



UNITED STATES DEPARTMENT *of* JUSTICE

Exemption 4



Text of Exemption 4

Exemption 4 protects:

“Trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

- 5 U.S.C. § 552(b)(4)



Purpose of Exemption 4

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

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



Exemption 4 Challenges

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



Exemption 4 Framework

Exemption 4 protects two separate categories of information:

- Trade Secrets; and
- Commercial or Financial Information, Obtained from a Person, that is Privileged or Confidential.



Trade Secrets – Narrow Definition

Defined “solely for the purpose of FOIA Exemption 4, 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.”*

* Public Citizen Health Research Group v. FDA, ⁶

704 F.2d 1280, 1288 (D.C. Cir. 1983)



Trade Secrets – Narrow Definition

“...[W]e feel free to repudiate the broad *Restatement* [of Torts] approach.... In our opinion, the term ‘trade secrets’ in Exemption 4 of the FOIA should be defined in its narrower common law sense....”*

* Public Citizen Health Research Group v. FDA,
704 F.2d 1280, 1288 (D.C. Cir. 1983) ⁷



Trade Secrets

Directly relates to the production or manufacturing process.

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



Location of Trade Secrets

Trade secrets may be found in:

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



Second Category of Exemption 4

Three part definition:

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

All three parts must be met

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



Commercial or Financial Information

The terms “commercial” and “financial” should be given their “ordinary meanings,” and information satisfies this element if the submitter has a “commercial interest” in the information.

- Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1980)



Commercial or Financial Information

Protection not limited to profit-seeking entities. E.g., charities, other non-profits, and individuals may submit commercial or financial information protectable by Exemption 4.



Obtained from a Person

“Person” is defined broadly. Includes “an individual, partnership, corporation, association, or public or private organization other than an agency”. Definition includes foreign, state, and tribal governments.



Obtained from a Person

Includes submitter-generated information summarized or reformulated by agency (e.g., through agency inspections, summaries, or audits)



Privileged or Confidential

“Privileged” encompasses Attorney-Client, Attorney Work Product, etc.



Privileged or Confidential

“Confidential” definition depends on the circumstances under which the information was obtained by the government – whether the information was a required or a voluntary submission.



Required vs. Voluntary

“Required” = 2 part test:

- 1) Legal authority to obtain information
 - Whether the submitter’s participation in a government program was voluntary is not the test
 - Example: submitting proposal in response to RFP

- 2) Whether the agency exercised its authority to require submission



Required vs. Voluntary

Test for distinguishing between required and voluntary submissions is an objective, not subjective, test. “[A]ctual legal authority, rather than parties’ beliefs or intentions, governs judicial assessments of the character of submissions.”

- Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin., 244 F.3d 144, 149 (D.C. Cir. 2001).



Required vs. Voluntary

When a submitter is required to provide certain information as a condition of participation in a voluntary government program, this information is treated as a required submission. (E.g., an agency solicits voluntary bids for a government contract, but requires bidders to include certain specified information in their bids).



Confidential

“Confidential” if release would:

- Impair the agency’s ability to obtain similar information in the future; or
- Likely cause substantial competitive harm to the person from whom the data was obtained; or
- Harm other governmental interests, such as compliance and program effectiveness.

- National Parks & Conservation Ass’n v. Morton,
498 F.2d 765 (D.C. Cir. 1974).



Confidential

Impairment Prong: Required submissions are confidential if release would harm agency's ability to obtain similar information in the future.



Confidential

Competitive Harm Prong: Required submissions are confidential if release would likely cause substantial competitive harm to the person from whom the data was obtained.

Test requires both actual competition and a likelihood of substantial competitive harm.



Confidential

Competitive harm means harm suffered due to affirmative use of information by competitors. Courts have strongly disfavored describing harms such as public embarrassment or employee disgruntlement as “competitive harm”.

Age of documents is not dispositive, but may be relevant.



Confidential

Third Prong: Required submissions are confidential if release would harm other governmental interests, such as compliance and program effectiveness.



Voluntary Submissions

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

Referred to as the Critical Mass test

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



Submitter Notice: E.O. 12,600

As noted above, the commercial sensitivity of records might not be readily apparent to agency personnel.

Recognizing this, Executive Order 12,600 sets out a process through which agencies obtain information about records' commercial sensitivity from submitters themselves.



Submitter Notice: E.O. 12,600

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



Submitter Notice: E.O. 12,600

Submitter Notice Does Not Apply If:

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



Submitter Notice: E.O. 12,600

- Might be appropriate to provide copies of the requested records.
- Advise submitter to identify specifically (by page, line, column, paragraph, etc.) any portion of information they believe meets the requirements of Exemption 4.



Submitter Notice: E.O. 12,600

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



FOIA Requester Notice

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



Notice of Intent to Disclose Letter

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



Trade Secrets Act - 18 U.S.C. § 1905

The Trade Secrets Act, at 18 U.S.C. § 1905, is a criminal statute that prohibits release of certain commercial information “except as provided by law.”

“[T]he scope of the [Trade Secrets] Act is at least co-extensive with that of Exemption 4....”

- CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1151-1152 (D.C. Cir. 1987).



Trade Secrets Act - 18 U.S.C. § 1905

Therefore, if an agency determines that it can withhold information under Exemption 4, the agency must withhold it, because the Trade Secrets Act would prohibit disclosure.

No additional discretionary release or foreseeable harm analysis needed.



“Reverse FOIA”

Traditional FOIA lawsuits seek to compel disclosure of records under FOIA.

“Reverse FOIA” lawsuits seek to prevent release of information in response to a FOIA request.



“Reverse FOIA”

- The FOIA itself does not prohibit release of any information
- Reverse FOIA suits are brought under APA
- Court reviews agency disclosure decision based on administrative record compiled by agency



Submitter Notice

Agencies can be sued by requesters or submitters. Important to do submitter notice either way.

- Support withholdings, by borrowing expertise of submitters, avoiding hazard of inaccurately assessing submitter equities.
- Support releases, by building administrative record (crucial for “Reverse FOIA” litigation) reflecting agency’s careful consideration.



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Questions?