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

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* This section primarily includes case law, guidance, and statutes up until December 31, 2022. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] 5 U.S.C. § 552(b)(4) (2018).

[2] See Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 440 (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") (internal citation omitted).

[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, 1288-89 (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

in Public Citizen Health Research Group v. FDA[5] 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.[6] In that decision, the court more narrowly defined a "trade secret" 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 the end product of either innovation or substantial effort."[7] This definition also incorporates a requirement that there be a "direct relationship" between the trade secret and the productive process.[8]

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."[9] 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.[10] Like the D.C. Circuit, the Tenth Circuit was "reluctant to construe the FOIA

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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").

[5] Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280 (D.C. Cir. 1983).

[6] See id. at 1287-88 (repudiating then-current broad approach "as inconsistent with the language of the FOIA and its underlying policies").

[7] Id. 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 the manufacturing process "may" have commercial value) (internal citation omitted); 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 Pub. 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)).

[8] 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") (internal citation omitted).

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

[10] 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").

in such a manner."[11] 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".[12] The Tenth Circuit found that 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.[13]

Trade secret protection has been recognized for a variety of records, such as product manufacturing and design information, technical blueprints, and drug product formulas.[14] Trade secret protection has been denied for general information concerning a product's physical or performance characteristics, or a product's ingredient category when this information was not sufficiently specific to reveal proprietary details of the product formula.[15] It has also been denied for a "'noncommercial scientist's research

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[11] Id.

[12] Herrick v. Garvey, 298 F.3d 1184, 1191 (10th Cir. 2002).

[13] Id. (declaring that agency "need not show that . . . ownership of these particular documents[, plans and specifications for antique aircraft,] was specifically mentioned and transferred" with each corporate succession because "such a requirement would be overly burdensome," and finding that agency "need only show that there was a corporate successor that received the assets of the prior corporation").

[14] 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'") (quoting complaint)); Appleton v. FDA, 451 F. Supp. 2d 129, 141 (D.D.C. 2006) ("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'" an 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) ("significant 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).

[15] See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 151 (D.C. Cir. 2001) (finding that airbag characteristics relating "only to the end product – what

design.'"[16] Moreover, one appellate court has concluded that "where the submitter or owner of 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 must be released.[17]

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: (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.[18] The overwhelming majority of Exemption 4 cases focus on this standard.

Courts have little difficulty finding information to be "commercial or financial" if it relates to business or trade.[19] The Court of Appeals for the District of Columbia Circuit

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features an airbag has and how it performs – rather than to the production process" do not qualify as trade secrets); Freeman v. Bureau of Land Mgmt., 526 F. Supp. 2d 1178, 1188 (D. Or. 2007) (determining that quantity and quality of ore reserve is not trade secret); Nw. Coal. for Alts. 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).

[16] Physicians Comm. for Responsible Med. v. NIH, 326 F. Supp. 2d 19, 23 (D.D.C. 2004) (quoting Wash. Rsch. Project, Inc. v. Dep't of Health, Educ. & Welfare, 504 F.2d 238, 244-45 (D.C. Cir. 1974)); see id. (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").

[17] Herrick, 298 F.3d at 1194 & n.10 (distinguishing facts of the case before it, and upholding trade secret protection, based upon subsequent revocation of that permission and 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).

[18] See, e.g., Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

[19] See Majuc v. DOJ, No. 18-0566, 2022 WL 266700, at *5 (D.D.C. Jan. 28, 2022) (concluding that records containing bank protocols and analysis of submitter's transactions, assessments of internal compliance policies, and legal advice regarding compliance with embargoes and related sanctions were commercial in nature); Leopold v. DOJ, No. 19-3192, 2021 WL 124489, at *6 (D.D.C. Jan. 13, 2021) (determining that reports prepared by a bank in order to comply with a deferred prosecution agreement that "'contains extensive proprietary, financial, and competitive business information about [the Bank] and its customers'. . . [including] 'findings in relation to [the Bank's] anti-money laundering and sanctions compliance around the world'" was commercial in nature) (quoting agency

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 if the submitter has a "commercial interest" in them.[20] The D.C. Circuit has further clarified

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declaration)); 100Reps. LLC v. DOJ, 248 F. Supp. 3d 115, 136-37 (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'") (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2002))); 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 the 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 v. HHS, 975 F. Supp. 2d 81, 105 (D.D.C. 2013) (finding that information related to business-related processes, decisions, and conduct to be "sufficiently commercial"); Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2003) (finding that 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)); In Def. of Animals v. HHS, No. 99-3024, 2001 WL 34871354, at *8 (D.D.C. Sept. 28, 2001) (withholding portions of letter detailing "financial situation" of private primate research facility); 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."); ISC Grp., 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 commercial or financial information); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (finding valid commercial interest in disbarment settlement negotiation documents reflecting "accounting and other internal procedures").

[20] 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) & Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980)); accord Watkins v. CBP, 643 F.3d 1189, 1194 (9th Cir. 2011) ("The terms 'commercial or financial' are given their ordinary meanings.") (citing Pub. Citizen Health Rsch. Grp., 704 F.2d at 1290)); 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" and release would help rivals "exploit those companies' competitive weaknesses" (citing Pub. Citizen Health

that the information must be commercial "in and of itself", such that it "serves a 'commercial function' or is of a 'commercial nature.'"[21]

Rsch. Grp., 704 F.2d at 1290)); see also First Look Inst., Inc. v. U.S. Marine Corps., No. 21-5087, 2022 WL 2784431, at *3 (C.D. Cal. June 13, 2022) (determining that user guide was commercial document as it contained trade secrets and nonpublic commercial information); Naumes v. Dep't of the Army, 588 F. Supp. 3d 23, 37 (D.D.C. 2022) (concluding that copyright holder "naturally has a commercial interest in the information [the holder] seeks to protect" as release "would undermine the market for the creator's work in much the same way that the release of other types of commercial information could inflict competitive harm"); Renewable Fuels Ass'n & Growth Energy v. EPA, 519 F. Supp. 3d 1, 8 (D.D.C. 2021) (protecting withholdings of names and locations of a refinery because "[c]ommon sense counsels that an oil refinery has a 'business interest' in the facts that it applied for, and either received or did not receive, a small-refinery exemption") (internal citation omitted); Immerso v. U.S. Dep't of Lab., No. 19-3777, 2020 WL 6826271, at *5 (E.D.N.Y. Nov. 20, 2020) (finding that email sent to private company's in-house attorney for advice regarding impact of certain contractual language was commercial or financial); 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. OMB, 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 research, as demonstrated by 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"); 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, and results in maximizing the Tribes' position is all commercial information in function"); Starkey v. U.S. Dep't of the Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (concluding that "well and water related information" on an 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)); FlightSafety Servs. v. U.S. Dep't of Lab., No. 03-1285, 2002 WL 368522, at *5 (N.D. Tex. Mar. 5, 2002) (protecting "information relating to the employment and wages of workers" as commercial or financial information), aff'd per curiam, 326 F.3d 607, 611 (5th Cir. 2003).

[21] Citizens for Resp. & Ethics in Wash. v. DOJ, 58 F.4th 1255, 1267 (D.C. Cir. 2023) (holding that agency did not provide sufficient detail to demonstrate how contractors' names were commercial, because "the commercial consequences of disclosure are not on their own

In an early case addressing this element of Exemption 4, the Court of Appeals for the Second Circuit categorically rejected a requester's argument that information was "not commercial or financial because the [submitter did] not have profit as its primary aim," and instead articulated a straightforward definition of the term "commercial," declaring that "surely [it] means [anything] pertaining or relating to or dealing with commerce."[22] Relatedly, 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] 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.[24]

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sufficient to bring confidential information within the protection of Exemption 4 as 'commercial'") (internal citation omitted); Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 38 (D.C. Cir. 2002) (concluding that data was not automatically commercial or financial even though it was collected pursuant to an agreement between federal and state government agencies).

[22] Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (declaring that requester's "interpretation [would give] much too narrow a construction to the phrase in question" and observing 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").

[23] Critical Mass Energy Project v. Nuclear Regul. Comm'n, 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 N.H. Right to Life v. HHS, 778 F.3d 43, 50 (1st Cir. 2015) (finding that non-profit organization may possess commercial information because "[a]ll sorts of non-profits – hospitals, colleges, and even the National Football League – engage 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"); 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").

[24] 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

Despite the widely accepted breadth of the term "commercial or financial," courts have 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."[25]

In delimiting the scope of the term "commercial," one 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."[26] Similarly, the District Court for the District of Columbia rejected a 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

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the common understanding of the term 'financial information'") (internal citation omitted); see also FOIA Update, Vol. IV, No. 4, at 14 ("OIP Guidance: Copyrighted Materials and the FOIA").

[25] 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 Nat'l Ass'n of Home Builders, 309 F.3d at 38-39 (noting that burden is on agency and finding that 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 information [had] a commercial interest at stake in its disclosure)" and stating it was "unpersuaded" that Exemption 4 applied); Wash. Post Co., 690 F.2d at 266 (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'") (internal citation omitted); N.Y. Times Co. v. DOJ, No. 19-1424, 2021 WL 371784, at *12-13 (S.D.N.Y. Feb. 3, 2021) (declining "to find that information about the design, implementation, and remediation of VW's compliance program is commercial" under the D.C. Circuit's expansive interpretation of the term commercial, because agency failed to prove compliance program was "intertwined with commercial information, such as 'sales statistics, profits and losses, and inventories' . . . or 'extensive information about the [company's] marketing and sales programs and contracting processes'") (quoting 100Reps. v. DOJ, 316 F. Supp. 3d 124, 142 (D.D.C. 2018) & Pub. Citizen v. HHS, 975 F. Supp. 2d 81, 108 (D.D.C. 2013))); 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 agency's declaration merely "state[d]" that 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") (internal citation omitted).

[26] Chi. Trib. Co. v. FAA, No. 97-2363, 1998 WL 242611, at *2-3 (N.D. Ill. May 7, 1998) (finding that "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"); 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").

incorrect."[27] The court further found that merely because information could harm a submitter's reputation does not compel the conclusion that the information is "commercial."[28]

Of note, the D.C. Circuit found that research designs submitted as part 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."[29] 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."[30] 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."[31]

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[27] 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" even though the submitter "had a financial stake" because there was no evidence "that disclosure would jeopardize [the submitter's] commercial interests or reveal information about [the submitter's] ongoing operations, or that [the submitter] generated the information for a purpose other than advocating a policy to a governmental agency").

[28] Pub. Citizen Health Rsch. Grp., 975 F. Supp. 2d at 106-07 (concluding that "[w]hile the Court appreciates that revealing the existence of an investigation, even if the status is closed, may be embarrassing or harmful to the reputation of a company, the law is well-settled that this potential consequence" is not commercial).

[29] See Wash. Rsch. Project, Inc. v. Dep't. of Health, Educ. & Welfare, 504 F.2d 238, 244 (D.C. Cir. 1974) (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").

[30] Id. at 245 (holding that while a scientist may have "a preference for or an interest in nondisclosure of his research design," if that interest is "founded on professional recognition and reward, it is surely more the interest of an employee than of an enterprise").

[31] Id. at 244 n.6 (concluding that agency failed to satisfy its burden because it "did not introduce a single fact relating to the commercial character of any specific research project"); see also Physicians Comm. for Responsible Med. v. NIH, 326 F. Supp. 2d 19, 24-25 (D.D.C. 2004) (concluding "as a matter of law" that 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 his research" and that "none of [his] research results have been marketed or used and subsequently subjected to additional study" (citing Wash. Rsch. Project, 504 F.2d at 244)).

Obtained from a "Person"

The second prong of Exemption 4's second category is that the information must be "obtained from a person."[32] Under the Administrative Procedure Act, the term "person" refers to individuals as well as to a wide range of entities[33], which include corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations who provide information to the government.[34] 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.[35] However,

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[32] 5 U.S.C. § 552(b)(4) (2018).

[33] 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); Renewable Fuels Ass'n & Growth Energy v. EPA, 519 F. Supp. 3d 1, 9 (D.D.C. 2021) (same); Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2003) (same).

[34] See, e.g., FlightSafety Servs. v. U.S. Dep't of Lab., 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); Immerso v. U.S. Dep't of Lab., No. 19-3777, 2020 WL 6826271, at *5 (E.D.N.Y. Nov. 20, 2020) (corporation); Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (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") (citing Indian L. Res. Ctr. v. U.S. Dep't of the Interior, 477 F. Supp. 144, 146 (D.D.C. 1979))); Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) (banks); 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 lessees could invoke Exemption 4, the Tribe could not).

[35] 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"); accord Critical Mass Energy Project v. Nuclear Regul. Comm'n, 830 F.2d 278, 280-81 (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); see, e.g., Miami Herald Publ'g Co. v. Small Bus. Admin., 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); Cause of Action Inst. v. Exp.-Imp. Bank of the U.S., No. 19-1915, 2022 WL 252028, at *17 (D.D.C. Jan. 27, 2022) (concluding that information that came from bank customers was

courts have held that information generated by the federal government itself is not "obtained from a person" and is therefore excluded from Exemption 4's coverage.[36] Exemption 5 of the FOIA incorporates a qualified privilege for sensitive commercial or financial information generated by the government.[37] (For further discussion of the "commercial privilege," see Exemption 5, Other Privileges.)

Documents prepared by the government can still fall within Exemption 4, however, if they simply contain summaries or reformulations of information provided by a source outside the government.[38] Additionally, documents may sometimes fall within

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obtained from a person); Renewable Fuels Ass'n & Growth Energy v. EPA, 519 F. Supp. 3d 1, 10 (D.D.C. 2021) (determining that name and location of entity was obtained from a person because "a refinery's status as a petitioner for an exemption, if not the result of that petition, qualifies as both (1) commercial information and (2) information obtained from a person"); Block & Leviton LLP v. FTC, No. 19-12539, 2020 WL 6082657, at *6 (D. Mass. Oct. 15, 2020) (concluding that settlement documents sent from private company to government satisfied obtained from a person element).

[36] 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"); Block & Leviton LLP, 2020 WL 6082657, at *6 (determining that settlement documents originating from government that were sent to private company can "qualify as 'from a person' only where [private company] is the source of commercial information contained within [the government documents]") (internal citation omitted); 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"); 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").

[37] 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).

[38] See, e.g., OSHA Data/C.I.H., Inc. v. U.S. Dep't of Lab., 220 F.3d 153, 162 n.23 (3d Cir. 2000) (concerning ratio calculated by agency based upon "individual components" supplied

Exemption 4 when they contain government observations directly based on information obtained from a person.[39] Moreover, the 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."[40] Similarly, the

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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 [the agency] 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") (internal citation omitted); 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 "may not be withheld under Exemption 4") (internal citation omitted).

[39] See, e.g., Flyers Rts. Educ. Fund, Inc. v. FAA, No. 19-3749, 2021 WL 4206594, at *5 (D.D.C. Sept. 16, 2021) (finding that agency comments satisfied "obtained from a person" requirement where comments included information obtained from airplane manufacturing company and disclosure could allow others to extrapolate submitter's information), aff'd, 71 F.4th 1051 (D.C. Cir. 2023); Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1076 (9th Cir. 2004) (finding that information obtained during quality assessment of raisins, including "observations" based on "weight, color, size, sugar content, and moisture" prepared by agency inspectors during plant visits satisfied "obtained from a person" requirement).

[40] See High Country Citizens All. v. Clarke, No. 04-0749, 2005 WL 2453955, at *5-6 (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.

District Court for the District of Columbia has held that particular information "arrived at through negotiation" with the government might be considered "obtained from a person."[41]

"Confidential" Information

In 2019, the Supreme Court issued an opinion in Food Marketing Institute v. Argus Leader Media[42] addressing the meaning of the word "confidential" in Exemption 4 that overturned over forty years of precedent.[43]

Historical Interpretation of Exemption 4

The word "confidential" is not defined in the FOIA, and in the early years after 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.[44] In 1974, the Court of Appeals for the District of Columbia Circuit issued its decision in National Parks & Conservation Ass'n v. Morton,[45] which became the leading case on

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Indus., Inc., 615 F.2d at 530)) (internal citation omitted). But cf. Consumers Union v. VA, 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).

[41] Pub. Citizen Health Rsch. Grp. v. NIH, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although licensee's final royalty rate was the result of negotiation with agency, that did "not alter the fact that the licensee is the ultimate source of [the] information," inasmuch as licensee "must provide the information in the first instance"); cf. Cause of Action Inst. v. Exp.-Imp. Bank of the U.S., No. 19-1915, 2022 WL 252028, at *17 (D.D.C. Jan. 27, 2022) (determining that terms of guarantee arrived at by agreement were not obtained by a person); In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 102-03 (D.D.C. 2008) (concluding that "incentive award" payments negotiated by 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").

[42] 588 U.S. 427 (2019).

[43] See id. at 432-35 (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'") (internal citation omitted).

[44] 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).

[45] 498 F.2d 765 (D.C. Cir. 1974).

the issue until the Supreme Court's decision in Argus Leader Media. Relying on legislative history, the court in National Parks 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.[46] 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.[47] Subsequent courts eventually adopted a third prong to protect information that would compromise agency program compliance and effectiveness.[48]

Nearly two decades later, the D.C. Circuit returned to this issue in Critical Mass Energy Project v. Nuclear Regulatory Commission.[49] While reaffirming the National Parks test, the court confined its application 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."[50] Under Critical Mass, commercial or financial information that was "voluntarily" provided to the government was categorically protected as long as it was not customarily disclosed to the public by the submitter.[51]

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.[52] Noting that the FOIA itself does not define the term "confidential," the Court found that "as usual, [it must] ask what [the] term's 'ordinary, contemporary, common meaning' was

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[46] Id. at 770.

[47] See id. at 770 n.17 (stating that "[the court] express[es] no opinion as to whether other governmental interests are embodied in this exemption.").

[48] See Critical Mass Energy Project v. Nuclear Regul. Comm'n, 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).

[49] 975 F.2d at 879.

[50] Id. at 875-79.

[51] Id.

[52] 588 U.S. 427, 430 (2019).

when Congress enacted FOIA in 1966."[53] Citing Webster's Seventh New Collegiate Dictionary, the Court found that "[t]he term 'confidential' meant then, as it does now, 'private' or 'secret.'"[54] 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.[55]

The Court further held that "[c]ontemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential."[56] First, "information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it."[57] Second, "information might be considered confidential only if the party receiving it provides some assurance that it will remain secret."[58]

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.[59] 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 satisfied in the case before it.[60] 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."[61]

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[53] Id. at 433-34 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

[54] Id. at 434.

[55] Id. at 435.

[56] Id. at 434.

[57] Id.

[58] Id.

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

[60] See id. at 434-35 (noting that USDA had long history, codified in its regulations, of promising retailers that it would keep the requested data private).

[61] Id. at 440.

"Confidential" Information Analysis Since Argus Leader Media

The Supreme Court's decision in Argus Leader Media serves as the starting point for analyzing Exemption 4's confidentiality element.[62]

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."[63] Courts have considered the submitter's practices and have focused on factors, such as

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[62] 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.") (internal citation omitted); 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 district court because "the record is underdeveloped" to apply Argus Leader Media); cf. Renewable Fuels Ass'n & Growth Energy v. EPA, 519 F. Supp. 3d 1, 12 (D.D.C. 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. Nuclear Regul. Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992))); Ctr. for Investigative Reporting v. CBP, 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.") (internal citation omitted). See generally OIP Guidance: Exemption 4 After the Supreme Court's Ruling in *Food Marketing Institute v. Argus Leader Media* (posted 10/3/2019, updated 10/4/2019); 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, updated 11/18/2022).

[63] Argus Leader Media, 588 U.S. at 440; see also Animal Legal Def. Fund, 790 F. App'x at 135-36 (concluding remand "particularly appropriate" to determine if one or more producers "customarily and actually treated" information as private); Pub. Citizen v. USDA, No. 21-01408, 2022 WL 3139003, at *2-3 (D.D.C. Aug. 5, 2022) (finding that agency's impressions of how the industry viewed withheld information does not support finding of confidentiality and that agency must provide evidence that owners treated information as private); First Look Inst., Inc. v. U.S. Marine Corps., No. 21-5087, 2022 WL 2784431, at *3-4 (C.D. Cal. June 13, 2022) (concluding that neither a regulation that may permit agency to disclose information nor a patent containing generalized information about the technology could overcome necessity to evaluate actual conduct of parties which supported confidentiality); Naumes v. Dep't of Army, 588 F. Supp. 3d 23, 40-41 (D.D.C. 2022) (requiring agency to contact individual copyright holders to determine if material was confidential rather than relying upon the copyright itself); 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).

whether the submitter internally restricts access to the records, whether restrictive markings are applied to the documents, whether submitters require individuals to enter into confidentiality agreements, and whether this information is already publicly available.[64] This supporting information should be submitted in an affidavit, or in a document that is notarized and under penalty of perjury, with specific facts explaining how the submitter customarily and actually treats this information as private.[65]

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[64] See First Look Inst., Inc., 2022 WL 3784431, at *4 (rejecting the argument that absence of executed nondisclosure agreements prevented information from being confidential because "[t]he record as a whole is absent of any indication that the company or the government treated the [information] as anything other than . . . confidential"); Majuc v. DOJ, No. 18-566, 2022 WL 266700, at *7 (D.D.C. Jan. 28, 2022) (finding submitter's actions of requesting confidential treatment, marking many records as confidential for purposes of FOIA, and requesting that DOJ not release records and maintain them in non-public location as "consistent with the non-public nature of the records"); Humane Soc'y of the U.S. v. USDA, 549 F. Supp. 3d 76, 88 (D.D.C. 2021) (determining that borrowers did not actually and customarily treat information as private where allegedly confidential street address was publicly listed on business' website); 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) (concluding that agency declarations satisfied this prong because "the Agencies contacted the dealers to discuss how they treated [certain] information and then determined that . . . information was 'customarily' treated as 'confidential' by the dealers and 'not ordinarily or actually released to the public'") (internal citation omitted); Seife v. FDA, 492 F. Supp. 3d 269, 275-76 (S.D.N.Y. 2020) (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), aff'd, 43 F.4th 231 (2d Cir. 2022); Am. Small Bus. League v. DOD, 411 F. Supp. 3d 824, 830-31 (N.D. Cal. 2019) (discussing protective measures taken by submitters to keep information private, including confidentiality agreements, restrictive document markings, use of secure networks to store records, and access limited to "need to know" basis).

[65] See Cause of Action Inst. v. Exp.-Imp. Bank of the U.S., No. 19-1915, 2022 WL 252028, at *18 (D.D.C. Jan. 27, 2022) (relying on government's affidavit regarding its extensive history of interactions with participants which supported court's finding that information submitted was customarily kept confidential); Humane Soc'y Int'l. v. U.S. Fish & Wildlife Serv., No. 16-720, 2021 WL 1197726, at *3 (D.D.C. Mar. 29, 2021) (rejecting declarations provided by government, because "[n]early all the objections the Service submitted were not notarized and were not made under the penalty of perjury, thereby constituting inadmissible hearsay" and that non-hearsay information was "conclusory," without sufficient facts to demonstrate how company actually treated relevant data); cf. Citizens for Resp. & Ethics in Wash. v. DOJ, 58 F.4th 1255, 1269-70 (D.C. Cir. 2023) (rejecting agency's argument that release of contract terms would cause harm by identifying contract vendors because agency had not actually demonstrated that such terms were, in fact, identifying); Friends of Animals v. Bernhardt, 15 F.4th 1254, 1270-71 (10th Cir. 2021) (holding that government failed to demonstrate confidentiality prong because evidence used to attempt to demonstrate confidentiality in FOIA Officer's affidavit was almost entirely hearsay); Pub. Citizen, 2022 WL 3139003, at *2-3 (concluding that third party letter and email provided to

Upon finding the first prong of the confidentiality analysis is 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 also be satisfied.[66] The District Court for the District of Columbia has treated the absence of assurances of confidentiality as just one factor to be considered in determining confidentiality under Exemption 4.[67] Other court decisions have assumed, without deciding, that an assurance of confidentiality by

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court were inadmissible hearsay, because letter and email did not fall within any hearsay exception and there was no indication the third party would testify under oath); Block & Leviton LLP v. FTC, No. 19-12539, 2020 WL 6082657, at *5 (D. Mass. Oct. 15, 2020) (concluding that government failed to explain "document-by-document" why information withheld was commercial to allow the court "to independently determine whether the withheld information 'reveal[s] basic commercial operations,' 'relate[s] to the income-producing aspects of [Facebook's] business,' or bears upon Facebook's 'commercial fortunes'") (quoting Baker & Hostetler LLP v. U.S. Dep't of Com., 473 F.3d 312, 319 (D.C. Cir. 2006))).

[66] Argus Leader Media, 588 U.S. at 434-35 (discussing possibility 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 this 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, updated 10/4/2019) (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").

[67] See Naumes v. Dep't of the Army, No. 21-1670, 2022 WL 17752206, at *5 (D.D.C. Dec. 19, 2022) (stating that D.C. Circuit "'does not require assurances of privacy as a separate component of confidentiality'" (quoting Naumes, 588 F. Supp. 3d at 40)); WP Co. v. Small Bus. Admin., 502 F. Supp. 3d 1, 12, 16 (D.D.C. 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. 16-0635, 2020 WL 1323896, at *11 & n.12 (D.D.C. Mar. 20, 2020) (determining that absence of an express assurance of confidentiality is just "one factor to consider" and will not alone prevent information from being "confidential" for purposes of Exemption 4); Ctr. for Investigative Reporting, 436 F. Supp. 3d at 112-13 (describing 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").

the government is required.[68] The D.C. District Court has found that a governmental assurance of confidentiality can be either express or implied.[69] For circumstances in which the government gave assurances of *non*-confidentiality, courts have held that agencies should consider submitted information to be non-confidential.[70] Courts have

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[68] See Citizens for Resp. & Ethics in Wash. v. Dep't of Com., No. 18-03022, 2020 WL 4732095, at *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"); 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.") (internal citation omitted); cf. Seife v. FDA, 492 F. Supp. 2d 269, 275-76 (S.D.N.Y. 2020) (determining that court need not decide whether both prongs are required because both prongs were satisfied).

[69] Accord Zirvi v. NIH, No. 20-7648, 2022 WL 1261591, at *5 (D.N.J. Apr. 28, 2022) (concluding that Institute's grant policy "assured grant submitters . . . that such information would be kept confidential"); see Leopold v. DOJ, No. 19-3192, 2021 WL 124489, at *6 (D.D.C. Jan. 13, 2021) (holding that company "provided this sensitive banking information to the Monitor based on the express assurance that this information would remain confidential . . . [because] the Monitor Agreement stated that the reports prepared by the monitor 'will likely include proprietary, financial, confidential, and competitive business information' and that 'the reports and the contents thereof are intended to remain and shall remain non-public'") (quoting corporate compliance monitor agreement)); 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); see also OIP Guidance: Exemption 4 After the Supreme Court's Ruling in *Food Marketing Institute v. Argus Leader Media* (posted 10/3/2019, updated 10/4/2019) ("Such an assurance of confidentiality can be either explicit or implicit. Neither the Court's decision in Argus Leader nor any of the authority it cited suggests a requirement of an express (as opposed to implied) assurance of confidentiality by the government"); 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, updated 11/18/2022).

[70] See Humane Soc'y of the U.S. v. USDA, 549 F. Supp. 3d 76, 90-91 (D.D.C. 2021) (determining that "[a]gency's 'notice *disclaimed* confidentiality . . . rather than provid[ing] an assurance of it'" where agency advised that certain information may be disclosed to other government agencies or to non-governmental agencies for routine uses, including granting media access to information where there is legitimate public interest in disclosure about individuals who received federal assistance) (internal citation omitted); Pub. Just. Found. v. Farm Serv. Agency, 538 F. Supp. 3d 934, 942 (N.D. Cal. 2021) (holding that government did not provide an express or implied assurance of confidentiality to submitters where loan application referenced the Privacy Act and the FOIA, which the court construed as "a warning that under some circumstances, information will be disclosed"); Am. Soc'y for the Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv., No. 19-3112,

also considered whether there were expressed or implied indications at the time the information was submitted that the government would disclose the information.[71]

Finally, courts have applied the foreseeable harm requirement of the FOIA[72] to Exemption 4, but have taken differing approaches regarding the harm that must be demonstrated by agencies. The D.C. District Court's foreseeable harm standard requires agencies to explain how disclosure "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

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2021 WL 1163627, at *5 (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. U.S. Dep't of Lab., 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 confidentiality it may have had."); Ctr. for Investigative Reporting v. Dep't of Lab., 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 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, updated 11/18/2022); cf. WP Co., 502 F. Supp. 3d at 17 (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").

[71] See Humane Soc'y Int'l. v. U.S. Fish & Wildlife Serv., No. 16-720, 2021 WL 1197726, at *5 (D.D.C. Mar. 29, 2021) (concluding that "whether the government has disclosed the same type of information on prior occasions remains a consideration when weighing whether the information is confidential"); Am. Soc'y for the Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv., No. 19-3112, 2021 WL 1163627, at *5 (S.D.N.Y. Mar. 25, 2021) (observing that "at the time the [animal] dealers submitted the [documents] in question, the Agencies took the public position that they would not treat [certain] information as confidential" and, therefore, dealers did not have an expectation that this information would be kept confidential); 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, updated 11/18/2022).

[72] 5 U.S.C. § 552(a)(8)(A)(i)(I).

. . . ."[73] The Court of Appeals for the Second Circuit has also followed this approach.[74] Alternatively, the Northern District for the District of California has determined that the focus of Exemption 4's foreseeable harm standard should be "that of the information's *confidentiality* – that is, its private nature[– such that] [d]isclosure would necessarily destroy the private nature of the information, no matter the circumstance".[75] (For further

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[73] Ctr. for Investigative Reporting v. CBP, 436 F. Supp. 3d 90, 113 (D.D.C. 2019) (conceding that "[t]he FOIA Improvement Act's 'foreseeable harm' requirement replaces to some extent the 'substantial competitive harm' test that the Supreme Court overruled in [Argus Leader Media]" and referencing Justice Breyer's dissent in Argus Leader Media to reason that the "[t]he foreseeable-harm requirement, as applied to Exemption 4, enhances the useful 'tool' of FOIA" which can be "'used to probe the relationship between government and business'" and that that tool "'should not be unavailable whenever government and business wish it so'" (quoting Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 441-44 (2019))); see also Naumes v. Dep't of Army, 588 F. Supp. 3d 23, 42 (D.D.C. 2022) (concluding that agency's declaration stating that release of copyrighted information would likely result in financial and competitive harm to owners and also cause financial harm to the Army as a result of copyright infringement litigation was adequate to satisfy foreseeable harm requirement); aff'd on reh'g, No. 21-1670, 2022 WL 17752206, at *6 (D.D.C. Dec. 19, 2022) (applying earlier foreseeable harm analysis to remaining material withheld under Exemption 4 and directly citing to Critical Mass Engine Project v. Nuclear Regul. Comm'n, 975 F.2d 871 (D.C. Cir. 1992)); Greenspan v. Governors of the Fed. Rsrv. Sys., No. 21-01968, 2022 WL 17356879, at *5 (D.D.C. Dec. 1, 2022) (finding adequate defendant's focus on economic harm that would result from release of records as well as noting that if the information was disclosed here, "it might be less likely to voluntarily disclosure such information" in future); Leopold, 2021 WL 124489, at *7 (finding foreseeable harm because "'[t]he Report also provides extensive detail about [the company at issue's] sensitive proprietary information used in combatting financial crime' and 'information about the Bank's technology infrastructure, which is used to identify and analyze financial crime as well as the Bank's bespoke policies and procedures . . . [which] could disadvantage [the company at issue] and provide an unfair advantage to its competitors'" and could also dissuade companies from future cooperation with federal government) (quoting agency declaration)); cf. Wilson v. FCC, No. 21-895, 2022 WL 4245485, at *11 (D.D.C. Sept 15, 2022) (holding that "agency's fear of reduced company candidness is reasonable" and accepting generally agency's "competitive harm" argument, but finding that agency's showing was too nebulous and nonspecific to prevail in instant motion for summary judgment).

[74] Seife v. FDA, 43 F.4th 231, 240-42 (2d Cir. 2022) (concluding that "the protected interests are the submitter's commercial or financial interests, and the [FOIA's] foreseeable harm requirement refers to harm to the submitter's commercial or financial interests" and that an agency "can therefore meet the foreseeable harm requirement of the [FOIA] by showing foreseeable commercial or financial harm to the submitter upon release of the contested information").

[75] Am. Small Bus. League v. DOD, 411 F. Supp. 3d 824, 835-36 (N.D. Cal. 2019) (confirming that foreseeable harm standard applies to Exemption 4 but declining to "effectively reinstate the competitive harm test for Exemption 4").

discussion of the Foreseeable Harm showing in litigation, see Litigation Considerations, Foreseeable Harm Showing.)

Privileged Information

The term "privileged" in Exemption 4 has been used 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 light of the legislative history's explicit reference to certain privileges, e.g., the attorney-client and doctor-patient privileges.[76] 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 performed for the Hopi Indians as "privileged" because of their work-product nature within the meaning of Exemption 4.[77] In another 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.[78] In both of these cases the information was also withheld as "confidential."[79]

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.[80] In a brief opinion, one court recognized Exemption 4 protection for settlement negotiation documents but did not expressly characterize them as "privileged."[81] Another court

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

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

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

[79] Id. at 771-72; Indian L. Res. Ctr., 477 F. Supp. at 147.

[80] 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).

[81] 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. COMPTEL v. FCC, 945 F. Supp. 2d 48, 58 (D.D.C. 2013) (agency "cannot

subsequently recognized Exemption 4 protection for documents subject to the critical self-evaluative privilege.[82]

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.[83] 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,"[84] were protected by the attorney-client privilege.[85] 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."[86]

Approximately two decades later, 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."[87] The court explained that the email was labeled "Subject to Attorney-Client Privilege," and contained "an express request for legal

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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 COMPTEL 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") (internal citation omitted) (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 proponent of privilege failed to meet its burden to show that disputed documents were created for purpose of settlement discussions).

[82] 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, 103 (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).

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

[84] Id. at 237.

[85] Id. at 242-43.

[86] Id. at 243.

[87] Jordan v. U.S. Dep't. of Lab., 273 F. Supp. 3d 214, 227 (D.D.C. 2017), aff'd, 2018 WL 5819393 (D.C. Cir. Oct. 19, 2018).

advice."[88] 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."[89]

In a decision later affirmed by the Court of Appeals for the Second Circuit, the Eastern District for the District of New York determined that an email transmitted to an in-house attorney seeking legal advice garnered Exemption 4 protection as the email was privileged.[90] The email was marked as "Subject to Attorney Client Privilege," updated the attorney on a contract, and "explicitly requested the attorney's input and review of information transmitted."[91] The lower court determined it was "clear that exemption 4 at least encompasses information that falls within the attorney-client privilege."[92]

On the other hand, the Court of Appeals for the Tenth Circuit has held that documents subject to a state protective order designed to protect trade secrets or other confidential information were not "privileged" for purposes of Exemption 4 because while discovery privileges "may constitute an additional ground for nondisclosure," those other privileges are for information "not otherwise specifically embodied in the language of Exemption 4."[93]

Finally, 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.[94] (For 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

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[88] Id. at 231-32.

[89] Id. at 232.

[90] Immerso v. U.S. Dep't of Lab., No. 19-3777, 2020 WL 6826271, at *6 (E.D.N.Y. Nov. 20, 2020), aff'd, No. 20-4064, 2022 WL 17333083, at *1 (2d Cir. Nov. 30, 2022) (per curiam).

[91] Id. at *6.

[92] Id. at *5.

[93] Anderson v. HHS, 907 F.2d 936, 945-46 (10th Cir. 1990) (explaining that recognition of a privilege for materials protected by this type of protective order "would be redundant and would substantially duplicate Exemption 4's explicit coverage of 'trade secrets and commercial or financial information'").

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

within the first category of Exemption 4.[95] 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."[96] 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."[97] (For 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 be considered to ascertain whether the agency is forbidden from disclosing the information."[98]

Nonetheless, prior to the Supreme Court's decision in Food Marketing Institute v. Argus Leader Media,[99] the Trade Secrets Act had been held to prohibit the unauthorized disclosure of all information protected by Exemption 4.[100] 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.[101] Thus, the

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[95] See 18 U.S.C. § 1905 (2018).

[96] Id.

[97] H.R. REP. NO. 880, pt. 1, at 23 (1975), as reprinted in 1976 U.S.C.C.A.N. 2183, 2205.

[98] Id.

[99] 588 U.S. 427 (2019).

[100] See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987) (reverse FOIA suit).

[101] 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); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2006)); 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. Nuclear Regul. Comm'n, 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).

D.C. Circuit held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act.[102]

However, the Supreme Court in Argus Leader Media reconsidered the meaning of the word "confidential" in Exemption 4, which expands the scope of Exemption 4[103] and may impact the relationship between Exemption 4 and the Trade Secrets Act to the extent they were previously considered coextensive.[104] (For further discussion of Argus Leader Media, see "Confidential" Information, above.)

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[102] 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").

[103] 588 U.S. at 434, 439 (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") (internal citation omitted).

[104] See Synopsys, Inc. v. U.S. Dep't of Lab., Nos. 20-16414 & 20-16416, 2022 WL 1501094, at *4 n.3 (9th Cir. May 12, 2022) ("We need not decide here whether Exemption 4 is indeed now broader in scope than the Trade Secrets Act. Even if it were, the district court's holding that [the report] was outside the scope of Exemption 4 would necessarily mean that [the] report was also outside the scope of the Trade Secrets Act.") (reverse-FOIA case); McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1165 n.2 (D.C. Cir. 1995) (noting that following 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. Nuclear Regul. Comm'n, 975 F.2d 871 (D.C. Cir. 1992))); Seife v. FDA, 492 F. Supp. 3d 269, 279 n.3 (S.D.N.Y. 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.").