ORIGINAL

In the

Supreme Court of the United States

CHRYSLER CORPORATION,

PETITIONER,

V.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL.,

RESPONDENT.

No. 77-922

Washington, D. C.
November 8, 1978

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CHRYSLER CORPORATION, Petitioner,	:	
v.	:	No. 77-922
HAROLD BROWN, SECRETARY OF DEFENSE, et al., Respondent.	:	

Washington, D. C.,

Wednesday, November 8, 1978.

The above-entitled matter came on for argument at 1:37 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BURT A. BRAVERMAN, ESQ., Cole, Zylstra & Raywid, 2011 Eye Street, N. W., Washington, D. C. 20006; on behalf of the Petitioner.

MRS. BARBARA ALLEN BABCOCK, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 922, Chrysler Corporation against Brown.

Mr. Braverman, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF BURT A. BRAVERMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BRAVERMAN: Mr. Chief Justice, and may it please the Court:

This is what is known as a reverse Freedom of Information Act case. An action to enjoin certain government agencies from disclosing documents that are asserted to be confidential in nature. The action was brought against the respondent, Defense Logistics Agency, Department of Labor, Department of Defense.

The issues in this case concern the extent to which these agencies are prohibited by federal statutes and regulations from disclosing confidential business information. And also the extent to which the petitioner, Chrysler Corporation, is entitled to a de novo trial.

The case arose as follows: The respondent agencies notified Chrysler that two requests for disclosure of documents had been received and that those requests were made under the Freedom of Information Act. They advised Chrysler that it could object to the disclosure of those documents if

it chose.

The documents in this case were of two types. The first called an affirmative action program, or an AAP, consisted of several hundred pages of extremely detailed employment data. The data, in essence, was a blueprint or a handbook of the organization and staffing of Chrysler's assembly plants.

The second kind of document involved was a government report which was prepared concerning a review of those facilities, and the compliance of those facilities with various regulations applicable to government contractors. Those government reports incorporated into them substantial portions of the data that was included in the affirmative action programs themselves.

And I want to note at this point that the data included in Chrysler's AAP's is viewed by Chrysler as confidential in nature. It is covered by various written confidentiality policies and practices of the Corporation, and the Corporation and its employees are expressly restricted from disclosing that data either to competitors or to the public.

The respondents permitted written objections to be filed to disclosure. Chrysler objected on essentially two bases. First, it asserted that the information was exempt from disclosure under Exemption 4 of the Freedom of Informa-

tion Act. That exemption says that the disclosure mandate of the Freedom of Information Act shall not apply to information which is confidential and commercial in nature, or trade secrets. And, second, it asserted that disclosure of these documents was prohibited by the Federal Trade Secrets Act, 18 U.S.C. Section 1905, which makes it a crime for any federal employee to disclose certain specified types of confidential business statistical data, such as was contained in the AAP's.

The respondents decided the issue against Chrysler and informed Chrysler that the documents would be disclosed. Although Chrysler was supposedly afford a right to appeal administratively from that determination, it was not allowed to do so because the agency indicated that it would not await the results of that appeal prior to disclosing the documents.

Consequently, Chrysler, having exhausted its administrative remedies, was compelled to institute an injunctive action in the District Court for Delaware.

Following a de novo trial, in which the District Court heard the testimony of expert witnesses and other witnesses concerning the nature of the information at issue and the consequences of disclosure of that information to the public, the District Court issued its decision, in which it held that, first, the information was in fact exempt from disclosure under the Freedom of Information Act, because it

was confidential in nature, and because its disclosure would cause substantial competitive injury to Chrysler. And, second, it held that disclosure of that information would violate the Trade Secrets Act as well as certain parallel provisions of the defendant's regulations.

Consequently, it enjoined the disclosure of those portions of the documents which it found to be exempt from disclosure.

QUESTION: When you say the Trade Secrets Act, counsel, you mean 18 U.S.C. 1905?

MR. BRAVERMAN: Yes, sir.

QUESTION: Isn't one of the Black Letter principles of equity that a court of equity will not enjoin a criminal act?

MR. BRAVERMAN: That is correct. However, it would be an abuse of discretion, of course, if the agency were to exercise its discretion to disclose documents in violation of that law; and to prevent that abuse of discretion in an anticipatory sense, the District Court exercised its equitable jurisdiction to enjoin the disclosure. The problem --

QUESTION: Well, you're saying then, it just didn't bother to follow what is known as a Black Letter principle of equity?

MR. BRAVERMAN: I believe it did bother to follow it. It realized that it could not await the disclosure of that

information to then remedy the problem. Because once disclosed the confidential information could never be returned to its original state. And this Court has recognized, in that aspect, there will be implied a cause of action under certain statutes where the remedy is necessary where, to effectuate the purpose of the statute and it has applied that principle in criminal cases.

And, consequently, the District Court did in fact, I think, consider that equitable principle, but realized that the information had to be enjoined prior to disclosure.

Again, we were also proceeding under the Freedom of Information Act, which, we asserted, also provided a basis for the District Court to enjoin disclosure of the information.

But the basic answer is that the Court found that it would be an abusive discretion and that the APA permitted it to provide that injunctive remedy.

Cross-appeals were filed from the District Court's decision, and the Court of Appeals reversed. The Court of Appeals held that the District Court had erroneously engaged in a de novo trial, that Chrysler's cause of action did not arise under either the FOIA or the Trade Secrets Act, but, rather, only under the Administrative Procedure Act. And it also held that the federal agencies had discretion to disclose these documents, even if they were exempt from disclosure under the Freedom of Information Act, and even if they fell

within the Trade Secrets Act, if the agencies had some regulation which authorized that disclosure.

The agency found however -- I'm sorry; the Court of Appeals found, however, that the agency's record that it had compiled in the course of deciding these issues was so inadequate as to prevent further review, and it remanded the case for further proceedings.

This Court has recognized on a number of occasions that the Freedom of Information Act was brought into existence to remedy what had been perceived to be an era of secrecy on the part of government agencies. The object of Congress was that if it could open the processes of government to greater public scrutiny, those agencies and the government itself would become more accountable to the public.

At the same time that it was attempting to end this era of secrecy, however, it was aware that businesses such as Chrysler submit vast amounts of business information to federal agencies, both voluntarily and in compliance with various regulatory requirements. Now, some of that information, Congress knew, could be disclosed without harming the businesses that provided it. But it was also aware that significant amounts of that information were of a truly confidential nature, and that if that information was disclosed, that could impair the competitive or other health of the businesses.

At the time that the Freedom of Information Act was coming into existence in its early stages, '63 and when the Senate hearings were being conducted, there was no exemption in the Act for confidential business information. And this omission gave rise to a great hue and cry over the need for such protection.

Interestingly, the greatest or perhaps the most vocal proponents of the need to protect business documents were the federal agencies themselves. They cited two principal reasons for the need for this protection. First and most obviously was the need to protect businesses which were, either pursuant to regulation or in a cooperative effort, furnishing confidential information to the agencies to protect these businesses from the harm which could be caused by disclosure.

And, second, they realized that this protection was the quid pro quo for the agency's ability to obtain this kind of information in the future, if the information were not to be respected in its confidentiality, the business would no longer furnish that information.

And in reaction to this outcry for the need for protection, Congress in fact added what is now the fourth exemption to the Freedom of Information Act.

But Exemption 4 was considerably different than the other exemptions to the Act. The other exemptions, for example

Exemption 1 or 2 or 5 or 7, dealing with national security secrets, dealing with investigative files, dealing with inter-agency memoranda, these exemptions were designed to protect governmental interests. They were designed to give the agency the option, if it needed to, to withhold certain documents from disclosure because governmental interests might truly be impaired.

But as to these exemptions, Congress still made them permissive only. When I say permissive, it gave the agencies discretion to withhold those documents if it needed to, but it made clear in the legislative history that those exemptions were not to be invoked unless it was truly necessary to protect the governmental interest.

QUESTION: Which legislative history are you talking about, the Senate or the House?

MR. BRAVERMAN: This comes through, in fact, in both the Senate and the House. It comes through in the sense that, although there are statements made concerning the permissive nature of the exemption, the only time that they are made is with respect to those exemptions relating to governmental interests. In contrast, when the Congress remarked concerning Exemption 4, which was an exemption designed to protect private interests, its statements were in the sense of mandatory remarks that the exemption must be enforced and must be utilized to protect those private

interests.

QUESTION: This is committee reports?

MR. BRAVERMAN: These are in the Committee reports. For example, in House Report 1497, the House stated that Exemption 4, and I quote, "would assure the confidentiality of confidential business information obtained by the government."

And during the Senate hearings, the statement was made, "Such protection must be afforded not only as a matter of fairness but", again I quote, "as a matter of right." Congressman --

QUESTION: Well, I've always had the feeling that the House report was written by the proponents and the Senate report was written by the opponents, or vice versa. I find those reports quite contradictory.

MR. BRAVERMAN: They obviously have their proponents and their opponents. The House report, in fact, was somewhat more liberal in terms of the protection to be afforded.

But what I'm trying to make clear is that both the House and Senate indicate that the need was there to protect confidential business information. In fact, even Attorney General Ramsey Clark, after the Act was enacted, made the statement that confidential business information must be protected from disclosure and must remain outside the zone of

accessibility.

QUESTION: Mr. Braverman, I wonder if your argument really advances your cause, because the statutory language is the same, is it not, in terms of whether it's permissive or mandatory, for all six exemptions, or for all seven exemptions, rather, --

MR. BRAVERMAN: Yes, sir.

QUESTION: -- and if you are conceding, in effect, that 1, 2, 5 and 7 are permissive, and the statute used the same language for 3, 4 and 6, maybe you've put yourself in a hole.

MR. BRAVERMAN: No, I don't believe so. The Act says that "Where information falls within an exemption, the Act shall not apply." That's clear. That is the statutory language.

But, as the Court of Appeals noted in the Westinghouse case, the legislative history reflected so clear, so clear a purpose to protect that information and to continue the practice that had previously existed in government of protecting confidential business information, that this legislative, these remarks from which I've quoted, expressed an affirmation, a mandate that this information be protected. It was not simply to be something that the government agency had the discretion either to adhere to or not to adhere to.

Now, in this case, for example, the government takes

the position that even where information falls within the fourth exemption, even where that information is confidential, even where that information would cause substantial competitive injury if disclosed, the agency still has discretion to disclose that information.

We think Congress intended otherwise and intended to provide protection to that information.

Furthermore, this statute can be read in tandem with the Trade Secrets Act.

QUESTION: If Exemption 4 was added later, how do you explain the failure to use different language?

MR. BRAVERMAN: Exemption 4 was added in response to the need to protect the information. If you read the legislative history, it shows that there was a concern for a need for protection. Congress added the exemption in response to that, its intent, as viewed from the legislative history, was to provide that protection.

We think that something more --

QUESTION: That doesn't really explain why they used statutory language that had previously been made clear to have a permissive meaning to accomplish the purpose you describe. It's just poor legislative drafting, I take it.

MR. BRAVERMAN: I think it's poor legislative drafting, because I think that they meant something more than merely "shall not apply"; and what has to be done is to

be read in the context of what preceded this. Congress was attempting to reverse the practice of agency secrecy concerning agency documents. It was not intending to reverse the practice of agency respect for the confidentiality of business documents.

As I understand the legislative history, it was Congress's purpose to allow the agencies to continue that practice and, in fact, it endorsed the practice of respecting the confidentiality of the business document. Perhaps the drafting could have been clearer.

There is what we believe to be a mandate for confidentiality in the Freedom of Information Act. Yet, in spite of that mandate, the Court below and the respondents through their regulations have turned the Act around. Rather than providing protection for confidential business information through the fourth exemption, and rather than serving as a vehicle for the public to find out about how the agency functions, the Act today has become a principal method for finding out about private business activities, for finding out about your neighbor or your competitor, or just about anybody who files documents in the government.

Now, let me give you some examples to illustrate my point. The Act has become a very, very frequently used vehicle for industrial espionage. The Food and Drug Administration testified in congressional hearings recently

that, of the many thousands of FOIA requests which it receives annually, 86 percent of those requests come from corporations or corporate representatives seeking to obtain private data that has been filed in either applications or similar reports with that agency. The reports of other agencies are the same.

QUESTION: Was there anything in the legislative history discussing the organization of groups,business groups, who simply sought information in the abstract, then classified it and sold it. Was that developed in the legislative history?

MR. BRAVERMAN: I do not recall anything concerning that in the legislative history.

QUESTION: It was developed in some reports, but I wondered whether it was in this history.

MR. BRAVERMAN: I do not recall that. There is, however, reference in the legislative history to the converse practice of agencies such as the Bureau of the Census and the Bureau of Labor Statistics, which acquire information from the public and aggregate it in such a way as to maintain its confidentiality because they recognized it should not be available.

But there was nothing that I know of in the legislative history on the other point.

QUESTION: But it's true that Congress knew that this pirating, for lack of another word, between business

corporations was going on?

MR. BRAVERMAN: They knew that this was --

QUESTION: This wasn't brand new.

MR. BRAVERMAN: In '67 they knew that this was a practice that was then conducted by sequestering an employee, taking a photograph; they did not know --

QUESTION: Any way possible.

MR. BRAVERMAN: Any way. But they did not realize that the Act would be used this way.

QUESTION: And didn't they realize that this was going to be a new way?

MR. BRAVERMAN: They didn't realize it because they intended that the fourth exemption would provide protection. They did not --

QUESTION: Well, that I don't think is as clear as you think it is. I think, knowing that, it could have been much clearer.

MR. BRAVERMAN: Perhaps they should have had more foresight; we wish they had. But they did not, and today the Act is being used in that fashion. Indeed, it is now possible, through the FOIA to obtain business data which could not be legitimately obtained under the Federal and State Trade Secret Laws, Fair Practice Laws, but to obtain that data simply by sending an FOIA request to your friendly government agency and saying, "Please give me this application form; please give

me the formula described in this report." And the data is available.

We think this not only cuts against the careful fabric of trade secret laws that have been developed over the years, but we also think it raises very serious questions about whether government agencies, in disclosing private data under the Freedom of Information Act to private persons, whether those agencies are in fact impairing property rights in contravention of the Fifth Amendment.

QUESTION: But, now, Congress did provide some protection for the kind of thing you're talking about. In our decision in the Robertson case, for example, where disclosure is prohibited by some other law, then the agency at the very least need not disclose it and probably cannot disclose it.

MR. BRAVERMAN: Absolutely. That is, in fact, another issue in the case which I was not going to address today, but I will say that we do contend, although the --

QUESTION: That's Exemption 3 you mean?

MR. BRAVERMAN: -- the Court did not agree -- that's right -- that Exemption 3 incorporates the Trade Secrets Act into the FOIA in such a way as to make the Act not applicable to any information which falls within the Trade Secrets Act. And that is in issue.

QUESTION: But is it your view that Exemption 3 is more than just permissive, too? As you submit Exemption 4 is.

MR. BRAVERMAN: Exemption 3 is absolutely mandatory, yes. That's our contention.

QUESTION: And that neither under -- if material falls under either Exemption 3 or Exemption 4, the agency may not waive the exemption; is that it?

MR. BRAVERMAN: That is correct.

Another use, in fact, that has been made of the --

QUESTION: Although you can see the agencies may waive the other, or at least some of the other exemptions.

MR. BRAVERMAN: Exactly, because those exemptions are designed to protect governmental interests.

QUESTION: Now, is this because of the legislative history or because of the interest they are designed to protect or because of their language or what?

MR. BRAVERMAN: It is because of the interests that they are designed to protect. It is because of the history of Section 1905, the Trade Secrets Act, that the Court has incorporated through Exemption 3. It is not only because of the "shall not apply" language of the Freedom of Information Act.

QUESTION: Mr. Braverman, I'm puzzled by your reliance on 3, because a condition of coming within 3 is that some other statute mandate nondisclosure.

MR. BRAVERMAN: That's right, and in this --

QUESTION: So, then, how can 3 be the source of the

mandate for nondisclosure, when you don't even reach that?

MR. BRAVERMAN: It's a somewhat circular process. If the information is prohibited from being disclosed by 1905, and if, as we assert, 1905 is an Exemption 3 statute, then the Freedom of Information Act does not apply to that data. It cannot authorize its disclosure because that data is specifically exempted from disclosure by 1905.

And so, in that way, the Act is rendered inoperative, and the information is protected by the Trade Secrets Act.

Now, this perversion of Exemption 4 has also been used now to circumvent the Federal Rules of Civil Procedure. A litigant,who could and should seek to acquire information under the Federal Rules of Civil Procedure in a discovery context, will make a Freedom of Information Act request for private documents and in that way will circumvent all of the protection and scrutiny that the court itself could provide with respect to that discovery request.

In fact, that is the case with the two requests in this case. The two litigants, in cases involving Chrysler, desired to obtain information for use in those cases against Chrysler, but rather than proceeding in those actions, where Chrysler could have objected on the basis of relevance, burdensomeness, it instead came through the Freedom of Information Act and attempted to get that information in circumvention of the federal rule.

We think this Court has frowned upon this practice both in Robbins Tire and NLRB v. Sears, Roebuck, where it indicated, in an agency context, that the Act should not be used for this purpose; and we think that it is equally abhorrent to use the Act for this purpose against a private person, particularly where the Federal Rules of Civil Procedure do exist as a means of obtaining this data.

Now, I mention these examples really to show that the Act no longer is being used to find out about government operations, but instead is being used to find out about private activities. This, unfortunately, is not what the Act was intended to accomplish.

In allowing these practices, it has the effect of undermining the fourth exemption, undermining the protection which that exemption was intended to provide, and of upsetting the balance that Congress was trying to fashion between the public's right to know on the one hand and the business community's right to be secure in its property and privacy.

We think that the decision below, by recognizing this broad agency discretion, to disclose the very kinds of documents which Exemption 4 was intended to protect, disrupts the legislative scheme, is contrary to the legislative history, and we urge the Court to reverse the decision below.

QUESTION: Before the enactment of the FOIA, Mr. Braverman, I take it if you had been defending Chrysler

against a private litigant in the United States District Court, that private litigant would have been free to go to the Department of Defense and say, "Look we've got a lawsuit, will you give us some papers that you've got here?" And the Department of Defense could have given it to them without the necessity of going through the compliance with the Federal Rules of Civil Procedure. The Department of Defense isn't a defendant in the private action.

MR. BRAVERMAN: That's not true, because, at that point, the Department of Defense would have been prohibited by the Trade Secrets Act from disclosing that to any person.

QUESTION: But if you're right, they still are.

MR. BRAVERMAN: If we are right, and if the Trade Secrets Act falls within Exemption 3.

QUESTION: And in each case the remedy would be a criminal prosecution.

MR. BRAVERMAN: Exactly.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Babcock.

ORAL ARGUMENT OF MRS. BARBARA ALLEN BABCOCK, ESQ.,

ON BEHALF OF THE RESPONDENTS

MRS. BABCOCK: Mr. Chief Justice, may it please the Court:

I think at the outset we should put this case in context. This is not a strange, new animal on the legal

landscape. The issues here are old and familiar ones. Whether an agency has abused its discretion or acted contrary to law in a decision that it made. Nothin in or about the Freedom of Information Act changes the approach that this Court took a year before the Freedom of Information Act was passed, in the Federal Communications Commission vs. Schreiber, 381 U.S. 279.

There, this Court upheld the discretion of the FCC to hold public hearings, against the objections of a private corporation, much the same as the objections that are being made here, that public view of its records would cause competitive harm and would ruin the American economy.

The authority of the FCC to hold these public hearings was found in their authorizing statute, which says that they could conduct proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.

And this Court found, in that context, that the decision of the FCC to hold public hearings to expose this information to the public was completely within its discretion.

We have all, in a way, fallen --

QUESTION: Mrs. Babcock, isn't it true that in -- we're not to confront the abuse of discretion issue here, are we? Isn't that what's left open on the remand by the Third Circuit?

MRS. BABCOCK: Yes, it is. But I think that here this Court should take the approach, should mandate the approach in this kind of case, which we all have fallen into the habit of calling reverse Freedom of Information Act cases. They are not Freedom of Information Act cases. They are Administrative Procedure Act cases.

And the approach of the Court of Appeals here was exactly right. If the record -- if --

QUESTION: Well, that's the issue, isn't it?

MRS. BABCOCK: It is the issue, and --

QUESTION: And you're making an argument on the merits, but we don't begin with that as a hypothesis agreed to by both sides.

[Laughter.]

MRS. BABCOCK: Oh, no, it's certainly not agreed to by both sides. But that is the point that I am making here, which is that these very kinds of issues, which is the balancing of the public interest in knowing and the private interest in concealing, these have risen before to this Court in other contexts, and there is nothing about the Freedom of Information Act that changes that.

QUESTION: Of course, in the Schreiber case --

QUESTION: Mrs. Babcock -- oh, excuse me; go ahead.

QUESTION: In the Schreiber case it was an agency proceeding. The agency was really an interested party in

conducting those hearings, was it not? And here it's more or less just a bystander saying, "Look through our files if you want to."

MRS. BABCOCK: Not at all, Your Honor. I think that's a very important point. The agency is not a disinterested bystander. We have to look at what the records that are compiled here are. These are records which are demanded from government contractors as a condition of getting a government contract. That people at Chrysler have hundreds of millions of dollars' worth of these government contracts, and, as a condition, they must supply this information to the government in the form that the government requires it. And the agency has an interest in continuing to get that kind of information from Chrysler, it has an interest in protecting Chrysler, if that information -- the disclosure of that information would, in the future, make information less secure.

QUESTION: Does the government need to disclose it to the world at large in order to make use of it for governmental purposes?

MRS. BABCOCK: No, it doesn't need to disclose it to the world at large, except this particular kind of information, which is equal employment opportunity information, has been found, under the regulations of the Labor Department and the Office of Federal Contract Compliance, to

be useful for disclosure. The public has an interest in knowing how the government is doing in its enforcement of equal employment opportunity; and so that this is peculiarly a kind of information in which there may be some public interest, and that the agency should evaluate.

QUESTION: Why does it have more of an interest in that area than in any number of other areas, where the Department of Defense receives information?

MRS. BABCOCK: Why does the agency have more interest?

QUESTION: Well, why does the agency conclude that [interest] /sic/ the public has more information in the equal employment operations of the Department of Defense, say, than in the procurement regulations or the personnel policies or the veteran's preference, or something else?

MRS. BABCOCK: It doesn't, it doesn't conclude that it has more of an interest, Mr. Justice Rehnquist, but it does say that peculiarly there is a current interest in the enforcement of the Executive Order, and that the -- but it is not -- but there may be an equal interest in procurement or any of those other matters. That the whole basis of the Freedom of Information Act is that the public does have an interest in the whole range of governmental activities.

But I think that the real point here is that these are not -- that a clear bright line cannot be drawn between

what are public and private records. These records here being created for the government at the command of the government, in return for a government contract, and needed by the government for the enforcement of a program that is the subject of an Executive Order, and that is one of the major government programs. How can you call these private records?

And if they are --

QUESTION: I don't see how any of that has any relevance if the information is, in fact, trade secrets and confidential. The fact that they are doesn't make any difference if it presents this information or anything else, does it?

MRS. BABCOCK: Well, Mr. Justice Stevens, that's what I was just going to reach. If there is incorporated into this record, created for the government, if there is incorporated necessarily real trade secrets or confidential commercial information, then there is the possibility of the submitter challenging, both at the agency level, the release of that information, and then under the Administrative Procedure Act in a court, that the agency has gone beyond its authority, has acted contrary to law, has misapplied its regulations.

And that's plenty of protection, that's sufficient protection.

QUESTION: Well, that depends on the point of view

you look at it from, I suppose; but do we not start with the assumption that some of this information is confidential or trade secret information within the meaning of Exemption 4?

MRS. BABCOCK: Well, we can't start, we can't really start with that. That is going to be one of the subjects of the remand in this case, that --

QUESTION: But the District Court so found in this case.

MRS. BABCOCK: The District Court so found, yes, but the Court of Appeals said that the record was not sufficient to determine whether the agency had decided that Exemption 4 applied or whether it didn't apply. And so that that is an issue for another day.

Now, for the purposes --

QUESTION: Well, let's be sure I have your position well in mind. You do take the position, the United States takes the position that even if Exemption 4 applies, and even if the information is a trade secret, a bona fide, genuine trade secret, they may nevertheless, in their discretion, decide to disclose it.

MRS. BABCOCK: Under -- Yes, sir. Under certain regulations, though, and that is, if the disclosure is in the public interest and if the disclosure would not harm the agency's ability to gather information or to do its job in the future. So that there are --

QUESTION: Even though it would harm the proponent of the information?

MRS. BABCOCK: Even though it is confidential commercial information, it is -- what we are talking about here, under these regulations, is a balancing, and the balancing has to be the harm to the submitter of the information and the benefit to the public and the need for the public in the interest of the Freedom of Information Act.

QUESTION: Did the Court of Appeals find that there was no substantial evidence to support the findings made by the District Court?

The District Court found that the information was confidential, it also found as a fact that the release of it would be adverse to the interests of Chrysler. Now, were those findings found to be without substantial support by the Court of Appeals?

MRS. BABCOCK: No, Mr. Justice Powell. In effect, the Third Circuit just kind of leaped over the District Court opinion. The District Court opinion was very, very narrow here, and dealt only -- Chrysler was challenging the release of all of the information --

QUESTION: But for purposes of deciding this case, do you think we must accept those findings by the District Court?

MRS. BABCOCK: No, Your Honor, I don't. Because

what I have asked --

QUESTION: What do we do with them?

MRS. BABCOCK: What you do with them is affirm the judgment of the Third Circuit --

QUESTION: I understand.

MRS. BABCOCK: -- which sort of skipped over the findings of the District Court and said --

[Laughter.]

MRS. BABCOCK: -- and said that the case should go back to the agency for a further record, and mandated the creation of the kind of record which would allow a District Court to review these kinds of cases under the Administrative Procedure Act.

QUESTION: May I ask you this: Let's assume for the moment that the case does go back, and these findings are reaffirmed, say, by the agency. I understand from your argument that the agency, in its balancing discretion, nevertheless may release them; right?

MRS. BABCOCK: That's correct, Your Honor.

QUESTION: Yes. The next question is this: Would it be possible for the agency,under the regulations that now exist or under new regulations, to write to, say, all of the companies in the automobile industry and say, "I know you all want this information on your competitors; rather than put us to the trouble of arranging for you to have them

copied here, from now on send carbon copies of everything you send us on this case to Ford, General Motors and American Motors." Would that be appropriate?

MRS. BABCOCK: No, that would not be appropriate, because the agency has a function here. And the agency -- and we really, I don't think, can down-play this; the agency has an interest in continuing to get information. And the agency has an interest in not upsetting its contractors, and it has an interest in doing an appropriate balance. And it has the expertise.

QUESTION: Does the record in this case show what interest the agency has in making this information available to competitors of Chrysler?

MRS. BABCOCK: No, it does not, and I think it could be made very clear that the requesters in this case are not competitors of Chrysler, and in fact, in the vast majority --

QUESTION: They could be, couldn't they? Any member of the public.

MRS. BABCOCK: Any member -- there is no distinction made among requesters, but if we look at the real world and what's really happening in those so-called reverse Freedom of Information Act cases, the requesters are not the competitors. The requesters are members of the public, newspaper people, public interest groups, potential plaintiffs and actual

plaintiffs in discrimination suits. That's who the requesters have been in these cases.

QUESTION: Would the information be denied if one showed up and said, "I represent General Motors and I'd like to have this information"?

MRS. BABCOCK: No, it wouldn't, except that in the balancing that the agency does, and in the administrative record that the agency would make, it would certainly, I think, be taken into account, when you weigh the interest of Chrysler in withholding the information, who the requester was.

QUESTION: But if General Motors was denied, they could just ask their friendly newspaper to go get them for them.

MRS. BABCOCK: That's certainly true. And that's why the Act -- I mean, that's one of the problems of the Freedom of Information Act, that there is no way to distinguish among requesters. But I --

QUESTION: But this includes the group of people who may organize a corporation as Industrial Intelligence, Incorporated, to gather the information, classify it, and then sell it to the people who were interested.

MRS. BABCOCK: That is happening. And that is certainly a distressing aspect of the Freedom of Information Act. But that is not -- it doesn't have anything to do with this case. So I think that --

QUESTION: What would we do if we disagree with you or the agency, that if this is within Exemption 4, namely, really a trade secret, that the agency may not release it; what do we do in this case? We certainly don't affirm, do we?

MRS. BABCOCK: Your Honor, you don't have a record here which would allow you to find that this is information that --

QUESTION: I didn't ask that. I just asked what do we -- someone gave you a hypothetical that said if there are really trade secrets involved here, could the agency still release this by exercising its balance; and you said yes. Now, what if we disagree with you there?

That if there are trade secrets involved here, the agency may not release them. Then, what do we do?

MRS. BABCOCK: Well, what you would have to do --

QUESTION: Under any circumstances they may not release them.

MRS. BABCOCK: What you would have to do, as a legal matter, Your Honor, is to find that Exemption 4 is mandatory. Now, you can't find that, I think, in the face of --

QUESTION: Yes, but suppose we do; what do we do then?

MRS. BABCOCK: Well, if you do, I would submit you've made an incorrect legal decision.

QUESTION: Well, I understand that.

[Laughter.]

QUESTION: But that may happen time and again here, and --

[Laughter.]

QUESTION: But, nevertheless, would you lose your case?

MRS. BABCOCK: If you find that Exemption 4 is mandatory, we certainly lose our case, yes.

QUESTION: Or what if we found that 1905 prevented the agency from -- even if Exemption 4 was permissive, Exemption 3 invokes 1905, and that the agency may not release the materials under 1905?

MRS. BABCOCK: Well, 1905 -- you don't -- if you find that 1905 applies here, and that these materials should have been withheld under 1905, then you don't need to reach the point of whether it is an Exemption 3, whether 1905 is an Exemption 3 statute.

QUESTION: If 1905 -- if the agency has held a hearing and decided that the material should be released, 1905, by definition, does not apply; isn't that right?

MRS. BABCOCK: If the agency has held a hearing and decided that the material should be released --

QUESTION: Then 1905, by definition, does not prohibit its release, since it's then -- if an agency regula-

tion will bring it within the "as authorized by law" clause of the 1905.

MRS. BABCOCK: Absolutely. And --

QUESTION: But that's a big "if", and you --

QUESTION: A rather large "if".

MRS. BABCOCK: Well, the "if" being if the agency has held a hearing, Your Honor, or --?

QUESTION: If an agency regulation is a law.

MRS. BABCOCK: If the agency regulation --

QUESTION: Within the meaning of 1905.

MRS. BABCOCK: Exactly. And that is one of the issues in this case. And yet I would draw your attention to this Court's opinion in Blair vs. Oesterlein, in which there was a subpoena from the Board of Tax Appeals to the Commissioner of Internal Revenue for the tax returns of twelve corporations, and this case was under the predecessor statute of 1905, one of the predecessor statutes. And there this Court held that 1905 was raised as a defense. The Commissioner said, "I can't give up these records, because I would be in violation of the statute." And there this Court said that 1905 cannot be deemed to forbid disclosures made in obedience to process lawfully issued.

Now, that was a subpoena, that was not a statute, and it was also not a regulation, I would be the first to admit; but it was not a statute. So that certainly "authorized

by law" within the meaning of 1905 goes beyond the strict requirement of a statute.

And I would also call to the Court's attention that a statute that tracks 1905 exactly has been put into the IRS Code of 1954, and this is 26 U.S.Code 7213, and that is just like 1905, in terms of being a criminal statute.

And in the Laughlin case, cited in our brief at page 43, the D. C. Circuit said specifically that regulations permitting release of this kind of information covered by 1905, for use of grand juries, was authorized by law.

So that there are -- and there are other citations in our brief, and then there is the general legal principle that --

QUESTION: Doesn't a regulation have to be adopted after notice and chance for comment, or would just an ordinary housekeeping regulation be sufficient?

MRS. BABCOCK: The regulations must be valid, Your Honor, and so --

QUESTION: I know they must be valid, but must they be the kind that are adopted after notice and -- after public notice?

MRS. BABCOCK: I think it would depend on the circumstance of the case. We would certainly urge that these regulations were valid, that this pattern of regulations are valid. Now, that would be one of the issues to be raised by

submitters in their challenge under the APA, which is the design that we're arguing here.

QUESTION: Is it open to a district judge, confronted with this problem, to hold that the discretion under Exemption 4 has been abused in granting disclosure?

MRS. BABCOCK: Is --?

QUESTION: Is it permissive --

MRS. BABCOCK: Yes, I think that -- yes, under the --

QUESTION: Can the district judge say, "Yes, they have discretion, but here, on the record made before me, the discretion has been abused, and therefore I deny this order."

MRS. BABCOCK: Under the standard of review that we're arguing, under the Administrative Procedure Act, it would be open to the District Court to say that the agency committed a clear error of judgment, and it would also go to whether the agency acted within the scope of its authority. And Mr. Justice White's concern with whether the regulations that it was acting under were properly promulgated, were proper regulations; whether the agency followed its own regulations. All of those things would be open to review under the Administrative Procedure Act in the scheme that the Third Circuit devised, and that we are urging here.

I want to return just for a minute to the point that Exemption 4 cannot be correctly read as being mandatory. Mr. Braverman says that perhaps, in trying to make it

mandatory, Congress could have been a little clearer. Well, they couldn't have been any clearer. They included it within the other nine exemptions, and they started out, the heading to the nine exemptions, with: "This Act compelling disclosure does not apply to" the nine exemptions.

So that the exemptions themselves neither direct disclosure nor direct withholding. The exemptions are set out in the statutory pattern, and it really could not be more plain that they are a guide to the agency in deciding whether to disclose or whether to withhold.

In its starkest terms, Exemption 4 can't be mandatory because Congress, if it had made Exemption 4 -- and there's no distinction between Exemption 4 and any other exemption; other exemptions cover private information also -- that they would have, if they had made this exemption mandatory, created a withholding statute that went far beyond what the law was before the Freedom of Information Act. And literally, I mean, Congress cannot be that stupid, when they were trying to make a Freedom of Information Act, that they created a withholding statute is not possible, and that would have to be the result of finding Exemption 4 to be mandatory.

QUESTION: Then your argument would -- that view of the statute would lead to the conclusion that, with respect to material covered by the exemption, one just disregards the

Freedom of Information Act. Right?

MRS. BABCOCK: That's correct, Your Honor.

QUESTION: That with respect to that, anything covered by the nine exemptions, one just pretends the Freedom of Information Act had never been enacted. That's the result of your argument.

MRS. BABCOCK: In a sense. I mean, the analysis would be: does the information fall within an exemption?

QUESTION: If so, forget the Freedom of Information Act. Isn't that right? Doesn't that follow?

MRS. BABCOCK: That's correct, Your Honor. And if it does, the Act does not apply. And then the agency may decide --

QUESTION: Well, subject to 1905 and to any of the other laws, too.

MRS. BABCOCK: Subject to nondisclosure statutes, subject to the public interest in disclosure. And the agencies often decide to withhold, on the basis of one of these exemptions.

QUESTION: Yes, but the agency may or may not have discretion, but whether or not it does is to be determined by laws other than the Freedom of Information Act.

MRS. BABCOCK: That's exactly right, Your Honor.

QUESTION: And that's a part of your argument, isn't it?

MRS. BABCOCK: That is my argument.

QUESTION: But, General Babcock, I thought you had said -- perhaps I misunderstood you -- that in the hearing that the agency would conduct, that Exemption 4 would have to be taken into consideration in deciding whether or not to release.

MRS. BABCOCK: It would be taken -- in practical terms, it would be taken into account in the balancing that is done --

QUESTION: How is that consistent with your answer to Mr. Justice Stewart's question?

MRS. BABCOCK: It is that as a matter of statutory construction, once it is decided that material falls within the Act, then the Act does not -- falls within one of the Exemptions, then the Act does not apply.

However, when the agency then goes on to say, "Should we release this material? We don't -- it falls within one of the exemptions, so it is not mandatorily released, but we are going to go on and decide whether or not the public interest requires it, whether there are other interests, whether there are nondisclosure statutes", one of the things that the agency might well take into account are the same concerns that caused Congress to pass Exemption 4. And it wouldn't actually be applying Exemption 4, but it would be --

QUESTION: I don't understand this. If you can't

-- if it falls under Exemption 4, then the agency can't release it. Isn't that true?

MRS. BABCOCK: No, Mr. Justice Marshall. That is not --

QUESTION: Well, under what authority would the agency release it?

MRS. BABCOCK: The agency -- if it falls within Exemption 4, then the Act does not apply. The Act does not require the agency to --

QUESTION: Well, what authority does the agency have to release my private property?

MRS. BABCOCK: The agency may release your property if it is in the public interest to do so, --

QUESTION: Or the agency -- first of all, your answer must be the agency has whatever power it may have or had, or may have not had, without any consideration of the exemption --

MRS. BABCOCK: Exactly, Your Honor. And the --

QUESTION: Your claim is that power includes a discretion by the agency.

MRS. BABCOCK: Of course it does, and it has since 1789.

QUESTION: Of course that's your contention.

MRS. BABCOCK: Yes. And I continue to make it, Your Honor.

QUESTION: In 1789 they weren't releasing it.

MRS. BABCOCK: They didn't. And certainly -- I am not saying -- this is a tool of analysis in terms of reading the statute. I am not saying that the Freedom of Information Act is not implicated in any analysis here, but it is -- certainly the Exemption 4 is not mandatory. And once it's decided that materials fall within Exemption 4, the agency may withhold them and fight the requester or they may move on and decide whether, within their regulations, within the statute, within the public interest, it is wise --

QUESTION: Whereas, when the Act does apply, it must be released.

MRS. BABCOCK: That's exactly right. That is the point.

QUESTION: Could a District Court reverse the agency under the APA abuse of discretion standard when the agency had decided to release the information, if the District Court felt it should have applied Exemption 4 and not released it?

MRS. BABCOCK: If the agency had so far misread, and the remand in this case seems to take that into account, if the agency had so far misread Exemption 4, that it was a clear error in judgment so as to be an abuse of discretion or to be contrary to law, then the District Court could. The short answer to Mr. Justice Rehnquist's question.

QUESTION: Is there a large amount of information, Mrs. Babcock, that the government has in its files which is supplied voluntarily by many different industries in the country?

MRS. BABCOCK: It depends on what you mean by voluntary, Mr. Chief Justice, and --

QUESTION: Well, that they are not required to furnish it. They furnish it or they do not furnish it; that's their own choice.

MRS. BABCOCK: They furnish it because of their interest in getting government contracts, in getting the government on their side, persuading the government to do what they want to do.

QUESTION: Well, the Forest Service, for example, asked for and received a lot of information which the suppliers need not give to them if they don't want to. Now, take that as one category, and there are many others. The environmental people are very much interested in that, the environmental people within the government, not outside the government. Now, that information which has been voluntarily furnished to the government for its over-all purposes is available, subject to the Freedom of Information Act, is it not?

MRS. BABCOCK: It could be. I don't see, offhand, why it would fall under any of the exemptions, but it might.

QUESTION: Well, on its face, it's subject to the Act; whether it falls under an exemption is a second inquiry.

MRS. BABCOCK: Certainly.

QUESTION: Now, then, is there some -- would a district judge, again, be entitled to take into account, or must the agency itself take into account, whether that source of information would dry up if the government disclosed it?

MRS. BABCOCK: Certainly. And that -- actually, in these regulations that we're concerned with in this case, that is one of the considerations that the agency applies.

QUESTION: Well, it's important whether that discretion of the Act is applicable.

MRS. BABCOCK: Oh, if the Act is applicable --

QUESTION: That calls for release by --

MRS. BABCOCK: If the Act is applicable, it must release. But if it falls within an exemption, and I was assuming that --

QUESTION: Then the minute their discretion comes into play, that is a factor to weigh, is it?

MRS. BABCOCK: Yes, and it is a factor that is built into the regulations in this case.

QUESTION: Mrs. Babcock, who in fact made the decision in this case, that this material should be released in the public interest?

MRS. BABCOCK: The record shows some functionaries

in the Office of Federal Contract Compliance made the decision. The record in this case does not -- the administrative record is nothing wonderful for either side in this case.

QUESTION: Right. But what troubles me is normally if someone's rights are affected, even in a bureacracy, you can identify who has made a decision and perhaps have a chance to talk to him or her.

MRS. BABCOCK: And that's exactly what the effects of this opinion would be, the remand in this case, and if this Court would mandate this as the proper procedure, is for the agency to make a proper record on whether the materials fall into Exemption 4 and then why they have found it is in the public interest for there to be a release.

QUESTION: A decision was made initially without any record, I take it, that's why the case is here.

MRS. BABCOCK: The decision -- the record is inadequate.

QUESTION: Are there any written guidelines or standards as to what elements are to be considered in making a judgment as to what is or is not in the public interest?

MRS. BABCOCK: There are not any in the actual regulations that we have at issue here. But it would certainly be possible to develop them in these kinds of cases. And I think that would be the result of the regular review

under the Administrative Procedure Act, of an adequate agency record in these kinds of cases.

QUESTION: Absent something like that, the discretion would be virtually limitless, wouldn't it?

MRS. BABCOCK: If it were virtually limitless, that would be subject to attack, I think, under the APA, as being beyond the agency's discretion; that it shouldn't be virtually limitless. There are regulations.

Let me just --

QUESTION: What is the provision for a delay in the release of the information during the administrative procedure? Here, as I remember, they give a five-day notice, and if there's an objection to the release of anything, then it had to go into federal court. How is that problem handled now -- is to be handled now?

MRS. BABCOCK: The problem can be handled in a number of ways. There is a ten-day period, and then, they are for unusual circumstances, which could well be the objection by a submitter, there can be another ten-day period for exceptional circumstances.

QUESTION: Well, there can be, but must there be?

MRS. BABCOCK: I think they would probably --

QUESTION: Is it still possible the agency can say, "Oh, we see your objection, but we're going to go ahead and release it, and we'll have our hearing later"?

MRS. BABCOCK: If the procedure set out here for review for submitters under the APA were followed, then the agency would have every interest in getting the submitter's view and having an adequate record.

QUESTION: But they have got the view, and the view is "please don't release it", can they still release it?

MRS. BABCOCK: They can still release it, certainly, but the submitter can go to court and --

QUESTION: Then you would have the same thing happen all over again under the APA procedure that we had in this case, but with just a little better record.

MRS. BABCOCK: But that's a big difference. That's a very, very substantial --

QUESTION: What if they take 15 days to have the hearing or something like that?

MRS. BABCOCK: Well, they could probably --

QUESTION: But they're going to release it in the meantime.

MRS. BABCOCK: No, they wouldn't release it in the meantime, because the submitter is going to go to court, and get, as they have in all of these cases, and get a preliminary injunction against the release of it. So that there hasn't been any case --

QUESTION: What I'm trying to find out is, is there a duty under the administrative procedure to withhold the

release until there's been a reasoned decision by the agency?

MRS. BABCOCK: There isn't any duty, but it has never happened that the agency has done that.

QUESTION: But it's happened in this case.

QUESTION: Not in an administrative hearing.

MRS. BABCOCK: It hasn't -- the agency has not released the information in this case.

QUESTION: Well, they said they were going to within five days.

MRS. BABCOCK: But they didn't do it.

QUESTION: Only because they went to court, and now the Third Circuit says they had no business in court. Your remedy is before the APA. And as I understand your answer, if it's before the APA you cannot prevent disclosure.

You put two things: One, under the Third Circuit, you cannot go to court, your only remedy is before the APA. The second thing you've said is: If you go before the APA there's no way you can stop the release in five days.

MRS. BABCOCK: I understand, Mr. Justice Stevens, where our problem is -- my problem. Which is, I don't mean before the APA, I mean under the APA in the District Court. The APA, Administrative Procedure Act, should provide the standard of review in the District Court for the submitters' cases. They should make their record with the agency before --

QUESTION: My question is: what guarantee do they

have that the information will not be released while they are trying to make a record?

MRS. BABCOCK: They have the ability to go to court, to stop it from being released.

QUESTION: I see. I came to the wrong conclusion. Well, they do, you concede they have a right to go to court?

MRS. BABCOCK: Yes, absolutely. And the only thing that we're concerned with is the standard of review and the statute under which it's reviewed. And they would still have that same right.

And, in fact, they have exercised it freely.

In closing, let me say that though I started by saying that this is not a Freedom of Information Act case, it is obvious that the Freedom of Information Act is implicated here, and in the Court's decision -- and we are in great need of direction from the Court in this kind of case. We ask that you mandate the orderly procedure under the Administrative Procedure Act, which the Third Circuit has established; that you hold that neither Exemption 4, nor, for that matter, any other exemption is mandatory; that you find that validly issued regulations are authorization by law; and that you act, in this opinion, in truth to the spirit of the FOIA, with all its faults and its burdens and its daily difficult balancing, is bringing a measure of openness to the government that is unprecedented and which was the intent of Congress.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Braverman?

MR. BRAVERMAN: Yes, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

REBUTTAL ARGUMENT OF BURT A. BRAVERMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BRAVERMAN: This is something of a case where the pendulum has swung a bit too far. Congress was attempting to eliminate government secrecy, and one way it was going to do that was to get rid of the so-called public interest standard that was in Section 3 of the Administrative Procedure Act in the Fifties and early Sixties. That public interest standard is used to shield agency documents.

Now, the government is here, ten, twelve, fourteen years later, and it's saying: Well, we're going to decide these questions under that public interest standard. Back then it was the public's right that was being sacrificed when the agency exercised or misexercised that public interest standard. Today it's the private person's right that's being sacrificed, when the agency again, lacking an adequate record, lacking any standards, lacking any guidelines, simply says: We're going to ignore the fact that disclosure of this information is going to cause you what the District Court found to be substantial competitive injury, and because of

what we perceive to be the better way of things, the public interest, we're going to disclose those documents.

I don't think Congress ever intended that the pendulum swing so far that the private interests, in their property and in their privacy, be damaged like that.

The District Court found --

QUESTION: Your problem is to get a record on that, isn't it?

MR. BRAVERMAN: The problem is that there cannot be an adequate record in these cases. In almost all of the reverse-FOIA cases that have gone to the Court of Appeals, in this case, in the Sears v. Eckerd case in the Seventh Circuit, in the General Dynamics case in the Eighth Circuit, the agency found that the documents should be disclosed. The reverse-FOIA claimants went to court, and the District Court found that there would be substantial competitive injury, and then, because those courts found that there should be APA review, they remanded. They did not find that the finding of competitive injury was improper, they simply said that the agency should have been the ones to examine whether there would be injury.

The problem is that under the FOIA the agency cannot conduct an adequate fact-finding inquiry, because it doesn't have the time. In this case, we were notified --

QUESTION: Nor does the court have the time.

MR. BRAVERMAN: The court --

QUESTION: Why would we have the time if nobody else has it?

MR. BRAVERMAN: The diference is that the court is not subject to the ten-day limitation that is found in the FOIA, and the agencies are. I mean, it is simply impossible for an agency employee, who has no expertise on the question of determining competitive injury, to get, in some case, thousands of pages of documents in front of him and to try to make a judgment in a matter of days, and also to assume that the company itself can make the kind of showing necessary in this case. And this is just impossible, and this is what gives rise to our contention that the agency's fact-finding procedures here are inadequate. It's the procedures, the fact-finding procedure that is inadequate, not merely the record in these cases.

And under this Court's precedent in Overton Park, even if you were to find that the APA was the proper basis for review, we think you should still find that there is a right to a de novo trial until the time that Congress gets around to saying that the ten-day period won't work.

And I hasten to add that the Freedom of Information Act amendments in '74, when the ten-day period was added, were vetoed by the President, in part because he expressly say that the ten-day limit won't work; it would be impossible

to operate under the Act.

QUESTION: Suppose under the -- without the Freedom of Information Act, before it was even passed, 1905 was on the books. Suppose the agency could, by a set of regulations, provide for the release of the information covered by 1905? Suppose its regulations would qualify as the law?

MR. BRAVERMAN: If regulations would qualify, then perhaps those regulations could disarm the Trade Secret law. They would constitute authorization by law.

QUESTION: Yes. And let's suppose that, and then comes the Freedom of Information Act. You say that the Freedom of Information Act would forbid the disclosure of what the agency could have disclosed before the Act?

MR. BRAVERMAN: The express affirmation in the legislative history --

QUESTION: Is it yes or no?

MR. BRAVERMAN: Yes.

QUESTION: Yes. Okay.

QUESTION: So that what was purported to be, on the part of Congress, an Act setting a floor under disclosure by the agency, in your view set a ceiling, in at least one case?

MR. BRAVERMAN: It continued to recognize the practice of the standard --

QUESTION: Justice White's question was that, did the Freedom of Information Act change the previous --

QUESTION: Did it lock up -- did the Freedom of Information Act lock up something that was available before or not?

MR. BRAVERMAN: The information, as a practical matter, --

QUESTION: You said it did.

MR. BRAVERMAN: -- was not available.

QUESTION: You said it did.

MR. BRAVERMAN: It was not available, and it provided mandatory protection for it.

QUESTION: Yes, but my example was: suppose that before the Freedom of Information Act passed, this information was available, even though -- under 1905, because the agency had provided for release by regulation?

MR. BRAVERMAN: It had regulations, yes.

QUESTION: All right. Then comes the Freedom of Information Act, and you say that what was previously available is now unavailable.

QUESTION: Because of Exemption 4 and its legislative --as to what it means.

MR. BRAVERMAN: That goes back to your submission.

QUESTION: Was it not one of the considerations of Congress that FOIA was an effort to have some harmony and uniformity among the dozens and dozens of agencies about disclosure; was that a factor?

MR. BRAVERMAN: Certainly it was the intention to eliminate the public interest standard that was unevenly applied by agencies. By eliminating the public interest standard and by putting in a legislative standard that Congress set, and not the agency, yes, the intent was to eliminate that --

QUESTION: But you say that it's still unevenly applied because each agency has a different view of the exemptions. Do I understand that?

MR. BRAVERMAN: A different view, perhaps, and also differing amounts of expertise, different perceptions of what the public interest should be.

Congress had the uniform perception of what the public interest would be.

If I could respond to Mr. Justice White's question. The one thing that should be noted is that we do not believe that Congress intended agency regulations to constitute --

QUESTION: I'm quite aware of that. But your submission is that even if it did, the Freedom of Information Act changed the rules?

MR. BRAVERMAN: It would have to be read as a later legislative statement, yes.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 2:45 p.m., the case was submitted.]