



Exemption 4

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."¹ This exemption is intended to protect the interests of both the government and submitters of information.² The exemption covers two distinct categories of information in federal agency records: (1) trade secrets; and (2) information that is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential.³

Trade Secrets

For the purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit has adopted a "common law" definition of the term "trade secret" that is narrower than the broad definition used in the Restatement of Torts.⁴ The D.C. Circuit's decision in Public Citizen Health Research Group v. FDA was a departure from what until then had been almost universally accepted by the courts – that a "trade secret" encompasses virtually any information that provides a competitive advantage. In Public Citizen Health Research Group v. FDA, a "trade secret" was more narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be

¹ [5 U.S.C. § 552\(b\)\(4\) \(2018\)](#).

² See Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (opining that "when Congress enacted FOIA it sought a 'workable balance' between disclosure and other governmental interests – interests that may include providing private parties with sufficient assurances about the treatment of their proprietary information so they will cooperate in federal programs and supply the government with information vital to its work").

³ See [5 U.S.C. § 552\(b\)\(4\)](#).

⁴ Compare Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1284 n.7, 1288 (D.C. Cir. 1983) (constructing "trade secret" definition that more closely aligns with legislative intent of FOIA), with Restatement (First) of Torts § 757 cmt. b (Am. L. Inst. 1939) (explaining that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it").

the end product of either innovation or substantial effort."⁵ This definition also incorporates a requirement that there be a "direct relationship" between the trade secret and the productive process.⁶

The Court of Appeals for the Tenth Circuit has expressly adopted the D.C. Circuit's narrower definition of the term "trade secret," finding it "more consistent with the policies behind the FOIA than the broad Restatement definition."⁷ In so doing, the Tenth Circuit noted that adoption of the broader Restatement definition "would render superfluous" the second category of Exemption 4 information "because there would be no category of information falling within the latter" category that would be "outside" the reach of the trade secret category.⁸ Like the D.C. Circuit, the Tenth Circuit was "reluctant to construe the FOIA in such a manner."⁹ In a later case, the Tenth Circuit declined to "address whether [it] should supplement" this narrower trade secret definition "to require a governmental showing that the documents in question are actually owned by the submitting entity or by any other party," finding that in the case before it, involving plans and specifications for an antique aircraft, the agency had shown a "corporate 'chain-of-ownership'" for the requested documents, leading from "the original owner and submitter" to the company currently claiming "trade secret" protection for them.¹⁰

⁵ 704 F.2d at 1288; see also Henson v. HHS, No. 14-0908, 2017 WL 1090815, at *5 (S.D. Ill. Mar. 23, 2017) (finding that Exemption 4 was "appropriate" to prevent disclosure of "raw material used in [a] manufacturing process[] [and] raw material used in [a] testing process," which "constitute[d] trade secrets"); Freeman v. Bureau of Land Mgmt., 526 F. Supp. 2d 1178, 1188-89 (D. Or. 2007) (concluding that trade secrets are not limited to processes "actually proven to be 'commercially valuable'"; rather, it was sufficient for plaintiff to show that his manufacturing process "may" have commercial value); Appleton v. FDA, 451 F. Supp. 2d 129, 142 & n.8 (D.D.C. 2006) (rejecting plaintiff's argument that trade secret, as defined in Public Citizen, requires "sole showing of 'innovation or substantial effort,'" and emphasizing that trade secret applies to information that "constitutes the 'end product of either innovation or substantial effort'" (quoting Pub. Citizen Health Rsch. Grp., 704 F.2d at 1288)).

⁶ Pub. Citizen Health Rsch. Grp., 704 F.2d at 1288; accord Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 150-51 (D.C. Cir. 2001) (reiterating the Public Citizen definition and emphasizing that it "narrowly cabins trade secrets to information relating to the 'productive process' itself").

⁷ Anderson v. HHS, 907 F.2d 936, 944 (10th Cir. 1990).

⁸ Id. (adopting narrower definition of trade secrets to ensure continued vitality of second category of Exemption 4 concerning "commercial or financial information obtained from a person that is privileged or confidential").

⁹ Id.

¹⁰ Herrick v. Garvey, 298 F.3d 1184, 1191 (10th Cir. 2002) (declaring that the agency "need not show" that "ownership of these particular documents was specifically mentioned and

Trade secret protection has been recognized for product manufacturing and design information,¹¹ but it has been denied for general information concerning a product's physical or performance characteristics and ingredient category information when this information was not sufficiently detailed to reveal proprietary details of the product formula.¹² It has also been denied for a "noncommercial scientist's research design."¹³ Moreover, one appellate court has concluded that "where the submitter or owner of

transferred" with each corporate succession because "such a requirement would be overly burdensome," and finding that the agency "need only show that there was a corporate successor that received the assets of the prior corporation").

¹¹ See, e.g., Rozema v. HHS, 167 F. Supp. 3d 324, 327 (N.D.N.Y. 2016) ("quantities of menthol contained in cigarettes 'by brand and by quantity in each brand and subbrand'"); Appleton, 451 F. Supp. 2d at 141 n.7 ("drug product manufacturing information, including manufacturing processes or drug chemical composition and specifications"); Herrick v. Garvey, 200 F. Supp. 2d 1321, 1326 (D. Wyo. 2000) ("technical blueprints depicting the design, materials, components, dimensions and geometry of" aircraft first manufactured in 1935 (quoting agency declaration)), aff'd, 298 F.3d 1184, 1190 n.3 (10th Cir. 2002) (noting requester's concession at oral argument that blueprints remained commercially valuable); Heeney v. FDA, No. 97-5461, 1999 WL 35136489, at *7 n.13 (C.D. Cal. Mar. 16, 1999) ("compliance testing" and "specification of the materials used in constructing" electrode catheter), aff'd, 7 F. App'x 770 (9th Cir. 2001); Citizens Comm'n on Hum. Rts v. FDA, No. 92-5313, 1993 WL 1610471, at *7 (C.D. Cal. May 10, 1993) ("information about how a pioneer drug product is formulated, chemically composed, manufactured, and quality controlled"), aff'd in part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995); Pac. Sky Supply, Inc. v. Dep't of the Air Force, No. 86-2044, 1987 WL 25456, at *1 (D.D.C. Nov. 20, 1987) (design drawings of airplane fuel pumps developed by private company and used by Air Force), modifying No. 86-2044, 1987 WL 18214 (D.D.C. Sept. 29, 1987); cf. Myers v. Williams, 819 F. Supp. 919, 921 (D. Or. 1993) (granting preliminary injunction to prevent FOIA requester from disclosing chemical formula trade secret information acquired through mistaken, but nonetheless, official FOIA release) (non-FOIA case).

¹² See Ctr. for Auto Safety, 244 F.3d at 151 (finding that airbag characteristics relating "only to the end product – what features an airbag has and how it performs – rather than to the production process" do not qualify as trade secrets); Freeman, 526 F. Supp. 2d at 1188 (determining that quantity and quality of ore reserve is not trade secret); Nw. Coal. for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201-02 (D.D.C. 1996) (ruling that "common names and Chemical Abstract System (CAS) numbers of the inert ingredients" contained in pesticide formulas do not disclose either inert ingredients' trade names or the pesticide product formula, and therefore do not qualify for Exemption 4 protection as trade secrets).

¹³ Physicians Comm. for Responsible Med. v. NIH, 326 F. Supp. 2d 19, 23 (D.D.C. 2004) (quoting Wash. Rsch. Project, Inc. v. HEW, 504 F.2d 238, 244-45 (D.C. Cir. 1974)) (explaining that noncommercial scientists engaged in research for a university are not generally engaged in trade or commerce and a "noncommercial scientist's research design is not literally a trade secret or item of commercial information").

documents held by the government grants the government permission to loan or release those documents to the public, those documents are no longer 'secret' for purposes of [trade secret protection under] Exemption 4" and so must be released.¹⁴

Commercial or Financial Information

If information does not qualify as a trade secret, it nonetheless may be protected pursuant to Exemption 4 if it falls within its second, much larger category. To be protected as such, the information must be commercial or financial, obtained from a person, and privileged or confidential.¹⁵ The overwhelming majority of Exemption 4 cases focus on this standard.

Courts have little difficulty in regarding information as "commercial or financial" if it relates to business or trade.¹⁶ The Court of Appeals for the District of Columbia Circuit

¹⁴ Herrick, 298 F.3d at 1194 & n.10 (distinguishing facts of the case before it, and upholding trade secret protection nonetheless, based upon the subsequent revocation of that permission and the requester's failure to challenge both whether such revocation could legally operate to "restore the secret nature of the documents" and, if so, whether such revocation could properly be made after the documents had been requested under the FOIA).

¹⁵ See, e.g., Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); Herrick v. Garvey, 200 F. Supp. 2d 1321, 1324 (D. Wyo. 2000), aff'd, 298 F.3d 1184, 1193-95 (10th Cir. 2002).

¹⁶ See, e.g., 100Reps. LLC v. DOJ, 248 F. Supp. 3d 115, 136 (D.D.C. 2017) (finding that annual report information, including summarized presentations and materials describing "specific transactions, projects, bids, and business partners" as well as "work plans and related" material were commercial in nature because they involved business operations); Forest Cnty. Potawatomi Cmty. v. Zinke, 278 F. Supp. 3d 181, 200 (D.D.C. 2017) (concluding that information related to establishing a casino was "commercial 'in its function,' as the [tribe has] 'a commercial interest at stake in its disclosure'"); Elec. Priv. Info. Ctr. v. DHS, 117 F. Supp. 3d 46, 62-63 (D.D.C. 2015) (holding that identities of corporations participating in pilot security program were exempted from release because "[t]he identities of which companies have participated in [the program], if disclosed, could have a commercial or financial impact on the companies involved"); San Juan Citizens All. v. U.S. Dep't of Interior, 70 F. Supp. 3d 1214, 1219 (D. Colo. 2014) (determining that email address of client who hired submitter to act as land lease broker to protect identity of client was exempted from release because "[e]nsuring client confidentiality by conducting its leasing efforts in a discrete manner is an integral aspect of the services [the submitter] provides"); Waterkeeper All. v. U.S. Coast Guard, No. 13-0289, 2014 WL 5351410, at *15 (D.D.C. Sept. 29, 2014) (determining that information related to "oil and gas leases, prices, quantities and reserves" is commercial in nature); Pub. Citizen Health Rsch. Grp. v. HHS, 975 F. Supp. 2d 81, 105 (D.D.C. 2013) (finding information related to business-related processes, decisions, and conduct to be "sufficiently commercial" to benefit from Exemption 4); Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2003) (finding that

has held that these terms should be given their "ordinary meanings" and has specifically rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.¹⁷

information relating "to business decisions and practices regarding the sale of power, and the operation and maintenance" of generators was commercial and financial in nature (quoting agency declaration)); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001) ("Information regarding oil and gas leases, prices, quantities and reserves is obviously commercial in nature."); In Def. of Animals v. HHS, No. 99-3024, 2001 WL 34871354, at *2, *8 (D.D.C. Sept. 28, 2001) (withholding portions of letter detailing "financial situation" of private primate research facility); ISC Group, Inc. v. DOD, No. 88-0631, 1989 WL 168858, at *2-3 (D.D.C. May 22, 1989) (finding investigative report concerning allegations of overcharging on government contract to be financial information exempted from release); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (determining that Exemption 4 claim relating to disbarment settlement negotiation documents reflecting "accounting and other internal procedures" was valid because there was a commercial interest in those materials).

¹⁷ Pub. Citizen Health Rsch. Grp., 704 F.2d at 1290 (citing Wash. Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982) and Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980)); accord Baker & Hostetler LLP v. U.S. Dep't of Com., 473 F.3d 312, 319-20 (D.C. Cir. 2006) (finding that letters describing "favorable market conditions for domestic [lumber] companies" constituted "commercial information" because those companies "have a 'commercial interest' in such letters" (citing Pub. Citizen Health Rsch. Grp., 704 F.2d at 1290)); see also Tokar v. DOJ, 304 F. Supp. 3d 81, 94 n.3 (D.D.C. 2018) (concluding that information describing how corporation implemented regulatory compliance program was "commercial" because that company had "commercial interest" in such information); Soghoian v. Off. of Mgmt. & Budget, 932 F. Supp. 2d 167, 174-75 (D.D.C. 2013) (finding that trade association has "commercial interest" in information reflecting "allocation of costs surely to impact the commercial status and dealings" of its members); Cooper v. U.S. Dep't of the Navy, No. 05-2252, 2007 WL 1020343, at *3-4 (D.D.C. Mar. 30, 2007) (determining that professor had commercial interest in his research, as demonstrated by his filing of patent applications and formation of for-profit company); ICM Registry v. U.S. Dep't of Com., No. 06-0949, 2007 WL 1020748, at *7 (D.D.C. Mar. 29, 2007) (holding that professional opinions of telecommunications consultant "clearly constitute commercial material"); Jud. Watch, Inc. v. DOE, 310 F. Supp. 2d 271, 308 (D.D.C. 2004) (holding that because reports "constitute work done for clients," they are "'commercial' in nature"), aff'd in part & rev'd in part on other grounds, 412 F.3d 125 (D.C. Cir. 2005); Jud. Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (finding export insurance applications containing detailed information on goods and customers to be "commercial or financial"); cf. Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (declaring that "water rights themselves are an object of commerce . . . that is bought and sold," and holding that "information about the quantity available" or "information that creates the Tribes' negotiating position, supports their claims" or maximizes their position "is all commercial information in function"); Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (concluding that "well and water related information" on an

In an early case addressing this element of Exemption 4, which involved a request for employee authorization cards submitted by a labor union, the Court of Appeals for the Second Circuit articulated a straightforward definition of the term "commercial," declaring that "surely [it] means [anything] pertaining or relating to or dealing with commerce."¹⁸ In doing so, it categorically rejected the requester's argument that the information was "not commercial or financial because the [labor union did] not have profit as its primary aim."¹⁹ The Second Circuit declared that such an "interpretation [would give] much too narrow a construction to the phrase in question."²⁰ Instead, the Second Circuit focused on the union's relationship with "commerce" and found that "[l]abor unions, and their representation of employees, quite obviously pertain to or are related to commerce and deal with the commercial life of the country."²¹ Accordingly, the employee authorization cards were readily deemed to be "commercial."²²

The D.C. Circuit has held that a submitter's "nonprofit status is not determinative of the character of the information it reports," holding instead that "information may qualify as 'commercial' even if the provider's . . . interest in gathering, processing, and reporting the information is noncommercial."²³ The First Circuit reasoned similarly, finding that a non-profit organization may possess commercial information because "[a]ll sorts of non-profits – hospitals, colleges, and even the National Football League – engage

Indian reservation is "commercial or financial in nature" because "'water is a precious, limited resource'" and disclosure "'would adversely affect the Band's ability to negotiate its water rights or to litigate that issue'" (quoting agency declaration)).

¹⁸ Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978).

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.; see also FlightSafety Servs. v. U.S. Dep't of Labor, No. 3-1285, 2002 WL 368522, at *5 (N.D. Tex. Mar. 5, 2002) (protecting "information relating to the employment and wages of workers"), aff'd per curiam, 326 F.3d 607, 611 (5th Cir. 2003) (citing Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981)).

²³ Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (finding that health and safety reports submitted by the nonprofit Institute for Nuclear Power Operations were "commercial" because the Institute's "'constituent utility companies [were] assuredly commercial enterprises engaged in the production and sale of electrical power for profit'" and "the commercial fortunes of [those] member utilities . . . could be materially affected by" disclosure (quoting district court)), vacated en banc on other grounds, 975 F.2d 871, 880 (D.C. Cir. 1992) (reiterating that it "agree[d] with the district court's conclusion that the information [contained in the nonprofit Institute's safety reports] is commercial in nature"); see also Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir. 1985) (declaring summarily that audit reports submitted by nonprofit water supply company "clearly are commercial or financial").

in commerce as that term is ordinarily understood[;]" "how the tax code treats income from that commerce is a separate issue that has no bearing on our inquiry here."²⁴

Additionally, protection for financial information is not limited to information generated by commercial entities, but rather it has been held to apply to any financial information, including personal financial information.²⁵

Despite the widely accepted breadth of the term "commercial or financial," the District Court for the District of Columbia has held that the burden is on the government to demonstrate that this element is satisfied, and "merely assert[ing], without any supporting detail" that records contain commercial or financial information is "inadequate."²⁶ The D.C. Circuit rejected an agency's argument that data pertaining to the location of endangered pygmy owls sightings qualified as "commercial or financial" information "simply because it was submitted pursuant to a government-to-government cooperative agreement" whereby a state agency provided "access to its database in return for money" from the federal government.²⁷ The D.C. Circuit reasoned that "[s]uch a quid-pro-quo exchange between governmental entities does not constitute a commercial transaction in the ordinary sense."²⁸ Moreover, the D.C. Circuit found the requested "owl-sighting data itself [was] commercial neither by its nature (having been created by the government rather than in connection with a commercial enterprise) nor in its function (as there [was] no evidence that the parties who supplied the owl-sighting

²⁴ N.H. Right to Life v. HHS, 778 F.3d 43, 50 (1st Cir. 2015).

²⁵ See Wash. Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982) (holding that "the plain language of Exemption 4 covers all financial information" including "personal financial information"); Defs. of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 15 (D.D.C. 2004) (finding that draft severance agreements which contained "financial information surrounding [the Deputy Secretary's] separation from his former company . . . are within the common understanding of the term 'financial information'"); see also FOIA Update, Vol. IV, No. 4, at 14.

²⁶ COMPTEL v. FCC, 945 F. Supp. 2d 48, 57 (D.D.C. 2013) (rejecting as "conclusory" agency's bare assertion that documents were "commercial" or "financial"); see also Wash. Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982) (noting that "[w]e do not see, nor has the government explained, how the list of non-federal employment on Form 474 can be "commercial or financial information"); Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 303 (D.D.C. 1999) (denying summary judgment when the agency's declaration merely "state[d]" that the company's "proposals contain 'commercial and financial information'" but failed to provide a "description of the documents to permit the [requester] or [the] Court to test the accuracy of that claim").

²⁷ Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 38 (D.C. Cir. 2002).

²⁸ Id. at 38-39.

information [had] a commercial interest at stake in its disclosure)." ²⁹ Consequently, the D.C. Circuit was "unpersuaded" that Exemption 4 applied.³⁰

Similarly, a district court rejected an agency's attempt to convert "factual information regarding the nature and frequency of in-flight medical emergencies"³¹ into "commercial information" for purposes of Exemption 4, finding instead that the "medical emergencies detailed in the [requested] documents [did] not naturally flow from commercial flight operations, but rather [were] chance events which happened to occur while the airplanes were in flight."³² In delimiting the scope of the term "commercial," the court opined that "[t]he mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information."³³ Additionally, the District Court for the District of Columbia rejected an intervenor-defendant submitter's broad argument that a company has a commercial interest in "all records that relate to every aspect of the company's trade or business," by finding such a construction "plainly incorrect."³⁴ The court further found that merely because information could harm a submitter's reputation does not compel the conclusion that the information is "commercial."³⁵

An agency's failure to establish the "commercial" character of requested information precluded Exemption 4 protection in the only appellate court decision to address the protection of information submitted by a scientist in connection with a grant application.³⁶ In that case, the D.C. Circuit found that research designs submitted as part

²⁹ Id. at 39.

³⁰ Id. at 38.

³¹ Chi. Trib. Co. v. FAA, No. 97-2363, 1998 WL 242611, at *3 (N.D. Ill. May 7, 1998).

³² Id. at *2.

³³ Id.; see also In Def. of Animals v. HHS, No. 99-3024, 2001 WL 34871354, at *8 (D.D.C. Sept. 28, 2001) (observing that "identities of [private] Foundation employees . . . standing alone, may not be commercial").

³⁴ Pub. Citizen Health Rsch. Grp. v. HHS, 975 F. Supp. 2d 81, 100 (D.D.C. 2013); see also N.Y. Pub. Int. Rsch Grp. v. EPA, 249 F. Supp. 2d 327, 330, 332-34 (S.D.N.Y. 2003) (finding records are not "commercial" when agency "failed to establish that the information [had] any intrinsic commercial value" despite the fact that the submitter "had a financial stake" in the matter because there was no evidence "that disclosure would jeopardize [submitter's] commercial interests or reveal information about [submitter's] ongoing operations, or that [submitter] generated the information for a purpose other than advocating a policy to a governmental agency") (abrogated in part on other grounds by Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019)).

³⁵ Pub. Citizen Health Rsch. Grp., 975 F. Supp. 2d at 106-07.

³⁶ See Wash. Rsch. Project, Inc. v. HEW, 504 F.2d 238, 244 (D.C. Cir. 1974).

of a grant application were not "commercial" despite claims that "[t]heir misappropriation," which "would be facilitated by premature disclosure, [would] deprive[] [the researcher] of the career advancement and attendant material rewards in which the academic and scientific market deals."³⁷ Finding that "the reach" of Exemption 4 "is not necessarily coextensive with the existence of competition in any form," the D.C. Circuit declared that "a noncommercial scientist's 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."³⁸ Although recognizing that a scientist may have "a preference for or an interest in nondisclosure of his research design," the D.C. Circuit held that if that interest is "founded on professional recognition and reward, it is surely more the interest of an employee than of an enterprise" and so is beyond the reach of Exemption 4.³⁹ Significantly, the D.C. Circuit noted that a given grantee "could conceivably be shown to have a commercial or trade interest in his research design," but it emphasized that "the burden of showing" such an interest "was on the agency."⁴⁰ Because the agency "did not introduce a single fact relating to the commercial character of any specific research project," the D.C. Circuit concluded that in that case, the agency had failed to "carr[y] its burden on this point."⁴¹

Obtained from a "Person"

The second of Exemption 4's specific criteria is that the information be "obtained from a person."⁴² Under the Administrative Procedure Act, the term "person" refers to individuals as well as to a wide range of entities⁴³ and has been found to include corporations, banks, state governments, agencies of foreign governments, and Native

³⁷ Id. (observing that "the government has been at some pains to argue that biomedical researchers are really a mean-spirited lot who pursue self-interest as ruthlessly as the Barbary pirates did in their own chosen field").

³⁸ Id.

³⁹ Id. at 245.

⁴⁰ Id. at 244 n.6.

⁴¹ Id.; see also Physicians Comm. for Responsible Med., 326 F. Supp. 2d 19, 24-25 (D.D.C. 2004) (concluding "as a matter of law" that a noncommercial scientist's research designs did "not amount to commercial information" after finding that the scientist "never manufactured or marketed any drug . . . that was produced as a result of [their] research" and that "none of [their] research results have been marketed or used and subsequently subjected to additional study" (citing Wash. Rsch. Project, 504 F.2d at 244)).

⁴² [5 U.S.C. § 552\(b\)\(4\) \(2018\)](#).

⁴³ 5 U.S.C. § 551(2) (2018) (defining "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency"); see also, e.g., Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996) (quoting definition of "person" found in Administrative Procedure Act); Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2003) (same).

American tribes or nations who provide information to the government.⁴⁴ The reach of Exemption 4 is "sufficiently broad to encompass financial and commercial information concerning a third party," and protection is therefore available regardless of whether the information pertains directly to the commercial interests of the party that provided it – as is typically the case – or pertains to the commercial interests of another.⁴⁵ The courts have held, however, that information generated by the federal government itself is not "obtained from a person" and is therefore excluded from Exemption 4's coverage.⁴⁶ Exemption 5 of the FOIA incorporates a qualified privilege for sensitive commercial or

⁴⁴ See, e.g., FlightSafety Servs. v. U.S. Dep't of Labor, 326 F.3d 607, 611 (5th Cir. 2003) (per curiam) (business establishments); Stone v. Exp.-Imp. Bank, 552 F.2d 132, 137 (5th Cir. 1977) (foreign government agency); Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (Indian tribes) (citing Indian L. Res. Ctr. v. U.S. Dep't of the Interior, 477 F. Supp. 144, 146 (D.D.C. 1979) (holding that an Indian tribe, "as a corporation that is not part of the Federal Government, is plainly a person within the meaning of the Act")); Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) (banks) aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (state government). See generally Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1189 (D. Colo. 2001) (rejecting Apache Tribe's claim of confidentiality for information "accumulated by the Tribe [pursuant to a cooperative agreement] that would otherwise be submitted by [oil and gas] lessees directly to the agency," and concluding that although the lessees could invoke Exemption 4, the Tribe could not).

⁴⁵ Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 405 (D.C. Cir. 1980) (holding that the "plain language" of Exemption 4 "does not in any way suggest that" the requested information "must relate to the affairs of the provider"), abrogated on other grounds by U.S. Dept. of State v. Wash. Post Co., 456 U.S. 595 (1982); accord Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (citing Bd. of Trade and protecting safety reports submitted by power-plant consortium based on commercial interests of member utility companies), vacated en banc on other grounds, 975 F.2d 871 (D.C. Cir. 1992); see, e.g., Miami Herald Publ'g Co. v. SBA, 670 F.2d 610, 614 & n.7 (5th Cir. 1982) (analyzing Exemption 4 argument raised on behalf of borrowers even though no Exemption 4 argument was raised for lenders, who actually had "directly" supplied requested loan agreements to agency).

⁴⁶ See Bd. of Trade, 627 F.2d at 404 (concluding that scope of Exemption 4 is "restrict[ed]" to information that has "not been generated within the Government"); Det. Watch Network v. ICE, 215 F. Supp. 3d 256, 262-63 (S.D.N.Y. 2016) (holding that contract terms were not "obtained from a person" because they were "negotiated and agreed on by the Government" rather than "obtained from" the contractors and "simply incorporated into the final contracts"); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) (declaring that "person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); cf. Ctr. for Auto Safety v. U.S. Dep't of Treasury, 133 F. Supp. 3d 109, 124 (D.D.C. 2015) (ordering agency to revise Vaughn index after finding that index did not permit court to "determine whether the documents contain[ed] information 'obtained from a person' rather than information generated within Treasury").

financial information generated by the government.⁴⁷ (For a further discussion of the "commercial privilege," see Exemption 5, Other Privileges.)

Documents prepared by the government can still come within Exemption 4, however, if they simply contain summaries or reformulations of information provided by a source outside the government.⁴⁸ Documents can also still come within Exemption 4 when they contain information obtained through a plant inspection.⁴⁹ Moreover, the

⁴⁷ See Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979) (concluding that "Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract"); Morrison-Knudsen Co. v. Dep't of the Army of the U.S., 595 F. Supp. 352, 354-56 (D.D.C. 1984) (analyzing whether commercial information generated by the government can be withheld under Exemption 5 after noting that "[t]he theory behind a privilege for confidential commercial information generated in the process of awarding a [government] contract . . . is . . . that the Government will be placed at a competitive disadvantage or that consummation of the contract may be endangered" (quoting Merrill, 443 U.S. at 360)), aff'd, 762 F.2d 138 (D.C. Cir. 1985).

⁴⁸ See, e.g., OSHA Data/C.I.H., Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 162 n.23 (3d Cir. 2000) (concerning ratio calculated by agency, but based upon "individual components" supplied by private-sector employers); Gulf & W. Indus. v. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (concerning contractor information contained in agency audit report); Elec. Priv. Info. Ctr. v. DHS, 117 F. Supp. 3d 46, 63 (D.D.C. 2015) (holding that identities of corporations were "obtained from a person," even when those names appeared in wholly intra-agency emails, because corporations' names "originated with the corporations which provided their identities to DHS in order to participate in the program"); Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior, 36 F. Supp. 3d 384, 401 (S.D.N.Y. 2014) (concerning Bureau of Land Management analysis of mine data provided by mining companies); Freeman v. Bureau of Land Mgmt., 526 F. Supp. 2d 1178, 1188 (D. Or. 2007) (finding that government's research "piggyback[ed] upon [submitter's] data to such an extent that the government's data [was] not truly independent for purposes of Exemption 4"); Dow Jones Co., 219 F.R.D. at 176 (concerning power-plant information obtained by agency staff through interviews with "employees or representatives" of companies); Matthews v. USPS, No. 92-1208, slip op. at 6 (W.D. Mo. Apr. 15, 1994) (concerning technical drawings prepared by agency personnel but based upon information supplied by computer company). But see COMPTEL v. FCC, 945 F. Supp. 2d 48, 57 (D.D.C. 2013) (explaining that agency "does not explain how all portions of a document prepared by its own staff can be considered 'obtained from a person' . . . [w]hile it is possible that the government relied on information from [submitter] to draft parts of the original version, it seems unlikely"); Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (characterizing an agency audit as "not simply a summary or reformulation of information supplied by a source outside the government," and finding that an analysis "prepared by the government" is not "'obtained from a person'" and so "may not be withheld under Exemption 4").

⁴⁹ See, e.g., Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1076 (9th Cir. 2004) (concerning quality assessment of raisins, "including weight, color, size, sugar content, and moisture"

mere fact that the government supervises or directs the preparation of information submitted by sources outside the government does not preclude that information from being "obtained from a person."⁵⁰ Similarly, the District Court for the District of Columbia has held that the fact that particular information is "arrived at through negotiation" with the government does not necessarily preclude it from being regarded as "obtained from a person."⁵¹

"Confidential" Information

In 2019, the Supreme Court issued an opinion in Food Marketing Institute v. Argus Leader Media addressing the meaning of the word "confidential" in Exemption 4 that overturned over forty years of precedent.⁵²

reflected in "Line Check Sheets" prepared by USDA inspectors during plant visits), overruled on other grounds by Animal Legal Def. Fund v. FDA, 836 F.3d 987, 990 (9th Cir. 2016); Mulloy v. Consumer Prod. Safety Comm'n, No. 85-0645, 1985 U.S. Dist. LEXIS 17194, at *2 (S.D. Ohio Aug. 2, 1985) (concerning manufacturing and sales data compiled in establishment inspection report prepared by Commission investigator after on-site visit to plant), aff'd, No. 85-3720 (6th Cir. July 22, 1986).

⁵⁰ See High Country Citizens All. v. Clarke, No. 04-0749, 2005 WL 2453955, at *5 (D. Colo. Sept. 29, 2005) (finding that "when (1) an outsider compiles information on behalf of a client with whom it has a contractual relationship, (2) the client is also an outsider, and (3) the client has an expectation that the information will remain confidential, then the exemption may apply" and, here, submitter was in contractual relationship with another outside party, not agency, even though some agency supervision existed); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001) (holding that "[e]ven where the compilation of information is directed by a government agency, it is still from a 'person' to the extent it is obtained from an entity outside the government" (citing Gulf & W. Indus., Inc., 615 F.2d at 530)). But cf. Consumers Union v. Veterans Admin., 301 F. Supp. 796, 803 (S.D.N.Y. 1969) (deciding that when "[t]he only things . . . obtained from outside the government were the hearing aids themselves," and the requested product testing on those hearing aids actually was performed by government personnel using their expertise and government equipment, the resulting data was not "obtained from a person" for purposes of Exemption 4).

⁵¹ Pub. Citizen Health Rsch. Grp. v. NIH, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the agency, that did "not alter the fact that the licensee is the ultimate source of [the] information," inasmuch as the licensee "must provide the information in the first instance"); cf. In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 102-03 (D.D.C. 2008) (concluding that "incentive award" payments negotiated by the parties were not "obtained from a person" because agency "nowhere demonstrated that the contractor was the source of information in the first instance and not the agency").

⁵² See 139 S. Ct. 2356, 2363 (2019) (concluding that term "confidential" should be given its ordinary meaning as of time of FOIA's enactment, and holding that "term 'confidential' meant then, as it does now, 'private' or 'secret'").

Historical Interpretation of Exemption 4

The word "confidential" is not defined in the FOIA, and in the early years subsequent to the enactment of the FOIA, courts applied various tests to determine whether commercial and financial information provided to an agency fell within the parameters of Exemption 4.⁵³ In 1974, the Court of Appeals for the District of Columbia Circuit issued its decision in National Parks & Conservation Association v. Morton,⁵⁴ which became the leading case on the issue until the Supreme Court's recent decision. Relying on legislative history, in National Parks the court determined that information should be treated as confidential if its disclosure would: 1) impair the government's ability to obtain necessary information in the future, or 2) cause substantial harm to the competitive position of the submitter of the information.⁵⁵ While establishing this two-prong test, the court expressly reserved the question of whether any other governmental interests might also be embodied in a "third prong."⁵⁶ Subsequent courts eventually did adopt a third prong to protect information that would compromise agency program compliance and effectiveness.⁵⁷

Nearly two decades later, the Court of Appeals for the District of Columbia Circuit returned to this issue in Critical Mass Energy Project v. NRC,⁵⁸ and, while reaffirming the National Parks test, the court confined the application of the National Parks test to information that was required to be provided to the government and established a separate standard for determining whether information "voluntarily" submitted to an agency is "confidential."⁵⁹ Under Critical Mass, commercial or financial information that

⁵³ See Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971) (defining "confidential" based on whether information was of type not customarily released to public by submitter and which government "agreed to treat . . . as confidential"); GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969) (defining "confidential" based on whether there was express or implied promise of confidentiality by government to submitting party); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 471 (D.D.C. 1972) (same).

⁵⁴ 498 F.2d 765 (D.C. Cir. 1974).

⁵⁵ Id. at 770.

⁵⁶ See id. at 770 n.17.

⁵⁷ See Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (holding that "[i]t should be evident from this review that the two interests identified in the National Parks test are not exclusive"); Pub. Citizen Health Rsch. Grp. v. NIH, 209 F. Supp. 2d 37, 52 (D.D.C. 2002) (holding that "impairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under" Exemption 4).

⁵⁸ 975 F.2d at 879.

⁵⁹ Id. at 875-79.

was "voluntarily" provided to the government was categorically protected as long as it was not customarily disclosed to the public by the submitter.⁶⁰

*The Supreme Court's Decision in
Food Marketing Institute v. Argus Leader Media*

In Argus Leader Media, the Supreme Court addressed the question of "when does information provided to a federal agency qualify as 'confidential'" under Exemption 4.⁶¹ Noting that the FOIA itself does not provide a definition of the term "confidential," the court found that "as usual, [it must] ask what [the] term's 'ordinary, contemporary, common meaning' was when Congress enacted FOIA in 1966."⁶² Citing Webster's Seventh New Collegiate Dictionary, the Court found that "[t]he term 'confidential' meant then, as it does now, 'private' or 'secret.'"⁶³ The Supreme Court emphasized that "[n]otably lacking from dictionary definitions, early case law, or any other usual source that might shed light on the statute's ordinary meaning is any mention of the 'substantial competitive harm' requirement" established in National Parks.⁶⁴

The Court further held that "[c]ontemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential."⁶⁵ First, "information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it."⁶⁶ Second, "information might be considered confidential only if the party receiving it provides some assurance that it will remain secret."⁶⁷

The Court determined that the first condition – that the information be kept private or closely held by the submitter – must always be met for information to be considered confidential.⁶⁸ As to the second condition – whether information must also be communicated to the government with assurances that it will be kept private – the Court found that it did not need to resolve that question, as that condition was clearly

⁶⁰ Id.

⁶¹ 139 S. Ct. at 2360.

⁶² Id. at 2362 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

⁶³ Id. at 2363.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ See id. (explaining that "it is hard to see how information could be deemed confidential if its owner shares it freely").

satisfied in the case before it.⁶⁹ In conclusion, the Court held that "at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."⁷⁰

"Confidential" Information Analysis Since Argus Leader Media

Following the Supreme Court's decision in Argus Leader Media, the Department of Justice issued guidance to assist agencies with analyzing whether information determined to be financial or commercial and obtained by a person is confidential.⁷¹ Most courts have recognized that Argus Leader Media now serves as the starting point for analyzing the confidentiality of commercial or financial information.⁷²

The first prong of the confidentiality analysis is whether the "commercial or financial information is both customarily and actually treated as private by its owner."⁷³

⁶⁹ See id. (noting that USDA had long history, codified in its regulations, of promising retailers that it would keep the requested data private).

⁷⁰ Id. at 2366.

⁷¹ See OIP Guidance: [Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media](#) (posted 10/3/2019); see also OIP Guidance: [Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person Is Confidential Under Exemption 4 of the FOIA](#) (posted 10/3/2019).

⁷² See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 802 F. App'x 309, 310 (9th Cir. 2020) (per curiam) ("The district court did not have the benefit of [Argus Leader Media] in deciding whether the disputed information is 'confidential,' and we decline to apply the new legal standard in the first instance."); Animal Legal Def. Fund v. FDA, 790 F. App'x 134, 135 (9th Cir. 2020) (per curiam) (unpublished table disposition) (declining to apply "the new legal standard in the first instance," and remanding to the district court because "the record is underdeveloped" to apply Argus Leader Media); cf. Renewable Fuels Ass'n & Growth Energy v. EPA, No. 18-2031, 2021 WL 602913 (D.D.C. Feb. 16, 2021) (stating that "[t]he current law of the D.C. Circuit, which remains binding authority, is that information is confidential under Exemption 4 'if it is of a kind that would customarily not be released to the public by the person [or entity] from whom it was obtained'" (quoting Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992))); Ctr. for Investigative Reporting v. U.S. Customs & Border Prot., 436 F. Supp. 3d 90, 109 (D.D.C. 2019) ("The import of Food Marketing's holding that the ordinary meaning of 'confidential' applies in *all* Exemption 4 cases, then, is clear: Critical Mass and its progeny now supply the framework in this Circuit for determining whether voluntarily submitted *and* involuntarily submitted commercial or financial information are 'confidential' under Exemption 4.").

⁷³ Argus Leader Media, 139 S. Ct. at 2363; see also Animal Legal Def. Fund, 790 F. App'x at 135-36 (finding remand "particularly appropriate" to determine if one or more producers

Courts have considered the practices of the submitter and have focused on factors such as whether the submitter internally restricts access to the records, whether restrictive markings are applied to the documents themselves, and whether submitters require individuals to enter into confidentiality agreements.⁷⁴ Additionally, only information originating from submitters themselves, and not the government, can be considered under this prong.⁷⁵

Upon finding the first prong of the confidentiality analysis to be satisfied, courts have taken differing approaches to the second prong – whether the government provided assurances that the information would be kept private –because the Supreme Court left open the question of whether this prong must additionally be satisfied.⁷⁶ The District Court for the District of Columbia has treated the absence of an assurance of confidentiality as just one factor to be considered in determining confidentiality under

"customarily and actually treated" the information as private); cf. Ctr. for Investigative Reporting, 436 F. Supp. 3d at 109-11 (finding that Argus Leader Media functionally requires application of Critical Mass and its progeny to "confidentiality" determinations made under Exemption 4).

⁷⁴ See Am. Small Bus. League v. DOD, 411 F. Supp. 3d 824, 831 (N.D. Cal 2019) (discussing protective measures taken by submitter to keep information private); see also Seife v. FDA, No. 17-3960, 2020 WL 5913525, at *4 (S.D.N.Y. Oct. 6, 2020) (appeal pending) (observing that company customarily and actually kept information confidential, and noting that information was subject to strict confidentiality protocols because such information would be highly valuable to competitors); Am. Small Bus. League v. DOD, No. 18-1979, 2019 WL 4416613, *3 (N. D. Cal Sept. 15, 2019) (noting that submitter's "selective disclosure of supposed confidential information . . . undercuts its vague contention that the company customarily treats said information as confidential").

⁷⁵ See Am. Small Bus. League, 411 F. Supp. 3d at 830 (explaining that government assessments and evaluations cannot be considered "confidential" information for purposes of Exemption 4).

⁷⁶ Argus Leader Media, 139 S. Ct. at 2363 (discussing second prong that information might be considered confidential only if the party receiving it provides some assurance that it will remain secret, but not determining to what extent the second condition must also be met); see also Ctr. for Investigative Reporting, 436 F. Supp. 3d at 112 (speculating that "[t]he Supreme Court stopped short, however, of deciding that Exemption 4 does in fact impose this second requirement . . . perhaps because when information is involuntarily submitted to the government, the government often does not provide an assurance of privacy in return"); OIP Guidance: [Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media](#) (posted 10/3/2019) (explaining that "the Supreme Court's opinion did not determine to what extent the second condition – an assurance of confidentiality by the government – must also be met," but suggesting that "agencies should as a matter of sound administrative practice consider whether the context in which the information was provided to the agency reflects such an assurance").

Exemption 4.⁷⁷ Other court decisions have assumed, without deciding, that an assurance of confidentiality by the government is required.⁷⁸ Comporting with DOJ's Argus Leader Media guidance,⁷⁹ the District Court for the District of Columbia has found that a governmental assurance of confidentiality can be either express or implied.⁸⁰ For circumstances in which the government gave assurances of *non*-confidentiality, courts have held that agencies should consider submitted information to be non-confidential.⁸¹

⁷⁷ See WP Co. v. SBA, No. 20-1614, 2020 WL 6504534, at *6, *9 (D.D.C. Nov. 5, 2020) (finding that whether "government assurance that information will remain private is necessary" is an open question though "undoubtedly relevant" to Exemption 4's confidentiality determination); Gellman v. DHS, No. 16-635, 2020 WL 1323896, at 11 & n.12 (D.D.C. Mar. 20, 2020) (determining that the absence of an express assurance of confidentiality is just "one factor to consider" and will not alone prevent information from being "confidential" for the purposes of Exemption 4); Ctr for Investigative Reporting, 436 F. Supp. 3d at 112-13 (describing a governmental assurance of privacy as a "potential additional requirement" of Exemption 4, and holding that if such an assurance is required, those opposing disclosure "must supply at least *some* evidence that this assurance was given").

⁷⁸ See Am. Small Bus. League, 411 F. Supp. 3d at 830 ("Assuming without deciding that the "'assurance of privacy'" requirement applies here, this order finds that defendants have sufficiently shown that the government made an implied assurance."); Citizens for Resp. & Ethics in Wash. v. Dep't of Com., No. 18-03022, 2020 WL 4732095, *3 (D.D.C. Aug. 14, 2020) (prefacing its holding by noting that "Exemption 4 can be satisfied only if [agency] gave [submitter of information] some assurance of confidential treatment"); cf. Seife, 2020 WL 5913525, at *4 (determining that the court need not decide if both prongs are required because both prongs were satisfied).

⁷⁹ See OIP Guidance: [Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media](#) (posted 10/3/2019); see also OIP Guidance: [Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person Is Confidential Under Exemption 4 of the FOIA](#) (posted 10/3/2019).

⁸⁰ Citizens for Resp. & Ethics in Wash., 2020 WL 4732095, at *3 (holding that "[a]ssuming that Exemption 4 can be satisfied here only if Commerce gave [the submitter] some assurance of confidential treatment, that assurance of confidentiality [can be] either express or implied" and citing to OIP's Exemption 4 guidance).

⁸¹ See Am. Soc'y for the Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv., No. 19-3112, 2021 WL 1163627, at *4 (S.D.N.Y. Mar. 25, 2021) ("The Court . . . joins the growing chorus of opinions reasoning that Exemption 4 does not apply when an agency publicly acknowledges that it will not treat information as confidential, a conclusion that is even endorsed by the Department of Justice's official guidance on Exemption 4 in the wake of Argus Leader."); Ctr. for Investigative Reporting v. United States Dep't of Labor, 470 F. Supp. 3d 1096, 1114 (N.D. Cal. 2020) ("[W]hile it is uncertain whether an assurance of privacy is required, where, as here [the agency] indicated the opposite – that it would disclose the [information submitted] – [submitter] lost any claim of

DOJ's Argus Leader Media guidance also considers whether there were expressed or implied indications at the time the information was submitted that the government would disclose the information.⁸²

Finally, courts have applied the foreseeable harm requirement of the FOIA⁸³ to Exemption 4, but they have taken differing approaches regarding the harm that must be demonstrated by agencies.⁸⁴

Privileged Information

The term "privileged" in Exemption 4 has been utilized by some courts as an alternative for protecting nonconfidential commercial or financial information. Indeed, the Court of Appeals for the District of Columbia Circuit has indicated that this term should not be treated as being merely synonymous with "confidential," particularly in

confidentiality it may have had."); Ctr. for Investigative Reporting v. Dep't of Labor, No. 18-2414, 2020 WL 2995209, at *5 (N.D. Cal. June 4, 2020) (finding that agency's "statement about its intent to post the information online is dispositive of the question of confidentiality" because "information loses its character of confidentiality where there is express agency notification that submitted information will be publicly disclosed"); see also Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person Is Confidential Under Exemption 4 of the FOIA (posted 10/3/2019); cf. WP Co. v. SBA, No. 20-1614, 2020 WL 6504534, at *20 (D.D.C. Nov. 5, 2020) (noting in dicta that "when the government not only provided no assurance of privacy, but also told [submitters] explicitly that the information would be disclosed[,] "the agency likely[] could not withhold such information under Exemption 4").

⁸² See OIP Guidance: Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person Is Confidential Under Exemption 4 of the FOIA (posted 10/3/2019).

⁸³ 5 U.S.C. § 552(a)(8)(A)(i)(I).

⁸⁴ Compare Am. Small Bus. League, 411 F. Supp. 3d at 835-36 (confirming that foreseeable harm standard applies to Exemption 4, but declining to "effectively reinstate the competitive harm test for Exemption 4," explaining that "the relevant protected interest is that of the information's *confidentiality* – that is, its private nature[;] [d]isclosure would necessarily destroy the private nature of the information, no matter the circumstance"), with Ctr. for Investigative Reporting, 436 F. Supp. 3d at 113 (finding that foreseeable harm requirement applies to Exemption 4, and explaining that "[t]o meet this requirement, the defendants must explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would harm an interest protected by this exemption, such as by causing 'genuine harm to [the submitter's] economic or business interests,' . . . , and thereby dissuading others from submitting similar information to the government"); cf. Seife, 2020 WL 5913525, at *7 (finding that "[b]y its terms, [the foreseeable harm] provision applies to Exemption 4" and that foreseeable harm standard was satisfied because, "under its own regulations, the FDA does not have discretion to disclose [the submitter's] non-public clinical study procedures, and the foreseeable harm standard set forth in Section 552(a)(8)(A)(i)(I) does not apply").

light of the legislative history's explicit reference to certain privileges, e.g., the attorney-client and doctor-patient privileges.⁸⁵ Nevertheless, during the FOIA's first two decades, few district court decisions discussed the meaning of the word "privileged" in the Exemption 4 context.

In one case, the court upheld the Department of the Interior's withholding of detailed statements by law firms of work that they had done for the Hopi Indians on the ground that they were "privileged" because of their work-product nature within the meaning of Exemption 4: "The vouchers reveal strategies developed by Hopi counsel in anticipation of preventing or preparing for legal action to safeguard tribal interests. Such communications are entitled to protection as attorney work product."⁸⁶ In the second case, a legal memorandum prepared for a utility company by its attorney qualified as legal advice protectible under Exemption 4 as subject to the attorney-client privilege.⁸⁷ In both of these cases the information was also withheld as "confidential."

It was not until another five years had passed that a court protected material relying solely on the "privilege" portion of Exemption 4 – specifically, by recognizing protection for documents subject to the "confidential report" privilege.⁸⁸ In a brief opinion, one court recognized Exemption 4 protection for settlement negotiation documents but did not expressly characterize them as "privileged."⁸⁹ Another court

⁸⁵ Wash. Post Co. v. HHS, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

⁸⁶ Indian L. Res. Ctr. v. U.S. Dep't of the Interior, 477 F. Supp. 144, 148 (D.D.C. 1979).

⁸⁷ Miller, Anderson, Nash, Yerke & Wiener v. DOE, 499 F. Supp. 767, 771 (D. Or. 1980).

⁸⁸ Wash. Post Co. v. HHS, 603 F. Supp. 235, 237-39 (D.D.C. 1985), rev'd on procedural grounds & remanded, 795 F.2d 205 (D.C. Cir. 1986).

⁸⁹ See M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692-93 (D.D.C. 1986) (noting that the information was obtained "in confidence" and public interest exists in encouraging settlement negotiations); cf. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 983 (6th Cir. 2003) (recognizing settlement negotiation privilege) (non-FOIA case). But cf. COMPTTEL v. FCC, 945 F. Supp. 2d 48, 58 (D.D.C. 2013) (agency "cannot justify its Exemption 4 redactions . . . merely by linking the documents to settlement discussions," and "'to the extent the FCC redacted information under Exemption 4 solely because it relates to settlement, the Court would reject such a justification'" (quoting COMPTTEL v. FCC, 910 F. Supp. 2d 100, 117 (D.D.C. 2012))); Performance Aftermarket Parts Grp. v. TI Grp. Auto. Sys., No. 05-4251, 2007 WL 1428628, at *3 (S.D. Tex. May 11, 2007) (observing that Sixth Circuit's decision in Goodyear Tire & Rubber Co. "has not been widely followed," and concluding that "no 'settlement negotiations' privilege exists") (non-FOIA case); In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 208-10 (D.D.C. 2005) (refusing to recognize settlement negotiations privilege) (non-FOIA case), aff'd in part on other grounds, 439 F.3d 740, 754-55 (D.C. Cir. 2006) (finding it unnecessary to decide whether federal settlement negotiations privilege exists because

subsequently recognized Exemption 4 protection for documents subject to the critical self-evaluative privilege.⁹⁰

Sixteen years after the first decision protecting attorney-client information under Exemption 4, the District Court for the Eastern District of Missouri issued the second such decision.⁹¹ The court held that a company's "adverse impact analyses, [prepared] at the request of its attorneys, for the purpose of obtaining legal advice about the legal ramifications of [large scale] reductions in force,"⁹² were protected by the attorney-client privilege.⁹³ In so holding, the court found that disclosure of the documents to the agency "constituted only a limited waiver and did not destroy the privilege."⁹⁴ More recently, the District Court for the District of Columbia concluded that a corporate email was properly withheld under Exemption 4 "based on its attorney-client privileged nature."⁹⁵ There, the court explained that the email was labeled "Subject to Attorney-Client Privilege," and contained "an express request for legal advice."⁹⁶ However, a second email that lacked those characteristics was found not to be protected by attorney-client privilege under Exemption 4, even though the second email responded to information in the first and had an attorney 'cc-ed.'⁹⁷

On the other hand, the Court of Appeals for the Tenth Circuit has held that documents subject to a state protective order entered pursuant to the State of Utah's equivalent of Rule 26(c)(7) of the Federal Rules of Civil Procedure – which permits courts

proponent of privilege failed to meet its burden to show that disputed documents were created for purpose of settlement discussions).

⁹⁰ Wash. Post Co. v. DOJ, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at *21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted, No. 84-3581 (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96, 99 (D.C. Cir. 1988). But cf. Kan. Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (holding that because self-critical analysis privilege had been rejected previously in state court proceeding brought to suppress disclosure of documents, "doctrine of collateral estoppel" precluded "relitigation" of that claim in federal court) (reverse FOIA suit).

⁹¹ McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 237, 242-43 (E.D. Mo. 1996) (alternative holding) (reverse FOIA suit).

⁹² Id. at 237.

⁹³ Id. at 242-43.

⁹⁴ Id. at 243.

⁹⁵ Jordan v. U.S. Dept. of Labor, 273 F. Supp. 3d 214, 227 (D.D.C. 2017), motion for reconsideration denied, 308 F. Supp. 3d 24 (D.D.C. 2018), aff'd, 2018 WL 5819393 (D.C. Cir. Oct. 19, 2018).

⁹⁶ Id. at 231-32.

⁹⁷ Id. at 232.

to issue orders denying or otherwise limiting the manner in which discovery is conducted so that a trade secret or other confidential commercial information is not disclosed or is only disclosed in a certain way – were not "privileged" for purposes of Exemption 4.⁹⁸ While observing that discovery privileges "may constitute an additional ground for nondisclosure" under Exemption 4, the Tenth Circuit noted that those other privileges were for information "not otherwise specifically embodied in the language of Exemption 4."⁹⁹ By contrast, it concluded, recognition of a privilege for materials protected by a protective order under Rule 26(c)(7) "would be redundant and would substantially duplicate Exemption 4's explicit coverage of 'trade secrets and commercial or financial information.'"¹⁰⁰ Additionally, the Court of Appeals for the Fifth Circuit has "decline[d] to hold that the [FOIA] creates a lender-borrower privilege" despite the express reference to such a privilege in Exemption 4's legislative history.¹⁰¹ (For a further discussion of atypical privileges, see Exemption 5, Other Privileges.)

Interrelation with the Trade Secrets Act

Finally, it should be noted that the Trade Secrets Act – a criminal statute – prohibits the disclosure of more than simply "trade secret" information as contained within the first category of Exemption 4.¹⁰² Instead, the Trade Secrets Act prohibits disclosure "to any extent not authorized by law" of information "concern[ing] or relat[ing] to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association."¹⁰³ The U.S. House of Representatives Report on the Government in the Sunshine Act—which amended the FOIA in 1976—explains that "if material d[oes] not come within" FOIA's Exemption 4, the Trade Secrets Act "would not justify withholding" because disclosure would be "authorized by law."¹⁰⁴ (For a further discussion of this point, see Reverse FOIA.) But "if material is within" Exemption 4 "and therefore subject to disclosure if the agency determines that disclosure is in the public interest, [the Trade Secrets Act] must

⁹⁸ Anderson v. HHS, 907 F.2d 936, 945 (10th Cir. 1990).

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir. 1985).

¹⁰² See 18 U.S.C. § 1905 (2018).

¹⁰³ § 1905.

¹⁰⁴ H.R. Rep. No. 880, pt. 1, at 23 (1975), as reprinted in 1976 U.S.C.C.A.N. 2183, 2205.

be considered to ascertain whether the agency is forbidden from disclosing the information."¹⁰⁵

Nonetheless, prior to the Supreme Court's decision in Food Marketing Institute v. Argus Leader Media,¹⁰⁶ the Trade Secrets Act had been held to prohibit the unauthorized disclosure of all information protected by Exemption 4.¹⁰⁷ Indeed, the Court of Appeals for the District of Columbia Circuit, prior to Argus Leader Media, had found the Trade Secrets Act's coverage to be at least "co-extensive" with that of Exemption 4.¹⁰⁸ Thus, the D.C. Circuit had held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act.¹⁰⁹

However, the Supreme Court in Argus Leader Media recently reconsidered the meaning of the word "confidential" in Exemption 4, which expands the scope of Exemption 4 and may impact the relationship between Exemption 4 and the Trade

¹⁰⁵ Id.

¹⁰⁶ 139 S. Ct. 2356 (2019).

¹⁰⁷ See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987) (reverse FOIA suit).

¹⁰⁸ See CNA Fin. Corp., 830 F.2d at 1151 (non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2006)); accord Canadian Com. Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (quoting CNA Fin. Corp., 830 F.2d at 1151) (reverse FOIA suit); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1185-86 (D.C. Cir. 2004) (same) (reverse FOIA suit), *reh'g en banc denied*, No. 02-5342 (D.C. Cir. Dec. 16, 2004); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (citing CNA Fin. Corp., 830 F.2d at 1151); Boeing Co. v. U.S. Dep't of the Air Force, 616 F. Supp. 2d 40, 45 (D.D.C. 2009) (reverse FOIA suit). But see Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (contrasting Exemption 4 as "broadly worded" with the Trade Secrets Act as "almost certainly designed to protect that narrower category of trade secrets . . . whose disclosure could be devastating to the owners and not just harmful," and elaborating that "if the [record] is not protected by [E]xemption 4, even more clearly is it not protected by [the Trade Secrets Act] either") (reverse FOIA suit).

¹⁰⁹ CNA Fin. Corp., 830 F.2d at 1151-52; see also Canadian Com. Corp., 514 F.3d at 39 (noting that "unless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4"); McDonnell Douglas Corp., 375 F.3d at 1185-86 (finding that the Trade Secrets Act "effectively prohibits an agency from releasing information subject to [Exemption 4]"); Bartholdi Cable Co., 114 F.3d at 281 (declaring that when information is shown to be protected by Exemption 4, agencies are generally "precluded from releasing" it due to provisions of Trade Secrets Act); Boeing Co., 616 F. Supp. 2d at 45 (holding that "when information falls within Exemption 4, the Trade Secrets Act compels an agency to withhold it"); Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 77 n.5 (D.D.C. 2001) (noting that "[a]lthough FOIA exemptions are normally permissive rather than mandatory, the D.C. Circuit has held that the disclosure of material which is exempted under [Exemption 4 of the FOIA] is prohibited under the Trade Secrets Act").

Secrets Act to the extent they were previously considered coextensive.¹¹⁰ (For further discussion, see "Confidential" Information, above.)

¹¹⁰ 139 S. Ct. at 2363, 2366 (concluding that term "confidential" should be given its ordinary meaning as of the time of FOIA's enactment, and holding that the "term 'confidential' meant then, as it does now, 'private' or 'secret'" and that the Court "cannot arbitrarily constrict [Exemption 4] . . . by adding limitations found nowhere in its terms"); cf. McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1165 n.2 (D.C. Cir. 1995) (noting that following the D.C. Circuit's 1992 Critical Mass decision it was possible that Exemption 4 and the Trade Secrets Act were no longer coextensive (discussing Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992)); Seife v. FDA, No. 17-3960, 2020 WL 5913525, at *6 n.3 (S.D.N.Y. Oct. 6, 2020) ("[B]ecause the information satisfies the foreseeable harm requirement, the Court need not and will not decide whether the information at issue is covered by the Trade Secrets Act.").