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Understanding Confidentiality: Program Effectiveness and the Freedom of Information Act Exemption 4

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UNDERSTANDING CONFIDENTIALITY: PROGRAM
EFFECTIVENESS AND THE FREEDOM OF INFORMATION
ACT EXEMPTION 4

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INTRODUCTION

On August 22, 2007, the four biggest banks in the country—Citigroup, Bank of America, JPMorgan, and Wachovia—each borrowed \$500 million directly from the Federal Reserve Bank of New York.¹ At the time, observers saw the move as largely symbolic—a coordinated attempt by the Federal Reserve System (Fed) and these major financial institutions to remove preemptively the stigma associated with borrowing from the discount window.² Within a month, borrowing from the discount window rose to the highest level since the day after the September 11 terrorist attacks.³ As the financial crisis unfolded, the Fed continued lending, and by August 2009, its balance sheet approached \$2.08 trillion.⁴

Public and private interests clashed as the Fed refused to disclose information regarding these transactions, such as the identities of the borrowers, the amount of the loans, and the collateral accepted in return.⁵ As a result, in the midst of the financial crisis and this unprecedented level of Federal Reserve lending, the U.S. District Court for the Southern District of New York heard two cases, involving the Bloomberg and Fox News media outlets, seeking to gain information regarding the Fed's lending practices pursuant to the Freedom of Information Act (FOIA).⁶ In both cases, the Fed rejected the requests on the basis that the information was exempt

1. Eric Dash, *Four Major Banks Tap Federal Reserve for Financing*, N.Y. TIMES, Aug. 23, 2007, at C10.

2. *Id.* For a discussion of the discount window and the mechanics of Federal Reserve lending, see *infra* Part I.A.

3. Sudeep Reddy, *Banks Flock to Discount Window—Borrowing Surge Comes as Reduction Is Expected in Fed's Overnight Rate*, WALL ST. J., Sept. 12, 2007, at A2.

4. See Federal Reserve Statistical Release, Bd. of Governors of the Fed. Reserve Sys., *Factors Affecting Reserve Balances of Depository Institutions and Condition Statement of Federal Reserve Banks* (Aug. 27, 2009), available at <http://federalreserve.gov/releases/h41/20090827/>.

5. See Mark Pittman, Bob Ivry & Alison Fitzgerald, *Fed Defies Transparency Aim in Refusal To Disclose (Update2)*, BLOOMBERG, Nov. 10, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOngFPgq7r3M>.

6. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2009); *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384 (S.D.N.Y. 2009); see also 5 U.S.C. § 552 (2006).

from disclosure under FOIA Exemption 4,⁷ which exempts from disclosure “commercial or financial information obtained from a person and privileged or *confidential*.”⁸ The opposite conclusions reached by the two courts⁹ are representative of the divergent approaches courts have taken in their attempt to understand the word “confidential.”¹⁰

The ruling of the Second Circuit Court of Appeals, endorsing the narrow view of confidentiality taken by the district court in *Bloomberg*, failed to resolve this problem.¹¹ The interpretation of confidentiality that the Second Circuit endorsed is narrow because it views the two-pronged test for confidentiality as exclusive.¹² The program effectiveness test, by contrast, allows an agency to withhold information in situations in which the disclosure of information that serves a valuable purpose and is useful for the performance of statutory duties would disadvantage the agency.¹³ This approach espouses a broad view of confidentiality because it adds a third prong to the otherwise dichotomous test.¹⁴

7. See *Bloomberg*, 649 F. Supp. 2d at 270 (“The denial letter also reiterated that ... the Board considered [the responsive documents] exempt under Exemptions 4 and 5.”); *Fox News*, 639 F. Supp. 2d at 388 (“The Board ... replied that all the documents that Fox had sought were exempted from required disclosure rules under ... Exemptions 4 and 5.”).

8. 5 U.S.C. § 552(b)(4) (emphasis added).

9. Compare *Bloomberg*, 649 F. Supp. 2d at 280 (finding that the information is not confidential), with *Fox News*, 639 F. Supp. 2d at 400 (finding that the information is confidential).

10. Compare, e.g., *Nat’l Cmty. Reinv. Coal. v. Nat’l Credit Union Admin.*, 290 F. Supp. 2d 124, 133-34 (D.D.C. 2003) (finding information confidential only if it is likely to impair the government’s ability to obtain future information or is likely to cause competitive harm to the original information provider), with *Pub. Citizen Health Research Grp. v. Nat’l Insts. of Health*, 209 F. Supp. 2d 37, 46 (D.D.C. 2002) (finding information confidential in part because disclosure would impair “the efficient and effective performance” of the government’s duties).

11. See *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150-51 (2d Cir. 2010). A clearinghouse representing the banks as reverse-FOIA plaintiffs filed a petition for certiorari against which the Fed filed a brief in opposition. See Brief for the Federal Respondent in Opposition, *Clearing House Ass’n v. Bloomberg, L.P.*, 131 S. Ct. 1674 (2011) (No. 10-543), 2011 WL 601152; Petition for Writ of Certiorari, *Clearing House*, 131 S. Ct. at 1674 (No. 10-543), 2010 WL 4232635. The Supreme Court has denied certiorari. *Clearing House*, 131 S. Ct. at 1674.

12. For a discussion of the two-pronged test and the test’s development, see *infra* Part III.A.

13. See *infra* Part III.B.

14. See *infra* Part III.B.

This Note argues that given the legislative history and underlying purposes of FOIA, the program effectiveness test rejected by the Second Circuit is a proper approach to interpreting the statutory meaning of the word “confidential.”¹⁵ Furthermore, an examination of the costs and benefits of the disclosure of financial information that would affect an agency’s performance of its statutory duties justifies overcoming FOIA’s default presumption in favor of disclosure. Part I of this Note discusses the factual background of the Second Circuit cases, including the relevant details of the financial crisis, the mechanics of Federal Reserve lending, and the information sought in FOIA requests. Part II examines the legislative history of FOIA to show that the program effectiveness test protects specific congressionally contemplated interests. Part III traces the development of Exemption 4 jurisprudence and analyzes the organic development of the program effectiveness test. Part IV rejects the Second Circuit’s comparison of the program effectiveness test to the discredited “public interest” doctrine and proposes that the broadness of the program effectiveness test is not only permissible but also proper. Part V suggests that courts adopt a modified version of the existing program effectiveness test—one that incorporates a balancing test—in order to give the courts the ability to prevent agencies from arbitrarily withholding information.

I. BACKGROUND

A. *Financial Crisis and Federal Reserve Lending*

The financial crisis has complex and multifaceted roots,¹⁶ with the collapse of the subprime mortgage industry commonly considered

15. It is worth noting that academic literature has largely ignored the question of interpreting “confidential” as the term is used in Exemption 4. Despite the long history of courts grappling with the proper approach to this problem, *see infra* Part III, academic commentary is limited to a handful of student-authored pieces and a small number of articles in the *Administrative Law Review*. *See, e.g.*, Sarah W. Carroll, Secrecy, Systemic Risk, and the Freedom of Information Act’s “Confidentiality” Exemption 4 (Aug. 20, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1662687> (“[A]cademic literature appears to have ignored [this question] thus far.”).

16. For a discussion of the origins of the financial crisis, see generally HOWARD DAVIES, *THE FINANCIAL CRISIS: WHO IS TO BLAME?* (2010); RICHARD A. POSNER, *A FAILURE OF CAPITALISM* 1-40 (2009).

the proximate cause.¹⁷ The Fed became involved in response to the imminent failure of numerous significant financial institutions.¹⁸ The first financial institution to collapse was Bear Stearns in March 2008.¹⁹ September 2008 saw the nationalization of Fannie Mae and Freddie Mac,²⁰ the bankruptcy of Lehman Brothers,²¹ and the Fed's bailout of the American International Group.²²

The Fed acts pursuant to authority granted by the Federal Reserve Act (FRA).²³ One of the Fed's primary duties is to serve as a lender of last resort and lend to "any individual, partnership, or corporation ... unable to secure adequate credit accommodations from other banking institutions."²⁴ The discount window operates to provide two types of credit: primary credit, which is available to depository institutions "in generally sound financial condition,"²⁵ and secondary credit, which is available to depository institutions

17. See DAVIES, *supra* note 16, at 25-34 (discussing the subprime mortgage collapse as a "trigger" of the greater financial crisis).

18. See Edmund L. Andrews, *Vast Bailout by U.S. Proposed in Bid To Stem Economic Crisis*, N.Y. TIMES, Sept. 19, 2008, at A1.

19. See Landon Thomas, Jr., *Run on Big Wall St. Bank Spurs U.S.-Backed Rescue*, N.Y. TIMES, Mar. 15, 2008, at A1 (describing the series of events leading to the collapse of Bear Stearns as tantamount to a bank run). JPMorgan quickly bought Bear Stearns, with the Fed acting as a facilitator in the process. See Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 480-83 (2009).

20. See James R. Hagerty, Ruth Simon & Damian Paletta, *U.S. Seizes Mortgage Giants—Government Ousts CEOs of Fannie, Freddie; Promises up to \$200 Billion in Capital*, WALL ST. J., Sept. 8, 2008, at A1.

21. See Davidoff & Zaring, *supra* note 19, at 491-94. For a first-person account of the working of Lehman Brothers and the personalities involved in its operation and collapse, see generally LAWRENCE G. McDONALD WITH PATRICK ROBINSON, *A COLOSSAL FAILURE OF COMMON SENSE: THE INSIDE STORY OF THE COLLAPSE OF LEHMAN BROTHERS* 298-339 (2009).

22. See Matthew Karnitschnig, Deborah Solomon, Liam Plevin & Jon E. Hilsenrath, *U.S. To Take Over AIG in \$85 Billion Bailout; Central Banks Inject Cash as Credit Dries*, WALL ST. J., Sept. 17, 2008, at A1.

23. Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.). The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010), has significantly changed the operation of the Federal Reserve System in response to the financial crisis and in numerous instances has amended the FRA. However, as the purpose of this Part is to describe the Fed's actions during the financial crisis in order to provide context to the subsequent FOIA litigation, other changes will not be discussed.

24. 12 U.S.C. § 343 (2006).

25. 12 C.F.R. § 201.4(a) (2010).

“not eligible for primary credit.”²⁶ Since the passage of the Monetary Control Act of 1980,²⁷ access to the discount window has been open to both member and nonmember institutions.²⁸ Although loans must be “secured to the satisfaction of the Reserve Bank providing the credit,”²⁹ banks have broad discretion to determine what constitutes acceptable collateral.³⁰ During the financial crisis, the Fed created three new facilities to lend to financial institutions: the Term Auction Facility (TAF),³¹ the Term Securities Lending Facility (TSLF),³² and the Primary Dealer Credit Facility (PDCF).³³ The significant increase in the Fed’s balance sheet³⁴ is attributable to increased lending through the discount window and these newly developed facilities.³⁵

B. FOIA Requests and Court Decisions

In response to the vast increase in the Fed’s lending, two news agencies submitted requests under FOIA for information regarding the Fed’s lending practices.³⁶ The Fed has a standard policy of

26. *Id.* § 201.4(b).

27. Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C.).

28. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS* 57 (1984).

29. *Id.* at 59.

30. Kara Karlson, Comment, *Checks and Balances: Using the Freedom of Information Act To Evaluate the Federal Reserve Banks*, 60 AM. U. L. REV. 213, 222 (2010).

31. Press Release, Bd. of Governors of the Fed. Reserve Sys. (Dec. 12, 2007), available at <http://www.federalreserve.gov/newsevents/press/monetary/20071212a.htm>.

32. Press Release, Bd. of Governors of the Fed. Reserve Sys. (Mar. 11, 2008), available at <http://www.federalreserve.gov/newsevents/press/monetary/20080311a.htm>.

33. Press Release, Fed. Reserve Bank of N.Y., Federal Reserve Announces Establishment of Primary Dealer Credit Facility (Mar. 16, 2008), available at <http://www.ny.frb.org/newsevents/news/markets/2008/rp080316.html>.

34. See *supra* text accompanying note 4.

35. See Kathleen Vermazen Radez, Survey, *The Freedom of Information Act Exemption 4: Protecting Corporate Reputation in the Post-Crash Regulatory Environment*, 2010 COLUM. BUS. L. REV. 632, 664-65 (describing the loan facilities and stating that they caused the balance of outstanding loans to reach \$400 billion); Alexander Sellinger, Note, *Backdoor Bailout Disclosure: Must the Federal Reserve Disclose the Identities of Its Borrowers Under the Freedom of Information Act?*, 15 FORDHAM J. CORP. & FIN. L. 259, 264 (2009) (attributing the increase in lending to the special credit and liquidity facilities).

36. See *supra* text accompanying note 6.

resisting attempts to compel disclosure.³⁷ The Board of Directors of the Federal Reserve System (Board) justifies this policy in part because it claims that the Fed releases broader aggregate information.³⁸ The Board's approach ultimately led to the litigation of both media outlets' FOIA requests.³⁹ Bloomberg filed its first request on April 7, 2008, requesting "[a]ll documents reflecting or concerning the portfolio of securities ... supporting the loan extended by the Federal Reserve in connection with the proposed acquisition of Bear Stearns Cos. by JP Morgan Chase & Co."⁴⁰ Bloomberg filed its second FOIA request on May 20, 2008, requesting documents related to the loans given and collateral accepted in transactions by the discount window, the TSLF, the TAF, and the PDCF.⁴¹ The news outlet sought the information in order to evaluate the government's response and "[t]o discharge its obligation as the eyes and ears of the public."⁴² After failing to receive a formal response to the request, Bloomberg filed its complaint in federal court on November 7, 2008.⁴³

Fox Business submitted its initial FOIA request on November 10, 2008, seeking "the names of institutions receiving Federal Reserve lending" and "an accounting of the collateral provided by these

37. See Sellinger, *supra* note 35, at 264-68 (describing the difficulties associated with obtaining records from the Fed); see also Timothy A. Canova, *Black Swans and Black Elephants in Plain Sight: An Empirical Review of Central Bank Independence*, 14 CHAP. L. REV. 237, 308 (2011) ("The Fed has never disclosed the identities of borrowers of its discount window lending since the program was created in 1914.").

38. See *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 388 (S.D.N.Y. 2009).

39. The Dodd-Frank Act has changed the Fed's disclosure mandates to require the timely disclosure of the information discussed later in this Note. See *infra* text accompanying notes 40-45; see also Pub. L. No. 111-203, § 1103, 124 Stat. 1376, 2118-20 (2010). This change does not affect the litigation in question. Because piecemeal statutory changes are an inadequate solution to the problems that Exemption 4 poses, see *infra* Part V, the factual predicate discussed in this Note still presents an ideal opportunity to adjust the current doctrine.

40. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 269 (S.D.N.Y. 2009) (quoting Declaration of Allison M. Thro ¶ 5, *Bloomberg*, 649 F. Supp. 2d 262 (No. 08 Civ. 9595) (internal quotation marks omitted)).

41. Complaint for Declaratory and Injunctive Relief ¶¶ 17-18, *Bloomberg*, 649 F. Supp. 2d 262 (No. 08 Civ. 9595), 2008 WL 8066871, at *5-6.

42. *Id.* ¶¶ 2, 4.

43. *Id.* ¶¶ 22-26.

institutions in exchange for the lending.”⁴⁴ Fox Business submitted a second FOIA request eight days later on November 18, 2008, requesting similar documents for the months of September and October 2008 and also requesting “records showing (a) the amounts borrowed by each named institution, (b) the collateral pledged by each institution, and (c) the collateral held by the Federal Reserve at the close of business on November 14, 2008.”⁴⁵ Fox Business did not receive a response from the Fed regarding its first FOIA request and received a denial in response to the second request.⁴⁶

In the course of litigation of both cases in the district courts, the Fed asserted that all responsive records were exempt pursuant to Exemptions 4 and 5 of FOIA.⁴⁷ Significantly, the Fed asserted that Exemption 4 allowed the agency to withhold responsive records under a “third prong” of *National Parks & Conservation Ass’n v. Morton*,⁴⁸ the case that established the standards for withholdings under Exemption 4.⁴⁹ The Fed asserted that “exemption [4] also protects a governmental interest in administrative efficiency and effectiveness.”⁵⁰ The Fed claimed that disclosure of the requested information would impair

(i) the Board’s ability to carry out its statutory responsibility “to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates” specified in section 2A of the Federal Reserve Act ... 12 U.S.C. § 225a; (ii) its ability effectively to utilize its authority under section 13(3) of

44. Complaint ¶¶ 17-18, *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384 (S.D.N.Y. 2009) (No. 09 Civ. 272), 2009 WL 78133, at *5-6 [hereinafter *Fox Complaint*].

45. *Id.* ¶¶ 22-24.

46. *Id.* ¶¶ 21, 31.

47. Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment, *Bloomberg*, 649 F. Supp. 2d 262 (No. 08 Civ. 9595), 2009 WL 6800709, at *6-7 [hereinafter *Fed Memorandum*]; accord *Fox Complaint*, *supra* note 44, ¶¶ 31-32 (describing the denial letter from the Fed). This Note does not discuss the applicability of Exemption 5 to the responsive records.

48. 498 F.2d 765 (D.C. Cir. 1974).

49. *Fed Memorandum*, *supra* note 47, at *23-30; see also *Nat’l Parks*, 498 F.2d at 766-67; *infra* Part III.A.

50. *Fed Memorandum*, *supra* note 47, at *23-24 (quoting *Critical Mass Energy Project v. NRC (Critical Mass III)*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc)). The Fed also claimed that the records were exempt from disclosure under the second prong of *National Parks*, claiming competitive harm to the borrowers. *Id.* at *18-23.

the FRA to permit lending by the Reserve Banks to individuals, partnerships or corporations to address “unusual and exigent circumstances” in the domestic economy; and (iii) and [sic] its ability under section 10B and related sections of the FRA to utilize [discount window] and TAF lending by the Reserve Banks as a safety valve.⁵¹

Essentially, the Fed argued that disclosure of the identities of borrowing institutions would subject the institutions to stigmatization and would discourage institutions from using the Fed as a lender of last resort.⁵² This would, in turn, impair the Fed’s ability to maintain “the basic stability of the payment system by supplying liquidity during times of systemic stress.”⁵³

After considering the Fed’s reasoning, the *Fox News* and *Bloomberg* district courts came to opposite conclusions as to the applicability of this program effectiveness analysis. The district court in *Fox News* recognized that courts have applied the exemption “if disclosure would undermine the agency’s ‘effective execution of its statutory responsibilities,’”⁵⁴ and noted that in this case, “[t]he Board’s concerns, that rumors are likely to begin and runs on banks are likely to develop, cannot be dismissed.... The national economy is not so out of danger ... as to make the Board’s concern academic.”⁵⁵ The court fully credited the Board’s argument regarding the Fed’s statutory duties⁵⁶ and held that FOIA allowed nondisclosure on this basis.⁵⁷ The *Bloomberg* court, on the other hand, reached the opposite result, stating that “[i]n light of the strong presumption in favor of interpreting FOIA exemptions *narrowly* ... this Court will not import or apply the program effectiveness test.”⁵⁸

The Second Circuit Court of Appeals needed to resolve the split that had developed organically within the lower courts and did so by

51. *Id.* at *26.

52. *Id.* at *19, 29-30.

53. *Id.* at *29-30.

54. *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384, 400 (S.D.N.Y. 2009).

55. *Id.* at 401.

56. *See supra* note 51 and accompanying text.

57. *Fox News*, 639 F. Supp. 2d at 401-02.

58. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 278 n.15 (S.D.N.Y. 2009).

deciding appeals of *Fox News* and *Bloomberg* on the same day.⁵⁹ In *Bloomberg*, the Second Circuit held that, although the arguments in favor of the program effectiveness test were “plausible, and forcefully made,”⁶⁰ adopting the test would give the agency an inappropriate degree of discretion and undermine FOIA’s basic policy of disclosure.⁶¹ The court acknowledged that it created a circuit split with the First and D.C. Circuits by declining to adopt the program effectiveness test.⁶²

II. LEGISLATIVE HISTORY

Because the statute provides no guidance as to the proper definition of “confidential,” the legislative histories of FOIA and its exemptions are useful tools for trying to define the term through an understanding of the underlying purposes of FOIA generally and Exemption 4 specifically.⁶³ Understanding FOIA’s legislative history

59. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010); *Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 158 (2d Cir. 2010). The *Bloomberg* decision contains the court’s analysis of the applicability of Exemption 4; *Fox News* only references the reasoning in *Bloomberg*. *Fox News*, 601 F.3d at 160.

60. *Bloomberg*, 601 F.3d at 151.

61. *Id.* at 150-51.

62. *Id.* at 150.

63. There has been significant debate over the legitimacy of using legislative histories to interpret statutes and the value of any information obtained in such a manner. See Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC’Y INT’L L. PROC. 305, 306 (2004) (“Congress makes its wishes known in laws; only statutes—not committee hearings, not floor statements, not even committee reports—have the approval of both Houses and of the president that laws require.... We must do our best to discern the meaning of the statute from its text.”); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 379 (“[T]he benefits accruing from the use of legislative history are marginal when weighed against the potential for abuse and the enormous effort involved.”). But see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (“Legislative history helps a court understand the context and purpose of a statute.”); Abner J. Mikva, *A Reply to Judge Starr’s Observations*, 1987 DUKE L.J. 380, 386 (stating that judges “cannot afford to ignore those obvious tools which members of Congress use to explain what they are doing and the meaning of the words used in the statute”); see also CHARLES H. KOCH ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 665-66 (6th ed. 2010) (acknowledging this divide).

The views in favor of a disciplined use of legislative history must prevail in the present situation. The word “confidential” is defined as “private” or “secret.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 261 (11th ed. 2003). This plain meaning of confidentiality cannot be reconciled with courts’ rejection of agencies’ ability to invoke Exemption 4 based on an express

is particularly important to understanding Exemption 4, as most courts faced with this question have turned to the legislative history for guidance⁶⁴ despite the fact that a court once described the Act's legislative history as "tortured, not to say obfuscating."⁶⁵

President Lyndon Johnson signed FOIA into law on July 4, 1966, following an effort spearheaded by media outlets and with the public support of Congress and the executive branch.⁶⁶ The general purpose of FOIA is, quite simply, to vindicate the public interest in knowing what the government is doing.⁶⁷ However, a significant amount of information that the government holds sheds light not on the actions of the government but rather on the actions of third parties who interact with the government. Congress recognized that such information often merits protection and incorporated exemptions to this effect.⁶⁸

Records of congressional hearings show that Congress was aware that a problem area lay "in the large body of the Government's information involving private business data."⁶⁹ The Department of Justice expressed its view that disclosure of commercial or financial information could cause competitive injury to third parties, impair voluntary reporting programs, and "impede or wholly obstruct the proper performance of necessary government[] functions."⁷⁰ Congress intended Exemption 4 to "protect the confidentiality of information which is obtained by the Government ... but which would customarily not be released to the public by the person from whom it was obtained."⁷¹ The Senate Report states specifically that

grant of confidentiality. *See infra* notes 77-79 and accompanying text. As such, understanding the term in its statutory context is preferable to some other, more arbitrary, alternative.

64. *See infra* Part III.

65. *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 865 (2d Cir. 1978).

66. *See* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650-52 (1984) (describing the context of the passage of FOIA and the push for "open government").

67. 1 RICHARD J. PIERCE JR., *ADMINISTRATIVE LAW TREATISE* § 5.1 (4th ed. 2002).

68. *See* 5 U.S.C. § 552(b) (2006).

69. *Freedom of Information: Hearings on S. 1666 and S. 1663 (in Part) Before the Subcomm. on Admin. Practice & Procedure of the Comm. of the Judiciary*, 88th Cong. 199 (1963) (statement of Norbert A. Schlei, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice).

70. *Id.* at 200.

71. S. REP. NO. 89-813, at 9 (1965). The House Report uses similar language but has a number of clauses that seem to favor nondisclosure. *See* H.R. REP. NO. 89-1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2426-29. The House considered the bill after the Senate

Exemption 4's protections "would include any commercial ... and financial data, submitted by ... a borrower to a lending agency in connection with any loan."⁷²

Although the Senate framed the language in the report in terms that seek to protect information based on the third party's policies and expectations regarding the release of the information, nothing in the report limits the purposes for which someone may invoke the exemption. Congressional discussions regarding the potential effects on government information gathering and competitive harm to third parties made their way into neither the Senate Report nor the final law.

III. DEVELOPMENT OF EXEMPTION 4 LEGAL DOCTRINE

A. National Parks *and the Narrow Test for Confidentiality*

As a threshold measure, Exemption 4 applies only to "information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential."⁷³ The first two elements of the threshold test are much clearer than the third.⁷⁴ Analysis of the development of Exemption 4 jurisprudence regarding the meaning of "confidential" necessarily begins with *National Parks & Conservation Ass'n v. Morton*.⁷⁵ *National Parks* dealt with a FOIA request by an environmental interest group seeking records from the Department of the Interior regarding concessions operated

committee had made its report and the Senate had passed the bill. Rather than put the restrictions on disclosure into the bill, the House committee wrote the restrictions into the committee report and passed the bill without amendment, depriving the Senate of the opportunity to comment on the House Report. See 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 5:3 (2d ed. 1978). The House Report is considered unreliable to the extent it differs from the Senate Report. See *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 366 (1976) ("[W]e too 'choose to rely upon the Senate Report' in this regard." (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975))).

72. S. REP. NO. 89-813, at 9.

73. *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971) (quoting *Consumers Union of the U.S., Inc. v. Veterans Admin.*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969)).

74. Although the question of whether information generated by the Federal Reserve Banks themselves can be considered "obtained from a person" was also an issue in the Second Circuit cases, see *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148-49 (2d Cir. 2010), this question is immaterial to this Note's discussion of the third prong.

75. 498 F.2d 765 (D.C. Cir. 1974).

within the national parks.⁷⁶ The *National Parks* court stated that, although past decisions relied upon the “which would customarily not be released” language of the Act’s legislative history, the subjective intent or expectations of the submitting party could not be determinative.⁷⁷ Indeed, courts had rejected earlier tests that had relied upon either a promise of confidentiality or an expectation of confidentiality because they provided the submitting party with undue discretion.⁷⁸ The court reasoned that the legislative purpose underlying the exemption must objectively justify nondisclosure.⁷⁹ To vindicate the legislative purpose, the court adopted a two-pronged test, now known as the *National Parks* test, to determine confidentiality under Exemption 4. The court held that:

commercial or financial matter is “confidential” for the purposes of [Exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.⁸⁰

Significantly, the court expressed no opinion as to whether other governmental interests are embodied in this exemption, specifically referencing program effectiveness.⁸¹

The test developed by the D.C. Circuit became widely used throughout other circuits. Although commentators have criticized the holding as being “fabricated, out of whole cloth,”⁸² seven circuits have adopted it, and no circuit has expressly rejected it.⁸³

76. *Id.* at 766.

77. *Id.* at 766-67.

78. See H.R. REP. NO. 95-1382, at 16-21 (1978) (discussing various approaches courts took to define confidentiality prior to *National Parks*).

79. *Nat’l Parks*, 498 F.2d at 766-67.

80. *Id.* at 770 (footnote omitted).

81. *Id.* at 770 n.17. When the case came back to the court of appeals for a second time, the court acknowledged that it had left this question open but declined to resolve it. See *Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976).

82. John C. Janka, Comment, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets*, 54 U. CHI. L. REV. 334, 364 (1987).

83. *Critical Mass III*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc) (surveying the adoption of the *National Parks* test by other circuits).

B. 9 to 5 and Critical Mass Embrace a Broader View of Confidentiality

Although the D.C. Circuit declined to address the question of whether Exemption 4 protects government interests outside of the two enumerated in the *National Parks* test,⁸⁴ other courts began to develop a program effectiveness test organically. The first court to do so was a district court in the District of Columbia.⁸⁵ In *Comstock International v. Export-Import Bank of the United States*, the court held that the Export-Import Bank had established that disclosure of certain information would damage program effectiveness by impairing the bank's ability to promote exports, thus making it more difficult to negotiate loan arrangements and discouraging participation in the bank's programs.⁸⁶

Other courts found this logic persuasive, and the program effectiveness test prospered. In *9 to 5 Organization for Women Office Workers v. Board of Directors of the Federal Reserve System*, the Court of Appeals for the First Circuit developed an influential version of the program effectiveness test.⁸⁷ In that case, the First Circuit considered a FOIA request for records relating to the Federal Reserve Bank's participation in a confidential salary survey.⁸⁸ The Board argued that participation in the salary survey, which required the nondisclosure of the inputs or results of the survey, was necessary to ensure competitive compensation in accordance with regulations promulgated to fulfill the statutory duty of setting employee salaries.⁸⁹ The court held that "[i]n view of the legitimate government interest of efficient operation, it would do violence to the statutory purpose of exemption 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities."⁹⁰ The court specifically referenced *Comstock* in rejecting the two prongs of the *National Parks* test as

84. See *supra* text accompanying note 80.

85. *Comstock Int'l (U.S.A.) v. Export-Import Bank of the U.S.*, 464 F. Supp. 804 (D.D.C. 1979).

86. See *id.* at 808.

87. 721 F.2d 1 (1st Cir. 1983).

88. *Id.* at 1.

89. *Id.* at 10.

90. *Id.* at 11.

exclusive.⁹¹ Notably, on the issue of what qualifies as a “valuable purpose,” the court stated that it found no justification in the legislative history for the argument that commercial or financial information must be absolutely essential to the operations of the agency in order to be treated as confidential.⁹²

The D.C. Circuit adopted the program effectiveness test in *Critical Mass Energy Project v. Nuclear Regulatory Commission*.⁹³ In this case, the D.C. Circuit reviewed a FOIA request by a nuclear power watchdog group seeking reports prepared by a utility industry consortium.⁹⁴ The court accepted the Nuclear Regulatory Commission’s argument that although it could obtain the information in other ways, meaning that the agency could not satisfy the first prong of the *National Parks* test, using alternative methods would significantly reduce agency efficiency.⁹⁵ The court remanded to the district court with directions to “afford the agency the opportunity to show ... that exercising its full authority under this regulation would damage some identifiable agency interest relating to program effectiveness or efficiency.”⁹⁶ Specifically, the agency had to demonstrate that obtaining this information in another way would impair “efficient operation[s]” or “effective execution of [NRC’s] statutory responsibilities.”⁹⁷ *National Parks* received additional negative treatment when the case came to the court of appeals for the second time.⁹⁸

Although *Critical Mass III* eventually reversed the *Critical Mass I* decision, the *Critical Mass III* court, sitting en banc, recognized

91. *Id.* at 9. Even the dissent acknowledged that the *National Parks* test was not an exclusive formulation of the interests that Exemption 4 protects. *Id.* at 12 (Breyer, J., dissenting).

92. *Id.* at 10 (majority opinion).

93. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n (Critical Mass I)*, 830 F.2d 278 (D.C. Cir. 1987), *rev’d on other grounds, Critical Mass III*, 975 F.2d 871 (D.C. Cir. 1992) (en banc).

94. *Id.* at 279. *Critical Mass II* and *Critical Mass III* dealt with the same litigation as the issue repeatedly returned to the court of appeals. *See Critical Mass III*, 975 F.2d at 872; *Critical Mass Energy Project v. Nuclear Regulatory Comm’n (Critical Mass II)*, 931 F.2d 939, 940, 947-48 (D.C. Cir. 1991).

95. *Critical Mass I*, 830 F.2d at 286.

96. *Id.* at 287.

97. *Id.* (quoting 9 to 5 *Org. for Women Office Workers v. Bd. of Dirs. of the Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983)).

98. *See Critical Mass II*, 931 F.2d at 947-48 (Randolph, J., concurring) (opining that *National Parks* incorrectly interpreted Exemption 4).

that the *Critical Mass I* court applied Exemption 4 protection to the governmental interest in administrative efficiency and effectiveness.⁹⁹ The court continued on to state clearly that the two interests identified in the *National Parks* test are not exclusive.¹⁰⁰ The *Critical Mass III* court held that the *National Parks* test is overly narrow and adopted a new test that distinguished between information that a third party voluntarily provides and information that an agency compels.¹⁰¹ When a person gives information to the agency voluntarily, the information is confidential if it is “of a kind that would customarily not be released to the public by the person from whom it was obtained.”¹⁰²

C. Exemption 4 in the Second Circuit

The Second Circuit adopted the two-pronged *National Parks* test in *Continental Stock Transfer and Trust Co. v. SEC*.¹⁰³ The district court in *Bloomberg* relied heavily on *Continental Stock* in determining that the program effectiveness test was not the law of the Second Circuit.¹⁰⁴ In *Continental Stock*, the Second Circuit simply adopted the law of the D.C. Circuit without engaging in an independent review of legislative history or purpose, stating that “opinions [of the Court of Appeals for the District of Columbia Circuit] construing the Freedom of Information Act are entitled to appropriate weight.”¹⁰⁵ The fact that the court delivered its opinion

99. *Critical Mass III*, 975 F.2d at 879.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977) (per curiam). *Continental Stock* cites to *Charles River Park “A,” Inc. v. Department of Housing & Urban Development*, 519 F.2d 935 (D.C. Cir. 1975), which in turn quotes *National Parks* for the formulation of the Exemption 4 test. *Cont'l Stock*, 566 F.2d at 375 (citing *Charles River*, 519 F.2d at 940).

104. See *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 278 (S.D.N.Y. 2009); see also Sellinger, *supra* note 35, at 310 (citing *Continental Stock* for the proposition that “[p]rogram effectiveness’ is certainly not the law of the Second Circuit”).

105. *Cont'l Stock*, 566 F.2d at 375. The court referred to the “appropriate weight” accorded to the D.C. Circuit’s FOIA decisions because the D.C. Circuit’s universal jurisdiction over FOIA complaints, see 5 U.S.C. § 552(a)(4)(B) (2006), results in that circuit hearing the largest number of cases and developing the most sophisticated doctrine. See also Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 779-86 (2002) (discussing the important roles of the D.C. Circuit in administrative law

from the bench immediately following oral argument and published the decision *ex post* only at the request of the SEC suggests that the court did not see its decision as having significant precedential value.¹⁰⁶ Additionally, as *Continental Stock* was a case of a reverse-FOIA plaintiff contesting the decision of the SEC to disclose information, the facts of the case did not present the court with the issue of program effectiveness.¹⁰⁷

Between the *Continental Stock* and *Bloomberg* decisions, the Second Circuit did not hear a case that required it to decide whether the *National Parks* test represented the exclusive interests protected by Exemption 4. In *American Airlines, Inc. v. National Mediation Board*, the Second Circuit recognized criticism of the restrictiveness of the *National Parks* test.¹⁰⁸ However, because the government clearly had the ability to compel the information at issue, and the information was exempt under the second prong of *National Parks*, the court did not have to reach the question.¹⁰⁹

Despite the lack of clarity from the court of appeals, the district courts in the Second Circuit have given the program effectiveness approach positive treatment.¹¹⁰ In *Buffalo Evening News, Inc. v. Small Business Administration*, for example, the Small Business Administration, citing to *Comstock*, argued that disclosure would hamper its ability to effectively operate its loan assistance program.¹¹¹ Although the district court ruled against the agency, it did so based on its finding on summary judgment that disclosure would not in fact have had a negative impact on program effectiveness.¹¹² In another case, a different district court cited *9 to 5* with approval, stating that the defendants had “submitted extensive [documents] that explain why disclosure ... would interfere with the export

decision making generally); G. Branch Taylor, Comment, *The Critical Mass Decision: A Dangerous Blow to Exemption 4 Litigation*, 2 *COMMLAW CONSPECTUS* 133, 139 (1994) (recognizing the importance of the D.C. Circuit in the development of FOIA doctrine).

106. *Cont'l Stock*, 566 F.2d at 374.

107. *Id.* at 374-75.

108. 588 F.2d 863, 871 (2d Cir. 1978).

109. *Id.*

110. *But see* N.Y. Pub. Interest Research Grp. v. EPA, 249 F. Supp. 2d 327, 334-36 (S.D.N.Y. 2003) (recognizing the split between *National Parks/Continental Stock* and *Critical Mass III* but expressing the opinion that the *Critical Mass III* interpretation was too broad).

111. 666 F. Supp. 467, 470 (W.D.N.Y. 1987).

112. *Id.* at 471.

control system.”¹¹³ In one of the most in-depth discussions of the program effectiveness test, the Southern District of New York heard a case involving the potential disclosure of information obtained by the FDIC acting in its capacity as a receiver.¹¹⁴ The district court held that “the peril to the FDIC’s mission here as receiver is sufficiently compelling to merit use of the exemption.”¹¹⁵ The court acknowledged that allowing “program effectiveness” to justify nondisclosure could threaten the general policy of openness and disclosure, but the court ultimately rejected this argument, claiming that the district court had the power to hold the agency to more than “ritual and unsubstantiated incantations.”¹¹⁶ On appeal, the Second Circuit declined to reach the issue of the program effectiveness test, stating that “[b]ecause we agree with the district court’s analysis as to [the] second prong, we do not reach the issue whether the district court properly afforded relief to the FDIC on the basis of the ‘program effectiveness’ exemption derived from footnote seventeen of *National Parks*.”¹¹⁷

Although the legal precedent for the program effectiveness test in the Second Circuit is admittedly sparse, this approach, and the cases from other circuits developing it, has received positive treatment.¹¹⁸ Furthermore, decisions prior to *Bloomberg* certainly did not reject the program effectiveness approach. Before *Bloomberg*, the Second Circuit had not decided any cases that forced it to confront the issue directly. Considering that the *Continental Stock* court based its adoption of *National Parks* on deference to the D.C. Circuit, rather than on its own independent policy analysis,¹¹⁹ the court would not have brought itself into conflict with prior circuit decisions had it decided to embrace a broader view of confidentiality and adopt the program effectiveness test.

113. *Africa Fund v. Mosbacher*, No. 92-289, 1993 WL 183736, at *6-7 & n.3 (S.D.N.Y. May 26, 1993).

114. *Nadler v. FDIC*, 899 F. Supp. 158, 159 (S.D.N.Y. 1995).

115. *Id.* at 162.

116. *Id.*

117. *Nadler v. FDIC*, 92 F.3d 93, 96 (2d Cir. 1996).

118. *See, e.g., Clarke v. U.S. Dep’t of the Treasury*, No. 84-1873, 1986 WL 1234, at *3 (E.D. Pa. Jan. 28, 1986) (rejecting FOIA request under Exemption 4 where disclosure of information regarding the sale of U.S. treasuries “would threaten to eliminate or reduce the pool of investors willing to purchase Government Securities”); Radez, *supra* note 35, at 647-48 & n.56.

119. *See supra* note 105 and accompanying text.

IV. TRANSPARENCY AND FINANCIAL INFORMATION: IS DISCLOSURE ALWAYS GOOD?

A. Program Effectiveness Versus Public Interest

Although the Second Circuit could have adopted the program effectiveness test, it chose not to, stating that doing so would be contrary to “the basic policy that disclosure, not secrecy, is the dominant policy objective of FOIA.”¹²⁰ The court was correct in its recognition that FOIA exemptions “have been consistently given a narrow compass,”¹²¹ but this does not mean that courts should read the exemptions out of the law or that courts must choose the narrower of two interpretations when both law and policy support the broader interpretation.

In determining that program effectiveness would give the agencies too much deference, the *Bloomberg* court relied heavily on its conclusion that the program effectiveness test would be analogous to the “public interest” standard that the Supreme Court previously rejected.¹²² On closer inspection, however, the two doctrines are not as similar as their names may have led the court to believe.¹²³ The *Bloomberg* court was the first court to compare the program effectiveness test with the “public interest” standard, and the only commentator to address the comparison agreed with the court’s analogy.¹²⁴ Because the *Bloomberg* court found the Supreme Court’s reasoning in *Merrill* to be “instructive,”¹²⁵ if this analogy is false it

120. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 151 (2d Cir. 2010) (quoting *U.S. Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)) (internal quotation marks omitted).

121. *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

122. *Bloomberg*, 601 F.3d at 150 (citing *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979)); see also Carroll, *supra* note 15, at 27-30 (endorsing the Second Circuit’s analogy to *Merrill*).

123. See Brief for the Federal Respondent in Opposition at 15-16, *Clearing House Ass’n v. Bloomberg L.P.*, No. 10-543 (U.S. Feb. 18, 2011) (“The court of appeals mistakenly concluded that the program effectiveness test was the ‘functional equivalent’ of the ‘public interest’ standard for withholding under Exemption 5, which [the Supreme Court] rejected.”).

124. See Carroll, *supra* note 15, at 27-30.

125. *Bloomberg*, 601 F.3d at 150 (stating additionally that the program effectiveness test is the “functional equivalent” of the “public interest” standard).

would weaken the logic on which the court based its rejection of the program effectiveness test.

Merrill dealt not with Exemption 4 but with FOIA Exemption 5,¹²⁶ which applies to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... *in litigation with the agency*.”¹²⁷ The guiding principles of Exemption 5 doctrine are the “privilege[s] enjoyed by the Government in the civil discovery context.”¹²⁸ In *Merrill*, the Fed did not argue that withholding records in the public interest is a privilege enjoyed by the agency in civil discovery, and it probably could not have made a nonfrivolous argument to that effect. The Fed argued in *Merrill* that “[t]his general authority exists ... even if the memoranda in question could be routinely discovered by a party in civil litigation with the agency.”¹²⁹ The Fed’s argument clearly conflicts with the plain meaning of Exemption 5, because “public interest” is not relevant to civil discovery.¹³⁰ Confidentiality, however, has a direct relationship to program effectiveness insofar as confidentiality promotes participation in or the operation of government programs.¹³¹

The *Bloomberg* court misconstrued the rationale for the Supreme Court’s rejection of the “public interest” standard. The “public interest” standard failed not because of its *breadth* but because of its *incompatibility* with the statutory language. The Supreme Court did say that the “public interest” standard “proves too much” and “would leave little, if anything, to FOIA’s requirement of prompt disclosure”;¹³² however, the *Bloomberg* court’s analogy fails to take into account the vastly different scopes of the exemptions in question. The “public interest” test would “allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy.”¹³³ The program effectiveness test would apply only once the threshold test is satisfied,¹³⁴ meaning that only commercial or financial information obtained from a person would qualify. As

126. *Merrill*, 443 U.S. at 350-52.

127. 5 U.S.C. § 552(b)(5) (2006) (emphasis added).

128. *Merrill*, 443 U.S. at 354.

129. *Id.* at 353.

130. *See id.* at 354.

131. *See supra* Part III.B; *supra* notes 68, 70 and accompanying text.

132. *Merrill*, 443 U.S. at 354.

133. *Id.*

134. *See supra* text accompanying note 73.

courts have rejected the argument that Exemption 4 covers confidential noncommercial information,¹³⁵ the threshold test significantly limits the scope of the exemption. Considering that the purpose of FOIA is to inform the citizenry of the actions of the government,¹³⁶ the “public interest” test rejected in *Merrill* does significantly more to undermine this goal than does the program effectiveness test.

B. Treating Financial Information Differently Under FOIA

Even if the analogy between the “public interest” test and the program effectiveness test is appropriate, legitimate policy justifications support treating the disclosure of financial information differently than the disclosure of other agency records. A blanket policy in favor of disclosure is able to produce generally consistent and predictable results and create a higher degree of transparency. However, such a policy fails to account for the costs and benefits of transparency, which change relative to the government process in question.¹³⁷ The impact of a broad-based policy of transparency on the use of Exemption 4 has increased under the current administration.¹³⁸

Justice Scalia once called FOIA “the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.”¹³⁹ One of the primary causes for failures in cost-benefit analysis in the application of FOIA is a lack of clear understanding of what transparency means and when it is most important.¹⁴⁰ The benefits of transparency are well known and “fairly commonsensical” because they are “consistent with modern

135. See *Wash. Project, Inc. v. U.S. Dep’t of Health, Educ. & Welfare*, 504 F.2d 238, 244-45 (D.C. Cir. 1974).

136. See *PIERCE*, *supra* note 67, § 5.1.

137. See Carroll, *supra* note 15, at 30-31 (citing Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 *GOVERNANCE* 529, 530 (2009)).

138. See Oliya S. Zamaray, Note, *The Obama Administration’s Blanket FOIA Policy Is No Comfort to Federal Contractors: The Need for Executive Branch Guidance on Exemption 4 Within the “Openness Regime,”* 39 *PUB. CONT. L.J.* 617, 621-23 (2010) (discussing the effect of executive policy on FOIA disclosure).

139. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 *REGULATION* 14, 15 (1982).

140. See Mark Fenster, *The Opacity of Transparency*, 91 *IOWA L. REV.* 885, 885 (2006).

Western political values.”¹⁴¹ Yet transparency also has distinct costs, such as national security, the fiscal cost of compliance, the impairment of deliberative government action, and the inability of the government to control the information it produces.¹⁴²

These costs can be particularly acute in the case of the potential disclosure of commercial and financial information. One commentator has noted that such third-party information is “not the stuff that comprises the heart of democratic self-rule.”¹⁴³ Transparency is no better defined in the context of banking and financial services than it is in other areas of government.¹⁴⁴ The inability of an agency such as the Fed—charged with increasing market confidence, acting as a lender of last resort, and preventing bank runs—to control the flow of the information it holds can have potentially serious negative consequences.¹⁴⁵ Some unresolved issues regarding transparency in bank supervision include fairness and access to market information, market stigma and competitive harm, government role as a potential market mover, and concerns regarding the public’s ability to digest complex financial information in a way that promotes the benefits of transparency.¹⁴⁶ Until policymakers have an opportunity to further examine these issues, it is imprudent to dismiss the Fed’s claims of impaired program effectiveness. Transparency is a means to an end rather than an end in and of itself, and the blanket policy in favor of disclosure deprives courts of the ability to use transparency as a means to an end.

Although disclosure of the records at issue in *Bloomberg* will undoubtedly shed light on the actions of the Fed, it also threatens to disclose a significant amount of information about the banks that transacted with the Fed.¹⁴⁷ Disclosure of these private records does not achieve FOIA’s goal of openness and government transpar-

141. *Id.* at 894; see also Wald, *supra* note 66, at 679 (asking “whether any alternative ... defense against a secretive and capricious Executive is as effective as an informed citizenry”).

142. See Fenster, *supra* note 140, at 906-10.

143. Amy E. Rees, Note, *Recent Developments Regarding the Freedom of Information Act: A “Prologue to a Farce or a Tragedy; or, Perhaps Both,”* 44 DUKE L.J. 1183, 1187 (1995) (arguing that Exemption 1 should be construed more narrowly than Exemption 4).

144. See James E. Kelly, *Transparency and Bank Supervision*, 73 ALB. L. REV. 421, 421-25 (2010).

145. See Fed Memorandum, *supra* note 47, § D(1)(b).

146. Kelly, *supra* note 144, at 446.

147. See *supra* Part I.B.

ency.¹⁴⁸ In fact, the disclosure of sensitive business information has long been a perceived problem of FOIA, despite the protection of Exemption 4.¹⁴⁹ The *National Parks* test fails to take into account numerous reasons why businesses would desire to keep information secret outside the limited scope of competitive harm.¹⁵⁰ *National Parks* also fails to protect businesses from corporate espionage in situations in which information would be useful to a competitor but would render competitive harm difficult or impossible to prove.¹⁵¹ These economic costs must be considered in deciding whether the costs of disclosure are sufficient to overcome FOIA's presumption in favor of transparency.

V. A PROPOSED SOLUTION

The circuit split created by the Second Circuit's rejection of the program effectiveness test shows the lack of clarity regarding the proper scope of Exemption 4. Although the Dodd-Frank Act has changed some disclosure requirements,¹⁵² the legislation did not affect the vast majority of financial and commercial information held by the government. Congress's lack of specialization and institutional inertia make such an ad hoc approach to defining "confidential" impractical. Considering that Congress made the changes that it did only in response to financial crisis, the legislature cannot be expected to make legislative policy determinations regarding each type of commercial or financial information in the government's possession. Such an approach would be a completely inefficient use of congressional resources. Courts need a more workable test, and they are the institution best positioned to create one.

148. See Gary I. Kruger, Comment, *A Review of the Fourth Exemption of the Freedom of Information Act*, 9 AKRON L. REV. 673, 694 (1976).

149. See Russell B. Stevenson, Jr., *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 ADMIN. L. REV. 207, 222 (1982).

150. See, e.g., Radez, *supra* note 35, at 663-73 (discussing the interest in preventing reputational harm).

151. See Thomas L. Patten & Kenneth W. Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 ADMIN. L. REV. 193, 195-200 (1977).

152. See *supra* note 39.

The broader view of confidentiality embraced by the First and D.C. Circuits¹⁵³ is appropriate in light of FOIA's legislative history¹⁵⁴ and is preferable to the narrow view as a matter of policy.¹⁵⁵ In this respect, this Note breaks from existing commentary that has largely argued that the program effectiveness test is impermissibly broad.¹⁵⁶ In a modified version of the test developed by the First Circuit,¹⁵⁷ agencies should be entitled to invoke Exemption 4 when the value of disclosure is outweighed by the information's utility as a tool for the effective execution of the agency's statutory responsibilities. Although this proposed solution invites courts to engage in a balancing analysis, it should not change the way courts have used the program effectiveness test in the past. Making the balancing test explicit would simply encourage courts to engage in the type of principled cost-benefit analysis necessary for any proper transparency analysis.¹⁵⁸

This proposed test's workability is one of its primary advantages. The record of use from twenty years of application in the First and D.C. Circuits¹⁵⁹ undermines the contentions that the program effectiveness test gives impermissible deference to the agencies.¹⁶⁰ District courts have demonstrated that they can properly hold the agency to a meaningful burden of proof.¹⁶¹ Additionally, many circuits have not considered the applicability of the program effectiveness test, meaning that its adoption would not create significant conflicts with existing precedent.¹⁶² Further, district courts in other circuits have given the program effectiveness test positive treat-

153. See *supra* Part III.B.

154. See *supra* Part II.

155. See *supra* Parts III.A, IV.B.

156. See, e.g., Sellinger, *supra* note 35, at 309-15; Carroll, *supra* note 15, at 26-29.

157. See *supra* text accompanying note 90.

158. See *supra* Part IV.B.

159. See *supra* Part III.B.

160. See *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150 (2d Cir. 2010).

161. See *Nadler v. FDIC*, 899 F. Supp. 158, 162 (S.D.N.Y. 1995); *Buffalo Evening News, Inc. v. Small Bus. Admin.*, 666 F. Supp. 467, 470-71 (W.D.N.Y. 1987) (rejecting an agency's contention of impaired program effectiveness based on the inadequacy of its declarations).

162. See *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 597 (4th Cir. 2004); *Utah v. U.S. Dep't of the Interior*, 256 F.3d 967, 969 n.1 (10th Cir. 2001); *Frazer v. U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996).

ment.¹⁶³ The Supreme Court has recognized workability as an important objective of FOIA policy and has encouraged the development of categorical rules to achieve this goal.¹⁶⁴

Additionally, courts should use the program effectiveness test to supplement the *National Parks* test, not supplant it. Despite the many criticisms of *National Parks* and the fact that agencies are ill-equipped to handle claims of confidentiality properly,¹⁶⁵ the *National Parks* test has proved workable. Indeed, in *Critical Mass III*, the D.C. Circuit reexamined the *National Parks* test and determined that none of the arguments against the test “justifie[d] the abandonment of so well an established precedent.”¹⁶⁶

The program effectiveness test would work essentially as a third prong of the *National Parks* test. In formulating the first prong of the *National Parks* test, the court found that the exemption served the government’s interest in efficient operation,¹⁶⁷ but the test encompasses this interest only to the extent that the efficiency of agency operations depends on the cooperation of individuals in the submission of information. As the cases developing the program effectiveness doctrine show, an agency’s efficiency can be severely hampered without an impairment of its ability to obtain information in the future.¹⁶⁸ Unlike with third-party claims of confidentiality, agencies should be able to adequately recognize and articulate specific threats that disclosure poses to their own performance of their statutory duties.

Many examples in which an agency’s ability to perform its statutory duties may be impaired involve participation in voluntary agency programs. *Bloomberg*, for example, dealt with program

163. See *Env’tl. Tech., Inc. v. EPA*, 822 F. Supp. 1226, 1229 (E.D. Va. 1993); *Clarke v. U.S. Dep’t of the Treasury*, No. 84-1973, 1986 WL 1234, at *3 (E.D. Pa. Jan. 28, 1986).

164. See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 779 (1989).

165. See David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-To-Know Laws*, 86 TEX. L. REV. 1787, 1793 (2008).

166. *Critical Mass III*, 975 F.2d 871, 875-77 (D.C. Cir. 1992); see also *Critical Mass II*, 931 F.2d 939, 948 (D.C. Cir. 1991) (Randolph, J., concurring) (arguing against the reversal of *National Parks* based on the principle of stare decisis). But see Richard L. Rainey, *Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the National Parks Test*, 61 GEO. WASH. L. REV. 1430, 1460-73 (1993) (arguing that the D.C. Circuit gave undue weight to stare decisis and should have overruled *National Parks*).

167. *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974).

168. See *supra* Part III.B-C; sources cited *supra* note 163.

effectiveness in the context of participation in the Fed's emergency lending programs.¹⁶⁹ With respect to such programs, the agency is not concerned with its ability to gather information through questionnaires and investigations and, as such, often cannot meet the first prong of the *National Parks* test. However, a real threat remains that persons will not participate in agency programs out of fear that courts might compel the agency to disclose information it obtains from participants.

In order to protect the interests of such persons, another commentator has proposed incorporating specific protections against reputational harm.¹⁷⁰ This approach is understandable, as fear of reputational harm would have been a primary cause of future nonparticipation in the Fed's lending programs. Fear of reputational harm, however, is not the only reason that disclosure of commercial or financial information might impair an agency's ability to perform its statutory duties. For example, in *9 to 5*, the case that introduced the program effectiveness test, disclosure would have impaired the Board's ability to participate in an employer survey that was necessary to set employee salaries.¹⁷¹ No one contended that disclosure would have caused any reputational harm, yet the agency's ability to perform its duties would have been impaired. Similarly, in *Nadler v. FDIC*, the FDIC acted as a receiver for a failed bank.¹⁷² Because the bank had failed, harm to its reputation was not an issue. Nevertheless, the disclosure of commercial and financial information would have significantly impaired the FDIC's receivership program, which "aims to maximize profits on the assets acquired from failed banks."¹⁷³

As these examples show, adding protection for only reputational harm addresses a limited subset of situations and fails to take into account the various other ways in which disclosure of commercial or financial information obtained from third parties might impair an agency's ability to perform its statutory duties. There is no reason that FOIA exemptions should protect against fear of reputational harm but not other causes of impairment. For this reason, the

169. See *supra* Part I.A.

170. See Radez, *supra* note 35, at 673-84.

171. See *supra* notes 87-89 and accompanying text.

172. 899 F. Supp. 158 (S.D.N.Y. 1995); see *supra* text accompanying note 114.

173. *Nadler*, 899 F. Supp. at 162-63.

program effectiveness test is preferable to specific protection against reputational harm.

Another potential counterargument concerns the scope of the program effectiveness test. One might contend that, because the program effectiveness test seeks to withhold information based on the impact of disclosure on the agency's effective execution of its programs, information that might fall under this prong is actually more relevant to the people's interest in their government's activities than information that falls under the two prongs of *National Parks*. In *Bloomberg*, the news outlets made precisely this argument by claiming that their FOIA requests would serve to inform the public as to the actions of the Fed during the financial crisis.¹⁷⁴ However, as Exemption 4 applies to only commercial or financial information obtained from a person,¹⁷⁵ the program effectiveness test would only bar requesters from obtaining qualifying third-party information. Any information generated by the government would not qualify. The program effectiveness test would merely give an additional justification for agencies to withhold the private information that they obtain from persons with whom they transact.

CONCLUSION

Although the Dodd-Frank Act has addressed the specific contested information,¹⁷⁶ the recent litigation in the Second Circuit highlights the need for a general reevaluation of Exemption 4 protection.¹⁷⁷ Congress does not have the ability to legislate the disclosure requirements for all the information held by all agencies.¹⁷⁸ The *National Parks* test currently used in the Second Circuit fails to adequately protect the legitimate private and governmental interests that Congress intended to protect when it enacted Exemption 4. When taken as an exclusive view of Exemption 4's scope, the two-pronged test is too narrow. Because the two-pronged test only protects one government interest and one private interest, it fails to account for the huge number of instances in which both

174. See *supra* text accompanying note 42.

175. See 5 U.S.C. § 552(b)(4) (2006).

176. See *supra* Part V.

177. See *supra* Part III.C.

178. See *supra* Part V.

the agency and the private party would want the information withheld. Businesses or individuals that interact with the government take the risk that a court might compel the disclosure of their private financial information.¹⁷⁹ By linking disclosure requirements to the effect of disclosure on the agency's ability to perform its statutory duties, the program effectiveness test incentivizes participation in all types of government programs. Individuals who would not otherwise participate in government programs for fear of a FOIA request exposing their participation would receive increased protection. The Fed's lending during the financial crisis provides just one example of how anonymous participation in government programs can be beneficial, both for the participants and for the public.

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179. *See supra* Part IV.B.

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