their reprehensible actions have only served to strengthen the rational majority opposing them.

What the Red Brigades seek is the destruction of all organized political parties in Italy. What they may promote, instead, is a working accommodation between the Christian Democrats and the Communist Party of Italy. Aldo Moro was active in pressing for gradual accommodation between the two parties. It is a sad irony that his death may very well be a factor in moving this process forward.●

UGANDAN COFFEE BOYCOTT

● Mr. WEICKER. Mr. President, on Wednesday, three U.S. corporations took a step of principle and courage. Procter and Gamble, General Foods, and Nestlé, our largest coffee producers, told Idi Amin of Uganda to go to hell.

Their decision to stop purchasing Ugandan coffee is a victory both for the principles on which our Nation stands and for the oppressed people of Uganda. Their commitment to spurn Amin's cash crop, the economic and political life blood of his government, is an admirable response to his abhorrent regime.

Mr. President, U.S. Government assistance to Uganda ended in 1973, when diplomatic relations were severed in protest of Amin's genocidal policies. Investigation by Members of Congress over the last year has uncovered the substantial support provided Amin by U.S. commercial trade. Coffee sales to the United States alone brings hundreds of millions of dollars of hard currency into the coffers of the Ugandan Government. Coffee income maintains and equips the mercenary army which daily terrorizes the Ugandan people. U.S. exports of communications equipment and luxury goods have been employed to organize field operations of the government and to buy the loyalty of Amin's lieutenants.

In recognition of this strategic trade, I introduced legislation in the Senate (S. 2412, S. 2413, S. 2414) to cut off commercial relations with Uganda. These efforts and those of Congressman PEASE in the House have been opposed by the Carter administration, in spite of its heralded human rights policy.

Mr. President, Procter and Gamble, General Foods, and Nestle, in a voluntary act of economic sacrifice, have responded in a very concrete and effective manner to the human rights violations in Uganda. In the process, they have made a compelling statement about corporate responsibility and the role of American economic power around the world.

Following the lead of these corporations, the President and the Congress should quickly enact a total embargo of tarde against Uganda, bringing the full force of American business and Government to bear against this heinous regime.●

PATENTABLE MATERIAL AND THE FREEDOM OF INFORMATION ACT

● Mr. NELSON. Mr. President, Government patent policy generates a substantial flow of information in connection with its outlays for research and development.

For example, as a result of its expenditures of about $100 billion for research and development from fiscal year 1970 through 1975, the Government received 52,996 invention disclosures.

Patent rights clauses in the Armed Services Procurement Regulations and Federal Procurement Regulations require a Government contractor to submit a complete technical disclosure of each invention conceived or first actually reduced to practice under the contract.

The definition covers any invention or discovery "which is or may be patentable under the laws of the United States of America or any foreign country."

In its study of Government patent policy, the Monopoly and Anticompetitive Activities Subcommittee of the Select Committee on Small Business has noted the substantial flow of preinvention information to the Department of Health, Education, and Welfare which is, nonetheless, claimed to involve patentable material.

From 1969 through 1974, roughly 100,000 grant applications and contract proposals were submitted to HEW. During that period, the Department estimates, universities filed patent applications on 329 inventions which were either generated or corroborated by HEW-funded grants and contracts.

The Freedom of Information Act was in effect throughout that period. On January 5, 1973, the Federal Advisory Committee Act went into effect, requiring that meetings of Federal advisory committees be open to the public but allowing certain meetings to be closed on the same grounds that the FOIA allows certain documents to be exempt from mandatory public disclosure.

Typically, the advisory committees of the National Institutes of Health that review grant applications and contract proposals for scientific and technical merit—commonly known as "peer review" committees—would close their meetings on grounds that the FOIA exemptions for trade secrets and invasion of personal privacy applied to the matters to be discussed.

As of early March 1977, NIH notices in the Federal Register announcing that a peer review panel meeting would be closed in accordance with the Federal Advisory Committee Act and exemptions 4 (trade secrets) and 6 (personal privacy) of the Freedom of Information Act customarily asserted:

> The (grant) applications contain information of a proprietary or confidential nature, including detailed research protocols, designs, and other technical information; financial data, such as salaries; and personal information concerning individuals associated with the applications.

However, on or about March 11, 1977, the eve of the effective date of the Government in the Sunshine Act, the wording of NIH notices changed. Here is an example from page 13603 of the Federal Register of March 11, 1977, which was meant to apply to meetings dealing with contract proposals and/or grant applications:

> These proposals and applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposals and applications.

Mr. President, I asked the Congressional Research Service to determine whether use of the phrase "patentable material" could be justified either by statutory law or by judicial interpretations of exemption 4. The CRS reply says in part:

> Patentable material is not automatically exempt; it must satisfy the criteria of Exemption Four and its judicial gloss.

However, it also acknowledges a frankly commercial aspect urged by commentator James T. O'Reilly. The reply was:

> A threshold consideration in determining the applicability of Exemption Four to research grant applications and proposals is the motivation of the researcher or organization. In the words of one commentator, "in the research area, the motive of the researcher to make his findings profitable in the commercial sense is considered a prerequisite to b(4) protection for the research."

I find that view somewhat bizarre. It raises the prospect of grant applications being judged by the commercial gleam in the applicant's eye, instead of their scientific and technical merit. Would the peer review system go cash-and-carry?

Also, it raises doubts about the use of institutional patent agreements—giving universities first option to own the rights to inventions resulting from Government-sponsored research and development—as an implement of Government patent policy. Could the 72 institutions having such agreements with HEW cite that fact on their grant applications as official recognition of the commercial potential of the proposed research.

Finally, there is the basic question of what is patentable. NIH sometimes receives different opinions from its advisers as to what is patentable, as do universities and researchers. It is by no means obvious, perhaps because inventions must be "unobvious" to qualify for patenting.

Mr. President, I ask that the analysis by CRS, consisting of two memorandums, be printed in the RECORD.

The material follows:

THE LIBRARY OF CONGRESS
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., May 8, 1978.

To: Senate Subcommittee on Monopoly and Anticompetitive Act.

From: American Law Division.

Subject: The Applicability of Exemption Four of the Government-In-the-Sunshine Act and the Freedom of Information Act to NIH Peer Review Meetings and Invention Disclosures Pursuant to Institutional Patent Agreements.

This memorandum will analyze the propriety of language used in meetings notices of the National Institutes of Health in light of the Government-in-the Sunshine Act and the applicability of the Freedom of Information Act to invention disclosures required by the provisions of the proposed Institutional Patent Agreement.

Meetings of the National Institutes of Health dealing with contract proposals and/or grant applications have been closed to the public on the basis of Exemption 4 of the Government-in-the Sunshine Act, 5 U.S.C. 552b(c)(4)(1976). The Federal Register Notices of such closures have stated:

"These proposals and applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the proposals and applications."

The question is the propriety of use of the phrase "patentable material" in the agency's justification for closing a meeting to the public. The starting point for analysis is the statutory language—which is identical to Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4),—and judicial interpretation of that language, which was intended by Congress to be imported into the Government-in-the Sunshine Act provision. See, H. Rept. 94-880, 94th Cong., 2d sess. at 10 (1976).

Exemption 4 of both Acts excepts from mandatory disclosure or openness "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Thus, three basic categories of information are exempt from disclosure: 1) trade secrets; 2) commercial information obtained from a person which is privileged or confidential; or, 3) financial information obtained from a person which is privileged or confidential. See *Getman* v. *NLRB*, 450 F. 2d 670 (D.C. Cir. 1971).

The first category, trade secrets, has not occasioned much litigation as it was the intent of Congress to adopt the traditional interpretations of the legal term of art. See, O'Reilly, *Federal Information Disclosure*, 14.06 (1977). A common definition is that of the 1938 Restatement of Torts, § 757:

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

See, *Kewanee Oil Company* v. *Bicron Corporation*, 416 U.S. 470, 474 (1974). A similar and frequently relied on definition is that given in *United States ex rel. Norwegian Nitrogen Prods. Co.* v. *United States Tariff Comm.*, 6 F 2d. 491, 495 (D.C. Cir. 1925), rev'd on other grounds, 274 U.S. 106 (1927):

"An unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities."

The other categories of information exempt from disclosure are commercial or financial information which is privileged or confidential. Commercial or financial information relates to the business affairs of a person. The interest in nondisclosure must be a commercial or trade interest. Thus, in *Washington Research Proj., Inc.* v. *Department of H.E.W.*, 504 F. 2d 238 (D.C. Cir. 1974) cert. denied, 421 U.S. 963 (1975), the court held that research grant applications submitted by scientists to H.E.W. were not exempt from disclosure because "[i]t is clear enough that a non-commercial scientists' research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce." 504 F. 2d at 244 (footnote omitted).

Once it is determined that commercial or financial information is involved, it must further be shown that the information is "privileged or confidential". Privileged information refers to the traditional commonlaw privileges, such as doctor-patient, attorney-client, and has received little judicial attention. See, Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1065 (1975). For information to be "confidential", the test is "if disclosure of the information is likely to have either of the following effects: (1) to 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." *National Parks Conservation Association* v. *Morton*, 498 F. 2d 765, 767 (D.C. Cir. 1974), after remand, 547 F. 2d 673 (D.C. Cir. 1976).

Thus, to qualify for exemption under the Acts, the information must either be a trade secret, or, confidential commercial or financial information. Patentable material is not automatically exempt; it must satisfy the criteria of Exemption Four and its judicial gloss. The NIH notices propose to close meetings because they could reveal "confidential trade secrets or commercial property such as patentable material". Patentable material is used as an example of "commercial property". Commercial property which is privileged or confidential under the *National Parks* test is exempt from disclosure under Exemption Four. Thus, to the extent "patentable material" is congruent with confidential (under *National Parks*) commercial information, it is descriptive of a class of information which may be withheld under the FOIA. Of course, if the patentable material meets the criteria of a trade secret, it is also exempt from disclosure.

Grant applications and research protocols may well contain information which is patentable and has a "trade or commercial character". *Washington Research Project* did not preclude, even in the case of information submitted by non-profit organizations, the possibility of commercial activity entitling the information to the protection of Exemption Four. The court pointed out that it was the agency's burden to demonstrate the "trade or commercial character of the research design information" and that it failed to introduce "a single fact relating to the commercial character of any specific research project." 504 F. 2d at 244-5 n. 6. A threshold consideration in determining the applicability of Exemption Four to research grant applications and proposals is the motivation of the researcher or organization. In the words of one commentator, "in the research area, the motive of the researcher to make his findings profitable in the commercial sense is considered a prerequisite to b(4) protection for the research." O'Reilly, supra. § 14.07.

House Subcommittee hearings in 1977 on Exemption 4 did not examine the problem of research grant and contract proposals in depth. The Subcommittee did receive, however, communications for the record from various individuals and groups expressing concern that Exemption 4 did not provide sufficient protection for the scientist and researcher seeking funds from the Federal Government to conduct his projects. See generally, Hearings on the Business Record Exemption of the Freedom of Information Act Before a Subcomm. of House Government Operations Comm., 95th Cong., 1st sess. 302-345 (1977). It was pointed out in some of the communications that the material submitted to the Government by potential grantees often contained patentable ideas of potential commercial value. *Id.*, 318.

Furthermore, many projects were used to generate income for further research and education and enhancement of the institution involved. *Id.*, 321. Researchers thus may have proprietary interests as well as pure research motivations. *Id.*, 318. Under such circumstances, information contained in grant or contract applications may qualify for protection under Exemption 4 of the FOIA and the Government-in-the-Sunshine Act, *Washington Research Proj., Inc.* v. *Department of HEW*, 504 F. 2d 238, 244-5 n. 6 (D.C. Cir. 1974) cert. denied 421 U.S. 963 (1975).

II

The second inquiry is whether invention disclosures made pursuant to the provisions of the Institutional Patent Agreement proposed for Government-wide use would be disclosable under Exemption 4 of the Freedom of Information Act.

Recent proposed amendments to federal procurement regulations would provide for the use of Institutional Patent Agreements in contracts with universities and nonprofit organizations. 43 Fed. Reg. 4424 (1978). Such agreements would permit those institutions, subject to certain conditions, to retain the rights to inventions made in the course of contracts with the Government. Proposed 41 C.F.R. 1-9. 107-4 (a)(6); 43 Fed. Reg. 4424 (1978). Pursuant to such Institutional Patent Agreements, the institution must furnish the government agency involved a "complete technical disclosure for each subject invention within 6 months after conception or first actual reduction to practice . . . [and] prior to any sale, public use, or publication of the invention known to the institution." The disclosure must be "sufficiently complete in technical detail to convey to one skilled in the art to which the invention pertains a clear understanding of the nature, purpose, operation, and, to the extent known, the physical, chemical, biological, or electrical characteristics of the invention." Interim and final reports listing inventions are also required. Proposed Institutional Patent Agreement, section (e); 43 Fed. Reg. 4425 (1978).

The Proposed Institutional Patent Agreement also contains the following disclosure provision:

"(3) The Institution agrees that the Government may duplicate and disclose Subject Invention dislosure and, subject to paragraph (k), all other reports and papers furnished or required to be furnished pursuant to this Agreement. However, if the Institution is to file a patent application on a Subject Invention, the Agency agrees, upon written request of the Institution, to use its best efforts to withhold publication of such invention disclosures until a patent application is filed thereon, but in no event shall the Government or its employees be liable for any publication thereof." 43 Fed. Reg. 4425.

Paragraph (k), referred to above, provides that institutions which administer their inventions must report on "the status of development and commercial use that is being made or intended to be made of each subject invention . . . and the steps that have been taken by the Institution to bring the invention to the point of practical application. . . . To the extent data or information supplied to this section is considered by a licensee to be privileged or confidential and is so marked, the Agency agrees that, to the extent permitted by law, it will not disclose such information to persons outside the Government." 43 Fed. Reg. 4426-7.

Thus, the Institution, as a condition to the Institutional Patent Agreement, agrees to disclosure of invention disclosures made pursuant to section (e) of the Proposed Agreement, at least prior to a patient application being made. Once a patent application is made, the information contained in the application is protected by statute, 35 U.S.C. 122 (1970), and would be exempt under Exemption Three of the FOIA. See, *Irons* v. *Gottschalk*, 548 F. 2d 992, 994 n. 3. (D.C. Cir. 1976). In the case where the institution intends to file a patent application, the Agency agrees "to use its best efforts to withhold publication of such invention disclosures until a patent application is filed thereon . . ." As far as other reports and papers furnished pursuant to the Agreement are concerned, the institution may designate those it deems "privileged or confidential" and the Agency agrees, "to the extent permitted by law", not to disclose such information.

Throughout the procedures by which an institution (including universities and nonprofit organizations) enters into an Institutional Patient Agreement and develops a patented invention pursuant to Government grant or contract commercial use and mar-

keting of the invention is a primary consideration. Prior to qualifying for an Institutional Patent Agreement, a nonprofit organization must supply the contracting or granting agency with, among other things, a description of "the plans and intentions of the organization to bring inventions to the market place to which it retains title, including a description of the efforts typically undertaken by the organization to license its inventions." Proposed 41 C.F.R. 1-9.109-7 (a)(8); 43 Fed. Reg. 4427. Before entering into an Agreement, the nonprofit organization must have a technology transfer program which shall include an "active and effective promotional program for the licensing and marketing of inventions". Proposed 41 C.F.R. 1-9.109-7(b)(5); 43 Fed. Reg. 4428. Furthermore, under existing regulations, contracts having Patent Rights clauses are to be administered so that "[e]xpeditious commercial utilization of such inventions is achieved." 41 C.F.R. 1-9.109-1(e) (1977). See also, Proposed Institutional Patent Agreement, section (i), 43 Fed. Reg. 4426.

Thus, an important goal of inventions which are disclosed pursuant to the Institutional Patent Agreement would seem to be commercial marketing. The marketing of such inventions and receipt of income therefrom is to be accomplished by nonprofit organizations. In the words of the court in *Washington Research Project*, such institutions would, therefore, seem to have "a commercial or trade interest" in the invention and information relating to it. 504 F. 2d at 244 n. 6. Under such circumstances, the information may be exempt under Exemption 4.

In summary, with respect to invention disclosures for which no patent application is to be filed by the institution, the institution waives its rights to nondisclosure under the terms of the Institutional Patent Agreement. Proposed Agreement, Section (e)(3); 43 Fed. Reg. 4425. Once a patent application is filed, the information would appear to be protected by 35 U.S.C. 122. *Irons* v. *Gottschalk*, supra. It is those invention disclosures which the institution intends to patent but has not yet filed an application, to which Exemption 4 would be applied in determining disclosure. The criteria of trade or commercial character and confidentiality outlined in Part One would be the standards governing access. This would not be creating a new class of information that could be withheld from the public; it would be applying the general terms of the FOIA to a specific piece of information.

We hope the foregoing is responsive to your inquiries. If further analysis is desired or additional questions arise, please contact us.

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., May 16, 1978.

To Senate Subcommittee on Monopoly and Anticompetitive Act. Attention: Gerald Sturges.

From American Law Division.

Subject Patentable Material and the FOIA.

This memorandum will expand on a conclusion of a prior memorandum of May 8 on the applicability of Exemption Four of the Government-In-the-Sunshine Act to certain NIH peer review meetings. Federal Register notices of closure of meetings of the National Institutes of Health dealing with contract proposals and/or grant applications state that the proposals and applications and the discussions could reveal "confidential trade secrets or commercial property such as patentable material . . ."

Trade secrets and confidential commercial information are exempt from disclosure under both the FOIA and the Sunshine Act. Therefore, "patentable material" must meet the criteria of either a trade secret or confidential commercial information to be exempt from mandatory disclosure. Such material alone cannot justify withholding or nondisclosure. The presence of a trade or commercial interest is necessary before Exemption Four applies.

Patents may be obtained in the absence of a commercial interest or use. The statutory requirements of a patent in 35 U.S.C. 101 do not include trade or commercial use or interest. To be patentable, a "process, machine, manufacture, or composition of matter" must be "useful." 35 U.S.C. 101. However, " 'commercial usefulness', i.e. progress in the development of a product to the extent that it is presently commercially salable in the market place, has never been a prerequisite for a reduction to practice and the subsequent patentability of any of the classes of patentable subject matter set forth in § 101 . . ." *Application of Anthony*, 414 F.2d 1383 (Ct. Cust. Pat. App. 1969). Furthermore, "it does not follow from the fact that a patent has never been put into commercial use, never been recognized by the trade, and its possessor received no royalty for its license, that the patent is lacking in those novel features which support in fact and in law the essential requirements of a valid patent." Deller's Walker on Patents, § 229 (1965).

Thus, as stated in our prior memorandum, patentable material must satisfy the requirements of either a trade secret or confidentiality and commercial use before it is subject to withholding. It is not per se exempt nor is it necessarily synonymous with confidential commercial property, as the language in the NIH notices seems to indicate. In that regard, the closure notices would seem to be overly broad since any "patentable material" which may be involved must also meet the specific criteria of Exemption Four in order to justify closure.●

OLDER AMERICANS MONTH

● Mr. CHURCH. Mr. President, one of the major demographic changes in our society is the "graying" of our population.

When our nation declared its independence in 1776, only about 2 percent of the total population was 65 or older—or one out of every 50 Americans.

By the year 1900, there were 3 million senior citizens, or one out of every 25 Americans.

The proportion grew steadily until 10 percent of our population was 65 or older in 1966.

And today, almost 11 percent of all Americans are older Americans, or one out of every nine persons in the United States.

The increasing number of older citizens represents a triumph which our Nation can be justly proud of.

But I think that it is also important to remember the words of President Kennedy:

> It is not enough for a great nation merely to have added new years to life—our objective must also be to add new life to those years.

President Kennedy also launched a tradition when he designated May as "Older Americans Month" in 1963 to call attention to the problems and challenges confronting aged and aging persons.

Subsequent Presidents have continued this practice.

President Carter recently issued a similar proclamation to focus the attention of our Nation and Congress on the elderly.

His words take on added meaning, because America is about to become a four-generation society.

It is important, therefore, that we direct our attention toward the social, economic, and other implications of this demographic change.

Mr. President, I commend the President's proclamation on "Older Americans Month" to Members of the Senate and ask that it be printed in the RECORD.

The proclamation follows:

OLDER AMERICANS MONTH, 1978

(By the President of the United States of America)

A PROCLAMATION

When the month of May was first set aside in 1963 in special tribute to our nation's citizens, there were fewer than eighteen million Americans over the age of sixty-five. Today, their number exceeds twenty-three million.

Older Americans are in invaluable source of talent, skills and experience. Their sacrifice and hard work in the past have brought us through wars and hard times, and kept our Nation faithful to the values and principles on which it was founded. They are our link with what has gone before, remembering the good things we are in constant danger of losing, as well as the bad things we have overcome, and how it was possible. They can help us understand the mistakes of the past so that we do not repeat them. They can help us gather strength and courage from the wisdom of the past to make a better future for our children.

Their skills and knowledge are important to our economy, and it is important to their lives and health that they be able to remain as self-reliant as possible through employment and other opportunities, and through necessary supportive services that enable them to live their later years in dignity and self-respect. Just as they must not be arbitrarily excluded from contributing to our society, they must not be asked to bear the burdens of society when they are no longer able.

These men and women are a vital part of this Nation. Like all Americans, they need comfortable and safe places to live, nutritious daily diets and adequate incomes and services to give them freedom to make choices. We all must work together to create these conditions in our communities.

Now, therefore, I, Jimmy Carter, President of the United States of America, do hereby designate the month of May as Older Americans Month and I ask public officials at all levels, community agencies, educators, the clergy, the communications media and each American to help make it possible for older Americans to enjoy their later years.

In Witness Whereof, I have hereunto set my hand this nineteenth day of April, in the year of our Lord nineteen hundred seventy-eight, and of the Independence of the United States of America the two hundred and second.

JIMMY CARTER.●

PATENTING LIFE

● Mr. NELSON. Mr. President, if forms of life can be patented, should recombinant DNA research inventions developed with the support of the Department of Health, Education, and Welfare be patentable by universities in the same way drugs and other campus discoveries are?

As part of its continuing study of Government patent policy, the Monopoly and Anticompetitive Activities Subcommittee of the Select Committee on Small