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TABLE OF CONTENTS

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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

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[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 principles[4] 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.

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[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 steeled 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 Guidelines[6], which established elements of an effective compliance program; in the expression of Contractor Standard of Conduct in the DFARS[7]; in the FAR provisions relating to mitigating factors for contractor debarment[8], and even in the most recent federal legislation dealing with corporate governance – the Sarbanes-Oxley Act of 2002[9]. The Securities and Exchange Commission[10] 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 memorandum[11] 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.

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[6] ***The Guidelines and Supporting commentary may be found at www.ussc.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/cftf.***

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

LAWRENCE M. ANDERSON*

TABLE OF CONTENTS

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> *[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)*

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[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

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[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]

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[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

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[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 Regulation[25] (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

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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).*