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FEDERAL AGENCY POLICIES IMPERIL PRIVACY OF BUSINESS INFORMATION

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The White House issued an all-agency memorandum on March 19, 2002 urging the reform of agency procedures so that records regarding weapons of mass destruction are safeguarded. This White House directive needs to be broadened to reform federal agency rules governing the protection of confidential business records. For example, under current rules, a business that submits an unsolicited proposal in hopes of receiving a government contract runs the risk that the agency could not protect the business' confidential information unless the business can show that disclosure will cause it competitive harm. This risk substantially hinders the submission of innovative ideas. However, this risk can be eliminated if the U.S. Department of Justice (DOJ) and federal agencies (1) reform their Freedom of Information Act (FOIA) regulations and policies so that voluntarily submitted confidential business information is not characterized as a mandatory submission and (2) remove unnecessary burdens that hinder protecting business information as confidential. These reforms are a decade overdue.

Ten years ago, the U.S. Court of Appeals for the District of Columbia Circuit established the test for protecting confidential business information voluntarily submitted to a federal agency. In *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*), the court held that information voluntarily submitted to a government agency must be treated as confidential under FOIA Exemption 4 and protected from public disclosure if the information is commercial in nature and is not customarily released to the public. 975 F.2d at 880. This decision is significant because it eliminates the need to show competitive harm which is otherwise required to protect information as confidential under Exemption 4.

With one exception, federal agencies have uniformly ignored the *Critical Mass* decision. Only the U.S. Environmental Protection Agency (EPA) has publicly adopted the *Critical Mass* decision and proposed to amend its FOIA regulations by adopting a presumption of confidentiality for information that meets the *Critical Mass* test. 59 Fed. Reg. 60451 (Nov. 23, 1994). However, EPA has yet to issue these amendments in final form.

In an apparent attempt to minimize *Critical Mass*, DOJ opined that information submitted to obtain a "government benefit" is not voluntarily submitted. See DOJ's Office of Information and Privacy FOIA Update, Spring 1993. This remains DOJ's interpretation. See DOJ Freedom of Information Act Guide, May 2000, Exemption 4.

Citing DOJ's interpretation, EPA, for example, declined to apply the *Critical Mass* test to information that was submitted under EPA's *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66706 (Dec. 22, 1995). EPA treated the submission of self-

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disclosure information as not voluntarily submitted because “the submission of information under the Policy is a condition for participation in and receiving the benefits of the Policy.” EPA Office of General Counsel Letter, May 14, 1998.

This interpretation creates an intent test that assumes whenever a business voluntarily submits information, it is with the intent to obtain some form of benefit from the federal government. The submitting party has the burden to show that there is no intent to obtain a benefit from the federal government. The practical effect of this interpretation is to read the *Critical Mass* decision out of existence.

Notwithstanding DOJ’s interpretation, the *Critical Mass* decision is the law in the D.C. Circuit. *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 149 (D.C. Cir. 2001). The *Critical Mass* decision also has been followed by courts in the Second Circuit (*Lee v. FDIC*, 923 F. Supp. 451, 454 (S.D.N.Y. 1996)); Fourth Circuit (*Environmental Technology, Inc. v. United States EPA*, 822 F. Supp. 1226, 1229 (E.D. Va. 1993)); Eighth Circuit (*McDonnell Douglas Corp. v. United States EEOC*, 922 F. Supp. 235, 242 (E.D. Mo. 1996)); and Tenth Circuit (*Utah v. United States DOI*, 256 F.3d 967, 969 (10th Cir. 2001)).

In *Center for Auto Safety*, the D.C. Circuit held that an objective test is to be used in characterizing a submission as voluntary or mandatory and that the objective test must look to a federal agency’s actual legal authority and not to the parties’ beliefs or intentions. The court stated that “linking enforceability and mandatory submissions creates an objective test; regardless of what the parties thought or intended, if an agency has no authority to enforce an information request, submissions are not mandatory.” 244 F.3d at 149.

This objective test would characterize a submission as mandatory if two factors were present. First, the information must have been submitted in response to an information request issued by a federal agency. Second, the federal agency must have possessed the legal authority to enforce the information request.

Under the *Center for Auto Safety* decision, a federal agency cannot use the submitting party’s intent to seek a governmental benefit to determine whether the submission is mandatory. Rather, the test is whether the information is submitted in response to an information request and whether the federal agency has the authority to enforce the request. Applying this objective test to the EPA example described above, the submission of self-disclosure information is clearly voluntary because the information was not submitted in response to an EPA information request and EPA has no authority to require such self-disclosures.

The Attorney General recognizes that protecting sensitive business information is one of the fundamental values that federal agencies need to consider when making disclosure determinations under FOIA. See Attorney General Memorandum for Heads of All Federal Departments and Agencies, *The Freedom of Information Act*, October 12, 2001. In the spirit of the Attorney General’s Memorandum, federal agencies have an obligation to similarly protect confidential business information without imposing any unnecessary burdens on the business.

To carry out this obligation, DOJ should correct its interpretation of the *Critical Mass* decision and inform federal agencies that only information submitted in response to a federal agency’s fully enforceable request is a mandatory submission. Furthermore, federal agencies should amend their FOIA regulations to remove the unnecessary burden of having to show that disclosure of voluntarily submitted information would result in competitive harm. These reforms go beyond the laudable goal of adopting good government policies; the D.C. Circuit has required them for the past ten years.