CAN GOVERNMENT AND INDUSTRY CONSPIRE TO THWART FOIA?: A CRITICAL ANALYSIS OF CRITICAL MASS III

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I. Introduction

There are multiple reasons the government may have access to a private entity’s trade secrets. Trade secrets may be acquired from government contractors as part of a purchase (e.g. military technology which must remain classified and thus cannot be patented).\(^1\) Research where the government is a grantor or partner may allow government personnel to become aware of confidential information.\(^2\) Regulators or legislators may request confidential information in making decisions about what the law should be.\(^3\) Information may be required by regulators in order to approve certain conduct (e.g. mergers, drug sales).\(^4\) And the list goes on. Most of these types of disclosure are voluntary, at least in a sense. Refusal to disclose military technology forecloses the possibility of selling it to the government, but does not cause government retaliation.\(^5\) Refusal to disclose secret infor-

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1 See infra note 31 (discussing various definitions of “trade secret”).

2 See infra note 56 (noting the usage of Institutional Patent Agreements when research was conducted with certain federal funds).

3 See infra note 9 (explaining the requirement for confidentiality was held only applicable to information given voluntarily to the government).

4 See infra note 10 (describing the disclosure required to obtain regulatory approval).

5 See infra note 31 (discussing the Economic Espionage Act).

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formation to regulators such as the Food and Drug Administration, however, can result in total inability to sell a regulated product in the United States.\(^6\)

Cases dealing with disclosure have reached conflicting results. The Supreme Court held, in *Ruckelshaus v. Monsanto* (*Monsanto*),\(^7\) that disclosure of a trade secret may be an unconstitutional taking if the trade secret owner was forced to give the trade secret information to the government or gave it subject to a promise that it would not be disclosed.\(^8\) But the D.C. Circuit held in a later case that information the trade secret owner is forced to give to the government is not entitled to as much protection as information given to the government voluntarily.\(^9\) Further, it held that although an agency could compel a regulated company to submit information, and would then be required to disclose it to the public, nothing in the law prevents industry and government from conspiring together to protect companies from disclosure of embarrassing information through voluntary submission of information that the government would otherwise compel submission of.\(^10\) The result is a system where many regulatory bodies, including the Nuclear Regulatory Commission, do exactly that.\(^11\) In some situations, the D.C. Circuit’s principle cannot be squared with the Supreme Court’s *Monsanto* decision.

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\(^6\) See *infra* note 101 (offering discussion of voluntary disclosure where agency could mandate disclosure).

\(^7\) 467 U.S. 986 (1984) [hereinafter *Monsanto*].

\(^8\) See id. at 987-88 (1984) (holding absent express promise, appellee had no reasonable expectation that info submitted to EPA would be inviolate but deferring to Congress for extent of public disclosure for public safety).

\(^9\) See *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 872 (D.C. Cir. 1992) [hereinafter *Critical Mass III*] (reaffirming the two-prong test for determining when financial or commercial information in the Government’s possession is to be treated as confidential, but confining this exemption to information voluntarily given to the Government).

\(^10\) See id. at 880 (elaborating on what the government is and is not required to do in order to comply with the Freedom of Information Act).

\(^11\) See Jia Lynn Yang, *Democrats Step Up Pressure on Nuclear Regulators Over Disaster Preparedness*, *WASH. POST* (Mar. 17, 2011), archived at www.webcitation.org/66cSTqj3V (reporting on a Union of Concerned Scientists report which found that the NRC’s enforcement of safety rules has not
This note looks at the legal conflicts involved when demands for government transparency clash with the need to protect trade secrets. Section II describes the development of two occasionally conflicting strands of the law. Subsection A discusses the development of trade secrets law, especially as applied when the government possesses trade secrets. Subsection B covers the evolution of laws promoting government transparency. Section III takes a closer look at the conflict between Monsanto and Critical Mass III, two of the foundational cases dealing with the conflict between trade secrets and government transparency. Section IV looks for ways to address the conflicts between these disparate rulings. Section V concludes the note by reaffirming the fundamental conflict between Monsanto and Critical Mass III.

II. History

A. Definitions of Trade Secrets

In Monsanto, the Supreme Court for the first time held that trade secrets are property, with the specific rights property rights the owner is entitled to being dependent on the relevant state law in the absence of a federal definition of trade secrets.\(^{12}\) Under the Fifth Amendment, trade secrets’ status as property rights means they cannot be disclosed by the government without due process of law.\(^{13}\) When it comes to intangible property whose value lies in the fact that it is a secret, disclosure, by virtue of destroying the economic value of the property, would be a taking\(^{14}\) and thus a violation of the takings clause.\(^{15}\) Protecting

\(^{12}\) See 467 U.S. at 993, 1001 (indicating trade secrets definition left unanswered by Congress and property rights are defined by existing rules or understandings that stem from an independent source like state law).

\(^{13}\) See U.S. CONST. amend. V (prohibiting taking of property by government without due process of law or just compensation).

\(^{14}\) See, e.g., First English Evangelical Lutheran Church of Glendale v. County of L.A., Cal., 482 U.S. 304, 316-17 (1987) (holding that depriving a property owner of the value of their property short of outright conversion still constituted an unconstitutional taking).
property rights first requires understanding what those rights are. Federal law is unclear on what is a trade secret.

The Freedom of Information Act (FOIA), adopted in 1966, promotes the general principle of open and transparent government. FOIA requires the disclosure of all federal executive branch records unless they qualify for exemption in one of nine categories, including Exemption 4, covering “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

The inclusion of trade secrets as an exemption was interesting because FOIA does not provide a definition of the term “trade secrets.” No general definition of trade secrets exists in other federal statutes, though a handful of laws adopted long after the original FOIA do address limited aspects of trade secret protection.

Without a definition, the federal government’s obligations regarding trade secrets are unclear. By contrast, because trade secret protection is primarily a creation of state law, a state freedom of information act (public records law, etc.) which fails to

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15 See U.S. CONST. amend. V (limiting the government’s right to take private property).
18 Id. at § 552 (b)(4) (creating disclosure exemption for trade secrets).
19 See 5 U.S.C. § 552 (failing to state a definition of “trade secret”).
20 See Jack Bantle, Proprietary Information & Trade Secrets, EMPLOYEES’ GUIDE TO SECURITY RESPONSIBILITIES Apr. 2, 2012, archived at www.webcitation.org/66dHkDew9 (stating there is no general definition of “trade secret” in federal code).
22 See Bantle, supra note 20 (noting that there is no general definition of “trade secret” in federal code).
define trade secrets is not a major issue. There are ample other statutory or common law definitions of the term, clarifying the rights of trade secret owners in general and making it easier to determine the rights of people who do business with the government. Most significantly, at least forty-six states and the District of Columbia have adopted the Uniform Trade Secrets Act (UTSA) since its development in 1985. UTSA defines a trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Similar to the UTSA, the Economic Espionage Act (EEA) defines trade secret broadly, with only minor differences.
However, the EEA applies only to misappropriation of trade secrets. It does not address “improper” disclosure or taking of trade secrets short of misappropriation, or specify what rights the originator of a trade secret has once a trade secret has been stolen. These absences are important because unlike rights in tangible property, rights to a trade secret can be lost upon its being taken if the owner failed to safeguard it properly, or if it has been disclosed to anyone who might benefit economically from the disclosure, regardless of how prudent the owner was (depending of course on the jurisdiction’s law).

The Economic Espionage Act defines trade secret similarly, but substituting “the public” in place of “other persons who can obtain economic value from its disclosure or use.” The Federal Acquisition Regulation, the regulation governing the federal government’s purchase of goods and services, has a more limited definition covering a “proprietary interest” in “data resulting from private investment.”

sumably aware of the alternative definition. The legislative history confirms this awareness, and says that it was “largely based” on UTSA. See id. There have been no Supreme Court cases attempting to determine what “public” means in this context. The 3rd Circuit concluded that the “general” public was the “public” meant by Congress. See United States v. Hsu, 155 F.3d 189, 196 (3rd Cir. 1998). The 7th Circuit addressed this question, finding many possible definitions. See United States v. Lange, 312 F.3d 263, 268 (7th Cir. 2002). There, the 7th Circuit considered the “general,” “educated,” and “economically relevant” public the three most important possibilities for its analysis. See id. The Lange court indicated a preference for “economically relevant” public, and evinced a desire to interpret “public” as shorthand for UTSA’s terminology, just before deciding that the case would turn out the same regardless of the definition used. See id. at 271 (Ripple, J., concurring).

28 See Economic Espionage Act, § 1831 (banning activities considered to be “economic espionage” against the United States).
29 See id. at §§ 1831-39 (failing to address the issues noted).
30 See Uniform Trade Secrets Act § 1 (defining “trade secret” as subject to such risk).
31 See Economic Espionage Act § 1839 (defining “trade secret”).
The 1994 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)\(^{33}\) muddies the definition question further by providing yet another possible definition of “undisclosed information” which closely tracks definitions of “trade secrets”.\(^{34}\) The World Trade Organization, the organization responsible for enforcing TRIPS, considers “undisclosed information” to be a somewhat broader category of protection than trade secret.\(^{35}\)

There is also a statute making it a crime for a federal employee to disclose a valid trade secret.\(^{36}\) That statute provides no definition of “trade secret”.\(^{37}\) The statute, 18 U.S.C. §1905, one short paragraph in a chapter of the US Code otherwise devoted to good government moves such as prohibition of lobbying with federal money and limiting nepotism,\(^{38}\) creates a disincentive to


\(^{34}\) See id. at Art. 39 (establishing clear standard for when disclosure of trade secrets destroys property rights in secrecy). The TRIPS definition avoids some of the ambiguity of the Economic Espionage Act, using instead of “public” the standard “generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.” See id. To qualify as “undisclosed information” under TRIPS Art. 39, information must be lawfully within the control of the person seeking to protect it, and must meet the following conditions:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Id.

\(^{35}\) See Overview: The TRIPS Agreement, WORLD TRADE ORGANIZATION, archived at www.webcitation.org/66c43DGGK (explaining that “know-how” is an additional category of undisclosed information).


\(^{37}\) See id. (providing no definition of trade secret).

\(^{38}\) See 18 U.S.C. §§ 1910, 1913 (providing rules governing federal employees).
disclose any information that might be a trade secret, whether it really is or not.  

Among all the federal statutes, the Economic Espionage Act is probably the best guideline for interpreting the term “trade secret” as used in the FOIA. Even though the FOIA was adopted thirty years prior to the Economic Espionage Act, the FOIA has been amended as recently as 2007 with no attempt to define the term, indicating likely acceptance of the definition used in the Economic Espionage Act. However, when dealing with civil issues centered on the FOIA, it is possible that courts will favor the UTSA definition over the Economic Espionage Act definition. The reason is that the Economic Espionage Act is a criminal statute, while the UTSA is meant to cover civil penalties for improperly acquiring trade secrets.

The UTSA addresses the issue of “improper” acquisition of trade secrets, mentioning in the first Comment that this can apply to acquisition of trade secrets through otherwise legal activity, not just through illegal activity. Case law known to Congress when the Economic Espionage Act was enacted supports this notion; in one famous case, the defendant hired an aerial photographer to fly over the plaintiff’s plant and photograph it during construction. Flying over and photographing the plant with no purpose related to economic competition would have been legal, but was not a proper means of acquiring a trade secret.

39 See 18 U.S.C. § 1905 (creating strict liability penalties for disclosure of a trade secret and no corresponding penalty for failure to disclose information to which requesting party is entitled). 
40 See 18 U.S.C. § 1839 (providing clear definition of “trade secret” unconstrained by FOIA).
36 See Uniform Trade Secrets Act §1 (distinguishing “improper” from “illegal” acquisition of trade secrets).
43 See E. I. du Pont de Nemours & Co. v. Christopher, 431 F.2d 1012, 1013 (5th Cir. 1970) (noting the nature of the purported efforts to acquire trade secrets).
44 See id. at 1015 (holding otherwise legal activities could not be engaged in to acquire trade secrets).
Trade secrets have no federal protection from “improper” but otherwise legal acquisition. Additionally, there are no federal rules determining rights to a trade secret once it has been illegally acquired.\(^{45}\) This absence potentially has a major impact on the rights of trade secret owners in the event of a security breach.\(^{46}\) If one person’s illegal acquisition of a trade secret kills all rights to the secret, the government is then obligated to disclose it to anyone who asks for it, unless another FOIA exemption applies, because a trade secret is no longer valid once disclosed to the relevant public.\(^{47}\) If the secret remains a trade secret until it is known or readily ascertainable by all parties to whom it might be economically valuable, the government is obligated to protect it.\(^{48}\) The UTSA does deal with issues pertaining to a trade secret post-disclosure.\(^{49}\)

With the interpretation of vital aspects of the Economic Espionage Act still unsettled, there are multiple possible outcomes when a court does try to determine how the drafters of the Economic Espionage Act meant the term “trade secret” to be interpreted for purposes of the Act. One is to follow UTSA, as the 7th Circuit did.\(^{50}\) Another is to assume that Congressional failure to adopt UTSA wholesale indicates a desire to avoid certain of its provisions, as the 3rd Circuit apparently did.\(^{51}\)


\(^{46}\) See id. at 156 (arguing for less patent protection to promote free competition).

\(^{47}\) See Privacy Act, 15 C.F.R. §§ 4.21-.34 (2012) (allowing secrecy for information meeting any one of the standards for exemption).

\(^{48}\) See id. at § 4.33-.34 (providing exemptions for trade secrets).

\(^{49}\) See Uniform Trade Secrets Act § 2 (providing injunctive relief to restrict future use of misappropriated trade secrets).

\(^{50}\) See Lange, 312 F.3d at 267-68 (holding that the Economic Espionage Act should be interpreted using definitions in UTSA).

\(^{51}\) See Hsu, 155 F.3d at 196 (failing to give any explanation of why “general public” was the favored interpretation; the court simply said so and moved on, as the issue was not dispositive).
U.S. policy has shifted toward a more expansive view of IP rights in recent years. For example, federal policy has been moving toward larger grants of private intellectual property rights in situations where the government has an interest. For most of its history, the United States was presumed to be the owner of patents developed during the course of research conducted by small businesses and universities using federal dollars.52 For most of its history, the presumption was not important either way. The federal government spent heavily on research funding starting at the end of World War II53 and its various agencies had acquired 30,000 patents at its peak.54 A coalition of universities led by the University of Wisconsin-Madison lobbied for agencies to enter Institutional Patent Agreements (IPAs), which, inter alia, allowed universities and non-profits to patent the fruits of research conducted with federal dollars, under certain circumstances.55 In 1968 the Department of Health, Education, and Welfare and in 1973 the National Science Foundation signed IPAs.56 In 1980, the Bayh-Dole Act57 reversed the presumption of title, making non-profits and small businesses the owners of federally-funded inventions if they meet certain conditions, most notably filing to patent the invention, disclosing the invention to the funding agencies, attempting to commercialize the invention, and granting the government an irrevocable, non-exclusive, paid-up license to the invention.58


54 See Zeh, supra note 52, at 69 (discussing federal government’s collection of patents).

55 See WARF and Bayh-Dole, WISCONSIN ALUMNI RESEARCH FOUNDATION, Apr. 2, 2012, archived at www.webcitation.org/66cYFgse4 (discussing history of government policy with respect to patent rights where federal funding was involved).

56 See id. (discussing events leading up to Bayh Dole Act).


58 See id. at § 209 (establishing standards for privately-owned patents on the products of federally-funded research).
Copyright law, too, has been beefed up, with the enactment of the Digital Millennium Copyright Act of 1996 (DMCA) creating strict penalties for thwarting Copyright owners' attempts to protect digital works from copying. The Copyright Term Extension Act of 1998 (CTEA) extended copyright terms by twenty years.

Additionally, since the 1980s, promotion of strong intellectual property rights has been a major trade policy goal of the United States, as exemplified by the pressure the United States put on developing nations to adopt the TRIPS Agreement in the Uruguay Round in 1994. The TRIPS Agreement was considered a very high standard at the time, but has since been supplemented by other treaties further strengthening international IP rights. In 1996, the World Intellectual Property Organization (WIPO) Copyright Treaty banned circumvention of Digital Rights Management (DRM) systems in all signatory nations. The Economic Espionage Act and the criminalization of federal employees' disclosure of trade secrets are also evidence of an expansionary trend in the creation of IP rights.

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64 See Economic Espionage Act § 1831 (evidencing expansionary trend in the creation of IP rights).
Case law has demonstrated this trend since at least 1984, when the Supreme Court first recognized trade secrets as property, holding that public disclosure of a pesticide’s active ingredients, where the seller had to reveal the ingredients to the Environmental Protection Agency before selling it in the United States, was a taking within the meaning of the Fifth Amendment when the government previously promised the manufacturer that its formula would be kept secret. The D.C. Circuit has held that trade secrets voluntarily given to the government are automatically subject to an even higher standard of protection than trade secrets whose disclosure is compelled by the government.

B. FOIA and Government Transparency

Contrasted with this trend is a trend toward greater government transparency. FOIA has been amended frequently since initial passage, usually in the direction of openness. The Privacy Act Amendment of 1974 created judicial review of executive secrecy claims and gave individuals access to the government’s data on themselves. The 1976 Government in the Sunshine Act extended FOIA by requiring meetings of federal agencies to be open to the public unless exempted. The 1980s saw some weakening of FOIA with the 1986 Anti-Drug Abuse Amendments and President Reagan’s Executive Order No. 12,356 of

65 See Monsanto Co., 467 U.S. at 1016 (holding trade secrets were a property right and unauthorized disclosure was a taking).
66 See Critical Mass III, 975 F.2d at 879-80 (protecting trade secrets voluntarily given to Nuclear Regulatory Commission when trade secret owner was under no obligation to disclose to NRC).
Statutory changes should be given more credibility in determining what government policy is with respect to FOIA because dueling Executive Orders have alternately weakened and strengthened FOIA each time party control of the White House has changed hands, and indicate no trend other than partisan bickering. Congressional expansion of FOIA resumed in 1996 with the Electronic Freedom of Information Act Amendments (E-FOIA), requiring that certain types of records be available electronically. The Intelligence Authorization Act of 2002 theoretically limited openness somewhat by prohibiting intelligence agencies from complying with FOIA requests from foreign governments or their representatives. However, the rights of American citizens, or even of foreign agents who manage to avoid raising suspicion, are not affected. Finally, the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act) streamlined the handling of FOIA requests, required more data to be made available electronically, and extends FOIA coverage to certain records controlled by government contractors.

1. Policy objectives

Congress has embraced directly contradictory policy goals without specifying when exactly each should take precedence

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75 See id. (placing no limits on the rights of American citizens to obtain information from intelligence agencies through FOIA requests).
over the other. The overall goal of FOIA is to give the public access to government information. Protecting trade secrets has two policy rationales which were not stated in the act but determined judicially based on legislative history.\(^77\)

In the absence of more explicit guidance, government employees may display a bias in favor of non-disclosure, given the possibility of criminal penalties for disclosing a valid trade secret\(^78\) and the lack of any corresponding threat of prosecution for failure to comply with FOIA.\(^79\) The Supreme Court has interpreted the Trade Secrets Act and its corresponding criminal penalties broadly, so even an official release of information authorized by an agency head, not just a leak, may result in criminal penalties.\(^80\) Any rational government employee faced with any doubt about the legal course of action would clearly prefer non-disclosure when facing those incentives.

Effective state analogues to FOIA, by contrast, do specify punishment for violations, ranging from fines\(^81\) to imprisonment.\(^82\) Perhaps the federal government could put some teeth into FOIA and allow criminal punishments for violations. That, however, would create its own set of problems, as it has with Ar-


\(^{80}\)See Monsanto, 467 U.S. 986 at 1008 (determining that Trade Secrets Act would criminalize the release of valid trade secrets even through proper agency procedures).


\(^{82}\)See Arkansas Freedom of Information Act, ARK. CODE ANN. § 25-19-104 (2012) (making violation a class C misdemeanor); ARK. CODE ANN. § 5-4-401 (2012) (allowing imprisonment of up to thirty days for class C misdemeanors).
kansas’s FOIA. A better solution would be to clarify FOIA’s trade secret exemption by creating a federal statutory definition of trade secret. That option is analyzed further below, after an exploration of each of the competing policy goals that need to be satisfied and some of the other issues introduced by the Critical Mass III decision.

a. Public access to government information

FOIA and similar laws exist to promote citizens’ access to their government’s information, with exceptions for information too sensitive to be shared.

i. Promotion of democracy

One reason for favoring government transparency is the promotion of democracy. Citizens own the government and all the information it owns, so they should have access to that information unless access endangers their well-being. Some activists take this argument even further, arguing for disclosure even when it endangers national security. At least in principle, Congress seems to support the democracy promotion argument, even if its legislative decisions have created a mish mash that does not always work that way in real life. FOIA was signed into law in 1966. In spite of tampering by several Presidents and

83 See John Lyon, Court Ruling on FOIA Could Lead to Changes, THE ARKANSAS NEWS BUREAU, Oct. 10, 2011, archived at www.webcitation.org/6BR8uhjga (describing a ruling that the state FOIA is unconstitutionally vague).
86 See id. at 896 (discussing relationship of citizenry to government).
88 See Fenster, supra note 85, at 898 (describing the presumptions made by Congress in passing the FOIA).
89 See 5 U.S.C. §552 (mentioning date of enactment).
occasionally by Congress, it has survived forty-six years largely intact.  

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\[\textit{ii. Prevention of corruption}\]

The corruption prevention motive is the reason FOIA exists as it does today. The 1966 FOIA was a weaker law, not providing the judicial review of executive decisions permitted by the modern law.  

\[91\]  

Judicial review was introduced by amendments in 1974, overcoming a Presidential veto.  

\[92\]  

Congress passed the 1974 amendments as a response to Watergate.  

\[93\]  

Prior to the 1974 amendments, courts could not question the executive branch’s judgment that a document was classified, so long as the executive branch filed an affidavit claiming it was.  

\[94\]  

The corruption prevention rationale was also important to the Critical Mass III plaintiff’s argument.  

\[95\]  

The plaintiff claimed that protecting confidential information which was disclosed voluntarily, where disclosure could have been compelled and the compelled disclosure would not have been protected, “may lead government agencies and industry to conspire to keep information from the public by agreeing to the voluntary submission of information . . . .”  

\[96\]  

The court found this reasoning unpersuasive, noting that there was “no provision in FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act.”  

\[97\]  

\[90\] See id. (noting numerous revisions and amendments in the History section).

\[91\] See Cox, supra note 84, at 392 (explaining administrative appeal process and subsequent appeal process involving federal district courts).


\[93\] See Veto Battle, supra note 67 (discussing 1974 amendments to FOIA).

\[94\] See Veto Battle, supra note 67 (outlining the changes to FOIA).

\[95\] See Critical Mass III, 975 F.2d at 880 (discussing plaintiff’s reasoning).

\[96\] Id.

\[97\] Id.
b. Government access to information needed for decision-making

In discussing the district court's opinion, the appeals court mentioned three ways governmental interests might be served by keeping voluntary disclosures secret even though the government could compel disclosure and then make that information public after a FOIA request.98 The court was probably correct on one of the three, candor, was incorrect as to accuracy, and was probably incorrect as to timeliness.

i. Candor99

Regulated firms may be less honest with the government if forced to disclose information they do not want to make public. If the penalties for lying are less than the harm caused by revealing certain information, there is an incentive to lie. Perhaps more importantly, the promise of secrecy may encourage firms to share problems with the government in hopes of resolving such problems before they become worse or enabling the government to prepare in case things get out of hand.100

ii. Accuracy

The court cited accuracy of data as a reason voluntary disclosure might be helpful to governmental interests.101 This reasoning is entirely unpersuasive. If the government has the ability to compel data submission, it implicitly has the power to compel accurate data submission. Compulsion might serve governmental interests better here, by creating penalties for inaccuracy.

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98 See id. at 874 (illuminating the district judge's preference to have INPO reports furnished voluntarily under circumstances more conducive to candor, accuracy, and timeliness).
99 See id. (discussing benefits of voluntary disclosure).
100 See id. (describing INPO's program of soliciting candid solicitation of information about nuclear plant safety from plant employees).
101 See Critical Mass III, 975 F.2d at 874 (discussing reasons for allowing voluntary disclosure where agency could compel disclosure).
Voluntary disclosures are only motivated to be accurate to the extent that there is an overall motivation for candor, as discussed above.

iii. Timeliness

The court probably erred in claiming the government’s interest in timeliness would be served by allowing voluntary disclosures and keeping that information secret, because a system of voluntary disclosures allows trade secret owners to disclose information when it best suits their narrow interests, rather than when it benefits the government. In certain situations, the risk of public revelation may make disclosure less timely, as when a firm decides to send information to its public relations department for review before sending it to the government. Such a move would be unnecessary for information the government plans on keeping secret. But for the most part, the government’s ability to compel disclosure and set a deadline ensures disclosure will be timely enough, even if somewhat slower than it might have been if the firm worked diligently to provide information to the government and had no worries about public relations issues. Voluntary disclosure carries no such guarantee of timeliness.

c. Prevention of competitive harm to trade secret owners

The possibility of competitive harm is one of the factors which determine whether information is confidential. The Nat’l Parks court determined based on legislative history that it was one of the two reasons Congress adopted Exemption 4. See id. at 769-70 (discussing legislative history).

i. Risks of government-industry collusion when voluntary disclosure receives higher protection

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102 See id. (discussing governmental interest in keeping voluntarily disclosed information secret).
103 See id. (illustrating the government’s interest in receiving INPO reports in a timely manner).
104 See id. at 873 (applying National Parks test for confidentiality).
105 See Nat’l Parks and Conservation Ass’n, 498 F.2d at 769-70 (discussing legislative history).
Prior to the 1974 amendments, the executive branch could effectively avoid application of FOIA to its activities by inappropriately classifying information that had no legitimate national security reason for being classified, and all courts could do was verify whether the information was classified through proper procedures or not.\footnote{See Veto Battle, supra note 67 (discussing procedural history of FOIA litigation).} \textit{Critical Mass III} sets up a similar problem with respect to voluntary disclosure.\footnote{See \textit{Critical Mass III}, 975 F.2d at 880 (discussing how the industry keeps information from the public).} The court dismissed this problem rather than address it.\footnote{See \textit{id.} at 873 (noting government’s lack of obligation to disclose).} But under \textit{Monsanto}, mandating disclosure and then making the disclosed secrets public would be unconstitutional if the trade secret owner had a reasonable, investment-backed expectation of secrecy prior to the change.\footnote{See \textit{Monsanto}, 467 U.S. at 1005-06 (analyzing Monsanto’s investment-backed expectation with regard to data requested by EPA).} The only information which could constitutionally be disclosed would be that which had to be disclosed as of the time the trade secret owner developed its secrets.\footnote{See \textit{id.} (stating which information can constitutionally be disclosed).}

\section*{III. Major Cases}

A U.S. Supreme Court case and a D.C. Circuit case are the foundational cases for aspects of the government’s handling of trade secrets that are important for this note. \textit{Monsanto} focused on trade secrets whose disclosure to the government was mandated by law.\footnote{See \textit{id.} at 986 (summarizing the focus of the case).} \textit{Critical Mass III} covered trade secrets disclosed to the government voluntarily.\footnote{See \textit{Critical Mass III}, 975 F.2d at 872 (summarizing the focus of the case).}

\textit{Monsanto} was the first Supreme Court case to explicitly hold that trade secrets were a property right.\footnote{See John C. Janka, \textit{Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets}, 54 U. Chi. L. Rev. 334, (1987) (citing \textit{Monsanto}, 467 U.S. at 1000-04) (analyzing \textit{Monsanto}’s disclosure holding).} In \textit{Monsanto}, the
Environmental Protection Agency required the submission of information about the safety of a pesticide as a condition of licensing it for sale in the United States. The required information included trade secrets. Congress then made statutory changes which would have allowed the EPA to publicize some of the submitted information.

The Court ruled that disclosure could be a taking where there was a “reasonable, investment backed expectation” that it would be kept secret. Because the government changed the rules about what could be published after the plaintiff had already disclosed its data to the EPA, the rule change denied the plaintiff any meaningful opportunity to prevent publication of its trade secrets. Surprise publication was an unconstitutional taking of the plaintiff’s trade secret unless the EPA provided just compensation. The Court left the door open for publication of information disclosed to the EPA voluntarily and with the expectation that it would become public, stating that, “a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.” In fact, the Court ruled that publication of trade secrets disclosed after the 1978 amendments, when secrecy was explicitly denied, or before the 1972 amendments, when it was unclear whether secrecy would be protected, was not a taking, because the plaintiff

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114 See Monsanto, 467 U.S. at 991 (discussing history of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).
115 See id. at 993-97 (reviewing history of amendments to FIFRA).
116 See id. (pointing out legislation that made exceptions to previous prohibition on disclosure of trade secrets).
117 See id. at 1005 (discussing standards for determination of a regulatory taking and choosing what the Court believed to be the best one); id. at 1008 (applying the most relevant standard for determining a regulatory taking).
118 See id. at 1011 (analyzing effects of government guarantee of secrecy and of government’s violation of guarantee).
119 See id. at 1011-12 (explaining effect of earlier statute’s explicit guarantee that trade secrets disclosed to the EPA would not be compromised).
120 Monsanto, 467 U.S. at 1007.
had no "reasonable, investment-backed expectation" that trade secrets would remain secret.121

The status of voluntary disclosures of confidential information to the government was determined by Critical Mass III, the last in a series of lawsuits between Critical Mass Energy Project (CMEP) and the Nuclear Regulatory Commission.122 The Critical Mass III decision limited the D.C. Circuit's two-part test from Nat'l Parks to those situations where disclosure to the government was mandatory, while protecting information given to the government voluntarily if it was "of a kind that the provider would not customarily make available to the public."123 The Nat'l Parks test, by contrast, exempted information from disclosure if it met the test that: "Commercial or financial matter is "confidential" ... if disclosure of the information is likely ... either ... (1) to...

121 See id. at 1006 (holding publication of information disclosed to EPA after 1978 amendments could not be a taking because there was clearly no guarantee of secrecy); id. at 1008 (holding publication of information disclosed to EPA prior to 1972 amendments could not be a taking because the law was too unclear to support "reasonable, investment-backed expectation" of secrecy).

122 See Critical Mass III, 975 F.2d 871, 874 (summarizing the dispute). While Critical Mass III mentions trade secrets only in passing and focuses on the confidential "commercial or financial information" prong of Exemption 4, the court's discussion of the rationale behind Exemption 4 and its applicability provides no reasoning applicable only to non-trade secret confidential information. See id. at 872. In fact, its primary rationale is based on a sentence from a Senate report which, in context, clearly applied to trade secrets as much as to other information. See id.; see also U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, 1974, archived at www.webcitation.org/66c8uvFLv [hereinafter Senate Report] (citing S. REP. No. 89-813 (1965)). The court's definition of "commercial information" is questionable in terms of Congressional intent, because it relies on language from the Senate Report which explained the overall need for Exemption 4 rather than attempting to define "commercial information. See id at 44. Because the court chose to define "commercial information" as it did, it is likely that the court saw no reason to treat trade secrets any differently than other confidential information covered by Exemption 4, so Critical Mass III's holding applies as much to trade secrets as to confidential "commercial or financial information." Id.

123 See Critical Mass III, 975 F.2d at 872 (discussing changes made to standard for exemption under FOIA Exemption 4).
impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”

The Nat’l Parks standard was well-received by other appellate courts and by Congress. The court stated its belief that no previous case would have been decided differently under the new principle, except Critical Mass I and Critical Mass II.

The court viewed the new test not as an abandonment of the old test, but as a means of covering information the Nat’l Parks court never intended to cover with the old test.

CMEP argued that giving such strong protection to voluntarily disclosed information would result in industry and government conspiring to keep information secret through voluntary submission of information which agencies would otherwise be able to mandate disclosure of in order to fulfill their missions.

The court held that this possibility was irrelevant because FOIA does not require maximization of information that can be made available to the public. It further held that “So long as that information is provided voluntarily, and so long as it is of a kind that [the Institute for Nuclear Power Operations] customarily withholds from the public, it must be treated as confidential.”

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124 Id. at 873.
125 See id. at 876-77 (discussing adoption of the Nat’l Parks test by seven other circuit courts, rejection by none, and adoption by Congress in the Government in the Sunshine Act).
126 See id. at 879 (stating court’s belief about how ruling would have affected previous cases). As a D.C. Circuit case, Critical Mass III is technically not binding precedent nationwide, but might as well be because almost all federal agencies are based in the District of Columbia. See Bureau of Labor Statistics, Career Guide to Industries, 2010-11 Edition, U.S. DEPARTMENT OF LABOR, archived at www.webcitation.org/6381O3BIW (providing information on the federal agencies based in D.C.).
127 See Critical Mass III, 975 F.2d at 879 (addressing the court’s reasons for deviating from the old test).
128 See id. at 880 (analyzing assertions in appellant’s brief).
129 See id. at 879 (dismissing argument that its ruling would allow agencies and regulated industries to work together to conceal information that would otherwise be made public).
130 Id. at 880.
IV. Conflict Between Monsanto and Critical Mass III

A. Monsanto

The Supreme Court’s key holding in Monsanto was that trade secrets are a property right as long as they are protected by a “reasonable investment-backed expectation” of secrecy.

1. When disclosure to the public is not a taking

Disclosure to the public was a taking in Monsanto when the trade secret owner had no opportunity to protect its secrets. Pesticide manufacturers were promised confidentiality for trade secrets they submitted to the EPA until Congress changed the rules. However, voluntary disclosures are unlikely to qualify as a taking, “as long as [the trade secret owner] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest.”

The plaintiff argued for a broader application of the Takings Clause, claiming that even conditioning a government benefit (the right to sell pesticides in the US) on the sacrifice of a trade secret, as required by the post-1978 law, was unconstitutional. The Court disagreed, holding that the plaintiff had not challenged, and could not successfully challenge, the government’s authority to regulate pesticides.

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131 467 U.S. 986.
132 See id. at 1011 (holding plaintiff trade secret owner had a property right to its trade secrets).
133 See id. at 1010-11 (comparing the 1972-1978 statutory scheme, which gave pesticide manufacturers explicit assurance that confidential data submitted to the EPA would not be publicly disclosed, with the post-1978 statutory scheme, where confidential data was explicitly not protected, and the pre-1972 scheme, where any protection was ambiguous).
134 See id. (comparing the same statutory schemes).
135 Id. at 1007.
136 See id. (summarizing Monsanto’s argument).
137 See Monsanto, 467 U.S. at 1007 (describing such restrictions as “the burdens we all must bear in exchange for ‘the advantage of living and doing business in a civilized community,’” and noting that the plaintiff continued to sub-
2. What is a voluntary disclosure?

Two distinct types of voluntary disclosures are worth distinguishing from one another for this analysis.

a. Disclosure required in order to obtain rights the trade secret owner would not otherwise have

The Monsanto plaintiff presents the classic case of this type of voluntary disclosure, with its post-1978 disclosures and, according to the Court, its pre-1972 disclosures. The 1978 statute clearly established that the EPA could disclose data in its possession to the public under certain conditions that would be outside the manufacturer’s control, and that disclosure of health and safety data to the EPA was mandatory for anyone desiring to sell pesticides in the United States. The Court held that a pesticide manufacturer accepted this tradeoff when it chose to apply for a registration that would allow it to sell pesticides in the U.S. The “economic advantages of a registration” were not a pre-existing property right, but a benefit given subject to conditions, including the possible loss of trade secret rights.

b. Disclosure not traded for new rights

Trade secret owners may sometimes share information with the government without any explicit quid pro quo. The general policy of the government is to promote such disclosure, because it may serve various governmental interests, as discussed.

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138 See id. at 1006-07 (establishing the Court’s basis for treating the 1972-78 disclosures differently from the others).
139 See id. at 1006 (discussing the statute).
140 See id. at 1007 (holding plaintiff gave up its trade secret rights by submitting data).
141 See id. (discussing the trade off of rights).
below.\textsuperscript{142} \textit{Monsanto} did not address voluntary disclosures of this sort.\textsuperscript{143} As they are purely voluntary, they implicate the Takings Clause even less than \textit{Monsanto}-type disclosures.\textsuperscript{144} Nevertheless, it should be noted that where secrecy has been promised, and there is no reason for doubting the government’s ability to provide secrecy at the time the trade secrets are disclosed to the government, the “reasonable investment-backed expectation” test would arguably protect trade secrets disclosed with no quid pro quo the same as it would protect any others.\textsuperscript{145} Provided trade secret owners are forewarned that their trade secrets may be lost by disclosure, the government is not restricted from disclosing their trade secrets.\textsuperscript{146}

\textbf{B. Critical Mass III}\textsuperscript{147}

In \textit{Critical Mass III}, a citizens’ group sued the Nuclear Regulatory Commission (NRC) for the release of nuclear safety data that an industry group had provided to the NRC voluntarily under the condition that it be kept secret.\textsuperscript{148} The D.C. Circuit declined, citing the government’s right to keep trade secrets secret based on a governmental interest in promoting voluntary disclosure.\textsuperscript{149} The court found that “financial or commercial information provided to the Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was ob-

\textsuperscript{142} See \textit{Critical Mass III}, 975 F.2d at 878 (providing the D.C. Circuit’s discussion of the governmental interests affected by the voluntariness of disclosure).

\textsuperscript{143} See \textit{Monsanto}, 467 U.S. at 1007 (addressing voluntary disclosures which involve a tradeoff of rights but not those which are purely voluntary).

\textsuperscript{144} See \textit{id.} (noting certain voluntary disclosures).

\textsuperscript{145} Cf. \textit{Monsanto}, 467 U.S. at 1011 (discussing expectation of secrecy).

\textsuperscript{146} See \textit{id}. at 1008-10 (stating that if there is not express guarantee of confidentiality, then trade secret owners do not have a reasonable investment-backed expectation of non-disclosure).

\textsuperscript{147} 975 F.2d 871.

\textsuperscript{148} See \textit{id}. at 874 (summarizing the case).

\textsuperscript{149} See \textit{id}. at 879 (defending government’s right to keep trade secrets confidential).
Had the court simply followed Monsanto, and held that the Institute for Nuclear Power Operations had a property right in its trade secrets by virtue of a reasonable investment-backed expectation of secrecy at the time the data was submitted, this case would have been fairly unremarkable, but it based its holding on policy grounds with no basis in statute. The “governmental interest” rationale also had no basis in fact, because the NRC had the ability to compel disclosure of all of the information at issue in the case, as pointed out by the dissent.

Critical Mass III reached the right result through the wrong reasoning. Because the reasoning was so flawed, it must be taken as dicta. Trade secrets disclosed to the government voluntarily can still be protected, but not necessarily under the conditions one would expect if the reasoning in Critical Mass III had been valid. Under Monsanto’s reasoning, unauthorized disclosure of trade secret information disclosed to the government voluntarily under condition of continued secrecy would present the same Takings Clause problem as information the trade secret owner was compelled to give up, due to the “reasonable, investment-backed expectation” test. Because there is currently no consistent federal statutory definition of trade secret, the Monsanto test, as the leading judicial decision on point, defines the property rights a trade secret owner has under trade secret law, along with D.C. Circuit precedent and state law where applicable.

150 Id.
151 See id at 879-80 (stating public policy grounds for holding while observing that neither FOIA nor stare decisis precludes such a holding).
152 See id. at 885 (Ginsburg., dissenting) (noting that the FOIA request was intended to “advance public understanding”).
154 Compare Monsanto, 467 U.S. at 1007 (recognizing legitimate voluntary disclosures), with Critical Mass III, 975 F.2d at 880 (limiting circumstances in which voluntarily disclosed information is subject to FOIA requests).
155 See Monsanto, 467 U.S. at 1011 (laying out “reasonable, investment-backed expectation” test).
156 See id. (discussing when a trade secret owner has property rights). See also Pub. Citizen Health Res. Grp. v. Food & Drug Admin., 704 F.2d 1280, 1288 (D.C.
In *Critical Mass III*, the trade secret owner submitted its data under a promise of secrecy from the government, so the court could have protected the trade secret without changing the law, by following *Monsanto*. The *Monsanto* court spent a lot of time on the mandatory versus non-mandatory nature of the initial disclosure, but the "reasonable, investment-backed expectation" test, and the particular way it decided which disclosures were "mandatory" and which ones were not, indicate that the element of surprise is really the key issue.

What kind of situation may arise where trade secret owners would have different rights under *Monsanto* than under *Critical Mass III*? The most significant is probably the situation where the government’s legal ability to reveal the information is ambiguous, as with the pre-1972 disclosures in *Monsanto*. Before 1972, no statute authorized disclosure of trade secret information submitted to the EPA, and long-standing agency practice did not permit disclosure. In her dissent, Justice O’Connor interpreted this silence, combined with the Trade Secrets Act, as unambiguously prohibiting public disclosure of pesticide health and safety data submitted to the EPA. Justice O’Connor’s interpretation of the silence did not win the day, but it does indicate that trade secret owners may reasonably have considered continued secrecy of data submitted to the government to be significantly more likely

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157 See *Critical Mass III*, 975 F.2d at 872 (stating that the safety reports in question had been given to the government voluntarily on the understanding that they would be kept secret).

158 See *Monsanto*, 467 U.S. at 1011 (providing the test for deciding similar cases in the future).

159 See id. at 1008 (stating "...FIFRA was silent with respect to EPA’s authorized use and disclosure of data submitted to it in connection with an application for registration").

160 See id. at 1021 (O’Connor, J., concurring in part and dissenting in part) (arguing that pre-1972 data met the “reasonable investment-backed expectation” test).

161 See id. at 1022 (interpreting silence as deference to other federal statutes).
than not. Even when public disclosure was highly unlikely, the fact that it was not explicitly, unambiguously prohibited meant that trade secret owners did not have any reasonable, investment-backed expectation of secrecy, and had no legal right to stop the government from publicizing it. It was therefore not protected by FOIA Exemption 4.

Under *Critical Mass III*, the pre-1972 data submissions in *Monsanto* would not have been protected, but could have been if the facts had been only slightly different. The *Critical Mass III* court defined “voluntary” differently than the *Monsanto* court. In *Critical Mass III*, data submission would have been “compelled” if the NRC had required it as a condition on the continued right to operate a nuclear plant. It would then have been subject to public disclosure. Voluntarily submitted data was not subject to public disclosure, due to the governmental interest in being able to get access to information necessary for making decisions, and especially the need for candor, accuracy, and timeliness. If confidential information necessary to government decision-making had been submitted voluntarily under a legal cloud regarding public disclosure, similar to the pre-1972 FIFRA, the gov-

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162 See id. at 1023 (indicating likelihood of continued secrecy for trade secret owners).
163 See id. at 1008 (noting that the pre-1972 law was unclear).
164 See Freedom of Information Act, 5 U.S.C. § 552(b)(4) (exempting trade secrets and other “privileged or confidential commercial or financial information” from public disclosure, but not non-privileged commercial information).
165 Compare *Critical Mass III*, 975 F.2d at 874 (stating NRC regulated nuclear power plants and could “compel” their owners to submit safety reports to NRC), with *Monsanto*, 467 U.S. at 1007 (stating that a “voluntary submission . . . in exchange for the economic advantages of a registration” was not a taking, where submission was a requirement if the plaintiff wanted to sell its product in the United States).
166 See *Critical Mass III*, 975 F.2d at 874 (claiming NRC could “compel” nuclear plant owners to submit safety reports).
167 See id. at 878 (pointing out that governmental interests are not as likely to be harmed by disclosure to the public when the government has clear discretion to compel disclosure to itself, as was the case here).
168 See id. at 874 (discussing reasons voluntary disclosure may be preferable to compelled disclosure).
ernment would have had exactly the same interest in access to it as it had to the information in *Critical Mass III*. But according to *Monsanto*, the complete voluntariness of the disclosure to the government would eliminate any property right in the confidential information and subject it to a FOIA request.

### C. Possible Solutions

1. **Offering rewards for disclosure/penalties for nondisclosure**

One possibility for promoting disclosure to the government, in spite of the risk of revelation to the public, would be to change the relative costs of disclosure vs. non-disclosure through a punishment/reward system. This is essentially the nature of the type of disclosure *Monsanto* considers voluntary and *Critical Mass III* considers compelled. For these semi-voluntary disclosures, the government is free to (and under FOIA, may be required to) disclose the information to the public, provided that trade secret owners are not told their secrets will be protected if submitted. Regulated companies can either comply or stop doing business in the regulated industry in the United States.

Government generally has no problem getting the information it needs even if it may be disclosed to the public later. Accuracy and timeliness may actually be enhanced, contrary to the

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169 *See id.* (discussing governmental interest test, which focuses on the government's ability to get access to the information it needs).

170 *See Monsanto*, 467 U.S. at 1007 (establishing that voluntary disclosure presents no Takings Clause issue).

171 *See id.* (stating that a “voluntary submission ... in exchange for the economic advantages of a registration” was not a taking where registration was a requirement if the plaintiff wanted to sell its product in the United States, and further noting that if the plaintiff continued to submit data it would have preferred to protect as a trade secret even after the 1978 statutory changes which firmly established the government's right to disclose data submitted to the EPA in connection with an application for registration).

172 *See id.* (holding the government could disclose data submitted in exchange for economic advantages).

173 *See id.* (discussing how Monsanto will bear the burden of disclosure if it is to market pesticides in the U.S.).
assertions in *Critical Mass III*, while candor may be an issue.\textsuperscript{174} But regulations may be able to address lack of candor.\textsuperscript{175} By accepting voluntary submission the NRC may actually have undermined the governmental interest in candor.\textsuperscript{176} Even assuming INPO was honest in all of the data it submitted, other data may have been left out, which NRC would have been able to compel if it had gone through the regulatory process.\textsuperscript{177} Public disclosure has an added benefit in the modern world which it lacked at the time of *Critical Mass III*: most Americans have internet access, and anyone who wants to read through an online database and play investigative reporter can do so.\textsuperscript{178} If a company has lied to the government, an enterprising citizen journalist may discover the dishonesty which overworked regulators have failed to discover.\textsuperscript{179}

The competitive position of companies which disclose their trade secrets to the government is a trickier issue because it is really multiple issues. Some confidential information involves indisputably legitimate trade secrets, such as secret manufacturing processes or formulas. The trade secret owner would be harmed by disclosure of this information, and the general public

\textsuperscript{174}Contra *Critical Mass III*, 975 F.2d at 874 (stating that voluntarily disclosed data is likely to be more reliable).

\textsuperscript{175}See *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 830 F.2d 278, 286 (D.C. Cir. 1987) [hereinafter *Critical Mass I*] (discussing that the agency is required to resolve candor issues by specifying how certain types of information would be deprived in the future).

\textsuperscript{176}Cf. id. at 283 (holding it was unclear that governmental interests would be harmed by compelling disclosure of safety reports).

\textsuperscript{177}Cf. id. at 283 n.21 (quoting plaintiff’s brief, which points to the reason the voluntary reports may be less than 100% candid: “the reports are designed to convince the Commission that the nuclear industry is adequately addressing safety problems and that the Commission need not further tighten its regulatory grip, as suggested by the [Presidential] Commission [that investigated the Three Mile Island accident]”).

\textsuperscript{178}See Miniwatts Marketing Group, *Top 20 Countries With the Highest Number of Internet Users*, INTERNET WORLD STATS, archived at www.webcitation.org/66cOz6MqH (stating 78.2% of Americans have internet access).

\textsuperscript{179}See, e.g., PROPUBLICA, archived at http://www.webcitation.org/6CtQw94LR (providing an example of an online news source focused on investigative journalism capable of exposing governmental dishonesty).
does not need to know it as long as the government can ensure there are no health or safety concerns.\textsuperscript{180} Protection of this kind of information has a strong policy basis, and is presumably what Congress meant to protect when it expressed concern for trade secret owners’ competitive positions.\textsuperscript{181} Legitimate trade secrets would generally benefit more from the government not disclosing them to the public and there is a valid reason for protecting them.

Trade secrets that consist of potentially embarrassing information are a harder case. If a nuclear plant is unsafe, the public, especially in the area of the plant, has a right to know.\textsuperscript{182} This kind of information may very well meet all the criteria for trade secret protection, but if the government can mandate disclosure and take advantage of that disclosure to warn the public, it should do so. Government-industry collusion to cover up embarrassing information, by disclosing voluntarily in exchange for secrecy, when the government otherwise would have been able to warn the public, is exactly the problem the Critical Mass III plaintiffs warned about.\textsuperscript{183} It is the kind of corrupt government FOIA was meant to protect against.\textsuperscript{184} This aspect of the Critical Mass III decision is similar to the earlier prohibition on judicial review in its sweeping undermining of the statute’s intended purpose.\textsuperscript{185} The only limit on what industry and regulators can conspire to

\textsuperscript{180} See Nat’l Parks, 498 F.2d at 768 (protecting individuals who submit data to government agencies from competitive disadvantages that would result from its publication).

\textsuperscript{181} See id. at 769 (stating that Congress gave no explicit reason for the trade secret exemption, but a witness complained about the risk of disclosure of Rural Electrification Administration borrowers’ trade secrets due to the REA’s extensive reporting requirements, and a member of Congress assured the witness that issue was addressed in one of the exemptions).

\textsuperscript{182} See 5 U.S.C. § 552(a)(1)(A) (requiring government agencies to establish procedures to comply with the public’s request for information from them regarding their field of expertise).

\textsuperscript{183} See Critical Mass III, 975 F.2d at 880 (discussing risk of government-industry conspiracy).

\textsuperscript{184} See Veto Battle, supra note 67 (discussing role of Watergate scandal in influencing Congress to strengthen FOIA).

\textsuperscript{185} Cf. Veto Battle, supra note 67 (elaborating on the abuses resulting from the judiciary’s near-total inability to question executive decisions on FOIA).
hide is that imposed by specific statutes which may require disclosure; anything else can be hidden.

2. Penalties for FOIA noncompliance

Creating real penalties for FOIA non-compliance would bring about a better balance between protecting trade secrets and promoting government transparency. Government employees would no longer have an incentive to reflexively protect “trade secrets” which the government may actually be obligated to disclose under a proper reading of the law. However, criminal penalties would bring their own set of problems, as the Arkansas situation indicates. Even if well-written, criminal penalties would place government employees dealing with close cases in the untenable position of risking prison time for any decision they made. One way to address the Catch-22 situation would be to create a good faith standard. Another would be to reduce § 1905 penalties to the same level as FOIA penalties: allow only for internal disciplinary procedures, based on a finding that the employee acted arbitrarily or capriciously.

However, any lowering of trade secret disclosure penalties would have to be limited to the FOIA context. Federal employees who exchange a private entity’s trade secrets for a job at a competitor may not care about internal discipline once they have a firm offer elsewhere and are entirely beyond the reach of the formerly employing agency’s disciplinary mechanisms once they leave. Balancing the incentives for disclosure where disclosure is proper against the incentives for non-disclosure where disclosure is improper is not easy, but it is necessary if government transparency is to mean anything.

3. Creating a federal definition of trade secret

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187 See Lyon, supra note 83 (describing a ruling that the state FOIA is constitutionally vague).
Creating a federal statutory definition of trade secret, applicable for all federal purposes where trade secrets are at issue, and defining when trade secret rights apply and when they do not, would resolve some of the confusion in the law. Agencies would have a better idea of what they can and cannot disclose. Possible trade secret owners would have more certainty about the risks of submitting information to the government. Certainty would increase willingness to disclose information and eliminate Takings Clause issues. Public disclosure would be enhanced because public employees would not face as many closes cases and would be able to obey FOIA in situations where, at present, they should release information but choose not to due to the possibility that something is a trade secret.

Specifying when the revelation of a valid trade secret is a crime would also remove some of the current perverse incentives. The Trade Secrets Act could reasonably have been interpreted as an anti-industrial espionage statute instead of being given the broad interpretation it has. Legislation clarifying that as its true purpose would allow agencies to comply with FOIA without subjecting their employees to the risk of prosecution for making the wrong decision.

V. Conclusion

The Critical Mass III court could have reached the same result by following the Monsanto court’s reasoning. Instead, it delivered an opinion which conflicted with Monsanto in key respects, and is therefore invalid as to those issues. Under Monsanto, any public disclosure of trade secrets by the government is a taking, unless the government gave the trade secret owner the opportunity to prevent it. But under Critical Mass III, information the government compels a trade secret owner to dis-

189 See Monsanto, 467 U.S. at 1005 (establishing test for when disclosure of a trade secret is a taking).
190 See id. at 1008 (holding Trade Secrets Act applicable to all government employee disclosures of trade secrets, even when authorized by agency head).
close is more likely to wind up in the hands of the public than information submitted voluntarily. Under the reasoning of *Critical Mass III*, voluntary submission is almost a complete bar to public disclosure, which creates a more significant weakening of FOIA than is generally recognized. Several statutory clarifications are suggested to restore FOIA to the level of strength Congress intended.