bids."[494] In rejecting the agency's competitive harm claim -- which was similar to the argument often made by submitters seeking to withhold unit prices, namely, that competitors could "reconstruct each factor in the bidder's calculations" by "comparing the total bid amount with information already in the public domain" -- the court relied on several of the district court decisions within the D.C. Circuit that "have viewed such arguments with skepticism" and have "required disclosure of both aggregate and unit prices," and then it ordered disclosure itself.[495] One of the principal cases relied upon to make this determination was Brownstein Zeidman & Schomer v. Department of the Air Force, in which the court had ordered disclosure of unit prices, rejecting as "highly speculative" the argument that their release would allow competitors to calculate the submitter's profit margin and thus be able to underbid it in future procurements.[496]

In the immediate wake of the decision by the D.C. Circuit in Critical Mass Energy Project v. NRC,[497] two decisions afforded protection to unit prices premised on the theory that contract submissions are "voluntary" and that such pricing terms are not customarily disclosed to the public.[498] One of these decisions[499] was expressly disclaimed by another judge in that same judicial district for failing to identify any justification for its conclusion.[500] (For a further discussion of Critical Mass and its "voluntariness" standard, see Exemption 4, Applying Critical Mass, above.) In addition to affording protection to contract pricing information under Critical Mass, the other decision, went on to alternatively afford protection under the competitive harm prong.[501]

None of the above cases concerning unit prices involved a request for pricing information submitted by an unsuccessful offeror. In the first decision to touch on this point, the court considered a situation in which the requester did not actually seek unit prices, but instead had requested the bottom-line price (total cumulative price) that an unsuccessful offeror had proposed for a government contract, as well as the bottom-line prices it had

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[494] Ctr. for Pub. Integrity, 191 F. Supp. 2d at 196 (citing Racal-Milgo, 559 F. Supp. at 6).

[495] Id. at 194, 196.

[496] 781 F. Supp. 31, 33 (D.D.C. 1991). But see McDonnell Douglas v. Dep't of the Air Force, 375 F.3d 1182, 1189-90.

[497] 975 F.2d 871 (D.C. Cir. 1992) (en banc).

[498] Envtl. Tech., 822 F. Supp. at 1229; Cohen, Dunn, No. 92-0057-A, transcript at 28 (E.D. Va. Sept. 10, 1992).

[499] Envtl. Tech., 822 F. Supp. at 1229.

[500] Comdisco, 864 F. Supp. at 517 n.8.

[501] Cohen, Dunn, No. 92-0057-A, transcript at 29; Findings of Fact at 7-8 (E.D. Va. Sept. 10, 1992) (accepting argument that disclosure of detailed unit price information would reveal pricing strategy and permit future bids to be predicted and undercut).

proposed for four years' worth of contract options.[502] Accepting the submitter's contention that disclosure of these bottom-line prices would cause it to suffer competitive harm by enabling competitors to deduce its pricing strategy, the court found that unsuccessful offerors had a different expectation of confidentiality than successful offerors, that the public interest in disclosure of pricing information concerning unawarded contracts was slight, and most importantly, that the unsuccessful offeror -- who would be competing with the successful offeror on the contract options as well as on future related contracts -- had demonstrated factually how the contract and option prices could be used by its competitors to derive data harmful to its competitive position.[503] By contrast, such a detailed explanation of harm was found lacking in an analogous case involving the sale of land by the government, and as a consequence the court ordered disclosure of the names of the unsuccessful bidders seeking to buy the land as well as the amounts of their bids.[504]

Congress addressed this issue in the procurement context with a statute that prohibits most agencies from disclosing solicited contract proposals -- which would contain proposed price information -- if those proposals have not become incorporated into an ensuing government contract.[505] This Exemption 3 statute[506] has the practical effect of providing statutory protection for the prices proposed by unsuccessful offerors because, by definition, that information is not incorporated into the resulting government contract.[507]

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[502] Raytheon Co. v. Dep't of the Navy, No. 89-2481, 1989 WL 550581, at *1 (D.D.C. Dec. 22, 1989).

[503] Id. at *5-6; see also FOIA Update, Vol. XI, No. 2, at 2; FOIA Update, Vol. IV, No. 4, at 10-11.

[504] Ctr. for Pub. Integrity, 191 F. Supp. 2d at 195-96.

[505] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 821, 110 Stat. 2422 (containing parallel measures applicable to armed services and most civilian agencies) (codified at 10 U.S.C. § 2305(g) (2006), amended by Pub. L. No. 106-65, 113 Stat. 512 (1999) (extending coverage of statute to all agencies listed in 10 U.S.C. § 2303 (2006), notably NASA and Coast Guard), and at 41 U.S.C. § 253b(m) (2006)); see Ctr. for Pub. Integrity, 191 F. Supp. 2d at 194 (construing statute's coverage to include "a private party with whom the government has a procurement contract for products or services," but not "a private party purchasing government land").

[506] 5 U.S.C. § 552(b)(3) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

[507] See Hornbostel v. U.S. Dep't of the Interior, 305 F. Supp. 2d 21, 29-30 (D.D.C. 2003) (finding National Defense Authorization Act for Fiscal Year 1997, 41 U.S.C. § 253b(m) (2006), is covered by FOIA Exemption 3), aff'd per curiam on other grounds, No. 03-5257 (D.C. Cir. Aug. 25, 2004); FOIA Update, Vol. XVIII, No. 1, at 2 (discussing statute and fact that key determinant of exempt status under it is whether proposal was incorporated into or otherwise set forth in resulting contract).

conferencing software that the requester wanted to distribute on the Internet.[514] The court readily held that in such a situation "[t]here can be no doubt" that disclosure would cause "substantial commercial harm,"[515] because if the "technology is freely available on the Internet, there is no reason for anyone to license [it] from [its owner], and the value of [the owner's] copyright effectively will have been reduced to zero."[516]

Thirteen years after the National Parks decision first raised the possibility that Exemption 4 could protect interests other than those reflected in the impairment and competitive harm prongs, a panel of the Court of Appeals for the District of Columbia Circuit embraced the third prong in the first appellate decision in Critical Mass.[517] There, the panel adopted what it termed the "persuasive" reasoning of the First Circuit and expressly held that an agency may invoke Exemption 4 on the basis of interests other than the two principally identified in National Parks.[518]

Upon remand from the D.C. Circuit, the district court in Critical Mass found the requested information to be properly withheld pursuant to the third prong.[519] The court reached this decision based on the fact that if the requested information were disclosed, future submissions would not be provided until they were demanded under some form of compulsion -- which would then have to be enforced, precipitating "acrimony and some form of litigation with attendant expense and delay."[520] On appeal for the second time, a panel of the D.C. Circuit reversed the lower court on this point, but that decision was itself vacated when the D.C. Circuit decided to hear the case en banc.[521]

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[514] Gilmore v. DOE, 4 F. Supp. 2d 912, 922-23 (N.D. Cal. 1998); see also FOIA Update, Vol. VI, No. 1, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value"); FOIA Update, Vol. IV, No. 4 at 3-5 (setting forth similar basis for protecting copyrighted materials against substantial adverse market effect caused by FOIA disclosure).

[515] Gilmore, 4 F. Supp. 2d at 922 (protecting software, but not expressly doing so under "third prong").

[516] Id. at 923 (discounting the requester's argument that the copyright owner had "received only relatively meager royalties" and declaring that "there is a presumption of irreparable harm when a copyright is infringed"); cf. Cody Zeigler, 2002 WL 31159309, at *3-4 (accommodating, with requester's acquiescence, copyright owner's preference that requested copyrighted reports, although not protected by Exemption 4, be made available for inspection only, not copying).

[517] 830 F.2d 278, 282, 286 (D.C. Cir. 1987), vacated en banc, 975 F.2d 871 (D.C. Cir. 1992).

[518] Id. at 286.

[519] 731 F. Supp. 554, 557 (D.D.C. 1990), rev'd in part & remanded, 931 F.2d 939 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

[520] Id.

[521] 931 F.2d 939, 944-45 (D.C. Cir.), vacated & reh'g en banc granted, 942 F.2d 799 (D.C. Cir.
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In its en banc decision in Critical Mass, the D.C. Circuit conducted an extensive review of the interests sought to be protected by Exemption 4 and expressly held that "[i]t should be evident from this review that the two interests identified in the National Parks test are not exclusive."[522] In addition, the D.C. Circuit went on to state that although it was overruling the first panel decision in Critical Mass, it "note[d]" that that panel had adopted the First Circuit's conclusion in 9 to 5 that Exemption 4 protects a "governmental interest in administrative efficiency and effectiveness."[523] Moreover, the D.C. Circuit specifically recognized yet another Exemption 4 interest -- namely, "a private interest in preserving the confidentiality of information that is provided the Government on a voluntary basis."[524] It declined to offer an opinion as to whether any other governmental or private interests might also fall within Exemption 4's protection.[525]

The District Court for the District of Columbia relied on the en banc decision in Critical Mass to hold that "impairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under" Exemption 4.[526] The court utilized that test in a case involving a request for royalty rate information contained in licensing agreements that NIH entered into with pharmaceutical companies in accordance with a statutory mandate "to use the patent system to promote inventions arising from federally supported research."[527] The court upheld NIH's determination that it "'would cease to be an attractive or viable licensor of patented technology'" were it to disclose the royalty rate information.[528] The court found that "[s]uch a result obviously would hinder the agency in fulfilling its statutory mandate," and accordingly it afforded protection under the third prong of Exemption 4.[529] That same court issued a similar ruling in a case involving export-insurance documents, finding that disclosure "would interfere with the [Export-Import] Bank's ability to promote U.S. exports, and result in loss of business for U.S. exporters," which in turn would interfere with the agency's "ability to carry out its statutory purpose" of promoting the exchange of goods

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1991), grant of summary judgment to agency aff'd en banc, 975 F.2d 871 (D.C. Cir. 1992).

[522] 975 F.2d at 879.

[523] Id.; see also Allnet, 800 F. Supp. at 990 (recognizing, after Critical Mass, availability of third-prong protection to prevent impairment of agency effectiveness).

[524] 975 F.2d at 879.

[525] Id.

[526] Pub. Citizen Health Research Group v. NIH, 209 F. Supp. 2d 37, 52 (D.D.C. 2002) (alternative holding).

[527] Id. at 42-43.

[528] Id. at 45 (quoting agency declaration).

[529] Id.

and commercial or financial information.'"[543] Additionally, the Court of Appeals for the Fifth Circuit has "decline[d] to hold that the [FOIA] creates a lender-borrower privilege," despite the express reference to such a privilege in Exemption 4's legislative history.[544] (For a further discussion of atypical privileges, see Exemption 5, Other Privileges, below.)

Interrelation with the Trade Secrets Act

Finally, it should be noted that the Trade Secrets Act[545] -- a broadly worded criminal statute -- prohibits the disclosure of much more than simply "trade secret" information and instead prohibits the unauthorized disclosure of all data protected by Exemption 4.[546] (See the discussion of this statute under Exemption 3, Statutes Found Not to Qualify Under Exemption 3, above.) Indeed, the Court of Appeals for the District of Columbia Circuit and nearly every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be "coextensive."[547] Thus, the D.C. Circuit held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act.[548]

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[543] Id.

[544] Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir. 1985).

[545] 18 U.S.C. § 1905 (2006).

[546] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987) (noting that the Trade Secrets Act "appears to cover practically any commercial or financial data collected by any federal employee from any source" and that the "comprehensive catalogue of items" listed in the Act "accomplishes essentially the same thing as if it had simply referred to 'all officially collected commercial information' or 'all business and financial data received'") (reverse FOIA suit).

[547] See CNA, 830 F.2d 1132, accord Canadian Commercial Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (quoting CNA) (reverse FOIA suit); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1185-86 (D.C. Cir. 2004) (same) (reverse FOIA suit), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (citing CNA and declaring: "[W]e have held that information falling within Exemption 4 of FOIA also comes within the Trade Secrets Act.") (non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2006)); Boeing Co. v. U.S. Dep't of the Air Force, No. 05-365, 2009 WL 1373813, at *4 (D.D.C. May 18, 2009) (noting that D.C. Circuit "has 'long held' that the Trade Secrets Act and Exemption 4 are coextensive") (reverse FOIA suit). But see McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1165 n.2 (D.C. Cir. 1995) (noting in dicta that the court "suppose[s] it is possible that this statement [from CNA] is no longer accurate in light of [the court's] recently more expansive interpretation of the scope of Exemption 4" in Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992)) (non-FOIA case brought under Administrative Procedure Act); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (reverse FOIA suit).

[548] CNA, 830 F.2d at 1151-52; see also Canadian Commercial, 514 F.3d at 39 (noting that "unless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under (continued...)

The Trade Secrets Act, however, does not preclude disclosure of information "otherwise protected" by that statute, if the disclosure is "'authorized by law.'"[549] (For a further discussion of this point, see Reverse FOIA, below.) For that reason, the D.C. Circuit has concluded that it need not "attempt to define the outer limits" of the Trade Secrets Act -- i.e., whether information falling outside the scope of Exemption 4 was nonetheless still within the scope of the Trade Secrets Act -- because the FOIA itself would provide authorization for release of any information falling outside the scope of an exemption.[550]

The practical effect of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise exempt material, as a submitter could argue that a proposed release of such information would constitute "a serious abuse of agency discretion" redressable through a reverse FOIA suit.[551] Thus, in the absence of a statute or properly promulgated regulation giving the agency authority to release the information -- which would remove the disclosure prohibition of the Trade Secrets Act -- a determination by an agency that information falls within Exemption 4 is "tantamount" to a decision that it cannot be

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Exemption 4"); McDonnell Douglas, 375 F.3d at 1185-86 (finding that the Trade Secrets Act "effectively prohibits an agency from releasing information subject to [Exemption 4]"); Bartholdi, 114 F.3d at 281 (declaring that when information is shown to be protected by Exemption 4, agencies are generally "precluded from releasing" it due to provisions of Trade Secrets Act); Boeing, 2009 WL 1373813 at *4 (holding that "when information falls within Exemption 4, the Trade Secrets Act compels an agency to withhold it"); Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 77 n.5 (D.D.C. 2001) (noting that "[a]lthough FOIA exemptions are normally permissive rather than mandatory, the D.C. Circuit has held that the disclosure of material which is exempted under [Exemption 4 of the FOIA] is prohibited under the Trade Secrets Act").

[549] Bartholdi, 114 F.3d at 281 (quoting Trade Secrets Act).

[550] CNA, 830 F.2d at 1152 n.139; see also Chrysler Corp. v. Brown, 441 U.S. 281, 318-19 & n.49 (1979) (noting in dicta that "there is a theoretical possibility that material might be outside Exemption 4 yet within the [Trade Secrets Act]," but acknowledging that "that possibility is at most of limited practical significance"); Frazee v. U.S. Forest Serv., 97 F.3d 367, 373 (9th Cir. 1996) (holding that because requested document was "not protected from disclosure under Exemption 4," it also was "not exempt from disclosure under the Trade Secrets Act") (reverse FOIA suit).

[551] Nat'l Org. for Women v. Soc. Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord McDonnell Douglas, 57 F.3d at 1164 (holding that the Trade Secrets Act "can be relied upon in challenging agency action that violates its terms as 'contrary to law' within the meaning of the Administrative Procedure Act"); Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975) (reverse FOIA suit); see also FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4") (advising that the Trade Secrets Act is "barrier to the disclosure of any information that falls within the protection of Exemption 4"); accord *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

released.[552]

[552] CNA, 830 F.2d at 1144.