U.S. Department of Justice
Office of Information and Privacy

FOIA UPDATE

OIP Guidance

opyrighted Materials and the FOIA

One of the most difficult business-related issues to arise under the Freedom of Information Act is the proper treatment of copyrighted materials that are maintained by federal agencies. Such materials can come into an agency's possession in a variety of ways, including under the conditions of federal grants, pursuant to federal regulatory requirements, and even through unsolicited submissions. The question of their protected status can arise in processing any FOIA access request which encompasses a copyrighted record, or even possibly in a "reverse" FOIA context in which an objection to disclosure is raised by a copyright holder. As neither the FOIA nor the Copyright Act expressly addresses whether agencies must disclose a copyrighted record within the scope of a FOIA request, the design and purposes of both statutes must be considered in resolving this question.

THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976, 17 U.S.C. §§101, *et seq.*, essentially grants the holder of a copyright an exclusive right to reproduce and distribute copies of his work. *See* 17 U.S.C. §106. Under the Act as revised in 1976, this protection attaches automatically as soon as the work is "fixed" in any tangible medium; neither registration nor any type of designation or notice is necessary to trigger it. *See* 17 U.S.C. §§102, 405, 408. Thus, the potential for copyright protection exists in virtually every original work of authorship. Despite this sweeping grant of copyright entitlement, however, the revised Copyright Act specifically codifies the common law doctrine of "fair use," which permits the reproduction of copyrighted materials "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research" without liability for infringement. 17 U.S.C. §107.

THE COPYRIGHT ACT AND THE FOIA

Although at first glance it might appear that the Copyright Act and the FOIA do not even deal with the same thing, they do potentially conflict. The Copyright Act regulates only the reproduction and distribution of documents, not access to them; it even provides for full public inspection of any copyrighted work registered and deposited with the Copyright Office. *See* 17 U.S.C. §705(b). Yet the FOIA specifically contemplates document reproduction as a means of effectuating public access, *see* 5 U.S.C. §552(a)(4)(A), and plainly requires more than mere document inspection. *See, e.g., Perry v. Block*, 684 F.2d 121, 124 n.14 (D.C. Cir. 1982). Thus, federal agencies are in the difficult position of being subject to potentially conflicting legal obligations: compliance with the FOIA on the one hand, and noninfringement of the rights of copyright holders on the other. *See Weisberg v. Department of Justice,* 631 F.2d 824, 830 & n.39 (D.C. Cir. 1980).

Of course, it should be noted as a threshold matter that the mere fact that a record is copyrighted does not *per se* remove it from "agency record" status under the FOIA. The U.S. Court of Appeals for the D.C. Circuit flatly rejected such a notion in *Weisberg v. Department of Justice,* 631 F.2d at 827-28, in which it held that copyrighted photographs of the scene of Dr. Martin Luther King's assassination kept by the FBI were indeed "agency records" subject to FOIA disclosure. To be sure, it remains possible that the circumstances surrounding an agency's custody of a copyrighted document might amount to sufficient lack of "possession" or "control" to support an argument in a particular case that the document is not an "agency record." *See generally Paisley v. CIA*, 712 F.2d 686, 692-94 (D.C. Cir. 1983); *Wolfe v. HHS*, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983). But absent any such special circumstances, a copyrighted document must be regarded as an "agency record" and the resolution of the problem must be found within the FOIA's exemptions.

EXEMPTION 3

The first FOIA exemption logically to be considered on this issue is Exemption 3, which applies to records "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. §552(b)(3), as amended. In order to qualify for Exemption 3 protection, though, a statute must be an "explicit nondisclosure" statute. *Irons & Sears v. Dann,* 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1075 (1980). On its face, the Copyright Act simply cannot be considered a "nondisclosure" statute, especially in light of its provision permitting full public inspection of

registered copyrighted documents at the Copyright Office. *See* 17 U.S.C. §705(b). Indeed, there is nothing whatsoever in the statute or its legislative history to suggest that Congress intended it to trigger Exemption 3. To the contrary, a special provision of the Copyright Act, 17 U.S.C. §701(d), specifically excludes from FOIA access all registered documents deposited with the Copyright Office—but *only those* copyrighted documents—which indicates a recognition by Congress that the Copyright Act does not operate as an Exemption 3 statute, because such special protection for deposit copies of copyrighted documents in the Copyright Office would otherwise be unnecessary. Indeed, in the only two cases to have raised the issue it has readily been held that the Copyright Act is not an Exemption 3 statute. *See St. Paul's Benevolent Educational & Missionary Institute v. United States,* 506 F. Supp. 822, 830 (N.D. Ga. 1980); *Weisberg v. Department of Justice,* Civil No. 75-1996, slip op. at 5-6 (D.D.C. Feb. 9, 1978), *aff'd in part, vacated in part & remanded,* 631 F.2d 824 (D.C. Cir. 1980).

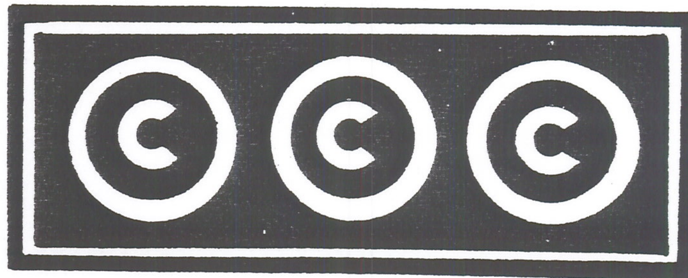
EXEMPTION 4

The only appropriate approach for protecting copyrighted documents under the FOIA is through the application of Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). Quite often, a copyrighted document can properly be regarded as consisting in whole or in part of "trade secret" material under the definition of that term, *see, e.g., Public Citizen Health Research Group v. FDA,* 704 F.2d 1280, 1288 (D.C. Cir. 1983), and can be withheld on that basis. In all other instances, it should be determined whether all or any portion of a copyrighted document can be withheld as exempt under the remaining part of Exemption 4. This requires an analysis of the "commercial value" of the work and the effect that FOIA disclosure would likely have on the copyright holder's potential market.*

Conducting such an analysis under Exemption 4 fully comports with the principles and standards of the Copyright Act. The commercial nature of copyrighted works is fully recognized in the current Copyright Act, in which the copyright holder is given the exclusive right to disseminate his work by sale, lease or rental. *See* 17 U.S.C. §106. Indeed, the need for protection of the holder's potential market is specifically included as one of the factors governing the "fair use" doctrine. *See* 17 U.S.C. §107(4). Additionally, the term "commercial" in the context of Exemption 4 has been interpreted to include all information "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Board,* 588 F.2d 863, 870 (2d Cir. 1978). Commercially valuable copyrighted works plainly pertain to commerce and thus logically satisfy this requirement of Exemption 4.

ADVERSE MARKET EFFECT

The most commonly dispositive requisite of Exemption 4—a showing of competitive harm necessary to satisfy the exemption's confidentiality requirement under the prevailing standard of *National Parks & Conservation Association v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974)—should be met whenever it is determined that the copyright holder's market for his work would likely be adversely affected by FOIA disclosure. The fact that the work can be acquired elsewhere, albeit at some cost (*e.g.,* by purchase, directly or indirectly, from the copyright holder) should not render it "nonconfidential" under Exemption 4. Indeed, in *Worthington Compressors, Inc. v. Costle,* 662 F.2d 45 (D.C. Cir. 1981), it was held that when requested information is



available elsewhere through some means other than the FOIA, the inquiry as to confidentiality under Exemption 4 must "be expanded to include two considerations: (1) the *commercial value* of the requested information, and (2) the *cost of acquiring* the information through other means." 662 F.2d at 51 (emphasis in original). The D.C. Circuit reasoned that where a commercially valuable document can be acquired elsewhere "only at considerable cost," agency disclosure at mere FOIA duplication costs could easily cause competitive harm to the submitter. *Id.* Providing requesters with such "bargains," at the expense of a copyright holder, was certainly not a result contemplated by Congress when enacting the FOIA. *Cf. id.*

To date, there has been scant judicial authority addressing the status of copyrighted documents under the FOIA and the district court decision in *Weisberg v. Department of Justice, supra,* is the only opinion to have considered Exemption 4 protection for such a document. The district judge there found, based upon a perfunctory and somewhat questionable analysis, that the requirements

*Such an analysis can be aided considerably (or in some instances even rendered unnecessary) by the copyright holder's own statement of the value of his work and the nature of the relevant market. Affording the submitter of a copyrighted document the opportunity to make such a statement in objection to disclosure is also good policy and should be done wherever reasonably possible. *See FOIA Update*, June 1982, at 3.

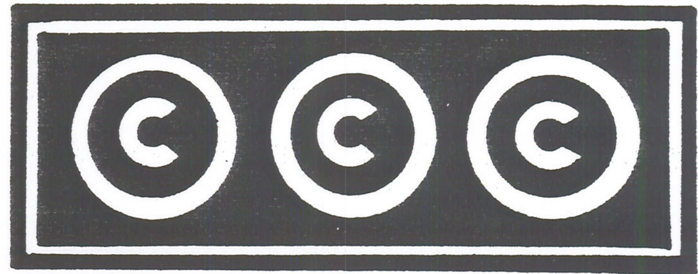
. . . Application of the 'Fair Use' Defense

of Exemption 4 were not met for the copyrighted photographs at issue there because they were not considered confidential commercial or financial information. *See* slip op. at 6–7. (That portion of the district judge's opinion was subsequently vacated on appeal on procedural grounds. *See* 631 F.2d at 831.) As one commentator has suggested, though, such a result seems nonetheless to have been correct in that particular case because the photographs actually had "little commercial value to the copyright holder." Note, *The Applicability of the Freedom of Information Act's Disclosure Requirements to Intellectual Property*, 57 Notre Dame Lawyer 561, 577 (1982); *see also id.* at 573 & n.96. In fact, after the court of appeals remanded the *Weisberg* case in order that the copyright holder might assert any substantial commercial interest, *see* 631 F.2d at 829-30, the copyright holder did not do so.

Thus, Exemption 4 stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to the government. *See National Parks & Conservation Association v. Morton*, 498 F.2d at 769. Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on "the potential market for or value of [a] copyrighted work," 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a "fair use" copyright defense. *See* 57 Notre Dame Lawyer at 577–78. Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found.**

"FAIR USE"

Where it is found that disclosure of a copyrighted document would not have a substantial adverse effect on the copyright holder's potential market, rendering Exemption 4 inapplicable, several considerations strongly compel the conclusion that its release pursuant to the FOIA would not subject the government to liability for copyright infringement. As a threshold matter, the courts have over the years placed a "judicial gloss" on the Copyright Act to generally preclude copyright status for works embodying statutes, opinions, and regulatory matters, based upon the general principle that such governmental matters should properly be in the public domain. *See, e.g., Building Officials & Code Administrators International, Inc. v. Code Technology, Inc.*, 628 F.2d 730, 734-35 (1st Cir. 1980). Additionally, the overriding consideration in determining that a particular use is a "fair use" under the Copyright Act, and thus not a copyright infringement, is the public interest in unrestricted access to the information. *See* A. Latman & R. Gorman,



Copyright for the Eighties 473 (1981); *see also Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Given that the FOIA is designed to serve the public interest in access to information maintained by the government, *see, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), disclosure of nonexempt copyrighted documents under the FOIA should be considered a "fair use."

In fact, reproduction of a copyrighted document by a government entity for a purpose that is not "commercially exploitive of the copyright holder's market," such as copying a work to use as evidence in a judicial proceeding, has been held to constitute a "fair use." *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407 (9th Cir.), *cert. denied*, 103 S.Ct. 58 (1982). Indeed, the leading commentator on copyright law has found it "inconceivable that any court would hold such reproduction to constitute infringement." 3 M. Nimmer, *Nimmer on Copyright* §13.05[D][2] (1983). In the FOIA context, because reproduction is mandated by law and serves to inform the public of the operation of government, it should similarly be unlikely that a court would find the disclosure of nonexempt information to constitute an infringement.

CONCLUSION

In sum, agencies should carefully examine all copyrighted materials encompassed within FOIA requests to determine whether they qualify for Exemption 4 protection as set forth above. As for those copyrighted materials to which Exemption 4 is inapplicable, the position of the Department of Justice is that the release of such materials under the FOIA is a defensible "fair use."

**In some circumstances, a FOIA requester denied access to a copyrighted document under Exemption 4 might seek to have an agency afford him non-FOIA access on the grounds that the document is publicly available elsewhere and that he wishes simply to inspect it at the agency as a matter of convenience. In such a case (or where the agency wishes to do so on its own initiative), an agency may, as a matter of administrative discretion, permit inspection but not duplication of the document, provided that the document is proven to be publicly available (*e.g.*, at a library or the Copyright Office).

... FOIA Counselor

The *J.H. Lawrence* Precedent

In the only thorough treatment of the issue, District Judge Shirley B. Jones in *J.H. Lawrence Co. v. Smith*, Nos. 81-2993, 82-0361 (D. Md. Nov. 10, 1982), examined a unit price breakdown that contained more than two thousand line items to ascertain whether disclosure would reveal the profit or overhead costs of the submitter. After receiving extensive testimony concerning the various formulas that might be used to compute the contractor's markup, profit and overhead costs, Judge Jones concluded that because so many variables and uncertainties were involved, disclosure of the unit prices would not permit competitors to calculate confidential proprietary information. *See* slip op. at 6-9. Her conclusion that those unit prices must be disclosed under the FOIA seems an entirely rational one, at least under the circumstances presented in that case.

Overall, the varying results in these cases can mostly be attributed to the extent to which, based on the evider available in a particular case, a judge has been convinc that release of the unit prices at issue would cau competitive harm to the submitter. Agencies can ful their responsibilities to both requesters and submitters conscientiously examining all such evidence at t administrative level, after following the submitter notifi tion procedures set forth in *FOIA Update*, June 1982, at 3, ascertain whether (1) disclosure of unit prices would le directly to the precise calculation of specific proprieta information and (2) revelation of that information wou cause substantial harm to the submitter. Only upon such assessment can it properly be determined whether unit pri should be disclosed under the FOIA in a given case.

This supersedes the guidance set forth in FOIA Upda Winter 1981, at 5-6.

Supreme Court Update

In an entirely unexpected development, the Washington Post Company has abruptly withdrawn its FOIA request underlying the case of *Washington Post Co. v. Department of State*, 685 F.2d 698 (D.C. Cir. 1982), which the Supreme Court only recently accepted for review.

The Washington Post Company had sought access to records reflecting the State Department's "Emergency Fund" expenditures for its diplomatic and consular services. The D.C. Circuit Court of Appeals ruled that the statutes authorizing the Secretary of State to keep such disbursements secret are not specific enough to satisfy Exemption 3, as amended. See 685 F.2d at 704; see also *FOIA Update*, Jan. 1983, at 5. After the D.C. Circuit denied rehearing *en banc*, the Solicitor General filed a petition for *certiorari* with the Supreme Court, which was granted when the Court reconvened in early October. See 52 U.S.L.W. 3239 (Oct. 3, 1983).

The Washington Post Company's sudden withdrawal of its underlying FOIA request, however, appears to have effectively precluded Supreme Court review of this important Exemption 3 issue. Such a development is highly reminiscent of a similar move made just last year in *Holy Spirit Association v. CIA*, 636 F.2d 838 (D.C. Cir. 1980), *cert. granted & vacated in part*, 455 U.S. 997 (1982), . Exemption 1 case in which the plaintiff withdrew its FO request literally on the eve of Supreme Court *certiorari* co sideration. See *FOIA Update*, March 1982, at 5. As in *Ho Spirit*, it can be expected that the Supreme Court will least vacate the D.C. Circuit's decision in *Washington Po*

This would have been the fourth adverse D.C. Circ FOIA decision reviewed by the Supreme Court at t government's urging in the last two years. In each of t three previous cases—*FTC v. Grolier, Inc.*, 103 S.Ct. 22 (1983) (Exemption 5), *Department of State v. Washingt Post Co.*, 456 U.S. 595 (1982) (Exemption 6), and *FBI Abramson*, 456 U.S. 615 (1982) (Exemption 7)—t Supreme Court reversed the D.C. Circuit with an opini strongly in the government's favor. See *FOIA Upda* Summer 1983, at 1-2; *FOIA Update*, June 1982, at 9.

Still remaining on the Supreme Court's docket this Ter is the Ninth Circuit's narrow Exemption 5 decision *Weber Aircraft Corp. v. United States*, 688 F.2d 638 (9 Cir. 1982), *cert. granted*, 103 S.Ct. 3534 (1983), in which t Ninth Circuit refused to accord traditional privile protection under that exemption to an Air Force accide investigation report. The government is asking the Supre Court to construe Exemption 5 broadly enough encompass such protection, as have both the Fifth a Eighth Circuits. See *Cooper v. Department of the Navy*, 5 F.2d 274, 278-79 (5th Cir. 1977), *modified on oth grounds*, 594 F.2d 484 (5th Cir. 1978), *cert. denied*, 444 U. 926 (1979); *Brockway v. Department of the Air Force*, 5 F.2d 1184, 1193 (8th Cir. 1975). See also *FOIA Upda* Jan. 1983, at 5.

Oral argument in *Weber Aircraft* has not yet be scheduled.