]

3. The Judicial Appeal

Once the agency appeal process is over, the person requesting records of a government contract can apply for judicial relief. FOIA provides every federal district court jurisdiction to force disclosure of agency records if the agency improperly withholds the records.[42] FOIA further provides that the district courts shall review the matter *de novo*[43] and may examine the agency record's contents *in camera* if necessary to protect against disclosure of

[24] Gregory H. McClure, *The Treatment of Contract Prices Under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 PUB. CONT. L.J. 185, 186 (2002).

[25] 5 U.S.C. § 552(a)(3)(A).

[26] *Id*. § 552(f). This definition includes all records in an agency's possession, whether created by the agency or by another entity covered by FOIA. McGehee v. CIA, 697 F.2d 1095, 1109 , *aff'd in part, vacated in part*, 711 F.2d 1076 (D.C. Cir. 1983).

[27] Dayton Newspapers, Inc. v. VA, 257 F. Supp. 2d 988 (S.D. Ohio 2003).

[28] Freedom of Information Act, 5 U.S.C. § 552(a)(3).

[29] *Id*.

[30] DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 56 (2009) (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(E)), http://www.justice.gov/oip/foia_guide09/procedural-requirements.pdf [hereinafter GUIDE TO THE FOIA]

[31] *See* U.S. DEP'T OF DEF. REG. 5400.7-R, DOD FREEDOM OF INFORMATION ACT PROGRAM para. C1.4.2 (Sept. 1998) (requiring that a records request to any Department of Defense (DOD) agency must: (1) be written; (2) express a willingness to pay fees or explain why fees should be waived; (3) be directed to the proper DOD component; and (4) expressly or impliedly invoke FOIA or an implementing regulation).

[32] *See* LaCedra v. Exec. Office for U.S. Att'ys, 317 F.3d 345 (D.C. Cir. 2003).

[33] 5 U.S.C. § 552(a)(3)(A), (a)(6)(A).

[34] *Id*. § 552(a)(6)(A)(i). If the agency is unable to meet the 20 day requirement, the agency may request an additional ten day extension upon notifying the requester in writing why it needs the extension and when it will make a determination on the request. *Id*.

[35] *See id*. § 552(a)(6)(C)(i) (requiring the records be made available "promptly").

[36] *See id.* § 552(a)(6)(A)(i) (requiring agencies to notify requesters of disclosure determinations, reasons for such determinations, and administrative appeal rights).

[37] *See* Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61–65 (D.C. Cir. 1990) (stating that once a party has exhausted its agency appeal, the court has jurisdiction to review the agency's denial).

[38] 5 U.S.C. § 552(a)(6)(A)(i).

[39] *Id*. § 552(a)(6)(A)(ii).

[40] Dettmann v. U.S. Dep't of Justice, 802 F.2d 1472, 1476–77 (D.C. Cir. 1986).

[41] *Id*.

[42] 5 U.S.C. § 552(a)(4)(B).

[43] *Id*.

exempted material.[44] If the court orders disclosure, the FOIA requester not only receives the requested documents, but the court may order the government to pay the requester's reasonable attorney fees and litigation costs.[45] But if the court finds that one of the FOIA exemptions applies, the requester will not receive the agency record.[46] The judiciary's decision ends the person's quest for the agency record.

As a result, in the battle for disclosure of a competitor's unit prices, the judiciary is the final step in the FOIA process. When a court upholds an agency denial, the requesting company may be dismayed by its failure to obtain the government contractor's unit prices. However, the contractor who submitted its unit price information (the submitter) is likely delighted by the prospect of maintaining its competitive advantage in the market place. Moreover, submitters of unit prices will not sit idly by and wait for a judge to make a determination on the exempt status of their commercially sensitive information.[47] Submitters will instead take proactive measures, both administrative and legal, to protect its unit prices contained in government records.[48] The contractor's business decision to protect its unit prices will be examined in the next section.

B. The Business of Protecting Unit Prices

Just as competitors for a government contract want to gain information concerning an established contract's unit prices, the contractor awarded the contract (the submitter) wants the agency to protect its unit price information so it can maintain its competitive advantage.[49] And while the submitter is the one most likely to be affected by disclosure, the submitter has very little time (twenty days) to respond to a FOIA request.[50] Therefore, submitters of unit price information usually stand ready to take legal action in order to prevent disclosure of their information.[51] A submitter's legal recourse to prevent disclosure of its unit prices is further discussed in the next section.

C. Reverse-FOIA

Although FOIA is a disclosure statute, submitters of documents to federal agencies have legal recourse to prevent disclosure of their documents. The name for such an action is a "reverse-FOIA" action.[52] This section will review the administrative and legal process involved when a submitter seeks to prevent disclosure of its unit prices.

1. Administrative Process

The first step in the reverse-FOIA process is the agency's receipt of a competitor's FOIA request. Recognizing that submitters of commercially sensitive information have some due process rights to that information, the President has signed an executive order that requires the agency to notify the submitter before it releases the information.[53] Executive Order 12,600 requires, with limited exceptions,[54] the federal agency to notify the submitters when the agency "determines that it may be required to disclose" the requested data.[55]

After the agency provides notice of possible disclosure to the submitter, the agency must provide the submitter a reasonable amount of time to object to the disclosure of the requested material.[56] However, this consultation is not sufficient to satisfy the agency's FOIA obligations.[57] In order to satisfy FOIA's obligations, an agency is "required to determine for itself whether the information in question should be disclosed."[58]

If an agency decides to disclose the information, the agency must notify the submitter of its decision to disclose the requested records as well as its reasons for disclosure.[59] After the submitter receives notice of the agency's disclosure decision, the agency must provide a reasonable amount of time before disclosure for the submitter to seek judicial relief.[60] It is at this point that the contractor can seek judicial enforcement to prevent disclosure of its submitted

[44] *Id*.

[45] *Id*. § 552(a)(4)(E).

[46] *See* Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37, 43 (D.C. Cir. 2008) (ruling that a contractor's line item pricing is subject to Exemption 4 of the FOIA, and is exempt from disclosure).

[47] Hordell & Hoffman, *supra* note 21.

[48] *Id*.

[49] *Id*.

[50] 5 U.S.C. § 552 (a)(4)(E).

[51] *See* Hordell & Hoffman, *supra* note 21 (stating that "[i]f you object to an agency's proposed release of your documents under FOIA, you must take prompt action to protect yourself [through]. . . 'reverse FOIA' . . . .").

[52] GUIDE TO FOIA, *supra* note 30, at 863.

[53] Exec. Order. No. 12,600, 3 C.F.R. § 235 (1988). Executive Order 12,600 requires federal agencies to establish procedures to notify submitters of document before disclosure. *Id*.

[54] *Id*. (listing six circumstances in which notice is not necessary, such as when the agency denies disclosure of the requested information or when the information is already public knowledge).

[55] *Id*.

[56] *Id*.

[57] Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996).

[58] *Id*. (specifically stating that providing notice to, and receiving an answer from the submitter, the agency still has the responsibility to make the final decision concerning release).

[59] 3 C.F.R. § 235.

[60] *Id*.

information.[61] If the submitter tries to bypass the agency and go directly to the judiciary, a court will find the case is not ripe for judicial review.[62] Once the agency has decided to release the information, the submitter can file a reverse-FOIA suit with the court.

2. Judicial Review

In discussing reverse-FOIA suits, it is helpful to understand where the court gets jurisdiction to hear such a case. Interestingly, a contractor's legal right to prevent disclosure in a reverse-FOIA action does not derive from FOIA.[63] The FOIA does not provide an individual right of action to prevent a federal agency from disclosing a submitter's confidential or commercial financial documents.[64] However, the U.S Supreme Court has recognized that the Administrative Procedures Act provides recourse for submitters to enforce a document's exemption status under FOIA.[65]

In *Chrysler Corp. v. Brown*,[66] the U.S. Supreme Court held that jurisdiction for a reverse-FOIA action cannot be based on the FOIA itself because "Congress did not design the FOIA exemptions to be mandatory bars to disclosure."[67] Consequently, the Court held that the FOIA "does not afford" a submitter "any right to enjoin agency disclosure."[68] Moreover, the Court held that jurisdiction cannot be based on the Trade Secrets Act[69] because it is a criminal statute that does not afford a "private right of action."[70] Instead, the Supreme Court found that federal district courts had jurisdiction to review an agency's decision to disclose requested records under the Administrative Procedure Act (APA).[71] Because of the Court's holding in *Chrysler v. Brown*, reverse-FOIA plaintiffs can argue, under the APA, that an agency's contemplated release would violate the Trade Secrets Act.[72] If the court finds that disclosure would violate the Trade Secrets Act, the agency's action would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[73] While the Supreme Court did not specifically address the interactions and boundaries between the Trade Secrets Act and FOIA Exemption 4 in *Chrysler*, the D.C. Court of Appeals did nearly a decade later in *CNA Financial Corporation v. Donovan*.[74]

In *CNA Financial Corp.*, the D.C. Court of Appeals ruled that the scope of the Trade Secrets Act covers the same type of information as that found in Exemption 4.[75] Consequently, if information falls within Exemption 4, then it also falls within the Trade Secrets Act, which prohibits disclosure without a company's express authorization to release it.[76] Conversely, if information contained in records is outside the scope of Exemption 4, the court in *CNA Financial Corp.* found it unnecessary to determine if the Trade Secrets Act prohibited its disclosure, as FOIA would grant statutory authorization for disclosure.[77] The combined effect of the courts' interpretation of the FOIA, Trade Secrets Act, and APA is that that agencies can no longer discretionarily disclose information if it falls under Exemption 4. Courts therefore conduct their review of the agency's decision to disclose unit prices by determining if Exemption 4 applies to the unit price.[78]

In making its findings of whether an agency's release of commercially sensitive information is exempt from disclosure under Exemption 4, and thus a violation of the Trade Secrets Act, the court begins its review by scrutinizing the agency's decision to disclose.[79] But the court does not conduct its review under the same *de novo* standard it uses in reviewing an agency's denial of disclosure. Instead, the court is supposed to review the agency's decision to disclose the requested information in deference to FOIA's policy of disclosure and the agency's decision.[80] As will be shown

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[61] *Id*.

[62] Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1234, 1238 (5th Cir. 1979).

[63] *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[64] *See id*. at 282.

[65] *Id*.

[66] *Id*.

[67] *Id*. at 293.

[68] *Id.* at 293–94.

[69] Trade Secrets Act, 18 U.S.C. § 1905 (2006). This statute prevents government employees or officers from unlawfully disclosing confidential information submitted by private persons. *See id*.

[70] *Chrysler Corp.*, 441 U.S. at 316–17.

[71] Administrative Procedures Act, 5 U.S.C. §§ 701–706 (1946).

[72] *Chrysler Corp.*, 441 U.S. at 316–17.

[73] *Id*.

[74] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1151 (D.C. Cir. 1987).

[75] *Id*.

[76] *See, e.g.*, Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (noting that "unless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4."); *see also e.g.*, Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (holding that when release of requested information is barred by Trade Secrets Act, agency "does not have discretion to release it"). Authorization in form of a statute or a properly promulgated regulation would satisfy the requirements of the Trade Secrets Act, thereby decriminalizing the release of such records. McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 306 (D.C. Cir. 1999) (repeatedly noting absence of agency reliance on "any independent legal authority to release" requested information as basis for concluding that it was subject to Trade Secrets Act's disclosure prohibition).

[77] *CNA Fin. Corp.*, 830 F.2d at 1152.

[78] *See Chrysler Corp.,* 441 U.S. at 318 (stating that a judicial review starts with the agency decision under the APA).

[79] *Id*.

[80] *See CNA Fin. Corp.*, 830 F.2d at 1152.

next, the courts' deference to FOIA's policy of disclosure routinely led to the disclosure of unit prices.

3. Differential Treatment

Unlike the heightened judicial scrutiny courts place on agencies when they decide to withhold records pursuant to a FOIA exemption, courts have generally deferred to the agency's decision to disclose requested material. The court shows deference to the agency by holding the party seeking to prevent disclosure to a very high standard of proof.[81] The Supreme Court has held that a court's standard of review for an agency's action of disclosing records over objection is whether the agency acted "arbitrarily and capriciously."[82] Consequently, courts base their review of the agency's decision upon the administrative record compiled by the agency.[83] Courts will not do a *de novo* review in reverse-FOIA cases, as they do for parties seeking to force agency disclosure, unless there are exceptional circumstances.[84] With these review standards, the court will generally defer to an agency's decision to disclose requested information.[85]

When reviewing the administrative record, the court is supposed to defer to the agency's decision unless the agency's decision was clearly erroneous.[86] In due deference to the agency's decision, the reviewing court "[will] not substitute its judgment for the judgment of the agency."[87] Instead, the court "simply determines whether the agency action constitutes a clear error of judgment."[88] Thus, the court does not require the agency to prove there will not be harm from the release of confidential or financial information; instead, it is "enough that the agency's position is as plausible as the contesting party's position."[89] In fact, the D.C. Court of Appeals has even stated that "[t]he harm from disclosure is a matter of speculation, and when a reviewing court finds that an agency has supplied an equally reasonable and thorough prognosis, it is for the agency to choose between the contesting party's prognosis and its own" and not the court's position to choose.[90]

Although the court automatically starts with the presumption that the agency acted properly in disclosing requested FOIA information, the court still has to make its decision on whether a FOIA exemption applies to the requested information. In regards to the litigation surrounding the disclosure and protection of unit prices, FOIA's Exemption 4 is the exemption most government contractors cite as the reason for non-disclosure.[91] Specifically, as the next section will show, contractors claim that the disclosure of their unit prices will cause them competitive harm in the marketplace and are therefore not releasable.[92]

D. FOIA's Exemption 4 and Substantial Competitive Harm

The vast majority of reverse-FOIA litigation aimed at protecting unit prices looks at whether release of such information will cause substantial competitive harm to the contractor.[93] Exemption 4 requires that information be confidential in order for it to be exempt under FOIA. But the statute does not define what information is confidential.[94] Since Congress failed to provide a definition for *confidential*, early courts only found information confidential, and therefore exempt, if there was a confidentiality clause explicitly stated in the government contract.[95] However, in 1974, the D.C. Court of Appeals superseded this test for confidentiality by developing a different test: substantial competitive harm.

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[81] *Id*.

[82] *See Chrysler Corp.*, 441 U.S. at 317–18 (citing 5 U.S.C. § 706(2)(A), which states that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[83] AT&T Info. Sys., Inc. v. Gen. Servs. Admin., 810 F.2d 1233 (D.C. Cir. 1987).

[84] Nat'l Org. for Women v. SSA, 736 F.2d 727, 745 (D.C. Cir. 1984) (stating that a *de novo* review is justified in reverse-FOIA cases when: (1) the action is adjudicatory in nature and the agency fact finding procedures are inadequate, or (2) issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action). A complete review is unnecessary for federal agency's that promulgate regulations for reverse-FOIA requests according to Executive Order 12,600. Paul M. Nick, De Novo *Review in Reverse Freedom of Information Act Suits*, 50 OHIO ST. L.J. 1307, 1324 (1989).

[85] *See, e.g.*, McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 981 F. Supp. 12, 14 (D.D.C. 1997) (stating that the courts conduct a "deferential standard of review" of an agency's decision to disclose information requested under FOIA).

[86] *Id*. (stating that the law "only requires that a court examine whether the agency's decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment'").

[87] McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 204 (D.D.C. 2002).

[88] *Id*.

[89] *Id*. at 205.

[90] *Id*.

[91] *See, e.g.*, Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37, 46 (D.C. Cir. 2008) (ruling that FOIA, Exemption 4, protected contractor's line item pricing from being disclosed).

[92] *See* Hordell & Hoffman, *supra* note 21 (stating that contractors should claim that the release of their unit prices would allow a competitor to gain a competitive advantage).

[93] GUIDE TO FOIA, *supra* note 30, at 274. The reason the vast majority of unit price cases fall within the "substantial competitive harm" test is that "[p]rice is an essential and required piece of information for the contract, no matter how it was achieved." McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 318 D.C. Cir. 2004). Therefore, unit price information is necessarily compelled information requiring a substantial competitive harm determination by the court. *Id*.

[94] *See* 5 U.S.C. § 552 (b)(4) (2006).

[95] GUIDE TO FOIA, *supra* note 30, at 273 (citing GSA v. Benson, 415 F.2d 878 (9th Cir. 1969)).

The D.C. Court of Appeals, the most influential court for Exemption 4 litigation,[96] developed the *substantial competitive harm* test in *National Parks & Conservation Ass'n v. Morton*.[97] In *National Parks*, after noting there was no statutory definition of confidential, the court developed the following definition from legislative intent:[98]

> [C]ommercial or financial matter is 'confidential' for purposes of the exemption 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*.[99]

The second prong of this test is now known as the *substantial competitive harm* prong.[100] It is here where the majority of contractors assert that unit prices are confidential and therefore exempt from disclosure.[101]

In applying the *substantial competitive harm* test, most courts historically concluded that unit prices are subject to disclosure under FOIA.[102] Each case decided upon the specific type of information that the government agency sought to release, but the basis for finding no substantial competitive harm centered upon two legal theories: (1) unit prices are too complex to cause a contractor competitive harm if released, and (2) FOIA's policy considerations favored disclosure.[103] A look at the courts' historical treatment of unit prices follows.

1. Complex Unit Prices

The majority of early court decisions favored disclosure of unit prices because they found unit prices contained so many fluctuating variables. The courts reasoned that with so many fluctuating variables, it would be near impossible for competitors to determine relative profit margins or cost multipliers.[104] Thus, the courts reasoned, a competitor's knowledge of the submitter's unit price would not enable it to underbid the submitter in future contracts.[105] Foremost among these lines of cases is *Acumenics Research & Technology v. U.S. Dept. of Justice*.[106]

In *Acumenics*, a 1988 case, the 4th Circuit Court of Appeals decided that release of pricing information would not allow a competitor to derive the bidder's profit multiplier,[107] and therefore would not cause the bidder competitive harm. To quote the court, there were "too many ascertainable variables in the unit price" for its release to do competitive harm.[108] In other words, the court found unit prices so complex that a competitor would not be able to determine the various factors that made up the unit price. Therefore, applying *National Parks*, the court found unit price information was neither a trade secret nor confidential commercial information subject to the Trade Secrets Act and Exemption 4 of FOIA.[109]

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[96] The D.C. circuit is the district of universal venue for all FOIA cases. A FOIA requester has to bring suit in either the district court in which he or she resides, has his or her principle place of business, where the records are located, *or* in the District of Columbia. *See* Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). Also, it is estimated that nearly 40% of all FOIA cases are brought in the D.C. circuit. E-mail from Richard L Huff, Retired Senior Exec. Serv. member and Co-Dir. of the Office of Info. & Privacy, Dep't of Justice, to Captain David A. Dulaney, Graduate Student, The Judge Advocate Legal Ctr. & Sch., (Jan. 5, 2010, 17:46 EST) (on file with author) (stating his office conducted an informal survey of all FOIA cases filed in a year and estimated that 40% of FOIA cases are filed in D.C.).

[97] Nat'l Parks & Conserv. Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

[98] In determining legislative intent for Exemption 4, the court looked at Senate panel reports discussing the balance of interests in exempting commercial and financial information from disclosure. The court found that there were two competing interests Congress intended for exempting commercial and financial information: government efficiency and individual privacy. Government efficiency, the court explained, was gained from encouraging private individuals that information provided to the government would remain confidential. It was feared that disclosure of the individual companies' information would chill their participation in government endeavors, thus limiting the ability of the government to make intelligent, well informed decisions. Conversely, the court found that the Congress recognized the need to protect individuals who submit financial or commercial information to government agencies from the competitive disadvantage from its publication. *Id*. at 767–68.

[99] *Id*. at 770 (emphasis added).

[100] GUIDE TO FOIA, *supra* note 30, at 274.

[101] *Id*.

[102] John Pavlick, Jr. & Rebecca E. Pearson, *Release of Unit Prices after* McDonnell Douglas Corp. v. NASA, PROCUREMENT LAW., Winter 2009, at 9.

[103] *See id*. at 9–10 (discussing the legal theories for releasing unit prices).

[104] Cost multipliers are "the complement of the markup percent charged" for goods or services. DICTIONARY, http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=C (last visited Feb. 13, 2010). The cost multiplier "indicates the average relationship of cost to retail value of goods handled in the accounting period." *Id.*

[105] GUIDE TO FOIA, *supra* note 30, at 274.

[106] Acumenics Research & Tech. v. U.S. Dep't. of Justice, 843 F.2d 800, 808 (4th Cir. 1988).

[107] A profit multiplier is the "[p]roduct of pretax or operating profit and a number (called market multiplier) which is either estimated from the selling prices of comparable businesses or is published by the financial press in some countries." Profit Multiple, http://www.businessdictionary.com/definition/unit-price.html (last visited Mar. 4, 2010). "This number commonly ranges from 1 to 5, depending on the current popularity or potential of a particular type of business." *Id*. "Profit multiple is one of the most widely used methods of valuing a business as a going concern." *Id*.

[108] *Id*. (holding that even if a competitor were able to derive the pricing multiplier there would still be no competitive harm because the information would become stale over time).

[109] *Id*.

The Ninth Circuit Court of Appeals has also viewed unit prices as too complex to cause substantial competitive harm if released.[110] In a 1990 case, *Pacific Architects and Engineers, Inc. v. Department of State*,[111] the Ninth Circuit court looked at whether the State Department acted arbitrarily and capriciously when it decided to release the unit price rates for a contract for hourly maintenance and operations services. The contractor argued that the release of unit price rates would cause potential harm because its competitors would be able to calculate its profit margin from the unit price.[112] After its review of the contractor's protest, the State Department disagreed, and found that the unit price contained too many fluctuating variables for competitors to determine profit margin.[113] In making its ruling, the court deferred to the State Department's determination, stating that the State Department had not acted arbitrarily or capriciously.[114] Although the Ninth Circuit agreed with the State Department's assessment that unit prices are too complex to derive a contractor's profit margins, it did not explicitly decide whether unit prices were confidential under Exemption 4.[115] Instead, the court decided the case under the deferential review standard of the Administrative Procedures Act, by holding that the agency did not act arbitrarily or capriciously in disclosing the contractor's unit prices.[116] As a result, the court deferred to the agency's decision that FOIA required disclosure of unit prices.[117]

2. Disclosure by Default

In addition to viewing unit price information as too variable to cause substantial competitive harm, many courts have based their decisions upon FOIA's underlying principle of disclosure. For example, in 1994, the Ninth Circuit, citing *National Parks*, stated that "in making our determination, we must balance the strong public interest in favor of disclosure against the right of private business to protect sensitive information."[118] The court then went on to find that "FOIA's strong presumption in favor of disclosure trumps the contractors' right to privacy" when the data was comprised of "too many fluctuating variables."[119]

In the 1997 case of *Martin Marietta Corp. v. Dalton*, a D.C. district court went as far as to say that FOIA's strong policy of disclosure requires the release of unit prices to the public unless the contractor can prove it will no longer be an effective competitor for government contracts in the future.[120] In that case, the Navy sought to disclose three types of information contained in a government contract. The three types of information were: "(1) cost and fee information, including material, labor and overhead costs, as well as target costs, target profits and fixed fees; (2) component and configuration prices, including unit pricing and contract line item numbers (CLINS); and (3) technical and management information."[121] The contractor argued that the release of such specific information would lead to its competitors underbidding it in the future.[122] The Navy agreed that disclosure would cause the contractor competitive harm, but decided to disclose anyhow.[123] The Navy released the information based upon FOIA's strong policy of disclosure.[124]

The D.C. district court agreed with the Navy's decision to disclose the commercial information.[125] Instead of doing an analysis of the harm created by disclosure, as done in *National Parks*, the court here focused on FOIA's strong policy of disclosure. The court stated in its analysis:

> In perhaps no sphere of governmental activity would that purpose appear to be more important than in the matter of government contracting. The public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and, indeed, even to learn how to be more effective competitors in the future.[126]

The court then stated that in order to overcome FOIA's strong favor of disclosure the contractor would have to show that it would no longer be capable of winning government contracts if the agency disclosed its unit price information.[127] Thus, substantial competitive harm would occur only if the contractor could no longer do business with the government in the future.

[110] *See* Pac. Architects and Eng'rs, Inc. v. Dep't of State, 906 F.2d 1345 (9th Cir. 1990).

[111] *Id*.

[112] *Id*. at 1347.

[113] *Id*.

[114] *Id*.

[115] *Id*. at 1348.

[116] *Id*.

[117] *Id*.

[118] GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994).

[119] *Id*.

[120] Martin Marietta Corp. v. Dalton, 974 F. Supp. 37 (D.D.C. 1997).

[121] *Id*. at 38.

[122] *Id*.

[123] *Id*.

[124] *Id*. at 39.

[125] *Id*.

[126] *Id*. at 40.

[127] *Id*. at 41.

The combined effect of the courts' general deference to disclosure and its skepticism of harm created by disclosure led to a generally permissive legal precedent for disclosure of unit prices. This permissive precedent lasted from FOIA's inception in 1966 to the end of the 20th century.[128] During this time, most federal courts, including the D.C. Court of Appeals, historically applied *National Parks* and found that agencies must disclose unit prices under the FOIA.[129] Many jurisdictions still practice under this precedent.[130] However, the D.C. Court of Appeals made a sudden departure from this permissive legal precedent in a surprising case just over ten years ago.[131] In the following section, this paper will examine how the D.C. Court of Appeals departed from the precedent of unit price disclosure under the FOIA and has created a near *per se* rule against the disclosure of unit prices.

III. D.C. Court of Appeals' Departure from the Disclosure Precedent

While most courts favored disclosure of unit prices when they applied the *National Parks* substantial competitive harm test, the D.C. Court of Appeals changed that precedent in 2004 with its controversial ruling in *McDonnell Douglas v. National Aeronautics and Space Administration*.[132] In *McDonnell Douglas*, the FOIA Group, Inc. (a law firm dedicated to filing FOIA requests)[133] requested a copy of the government contract, including specific information concerning launch service prices, cost figures for specific launch service components and overhead, labor rates, and profit figures and percentages.[134] McDonnell Douglas objected, stating that the release of the line items prices would allow its customers to "ratchet down" their prices and help competitors to underbid it for future contracts.[135] The NASA, after receiving McDonnell Douglas's protest, determined that release would not cause McDonnell Douglas substantial competitive harm.[136] McDonnell Douglas filed a reverse FOIA suit but the district court agreed with NASA, prompting McDonnell Douglas to appeal.[137]

On appeal, NASA argued that it had properly released the unit prices for two reasons. The NASA's first argument to the court was that disclosure of unit prices was the cost of doing business with the government.[138] The court harshly dismissed this assertion as "either assum[ing] the conclusion, or else assum[ing] a legal duty or authority on the government to publicize these prices."[139] The NASA's second argument was that disclosure of the unit prices would not enable competitors to underbid McDonnell Douglas in future contracts since price was only one of many factors for contract award.[140] The court flippantly dismissed this argument as a "response . . . too silly to do other than to state it, and pass on."[141] The court then ruled that "under the present law, whatever may be the desirable policy course, [McDonnell Douglas] ha[d] every right to insist that its line item prices be withheld as confidential."[142]

The court's ruling created a precedent within the D.C. circuit that substantial competitive harm would follow the disclosure of unit prices to a contractor's competitors, and would thus exempt the information from disclosure.[143] The general preference for disclosing unit prices under FOIA had now changed. The most influential court on FOIA cases appeared to dismiss FOIA's underlying policy of disclosure and view unit prices as *per se* confidential information exempt from disclosure.[144] If unit prices are exempt under Exemption 4, then government agencies are absolutely prohibited from disclosing unit prices.[145] In each successive unit price case brought before the D.C. circuit, the court answered affirmatively and repeatedly that unit prices are confidential and prohibited from disclosure.

In the decade following *McDonnell Douglas*, the D.C. courts have continually ruled that release of unit prices constitutes substantial competitive harm if the contractor

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[128] Paul G. Dembling & Stefan M. Lopatkiewicz, *Access to Contractor Records Under the Freedom of Information Act*, *in* 2-10 FEDERAL CONTRACT MANAGEMENT 10.15, 10.15(4)(b)(i) (Matthew Bender & Co., Inc. ed., 2009).

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303 (D.C. Cir. 2004).

[133] *See* FOIA Group Inc., http://www.foia.com (stating that "[f] or a low fixed fee our legal staff files and coordinates each FOIA request to ensure that our clients obtain the most cost efficient information release while ensuring them 100% anonymity and confidentiality").

[134] *McDonnell Douglas Corp.*, 180 F.3d at 305.

[135] *Id*. at 306.

[136] *Id*. at 307.

[137] *Id*.

[138] This was a common belief by most federal government agencies at this time. *See* GUIDE TO FOIA, *supra* note 30, at 344 (noting that this was a general principle followed by the courts and agencies). The belief was based upon early court cases within the D.C. as well as U.S. Government Accounting Office bid protest decisions. Pavlick & Pearson, *supra* note 102, at 10.

[139] *McDonnell Douglas Corp.*, 180 F.3d at 306.

[140] *Id*.

[141] *Id*.

[142] *Id.* at 307.

[143] *See* Pavlick & Pearson, *supra* note 102, at 10 (analyzing the court's decision in *McDonnell Douglas*).

[144] *Id*.

[145] *See* discussion *supra* Part II.C.2 (showing how agencies lost their discretion to disclose exempted material under FOIA when the courts interpreted the Trade Secrets Act and the APA to be inextricably linked to the exempt status of requested agency records).

raises the issue.[146] Although the D.C. Court of Appeals specifically stated that it had not created a *per se* rule,[147] subsequent reverse-FOIA cases continually ruled that unit prices were exempt from disclosure.[148] Such repeated rulings frustrated some members of the appellate court, who wrote strong dissents stating that the court's legal precedent of non-disclosure frustrated the purpose of FOIA and created bad policy.[149]

Despite the concern of some of the appellate court judges, the precedent of non-disclosure is now so well established in the D.C. Court's jurisdiction that there is at least a perception by the district court judges that release of unit prices is *per se* prohibited. One district court judge, in following the de facto precedent of non-disclosure of unit prices, found that a contractor's eight-year-old unit price information was not releasable because it would cause the contractor substantial competitive harm.[150] The court made this ruling despite echoing previous dissenters, stating, "[u]nder the present law, whatever may be the desirable policy course, [contractors] have every right to insist that its [unit] prices be withheld . . . [although] it is not the optimal policy course."[151] Although the district court judge did not state why the appellate court's precedent of non-disclosure was "not the optimal policy course," the judge's comment infers that the disclosure of unit prices under FOIA would be sound policy. In the next section, this paper will review the need to change the D.C. Court of Appeals' legal precedent in order to create a more sound procurement policy.

IV. The Need to Change the Non-Disclosure Precedent

As voiced in the minority's dissent within the D.C. Court of Appeals, the court's precedent of preventing disclosure of unit price information is inconsistent with FOIA's fundamental objective of promoting governmental transparency. The D.C. circuit's consistent decisions prohibiting disclosure of unit prices is also contrary to the President's renewed interest in promoting accountability in government procurement. Furthermore, the court's hostile approach to unit price disclosure is frustrating the basic principles of competition, integrity, and transparency in government procurement. The following sections will discuss both the policy shift towards a more scrutinized procurement system and the economic benefits of disclosing unit price information.

A. The Policy Shift to More Disclosure

Shortly after taking office, the President of the United States, Mr. Barack Obama, promised a new age of openness in the federal government.[152] In carrying out his promise, he issued a presidential memorandum to all federal agencies stating:

> In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike . . . . In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.[153]

Following his increased emphasis for a more open government, the President directed the U.S. Attorney General to "issue new guidance governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency."[154]

In accordance with the presidential order, the U.S. Attorney General authored a memorandum revising the Department of Justice's (DoJ) policy regarding requests

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[146] *See, e.g.*, McDonnell Douglas Corp. v. U.S. Dep't. of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004) (ruling that disclosure of option year prices and vendor pricing CLINs is prohibited); MCI Worldcom, Inc. v. Gen. Servs. Admin., 163 F. Supp. 2d 28 (D.D.C. 2001) (ruling that future years' pricing information under contracts was prohibited); Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37 (D.C. Cir. 2008) (ruling that the Air Force could not release line-item pricing and hourly labor rates information in contract to provide turbojet engine repair, overhaul, and maintenance services); *see also* Essex Electro Eng'rs, Inc. v. U.S. Sec'y of Army, 686 F.Supp. 2d 91 (D.D.C. 2010) (ruling that the release of a contractor's unit prices would cause harm to the contractor's competitive position, and that the contractor only has to show potential competitive injury, not actual harm, for Exemption 4 to apply) .

[147] *See McDonnell Douglas Corp.*, 375 F.3d at 1193.

[148] *See id.*

[149] *Canadian Commercial Corp.*, 514 F.3d at 43–44 (concurring opinion stating that it is now an established rule in the circuit that release of unit prices is prohibited under *National Parks*, 498 F.2d 765 (D.C. Cir. 1974), and that seemed inconsistent with FOIA's fundamental objective).

[150] General Elec. Co. v. U.S. Dep't of Air Force, 648 F. Supp. 2d 95, 104 (D.D.C. 2009).

[151] *Id*. at 105.

[152] *See* Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

[153] *Id*.

[154] *Id*.

under FOIA.[155] The Attorney General stated, in the memorandum, that agencies "should not withhold information simply because it may do so legally."[156] Instead, the Attorney General emphasized that agencies should make "discretionary" disclosures of information. Specifically he wrote "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."[157]

The DoJ's new approach to FOIA exemptions was a departure from the previous administration's guidance. Under the previous administration, the DoJ would defend an agency's decision to deny a FOIA request unless the decision "lack[ed] a sound legal basis or present[ed] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[158] The DoJ now defends the denial of a FOIA request only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) the law prohibited disclosure.[159] The new guidance in favor of disclosure has some contractors concerned about the disclosure of their confidential commercial information.[160] Under pressure to follow the new policy, government agencies may now disclose unit prices where before they may have decided to withhold under Exemption 4.[161]

Contractors, however, may have nothing to fear under the D.C. Court of Appeal's interpretation of unit prices and Exemption 4. Since the court has repeatedly ruled that agencies should not disclose unit prices pursuant to Exemption 4, government agencies may decide that the law prohibits unit price disclosure.[162] This understanding means that the DoJ will likely defend the agency in litigation demanding release of unit prices, putting the government on the side of protecting unit prices from disclosure. If the D.C. Court of Appeals' precedent leads to agency reluctance to release unit prices, their unwillingness to disclose would be contrary to President Obama's push for more government transparency. Transparency, as shown in the next section, tends to lead to more integrity and competition in government procurement.

B. Economic Considerations for Unit Price Disclosure

Competition is the driving engine of government procurement.[163] Indeed, the importance of competition in government procurement is codified in U.S. law.[164] The Competition in Contracting Act of 1984 requires that government agencies conduct procurement through "full and open competitive procedures."[165] The D.C. Court of Appeals, however, has routinely ruled that releasing unit price information in awarded contracts decreases competition by enabling competitors to undercut the current procurement contract.[166] Contrary to the court's rulings, releasing unit prices may actually help in the procurement process by promoting basic fundamental economic principles.

In the government procurement system, there are three fundamental economic principles that aim to produce an effective and efficient procurement system.[167] The three principles are competition, integrity, and transparency.[168] These principles encourage participation in the system by treating competing contractors fairly and increasing the public's confidence in the procurement system.[169] This section further examines each principle below.

1. Competition

It is a well-established principle that full and open competition produces the best value.[170] Competition enables the government to increase the quantity, quality and diversity in its contractors.[171] Competition also creates incentives for suppliers to deliver products with emphasis on time, quality, and cost.[172] Additionally, competition motivates contractors to innovate and become more efficient

[155] Memorandum from the U.S. Attorney Gen. to Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *See* James J. McCullough & William S. Speros, *Feature Comment: The Obama Administration's Emerging Policies on Freedom of Information, Transparency, and Open Government—New Benefits and Costs for Government Contractors?*, 51 GOV'T CONTRACTOR 15, Apr. 15, 2009, *available at* http://www.ffhsj.com/siteFiles/Publications (discussing how contractors are rushing to the court to file reverse-FOIA suits to protect commercial information).

[161] *Id*.

[162] *Id*.

[163] Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 3 PUB. PROCUREMENT L. REV. 103, 104 (2002).

[164] Competition in Contracting Act, 41 U.S.C. § 253 (2006).

[165] *Id*. § 253(a).

[166] *See* discussion *supra* Part V.I.D for how the D.C. circuit relied upon the contractors' assertions that release of unit prices would decrease their ability to compete in future contracts.

[167] Schooner, *supra* note 163, at 104.

[168] *Id*.

[169] Am. Bar Ass'n, *Report to Accompany Principles of Competition in Public Procurements*, http://www.abanet.org/contract/admin/pocrpt.html (last visited Jan. 13, 2010) [hereinafter *Principles of Competition*].

[170] Schooner, *supra* note 163, at 104.

[171] *Id*.

[172] *Id*.

and cost effective while still producing the best product to meet the requirements of government.[173] Competition creates desirable economic efficiencies by identifying the most efficient supplier of a certain good or service while determining the most efficient and lowest price.[174] But competition, in and of itself, is not possible without integrity and transparency in the procurement system.[175]

2. Integrity

Integrity in the procurement system is critical to the success of competition.[176] Without confidence in the fairness and equality in the process, contractors may lose faith that agencies will consider their bids upon the merit of their proposals.[177] To support contractor confidence, the rules for competition must be fair and fully disclosed upfront.[178] There are many laws and regulations that promote fairness by preventing improper agency bias, but transparency in the system is also important in preventing bias and promoting integrity.[179] Just as "sunlight is said to be the best of disinfectants,"[180] opening the procurement system to the scrutiny of stakeholders, civil society, and the wider public best enforces integrity.

3. Transparency

Transparency in the procurement system holds both government contractors and officials accountable for the expenditure of public funds.[181] Opening records of procurement information, "demonstrates the integrity of the competitive system, and public confidence in the fairness of the procurement system increases the quantity and quality of the competition."[182] Transparency is therefore crucial for fostering public trust, from both taxpayers and potential government contractors.

In addition to fostering public trust, transparency in government procurement actions benefits competition and lowers procurement costs. Economic theories state that intelligence on a competitor's actions and policies in government procurements may lead to more competition.[183] Intelligence concerning a competing contractor's pricing and cost of bid components lowers the barriers to entry and invites new entrants into the market place.[184] Disclosing a successful government contractor's unit price information would increase competitor intelligence on what price ranges are successful for future government contracts. The increased competitor intelligence would therefore lead to more competition as more prepared contractors enter the procurement market. The procurement system would benefit from the robust competition, as more competition inevitably leads to lower prices.[185]

As beneficial as transparency is to the procurement system, the level of transparency must be balanced against disclosing either the commercially sensitive information in bid proposals or information rising to the level of a trade secret.[186] Disclosure of this type of data would undermine the trust contractors place in the fairness of the procurement system, discouraging competition.[187] It is therefore imperative that restrictions should apply in the disclosure of truly commercially sensitive data.

The government should protect trade secrets and other proprietary information, as release of such information would risk the labor and innovation of private entities. Confidentiality, however, should only be observed when ascertainable harm to the contractor is foreseeable and is not overwhelmed by the public's interest in knowing what its government is doing in the public's name.[188] Therefore, access to information should be balanced by clearly defined rules for ensuring necessary confidentiality. [189] Restricting access to unit price information, however, should not be based upon a contractor's efforts to prevent future

[173] *Id.*

[174] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PUBLIC PROCUREMENT 19 (2007), http://www.oecd.org/dataoecd/25/48/39891049.pdf.

[175] Schooner, *supra* note 163, at 104.

[176] *Principles of Competition*, *supra* note 169, ¶ 10.

[177] *Id*.

[178] *Id*.

[179] Schooner, *supra* note 163, at 107.

[180] Justice Louis D. Brandeis, *Other People's Money*, HARPER'S WKLY., November 29, 1913, *available at* http://www.law.louisville.edu/library/collections/brandeis/node/196.

[181] Schooner, *supra* note 163, at 111.

[182] *Principles of Competition*, *supra* note 169, ¶ 8.

[183] Steffan Huck et al., *Does Information About Competitor's Actions Increase or Decrease Competition in Experimental Oligopoly Markets?*, 18 INT'L J. OF INDUS. ORG. 1, 39–57 (2000), *available at* http://129.3.20.41/eps/io/papers/9803/9803004.pdf.

[184] Dakshina G. DeSilva et al., *An Empirical Analysis of Entrant and Incumbent Bidding in Road Construction Auctions*, 51 J. OF INDUS. ECON. 3, 295–316 (Sept. 2003), *available at* http://webpages.acs.ttu.edu/kdesilva/ /JOIE%20-%202003.pdf (finding that entrants to the government procurement system are at a significant disadvantage to established contractors because of a lack of information and experience, and that access to the pricing structure of previous contractors may alleviate the disadvantage and increase competition).

[185] Schooner, *supra* note 163, at 104.

[186] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PROMOTING TRANSPARENCY: POTENTIALS AND LIMITATIONS 10 (2007), http://www.oecd.org/dataoecd/43/36/38588964.pdf.

[187] *Id*.

[188] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT 23 (2009), http://browse.oecdbookshop.org/oecd/pdfs/browseit/4209061E.PDF.

[189] *Id*.

competition for government contracts. Instead, government agencies and courts should view the release of unit prices in light of balancing the interests of both the public and the contractor. In the following section, this paper will show how disclosure of unit prices will help restore the balance of confidentiality and the public trust.

C. Confidentiality and the Public Interest

In order to restore FOIA's purpose of transparency in government actions and promote more competition and accountability in the procurement process, the D.C. Court of Appeal's legal precedent against disclosure of unit prices must be reversed. Congress should create a new legal system for evaluating the confidentiality of unit prices under FOIA. The legal system should strive to restore the balance between the public interest of disclosure and the private interest of withholding. The best means of restoring this balance is to look at the balance Congress made in drafting Exemption 4 and the practice of protecting confidential commercial information before FOIA.

When drafting Exemption 4, Congress compared government efficiency with individual privacy.[190] While early case law recognized this balance, the courts do not have a clear balancing test that incorporates the public interest in Exemption 4.[191] Instead, the courts have established a review of an agency's decision that focuses on the expected harm to the contractor, instead of focusing on the public's interests in knowing what its government paid for a good or service.[192] The new system of review should include a balancing test that incorporates the public interest. Incorporating the public interest into Exemption 4 will prevent the distortion of balance found in the D.C. Court of Appeals' *per se* prohibition of unit price disclosure.

While allowing the courts to promote the public's interest, the new system should still protect the legitimate commercial interests of the contractor. The best means of allowing the contractor to protect its interest is to encourage the contractor to be proactive with the government agency.[193] By allowing the contractor to negotiate confidentiality of its commercially sensitive information, as they did before FOIA, the contractor is in the best position to determine the risk level that would accompany disclosure of unit prices. Ultimately, however, it is the agency's decision whether to accept the confidentiality of the information the contractor submits. Nevertheless, an agency's agreement to label a contractor's information as confidential should still be subject to the overall balancing test to prevent inappropriate decisions by agency officials.

Since the FOIA and the common law do not take into account a public interest test for disclosure of unit prices and confidentiality clauses, we must look to our international peers and see how their countries treat commercially sensitive information under their FOIA laws. By analyzing and comparing a legal system that incorporates confidentiality clauses and a public interest test, we are able to evaluate how such a system favors disclosure of unit price information when it promotes competition, decreases procurement costs, and furthers the public policy of monitoring what our government does with taxpayer money. We can also evaluate whether such a system protects truly sensitive information. The United Kingdom (U.K.) has such a legal system.[194] An examination of the U.K.'s law on confidential commercial information follows.

V. The United Kingdom's Approach to Confidential Commercial Information

The United States was not the first or last country to pass legislation providing a general right to access to information held by its public agencies.[195] There are now over sixty countries around the world that have freedom of information laws.[196] Each of these countries designed their freedom of information laws to disclose information as a matter of right, with enumerated exemptions prohibiting the release of particular kinds of information.[197] Most of these laws also provide protection for trade secrets and for other sensitive confidential business information belonging to private enterprises.[198] Some countries specifically exempt

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[190] Nat'l Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974).

[191] The FOIA does not have a public interest test applicable to its exemptions. *See* Freedom of Information Act, 5 U.S.C. § 552 (2006).

[192] *See Nat'l Parks and Conserv. Ass'n*, 498 F.2d 765.

[193] *See* LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 14.4 (4th ed. 2009) (advising contractor to "tag or otherwise identify any such material as a trade secret when filed with the government agency" in an effort to prevent disclosure of sensitive information).

[194] *See* discussion *infra* Part V.A–C.

[195] Sweden, with established freedom of information law since the eighteenth century, is recognized as the first country to provide a right to government information. THE LAW OF FREEDOM OF INFORMATION 260 (John MacDonald & Clive H. Jones eds., 2003) [hereinafter FREEDOM OF INFORMATION].

[196] These countries include: Albania, Argentina, Armenia, Australia, Austria, Belgium, Belize, Bosnia & Herzegovina, Bulgaria, Canada, Colombia, Croatia, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Hong Kong, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, South Korea, Kosovo, Latvia, Liechtenstein, Lithuania, Macedonia, Mexico, Moldova, Montenegro, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Thailand, Turkey, Trinidad & Tobago, Ukraine, United Kingdom, United States, Uzbekistan, Zimbabwe. Freedominfo Home Page, http://www.freedominfo.org.

[197] FREEDOM OF INFORMATION, *supra* note 195, at 260.

[198] Commercial Secrets, http://right2info.org/exceptions-to-access/commercial-secrets (last visited Nov. 26, 2009).

information provided in confidence.[199] However, the laws of several countries contain either an explicit or implicit public interest override concerning confidential commercial information, whether it was provided in confidence or not.[200] The United States' FOIA does not contain either of these provisions.[201] However, modern liberal-democracies such as the U.K. do.[202] The following section is a discussion of how the U.K. treats commercial information submitted to its government agencies.

A. Commercial Interests Exemption

Under the U.K.'s Freedom of Information Act (UKFOIA), commercial interests are exempt from disclosure under two circumstances. The first exemption is a class-based exemption based upon whether the information sought is a trade secret.[203] The second exemption is a prejudice-based exemption for commercial interests similar to the *substantial competitive harm* test used in U.S. courts.[204] This second exemption states that a public authority is exempt from the duty to communicate requested information where information disclosure "would, or would be likely to, prejudice the commercial interests of any person."[205]

The U.K. considers the term *commercial interests* under this exemption to mean "a person's ability to successfully participate in a commercial activity."[206] In determining whether disclosure of information would prejudice the commercial interests of the submitter, the U.K. Information Commissioner[207] (Commissioner) considers the following factors: (1) the commercial interests themselves and how disclosure might prejudice the submitter; (2) whose interests they are; (3) whether release of the information would damage the submitter's business reputation or the confidence that customers, suppliers, or investors may have in it; (4) whether disclosure would have a detrimental impact on its commercial revenue or threaten its ability to obtain supplies or secure finance; or (5) whether disclosure would weaken the submitter's position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors.[208]

A key point to note is that the U.K.'s *commercial interests* exception is only a temporary qualified exemption. While considering all of the previously discussed factors, the Commissioner recognizes that the commercial sensitivity of information may diminish over time.[209] For example, release of unit prices during the bidding process might be more commercially harmful to a government contractor than after the contract is awarded.[210] Thus, in the U.K., if a company wants to protect its commercial information indefinitely, the second commercial interest exemption may not be the best exemption to claim.[211] Under the UKFOIA, a business has a better chance to protect its commercially sensitive information by having a government official classify the information a confidential.[212] The next section further examines the U.K.'s confidentiality exemption.

B. Confidential Information

While the UKFOIA has a specified exemption for information constituting a trade secret or other information that "would, or would be likely to, prejudice the commercial interests of any person,"[213] the UKFOIA also has a separate section in the law that prevents a disclosure of information provided in confidence to a public agency.[214] The exemption found in section 41(1) of the UKFOIA only applies if disclosing the information would constitute an actionable breach of confidence.[215] This is similar to

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[199] The United Kingdom, Ireland, and Australia are such countries. FREEDOM OF INFORMATION, *supra* note 195, at 289–93.

[200] The United Kingdom, Scotland, Australia, and New Zealand provide public interest tests to their exemptions. *Id*.

[201] *See* Freedom of Information Act, 5 U.S.C. § 552 (2006).

[202] FREEDOM OF INFORMATION, *supra* note 195, at 289–93.

[203] *Id.* at 204. The term "trade secret" is not defined in the UKFOIA, but it is generally understood under the common law as commercial information protected by an obligation of competence. *Id*. at 204–05.

[204] *Id*.

[205] Freedom of Information Act § 43(2), 2000, c. 36 (Eng.).

[206] MINISTRY OF JUSTICE, FREEDOM OF INFORMATION GUIDANCE SECTION 43—COMMERCIAL INTERESTS 4 (2008), http://www.justice.gov/uk/about/docs/foi-exemption-s43.pdf [hereinafter MINISTRY OF JUSTICE].

[207] The Information Commissioner is charged with enforcing the UKFOIA. The Commissioner's general responsibilities are to: (1) promote good practice, the observance of the requirements of the Act and the provisions of the codes; (2) disseminate information to the public about the operation of the Act, good practice and other matters within the scope of his functions and to give advice as to any of those matters; (3) assess, with the consent of any public authority, whether it is following good practice; and (4) consult the Keeper of Public Records about the promotion and observance of the section 46 code in relation to public records. Freedom of Information Act § 47, 2000, c. 36 (Eng.).

[208] MINISTRY OF JUSTICE, *supra* note 206, at 4–5.

[209] *Id.* at 5.

[210] *Id*.

[211] *See id*. at 544–45 (discussing the need for businesses to be mindful of the statutory exemptions, and that section 41 (confidential information) is an absolute exemption while section 43 (commercial interests) is a qualified exemption).

[212] *Id.*

[213] Freedom of Information Act § 43(1)–(2), 2000, c. 36 (Eng.).

[214] *Id.* § 41(1). Section 41(1) exempts information if: "(a) it was obtained by the public authority from any other person (including another public authority, and (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person." *Id*.

[215] INFORMATION COMM'R OFFICE (ICO), FREEDOM OF INFORMATION ACT AWARENESS GUIDANCE NO. 2, at 1 (2006), http://www.ico.gov.uk/upload/documenhttp://www.ico.gov.uk/upload/documents/library/freedom_of_information/ detailed_specialist_ guides/awareness_guidance_2_-_information

confidentiality clauses in the United States. Under British common law, a contractor can bring an action for breach of confidence to prevent the disclosure of commercial information of a confidential nature.[216]

Information is confidential if the person submitting the information to the public authority does so in circumstances importing an obligation of confidence.[217] Confidentiality can arise in a wide variety of circumstances, but the most straightforward example in which a confidential obligation will arise is when public officials enter into procurement contracts with private contractors.[218] However, in order for information to be protected from disclosure by an obligation of confidence, it must not be trivial information or already publicly available.[219]

Even when confidentiality arises in procurement contracts, the confidentiality of that contract is still subject to a balancing test that includes the public's interest in knowing the terms of the contract.[220] The public interest, as the next section shows, may allow agencies to disclose a contractor's unit prices even when an exemption applies.

C. Public Interest Overrides

Although U.K. government officials are not required to disclose a government contractor's submitted information if it falls under either the commercial interests or confidentiality exemptions, both exemptions are subject to the public interest. Under the UKFOIA, the commercial interests exemption is a qualified exemption that is statutorily based in section 2 of the UKFOIA.[221] Section 2 of the UKFOIA is subject to a statutorily prescribed public interest test.[222] The confidentiality exemption, however, is an absolute exemption to disclosure that is not subject to the statutory public interest test found in the UKFOIA.[223] Despite it being an absolute exemption, the confidentiality exemption is still subject to the public interest. Instead of an explicit public interest test, the confidential exemption has an inherent public interest defense found in the common law that is similar to the balancing test provided in the *commercial interests* exemption.[224] This section reviews how the Commissioner and U.K. courts apply the public interest test to both exemptions for commercial interests and information submitted in confidence.

1. Statutory Public Interest Test for Commercial Interests Exemption

Even when the release of commercial information prejudices a government contractor, a U.K. government official may still release the information if the official finds that releasing the information serves the wider public interest.[225] The Commissioner has recognized that there is a public interest in disclosing commercial information in order to ensure that: (1) "there is transparency in the accountability of public funds"; (2) "there is proper scrutiny of government actions in carrying out licensing functions in accordance with published policy"; (3) "public money is being used effectively, and that departments are getting value for money when purchasing goods and services"; (4) "departments' commercial activities, including the procurement process, are conducted in an open and honest way"; and (5) "business can respond better to government opportunities."[226] In determining whether information is exempt from disclosure for being commercially sensitive, the Commissioner weighs these public interest factors against the privacy interest of the submitter. As the next section will show, this balancing test that the Commissioner applies to the qualified exemption of commercial information is similar to the test the U.K. courts use in determining the applicability of the confidentiality exemption.[227]

2. Inherent Public Interest Test for Confidential Exemption

Although the confidential exemption is an absolute exemption, it is a rather dubious absolutism because the courts still subject it to its own public interest test. Since the UKFOIA does not provide for a cause of action to prevent

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_provided_in_confidance.pdf [hereinafter UKFOIA AWARENESS GUIDANCE].

[216] *Id*. at 2.

[217] *Id*.

[218] When entering into contracts with private contractors, United Kingdom public officials are warned that the contractors may request confidentiality clauses pertaining to the terms of the contract. *Id*. at 5. Upon this circumstance, the public official is instructed to carefully consider these terms in view of their obligations to disclose information under the UKFOIA. *Id.* at 1.

[219] *Id*. at 3.

[220] FREEDOM OF INFORMATION, *supra* note 195, at 601.

[221] *Id.* at 151.

[222] *Id*. at 35–36.

[223] *Id*. at 166.

[224] *Id*. at 601.

[225] *See* Freedom of Information Act § 2, 2000, c. 36 (Eng.). The act states,

> In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—(a) the information is exempt information by virtue of a provision conferring absolute exemption, or (b) in all the circumstances of the case, the *public interest* in maintaining the exemption outweighs the public interest in disclosing the information.

Id. (emphasis added).

[226] FREEDOM OF INFORMATION, *supra* note 195, at 11.

[227] *Id*. at 601.

disclosure, the party seeking to prevent disclosure must seek an injunction for a breach of confidence in the common law.[228] This is similar to the reverse-FOIA suit in the United States. Unlike the United States, however, U.K. courts will not enforce an obligation of confidence where to do so would be contrary to the public interest.[229] In cases concerning the public interest defense, U.K. courts have emphasized that their task is to balance the public interest in honoring an obligation of confidence in a particular case with the public interest in disclosing the information in question.[230] Consequently, the legal exercise that the courts conduct in a breach of confidence case is very similar to that which the Commissioner performs in the public interest test under the UKFOIA.[231] Contrary to the experience of unit price cases in the United States, when comparing the exemptions to disclosure against the public interest, it is very likely that unit prices in U.K. government contracts will be disclosed. The U.K.'s precedent of disclosing unit prices pursuant to the public interest is examined further below.

D. United Kingdom's Precedent of Disclosing Unit Prices

In the few cases the Commissioner has decided concerning the disclosure of a contractor's unit price information,[232] the Commissioner has routinely held that agencies should disclose unit prices under the UKFOIA.[233] In these unit price cases, the Commissioner has ruled that agencies should disclose unit prices for two general reasons. First, the Commissioner has ruled that government contractors are unlikely to suffer substantial harm from the release of their unit prices charged to the government.[234] Secondly, the Commissioner has found that any harm that the contractor suffers from the release of unit prices is outweighed by public's interests in knowing the amount its government pays to private sector companies for goods and services.[235] Specifically, the Commissioner has found that disclosure of unit prices serves the public interest in that it increases competition[236] and lowers procurement costs,[237] while increasing transparency and accountability of government procurement decisions.[238] The Commissioner's combined skepticism of contractor harm and respect for the benefits of unit price disclosure has led to disclosure of unit prices, as is discussed further below.

1. Skeptical View of Contractor Harm

Unlike the D.C. Court of Appeals, and like many of the other courts in the United States, the U.K. Commissioner seems skeptical of a contractor's claim that release of its unit prices will cause it substantial harm in the marketplace. In his decisions, the Commissioner has considered contractor and agency claims that release of the contractor's unit prices would "allow rival suppliers to reduce their own prices,"[239] and "allow competitors of the contractor to undermine its tenders in contracts of a similar nature."[240] The Commissioner has ruled that these claims of harm to legitimate commercial interests are meritless.[241]

In considering the assertion that disclosure of unit prices would allow a competitor to reduce its own prices and underbid the contractor in future cases, the Commissioner has ruled that these assertions of competitive disadvantage are very unlikely. First, the Commissioner has stated that release of unit price information would only reveal "how much a particular contractor has charged for a particular job."[242] The Commissioner reasoned that it would not follow that revealing the costs would allow a competitor to reduce its own prices, as prices consist of various fluctuating

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[228] *Id*. at 596. To bring suit under the common law for breach of confidence, the party seeking an injunction must meet three elements. *Id.* First, the information itself must be confidential. *Id.* Second, the information must have been submitted to another in circumstances importing an obligation of confidence. *Id.* Third, the receiver of information must have disclosed the information without authorization, to the detriment of the submitter. *Id.* Both trade secrets and commercially sensitive information are often viewed as confidential information subject to a breach of confidence suit. *Id*. at 544–45.

[229] *Id*. at 601.

[230] *Id*. at 170.

[231] *Id*.

[232] The author only found three decisions published by the Information Commissioner's Office pertaining to unit prices and the UKFOIA's exemptions for confidentiality and prejudice to commercial interests and trade secrets. The ICO publishes its decisions on its website, located at http://www.ico.gov.uk.

[233] *See* East Riding of Yorkshire Council, Decision Notice No. FS50090685 (U.K.), Info. Comm'r Office, Jan. 28, 2008, http://www.ico.gov/uk/upload/documents/decisionnotices/2008/fs_50090685.pdf (finding that the release of how much a public park pays its gas supplier for a 47kg cylinder of gas had to be released under the UKFOIA); East Riding of Yorkshire Council, Decision Notice No. FER0079969 (U.K.), Info. Comm'r Office, Feb. 5, 2008, http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fer_0079969.pdf (ruling that the UKFOIA required the amount the public authority paid a waste management company per ton of waste removed from a park to be disclosed); Bristol City Council, Decision Notice No. FS50164262 (U.K.), Info. Comm'r Office, May 27, 2009, http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50164262.pdf (requiring a school district to disclose the details of contractor costs for information technology services).

[234] *See* discussion *infra* Part V.D.1.

[235] *See* discussion *infra* Part V.D.2.

[236] *See East Riding of Yorkshire Council*, Decision Notice No. FER0079969.

[237] *See Bristol City Council*, Decision Notice No. FS50164262.

[238] *Id*.

[239] East Riding of Yorkshire Council, Decision Notice No. FS50090685 (U.K.), Info. Comm'r Office, Jan. 28, 2008, at 9.

[240] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 13.

[241] *Id*.

[242] *East Riding of Yorkshire Council*, Decision Notice No. FS50090685, at 9.

factors.[243] Second, in order for competitors to be able to ascertain the prices that the contractor might submit in future contracts, the competitor would have to be able to identify the pricing model the contractor used.[244] The Commissioner has found that disclosure of unit prices themselves does not reveal the means of accurately identifying the pricing model used by a contractor.[245] Thus, competitors would be unable to predict the prices that a contractor may decide to submit in any potential bids for future contracts.[246] Finally, the Commissioner has stated that the complaining contractor "would benefit from the same transparency when competing for other contracts."[247] In other words, releasing unit prices in similar government contracts would level out the playing field for all potential government contractors, not just the contractor's rivals.[248] For these reasons, the Commissioner found that it is unlikely that contractors would be prejudiced so much in the marketplace as to warrant exempting the disclosure of unit prices under the UKFOIA.[249] But even in those rare instances when the Commissioner found release of a contractor's unit prices would harm the contractor's legitimate commercial interests, the Commissioner has surmised that the public interest would require disclosure anyhow.[250] As will be examined in the next section, the Commissioner often finds that the public interest outweighs contractor harm from the release of unit price information.

2. The Public Interest Outweighs Contractor Harm

Even in those rare circumstances when the release of unit price information would harm the contractor, the Commissioner has found that the public interest outweighs whatever harm the contractor may suffer. Similar to the legal precedent before the D.C. Court of Appeals' precedent of non-disclosure, the Commissioner has ruled that the UKFOIA's strong policy of disclosure outweighs the contractor's privacy interest in protecting unit prices.[251] Specifically, the Commissioner seems to base his decisions to disclose unit price on the basic principles that transparency in the procurement system increases competition, lowers procurement costs, and promotes honesty and accountability in the government procurement system.

In each of the unit price cases reviewed for this article, the Commissioner has stated that the public interest benefits from more competition in the procurement system.[252] Similar to the findings of the economic studies discussed in section IV,[253] the Commissioner has stated that disclosure would attract more competitors for government contracts because "[c]ompetitors to the current supplier may see that they could also provide the same service to the [government] and make a profit."[254] Additionally, disclosure of unit prices would attract new entrants to the procurement system because it will "allow inexperienced contractors to have an understanding of the range of prices regularly tendered by experienced providers."[255] The result of the increased competition would almost inevitably drive down the costs to the government for procuring goods and services.[256] Thus, the Commissioner concluded that there is a "positive public interest in giving contractors the opportunity to consider tendering with greater knowledge of the current prices being accepted."[257]

In addition to increasing competition and lowering procurement costs, the Commissioner has also favored disclosure of unit prices because of the strong public interest in understanding the circumstances in which the government provides public money to private sector.[258] The Commissioner has stated that disclosure of unit prices would "allow proper accountability of spending of public funds."[259] Accountability of public spending, the Commissioner reasoned, would come from the "greater scrutiny of the contracts the government makes on behalf of its citizens."[260] The level of transparency gained from disclosure of unit prices would thereby "encourage integrity and quality in the handling of such agreements which are matters of legitimate public interest."[261] Disclosure of unit prices, the Commissioner has reasoned, would therefore benefit the

[243] *Id*.

[244] Bristol City Council, Decision Notice No. FS50164262, Info. Comm'r Office, (U.K.), May 27, 2009, at 16.

[245] *Id*.

[246] *Id*.

[247] *Id*. at 17.

[248] *Id*.

[249] *Id*. at 9; East Riding of Yorkshire Council, Decision Notice No. FER0079969 (U.K.), Info. Comm'r Office, Feb. 5, 2008, at 15.

[250] *Bristol City Council*, Decision Notice No. FS50164262, at 19.

[251] *Id*.

[252] *See* East Riding of Yorkshire Council, Decision No. FS50090685, Info. Comm'r Office (U.K.), Jan. 28, 2008; *East Riding of Yorkshire Council*, Decision Notice No. FER0079969; *Bristol City Council*, Decision Notice No. FS50164262.

[253] *See* articles cited *supra* notes 183, 184 (stating that competitor's intelligence about a contractor's pricing policies leads to more competition).

[254] *East Riding of Yorkshire Council*, Decision Notice No. FS50090685, at 9.

[255] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 15.

[256] *East Riding of Yorkshire Council*, Decision Notice No. FS50090685, at 9.

[257] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 14.

[258] Bristol City Council, Decision Notice No. FS50164262, Info. Comm'r Office, (U.K.), May 27, 2009, at 19.

[259] *Id*.

[260] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 13.

[261] *Bristol City Council*, Decision Notice No. FS50164262, at 9.

procurement system by increasing competition and promoting more accountability for government spending. This is a lesson that the United States can take from the U.K.'s treatment of unit prices.

E. Lessons Learned from the U.K.'s Treatment of Unit Prices

As was shown in the previous sections, the UKFOIA is designed to protect legitimate commercial interests of contractors, but only in so far as legitimate privacy interests do not overwhelm the public's interest. The UKFOIA's legal system of subjecting its exemptions to a public test allows the Commissioner and courts to balance these two interests for the overall good of the procurement system. When the UKFOIA is applied to unit prices, however, the public interest often wins over the privacy interest. Why is this so? As the Commissioner stated repeatedly in his decisions, there is a strong public interest in a more competitive, accountable, and transparent procurement system. In the Commissioner's decisions, disclosure of unit prices in awarded government contracts promotes these interests. Disclosing unit prices in the United States would presumably have the same benefits for our procurement system.

VI. Conclusion

Our procurement system can have the benefit of lower prices and greater accountability if the law provided for disclosure of unit prices, like what is found in our grocery stores. Just as a grocery shopper can view the various unit prices of bran flakes on a grocery shelf, so too can the cereal producer's competitors. The disclosure of the cereal producer's unit price causes its competitors to lower their prices, invites new entrants to the bran flake market, and increases better options for the consumer. Disclosure of unit prices also allows the consumer to go to another grocery store, compare prices, and determine if the store is overcharging. The benefit of disclosing the bran flakes unit prices is a more efficient and accountable bran flakes market.

Just as disclosure of unit prices is commonplace in our grocery stores, disclosure of contractors' unit prices in government contracts was also the norm under FOIA. Competing contractors were able to obtain unit prices by requesting agency records pertaining to awarded contracts. Contractors were able to seek judicial protection for what was truly commercially sensitive information. Courts routinely ruled in favor of disclosing unit prices for two reasons: (1) unit prices were too complex to identify information truly harmful to the contractor, and (2) FOIA's strong policy required disclosure regardless of the harm suffered by the contractor. For these two reasons, courts generally held that agencies could disclose unit prices.

Then, in 1999, the D.C. circuit began a pattern of successively ruling against agency decisions to disclose unit prices. This pattern continues even today.[262] The D.C. circuit's universal jurisdiction means that contractors file about half of all the reverse FOIA lawsuits in this one circuit. As a result, the D.C. courts have been allowed to change FOIA's generally permissive disclosure of unit prices into a prohibition. By prohibiting the disclosure of unit prices, the D.C. courts have thwarted FOIA's balance of contractor privacy and the public's interest in a transparent and efficient procurement system. The UK's treatment of sensitive commercial information, however, proves that freedom of information laws can protect both the private and public interests while generally disclosing unit price information.

Congress must act to restore FOIA's balance and correct the harm the D.C. courts have caused to the procurement system. Adopting the statutory language for Exemption 4 that this paper proposes[263] will permit disclosure of unit prices when the disclosure serves the public interest more than it harms the private contractor. This balanced approach is especially important considering the controversy over public expenditures. With the federal government spending the public's money at ever-increasing levels, and contractor fraud ever present, there is a strong public interest in holding the government accountable for how it spends taxpayer dollars on contracts.[264] A legal system that discloses unit prices will best serve the public's interest by promoting an accountable and efficient procurement system, just as disclosure of unit prices does in our grocery stores.

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[262] In *Essex Electro Eng'rs, Inc. v. U.S. Sec'y of Army*, 686 F.Supp. 2d 91 (D.D.C. 2010), the D.C. circuit once again held that a contractor's unit prices cannot be disclosed under FOIA.

[263] This article's proposed Exemption 4 language is available in Appendix A, along with the current Exemption 4 language, the UKFOIA's exemptions for commercial interests and information submitted in confidence, and the UKFOIA's codified public interest test.

[264] *See* Representative Henry A. Waxman, Prepared Remarks to The Center for American Progress Forum on return to Competitive Contracting (May 14, 2007), *available at* http://oversight.house.gov/images/stories/documents/20070515121402.pdf (noting that records levels of discretionary federal spending is spent on federal contracts, and that while spending has soared, oversight and accountability have been undermined).

Appendix

1. The current 5 U.S.C. § 552(b)(4) (Exemption 4) language is as follows:

> [FOIA] does not apply to matters that are—
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.[264]

2. The UKFOIA's exemptions for information submitted in confidence and commercial interests are as follows:

> Information provided in confidence.
> (1) Information is exempt information if—
> (a) it was obtained by the public authority from any other person (including another public authority), and
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.[265]
>
> Commercial interests.
> (1) Information is exempt information if it constitutes a trade secret.
> (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).[266]

3. The UKFOIA's exemptions are subject to the following statutory public interest test:

> In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.[267]

4. This paper's proposed change to 5 U.S.C. § 552(b)(4) (Exemption 4), which incorporates a balance of legitimate commercial interests with the public interest as seen in the UKFOIA, is as follows:

> [FOIA] does not apply to matters that are—
> (4) trade secrets and commercial or financial information submitted to a government agency in confidence, or the release of which would be expected to have an unreasonably adverse effect on a person's commercial or financial interests, *subject to the public interest.*

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[264] Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2006).

[265] Freedom of Information Act § 41, 2000, c. 36 (Eng.)

[266] *Id.* § 43.

[267] *Id.* § 2.