



UNITED STATES DEPARTMENT *of* JUSTICE

# Exemption 4



## *Text of Exemption 4*

Exemption 4 covers two categories of information:

- 1) Trade Secrets
- 2) Commercial or Financial Information  
Obtained from a Person and Privileged  
or Confidential

Collectively, these two categories are commonly referred to as Confidential Business Information or “CBI”



## *Purpose of Exemption 4*

The exemption protects the interests of **both** the government and the submitter/owner of the information.

- Encourages submitters to provide government with confidential information, that is accurate and reliable; and
- Provides assurances that the information will be safeguarded, protecting submitters from competitive disadvantage if disclosed.



## *Exemption 4 Challenges*

- Commercial sensitivity of the records may not be apparent to government personnel
- Decisions made on a case-by-case basis and are heavily dependent upon the facts
- Agency can be sued by requester or submitter



## *Trade Secrets*

### **Narrow definition:**

“a secret, commercially valuable plan, formula, process, or device that is used in making, preparing, compounding or processing of a trade commodity, and that can be said to be the end product of either innovation, or substantial effort.”\*

\* Public Citizen Health Research Group v. FDA,  
704 F.2d 1280, 1288 (D.C. Cir. 1983)



## *Trade Secrets*

Directly relates to the production or manufacturing process.

- Information relating to the end product (what features it has and how it performs) rather than the production process, is not a trade secret



# *Trade Secrets*

## *Location of Trade Secrets*

Expect to find Trade Secret Data in:

- Contracts
- Manufacturing Descriptions
- Schematics & Printed Circuits
- Product Formulas
- Software
- Quality control data & quality assurance procedures



## *Commercial or Financial Information*

Three part definition:

1. Commercial or financial info
2. Obtained “from a person”
3. Privileged or confidential

All three parts must be met

Most Exemption 4 litigation relates to  
“confidential” component of the definition



## *Commercial or Financial Information*

### **1. Commercial or Financial Information**

- Terms should be given their “ordinary meanings”
- Qualifies if submitter has a “commercial interest” in information

### **2. “Obtained From a Person”**

- Any entity (other than a federal agency)
- Agency inspections; summaries
- Prices arrived at through negotiation
- Exemption 5, commercial privilege



# *Commercial or Financial Information*

## 3. Privileged or Confidential

### Privilege

“Privileged”: Attorney-Client, Attorney Work Product, Deliberative Process



## *Commercial or Financial Information*

### 3. Privileged or Confidential

#### Confidential

In most judicial circuits, including D.C. Circuit, the definition of “confidential” hinges on the circumstances under which the information was received by the government



## *Required vs. Voluntary*

*“Required” = 2 part test:*

- 1) Legal authority to obtain information
  - Whether the submitter’s participation in a government program was voluntary is not the test.
  - Example: bidding on proposal
- 2) Whether the agency exercised its authority to require submission



## *Required Submissions*

“Required” information is protected as confidential *if release would cause any of the following:*

- A. **Impair the agency’s ability to obtain similar information in the future (the “impairment” prong)**



## *Required Submissions*

### **B. Likely cause substantial competitive harm to the person from whom the data was obtained (the “competitive harm” prong)**

- Competitive harm = affirmative use of information by competitors
- No balancing of interests. Public interest irrelevant
- Age of documents is not dispositive
- If information in public domain, no competitive harm



## *Required Submissions*

- C. Protects other governmental interests, such as compliance and program effectiveness (the “third prong”)
- Intrinsically valuable records. Owners retain proprietary rights, if a FOIA release would result in substantial loss of market value
  - Example: copyrighted videos, manuals, software



## *Impairment, Competitive Harm, and Third Prong Tests*

Referred to as National Parks test \*

\* National Parks & Conservation Association  
v. Morton, 498 F. 2d 765 (D.C. Cir. 1974)

In 2<sup>nd</sup> and 9<sup>th</sup> Circuits, only the National Parks test applies.



## *Voluntary Submissions*

“Voluntarily” submitted information is protected if the information “would customarily not be released to the public by the person from whom it was obtained”

Referred to as the *Critical Mass* test \*

\* Critical Mass Energy Project v. NRC, 975 F. 2d 871 (D.C. Cir. 1992)



## *Submitter Notice: Executive Order 12,600*

- Must advise the submitter that a FOIA request has been made if agency “has reason to believe” that records “arguably” contain information where disclosure “could reasonably be expected to cause substantial competitive harm”
- Solicit views as to whether disclosure would likely cause substantial competitive harm



## *Submitter Notice: Executive Order 12,600*

### *Submitter Notice Does Not Apply If:*

- Records have been released before, in an authorized manner
- Records are being withheld (denied)
- Disclosure is required by law, or by regulation promulgated subject to notice and comment



## *Submitter Notice: Executive Order 12,600*

- Provide copies of the requested records. You may include a copy of the FOIA request as well.
- Advise requesters to identify specifically (by page, line, column, paragraph, etc.) any portion of information they believe meets the requirements of Exemption 4.



## *Submitter Notice: Executive Order 12,600*

- Require submitter to provide detailed written justification as to how release would cause harm to their competitive position.
- Assertions that “all information was submitted in confidence and must be denied” are not adequate justification.
- Afford submitter a reasonable time period to present any specific written objections to release



## *FOIA Requester Notice*

Inform the FOIA requester that you must give the submitter of the data the opportunity to comment before the agency decides whether to release the information.



## *Notice of Intent to Disclose Letter*

- Evaluate submitter's comments, with assistance of agency's program personnel as necessary
- If submitter has not carried its burden of persuasion, prepare a detailed letter to submitter explaining why they are unconvincing
- Advise submitter that disclosure will be made on a specific date (not less than 10 business days from date of letter)



## *Trade Secrets Act*

### **18 U.S.C. § 1905**

Criminal statute that prohibits release of certain business information unless authorized by law (e.g., FOIA). In effect, it prevents agencies from making discretionary releases, of information falling within Exemption 4.