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TABLE OF CONTENTS

1. **President's Column** **Page 3**
Elaine Eder, Esq.
2. **Editor's Column** **Page 4**
Clarence D. Long III, Esq.
3. **Been There; Done That** **Page 5**
Richard J. Bednar
4. **Protection Of Government Confidential
Information Under FOIA** **Page 8**
Lawrence M. Anderson
5. **Wage Determination Claims, the DOL ,
and CDA Jurisdiction** **Page 51**
*Jeffrey P. Hildebrant
& William T. Welch*

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PRESIDENT'S COLUMN

These have been busy times “behind the scenes” for your leadership team at BCABA. We are completing planning for our Spring and Fall training programs for new practitioners, the Spring Executive Forum, and next Fall’s Annual Meeting. We are forging links with other professional associations in allied practice areas, and will soon have additional training and publication benefits for our members. And we are finalizing the Vision Statement both to focus our long term view, and set a mid-term action plan for services for our membership and broader constituency. I expect all these will complete significant developments before Hugh Long completes his very valued service in editing the next edition of *The Clause*; I urge you to check the website for more interim information.

I also invite all of our readers to consider more active participation with us! We welcome all articles for consideration for publication in *The Clause*, your thoughts on training and discussion topics, and especially your suggestions for networking opportunities with fellow private, corporate, and government attorneys working with government contracts - both in D.C. and out of town. All our numbers and contact info is right here – please do call or e-mail with your ideas, successes, or proposed initiatives. We are a small enough Association that we can quickly make good ideas take shape – and large enough that we will reach the most relevant audience with precision. On behalf of my fellow officers and all the members of the Board of Governors, I invite you to join us in active participation!

Elaine Eder

EDITOR'S COLUMN

This month we have three very interesting and extremely informative articles. The first is an article by Dick Bednar about the necessity to preserve integrity in government contracting. General Bednar is so right about this. If we want the public to have confidence in our military and in our government, we must have the public perception that we are honest. When all the money is flying around, it is easy to get caught up in a "where's mine" mentality. Having been chief attorney of a government contracting agency, I have seen this attitude first hand. But whether you are a government contractor, a government contracting officer, or a lawyer for either, the important thing to remember is, "It's NOT your money." It is, in fact, the taxpayer's money. Some pretty famous people, people known to many of us, have forgotten that. Now they are waiting at home, hoping the press does not call, and that the US attorney has better things to do this week.

The next piece illustrates the virtue of youth and energy. Major Larry Anderson is one of the finest young officers that I have met since joining the Air Force Contract Law Division in March, 2003. Even lawyers have difficulty with the minutiae of FOIA. Larry has written the best practical treatise on the Freedom of Information Act, particularly as it applies to contract law matters, that I have ever read. I predict that it will become a quiet classic, and will be on the shelves of every contract law office for many years. But you got it first, because you belong to BCABA.

The Department of Labor can impose grave difficulties on a contractor seeking to maintain CDA jurisdiction. Jeff Hildebrandt and Bill Welch tell us how to avoid these pitfalls, in another one of the nuts and bolts articles for which the *Clause* is famous.

Hugh Long

BEEN THERE; DONE THAT

Richard J. Bednar ¹
Crowell & Moring LLP
February 2004

THERE AND THAT:

There was a time during the 1980s when government contracting was widely publicized as being synonymous with corruption and inefficiency; that publicity washed over and stained both government contractors and Department of Defense procurement personnel. This was the Reagan era. The best of times and the worst of times. President Reagan's vision was to build up our national defense capability to an unprecedented level; to overwhelm the Soviet threat and to defeat it. This meant huge outlays for defense, especially ships, aircraft, tanks, and other weapon systems. For defense contractors, these were good times.

Almost concurrently, these were the worst of times. Along with record expenditures for defense procurement came reports of corruption and inefficiencies, both inside and outside the Pentagon. From the outside came offers of gratuities and bribes, offers of important industry jobs, payments for procurement information, rigged bids, illicit exchange of classified documents, and other manipulative devices to capture defense contracts. From the inside, there were enough unscrupulous procurement executives to make it work.

It is fair to say, that for some defense contractors, a perception existed that the corporate culture was to pursue whatever tactic was necessary to fatten the bottom line. It is also fair to say that some government procurement officials became willing participants, looked the other way, or lacked the courage to take on the corruption apparent to them. As a consequence, even before the law enforcement apparatus went into full gear, the public and the Congress lost confidence in the defense industry and in those within government entrusted to protect the public interests.

By the spring of 1985, half of the top 100 defense contractors were under criminal investigation. "Operation Ill Wind", the largest procurement fraud investigation in the history of our nation, headed by Henry Hudson, the U.S. Attorney for the Eastern District of Virginia, involved thousands of investigators, including the FBI and the DCIS, and assistant prosecutors. Eventually, over ninety contractors and individuals were convicted of felonies stemming from this scandal. ²

In the summer of 1985, President Reagan established the President's Blue Ribbon Commission on Defense Management (the "Packard Commission") (Executive Order 12526, July 15, 1985). In the course of its comprehensive work, the Commission heard from many

¹ Mr. Bednar is a former Army Chief Trial Attorney; he now practices law with Crowell & Moring LLP in Washington, D.C. He also coordinates the Defense Industry Initiative on Business Ethics and Conduct ("DII") activities. (Also see www.crowell.com.) The views expressed in this paper are those of the author and do not necessarily represent those of Crowell & Moring LLP or the DII.

² Andy Pasztor, When the Pentagon was for Sale: Inside America's Biggest Defense Scandal, (New York, Scribner, 1995)

witnesses who demanded more government oversight, more penal laws, and more regulation of the industry. The Commission, however, recognized that excellence in defense management could not be mandated by more laws and more regulations. Instead, the Commission wisely concluded that Government should foster and encourage contractor self-governance.

Excellence in defense management will not be achieved through legions of government auditors, inspectors, and investigators. It depends on the honest partnership of thousands of responsible contractors and DOD, each equally committed to proper control of its own operations.

The Commission recommended that the industry develop self-governance programs. Nevertheless, statutory and regulatory controls over procurement, especially defense procurement, were stiffened.³

Based on the Packard Commission's recommendation regarding proper internal controls, and on the industry's own perception that confidence in the industry could be regained only by embracing and practicing values-based compliance, a group of 18 senior defense contractor executives met, pondered, and adopted six ethical principles⁴ that became the Defense Industry Initiative on Business Ethics and Conduct (DII) (www.dii.org). That leading industry group, which now numbers about 50, and includes nine of the top ten defense contractors, has faithfully implemented the principles over the past nearly 18 years.⁵ The DII Principles have endured because practice has proven they do promote sound management practices, ensure ethical conduct in compliance with procurement regulations and standards, and serve to maintain DoD and public confidence in the industry. DII has demonstrated over the years that self-governance can work, such that when an isolated act of business misconduct occurs within a DII company, the integrity of the company itself (and the defense industry as a whole) is not called into question.

LET'S NOT GO BACK:

"There and That" was nearly 20 years ago. Now, again concurrently with increased government procurement, we read about serious ethical and compliance lapses in the industry and fears of a deterioration in the proper, arms-length relationship between industry and its government contracting partner. Confidence in government procurement officials, government contractors, and in the defense contracting process has been shaken; some wonder whether we have forgotten the lessons of the past.

³ *Among these new constraints: the 1986 DOD Voluntary Disclosure Program; the 1986 Amendments to the Civil False Claims Act; Program Fraud Civil Remedies Act and the Anti-Kickback Act of 1986..*

⁴ *Have and adhere to written Codes of Conduct; Train employees in those Codes; Encourage internal reporting of violations of the Code, within an atmosphere free of fear of retribution; Practice self-governance through the implementation of systems to monitor compliance with federal procurement laws and the adoption of procedures for voluntary disclosure of violations to the appropriate authorities; Share with other firms their best practices in implementing the principles, and participate annually in "Best Practices Forums"; and Be accountable to the public.*

⁵ *The current DII Signatories are identified on www.dii.org.*

However, there is reason to believe that conditions today are improved, and that the recent headline scandals do not signal a return to the wide-spread government procurement abuses of the 1980's. Evidence of such improvements rests upon the expectations, even the demands, of the public, the government and investors for responsible corporate self-governance and ethical business conduct. There are many manifestations of this heightened expectation. The original DII principles have steered the DII signatories to a firm and consistent commitment to ethical business conduct, which is regarded as more than "the right thing to do". The DII companies view this commitment as adding to the bottom line in terms of the resulting trust and confidence by investors, customers and suppliers. There are distinct linkages between the 1986 DII principles in the 1991 U.S. Sentencing Commission Organizational Guidelines⁶, which established elements of an effective compliance program; in the expression of Contractor Standard of Conduct in the DFARS⁷; in the FAR provisions relating to mitigating factors for contractor debarment⁸, and even in the most recent federal legislation dealing with corporate governance – the Sarbanes-Oxley Act of 2002⁹. The Securities and Exchange Commission¹⁰ regulations additionally recognize that corporate codes of ethics should include standards to promote honest and ethical conduct. In the same theme, the Deputy U.S. Attorney General's January 31, 2003 memorandum¹¹ singles out the role of Management as an important factor in determining whether to prosecute a corporation: "...management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged."

What all of this means is that more decision makers in government and in responsible government contractors have gotten the message. There is broad agreement that ethics, both as conduct and culture, matters; that self-governance works where regulation alone does not work. Regulation works only in conjunction with culture of commitment to integrity.

We are in a time when the current administration seeks to provide greater competition with the private sector to perform functions inherently commercial in nature. We work in a time where our national security is threatened. To meet and defeat this threat, the government and government contractors need to trust each other. That trust can blossom and endure only if each side regards the other as an ethical contracting partner. We need to work together to nurture that regard and to make it justifiably placed.

⁶ *The Guidelines and Supporting commentary may be found at www.usssc.gov.*

⁷ *48 C.F.R. §203.7001.*

⁸ *48 C.F.R. Subpart 9.4.*

⁹ *Pub. L. No. 107-204, 116 Stat. 745 (2002)*

¹⁰ *68 Fed. Reg. 5110, 5118, 5129 (January 31, 2003)*

¹¹ *"Principles of Federal Prosecution of Business Organizations", <http://www.usdoj.dag/cff>.*

**PROTECTION OF
GOVERNMENT CONFIDENTIAL COMMERCIAL INFORMATION
UNDER EXEMPTION (b)(5) OF THE FREEDOM OF INFORMATION ACT**

LAWRENCE M. ANDERSON*

TABLE OF CONTENTS

- I. Introduction
- II. Federal Acquisition Regulation (FAR) Guidance Relating to Protection of Government Confidential Commercial Information
 - A. Certain Information is Released When Particular Open Competition Milestones are Achieved
 - 1. FAR Section 14.402
 - 2. FAR Section 14.409
 - 3. FAR Section 15.505
 - 4. FAR Subpart 24.2
 - B. Other Information Remains Protected Even After Contract Formation
- III. Background—Origin of Exemption (b)(5) Government Confidential Commercial Information Privilege
 - A. The Opaque Statutory Language
 - B. The Seminal Case of Federal Open Market Committee v. Merrill
- IV. Under What Circumstances Can the Government Confidential Commercial Information Privilege Be Asserted?
 - A. Exploring the Contours of the Privilege: Case Law after Federal Open Market Committee
 - 1. Hack v. Department of Energy
 - 2. Government Land Bank v. GSA
 - 3. Morrison-Knudsen Company v. Department of the Army
 - 4. Shermco Industries v. Secretary of the Air Force

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5. American Society of Pension Actuaries v. Pension Benefit Guarantee Corp
 6. Burka v. U.S. Department of Health and Human Services
 7. Southwest Center for Biological Diversity v. U.S. Department of Agriculture
- B. Protections Under Other Exemption 5 Privileges
- V. How The Exemption (b)(5) Government Confidential Commercial Information Privilege Overlaps With FOIA Exemptions 3 and 4
- A. Protection of Government Commercial Information under Procurement-Related FOIA Exemption 3 Statutes
- B. Protection of Government Commercial Information Under FOIA Exemption 4
- VI. Strengthening The Privilege—What Actions Can and Should DoD Take to Enhance the Legal Vitality of the Privilege?
- A. Understanding How Privileges Work—Federal Rule of Civil Procedure 26
1. Lessons Learned from Deliberative Process Privilege Cases
 2. Erosion of Privileges
- B. Procedural and Substantive Requirements for Proper Invocation of any Federal Rule of Civil Procedure 26 Privilege
1. Preparing for the Worst
 2. Agency Will to Fight for its Commercial Information Privilege
- VII. Conclusion

[T]he exact relationship between ordinary civil discovery and Exemption (b)(5), particularly the application of discovery privileges under the exemption, has bedeviled the courts since the [FOIA] Act's inception. The Supreme Court, seeing the need for a broadly sweeping rule on the matter, has insisted that the needs of a particular plaintiff are not relevant to the exemption's applicability, and has held repeatedly that only documents "normally" or "routinely" disclosable in civil discovery fall outside the protection of the exemption. To resolve the present case we must grapple directly with the confusion plaguing the courts' efforts to apply the law of civil discovery privilege in Exemption (b)(5) analysis.¹

I. Introduction

Imagine yourself sitting at your desk on a Friday morning. You've had a hard week, but did manage to clean out your in-basket of all work. As you slowly savor that well-deserved second cup of coffee, the office manager hands you an overdue Freedom of Information Act (FOIA)² request marked "urgently hot." You notice that the requester asks for "all documents whatsoever related to the recently completed Office of Management and Budget (OMB) Circular Number A-76 study" at your installation. The suspense for the legal review is Monday morning. Your office FOIA expert is on leave and unreachable. Your only experience with the FOIA is the Army Basic Course. Since then you have not had the occasion to grapple with the FOIA. You have forgotten nearly everything about the FOIA. You're not even sure whether your goal should be to withhold as much of the A-76's government-generated commercial information as possible, or to release as much as possible to "promote competition."³ You dust off your Basic Course notes, find a government information law hornbook,⁴ and begin your research. This paper traces your legal journey as you first relearn the general philosophy of the FOIA and the limited guidance found in the Federal Acquisition Regulation (FAR) concerning the protection of government confidential commercial information.⁵ It then follows you as you learn the origin of the exemption (b)(5)

¹ *Martin v. Office of Special Counsel*, 260 U.S. App. D.C. 382, 819 F.2d 1181, 1184 (D.C. Cir. 1987) (alteration of text in original) (quoting D.C. Circuit Judge Mikva, who authored the opinion).

² 5 U.S.C. §552 (2000).

³ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.102(b)(1)(iii) (Sept. 2001) [hereinafter FAR].

⁴ The best hornbook on the subject is the DEP'T OF JUSTICE FREEDOM OF INFORMATION ACT GUIDE [hereinafter FOIA GUIDE] (Richard L. Huff & Daniel J. Metcalfe, eds., 2002), available at <http://www.usdoj.gov/oip/introduc.htm>.

⁵ Throughout this paper, this author will use the term "the government confidential commercial information privilege" or "the government commercial information privilege" when discussing the exemption (b)(5) government commercial information privilege. Many cases and some commentaries use the phrase "the government trade secrets privilege" or "the government trade information privilege." These latter phrases are avoided in this paper to avoid confusion of this privilege with the Trade Secrets Act, 18 U.S.C. 1905 (2000). "[A]n extraordinarily broadly worded criminal statute . . . [that] prohibits the unauthorized disclosure of all data protected by Exemption 4." FOIA GUIDE, supra note 4, at 267.

government commercial information privilege and the circumstances under which it can be asserted. In dialogue-like fashion it notes your reactions as you examine how commercial information can sometimes be protected by other overlapping FOIA exemptions such as 3 and 4. As you walk your way through the requested material, you realize some of it may be covered by the concepts of privilege. This forces you to take hints from the experts on how to successfully invoke privileges within the context of exemption 5. Your journey ends with a recommended denial of all of the requested information. The purpose of this paper is to walk the reader through a file which is the subject of a FOIA request—by following your difficult legal journey.

The FOIA essentially gives any person in the world the right to obtain federal executive branch records unless one of nine exemptions or three special law enforcement record exclusions are asserted by the government as a legal basis for denying the requested records. The underlying purpose of the FOIA is to “ensure an informed citizenry, vital to the functioning of a democratic society, [that is] needed to check against corruption and to hold the governors accountable to the governed.”⁶ However, this requirement for an open government is counterbalanced against the need for government secrecy. In today’s information age, virtually any kind of information can have commercial value. Because we live in a relatively open free market economy, a keen competitive edge over one’s competitors can be obtained by simply being the first to obtain commercially valuable information and withholding it from others for as long as possible.⁷

Because executive departments of the federal government, such as the Department of Defense (DoD), are often forced to enter into the open competitive marketplace either as a matter of necessity or as a matter of government policy, the government faces the same competitive pressures that private commercial businesses face in competing for scarce economic resources.⁸ The mere fact that it is often the first to obtain commercially valuable information gives the government a keen competitive edge over its commercial adversaries. This valuable commercial information may be internally generated by the government,⁹ generated by contractors hired by the government for this very purpose,¹⁰ or obtained from

⁶ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁷ David A. Vogel, *Government Agencies Can Misuse Your Trade Secret and you Can’t Stop Them*, *PUB. CONT. L. J.*, Vol. 28, No. 2 at 162 (1999). “The confidentiality of the information may enable the company to gain an economic advantage over its competitors who lack the information. The secrecy of the information thus has value separate from the intrinsic value of the information.” *Id.*

⁸ Introduction to *FOIA GUIDE*, *supra* note 4, at 5.

⁹ An example of this is the outsourcing initiative in which the government studies whether a particular government function currently performed in-house by the government itself could be more efficiently performed by a private government contractor. The government develops its own internal “Most Efficient Organization” (MEO) plan to streamline its own operation that it competes against commercially submitted plans. See *FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES* (Aug. 4, 1983; Revised 1999). For an easy to understand summary of the overall process, see also *CONTRACT AND FISCAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, 51ST JUDGE ADVOCATE OFFICER GRADUATE COURSE, CONTRACT & FISCAL LAW DESKBOOK (2002-2003), Chapter 25 (Competitive Sourcing)*.

voluntary and involuntary submissions by contractors competing to obtain government contracts to build a product such as a weapons system or provide a service such as weapons maintenance.¹¹

When the government receives a FOIA request, it must affirmatively assert a FOIA exemption or exclusion if it desires to withhold the requested material.¹² Ultimately, the decision whether to assert any particular FOIA exemption is discretionary.¹³ The FOIA itself does not require withholding; it merely permits it. However, certain executive orders and statutes that are incorporated by the FOIA do often prohibit release of information—either through FOIA or any other means. Because of these underlying laws, certain exemptions limit government discretion to assert them. Examples of such nondiscretionary exemptions are exemption 1, protecting classified information;¹⁴ exemption 3, authorizing the withholding required by a particular underlying statute;¹⁵ exemption 6, protecting personal privacy information;¹⁶ and exemption 7(C) personal privacy information related to law enforcement.¹⁷

¹⁰ *An example of contractor-generated information in the possession of the government would occur when a contractor is hired to creatively develop and field an entirely new generation of electronically-linked land combat vehicles. The prime contractor could be allowed to research and develop the new system using subcontractors to develop separate aspects of the system. The prime contractor itself would issue requests for proposals, evaluate the submitted proposals, and then choose the proposals it deems best, based on its self-selected grading criteria. This prime contractor-generated information would routinely be shared with the government.*

¹¹ See Robert B. Kelso, A Practitioner's Guide to "Confidential Commercial and Financial Information" and the Freedom of Information Act, *ARMY LAW*, July 1990, at 10. FOIA case law distinguishes between "voluntary" contractor submissions and "involuntary" or required contractor submissions. As a prerequisite to participation in government procurements, contractors must submit certain information in their bids and proposals. The government dictates what information must be submitted. Many contractors would prefer not to submit some of the requested information, but have no choice but to submit it if they want to "play" in the process. Such reluctant submissions by contractors are considered "involuntary." See also, *infra*, text accompanying note 28.

¹² 5 U.S.C. §552(d) (2000).

¹³ *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information). See, *infra*, text accompanying notes 18-21.

¹⁴ 5 U.S.C. §552(b)(1) (2000) (release prohibited by Executive Order 12,958).

¹⁵ 5 U.S.C. §552(b)(3) (2000). Examples include 10 U.S.C. 130c (2000) (nondisclosure of sensitive information concerning foreign governments and international organizations); 10 U.S.C. 2487 (limitations on release of sales information concerning commissary stores); 35 U.S.C. 181-188 (2000) (secrecy of certain inventions and withholding of patents); 35 U.S.C. 205 (2000) (confidentiality of inventions information); 50 U.S.C. 2170(c) (2000) (authority to review certain mergers, acquisitions and takeovers).

¹⁶ 5 U.S.C. §552(b)(6) (2000). Even if exemption 6 permits release of information in a particular instance, the Privacy Act prohibits release of the same information if it is contained in a federal government "system of records" that pertains to a particular individual, unless such release is "required under" the FOIA. 5 U.S.C. §552a(b)(2) (2000).

¹⁷ 5 U.S.C. §552(b)(7)(C) (2000). Release of such information is usually limited by agency law enforcement regulations, to protect informants and other upright citizens who cooperate with the government in the eradication of crime.

However, the decision whether to assert other exemptions is purely discretionary on the part of the government. This is particularly true of exemption 2, which protects internal personnel rules and practices of an agency,¹⁸ and exemption 5, which covers inter-agency or intra-agency documents.¹⁹ The policy decisions related to the discretionary assertion of these exemptions varies from one executive administration to another. Typically, each administration's Attorney General issues his or her own policy concerning the FOIA, indicating what release policy should be followed concerning discretionary releases.²⁰ Individual administrative agencies within the government may additionally have an underlying local release policy that is more restrictive than the overall federal government's policy as set by the Attorney General. Of course, a discretionary release or a failure to assert a particular exemption, or subcategory of exemption, results in a waiver of the agency's later right to withhold that information.²¹

The very decision to assert an exemption and thereby withhold information from the public is not without controversy. Since knowledge is power, the discretionary decision to keep information from one's perceived adversary is an exercise of power. There are commentators who note that "[b]ecause the operation of government is funded by the imposition of taxes . . . the government has an unfair competitive advantage over members of the private sector who sell the same goods or services."²² One commentator addressing this

¹⁸ 5 U.S.C. §552(b)(2) (2000). Examples include internal office leave policy rules or fax cover sheets.

¹⁹ 5 U.S.C. §552(b)(5) (2000). Examples include legal reviews or policy recommendations not yet finalized.

²⁰ The most recent memorandum on the subject being Attorney General John Ashcroft's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in FOIA POST (posted 10/15/01), at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

²¹ Under some circumstances, an agency loses the right to invoke a FOIA exemption because the information sought to be withheld has been previously released by the agency. "[T]he extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed." *Carson v. United States Dep't of Justice*, 631 F.2d 1008, 1016 n.30.

²² Sharon K. Sandeen, Preserving the Public Trust in State-Owned Intellectual Property: A Recommendation for Legislative Action, 32 *MCGEORGE L. REV.* 385, 402 (2001). Ms. Sandeen complains that "various changes to U.S. intellectual property laws have resulted in an unfortunate erosion of the public domain whereby more and more information is placed off limits to public use. Although this trend is pursued in the interest of protecting intellectual property rights, the increased privatization of intellectual property threatens to undermine future creativity and innovation and can act as a costly barrier to entry into what is supposed to be a 'free market.'" *Id.* at 397 (footnotes omitted). Ms. Sandeen accuses the federal government as being one of the chief actors in "privatizing" commercial information, that is, keeping it "private" for its own sovereign uses while at the same time legally blocking the rest of society's access to it allegedly for the purpose of enhancing free competition.

Once a state decides to protect certain of its intellectual property rights, a myriad of issues arise concerning how those rights are to be identified, managed and used. Who in . . . government is to decide what is to be protected and when, and on what basis is that decision to be made? Should these decisions be made by each component of . . . government as they see fit, or should the decision be made by some centralized organization? If the former, should uniform standards

issue, David Vogel, bluntly entitled his article Government Agencies Can Misuse your Trade Secret and you Can't Stop Them.²³ Vogel notes that when the government does misuse a contractor's trade secret, the only relief available to the contractor is monetary compensation, not injunctive relief. "The lesson: If a contractor cannot risk losing the absolute secrecy of a trade secret, then the contractor should not disclose the secret to the Federal Government."²⁴

The extent to which the federal government monopolizes commercial information is no better seen than in the current federal acquisition policy concerning the purchase of commercial items. Included in the Federal Acquisition Regulation²⁵ (FAR) is a section explaining that "[i]f the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional information from sources other than the offeror, then the contracting officer must require the offeror to submit information other than cost or pricing data to support further analysis."²⁶ On the other hand, other players in the competitive market are forced to determine whether an offered commercial item price is "fair and reasonable" by using an informed guess or reasonable judgment when public information

be developed to govern the decision making process or should each component of a state be allowed to develop its own policies?

Id. at 402. See also Keith Aoki, Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain, 18 COLUM.-VLA J.L. & ARTS 1, 27 (1994) ("This is the central problem in intellectual property law: privatizing information reduces competition and impedes widespread uses of such information." Id. at 21).²³ Vogel, supra note 7, at 159.

²⁴ Id. at 160. Mr. Vogel is here addressing the internal government use of trade secrets, not government dissemination of trade secrets to the public. Mr. Vogel is refreshingly blunt in the describing the true advantages the government exercises in actual federal litigation practice:

Most persons dealing with the Government assume that the Government's misuse of a trade secret can be prevented by court order, as is the case in the private sector [but] there is no such right to injunctive relief. . . . It is black-letter law under the Fifth Amendment's Takings Clause that a taking is remediable only by the recovery of just compensation by the aggrieved property owner. Injunctive relief is never available for a taking under the Fifth Amendment. Although no court yet has reached the inevitable conclusion, there is likely no opportunity to obtain injunctive relief to prevent a government taking of a trade secret.

Id. at 161 (citations removed). In a similar area of intellectual property law, namely patents, federal statutes grant to the federal government the right to prevent the owner of a patent from enjoining use of an invention when the government desires to make use of it or contract with a contractor to produce it. See 28 U.S.C. §1498; 10 U.S.C. §2386. The patent owner is required to accept a reasonable monetary compensation for the government infringement, but cannot enjoin the infringement. The FAR requires inclusion of an "Authorization and Consent" clause in all government contracts. FAR, supra note 3, at 27.201-1, 27.201-2. This clause authorizes other government contractors to make any necessary use of any invention covered by a U.S. patent. Id. at 52.227-1. If the patent owner is dissatisfied with the "reasonable" compensation paid by the government for the infringement, her only remedy is to file a claim or file suit in the Court of Federal Claims to force the government to pay more compensation.

²⁵ FAR, supra note 3.

²⁶ Id. at 15.403-3(c)(1) (reference omitted).

is not available. Moreover, the government interest, in monopolizing what to other competitors is unobtainable information, is so strong that

an offeror who does not comply with a requirement to submit information for a contract or subcontract in accordance with . . . this subsection is ineligible for award unless the HCA [Head of the Contracting Authority] determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the . . . (iii) [i]ncreased cost or significant harm to the Government if award is not made.²⁷

It could be argued that any large private corporation or organization could make submission of confidential commercial information a precondition of being let a contract by that entity. The federal government would then have no unfair advantage vis-à-vis other large market competitors who required these submissions. But the reality is that no private corporation or organization comes close to having the money to spend on contracts as the U.S. federal government has. This resource disparity and inequity of bargaining positions permits the federal government to force competitors to reveal confidential commercial information that would never be revealed in non-governmental competition. Sensitive commercial information obtained because of this disequilibrium in bargaining power is heightened by the government's use of the FOIA as a shield to protect its commercial information treasure trove. This government protectionist trend has actually accelerated with the advent of privatization.²⁸

As the federal government contracts with private entities to handle . . . services, citizens are finding it very difficult to obtain important information related to the government because these private entities often do not fall under the definition of "agency" in the FOIA. Additionally, the Act does not define the term "agency records," and private entities may not be holding records with a sufficient nexus to the government to qualify as agency records under judicial analysis. Thus, federal government privatization can have a substantial impact on important information that was public while in the government's hands but becomes secret once it is farmed out to private entities. . . .

²⁷ *Id.* at 15.403-3(a)(4).

²⁸ *The Office of Management and Budget (OMB) has been at the forefront of this privatization effort. OMB opines that a government function that has been "privatized" "[s]ave[s] taxpayers 30% of the cost of current government functions." Policy Statement, The Purpose of OMB Circular A-76, Office of Management and Budget website, available at http://www.whitehouse.gov/omb/procurement/benefitsofa_76.html. "Federal agencies rely on a mix of public and private sector sources to perform a wide variety of recurring commercial activities that are needed to conduct the business of government. These activities range all the way from custodial services to data collection, computer services and research, testing, and maintenance of equipment used by our nation's war fighters. [Office of Management and Budget Circular] A-76 establishes the policies and procedures for identifying commercial activities and determining the best provider of the services." *Id.**

In short, the requirement that the subject of a FOIA request be an agency record is a threshold requirement under the Act, and information possessed by researchers and other private entities will not generally be considered agency records.²⁹

The FOIA is used by the government as a legal tool to protect its bargaining power. When commercially valuable information is held by the government, potentially more than one exemption may be assertable to withhold it from a requester. With certain exemptions, especially exemption 5, the underlying rationale for the government assertion of the exemption must be stated with clarity in order to preserve that particular subcategory of withholding within the exemption. This is because exemption 5 works by incorporating, and thereby permitting the assertion of, statutory and case law-recognized civil discovery privileges as a basis for withholding requested documents.³⁰ When civil discovery of a

²⁹ *Craig D. Feiser, Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 *FED. COMM. L.J.* 21, 23 & 35 (1999) (footnotes omitted). Mr. Feiser's remedy for increasing the public's (and therefore commercial business') access to government held confidential commercial, research and activity information is to rewrite the definition of "agency" and "agency record" in such a way as to permit FOIA requesters to access a greater number of what are now considered non-government private documents. Feiser totally ignores the fact that, even if the number of records technically touchable by a FOIA requester is increased, government agents will still be able to use appropriate FOIA exemptions to significantly block access to the requested material. Thus, the government "curtains of secrecy" bemoaned by Feiser (*Id.* at 62) would still in large part remain, along with the government's confidential commercial information monopoly.

Mr. Feiser is accurate in noting the FOIA does not define "agency record." Although section f(2) of the FOIA purports to define "record," the definition is circular: "'record' . . . includes any information that would be an agency record. . . ." 5 U.S.C. 552f(2) (2000). Because of the lack of a clear definition within the act itself, the Supreme Court was forced to develop a two-part functional test for determining what an agency record consists of: "Agency records" are records that are 1) under agency control at the time of a FOIA request and 2) created or obtained by an agency." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). See also *FOIA GUIDE*, *supra* note 4, at 32-38, for a good explanation of the case law on this issue.

As regards federally funded research data, Congress has recently passed a law which has made some of this research data subject to the FOIA by requiring the Office of Management and Budget (OMB) to revise Circular A-110 (a regulation which sets the rules for grants from federal agencies to institutions of higher education and nonprofit institutions). Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998). The OMB revised circular requires agencies to obtain data from a grantee and process it for release to a FOIA requester. See *FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-110, UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND OTHER AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITAL, AND OTHER NON-PROFIT ORGANIZATIONS* (Nov. 19, 1993; Revised Sep. 30, 1999).

Of course, in situations where the government exercises significant control over a contractor and obtains the contractor produced data, such records are considered to be agency records for purposes of the FOIA. See discussion *infra* Part IV.A.6. concerning *Burka v. U.S. Dep't of Health and Human Services*.

³⁰ *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984) (Congress intended to incorporate governmental privileges into the FOIA to prevent civil litigants from using the FOIA as a vehicle to obtain material that would not otherwise be accessible in the civil discovery context because of its privileged nature).

particular type of information can normally and routinely be thwarted in civil litigation through assertion of a privilege, that information is per se withholdable under exemption 5 of the FOIA.³¹ Professor Edward Imwinkelried noted that privileges are a doctrinal development of the law that permit the exclusion of logically relevant information “to promote an extrinsic social policy.”³² The object of the societal protection is usually a relationship, such as that between an attorney and his client, a minister and his parishioner, or a wife and her spouse.

Similar reasoning underlies the topical government privileges. Modern government needs a vast amount of information to perform its tasks, especially its regulatory functions, and sometimes the government cannot obtain information from particular sources without assuring confidentiality. The government’s interest is even more compelling if the government information qualifies as a military or state secret. The balance of interests favors creating a doctrine which the government may invoke to suppress the information. The information may be highly relevant and thoroughly trustworthy, but the public interest in maintaining the information’s secrecy outweighs the parties’ interest in disclosure.³³

Since privileges cannot arise absent a clear recognition within society that protection of either a relationship or government function has greater importance than facilitating the free flow of information, the very fact that an invocable privilege exists under the law is already strong proof that its invocation is justified. Stating this principle is more than simply reciting a tautology. Properly understood, the legal doctrine of privilege counsels that when a privilege has been statutorily stated or recognized in case law by the courts, society as a whole has already decided that, in the majority of the time, the interest protected by the privilege has greater value than a party’s or the public’s right to the information to be made unavailable by the privilege.

Finally, getting back to your FOIA request for confidential commercial information in the A-76 study, your research reveals that “[t]here is no discernable evidence in the legislative history of the FOIA that Congress explicitly contemplated the disclosure of valuable technical data to anyone upon request.”³⁴ Both statutes and regulations reflect this government

³¹ Kirk D. Jensen, Note: The Reasonable Government Official Test: A Proposal For The Treatment Of Factual Information Under the Federal Deliberative Process Privilege, 49 DUKE L.J. 561, 581 (1999). “Any material that is protected by a privilege, whether absolute or qualified, is clearly not subject to routine disclosure under FOIA. In other words, once the government makes a prima facie showing for invoking the privilege, analysis under FOIA Exemption 5 stops and does not proceed to the balancing of the interests [as would be the case in normal discovery litigation].” Id.

³² EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 205 (4th ed. 1998).

³³ Id.

³⁴ Theodore T. Belazis, The Government’s Commercial Information Privilege: Technical Information and the FOIA’s Exemption 5, 33 ADMIN. L. REV. 415, 416 n.4 (1981). In fact,

policy.³⁵ With this backdrop in mind, you realize that it is not your task as a reviewing attorney to argue whether it is appropriate for the government to withhold from its competitors confidential commercial information, however it was acquired, through the use of FOIA exemptions. Rather, you simply acknowledge the government's monopoly-like status even as it allegedly stoops to be a "competitive player" in the marketplace. Recognizing that the Department of Defense is only one competitor among many in a highly competitive economic environment, you realize your task is to learn how FOIA exemptions can be most effectively used as a shield to protect government-produced or -obtained commercial information.³⁶ You assume that when a member of the Defense Department receives a FOIA request, his overarching goal should be to protect Department of Defense interests vis-à-vis all other non-privileged societal interests. You assume that this is the highest societal good.³⁷

II. Federal Acquisition Regulation (FAR) Guidance Relating To Protection of Government Confidential Commercial Information

Because the FOIA is a federal statute, FAR administrative policy concerning information release cannot supercede release requirements under the FOIA.³⁸ This is important because the purposes of the two are not synonymous. The FOIA is designed to ensure information is

[i]n order to reduce . . . enormous [product and technology development] costs, it is the policy of the U.S. government to recover its nonrecurring investment costs on DOD Foreign Military Sales (FMS) of defense articles and technology, as well as direct foreign or domestic commercial sales by defense contractors of products, components and technologies developed with government funds.

Id. at 416. *Belazis* ironically notes the inherent conflict between FOIA release principles and the government policy of recouping its investment costs of developing commercial information. "Certainly if such data are subject to FOIA, the fact that 'any person' may use the statute to obtain the data does not assist in the recoupment of development costs nor the task of enforcing U.S. export laws." *Id.* at 421 n.22. *Belazis* further notes "[t]he inflexible all-or-nothing framework of the FOIA, which works reasonably well in the context of most types of documents generated by administrative agencies is ill-suited to selected dissemination of technical data." *Id.* at 419 n.19.

³⁵ See, e.g., 22 U.S.C. §2761(b) (2000) (indicating that sales of defense articles and services is permitted to foreign countries but "payment shall be made . . ."). See also FAR, *supra* note 3, at 32.001 (Definitions). "Recoupment," as used in this part, means the recovery by the Government of Government-funded nonrecurring costs from contractors that sell, lease, or license the resulting products or technology to buyers other than the Federal Government." FAR, *supra* note 3, at 32.001.

³⁶ The best definition this author has found of the phrase commercial information "trade secret" is that given by Mr. David Vogel. "A trade secret, broadly defined, is any piece of confidential information that gives a company a 'leg up' on its competition." Vogel, *supra* note 7, at 162.

³⁷ This assumes, of course, that your legal "client" in this instance is the particular defense agency for which you work. The ethical tension could be greater if the defense component for which you work is at policy cross-purposes with broader DoD acquisition policy.

³⁸ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 842-843. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

available to show how the government works; on the other hand, the FAR is designed to make information available so as to ensure that the government's procurement processes are transparent. Nevertheless, it is interesting to see how FAR guidance dovetails with the FOIA by delineating when information becomes ripe for release under the FOIA. The FAR also provides release of information standards for non-FOIA situations.

A. Certain Information is Released When Particular Open Competition Milestones are Achieved

By identifying certain milestones or decision points in the procurement process, the FAR effectively times when certain government possessed commercial information becomes ripe for release to the public. The point in time when government commercial information becomes "ripe for release," and consequently no longer withholdable under the FOIA exemption 5's commercial information privilege, is usually decided by determining where in the acquisition process the government is at the time the request is received. Nonetheless, commercial information also ripens for release under the FOIA when public knowledge of government commercial information has become so widespread that the information is within the public domain. "Harm and sensitivity can be defined in reference to a point before which the advanced technology involved has become well-known and available from other sources."³⁹ Theoretically speaking, if a government commercial secret was leaked and became so widespread in the public knowledge that it was no longer "confidential," it arguably would receive no protection under the exemption 5 commercial information privilege. FAR section 14.402 attempts to pinpoint exactly when information has become public knowledge.

1. FAR Section 14.402

FAR section 14.402 (Opening of bids) requires bid opening officers to "publicly open all bids . . . and if practical, read the bids aloud to the persons present" at a bid opening session.⁴⁰ Additionally, "[e]xamination of bids by interested persons shall be permitted if it does not interfere unduly with the conduct of Government business."⁴¹ And once sealed bids have been opened, "all members of the public including competitors have the right to inspect the bids from that day on."⁴² According to the Comptroller General, "[t]he purpose of public

³⁹ *Belazis*, supra note 34, at 421.

⁴⁰ *FAR*, supra note 3, at 14.402-1(a).

⁴¹ *Id.* at paragraph 14.402-1(c).

⁴² *Professional Concepts, Inc. v. City of Central Falls*, 974 F.2d 1, 4 (1st Cir. 1992). This right only applies to a successful bid. Unsuccessful bids may not be reviewed by the public. See *FAR*, supra note 3, at 14.409-

opening of bids for public contracts is to protect both the public interest and bidders against any form of fraud, favoritism or partiality and such openings should be conducted to leave no room for any suspicion of irregularity.”⁴³ This provision precludes bidders from protecting information submitted through sealed bids as “proprietary information.”⁴⁴ These open information provisions are important in the FOIA context because they may, under the FOIA “waiver doctrine,” preclude later assertion of an otherwise appropriate exemption in many instances.

Specific military service regulations further implement this FAR provision as it relates to different types of procurement programs. For example, Army Regulation 5-20, Commercial Activities Program,⁴⁵ applies this provision to Office of Management and Budget (OMB) Circular A-76⁴⁶ cost comparison competitions which determine whether a contractor’s proposal or the government’s Most Efficient Organization (MEO) can better perform a function. AR 5-20, paragraph 4-6b, permits release of cost competition study information after the cost comparison bid opening occurs.⁴⁷ The value of service specific regulations is that they help determine the trigger point in the acquisition process when commercial information is no longer protectible under exemption 5 and has become ripe for release.⁴⁸ The extent to which even the FAR recognizes this principle is evident in the analysis of FAR section 14.409.

2. FAR Section 14.409

FAR section 14.409 provides that “[w]hen a request is received concerning an unclassified invitation from an inquirer who is neither a bidder nor a representative of a bidder, the contracting officer should make every effort to furnish the names of successful bidders and, if requested, the prices at which awards were made.”⁴⁹ This provision points the contracting officer to his own “agency regulations implementing Subpart 24.2” (Freedom of Information Act Prohibitions)⁵⁰ for guidance on what not to release. Although section 14.409 apparently

1(a)(2)(ii). In the case of the opening of classified bids, “[a] bidder or its representative may attend and record the results [of the bid opening] if the individual has the appropriate security clearance. The contracting officer also may make the bids available at a later time to properly cleared individuals.” Id. at 14.402-2.

⁴³ *Computer Network Corp.*, 55 *Comp. Gen.* 445, 75-2 CPD ¶297. *Comptroller General decisions are not controlling in most contract disputes, but the federal courts have recognized their instructiveness in procurement matters.*

⁴⁴ *Warner Laboratories, Inc.*, *Comp. Gen. Dec. B-189502*, ¶77-2 CPD, 1977 *U.S. Comp. Gen. LEXIS* 1952.

⁴⁵ *U.S. DEP’T OF ARMY, REG. 5-20, COMMERCIAL ACTIVITIES PROGRAM (1 Oct 1997) [hereinafter AR 5-20].*

⁴⁶ *FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983; Revised 1999).*

⁴⁷ *AR 5-20, supra note 45, at para 4-6b.*

⁴⁸ See *supra note 21.*

⁴⁹ *FAR, supra note 3, at 14.409-1(c).*

permits release of information without technically requiring a request that invokes the FOIA, the section contemplates use of the FOIA as the main vehicle for accommodating more burdensome requests that cannot be simply “furnished by telephone.”⁵¹

3. FAR Section 15.505

FAR section 15.505 deals with preaward debriefings of offerors. It limits the amount of confidential commercial information that may be released to offerors excluded from the competitive range or otherwise excluded from the competition before final award.⁵² Information that the government may release at a preaward debriefing is limited to the agency’s evaluation of the significant elements in the offeror’s proposal, a summary of the rationale for eliminating the offeror from the competition, and responses to any questions the offeror may have about the procurement procedures used.⁵³

As can be seen, previously unreleasable information can become ripe for release as the procurement progresses. This leaves open the question of whether information designated by the FAR as ripe for release must necessarily be deemed improper for withholding when analyzed under the FOIA. The Court of Federal Claims in a recent case, considered below, addressed this very issue.⁵⁴

4. FAR Subpart 24.2

⁵⁰ *Id.* at 14.409-1(d).

⁵¹ *Id.* at 14.409-2.

⁵² See FAR, *supra* note 3, at 14.5 for procedures to be used when two-step sealed bidding procedures are used. “Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. . . . This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items.” *Id.* at 14.501.

⁵³ FAR, *supra* note 3, at 15.506 deals with postaward debriefing of offerors. It permits the government to release a much greater amount of commercial information than at the preaward debriefing:

- (d) At a minimum, the debriefing information shall include—
- (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
 - (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
 - (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
 - (4) A summary of the rationale for award;
 - (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
 - (6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

⁵⁴ See *infra* Part II.A.4.

FAR subpart 24.2 deals with the Freedom of Information Act. The FAR simply incorporates the FOIA statute by reference⁵⁵ into the procurement process as simply one means, among many, to promote the free dissemination of information within the procurement community. The free dissemination of commercial information promotes the government's overall goal "to provide a level playing-field for all bidders."⁵⁶ The incorporation of the FOIA into the FAR is far from an easy fit. As is to be expected in dealing with two separately promulgated rules, there are times when the FOIA requires release of sensitive confidential commercial information that is at odds with or contrary to the release principles of the FAR. This was the case in the recent Court of Federal Claims case, *Flammann v. U.S.* The court admitted that once opened, sealed bids become public domain information that is available to any member of the public. "The public availability of all information contained in such bids logically nullifies any prospect of a confidentiality [FOIA] exemption. Where FAR Part 14 makes this information public, FOIA then becomes the mere vehicle through which that public information may be distributed."⁵⁷

In *Flammann* the court was confronted with a prebid opening FOIA request from a bidding competitor who sought the incumbent co-competitor's unit price bid submissions on the predecessor contract for the same services. The predecessor contract, for which the government had chosen not to exercise its first-year option, was substantially similar in most, if not all, material particulars with the re-solicited contract.⁵⁸ Of course the incumbent, *Flammann*, argued that if the Army were to release its unit prices on the previous contract, including its unit prices for the unexercised option years, its competitors would "ratchet down" its prices, which would cause it substantial competitive harm.⁵⁹ *Flammann* further argued that these unit prices, although previously publicly revealed in the January 2001 bid opening, were excepted from release by both FOIA exemption 4 and the Trade Secrets Act. The court rejected this reasoning, noting that at least two circuit courts had ruled that unit price information does not fall under the Trade Secrets Act "because overhead, profit margin,

⁵⁵ *R & W Flammann GmbH v. United States*, 53 Fed. Cl. 647, 652 (2002) ("the court . . . sua sponte takes judicial notice of the fact that FOIA is incorporated in Federal Procurement Regulations ('FAR') at Subpart 24.201").

⁵⁶ *Id.* at 656 (citing FAR paragraph 1.602-2(b) as authority for the proposition that "[c]ontracting officers . . . shall ensure that contractors receive impartial, fair, and equitable treatment").

⁵⁷ *Id.* at 654 (citing *ECDC Environmental, L. C. v. United States*, 40 Fed. Cl. 236, 238 (1998) (where the parties to a sealed bid protest each made unimpeded FOIA requests of one another's bids just days after bid opening) (alteration in original)).

⁵⁸ *Id.* at 655.

⁵⁹ *Id.* at 653. The term "ratchet down" was apparently first used in *McDonnell Douglas Corp. v. NASA*, 981 F. Supp. 12, 16 (D.D.C. 1997) (reverse FOIA suit), reconsideration denied, No. 96-2611, slip op. at 7-8 (D.D.C. May 1, 1998), rev'd, 180 F.3d 303 (D.C. Cir. 1999), reh'g en banc denied, No. 98-5251 (D.C. Cir. Oct. 6, 1999), dismissed as moot on motion for entry of judgment, 102 F. Supp. 2d 21 (D.D.C.) (underlying FOIA request withdrawn after D.C. Circuit rendered decision), reconsideration denied, 109 F. Supp. 2d 27 (D.D.C. 2000). In that case, the court recognized that customers, rather than competitors, could use released unit prices to "ratchet down" the prices within the submitters future bids. *Id. passim*.

and other cost multipliers cannot be derived from unit prices.”⁶⁰ But, in support of the plaintiff’s assertion, the court did find that the documents “were generally subject to release under FOIA.”⁶¹

The court held that FOIA release of the incumbent’s unit prices “under the peculiar facts at bar” was improper. The court based its holding on the theory that withholding was necessary to further the procurement systems “level playing field” concept. “Under the peculiar factual circumstances, and to ‘ensure [that] the contractors receive impartial, fair and equitable treatment,’ the contracting officer had a duty to preclude any and all access to plaintiff’s pricing information under its control, particularly that of the future unperformed option years.”⁶² Holding that FAR’s fairness provisions, found in paragraph 1.602-2(b), trumped the FOIA release provisions “during the running of the current solicitation,”⁶³ the court granted Flammann’s request for a permanent injunction enjoining opening of the bids for this solicitation. The court voided and set aside the solicitation.

In holding that the FAR trumps the FOIA—at least during the pendency of a solicitation—the Court Federal of Claims has boldly staked out a position that is unlikely to stand the test of future legal challenges. It appears the Flammann decision was wrongly decided. The court properly ruled that neither FOIA exemption 4 nor the Trade Secrets Act justified withholding unit prices previously released at the incumbent’s contractor’s bid opening and award. Unable to find any FOIA exemption justifying the withholding of the requested material, the court was forced into the awkward position of holding that the FAR, an administrative regulation promulgated under the Administrative Procedures Act,⁶⁴ has superceded the FOIA, a statute passed by Congress.

B. Other Information Remains Protected Even After Contract Formation

The FAR essentially expresses the policy that the procurement “process” is not just a single contract formed and completed in time but rather a continuing process with no temporal ending point. In espousing this doctrine, the FAR contemplates the withholding of certain commercial information under any circumstances. Such information may be essentially forever protected under exemption 5, or other appropriate exemptions (usually 3 or

⁶⁰ *R & W Flammann GmbH*, 53 Fed. Cl. at 654, citing with approval *Acumenics Research & Technology v. Dept. of Justice*, 843 F.2d 800, 808 (4th Cir. 1988) and *Pacific Architects and Engineers, Inc. v. Dept. of State*, 906 F.2d 1345, 1348 (9th Cir. 1990). A recent decision, *MCI Worldcom, Inc. v. GSA*, 163 F. Supp. 2d 28, (D.D.C. 2001) (reverse FOIA suit), has muddied what was previously thought to be relatively straightforward, well-settled case law on release of unit prices through the FOIA or at bid opening. Release of unit prices under the FOIA is a topic far too vast to be considered in this paper.

⁶¹ *R & W Flammann GmbH*, 53 Fed. Cl. at 654 (alteration of text in original).

⁶² *Id.* at 655.

⁶³ *Id.* at 656.

⁶⁴ 5 U.S.C. 551 et seq. (2000).

4). FAR section 15.506 (Postaward debriefing of offerors) prohibits the release of certain confidential commercial information even after contract formation:

- (e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 [FAR restrictions on release of contract proposals] or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including—
 - (1) Trade secrets;
 - (2) Privileged or confidential manufacturing processes and techniques;
 - (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and
 - (4) The names of individuals providing reference information about an offeror's past performance.
- (f) An official summary of the debriefing shall be included in the contract file.⁶⁵

At least one commentator, Theodore Belazis, has noted that such a narrow government interpretation that “the [commercial information] privilege remains intact temporarily, but indefinitely, for a given commercial secret that is the subject of multiple commercial transactions involving potentially numerous customers . . . would run against the grain of common business practice.”⁶⁶ Nevertheless, Belazis insists “the government is not so limited; it should be able to assert the privilege for as long as the factors of sensitivity and harm persist.”⁶⁷ Belazis is correct. The Supreme Court holding in *Federal Open Market Committee*⁶⁸ that the commercial information privilege is qualified and fleeting in nature “is not inconsistent with the conclusion that some technical data may be entirely exempt from disclosure to ‘any person’ until the basis for confidentiality ceases to apply.”⁶⁹ As of this date, no case law has arisen prohibiting the government from, on an ad hoc basis, applying such a concept of temporal permanence to commercial information kept confidential whose value may continue for years.⁷⁰

⁶⁵ FAR, *supra* note 3, at 15.506(e).

⁶⁶ Belazis, *supra* note 34, at 423.

⁶⁷ *Id.* at 424.

⁶⁸ *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 354 (1979).

⁶⁹ Belazis, *supra* note 34, at 424.

⁷⁰ Accord, Steven W. Feldman, *The Government's Commercial Data Privilege Under Exemption Five of the Freedom of Information Act*, 105 *MIL. L. REV.* 125, 141-42 (1984). “A few courts have indicated that the government's commercial information privilege expires automatically after contract award or offer withdrawal. Nonetheless, the government may need continued secrecy in these situations even after contract award when necessary to safeguard its valid business interests. For example, the agency might use the same data to award

Another commentator, Andrew Reish, argues that, based on Justice Brennan's concurring opinion in *Federal Trade Commission v. Grolier, Inc.*,⁷¹ commercial information could be withheld essentially forever from a FOIA requester in situations where "revealing prior sensitive estimates for similar procurement actions would substantially benefit a bidder while being a detriment to the Government."⁷² Justice Brennan used just such a rationale to justify a privilege-based exemption 5 government agency withholding of information in which agency attorney work product was requested through FOIA concerning past similar, but different, litigation cases involving the agency, in an attempt to discern the agency's strategic and tactical approach to similar past litigation. This, it was hoped, might reveal present litigation strategy for a current case. The Court held in that case that exemption 5 protects the attorney work product even if the litigation has ended.⁷³ Reish even goes so far as to argue that "[a]dding support to the proposition that the rationale can persist is the FOIA mosaic theory that exempts otherwise nonexempt pieces of information if, when pieced together, they would provide a picture of the particular government estimates sought to be withheld."⁷⁴

An excellent example of this temporal permanence doctrine is seen in the use that is made by the government of contractor performance evaluations. Because the Competition in Contracting Act of 1984 (CICA)⁷⁵ requires contractors to be "responsible" if they are to compete for a government contract,⁷⁶ the government is required to routinely record and maintain contractor performance information garnered from previous contracts as source selection information for procurements that occur in the future.⁷⁷ This material is kept for up to three years "after completion of contract performance."⁷⁸ Once a responsibility determination is made for a particular contract, and the contract is completed, this information ceases to have any value in relation to the completed contract. However, this same contractor

separate contracts to be performed in different time periods. In this example, the agency has a legitimate need for continued confidentiality even though the government has awarded the original contract." Id.

⁷¹ *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19 (1983).

⁷² Major Andrew F. Reish, Protection of Government-Generated Evaluative Estimates Under Exemption 5 of the Freedom of Information Act, 29 A.F. L. REV. 201, 205 (1988).

⁷³ *Federal Trade Commission*, 462 U.S. at 31.

⁷⁴ Reish, *supra* note 72, at 205. This reasoning would allow the FOIA exception of withholding information to swallow the normal FOIA default rule of release. Such attenuated reasoning might appropriately apply in very rare instances; it cannot be the norm.

⁷⁵ Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, Title VII, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 31 U.S.C. and 41 U.S.C.).

⁷⁶ "To be determined responsible, a prospective contractor must [among other things] . . . (a) Have adequate financial resources to perform the contract, or the ability to obtain them; (b) Be able to comply with the required or proposed delivery or performance schedule . . . (c) Have a satisfactory performance record . . ." FAR, *supra* note 3, at 9.104-1.

⁷⁷ *Id.* at 42.1503(b). See also 9.104-3(b).

⁷⁸ *Id.* at 42.1503(e).

may later compete for future contracts. In such a case, the assessment of the contractor's performance in the previous contract reacquires commercial value because it has importance in deciding the responsibility of the contractor to perform a newly competed contract. What is even more strange is that although "[c]ontractor performance evaluations might be viewed as post decisional because they are prepared upon the conclusion of a government contract . . . [t]hey are, however, more appropriately characterized as pre-decisional documents because the evaluation's primary purpose is to support future government procurements."⁷⁹ Based on this thinking, the United States Army Legal Services Agency has recommended that contractor performance evaluation information be withheld from FOIA requesters under exemption 3 (assuming the Procurement Integrity Act is an exemption 3 statute) and exemption 5 (asserting both the deliberative process and commercial information privileges).⁸⁰

Blanket protection for unsuccessful proposals submitted in response to a competitive proposal solicitation is provided by 10 U.S.C. 2305g and 41 U.S.C. 253b(m).⁸¹ Both of these statutes are mentioned in FAR section 24.202. A successful offeror's proposal is also protected if it is not set forth or incorporated by reference in the final contract.⁸² As is to be expected, the FAR, in the subpart incorporating the Freedom of Information Act, clearly prohibits release of information "that is exempt from disclosure under the Freedom of Information Act."⁸³

At this point, you realize that the guidance found in the FAR, while helpful, does not solve your problem completely. You still need to know which exemptions to apply in recommending denial of this request for your installation's A-76 study. Since the government has not yet opened contractor submitted competitive proposals from contractors competing with the government's proposed MEO, Army Regulation 5-20 indicates the time is not yet ripe for release of this confidential commercial information. But which FOIA exemptions will you assert? And can all the requested information be shielded from release? You realize you must examine the case law interpreting the exemptions to answer these questions.

III. Background—Origin of Exemption (b)(5) Government Confidential Commercial Information Privilege

⁷⁹ *Litigation Division Note, Responding to Freedom of Information Act (FOIA) Requests for Contractor Post-Performance Evaluations, ARMY LAW., Nov. 2001, at 46.*

⁸⁰ *Id. passim.*

⁸¹ 5 U.S.C. §552(b)(3) & (5) (2000). See *FOIA UPDATE, Vol. XVIII, No. 1, at 2*, available at http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_1/page2.htm, for a good explanation of the protections afforded by these two statutes.

⁸² *FAR, supra note 3, at 24.202(a)(2). Winning proposals are normally incorporated by reference into a final contract. However, the government and a contractor could mutually agree not to incorporate certain portions of a winning proposal into a final contract, such as unit prices.*

⁸³ *Id. at 24.202(b).*

A. The Opaque Statutory Language

By its wording, exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”⁸⁴ This language has been interpreted by the courts to “exempt those documents . . . that are normally privileged in the civil discovery context.”⁸⁵

Although originally it was “not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery,” the Supreme Court subsequently made it clear that the coverage of Exemption 5 is quite broad, encompassing both statutory privileges and those commonly recognized by case law, and that it is not limited to those privileges explicitly mentioned in its legislative history. Accordingly, the Court of Appeals for the District of Columbia Circuit has stated that the statutory language “unequivocally” incorporates “all civil discovery rules into FOIA [exemption 5].” However, this incorporation of discovery privileges requires that a privilege be applied in the FOIA context exactly as it exists in the discovery context. Thus, the precise contours of a privilege, with regard to applicable parties or the types of information that are protectible, are also incorporated into the FOIA.⁸⁶

With regard to the commercial information privilege, it is instructive to look at the first case recognizing that the FOIA incorporated such a privilege.

B. The Seminal Case of Federal Open Market Committee v. Merrill

In 1979, the Supreme Court in *Federal Open Market Committee v. Merrill* recognized that “for good cause shown . . . a trade secret or other confidential research, development or commercial information”⁸⁷ is privileged from discovery in the civil context based on Federal

⁸⁴ 5 U.S.C. §552(b)(5) (2000).

⁸⁵ *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 354 (1979). Commentator Lila Seal notes, not without humor, that “differentiating between discoverable and privileged material is not always easy.” Lila L. Seal, *Comments, The Future of the Freedom of Information Act’s Deliberative Process Exemption and Disclosure of Computerized Federal Records After Petroleum Information Corp. v. United States Department of Interior*, 71 *DENV. U. L. REV.* 719, 721 (1994).

⁸⁶ *FOIA GUIDE*, supra note 4, at 270 (citations omitted) (quoting *Fed. Open Mkt. Comm. V. Merrill*, 443 U.S. 340, 354 (1979) and *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987)).

Rule of Civil Procedure 26(c)(7). It had previously recognized up to this time only two civil discovery privileges as being incorporated by exemption 5—an “executive” privilege for predecisional deliberations and the attorney work product privilege. Since then, federal courts have recognized multiple other privileges as being incorporated by exemption 5.⁸⁸

Federal Open Market Committee set clear parameters for application of the confidential commercial information privilege in the FOIA context.⁸⁹ The case itself involved a FOIA request for the internal monthly reports for the months of January 1975 and February 1975 issued by the Federal Open Market Committee, an organ of the U.S. Federal Reserve System, to the Account Manager of the System Open Market Account. The reports essentially directed the Account Manager to buy or sell U.S. government securities in such a manner, and in such a volume, as to assure that the liquid money supply within the American economy would be maintained within certain ranges. The “tolerance ranges” within which the Account Manager was to keep the money supply were clearly spelled out, along with an explanation in general terms of the whether the Committee was implementing an expansionary, deflationary, or unchanged monetary policy in the period ahead.⁹⁰ To prevent security dealers from impairing the ability of the Federal Reserve to implement this short term policy, this internal document was not publicized in the Federal Register until the next month, at which time the document had been superceded by yet another monthly report. The Committee was required to publish the report because Section (a)(1)(D) of the FOIA statute required “[e]ach agency . . . [to] separately state and currently publish in the Federal Register for the guidance of the public-- . . . (D) . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency.”⁹¹ The FOIA requester argued that withholding the report for the month to which it pertained was not a “current” publishing in the Federal Register, nor was withholding it justified by any FOIA withholding exemption. Both the D.C. District Court and the D.C. Court of Appeals agreed with the requester that the reports must be released during the month to which they pertain, despite any financial harm the U.S. might suffer.⁹² The Supreme Court reversed, holding that FOIA exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this

⁸⁷ *Fed. Open Mkt. Comm.*, at 356 (quoting Federal Rule of Civil Procedure 26(c)(7) as it existed at the time of this case).

⁸⁸ *FOIA GUIDE*, supra note 4, at 316-317.

⁸⁹ *Belazis*, supra note 34, at 415-424.

⁹⁰ *Fed. Open Mkt. Comm.*, 443 U.S. at 345 & nn.5-6.

⁹¹ 5 U.S.C. §552(a)(1)(D) (2000). The wording in the version of the statute in effect at the time of the case was similar to the current statute.

⁹² *Fed. Open Mkt. Comm.*, 443 U.S. at 363 n.25. The Federal Open Market Committee estimated the additional cost to the government of early release of the report would be \$300 million annually because “the ‘announcement effect’ produced by immediate disclosure of the Directives and tolerance ranges would cause sharper fluctuations in the interest rates on Government securities traded by the System Open Market Account. As a result of these fluctuations, the risk of dealing in or purchasing Government securities would increase. To compensate for this larger risk, dealers and purchasers would demand a higher yield on Government securities. Given the huge amount of borrowing by the Federal Government each year, even a small change in yield on Government securities would represent a substantial cost to the government.” *Id.*

information is generated by the Government itself in the process leading up to awarding a contract.⁹³ The basis for this holding was the fact that Federal Rule of Civil Procedure 26(c)(7) provides qualified protection of trade secrets and commercial information in the civil discovery context.⁹⁴

In announcing this rule, however, the Court noted seven rules of application of the confidential commercial information privilege in the exemption 5 context. First, the confidential commercial information privilege is only a fleeting, transient privilege.

The theory behind a privilege for confidential commercial information generated in the process of awarding a contract . . . is . . . that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.⁹⁵

Second, unlike exemption 4, which is limited to information “obtained from a person” (i.e., outside the government), the confidential commercial information privilege “is necessarily confined to information generated by the Federal Government itself.”⁹⁶ Third, the privilege incorporated by exemption 5 is qualified, not absolute.⁹⁷ Fourth, to receive protection by the privilege, the confidential commercial information sought to be protected by the government does not have to be generated directly pursuant to the process of actually awarding a specific government contract. Data generated by the government in a “substantially similar” way can still receive the protection, “[a]lthough the analogy is not exact.”⁹⁸

Fifth, the mere fact that the information sought under the FOIA is confidential commercial information does not in itself trigger protection under the qualified privilege. In each case, an analysis must be conducted that weighs the public’s need to know the information versus the government’s need to protect the information. Only if it is likely the government would

⁹³ *Id.* at 357. *In this case, no contract was actually awarded. Nevertheless, because the records requested through the FOIA were substantially similar to confidential commercial information generated in the buying and selling of securities on the open market, the Court was willing to find the privilege applied. “Although the analogy is not exact, we think the Domestic Policy Directives and associated tolerance ranges are substantially similar to confidential commercial information generated in the process of awarding a contract . . . they are, in this sense, the Government’s buy-sell order to its broker.”* *Id.* at 361-362.

⁹⁴ *Id.* at 356.

⁹⁵ *Id.* at 360.

⁹⁶ *Id.* at 360.

⁹⁷ *Id.* at 360.

⁹⁸ *Id.* at 361.

routinely prevail in protecting the information under the Civil Rule of Procedure 26(c) balancing test in a litigation discovery context may the government actually withhold the information under exemption 5.⁹⁹ Sixth, the triggering test to use in deciding whether the qualified confidential commercial information privilege would shield the information sought under exemption 5 is whether “any type of order would be appropriate forbidding disclosure of confidential material therein to the general public” in the civil discovery context.¹⁰⁰ Finally, the FOIA principle of segregability still applies. Any matter that can reasonably be segregated from the protected privileged material must still be released.¹⁰¹

IV. Under What Circumstances Can the Government Confidential Commercial Information Privilege Be Asserted?

A. Exploring the Contours of the Privilege: Case Law after Federal Open Market Committee

Commentator Steven W. Feldman attempted to summarize the case law on the confidential commercial information privilege.¹⁰² Although Feldman wrote in 1984, when the contours of the privilege were still being defined by the courts, his analysis of the case law is

⁹⁹ *Id.* at 362. Justice Blackmun, who wrote the majority opinion, was quick to point out that in performing this balancing test the individual applicant's need for the information is “not to be taken into account in determining whether materials are exempt under Exemption 5.” *Id.* at 363. Ten years later, the Court clarified that only “official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose” of the FOIA for which the public has a need to know. *United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989). This is the public interest that should be balanced against the government's need to protect the information. The Court in *Reporters Committee* reiterated that the individual FOIA requester's personal need for the information sought was essentially irrelevant. *Id.* at 774.

¹⁰⁰ *Fed. Open Mkt. Comm.*, 443 U.S. at 363. See *Department of Justice guidance (FOIA GUIDE, supra note 4, at 270) on this technical issue.* “[T]his incorporation of discovery privileges requires that a privilege be applied in the FOIA context exactly as it exists in the discovery context. Thus, the precise contours of a privilege, with regard to applicable parties or the types of information that are protectible, are also incorporated into the FOIA. Additionally, it is not the ‘hypothetical litigation’ between particular parties (in which relevance or need are appropriate factors) that governs Exemption 5's applicability; rather, it is the circumstances in civil litigation in which memoranda would ‘routinely be disclosed.’ Therefore, whether the privilege invoked is absolute or qualified is of no significance. Accordingly, no requester is entitled to greater rights of access under Exemption 5 by virtue of whatever special interests might influence the outcome of actual civil discovery to which he is a party. Indeed, such an approach, combined with a careful application of Exemption 5's threshold language, is the only means by which the Supreme Court's firm admonition against use of the FOIA to circumvent discovery privileges can be given full effect.” *Id.* (footnotes omitted) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975) and *H.R. Rep. No. 89-1497, at 10 (1966)*, reprinted in 1966 U.S.C.C.A.N. 2418).

¹⁰¹ *Fed. Open Mkt. Comm.*, 443 U.S. at 364.

¹⁰² *Feldman, supra note 70, at 125 passim.*

enticing but falsely simplistic. Feldman would have us believe that “[t]he Exemption Four cases are persuasive authority in resolving undecided issues under Exemption Five. . . . The government’s trade secret protection should be construed in the same manner as a private person’s trade secrets under Exemption Four.”¹⁰³ The author of this paper believes Feldman erred when he concluded

[t]he Merrill Court stated that the government’s Exemption Five commercial privilege parallels a private party’s commercial privilege under FOIA’s Exemption Four. The analogy is complete because the government should receive only the same protection as any other competitor when the government descends into the market place. Consequently, the cases interpreting Exemption Four provide appropriate guidelines for determining the limits of the government’s Exemption Five commercial privilege.¹⁰⁴

Such simplistic conclusions cannot be squared with post Federal Open Market Committee case law precedent even as it existed in 1984.¹⁰⁵ Although Justice Blackmun, who authored the majority opinion in Federal Open Market Committee, used inexact analogies in his reasoning, Feldman carries Blackmun’s analogies to a simplistic extreme that is not supported by case law. Such non sequitur reasoning falsely leads Feldman to conclude that, “[p]roperly construed, Exemption Five should protect all government confidential commercial data, regardless of whether the data was generated incident to the award of a contract.”¹⁰⁶ How easy it would be for government functionaries to withhold all such data from FOIA requesters if Feldman were correct. However, post Federal Open Market Committee case law has not been so favorable to the government. Although these cases are favorable to the government in admitting that the confidential commercial information privilege exists, they often find the privilege does not apply to the facts in dispute.

1. Hack v. Department of Energy

In 1982, the District Court for the District of Columbia in Hack v. Department of Energy¹⁰⁷ was faced with the issue of whether government created Conceptual Design Reports (CDRs) could be withheld under the confidential commercial information privilege in response to a FOIA request. The reports were documents prepared in the early planning stages

¹⁰³ Id. at 142.

¹⁰⁴ Id. at 137 (footnotes omitted).

¹⁰⁵ While Feldman admits the purposes of exemption 4 and exemption 5 are different (protection of trade secrets and encouraging information submissions to the government vs. giving the government the same competitive advantage as private companies have and preserving the consummation of contracts), he nevertheless sees the practical contours of the protection afforded by either exemption as identical.

¹⁰⁶ Feldman, *supra* note 70, at 137.

¹⁰⁷ 538 F. Supp. 1098 (D.D.C. 1982).

of architectural/engineering projects. They consisted of two parts: 1) government-generated conceptual designs of the project with price estimates of what the project would cost, and 2) competing contractor submitted annual statements of their qualifications as well as appraisals of the outcomes of other projects previously awarded to the particular firms.¹⁰⁸ Without citing authority for doing so, the court held that the information submitted by sources outside the government was protected by the privilege to the same extent as the designs and cost estimates generated by the government itself. In so extending Federal Open Market Committee protection to information generated outside the government itself, the court set forth additional rules of application of the privilege in the exemption 5 context. Although it is only a federal district court opinion, it carries great weight because the federal District Court of the District of Columbia is the country's only court of universal jurisdiction for FOIA litigation.¹⁰⁹ In its ruling, the court set forth several guidelines.

First, “[a]t the outset, the privilege requires that documents be kept confidential.”¹¹⁰ This is both a historical inquiry into the agency's past practice (in this case the Department of Energy) in handling the type of documents in question, and an inquiry whether the documents in question actually were kept confidential. Documents that cannot be shown to have been kept confidential do not merit the privilege's protections.¹¹¹

Second, an agency's decision to keep confidential either commercial information that it has gathered from outside sources or internally generated as part of the contract award process is “one such matter best left to it,” if the agency has special expertise.¹¹² The plaintiff in this case argued that the agency could more efficiently let architectural/engineering contracts and achieve cost savings if it revealed the confidential information to other competitors as part of the competition process. The court was unwilling to substitute its own judgment for that of the agency in deciding what information is best kept confidential.¹¹³

Applying the Hack standard, you ask yourself whether the contracting office has kept the contents of the requested A-76 study “confidential.” A phone call to the contracting officer reveals that your installation has always historically kept a tight lid on A-76 studies, and that this particular study has been kept especially confidential. You are relieved. The contracting officer also tells you she has already made the decision that the information in this study needs to be kept absolutely confidential in the interest of achieving the best deal for the government. You breathe a sigh of relief. The Hack criteria have been met.

2. Government Land Bank v. GSA

¹⁰⁸ Id. at 1098.

¹⁰⁹ 5 U.S.C. §552(a)(4)(B) (2000).

¹¹⁰ Hack, 538 F. Supp. at 1101.

¹¹¹ Id.

¹¹² Id. at 1103.

¹¹³ Id. at 1102.

In *Government Land Bank v. GSA*,¹¹⁴ the First Circuit Court held realty appraisals generated by a government agency to help it sell property are protected by exemption 5's confidential commercial information privilege. In that case, the Government Land Bank of Massachusetts, which was attempting to buy property from the General Services Administration (GSA), made a FOIA request for the General Services Administration's appraisal of the value of the five tracts of land it was offering for sale at former Westover Air Force Base in Massachusetts. The court found this situation to be one squarely within the contemplation of the Federal Open Market Committee case.

Merrill held that the exemption prevails where the document contains "sensitive information not otherwise available," and disclosure would significantly harm the government's commercial interests. When an agency such as GSA is about to dispose of realty, its own expert's appraisal of value is sensitive: it is a critical factor in computing its initial asking price and its rock bottom price. Moreover, the appraisal is "not otherwise available": anyone could have the property appraised, but the agency's own appraiser does not reveal his conclusions outside the agency.¹¹⁵

The court clarified two principles of application concerning the privilege.

First, "[e]xemption 5 protects the government when it enters the marketplace as an ordinary commercial buyer or seller. The protection is limited to what is essential, but FOIA should not be used to allow the government's customers to pick the taxpayers' pockets."¹¹⁶

¹¹⁴ 671 F.2d 663 (1st Cir. 1982).

¹¹⁵ *Id.* at 665-666 (citation omitted) (quoting *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. at 363).

¹¹⁶ *Id.* at 665 (footnote omitted). But see *News Group Boston, Inc. v. Nat'l R.R. Passenger Corp.*, 799 F. Supp. 1264, 1270 (D. Mass. 1992), appeal voluntarily dismissed, No. 92-2250 (1st Cir. Dec. 4, 1992), which held that Amtrak payroll information requested through the FOIA by the Boston Herald newspaper could not be withheld under the Federal Open Market Committee confidential commercial information privilege. The court found that affidavits submitted by Amtrak managers opining that disclosure of the payroll information would cause significant competitive harm to Amtrak as inadequate evidence to prove this point. The managers opined that if third parties, with whom Amtrak enters into outside contracts, were to learn what wages Amtrak paid a particular employee with a certain skill level, they could reduce their own labor costs and thereby undercut Amtrak's competitive advantage vis-à-vis other railroads. But even more striking, the court held that "[s]ince payroll information does not fall within an area of clear Congressional concern, it is not subject to exemption 5['s confidential commercial information privilege]." *Id.* Since the appeal was dismissed, it is impossible to know whether the First Circuit would have affirmed or overturned this case on appeal. One argument favoring withholding payroll information under exemption 5's confidential commercial information privilege would be that contracts for employment are constantly being let by both the government and private employers competing with the government for the best and the brightest qualified personnel. Using this analysis, the consummation of ongoing and near future government labor contracts could be endangered by release of the information. However, this analysis would undercut the Supreme Court's admonition in *Federal Open Market Committee* that the privilege is fleeting, and ceases to protect the information once the contract has been let. However, that same decision expressly permitted a rough analogizing of contract principles without requiring a one hundred percent congruence to contract principles. In sum, the author of this paper believes the *News Group Boston* holding should be confined to the U.S. District Court for the District of Massachusetts. It does not articulate sound jurisprudential reasoning.

Second, sensitive commercial information can be withheld under exemption 5 using the privilege as justification if the material sought is “not the sort of material that private litigants can get as a matter of course” during discovery in the civil litigation context.¹¹⁷ More specifically, “[t]he issue of whether disclosure is required by FOIA turns on the nature of the document, not the particular party requesting it. Thus, an individual applicant’s need for information is not to be taken into account in determining whether materials are exempt.”¹¹⁸

Concerning the Government Land Bank criteria, you notice that your installation’s A-76 Study includes data on the estimated lease value of a certain warehouse storage yard that will be leased to the winning best and final proposal. This data will be critical to evaluating contractor proposal cost submissions. It can most likely be protected. You are unsure however whether estimated property lease values would be routinely released--or protected--in civil litigation. You will need to do further research to answer this question.

3. Morrison-Knudsen Company v. Department of the Army

In *Morrison-Knudsen Company v. Department of the Army*,¹¹⁹ the Morrison-Knudsen Company sought to obtain an Army A-76 MEO cost estimate at Fort Benning prior to the Army-issued invitation for bids on the project. The D.C. District Court had no difficulty finding that the documents could be withheld under the exemption 5 confidential commercial information privilege because if Morrison-Knudsen had filed a civil suit against the Army, it would normally have been unable to obtain the government’s cost estimate prior to solicitation and award of the A-76 contract.

However, in reaching its conclusion, the court noted two principles of application. First, the court reasoned that in every A-76 case of this nature, the government must convince the court that the documents sought do indeed “‘contain sensitive information not otherwise available’ which would ‘significantly harm’ the A-76 program if released prior to submission of bids.”¹²⁰ The results of this factual inquiry will necessarily vary from case to case. The court found in the instant case that the Army’s practice concerning release of the government’s own cost estimates were inconsistent and varied from installation to installation. However, the court found other installations’ release practices irrelevant. The key in this case was what Fort Benning had decided to do with the data; it had decided to withhold the information in its entirety to give the government the maximum competitive advantage in the process. In every instance, the government must meet its burden of persuasion by “demonstrating sound reasons to protect the commercial information being

¹¹⁷ *Gov’t Land Bank*, 671 F.2d at 666. See *Department of Justice guidance on this issue quoted supra note 100*.

¹¹⁸ *Id.* at 668.

¹¹⁹ 595 F. Supp. 352 (D.D.C. 1984), *aff’d*, 762 F.2d 138 (D.C. Cir. 1985) (*unpublished table decision*).

¹²⁰ *Id.* at 354 (*quoting Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. at 363).

sought. . . .”¹²¹ In applying Federal Rule of Civil Procedure 26(c)(7), the court has broad discretion to develop procedures “that will protect confidential information as far as feasible consistent with the need to insure fairness to all parties. Absolute protection of commercial data that will lead to relevant evidence is rare. . . .”¹²² Second, the court noted that discretionary releases¹²³ of portions or all of the government’s own cost estimate was always permissible by the government even in cases when the data is clearly privileged if the government determined that release was “appropriate” to further the government’s best overall interests.¹²⁴

Applying Morrison-Knudsen Company principles to your FOIA request, you decide you are on strong ground in withholding the entire A-76 study. No portions of the study had been released thus far. And the contracting officer’s articulated reason for withholding the material from the requestor was to best promote competition and obtain the best deal for the government. This rationale is sound.

4. Shermco Industries v. Secretary of the Air Force

In *Shermco Industries v. Secretary of the Air Force*,¹²⁵ the plaintiffs filed a protest with the General Accounting Office (GA) challenging the award of a contract to Tayko Industries. Shermco simultaneously filed a FOIA request for all documents related to the protest, including three internal Air Force legal memoranda advising on the merits of the protest as well as three other documents containing Tayko’s basic pricing information which included items, quantities and unit prices. The Air Force withheld these documents from the requester pending final resolution of the protest. The Air Force justified the withholding of the Tayko submitted pricing information using exemption 4; the legal memoranda were withheld using exemption 5 as justification. The court concurred that pricing information could be withheld under exemption 4.¹²⁶ As regards the legal memoranda, the court was faced with the novel

¹²¹ *Id.* at 355.

¹²² *Id.*

¹²³ See, *supra* text accompanying notes 13 & 18-21.

¹²⁴ *Morrison-Knudsen Co.*, 595 *F. Supp.* at 356.

¹²⁵ 613 *F.2d* 1314 (5th Cir. 1980).

¹²⁶ *Id.* at 1317.

The purpose of Exemption 4 is twofold to [sic] protect the interests of individuals who disclose confidential information to government agencies and to protect the Government as well. This information concerning Tayko’s costs proposals, in the hands of a competitor prior to the time of a final award, would jeopardize the Air Force’s ability to discern clearly which bidder could do the best job for the lowest price. Moreover, the nondisclosure of this information is in keeping with the Armed Services Procurement Regulations (ASPR) policy prohibiting bidding with

issue of whether the confidential commercial information privilege was broad enough to include legal memoranda prepared by an agency to aid it in its deliberations about how to handle a contract award protest. Arguably, by incorporating Tayko's sensitive commercial information into the legal memoranda, the drafting attorneys had effectively converted the sensitive contractor information into sensitive government information.

The court declined to read exemption 5's confidential commercial information privilege "so broadly as to include every type of information which could be protected under [Federal Rule of Civil Procedure] Rule 26(c)(7). . . ." because "predecisional deliberations and confidential commercial information are not the same thing."¹²⁷ The court noted that the Supreme Court's Federal Open Market Committee decision announced only a qualified confidential commercial information privilege, "and did not mention confidential research, a category in which we believe legal memoranda more readily fall."¹²⁸ The court did hold, however, that the legal memoranda were protected by exemption 5's deliberative process privilege, called the "executive privilege" by some commentators.

The court also held that the Air Force did not "waive" its exemption 5 protections merely because it supplied this sensitive information to the GAO, an outside agency, in its attempt to defend its award decision. The court explained that "[w]aiver occurs when an agency makes its information more broadcast than is allowed by its own regulations, but it does not occur when an agency whose action is being reviewed forwards to the reviewing agency legal memoranda in support of its position."¹²⁹ Although this waiver rule was applied in the context of the exemption 5 deliberative process privilege, the wording of the court's holding is broad enough to include waiver issues involving any exemption 5 incorporated discovery privilege.

Thinking back to your FOIA request, you remember there are several legal reviews of the A-76 study mixed in with the study files. These legal reviews discuss at great length some of the study's cost data. You now realize that these reviews can be withheld, but not based on the confidential commercial information privilege of exemption 5. You will have to assert the traditional attorney work product, attorney-client and deliberative process privileges of exemption 5, to withhold this material.

5. American Society of Pension Actuaries v. Pension Benefit Guarantee Corporation

In American Society of Pension Actuaries v. Pension Benefit Guarantee Corporation,¹³⁰

knowledge of competing bids. Id. (alteration in original) (citations omitted).

¹²⁷ *Id.* at 1320.

¹²⁸ *Id.*

¹²⁹ *Id.* (citation omitted).

the District Court for the District of Columbia concluded that financial advice provided to the Pension Benefit Guaranty Corporation (PBGC) by its Advisory Committee and its Investment Advisory Panel on the best way to invest annual pension plan termination insurance premiums was not protected by the exemption 5 confidential commercial information privilege. The PBGC is a corporation of the federal government. The court was unable to link advisory committee financial investment advice to the awarding of a contract as was the case in Federal Open Market Committee, since “[t]he PBGC’s advisory committees do not engage in buying or selling on the agency’s behalf but only in the rendering of advice.”¹³¹ Financial advice offered by the committees was not necessarily followed by the PBGC, moreover the advice was actually a refinement of input from outside management experts who in turn had provided their advice to the PBGC committees for evaluation.¹³² Although the court had no difficulty in distinguishing this situation from Federal Open Market Committee, this case indicatives how judges are careful to differentiate between confidential commercial advice and confidential commercial information. Although the advice itself was a form of information, held by the government, that arguably had commercial value, it did not constitute “confidential commercial information.”

This case causes you consternation. Your A-76 study case file contains multiple memoranda for record memorializing various government functionaries’ advice on how to make the government-submitted plan more efficient. This advice could be temporarily protected by asserting the exemption 5 deliberative process privilege. But you know that once the final decisions have been made, this privilege may go away because advice is merely a recommendation that may be protected only as long as it is predecisional and deliberative.¹³³ You decide you will have to read the entire study. You did not previously realize the distinction between commercial advice and commercial information.

6. *Burka v. U.S. Department of Health and Human Services*

In *Burka v. U.S. Department of Health and Human Services*,¹³⁴ the District of Columbia Federal Circuit was asked to decide whether costly smoking cessation research conducted by the National Cancer Institute constituted privileged confidential commercial information under exemption 5 of the FOIA.¹³⁵ The court noted that confidential research information was normally routinely available through discovery in a civil litigation context. Although a few courts have exercised their authority under Federal Rule of Civil Procedure 26(c)(7) to

¹³⁰ No. 82-2806, 1983 U.S. Dist. LEXIS 20337 (D.D.C. July 22, 1983).

¹³¹ *Id.* at 5-6.

¹³² *Id.* at 3.

¹³³ But see *Klamath Water Users Protective Ass’n v. Department of the Interior*, 189 F.3d 1034, 1038 (9th Cir. 1999), *aff’d*, 532 U.S. 1 (2001), which held that predecisional advice provided by an outside organization to an executive branch agency will not receive exemption 5 deliberative process protection where the organization is a “self-advocate[] at the expense of others seeking benefits inadequate to satisfy everyone.” *Id.* at 12.

¹³⁴ 87 F.3d 508 (D.D.C. 1996), *rev’d*, 318 U.S. App. D.C. 274 (D.C. Cir. 1996).

¹³⁵ *Id.* *passim*.

limit discovery access to confidential research material,¹³⁶ this was the exception rather than the rule. In many cases, the only limitation put on release by the courts was that individual patient names be redacted out of the material to protect the privacy of patients participating in the study. The court noted that although Rule 26(c)(7) does specifically say discovery may be limited when justice requires to protect a trade secret or other confidential research development “[a]t this juncture in the development of the law, we cannot say that there is an established or well-settled practice of protecting research data in the realm of civil discovery on the grounds that disclosure would harm a researcher’s publication prospects.”¹³⁷

The court held that the material was protected by neither the confidential commercial information privilege nor any other clearly recognized “confidential research privilege” incorporated into the FOIA by exemption 5. The court noted in dicta that given the right fact scenario, the government might prevail in such an exemption 5 privilege claim if it could “identify an interest similar to one which courts have found sufficient to justify the ‘good cause’ standard in discovery proceedings.”¹³⁸ Such an interest would justify withholding material from a requesting party in certain discovery contexts. The court was quick to point out, though, that “[i]f Exemption 5 is triggered every time an agency can point to such cases [i.e., a case extending a protective order to a certain category of information normally discoverable but not relevant to the other party in a particular discovery context], the exception carved out of FOIA’s overarching policy of disclosure will quickly swallow up the rule.”¹³⁹ The court then seemed to quote with approval a Tenth Circuit opinion addressing the issue that supported this reasoning: “It cannot be argued seriously that a Rule 26(c)(7) order merely limiting production of certain documents to a specified place renders those materials privileged for FOIA purposes.”¹⁴⁰

Whatever the strength of this dicta might be, *Burka* stands for the proposition that confidential research data, standing alone, does not receive exemption 5 confidential commercial information privilege protection even if the government spent an enormous amount of money generating the data. There must be a commercial tie-in that consists of more than taxpayer investment. In this particular case, the National Cancer Institute spent an unbelievable \$45 million on this seven-year study.¹⁴¹ However, no financial benefit was

¹³⁶ E.g., *Dow Chemical Company v. Allen*, 672 F.2d 1262 (7th Cir. 1982) (acknowledging existence of the privilege but deciding to override it anyway); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984) (holding “[w]e agree *arguendo* that the [research materials] may enjoy a qualified privilege and are not to be pried into unnecessarily,” *Id.* at 560-561); *In re American Tobacco Company*, 880 F.2d 1520 (2d Cir. 1989) (holding that in light of the significant need demonstrated by the tobacco companies for the information, the privilege would be overridden, even if it did exist).

¹³⁷ *Burka*, 87 F.3d at 521.

¹³⁸ *Id.* at 518.

¹³⁹ *Id.* at 517.

¹⁴⁰ *Id.* at 517 n.10 (quoting *Anderson v. Dep’t of Health & Human Services*, 907 F.2d 936, 946 (10th Cir. 1990)).

expected to flow from the study except for lessons learned that could be applied to enhance the overall health of the nation.¹⁴² This was not the kind of government interest that the Court in Federal Open Market Committee contemplated protecting.

You look again into your A-76 case file. It contains reams of "historical cost data" that obviously took a great many man-hours to compile. But is this research data? You think not. Although the government obviously researched its own past business data, this does not appear to be the kind of research data Burka says is unprotected. You decide you can withhold this compiled historical cost data as confidential commercial information under the temporal permanence doctrine.

7. Southwest Center for Biological Diversity v. U. S. Department of Agriculture

In *Southwest Center for Biological Diversity v. U. S. Department of Agriculture*,¹⁴³ the District Court for the District of Arizona reached a similar conclusion as *Burka*: confidential research data is not normally and routinely protected under the exemption 5 confidential commercial information privilege. In this particular case, the Fish and Wildlife Service had already published the general results of a research data study concerning the breeding habits of a rare bird of prey called the northern goshawk. The Southwest Center for Biological Diversity, through a FOIA request, sought specific details of the study concerning nesting locations of the rare bird. Because of the previous publication of the results of the study, the court reasoned that even if it were to find a qualified research data privilege applicable to this data, the prior publication resulted in the agency's waiver of any right to assert it. The court, after surveying the cases in the area, was unwilling to recognize any type of qualified research data privilege incorporated by exemption 5 and concluded that "research data such as that at issue here is normally and routinely disclosed in the course of civil discovery . . . FOIA exemption five does not protect research data, and that, to the extent any privilege for confidential research data may exist, it would not apply here [because of the prior publication of the general results of the research]."¹⁴⁴

The court was willing to recognize "the unremarkable proposition that, in specific situations, research material may be entitled to some protection [based on Federal Rule of Civil Procedure 26(c)(7)]. Exemption five, however, protects only material that would not be normally or routinely disclosed in civil discovery."¹⁴⁵ Citing *Burka* with approval, the court in *Southwest Center for Biological Diversity* reconfirmed the principle that confidential

¹⁴¹ *Id.* at 511. Although this data was generated by a contractor who conducted the research for HHS, the research data was given to HHS and thus clearly was under the ownership and control of the government. *Id.*

¹⁴² *Id.*

¹⁴³ 170 F. Supp. 2d 931, 942-943 (D. Ariz. 2000), *aff'd*, 2002 LEXIS 26454 (9th Cir. 2002) (appeal based solely on narrow issue of whether 16 U.S.C. §5937, which created a statutory exemption from FOIA under exemption (b)(3), applied to the present case that was pending when the statutory exemption was enacted).

¹⁴⁴ *Id.* at 943.

¹⁴⁵ *Id.* at 942.

research data, standing alone, does not receive exemption 5 confidential commercial information privilege protection even if the government spent an enormous amount of money generating the research data.¹⁴⁶ Data is not “commercial information” simply because it cost a lot of money to acquire. The courts seem to demand that the data sought to be protected be somehow linked to a genuine government commercial endeavor in which the government steps into the marketplace just like any other business person.¹⁴⁷

You sigh in relief. Southwest Center for Biological Diversity confirms your decision that research studies of installation historical cost data can be protected if the information is linked to a genuine government commercial endeavor. The data in question in your A-76 study had been saved for years to help the government form benchmark cost estimates for service contracts it had let in past years. Such government cost estimates helped alert the government to contract proposals that were clearly suspicious and in need of closer scrutiny. The data had clearly been saved and analyzed for genuine past business endeavors, and the data would continue to be used for future similar uses.

B. Protections Under Other Exemption 5 Privileges

As the above cases indicate, sometimes the commercial information privilege will not protect what at first blush appears to be commercial information. This is because the courts have construed very narrowly the definition of “commercial information.” In cases when the information sought to be protected does not fit squarely within the contours of the privilege’s coverage, the broader deliberative process privilege or yet another privilege incorporated by exemption 5 may permit withholding of the commercial-type information under exemption 5.¹⁴⁸ The deliberative process privilege will usually permit at least temporary withholding of sensitive government commercial information simply by virtue of the fact that a final agency decision has yet to be made when negotiations are underway on its use. In order to convince a court that information is protected by the deliberative process privilege, the government “must show that: 1) the information is predecisional, 2) the information is deliberative, 3) the government has maintained confidentiality, 4) the government has a legitimate need for the information, and 5) the government would be impaired in acquiring this type of information absent the protection of the privilege.”¹⁴⁹

Many times, government commercial information will be protectible under both the commercial information privilege and the deliberative process privilege. The two are not mutually exclusive. “Although Merrill distinguished the confidential commercial information

¹⁴⁶ *Id.*

¹⁴⁷ *In this particular case the court agreed with the Department of Interior that the northern goshawk is a National Park System resource “which is rare, threatened or endangered,” and that its gene pool “constitutes a ‘rare’ National Park System resource because the survival of the entire population is necessary to the continued presence of the goshawk in the park.” Id. at 937. Admitting that the birds may be subject to “poaching by falconers,” the court was still unable to find any commercial value in the data. Id. at 943.*

¹⁴⁸ See *Litigation Division Note*, *supra* note 79, at 41, for helpful advice on possible alternative bases to withhold contractor post-performance evaluations.

¹⁴⁹ *Jensen*, *supra* note 31, at 570.

privilege, the Court did not render this privilege mutually exclusive from the deliberative process privilege. Therefore, confidential commercial information of the government that is also deliberative and pre-decisional should also be evaluated under the deliberative process privilege of Exemption 5.”¹⁵⁰

At this juncture, you wonder if other exemptions, other than exemption 5, might protect your A-76 study. You now realize that at times more than one privilege within the same exemption may protect particular sets of data. Could the same be true for more than one exemption? You are excited to learn that exemptions themselves can overlap.

V. How the Exemption (b)(5) Government Confidential Commercial Information Privilege Overlaps With FOIA Exemptions 3 and 4

A. Protection of Government Commercial Information Under Procurement-Related FOIA Exemption 3 Statutes

Exemption 3 incorporates into its protection federal statutes that require that information be withheld from the public in such a manner as to leave no discretion on the issue, or that establish particular criteria for withholding requested information.¹⁵¹ On its World Wide Web FOIA site, the DoD has published the exemption 3 statutes it uses to withhold FOIA requested information. Many of the statutes listed permit the withholding of commercial information that is also withholdable under the commercial information privilege of exemption 5.¹⁵²

Your survey of the statutes listed on the DoD website reveals nothing new that you had not already found looking in the FAR. None of the statutes listed on the website seem to apply to your study except the ones regarding protection of unopened and losing contractor proposals.¹⁵³ Thus you to turn exemption 4.

¹⁵⁰ *Litigation Division Note, supra note 79, at 46.*

¹⁵¹ *5 U.S.C. §552(b)(3) (2000).*

¹⁵² *Available at <http://www.defenselink.mil/pubs/foi/guidance.html>. Examples include 10 U.S.C. §130c (2000) (nondisclosure of sensitive information concerning foreign governments and international organizations); 10 U.S.C. §2487 (2000) (limitations on release of sales information concerning commissary stores); 35 U.S.C. §181-188 (2000) (secrecy of certain inventions and withholding of patents); 35 U.S.C. §205 (2000) (confidentiality of inventions information); 50 U.S.C. §2170(c) (2000) (authority to review certain mergers, acquisitions and takeovers).*

¹⁵³ *41 U.S.C. §253b(m) (2000) (Prohibition on release of contractor proposals). This provision is adopted into the FAR guidance on release of confidential commercial information. See supra Part II.A.*

B. Protection of Government Commercial Information Under FOIA Exemption 4

Although information generated exclusively by the government itself is not protected by exemption 4, if the information is supplied by a source outside the government and then incorporated into government records by way of summary or reformulation, it may come under exemption 4's coverage.¹⁵⁴ The issue of whether competitive harm will result to either the government, the submitter, or both, if this information is released, is the cardinal issue in such cases.¹⁵⁵ A few courts have found that exemption 4 will protect nonconfidential commercial information that is otherwise privileged under a theory that exemption 4 incorporates the commercial information privilege to protect the commercial information.¹⁵⁶ However, at least one circuit court, the 10th Circuit, has specifically held that recognition of a privilege for materials protected by a protective order under [Utah's state equivalent of Federal Rule of Civil Procedure] Rule 26(c)(7) "would be redundant and would substantially duplicate Exemption 4's explicit coverage of 'trade secrets and commercial or financial information.'"¹⁵⁷

Some government confidential commercial information may be simultaneously withholdable under exemption 5 as well as under exemptions 3 and 4.¹⁵⁸ In addition, within exemption 5 itself, merger often occurs between "facts" such as a government commercial information, and "deliberations," such as ongoing negotiations, in which case the government commercial information privilege essentially merges or overlaps with the exemption (5) deliberative process privilege. This is because discrete facts, normally unprotected by the deliberative process privilege, can at times become so inextricably intertwined with predecisional deliberative material that the entire merged product is considered deliberative material.

Since your A-76 case file contains unopened contractor proposals, you feel safe in also asserting that exemption 4 protects the confidential commercial information within them. You also choose to recommend the use of exemption 3 to protect the unopened proposals. At this point, however, you realize your grasp of the exemption 5 commercial information privilege has been handicapped by your only minimal understanding of privileges in general. The case law clearly indicates privileges are elastic and strong only to the extent the government asserts and protects them. But how is this done? You decide a study of privileges is in order.

¹⁵⁴ See FOIA GUIDE, *supra* note 4, at 195.

¹⁵⁵ *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). "To summarize, commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770.

¹⁵⁶ FOIA GUIDE, *supra* note 4, at 265-267.

¹⁵⁷ *Anderson v. HHS*, 907 F.2d 936, 945 (10th Cir. 1990).

¹⁵⁸ Major Steven M. Post, *The Freedom of Information Act and the Commercial Activities Program*, ARMY LAW., May 1986, at 9.

VI. Strengthening the Privilege—What Actions Can and Should DoD Take to Enhance the Legal Vitality of the Privilege?

A. Understanding How Privileges Work—Federal Rule of Civil Procedure 26

Although understanding privileges has little bearing on the application of FOIA exemptions 3 and 4, it is critical in any exemption 5 analysis. Federal Rule of Civil Procedure 26 explains that litigation “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any [litigation] party.”¹⁵⁹ Since the government commercial information privilege is a qualified privilege, it can be strengthened by asserting it whenever necessary to protect government trade secrets in a non-FOIA context. Only through constant assertion of the privilege to maintain the confidentiality of government commercial information can the privilege have vitality in a FOIA context. On the other hand, assertion in a litigation setting of some privileges, such as the deliberative process privilege, must usually be made by the “head of the agency,” a heavy burden for the agency head who is typically overwhelmed with more weightier administrative concerns than merely strengthening a qualified privilege.¹⁶⁰ Assertion by the head of the agency does not seem to be necessary in the case of the commercial information privilege.

Law professor Edward Imwinkelried in his practical book *Evidentiary Foundations*¹⁶¹ lists the foundational elements needed to be laid in the litigation context to shield confidential information from release during discovery. When pondering information release issues in the FOIA context, one should think of these elements as the necessary foundation a litigator would have to lay during discovery litigation to shield his clients confidential commercial information from release to a suing plaintiff. Understanding the elements of the confidential commercial information privilege is critical to proper assertion of the privilege in the FOIA context.

The claimant has the burden of proving the existence of the elements of the prima facie case for privilege. The prima facie case for privilege includes these elements:

1. The privilege applies to this type of proceeding. The judge [in the litigation context] makes this determination by examining the pleadings in the case.
2. The claimant of the privilege is asserting the right type of privilege.

¹⁵⁹ *FED. R. CIV. P. 26(b)(1) (2002)*.

¹⁶⁰ *Hilary S. Cairnie & Ernest Edgar IV, An Imperfect Shield: How Private Parties Can Attack and Defeat the Executive Privilege for Deliberative Process in Government Procurement Litigation, 28 PUB. CONT. L. J., NO. 2, 127, 138 (1999)*.

¹⁶¹ *IMWINKELRIED, supra note 32*.

The judge makes this determination by insisting that the claimant specify the right he or she is claiming, that is, the right to personally refuse to disclose, the right to prevent a third party from disclosing, or the right to preclude comment on the invocation of the privilege.

3. The claimant is a proper holder.
4. The information the claimant seeks to suppress is privileged information.
 - a. It was a communication.
 - b. It was confidential. Some jurisdictions presume that a communication between properly related parties is confidential.
 - c. It occurred between properly related parties.
 - d. It was incident to the relation.¹⁶²

Imwinkelried opines that a communication is “confidential” when two elements are met, “(1) physical privacy; and (2) an intent on the holder’s part to maintain secrecy. . . . Even if there was physical privacy at the time of the communication, the communication is unprivileged if the holder intended subsequent disclosure outside the circle of confidence.”¹⁶³ Perhaps the greatest challenge to maintaining the privilege is avoiding waiver through disclosure. Imwinkelried lists these elements for an “out-of-court waiver”:

If the party opposing the privilege relies on the theory of out-of-court waiver, the party must lay the following foundation:

1. Where the out-of-court statement was made.
2. When the statement was made.
3. To whom the statement was made.
4. The holder knew that the addressee was outside the circle of confidence.
5. The holder disclosed information to the addressee.
6. The disclosure was voluntary.¹⁶⁴

As can be seen in the section below, waiver can occur in many ways.

1. Lessons Learned from Deliberative Process Privilege Cases

Examination of cases involving attempts to pierce the deliberative process privilege—where cases abound—is instructive on how qualified privileges erode, are waived, and can be strengthened. Commentators Hilary Cairnie and C. Ernest Edgar have developed a list of ways careless government workers can waive or erode privileges. For instance, the deliberative process privilege may be eroded or waived

¹⁶² *Id.* at 209-210.

¹⁶³ *Id.* at 207-208.

¹⁶⁴ *Id.* at 212. *Imwinkelried is here addressing out-of-court waiver in a non-FOIA context.*

through the public reading of withheld documents by government officials, the voluntary surrender of agency records in earlier litigation, the providing of information to a third-party outside the Government during contract negotiations, the release of U.S. government documents by a foreign embassy, and the release of documents to a court without limitations on their use or dissemination.¹⁶⁵

2. Erosion of Privileges

As a practical matter, qualified privileges quickly erode in the procurement context when confidential, privileged information is needlessly released to third parties outside the government during contract negotiations.¹⁶⁶ Commentator Steven Feldman properly notes that

these rules must be qualified when a potential bidder on a government contract obtains unauthorized access to procurement-sensitive information. In this context, waiver or its equivalent must be found to conform with agency directives. For example, the Defense Acquisition Regulation requires that all potential bidders should, to the greatest extent possible, have equal access to the government's procurement information on a pending acquisition. Thus, if the agency learns that one bidder has obtained improper disclosure by any means, the agency should take the affirmative step of making the same data available to all potential bidders.¹⁶⁷

Even over-extensive sharing of privileged data within the government itself can erode the privilege.¹⁶⁸ This is especially problematic when agency regulations provide no guidance about when release either within, or without, the government is appropriate in an administrative process. Relatively new commercial undertakings by the government, such as privatization of utilities and housing, as well as the ever-increasing pressure to outsource, often have processes that are "developed along the way" as "lessons are learned."¹⁶⁹ These kinds of scenarios have few clear answers when protection of exemption 5 commercial information privilege becomes an issue. One federal district court, in a deliberative process privilege case, succinctly defined the privilege erosion or waiver doctrine by stating that "[w]here an authorized disclosure is voluntarily made to a non-federal party, the government

¹⁶⁵ Hilary S. Cairnie & Ernest Edgar IV, *supra* note 160, at 151 (citations omitted).

¹⁶⁶ *Id.* at 150.

¹⁶⁷ Feldman, *supra* note 70, at 140 (footnote removed).

¹⁶⁸ *Id.* at 139-140 *passim*.

¹⁶⁹ *Id.* at 139-143 *passim*.

waives any claim that the information is exempt from disclosure under the deliberative process privilege.”¹⁷⁰

B. Procedural and Substantive Requirements for Proper Invocation of Any Federal Rule of Civil Procedure 26 Privilege

The key procedural requirement for invoking a privilege is to openly claim it. Remembering to claim all privileges that may apply is especially problematic with exemption 5, since it is not uncommon for two privileges to apply simultaneously to the same material. The United States Army Legal Services Agency therefore counsels that all potential exemption 5 privileges be claimed, when available.¹⁷¹ Federal Rule of Civil Procedure 26(b)(5) is less precatory and mandates express invocation of any claimed privilege:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.¹⁷²

Because previous versions of this rule did not require express claims of privilege, some litigants made “silent privilege claims” by “withholding information in response to discovery requests . . . without informing the discovering party either that additional information existed[ed] or that the party responding to the discovery [was] claiming that the information [was] protected against disclosure by a privilege.”¹⁷³ Although invocation of such silent privilege claims may seem downright unethical, the lesson to learn from the current rule is that, since exemption 5 incorporates all sorts of privileges, the government must specifically respond back to the FOIA requester explaining that it is invoking the confidential commercial information privilege, along with any other privileges, of exemption 5. The current case law trend in FOIA litigation is that government failure to clearly articulate which privilege it is claiming under exemption 5, at least at the district court level, may result in waiver of the

¹⁷⁰ *Shell Oil Co. v. Internal Revenue Service*, 772 F. Supp. 202 (D. Del. 1991).

¹⁷¹ See *Litigation Division Note*, supra note 79, at 41 & passim.

¹⁷² *FED. R. CIV. P. 26(b)(5)* (2002).

¹⁷³ *Rebecca A. Cochran*, Evaluating Federal Rule of Civil Procedure 26(B)(5) as a Response to Silent and Functionally Silent Privilege Claims, 13 *REV. LITIG.* 219, 223 (1994) (quoting *Wayne D. Brazil*, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 *AM. B. FOUND. RES. J.* 217, 224).

right to later assert it.¹⁷⁴ It is not appropriate to silently assert the privilege and “hide the ball” from the requester. It is also not ethical.

Direct commercial competitors to the government often seek commercial information through a FOIA request as a prelude to initiating contract litigation. To prevail in any subsequent FOIA litigation, the government need only convince the judge that the requested commercial information is not normally or routinely released in discovery. If the government prevails in the FOIA litigation, and the case then goes to commercial litigation, this defense of privilege is much weaker. During actual commercial litigation discovery, mere speculation that premature disclosure of government technical information would harm the government’s bargaining position during a negotiation process is not enough to trigger discovery protections. Substantiation of the harm to government commercial interests is necessary.¹⁷⁵ On the other hand, in actual civil litigation, “because most courts recognize that disclosure to one’s competitors is more harmful than disclosure to noncompetitors, an applicant who can demonstrate that its industry is competitive, and that the confidential information sought will undoubtedly be revealed to a competitor, stands a good chance of obtaining some form of protection. . . .”¹⁷⁶ in the form of a discovery protective order even if the information must be released to the opposing party in discovery. Such protective orders typically forbid the party opponent from further disseminating the information to any other party.¹⁷⁷ But such orders do not prevent the party opponent from accessing the material.

1. Preparing for the Worst

In an actual discovery context, courts balance litigants’ need for access to privileged information against the government’s need to protect its secrecy.¹⁷⁸ FOIA requests are notoriously misused as a means of effecting cheap, pre-litigation discovery.¹⁷⁹ When FOIA fails because the government asserts a privilege, litigants may be able to obtain the sought

¹⁷⁴ *Maydak v. United States Department of Justice*, 218 F.3d 760 (D.C. Cir. 2000), cert. denied, 533 U.S. 950 (2001) (FOIA exemptions must be invoked at the district court level as a defense in a manner in which the district court can rule on the issue to avoid de jure waiver at the appellate level). See Department of Justice guidance on this litigation issue: “Failure to raise an exemption in a timely fashion in litigation at the district court level . . . may result in a waiver.” FOIA GUIDE, supra note 4, at 706.

¹⁷⁵ *Reish*, supra note 72, at 206.

¹⁷⁶ *Jacqueline S. Guenego*, Note: Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score, 60 *FORDHAM L. R.* 541, 555 (1991).

¹⁷⁷ *Id.* at 541-543.

¹⁷⁸ *Id.* passim.

¹⁷⁹ “FOIA requests can be made for any reason whatsoever; because the purpose for which records are sought has no bearing upon the merits of the request, FOIA requesters do not have to explain or justify their requests. As a result, and despite repeated Supreme Court admonitions for restraint, requesters have invoked the FOIA successfully as a substitute for, or a supplement to, document discovery in the contexts of both civil and criminal litigation.” FOIA GUIDE, supra note 4, at 38 (citations omitted).

after commercial information through litigation-triggered discovery of material that was unavailable through the FOIA process. This is because in the discovery context, courts will do an actual fact-specific weighing of the competing interests,¹⁸⁰ whereas in the FOIA context courts permit assertion of a (b)(5) privilege if the documents "normally" or "routinely" are not discoverable in civil discovery. Just because the government is able to fend off a FOIA request by claiming a commercial information privilege does not guarantee such a privilege claim will succeed in preventing discovery if the case goes to acquisition-related litigation. In such a case, the government may lose the fact-specific discovery balancing test and may therefore have to release material it was able to protect under an exemption 5 qualified privilege theory. The government needs to have a backup plan for such cases.¹⁸¹ Seeking a discovery protective order in such cases is usually the best solution. "[W]hile there is no hard and fast rules to establish good cause for the entry of a protective order, courts appear ready and willing to look at a wide array of factors to determine exactly what 'justice requires.'"¹⁸² Consequently, "[p]rotective orders are granted generally to governmental units on a variety of grounds ranging from a qualified privilege, to undue burden from an overly broad discovery request, to the need to protect legitimate law enforcement interests."¹⁸³

2. Agency Will to Fight for its Commercial Information Privilege

An agency unwilling to fight for its commercial information privilege in FOIA or commercial litigation will waive the privilege in that particular case. Moreover, waiving the privilege will erode the strength of the privilege in future disputes. Privileges tend to be like muscles: failure to exert them leads to atrophy that weakens future exertion efforts.

¹⁸⁰ Jensen, *supra* note 31, at 570 (footnotes omitted). "Once the government has successfully invoked the [qualified] privilege, the burden shifts to the party seeking disclosure to show that its need outweighs the government's interest in confidentiality. Only after the party seeking discovery has demonstrated a particularized need for the privileged material will the court balance opposing interests." *Id.*

¹⁸¹ Accord, Hilary S. Cairnie & Ernest Edgar IV, *supra* note 160, at 129. In discussing privileges in general, and the deliberative process privilege in particular, Cairnie and Edgar note: "Congress established FOIA's deliberative process exemption (Exemption 5), in part, to preserve the executive privilege that was then developing in the common law. [FOIA] [e]xemption 5 does not apply in the context of procurement litigation discovery. The application of the analogous common law deliberative process aspect of the executive privilege is less compelling than that of Exemption 5 in the FOIA context; it is, therefore, more vulnerable to attack and defeat by private litigants." *Id.* Cairnie and Edgar opine that "[i]n the context of procurement disputes such as bid protests and contract claim appeals, the cognizant tribunals historically and rigidly have held the Government to high procedural and substantive standards in deciding whether the privilege should attach." *Id.* at 130 (footnote omitted). However, the privilege defense is easier in the FOIA context because "FOIA does not permit the Government to inquire into the requesting party's need for the information as would ordinarily be permitted in litigation." *Id.* at 134 (footnote omitted). Although these comments were addressed to situations involving assertion of the deliberative process privilege under exemption 5, they have equal applicability as regards assertion of other exemption 5 privileges, such as the commercial information privilege.

¹⁸² Guenego, *supra* note 176, at 543.

¹⁸³ *Id.* at 560 (footnotes omitted).

After reviewing this arcane area of the law, you vow to meet one-on-one with the installation contracting officer to commend her for her tight-lipped, no-release-to-anyone policy during this and past A-76 studies. By simply following her good business sense—and common sense for that matter—she has followed the requirements of the law of privilege exactly. As regards your agency's will to assert privileges, a quick phone call to the Litigation Division reveals that the will is there to assert privilege in the FOIA context.

VII. Conclusion

You now realize government contract workers should zealously protect government confidential commercial information by asserting the exemption (b)(5) government confidential commercial information privilege whenever appropriate in response to FOIA requests for government commercial information. Nevertheless, you feel some ethical uneasiness. The FOIA is a release statute. Its goal is to get information to the public. U.S. acquisition policy, on the other hand, as expressed through the FAR, is to protect the integrity of the acquisition process. And that sometimes means it is best to withhold information from the public until the information is "ripe" for release. Although there appears to be a conflict here, there really is none. When you invoke a FOIA exemption to withhold information, you are not violating the spirit of the FOIA. It is the FOIA itself that both permits and sanctions the withholding. You marvel at the flexibility of the FOIA; it dovetails perfectly with acquisition policy. Bottom line, your philosophy of zealously protecting confidential commercial information is in harmony with the FOIA.

But you have also learned that other FOIA exemption bases may simultaneously be available to protect commercial information. If available in a specific case, these other exemptions should be simultaneously invoked to provide additional protection for the requested material. You were surprised to learn that not all commercial-type information is protected. Although it was not critical in your case to understand that the commercial information privilege is only as strong as its underlying privilege, which can be kept strong only by asserting it vigorously in both FOIA and non-FOIA contexts, your contracting officer actually followed this principle by keeping government commercial information confidential. She limited access within the government to only those who had a genuine need to know. You respect your contracting officer even more than before.

Applying what you have learned, you concur with the contracting officer that all of the requested A-76 study may be withheld. Most of the documents will be withheld under various exemption (b)(5) privileges. Since the government has not yet opened contractor submitted competitive proposals from contractors desiring to compete with the government's proposed MEO, exemptions 3 and 4 should protect these proposals. Although a few pages of "chicken scratch" remain after redactions have been made, these remaining portions are unintelligible and therefore nonsegregable;¹⁸⁴ thus they may be withheld also. In your legal review you will

¹⁸⁴ See, *supra*, text accompanying note 101.

recommend that the response letter back to the requester list all FOIA exemptions claimed and every basis within a particular exemption used as a ground for withholding requested material. Such detail may not be necessary at the installation administration level; but if this case goes to litigation, such detail will make the work of the litigation attorneys easier.

Your work is done. The entire A-76 study will be withheld. For now, that is. The contracting officer has warned you that the requester plans to file yet another FOIA request after proposals are opened if his proposal is not selected by the government as the best final proposal. By that time your office FOIA expert will be back from leave.

KEEPING JURISDICTION AFLOAT WHEN YOUR CDA CLAIM INVOLVES A WAGE DETERMINATION

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The last thing that any litigant bringing an appeal under the Contract Disputes Act ("CDA") would want is to have their case scuttled by being dismissed for lack of jurisdiction. Yet, that is exactly what can happen if the appeal calls upon a board of contract appeals or the U.S. Court of Federal Claims to make decisions reserved to the U.S. Department of Labor ("DOL") concerning the obligations imposed by wage determinations or collective bargaining agreements under the Service Contract Act, the Walsh-Healy Public Contracts Act or the Davis-Bacon Act. This article identifies the channels that the boards and courts have charted through these waters in ruling on contractors' claims and provides some suggestions for navigating around hidden shoals that are not so clearly marked.

A contractor who incurs increased costs under a contract arising from a wage determination or collective bargaining agreement or arising from the reclassification by DOL of employees into higher wage categories generally is entitled to pursue its contract claim under the CDA, which gives the boards of contract appeals jurisdiction "to decide any appeal from a decision of a contracting officer . . . relative to a contract made by its agency." 41 U.S.C. § 607(d) (2003). Frequently, the claim is made under a contract clause which provides for a price adjustment for the contractor's actual increased costs incurred to comply with wage determinations or collective bargaining agreements under certain conditions for contracts covered by the Service Contract Act (41 U.S.C. § 351 et seq. (2003)), construction contracts covered by the Davis-Bacon Act (40 U.S.C. § 276a et seq. (2003)) and supply contracts covered by the Walsh-Healy Act (41 U.S.C. § 35 et seq. (2003)). See, e.g., FAR §§ 52.222-31, -32 (Davis-Bacon); 52.222-43(d), -44(c) (service and other contracts).

However, the contractor's contract rights and obligations pursuant to these labor laws are subject to DOL's procedural and substantive regulations, interpretations and rulings. DOL has the primary and final authority and responsibility for administering and interpreting the Service Contract Act among the executive agencies. See 29 C.F.R. §§ 4.101 and cases cited. Similarly, DOL's rulings and interpretations of requirements under the Davis-Bacon Act and the Walsh-Healy Act are authoritative and a contractor's good faith reliance on and conformance to them is an absolute bar to liability under those acts. 29 U.S.C. § 259 (2003). Consequently, applicable contract clauses provide that disputes involving labor standards requirements under these laws must be resolved pursuant to DOL's resolution procedures and substantive regulations, interpretations and rulings. See FAR § 52.222-14 (Davis-Bacon); FAR § 52.222-41(t) (Service Contract Act); and FAR § 52.222-20 (Walsh-Healy).

The charter granted to DOL to decide questions arising under these labor laws raises the inevitable question of whether issues in a contract dispute over increased costs incurred to comply with such laws must be resolved by DOL or may properly be resolved by a board or

court under the CDA. Courts and boards presented with CDA claims involving wage requirements have developed relatively clear rules where DOL has made a determination regarding the contractor's wage and benefit obligations. First, the board or court will not take jurisdiction of a claim that would require it to decide whether a determination made by DOL was correct. Second, a board or court will take jurisdiction of a claim that would require it only to apply a determination that DOL has already made. However, the rule is far less clear where the claim requires a determination of wage requirements about which there is no evidence in the record that DOL has made a determination.

Courts and Boards Will Not Question DOL Determinations Under the CDA

It has long been established that a contractor may not challenge in a CDA appeal a determination that has been made by DOL, regardless of how the contractor frames the issue. For example, in *Emerald Maintenance*, 88-3 BCA ¶ 21,103, ASBCA Nos. 36628, 26632 at 106,532, DOL had determined under the Davis-Bacon Act that the contractor's employees were properly categorized under the applicable wage determination as laborers instead of as lower paid journeymen. Seeking compensation for the higher costs, the contractor attempted to avoid the jurisdictional problem by asserting that the wage determination was a defective specification and that the government had misrepresented the rate at which laborers could be paid. However, because the challenge went directly to the classification of workers and the applicable wage rate, the Board held that the classification was a matter for the DOL to decide and the Board did not have jurisdiction.

Another example of more recent vintage of the application of this rule is presented by *Trataros Construction, Inc. v. United States*, 2002 WL 1963287 (unpublished Federal Circuit Decision, Aug. 21, 2002). There, the contractor had submitted its bid on a Davis-Bacon contract on the assumption that it called for residential construction of Bachelor Quarters where the solicitation had been amended specifically to include a DOL decision that the construction work was not residential construction but a "building construction project" with higher applicable wage rates. After award, the contractor complied with an order by DOL to pay "building construction" rates and then pursued a CDA claim on the grounds that "the Bachelor Quarters were, in fact, residential." The Court of Federal Claims dismissed for lack of jurisdiction because the claim related directly and exclusively to the wage rate the contractor had to pay. The Federal Circuit affirmed, noting that "a complaint that relates to the wage rate [a contractor] had to pay [its workers] and the listing of job categories and wage rates in the contracts is surely one of the labor standards provisions." *Id.*

The boards also have declined to take jurisdiction over issues that have been addressed by DOL where DOL has not reached a final adjudication. For example, in *Adventure Group, Inc.*, ASBCA No. 53097, 01-2 BCA ¶ 31623, the board dismissed without prejudice as premature an appeal in which contract claims were integrally related to wage classification disputes still pending before the Department of Labor. See also *Source A V, Inc.*, ASBCA No. 45192, 94-1 BCA ¶¶ 26,293 at 130,783 (dismissing appeal as premature because "it appears that a final [DOL] decision has not been issued as to the alleged misclassification violations") and *M.A. Mortenson Co.*, ASBCA No. 45584, 93-3 BCA ¶¶ 26,238 at 130,543 (both cases cited by *Adventure Group, Inc.*).

The foregoing cases all establish the now-reliable rule that a board or court cannot consider under a CDA claim any challenges to determinations that have been made by DOL concerning the contractor's wage and benefit obligations under the contract. The contractor's only recourse is to appeal the DOL determination under available non-CDA procedures or to accept the DOL determination and identify whether relief is available under the contractor's contract rights.

Courts and Boards Will Make Findings Under the CDA As to What DOL Determinations Have Been Made

Cases like Emerald Maintenance raised the question as to what issues a board or court could address under CDA jurisdiction when the relevant facts involve the contractor's obligations under a wage determination or collective bargaining agreement. The decision in *Burnside-Ott Training Center v. United States*, 985 F.2d 1574 (Fed. Cir. 1993), made clear that it is proper under CDA jurisdiction to consider the effect that a DOL determination has on the parties respective contract rights. In *Burnside-Ott*, the contractor pursued a CDA claim for increased costs resulting from an unappealed DOL decision requiring it to reclassify its technical employees to a higher-paid labor category. The Federal Circuit noted that CDA jurisdiction applies when a "dispute centers on the parties' mutual contract rights and obligations, . . . even though matters reserved to and decided exclusively by the Department of Labor are part of the factual predicate." *Id.* (quoting *Emerald Maintenance*, 88-3 BCA at 106,532). In reversing the Claims Court's dismissal of the appeal for lack of jurisdiction, the Federal Circuit held that CDA jurisdiction applied because *Burnside-Ott* was not questioning DOL's decision, but "simply requests the Claims Court to determine the effect that the DOL classification has on its contract rights." *Id.* at 1580.

Subsequent cases have made it clear that a tribunal under the CDA may make a finding as to what DOL actually determined concerning the contractor's wage and benefit obligations, although it may not question or reverse such a determination once found. The tribunal may then proceed to determine the parties' contractual rights based on its findings. For example, *Inter-Con Securities Systems, Inc.*, ASBCA No. 46,251, 95-1 BCA ¶ 27,424, involved a modification to an existing collective bargaining agreement ("CBA") which was contingent upon DOL's adoption of the modified CBA in a wage determination incorporated into the contractor's government contract. DOL subsequently issued a wage determination that stated simply that the contractor shall pay the wage rates set forth in the "current collective bargaining agreement." The parties disagreed as to whether DOL had adopted the terms of the modification in its wage determination. In upholding its own jurisdiction over the appeal, the board held that the narrow factual issue properly before it was not to decide for itself whether the CBA modification was part of the wage determination, but to make a factual finding as to whether DOL had incorporated the CBA modification into the wage determination. (The board found no evidence in the record that DOL had incorporated the modification and it denied the contractor's motion for summary judgment.)

The board applied a similar analysis in *Hunt Building Corp.*, ASBCA No. 50083, 97-1 BCA ¶ 28807, where DOL required the contractor to pay its employees under a higher-paid labor category and the contractor then pursued a CDA claim under a constructive change

theory. The board upheld its own jurisdiction to hear the appeal because the dispute focused on whether the increased costs resulting from the DOL determination were compensable under the changes clause of the contract. See also *Herman B. Taylor Const. Co. v. GSA*, 203 F.3d 808 (Fed. Cir. 2000) (court had jurisdiction to determine whether DOL had found violations of Davis-Bacon Act that would support contracting officer's default termination, but court had no jurisdiction to determine for itself whether such violations had occurred); *Penn Enterpr., Inc.*, ASBCA 52,234, 2001-1 BCA ¶ 31,244 (board decided contract claim on basis of wage determination); *Schleicher Commun. Corrections Ctr.*, DOTCAB No. 3067, 02-3 BCA ¶ 31.902 (board decided some issues and reserved others for DOL).

These cases provide an avenue for pursuing a CDA claim involving wage and benefit obligations only if the contractor can demonstrate that DOL made a determination that supports the contractor's theory of relief. If no such evidence exists, the contractor may wish obtain an appropriate ruling under applicable DOL dispute resolution procedures before pursuing a CDA claim.

CDA Claims Where DOL Has Made No Determination

A number of CDA claims involving wage and benefits obligations have been decided where there has been no finding that DOL has made a determination regarding the obligations at issue. These cases tend to show that the boards have been willing to take jurisdiction over issues that arguably are reserved to DOL. For example, *Classico Cleaning Contractors, Inc.*, DOTCAB No. 2786, 98-1 BCA ¶ 29,648, involved a claim for a price adjustment in the first option year of a service contract for increased costs resulting from a collective bargaining agreement that was negotiated and executed after the beginning of first option year. The contract clause permitted an equitable adjustment for increased costs incurred to comply with a wage determination applicable at the beginning of a renewal option period or otherwise applied to the contract by operation of law. Thus, the central issue regarding entitlement required a determination of whether the increased costs that the contractor undisputedly paid under its CBA were incurred pursuant to a wage determination applicable at the beginning of a renewal period or otherwise applied to the contract by operation of law.

The board found that DOL had issued a wage determination but made no analysis of whether it or any other DOL determination addressed the central issues in the appeal. Instead, the board interpreted the Service Contract Act, DOL's implementing regulations, and the Federal Acquisition Regulation ("FAR") provisions that correspond to the controlling DOL regulations, and prior board cases that have undertaken similar analyses. Such rulings by the boards are fairly common. See, e.g., *Tecom, Inc.*, ASBCA No. 51591, 01-01 BCA ¶ 3,156; *Ameriko*, ASBCA No. 50356, 98-1 BCA ¶ 29,905; *J&L Janitorial Svcs.*, ASBCA No. 31,245, 88-3 BCA ¶ 21,137; *Raytheon Service Co.*, ASBCA Nos. 28721, 29668, 86-3 BCA ¶ 19,094

As discussed at the beginning of this article, DOL claims exclusive jurisdiction for administering and interpreting the Service Contract Act ("SCA"). Contracts subject to the SCA provide that disputes involving labor standards requirements must be resolved pursuant to DOL's resolution procedures and substantive regulations, interpretations and rulings. FAR § 52.222-41(t). DOL exercises this responsibility through its Administrative Review Board

("ARB"), which consider appeals of wage determinations made under the Service Contract Act. 29 C.F.R. § 8.1(b)(1). Thus, the ARB has authority to determine, for example, whether a successor contractor is subject to a predecessor contractor's collective bargaining agreement under SCA Section 4(c). See, e.g., Fort Hood Barbers Assoc., ARB No. 96-181 (Nov. 12, 1996) (whether predecessor CBA applies beyond the first two-year contract period of a successor multiyear contract); GSA Region 3, ARB No. 97-052 (Nov. 21, 1997) (whether contract at issue was a successor contract); ITT Federal Services Corp., ARB 95-042A (July 25, 1996) (whether CBA that terminated before completion of predecessor contract applies to successor contract).

The boards may choose to delve into issues arguably reserved to DOL as a result of a well-intentioned desire to provide an efficient tribunal to litigants who come before them and the fact that many of DOL's regulations are repeated in the FAR. A potential down side of this practice is that a decision could later be challenged and overturned on the grounds that the board lacked jurisdiction.

A practical recommendation for contractors (and their counsel) wishing to avoid pitfalls in pursuing wage and benefit-related claims is to first obtain a definitive determination from DOL as to the contractor's obligations under the applicable labor law. DOL procedures provide that contractors may request written clarifications of wage determinations and other DOL determinations. See, e.g., 29 C.F.R. § 4.56, Review and Reconsideration of Wage Determinations [SCA]. DOL regulations also provide procedures for resolving disputes of such determinations. A determination by DOL will form the factual predicate for any subsequent CDA claim. Without it, a contractor risks pursuing a CDA claim only to have it dismissed without being considered on the merits.

Conclusion

Claims relating to a contractor's wage and benefits obligations can be substantial. It is critical, therefore, to ensure that the claim will not run aground and capsize due to lack of subject matter jurisdiction under the CDA.

A board or court will wave off a claim that challenges a determination by DOL. However, a claim based on a determination that the contractor can show DOL actually made will be considered. The winds are less predictable when the claim involves wage or benefit obligations where DOL has made no determination. While the boards have shown a willingness to apply FAR provisions to resolve such claims, their jurisdiction to do so is subject to challenge. It is, therefore, prudent to obtain an advisory or other ruling from DOL on pertinent wage or benefits issues to ensure clear sailing when you pursue your claim under the CDA.