

FREEDOM OF INFORMATION ACT (FOIA)

A. LAW

5 U.S.C., Section 552

(a)(3) Except with respect to the records made available under paragraphs (2) and (3) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed shall make the records promptly available to any person. . . .

B. REGULATION

43 C.F.R., Subtitle A, Part 2, Subpart B

§2.11 Purpose and scope

(a) This subpart contains the regulations of the Department of the Interior implementing the requirement of subsection (a)(3) of the Freedom of Information Act, 5 U.S.C. Section 552(a)(3),.... and describes the procedures by which records may be obtained from all constituent units of the Department of the Interior. . . .

§2.13. Records available [(a) and (b) omitted as they do not apply]

(c) Statutory exemptions. The Act exempts nine categories of records from this disclosure requirement. The Act provides that disclosure is not required of matters that are: . . .

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;. . .

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;. . . .

C. POLICY

It is the policy of the Department of the Interior to make the records of the Department available to the public to the greatest extent possible, in keeping with the spirit of the Freedom of Information Act.

D. PROCEDURES

In keeping with the spirit of the Freedom of Information Act (FOIA), the records maintained within the Concessions Divisions are to be made available to the public to the greatest extent possible. The procedures to be followed upon receiving a written request for records are contained in 43 CFR, Subtitle A, Part 2, Subpart B. These include time limits on processing requests, fees to be charged, denial of records and the public right of appeal.

As a result of the court's opinion in National Parks and Conservation Association vs. Morton, Civ No. 436-72 (D.D.C.) the following financial information must be provided when requested pursuant to an FOIA request.

1. The franchise fee amount (except for the supporting details used in computing the amount.)
2. The prepaid expense amount (previously included on Schedule M of the old annual financial report form).
3. The annual report of statistical information (except occupancy percentages) previously included on attachment 10-356(b) of the old annual financial report form.)

On the issue of competitive harm, the Court ruled that NPS concessioners face meaningful competition and that their competitive position would be likely to be harmed substantially by the disclosure of financial information sought.

On the issue of financial information that has been previously disclosed, the Court ruled that to the extent the Service determines that exactly the same financial information has been filed with the Service that is publicly available in the records of another agency, i.e., Securities and Exchange Commission and Internal Revenue Service, the Service must provide the financial information when requested pursuant to an FOIA request.

As a result of the Court's opinion, the Service must continue to handle FOIA requests for concessioner financial information on a case-by-case basis. Each request must be analyzed on its own merits with respect to the particular information sought. For each request, the affected concessioner should be contacted to solicit his/her impact on whether the requested information is publicly available elsewhere or previously made available by the concessioner, and whether its disclosure would be likely to cause substantial competitive harm. The concessioner should be requested in detail to articulate the precise bases for the alleged harm. This information must be carefully analyzed, since the decision to withhold and the rationale for withholding is a Service decision, not a concessioner decision. Accordingly, the Service must examine the requested information and segregate for disclosure information that has been made public elsewhere or information that is of a noncompetitive nature. The

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office handling the FOIA requests should work closely with the Solicitor's Office and also keep the Freedom of Information Officer informed.

A sample letter to a concessioner and a sample letter to a requestor for financial information pursuant to an FOIA are included in this chapter as Exhibits 1 and 2 respectively. Also, included as Exhibits 3, 4 and 5 is guidance received in prior memorandums from the Solicitor's office.



United States Department of the Interior

NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

SAMPLE LETTER TO CONCESSIONER

CERTIFIED MAIL--RETURN RECEIPT REQUESTED

Mr. Concessioner
Vice President
XYZ Corporation
80 Main Street
Washington, D.C. 20240

Dear Concessioner:

We have received a request from John Q. Public under the Freedom of Information Act for the most recently reported sales volume (total, food and beverage, lodging, souvenir and gifts, and other) of your concession operation at xxx National Park. This financial information is contained in the 1982 annual financial report submitted to the National Park Service by your company.

In order to determine whether this office is required by the Freedom of Information Act (FOIA), 5 U.S.C. §552 (1979), to release this information, we would appreciate receiving your comments on the following points. Your comments must be received in this office before September 1, 19___. Failure to respond before this date will result in the release of the requested information. If you do not object to the public disclosure of this information, please advise us promptly so that we can arrange for its release.

The Freedom of Information Act contains two exemptions from the disclosure requirement which may be applicable to the financial information requested. Exemption four relates to trade secrets and commercial or financial information obtained from a person and privileged or confidential, 5 U.S.C. §552(b)(4) (1976).

In order for the Service to deny the information sought on the basis that it is confidential within the meaning of exemption four, we must determine that you actually face competition and that substantial competitive harm would be likely to result from disclosure of the information. The failure to demonstrate either point will require disclosure. If you wish the National Park Service to invoke exemption four, we request that you provide us with the following information so that we can make the necessary determinations.

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As to whether you face competition, please identify those facilities operated by you under the National Park Service concession authorization, their location, their proximity to the park area, and the goods and services offered by you at these facilities. For each facility so identified, please provide the names and locations of those businesses which you consider to be competitors. Identify the proximity of the competitors to your business and the park area, and the nature and comparability of the goods and services offered by them. To the extent that such information is available to you, you may also wish to advise us as to your competitors' prices, marketing practices, personnel experience and qualifications, and expansion plans. Any other information which you feel is relevant to this question will also be appreciated.

As to the issue of substantial competitive harm, you may submit a statement about any adverse effects on your competitive position that you reasonably believe would be likely to result from the disclosure of your sales volume. In framing a response, you may wish to consider such factors as price competition, the length of operating seasons, contracting with your suppliers, the ability to secure credit, collective bargaining, expansion plans, marketing practices, and capital improvements, or any other factors deemed relevant.

Exemption six of the FOIA relates to personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. §552(b)(6) (1976).

In National Parks and Conservation Association vs. Kleppe, 547 F. 2d 673 (D.S. Cir. 1976), the court of appeals indicated that nondisclosure may be warranted in the case of small or individually owned concessions where the financial information sought is of a highly personalized and private nature. If you wish the Service to invoke exemption six, we must determine whether your sales volume records are exempt from disclosure on personal privacy grounds. Frankly, given the kind of information requested, we are doubtful that it can be considered as private in nature. Furthermore, the court defined "personalized" to apply to those concessioners where ownership is so limited that a business' finances can be attributed divisibly or accurately to individual stockholders or partners. To aid us in making our determination, please advise us whether you believe your sales volume records contain information of a highly personalized and private nature, and, if so, please identify that information and advise us how or to what extent the disclosure of such information would constitute an invasion of personal privacy. Any statement in this regard must contain a description of the structural organization of your business and identify the individual stockholders or partners whose privacy would be invaded by disclosure.

You should be aware that, even if you demonstrate that your financial records are personal in nature, they would not then automatically qualify for nondisclosure. As the Supreme Court has said in Department of Air

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Force vs. Rose, 48 L. Ed. 2d 11, 33 (April 21, 1976), the sixth exemption does not protect against disclosures which would constitute incidental invasions of privacy. The application of exemption six requires a balancing of the individual's privacy against the public's right to government information.

We also need to know if your sales volume has been made public or is otherwise available to the public as a result of filings with other Federal agencies, State regulatory authorities or with any other entity or organization. Any sales volume data which has been made public must be released.

We would appreciate receiving your statement in the form of a letter. If the need arises, however, you should be prepared to offer the same information in an affidavit or testimonial form. We wish to advise you that, unless you provide the National Park Service with sufficient detail to support the conclusion that the requested information falls within one of the exemptions to the FOIA, we will be required to release it. If you have any questions regarding this letter, please do not hesitate to call _____ at _____. Thank you for your cooperation.

Sincerely,

Director



United States Department of the Interior

NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

SAMPLE LETTER TO REQUESTOR

Mr. John Q. Public
Attorney at Law
100 South Avenue
New York, New York 10030

Dear Mr. Public:

This is in reply to your November 13, Freedom of Information Act request for the most recently reported sales volume (total, food and beverage, lodging, souvenir and gifts, and other) for the XYZ Corporation. We must respectfully deny your request. Our releasing of the information you requested would likely cause substantial competitive harm to the XYZ Corporation in its day-to-day business operations. In addition, we have determined that the specific data you requested, represents information which is not customarily exchanged among competitors within the industry.

Our denial is based upon exemption (4) of the Federal Freedom of Information Act (5 USC 552(b)(4) (1970)). In our judgment this exemption is applicable to the material you seek. The exemption permits the nondisclosure of confidential commercial or financial information which would customarily not be released to the public from the person from whom it was obtained.

You may appeal our decision not to disclose this financial information by writing, pursuant to 43 C.F.R. §2.17 to the Freedom of Information Act officer at the address cited below:

Freedom of Information Act Officer
Office of the Assistant Secretary
Policy, Budget and Administration
United States Department of the Interior
Washington, D.C. 20240

Your appeal must be received within 20 days (Saturdays, Sundays, and public holidays excepted) after the receipt of this letter. Your appeal must be accompanied by copies of your original request and this denial. It should be marked, both on the envelope and on the face of the appeal, with the legend "FREEDOM OF INFORMATION APPEAL." In order to expedite the appellate process and to ensure full consideration of your appeal, your letter should

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contain a brief statement of the reasons why you believe this initial decision to be in error.

The persons responsible for this determination are _____ and the undersigned.

Sincerely,

Director

cc: Freedom of Information Act Officer, Asst. Secy, PBA



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

DEC 3 1976

Memorandum

To: Director, National Park Service

From: Attorney-Adviser, Conservation and Wildlife

Subject: National Parks and Conservation Association v. Kleppe, et al., No. 76-1044 (D.C. Cir. November 15, 1976) [National Parks II].

The court of appeals has affirmed the district court's decision that the disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1970), of National Park Service concessioners' financial reports (i.e., those portions of the reports not previously required to be disclosed) would be likely to cause substantial competitive harm with respect to five of the seven concessioners 1/ involved in the subject case. Accordingly, their reports are held to be confidential within the meaning of exemption four and are not required to be disclosed under the FOIA. The appellate court reversed Judge Gasch's decision permitting nondisclosure of the financial records pertaining to National Park Concessions, Inc. and Buzzard Point Boatyard Corp. because there was insufficient evidence in the record to support his finding that they face meaningful competition. The court has remanded the case as to these two concessioners for a determination whether they face meaningful competition or, alternatively, whether the sixth exemption to the FOIA permits nondisclosure of their financial records on personal privacy grounds. A copy of the court's decision is enclosed for your reference.

The issue in this case is whether the financial information sought by plaintiff-appellant is confidential within the meaning of the fourth exemption to the FOIA, 5 U.S.C.

§ 552(b)(4) (1970). When this matter was before the court of appeals previously, the court promulgated a test for determining confidentiality which we interpreted to be: (1) whether the information requested would customarily be disclosed to the public by the person from whom it was obtained, and (2) whether disclosure of the information would be likely to (a) impair the Government's ability to obtain necessary information in the future, or (b) cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) [National Parks I]. This test has been stated somewhat differently in the court's second opinion. Whereas the court recognizes it as a relevant inquiry, it no longer views the first part of this test as a separate element for determining the applicability of exemption four. It now treats the consideration of customary disclosure to the public as relevant to the likelihood of substantial competitive harm. Therefore, under National Parks II, the party seeking to sustain nondisclosure will no longer have the additional burden of specifically proving that the information requested is not customarily disclosed to the public. ^{2/} See footnote 16 of the slip opinion. This conclusion, however, does not release the Service from inquiring into whether the information was previously made available by the concessioners to the public or other Government agencies.

In order to avoid disclosure under the National Parks I and II test, it is necessary to prove that (1) the Service's concessioners actually face competition, and (2) substantial competitive injury would likely result from disclosure. Failure to prove either point will require disclosure. The trial court found that the concessioners face both competition in their day-by-day business operations and competition in the renewal of their contracts. Judge Gasch also found that competition exists among concessioners, between concessioners and businesses located outside the parks, and between concessioners and businesses located on private property within the parks. He further found that disclosure would be likely to cause the concessioners substantial competitive harm. The appellant challenged these findings as erroneous. Under the applicable standard of appellate review, the court of appeals could not, however, overturn Judge Gasch's findings unless it determined that they were clearly erroneous.

A good portion of the appellate court's opinion deals with the nature of the proof required to sustain the burden of nondisclosure. The appellant argued that the Government had to prove meaningful competition through a detailed economic analysis of the concessioners' competitive environment, utilizing such devices as customer and marketing practice surveys, detailed comparative descriptions of the nature, quality, and price of goods and services, pricing and rate-of-return statistics, and advertising expenditure records. The court of appeals ruled that such evidence would be relevant to the test for the fourth exemption, but that it would not be required. The court reiterated that generalized allegations and conclusory opinion testimony are not sufficient to sustain the burden of nondisclosure. But, it held that where the specific exemption claimed is known to the parties, the Government has adequately specified the information withheld, there is an evidentiary hearing where the appellant has an opportunity to dispute the factual basis given for exempting the requested material, and there is a record sufficient to permit meaningful appellate review, the court will not require the kinds of evidence normally associated with elaborate antitrust proceedings. As to the question of substantial competitive harm, the court held that the record need only contain substantial evidence which supports the necessary inferences leading to that conclusion. No actual adverse effect on competition needs to be shown.

After reviewing the record, the appellate court concluded that the district court's finding that disclosure of financial records would materially increase damaging competition for renewal of concession contracts is clearly erroneous. The court based its conclusion on the infrequency of renewals, the statutory preference right of satisfactory concessioners, and the practical barrier of the concessioners' compensable possessory interests. The appellate court did, nevertheless, conclude that there is sufficient evidence in the record to support Judge Gasch's finding of day-to-day competition for five concessioners. As to the remaining two concessioners, the court noted that he made no specific findings as to their competitive positions. The appellate court found that the trial judge apparently relied upon presumed renewal contract competition and the testimony of the appellees' witness that, although he had no personal knowledge, he had no reason to believe that they faced a competitive situation any different from that faced by other concessioners. The court of appeals ruled

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that such conjecture is insufficient to sustain the district court's finding as to these two concessioners and, therefore, it reversed. Given the findings on the existence of competition for the five concessioners, the court of appeals stated that it considered the likelihood of substantial harm to their competitive positions as virtually axiomatic, and listed selective pricing, market concentration, expansion plans, and collective bargaining as areas where disclosure of their financial reports might be harmful to the concessioners.

In addition to challenging the district court's findings as to the competitive positions of the Service's concessioners, the appellant also challenged the district court's reliance on the personalized nature of the financial reports of three of the concessioners 3/ and 18 U.S.C. § 1905 (1970) as independent bases for non-disclosure. Although the court of appeals seemingly did not want to deal with the first issue, it was disinclined to find a personal privacy concern embodied in the fourth exemption. 4/ It did allow that personalized financial data may qualify as similar files under the sixth exemption. 5/ Finding nothing in the record to show that any of the concessioners' records were personalized and the district court's conclusion on the privacy issue vague, the court has remanded the case for a determination whether the sixth exemption might apply to any of the concessioners' financial records found to be personalized. 6/

As to 18 U.S.C. § 1905 (1970), which is a criminal statute making it illegal for any Government employee to disclose to any extent not authorized by law certain financial information, the court of appeals ruled that it does not provide a basis for withholding nonexempt materials required to be released by the FOIA. 7/ In addition, the court ruled that the third exemption under the FOIA does not incorporate section 1905 by its terms because section 1905 is a statute of general applicability, rather than one which specifically defines the information to be exempted within the meaning of exemption three. 8/

The Department of Justice has asked us for our recommendation as to whether it should petition the United States Supreme Court for a writ of certiorari in this case. We are not inclined to recommend certiorari; we would, however, appreciate receiving your views on this question within

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the next two weeks. The Department of Justice has also asked us for information pertaining to the confidentiality of the financial records of National Park Concessions, Inc. and Buzzard Point Boatyard Corp. In view of the remand, we request you to send a letter to these two concessioners, enclosing a copy of the decision and soliciting evidence that would assist us and the court in determining whether they face competition, and if so, whether the disclosure of their financial reports would be likely to cause them substantial competitive harm, and whether the financial records in question contain information about them of a highly personal or private nature, and if so, how and to what extent the disclosure of such records would constitute an invasion of their privacy. The concessioners should be advised that, unless they provide you with evidence of sufficient detail to support the conclusion that their financial reports are confidential within the meaning of exemption four as interpreted in National Parks I and II or the conclusion that the disclosure of such reports would constitute a clearly unwarranted invasion of their personal privacy within the meaning of exemption six, you will be required by the FOIA to release such information. 9/ The reply from each concessioner should be in the form of a letter, but each concessioner should be prepared to offer the same information in the form of an affidavit if one is subsequently requested by the Department of Justice. 10/ We are of course available to assist you in this effort and we should review the letters before they are sent. As a public service, you may also wish to provide the rest of your concessioners with a copy of the court's opinion.

If you have any questions about the decision or our requests, please call me on extension 7957.

(Sgd.) Sharon Allender
Sharon Allender

Enclosures

cc:

Assistant Secretary, Fish and Wildlife and Parks
Acting Assistant Director, Special Services, FNP
Chief, Concessions Management Division, FNP

FOOTNOTES

- 1/ The five concessioners are Cavern Supply Co., General Host Corp., Mountain Co., Yosemite Park and Curry Co., and Fred Harvey, Inc.
- 2/ Under the FOIA, the party seeking to avoid disclosure, which is normally the Government, bears the burden of proving that the circumstances justify nondisclosure.
- 3/ The district court's holding on privacy grounds was limited to small or individually owned concessioners. The three concessioners which the district court identified as having protectible personal privacy interests were Mountain Co., Cavern Supply Co., and Buzzard Point Boatyard Corp. Only the latter will be involved in the remand.
- 4/ The fourth exemption relates to trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. § 552(b)(4) (1970).
- 5/ The sixth exemption relates to personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) (1970).
- 6/ The court of appeals defined "personalized" to apply to those concessioners where "ownership is so limited that a business' finances can be attributed divisibly and accurately to individual stockholders or partners." Slip opinion at 24. We believe that this definition may be utilized in making the determination whether a particular concessioner's financial records qualify as "similar files" within the scope of exemption six.
- 7/ If the Service determines that a concessioner's financial records are exempt from the disclosure requirement of the FOIA, we believe that 18 U.S.C. § 1905 continues, under the holding of this case, to make illegal the disclosure of such records if they fall within the language of that section. In other words, section 1905 eliminates the discretion the Service would otherwise have to disclose such information. This would not be the case, however, if the information requested is clearly outside the scope of section 1905 or if its disclosure

is authorized by another statute or regulation. If it is decided that as a matter of policy the Service wishes to disclose to the public all confidential financial information obtained from its concessioners, including that which would ordinarily be exempt from the disclosure requirement of the FOIA, we recommend that you promulgate a regulation pursuant to the rulemaking authority contained in 16 U.S.C. § 3 (1970) providing for such disclosure. The effect of such a regulation would be to permit what is otherwise prohibited by section 1905. But, in order for such a regulation to be valid, it would be necessary to demonstrate the reasonable relationship between the public disclosure of concessioners' confidential financial records and the use and management of the national park system. We anticipate that the promulgation of such a regulation will result in litigation testing the Secretary's authority, in the face of section 1905, to provide for discretionary disclosure through rulemaking of information which is otherwise exempt from required disclosure under the FOIA.

8/ This opinion is consistent with the position taken by the Office of the Solicitor in providing advice to the Assistant Secretary--Program Development and Budget, who formerly had the program responsibility for FOIA appeals. The opposite position was taken by the fourth circuit in Westinghouse v. Schlesinger, No. 74-1801 (4th Cir. Sept. 30, 1976). We understand that the Department of Justice is currently considering whether to seek a writ of certiorari in that case.

9/ Even if the concessioners demonstrate that their financial records are personal in nature, it must be remembered that they would not then automatically qualify for nondisclosure. As the Supreme Court has said in Dept. of Air Force v. Rose, 48 L. Ed. 2d 11, 33 (April 21, 1976), the sixth exemption does not protect against disclosures which would constitute incidental invasions of privacy, but only against such disclosures as would constitute clearly unwarranted invasions of privacy. The application of exemption six requires a balancing of the individual's right to privacy against the public's right to Government information. The limitation against a clearly unwarranted invasion of personal privacy is thought to provide the proper balance between the two rights. The Rose opinion cites S. Rep. No. 813, 89th

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Cong., 1st Sess. 9 (1965), as indicating that exemption six is limited to the protection of an individual's private affairs from unnecessary public scrutiny.

10/ Of course, it is possible that National Park Concessions, Inc. and Buzzard Point Boatyard Corp. no longer object to the release of their financial reports. We suggest that you also explore this possibility with them.



United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

NOV 13 1975

Memorandum

To: Director, National Park Service

From: Assistant Solicitor, Parks and Recreation

Subject: National Parks and Conservation Association v. Morton,
Civ. No. 436-72 (D.D.C.)

On October 24, we discussed with Assistant Director LaCovey the decision in the subject case handed down by Judge Gasch on October 23. Enclosed with this memorandum, which confirms our discussions on October 24, is a copy of the decision.

The current practice of the Service, when faced with a F.O.I.A. request for opening balance sheets, annual reports, or audits of concession businesses, is to invoke the exemption from disclosure that applies to commercial or financial information obtained from a person and privileged for confidential (5 U.S.C. § 552(b)(4)) if the concessioners involved formally advise:

- (1) That the requested information has not previously been made public or is not available from some other publicly accessible source; and
- (2) That disclosure of the requested information would cause a substantial likelihood of competitive harm.

Administration of this standard has required a case by case review of each request, including contact with the affected concessioner and partial disclosures where some, but not all, of the, information is exempt.

The decision of Judge Gasch essentially supports the current practices of the Service in handling requests from the public for disclosure of commercial and financial information obtained by the Park Service from concessioners operating within the National Park System.

On the issue of competitive harm, the Court ruled that national park concessioners face meaningful competition and that disclosure of the information obtained by the Park Service would cause competitive harm:

The evidence received on remand establishes that park concessioners in general and particularly those identified in this proceeding do face meaningful competition . . . The Court concludes upon consideration of the evidence submitted on remand that the concessioners' competitive position would be likely to be harmed substantially by the disclosure of information sought by plaintiff. (Slip opinion at 15.)

On the issue of information that has been previously disclosed, the Court ruled that:

To the extent the Park Service determines that exactly the same information that is publicly available in the records of another agency . . . also appears in a concessioner's filing with it, and to that extent, the plaintiff desires to have a second source of that information, the Service should, and it is hereby directed, to make it available. (Slip opinion at 15.)

The Court also found, after detailed analysis of the opening balance sheets, annual financial reports, and audits, that disclosure of certain parts of the annual financial reports is required by the FOIA:

The Court finds no reason for not disclosing the following information from the annual financial reports of concessioners here involved: (a) Annual Financial Report, Schedule B, except for supporting details; (b) Annual Financial Report, Schedule M; and (c) Annual Financial Report, Attachment 10-356(b), except for occupancy percentages. (Slip opinion at 16.)

Thus, the Court's opinion requires that the Service continue to handle FOIA requests for concessioner financial information on a case by case basis. Each request must be analyzed on its own merits with respect to the particular information sought. For each request, the affected concessioner should be contacted to solicit his input on whether the

requested information is publicly available elsewhere or previously made available by the concessioner, and whether its disclosure would be likely to cause substantial competitive harm. The concessioner should be requested in detail to articulate the precise bases for the alleged harm. This information must be carefully analyzed, since the decision to withhold and the rationale for withholding is a National Park Service decision, not a concessioner decision. Accordingly, the Service must examine the requested information and segregate for disclosure information that has been made public elsewhere or information that is of a noncompetitive nature.

The Court directed that certain information contained in the annual financial reports for the eight named concessioners be released by the Park Service to the plaintiff at the earliest possible date. You should comply with the Court's order by immediately releasing to the plaintiff the following information from the annual financial reports of National Park Concessions, Inc., Mountain Company, Inc., Cavern Supply Co., Fred Harvey, Inc., Yosemite Park and Curry Company, General Host, Inc., and Buzzard Point Boatyard for the current year and for each preceding year included in your records: Schedule B (except for supporting details), Schedule M, and Attachment 10-356(b) (except for occupancy percentages). If the annual reports for preceding years contain different information in these schedules than the forms before the court, you should make available the franchise fee, schedule of prepaid expenses, and the annual report of statistical information (except occupancy percentages) for those years.

When this information is sent to the plaintiff, you should also offer to disclose information that is publicly available elsewhere should he so desire. If the plaintiff indicates that he does desire to have such information, then you should immediately make it available to him.

You should also take note of the Court's opinion respecting the private nature of some concessioner information. You may recall that our memorandum to you of September 12 cautioned that some information contained in concessioner files, particularly those of small family-run business, may be subject to the exemption protecting personal privacy (5 U.S.C. § 552 (b)(6)). The Court agrees with this assessment:

In the case of small or individually owned concessions, financial information is personalized and should be protected on grounds of individual privacy. (Slip opinion at 16.).

In light of this point, and in view of the fact that the Service has previously, on the advice of this office, disclosed at least some of the requested information applicable to Prince William Trailer Park, we suggest that the owner of Prince William Trailer Park, Mr. Enders, be contacted a second time prior to any additional disclosures of information pertaining to his concession. Mr. Enders should be fully informed of the broad nature of the plaintiff's request, that it covers all audits, annual financial reports, and opening balance sheets maintained in Park Service records on his business. A written waiver with respect to such information should be obtained prior to its disclosure to the plaintiff. Should Mr. Enders object to further disclosures on the grounds of personal privacy or competitive harm, you should in any event disclose those schedules of the annual financial reports discussed above.

Please contact John Griggs of this office should you have any further questions on this matter.

Enclosure

(Sgd.) David A. Watts

David A. Watts

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

SEP 12 1975

Memorandum

To: Director, National Park Service

From: Assistant Solicitor, Parks and Recreation

Subject: Disclosure of concessioner financial records

This memorandum addresses the problem of the applicability of three statutes to financial information submitted to the National Park Service by concessioners. This information includes opening balance sheets, audits, annual financial reports, and similar information. The three statutes in question are the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a and 18 U.S.C. § 1905.

Section 1905 of Title 18 makes it a crime to disclose confidential financial information in any manner or to any extent not authorized by law. There are numerous cases which have determined that this statute does not specifically exempt financial information from the disclosure requirements of the FOIA. In other words the FOIA is a statute which authorizes disclosure within the context of 18 U.S.C. § 1905. M.A. Shapiro and Co., v. S.E.C., 339 F. Supp. 467, 470 (D.D.C. 1972); Sears, Roebuck & Co., v. G.S.A., 509 F.2d 527 (D.C. Cir. 1974); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974).

Section 1905 does not provide a standard for ascertaining what types of information may be withheld. Rather, it provides a criminal penalty for disclosure if no other law authorizes disclosure. Whether or not disclosure is "authorized" must be determined under the provisions of the FOIA. Once such a determination has been made, it is conceivable that Section 1905 would apply to disclosure not authorized by the FOIA.

The FOIA, 5 U.S.C. § 552, requires that information retained by the government be promptly disclosed to the public on receipt of a specific request, unless disclosure is exempted by any of the nine exemptions contained in 5 U.S.C. § 552(b). Of these nine exemptions,

two are potentially applicable to concessioner financial information.

The fourth exemption, 5 U.S.C. § 552(b)(4), applies to:

trade secrets and commercial or financial information
obtained from a person and privileged or confidential.

This exemption applies only if disclosure of the information would impair the government's ability to obtain it in the future or if disclosure would cause a substantial likelihood of competitive harm. National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). It was held in National Parks and Conservation Association that disclosure of concessioner financial information would not impair the government's ability to obtain the information, and the case was remanded for a hearing on whether the competitive positions of the concessioners would be harmed by disclosure. A decision on the competitive harm issue is still pending.

The second exemption that might apply to concessioner financial information is 5 U.S.C. § 552(b)(6):

personnel and medical files and similar files the
disclosure of which would constitute a clearly unwarranted
invasion of personal privacy.

This exemption protects individual persons, not corporate entities, and it, therefore, exempts only the financial information submitted by concession businesses that are not corporations or that are "closely held" corporations. Files maintained by the Service which contain financial information of concessioners who are individuals (in lieu of corporate entities) or which contain financial information on individuals in corporations may qualify as "similar files" that may be subject to the exemption. See, Wine Hobby U.S.A. Inc. v. I.R.S., 502 F.2d 133 (3d Cir. 1974).

The Privacy Act, 5 U.S.C. s 552a, precludes the disclosure of any record about an individual, including his financial transactions, without the prior written consent of the individual to whom the record pertains, unless disclosure of the record would be required under the FOIA. Therefore, the FOIA remains as the standard for determining whether to allow disclosure with one slight modification. The Privacy Act essentially abolishes the "sound grounds" test under the (b)(6) exemption of the FOIA, whereby agencies were authorized to disclose information if an exemption applies but sound grounds did

not exist for invoking it. Thus, to the extent that the (b)(6) exemption applies (i.e., may be properly invoked) to financial information submitted by family owned concessions, partnership concessions, or closely held corporate concessions, the Privacy Act prohibits disclosure of such information without first obtaining the permission of the individual to whom such information pertains.

In applying the (b)(6) exemption, this Department has concluded that it does not protect information of an entrepreneurial character. Therefore, most determinations on disclosure of concessioner financial data must be made under the (b)(4) exemption. The (b)(6) exemption may be used only with respect to information that pertains to an individual in a personal, nonbusiness sense.

The crucial determination to be made in all cases is whether (b)(4) or (b)(6) under the FOIA applies to the concessioner financial data. This determination must be made by the National Park Service, with the assistance of the Solicitor's Office, and not be the concessioners. Information supplied by the concessioners, however, may be referred to in making such a determination. In fact, contacting the concessioner pursuant to 43 C.F.R. 2.13(b) should be the first step in any determination, since his written approval to disclose information avoids the pitfalls of the Privacy Act and Section 1905.

In making a (b)(4) determination the concessioner should be asked the following questions, answers to which should be received in writing prior to authorizing a withholding of the information:

- (1) Is any of the information in the requested documents information which the concessioner has previously made public or which may be made public in the future? Particularly, has any of the information been disclosed through public filings with state or federal regulatory agencies? Any items of information which have been made public should be identified.
- (2) With respect to those items which have not previously been made public, are these items which the concessioner would customarily decline to disclose to the public?
- (3) Would disclosure of any of the items not previously disclosed and which would not customarily be disclosed cause competitive harm to the concessioner, and, if so, to what extent? Statements asserting competitive harm should be supported by specific factual or evidentiary detail.

Freedom of Information Act (FOIA)

In handling requests for information of non-corporate concessioners, a (b)(6) determination may also be necessary. Here we must re-emphasize that for (b)(6) to apply, the information must relate to the individual as a person and not as a business. The test of whether (b)(6) applies is a difficult test to determine, since the right of the public to know must be weighed against the individual's interests in maintaining personal privacy. Although there are no cases that have litigated the (b)(6) issue for national park concessioners, we would assume that the interests of the public in knowing about concessioner operations are fairly important. Therefore, the extent to which disclosure would impinge the personal privacy of the individual is the crucial matter to determine. For a family owned business, the interests of the individual would probably dominate. For business partnerships and closely held corporations, the personal privacy considerations may be somewhat less important. We can only counsel a case by case approach on this point, with close coordination with the Solicitor's Office.



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