

of information deemed to be proprietary.

C. Document Return

2. *Comment.* Some commenters urged that, to protect proprietary information adequately, the NRC should implement presubmission review procedures during which a document would not be considered an "agency record" under the FOIA. The purpose of the procedure would be to allow submitters an absolute right to withdraw documents for which proprietary protection is denied during the "presubmission" period. One commenter requested clarification of the return provision to indicate that information would not be returned automatically if a withholding request is denied, but may be returned upon request. This commenter also wished to see the procedures for supplementing information pursuant to a potential denial of proprietary treatment and for the negotiation process on the matter.

Response. These comments seek a period of delay before a submitted document would have legal status as an agency record. The scheme suggested by the comments would allow documents to be tendered to the Commission on an informal basis along with a withholding request, pending a Commission determination on whether to grant or deny the withholding request. Then, should the Commission decide that the submitted information would not be withheld, the submitter could exercise an absolute right to withdraw the information, thereby avoiding any possibility of document capture (and possible release) under the FOIA.

The Commission finds this suggested approach to be legally flawed. A document becomes an "agency record" subject to capture under the FOIA if: (1) It is created or obtained by the agency; and (2) it is under the control of the agency at the time of an FOIA request. *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989). According to the Supreme Court, "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.*, 492 U.S. at 145. In this context, "control" is a broad concept, and exists at the moment the agency gains possession of documents submitted in the normal course of agency business. Therefore, the Commission does not believe that establishing presubmission review procedures would produce the commenter's desired legal effect of forestalling a document's becoming an agency record subject to capture under the FOIA.

Moreover, if presubmission procedures were seen as an attempt to evade or circumvent FOIA, the Commission would not expect them to survive judicial scrutiny. At least one court has held that an agency may not exclude documents from the legal ambit of the FOIA through presubmission procedures. See *Teich v. FDA*, 751 F. Supp. 243 (D.D.C. 1990). In fact, the court discredited procedures similar to those proposed by the commenter, stating that "presubmission review is nothing more than an attempt to get around the FOIA." *Id.* at 248.

While the Commission is not prepared to institute document presubmission procedures, commenter's concerns are mitigated by case law, which in recent years, has broadened the definition of what constitutes proprietary information. Additionally, the Commission historically has worked closely with submitters to negotiate a version acceptable for public release for information initially claimed to be proprietary but upon which there is ultimate mutual agreement that proprietary treatment is not appropriate. Indeed, we reiterate that the NRC has rarely, if ever, publicly released purportedly proprietary information over the objection of a submitter, and such a release only would be undertaken after considerable thought and discourse between the parties. Thus, the Commission is not revising its regulations to provide for presubmission procedures.

The commenter is correct in that the proposed rule does not call for automatic return of documents denied proprietary status. Commission policy is to return a document only upon request, subject to the document return exceptions. The rule neither addresses the negotiation process for obtaining the grant of a withholding request, nor how submittal of supplemental supporting documentation in support of the proprietary claim fits into the scheme. It is unclear that singling out this aspect of the administrative process for elaboration would be helpful. It would entail a fuller description than the other parts of the rule. This is viewed as unnecessary and potentially too limiting to be useful, and our regulations customarily do not go into that level of administrative detail.

3. *Comment.* One commenter asserted that the provisions for determining what constitutes proprietary information make no distinction between documents containing proprietary information that the Commission requires applicants, licensees, or others to submit, which are subject to the disclosure criteria set forth in *National Parks & Conservation*

Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974), and those that are voluntarily submitted, which are subject to the disclosure criteria set forth in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992). A commenter suggested that the rule be revised to distinguish between voluntary and mandatory submittals to reflect the dichotomy in standards applied to the proprietary determination for these documents.

Response. FOIA exemption 4 authorizes agencies to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Until the *Critical Mass* case, the test for whether information could be withheld as confidential under exemption 4 was two-pronged: disclosure had to be likely either to impair the Government's ability to obtain information in the future or to cause substantial harm to the competitive position of the submitter. *National Parks & Conservation Association v. Morton*, 498 F. 2d 765 (D.C. Cir. 1974). In *Critical Mass*, the court established a new and broader standard of categorical protection for information voluntarily submitted to an agency. For such information, the court found that there is a governmental interest to be protected, namely that of maintaining the continued and full availability of the information to the agency. In addition, the court held that the exemption also recognizes the submitter's interest in protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained'." *Critical Mass*, 975 F.2d at 878, citing *Sterling Drug, Inc. v. FTC*, 450 F. 2d 698, 709 (D.C. Cir. 1971). Thus, the court found that there was broad protection for voluntarily submitted information, provided it is not customarily disclosed to the public by the submitter.

Currently, § 2.790 does not explicitly distinguish between voluntary and mandatory submittals. Instead, the Commission's rules provide that in determining whether a submittal is proprietary, a number of factors are considered. In the Commission's view, this approach allows for maximum flexibility in accommodating the continually evolving legal standards governing the classification of proprietary information. Explicitly defining specific standards for voluntary submittals and mandatory submittals in the text of the final rule would remove this flexibility and potentially require revisions to the rule as judicial case law