



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 very existence of Exemption 4 encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable.³ The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.⁴ The exemption covers two distinct categories of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.⁵

¹ 5 U.S.C. § 552(b)(4) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines Creating a New Era of Open Government" (posted 4/17/09).

² See, e.g., Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 767-70 (D.C. Cir. 1974) (concluding that the legislative history of the FOIA "firmly supports an inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which collect it").

³ See Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc).

⁴ See Nat'l Parks, 498 F.2d at 768.

⁵ See 5 U.S.C. § 552(b)(4).

Trade Secrets

For purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit in Public Citizen Health Research Group v. FDA,⁶ has adopted a "common law" definition of the term "trade secret" that is narrower than the broad definition used in the Restatement of Torts.⁷ The D.C. Circuit's decision in Public Citizen represented a distinct departure from what until then had been almost universally accepted by the courts -- that a "trade secret" encompasses virtually any information that provides a competitive advantage. In Public Citizen, a "trade secret" was more narrowly defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."⁸ This definition also incorporates a requirement that there be a "direct relationship" between the trade secret and the productive process.⁹

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."¹⁰ In so doing, the Tenth Circuit noted that adoption of the broader Restatement definition "would render superfluous" the remaining 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.¹¹ Like the D.C. Circuit, the Tenth Circuit was "reluctant to construe the FOIA in such a manner."¹² More recently, the Tenth Circuit declined to "address whether [it] should supplement" this narrower trade secret definition "to require a governmental showing that the

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

⁷ Restatement (First) of Torts § 757 cmt. b (1939) (stating that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it"), quoted in Pub. Citizen, 704 F.2d at 1284 n.7.

⁸ 704 F.2d at 1288; see also Freeman v. Bureau of Land Mgmt., 526 F. Supp. 2d 1178, 1188 89 (D. Or. 2007) (concluding that trade secrets are not limited to processes "actually proven to be" commercially valuable; rather, it was sufficient for plaintiff to show that his manufacturing process "may" have commercial value); Appleton v. FDA, 451 F. Supp. 2d 129, 142 & n.8 (D.D.C. 2006) (rejecting plaintiff's argument that trade secret, as defined in Public Citizen, requires "sole showing of 'innovation or substantial effort,'" and emphasizing that trade secret applies to information that constitutes the "'end product of either innovation or substantial effort'" (quoting Pub. Citizen, 704 F.2d at 1288)).

⁹ Pub. Citizen, 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").

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

¹¹ Id.

¹² Id.

documents in question are actually owned by the submitting entity or by any other party," finding that in the case before it, involving plans and specifications for an antique aircraft, the agency had shown a "corporate 'chain of ownership'" for the requested documents, leading from "the original owner and submitter" to the company currently claiming "trade secret" protection for them.¹³

Trade secret protection has been recognized for product manufacturing and design information,¹⁴ but has been denied for general information concerning a product's physical or performance characteristics or a product formula when release would not reveal the actual formula itself.¹⁵ 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

¹³ Herrick v. Garvey, 298 F.3d 1184, 1191 (10th Cir. 2002) (declaring that the agency "need not show" that "ownership of these particular documents was specifically mentioned and transferred" with each corporate succession, because "such a requirement would be overly burdensome," and finding that the agency "need only show that there was a corporate successor that received the assets of the prior corporation").

¹⁴ See, e.g., Appleton, 451 F. Supp. 2d at 142 & n.7 ("drug product manufacturing information, including manufacturing processes or drug chemical composition and processes"); Herrick v. Garvey, 200 F. Supp. 2d 1321, 1326 (D. Wyo. 2000) ("technical blueprints depicting the design, materials, components, dimensions and geometry of" 1935 aircraft (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 U.S. Dist. LEXIS 23365, at *25 & n.13 (C.D. Cal. Mar. 18, 1999) ("compliance testing" and "specification of the materials used in constructing" electrode catheter), aff'd, 7 F. App'x 770 (9th Cir. 2001); Sokolow v. FDA, No. 1:97-CV-252, slip op. at 7 (E.D. Tex. Feb. 19, 1998) (description of how drug is manufactured, including "analytical methods employed to assure quality and consistency" and "results of stability testing"), aff'd, 162 F.3d 1160 (5th Cir. 1998) (unpublished table decision); Citizens Comm'n on Human Rights v. FDA, No. 92-5313, 1993 WL 1610471, at *7 (C.D. Cal. May 10, 1993) ("information about how a pioneer drug product is formulated, chemically composed, manufactured, and quality controlled"), aff'd in part & remanded in part on other grounds, 45 F.3d 1325 (9th Cir. 1995); Pac. Sky Supply, Inc. v. Dep't of the Air Force, No. 86-2044, 1987 WL 25456, at *1 (D.D.C. Nov. 20, 1987) (design drawings of airplane fuel pumps developed by private company and used by Air Force), modifying No. 86-2044, 1987 WL 18214 (D.D.C. Sept. 29, 1987), on motion to amend judgment, No. 86-2044, 1987 WL 28485 (D.D.C. Dec. 16, 1987); cf. Myers v. Williams, 819 F. Supp. 919 (D. Or. 1993) (granting preliminary injunction to prevent FOIA requester from disclosing trade secret acquired through mistaken, but nonetheless official, FOIA release) (non-FOIA case). But see Wash. Research Project, Inc. v. HEW, 504 F.2d 238, 244-45 (D.C. Cir. 1974) (denying trade secret protection for "noncommercial scientist's research design"); Physicians Comm. for Responsible Med. v. NIH, 326 F. Supp. 2d 19, 23 (D.D.C. 2004) (same).

¹⁵ See Ctr. for Auto Safety, 244 F.3d at 151 (airbag characteristics relating "only to the end product -- what features an airbag has and how it performs -- rather than to the production process"); Freeman, 526 F. Supp. 2d at 1188 (quantity and quality of ore reserve); Nw. Coal. for Alternatives to Pesticides v. Browner, 941 F. Supp. 197, 201-02 (D.D.C. 1996) ("common names and Chemical Abstract System . . . numbers of the inert ingredients" contained in pesticide formulas).

release those documents to the public, those documents are no longer 'secret' for purposes of [trade secret protection under] Exemption 4" and so must be released.¹⁶

Commercial or Financial Information

If information does not qualify as a trade secret, it nonetheless may be protected pursuant to Exemption 4 if it falls within its second, much larger category. To be protected as such, the information must be commercial or financial, obtained from a person, and privileged or confidential.¹⁷ The overwhelming majority of Exemption 4 cases focus on this standard.

Courts have little difficulty in regarding information as "commercial or financial" if it relates to business or trade.¹⁸ The Court of Appeals for the District of Columbia Circuit has firmly 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

¹⁶ Herrick, 298 F.3d at 1194 & n.10 (distinguishing facts of the case before it, and upholding trade secret protection nonetheless, based upon the subsequent revocation of that permission and the requester's failure to challenge both whether such revocation could legally operate to "restore the secret nature of the documents" and, if so, whether such revocation could properly be made after the documents had been requested under the FOIA).

¹⁷ See, e.g., Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); Herrick v. Garvey, 200 F. Supp. 2d 1321, 1324 (D. Wyo. 2000), aff'd, 298 F.3d 1184, 1193-95 (10th Cir. 2002).

¹⁸ See, e.g., Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (information relating "'to business decisions and practices regarding the sale of power, and the operation and maintenance'" of generators (quoting agency declaration)); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001) ("[i]nformation regarding oil and gas leases, prices, quantities and reserves"), appeal dismissed, No. 01-1347 (10th Cir. Sept. 4, 2001); In Def. of Animals v. HHS, No. 99-3024, 2001 U.S. Dist. LEXIS 24975, at *2, *29 (D.D.C. Sept. 28, 2001) (letter detailing "financial situation" of private primate research facility); Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) ("identities of businesses having unclaimed deposits"), aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); Cohen v. Kessler, No. 95-6140, slip op. at 9 (D.N.J. Nov. 25, 1996) ("rat study's raw data" submitted to support application for approval of new animal drug); Bangor Hydro-Elec. Co. v. U.S. Dep't of the Interior, No. 94-0173-B, slip op. at 7 (D. Me. Apr. 17, 1995) ("information relating to proposed [land] usage charges"); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 987 (D.D.C. 1992) (software "output data and reports and extensive descriptive and instructional material"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); RMS Indus. v. DOD, No. C-92-1545, slip op. at 3, 6 (N.D. Cal. Nov. 24, 1992) ("interim pricing, type and quality of machines owned" and names and background of key employees and suppliers"); ISC Group v. DOD, No. 88-0631, 1989 WL 168858, at *2-3 (D.D.C. May 22, 1989) (investigative report concerning allegations of overcharging on government contract); M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986) (settlement negotiation documents reflecting "accounting and other internal procedures"); see also FOIA Update, Vol. VI, No. 1, at 3-4 ("OIP Guidance: Protecting Intrinsic Commercial Value"); FOIA Update, Vol. IV, No. 4, at 3-5 ("OIP Guidance: Copyrighted Materials and the FOIA").

commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.¹⁹ Such a commercial interest has been found, for example, for information pertaining to water rights held by Indian tribes in light of the tribes' interest in "maximizing" their position vis-a-vis this valuable resource.²⁰

More than three decades ago, in a case involving a request for employee authorization cards submitted by a labor union, the Court of Appeals for the Second Circuit articulated a straightforward definition of the term "commercial," declaring that "surely [it] means [anything] pertaining or relating to or dealing with commerce."²¹ In doing so, it categorically rejected the requester's argument that the information was "not commercial or financial because the [labor union did] not have profit as its primary aim."²² The Second Circuit declared that such an "interpretation [would give] much too narrow a construction to the phrase in question."²³ Instead, the Second Circuit focused on the union's relationship with "commerce" and found that "[l]abor unions, and their representation of employees, quite

¹⁹ Pub. Citizen Health Research Group, 704 F.2d at 1290 (citing Wash. Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982), and Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir. 1980)); accord Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 319-20 (D.C. Cir. 2006) (citing Pub. Citizen Health Research Group, 704 F.2d at 1290, and finding that letters describing "favorable market conditions for domestic [lumber] companies" constituted "commercial information," because those companies "have a 'commercial interest' in such letters"); Cooper v. U.S. Dep't of the Navy, No. 05-2252, 2007 WL 1020343, at *3-4 (D.D.C. Mar. 30, 2007) (determining that professor had commercial interest in his research, as demonstrated by his filing of patent applications and formation of for-profit company); ICM Registry v. U.S. Dep't of Commerce, 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"); Judicial Watch, Inc. v. DOE, 310 F. Supp. 2d 271, 308 (D.D.C. 2004) (holding that reports that "constitute work done for clients" are "'commercial' in nature"), aff'd in part & rev'd in part on other grounds, 412 F.3d 125 (D.C. Cir. 2005); Judicial 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").

²⁰ Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (declaring that "water rights themselves are an object of commerce . . . that is bought and sold," and holding that "information about the quantity available," or "information that creates the Tribes' negotiating position, supports their claims," or maximizes their position, "is all commercial information in function"), appeal dismissed, No. 04-35230 (9th Cir. Feb. 11, 2005); see also Starkey v. U.S. Dep't of Interior, 238 F. Supp. 2d 1188, 1195 (S.D. Cal. 2002) (concluding that "well and water related information" on an 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)).

²¹ Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978).

²² Id.

²³ Id.

obviously pertain to or are related to commerce and deal with the commercial life of the country."²⁴ Accordingly, the employee authorization cards were readily deemed to be "commercial."²⁵ Likewise, 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."²⁶

Despite the widely accepted breadth of the term "commercial or financial," it is not without meaning and nevertheless remains a necessary element of Exemption 4 protection. For example, the D.C. Circuit rejected an agency's rather strained argument that data pertaining to the location of endangered pygmy owls qualified as "commercial or financial" information "simply because it was submitted pursuant to a government-to-government cooperative agreement" whereby a state agency provided "access to its database in return for money" from the federal government.²⁷ The D.C. Circuit reasoned that "[s]uch a quid-pro-quo exchange between governmental entities does not constitute a commercial transaction in the ordinary sense."²⁸ Moreover, the D.C. Circuit found, the requested "owl-sighting data itself [was] commercial neither by its nature (having been created by the government rather than in connection with a commercial enterprise) nor in its function (as there [was] no evidence that the parties who supplied the owl-sighting information [had] a commercial interest at stake in its disclosure)."²⁹ Consequently, the D.C. Circuit was "unpersuaded" that Exemption 4 applied.³⁰

Similarly, a district court rejected an agency's attempt to convert "factual information

²⁴ Id.

²⁵ Id.; see also FlightSafety Servs. v. U.S. Dep't of Labor, No. 3:00CV 1285P, 2002 WL 368522, at *5 (N.D. Tex. Mar. 5, 2002) (protecting "information relating to the employment and wages of workers"), aff'd per curiam, 326 F.3d 607, 611 (5th Cir. 2003); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (same).

²⁶ Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (finding that safety reports submitted by the nonprofit Institute for Nuclear Power Operations were "commercial," because the Institute's "'constituent utility companies [were] assuredly commercial enterprises engaged in the production and sale of electrical power for profit'" and "the commercial fortunes of [those] member utilities . . . could be materially affected by" disclosure (quoting district court)), vacated en banc on other grounds, 975 F.2d 871, 880 (D.C. Cir. 1992) (reiterating that it "agree[d] with the district court's conclusion that the information [contained in the nonprofit Institute's safety reports] is commercial in nature"); see also Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir. 1985) (summarily declaring that audit reports submitted by nonprofit water supply company are "clearly commercial or financial").

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

²⁸ Id. at 38-39.

²⁹ Id. at 39.

³⁰ Id. at 38.

regarding the nature and frequency of in-flight medical emergencies"³¹ into "commercial information" for purposes of Exemption 4, finding instead that the "medical emergencies detailed in the [requested] documents [did] not naturally flow from commercial flight operations, but rather [were] chance events which happened to occur while the airplanes were in flight."³² In delimiting the scope of the term "commercial," the court opined that "[t]he mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information."³³

Conversely, the District Court for the Southern District of New York held that documents submitted by the General Electric Company (GE) to the EPA supporting GE's alternative Hudson River dredging plan -- which would have been less costly to GE than the plan scheduled to be imposed on it by the EPA -- were not "commercial" under Exemption 4.³⁴ Despite the fact that GE "had a financial stake" in the matter and provided the documents in an effort "to convince the EPA to adopt its less expensive remedy," the court nonetheless held that the EPA had "failed to establish that the information [had] any intrinsic commercial value."³⁵

An agency's failure to establish the "commercial" character of requested information precluded Exemption 4 protection in the only appellate court decision to address the

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

³² Id. at *2.

³³ Id.; see also Maydak v. DOJ, 254 F. Supp. 2d 23, 48-49 (D.D.C. 2003) (rejecting an agency's argument that a company's report should be deemed "commercial" merely because it was "labeled" as "proprietary and confidential," and denying Exemption 4 protection based upon the agency's failure to provide "any description of the report's content"), renewed motion for summary judgment granted in part & denied in part on other grounds, 362 F. Supp. 2d 316 (D.D.C. 2005); In Def. of Animals, 2001 U.S. Dist. LEXIS 24975, at *29 (observing that "identities of [private] Foundation employees . . . standing alone, may not be commercial"); Animal Legal Def. Fund, Inc. v. Dep't of the Air Force, 44 F. Supp. 2d 295, 303 (D.D.C. 1999) (denying summary judgment when the agency's declaration merely "state[d]" that the company's "proposals contain 'commercial and financial information'" but failed to provide a "description of the documents to permit the [requester] or [the] Court to test the accuracy of that claim").

³⁴ N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 332-34 (S.D.N.Y. 2003) (describing the documents as containing GE's "analyses of the costs, benefits, and environmental impact associated with the EPA's proposed remedy and GE's alternative remedy").

³⁵ Id. at 334 (finding also that EPA had not shown "that disclosure would jeopardize GE's commercial interests or reveal information about GE's ongoing operations, or that GE generated the information for a purpose other than advocating a policy to a governmental agency"); see also id. at 330 (noting that GE had neither submitted an affidavit nor "taken a position with regard to the documents").

protection of information submitted by a scientist in connection with a grant application.³⁶ In that case, the D.C. Circuit found that research designs submitted as part of a grant application were not "commercial," despite claims that "[t]heir misappropriation," which "would be facilitated by premature disclosure, [would] deprive[the researcher] of the career advancement and attendant material rewards in which the academic and scientific market deals."³⁷ Finding that "the reach" of Exemption 4 "is not necessarily coextensive with the existence of competition in any form," the D.C. Circuit declared that "a noncommercial scientist's research design is not literally a trade secret or item of commercial information, for it defies common sense to pretend that the scientist is engaged in trade or commerce."³⁸ Although recognizing that a scientist may have "a preference for or an interest in nondisclosure of his research design," the D.C. Circuit held that if that interest is "founded on professional recognition and reward, it is surely more the interest of an employee than of an enterprise" and so is beyond the reach of Exemption 4.³⁹ Significantly, the D.C. Circuit noted that a given grantee "could conceivably be shown to have a commercial or trade interest in his research design," but it emphasized that "the burden of showing" such an interest "was on the agency."⁴⁰ Because the agency "did not introduce a single fact relating to the commercial character of any specific research project," the D.C. Circuit concluded that in that case, the agency had failed to "carr[y] its burden on this point."⁴¹

Lastly, protection for financial information is not limited to economic data generated solely by corporations or other business entities, but rather has been held to apply to personal financial information as well.⁴² Examples of items usually regarded as commercial or financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial

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

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

³⁸ Id.

³⁹ Id. at 245.

⁴⁰ Id. at 244 n.6.

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

⁴² See Defenders of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 15 (D.D.C. 2004) (finding that draft severance agreements which contained "financial information surrounding [the Deputy Secretary's] separation from his former company . . . are within the common understanding of the term 'financial information'"); see also FOIA Update, Vol. IV, No. 4, at 14. But see Wash. Post, 690 F.2d at 266 (holding that mere "list of non-federal employment" is not "financial" within meaning of Exemption 4).

condition.⁴³

Obtained from a "Person"

The second of Exemption 4's specific criteria, that the information be "obtained from a person," is quite easily met in almost all circumstances. The term "person" refers to individuals as well as to a wide range of entities,⁴⁴ including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government.⁴⁵ 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.⁴⁶ The courts have held, however, that information generated by the federal government itself is not "obtained from a person" and is therefore excluded from Exemption

⁴³ See, e.g., Landfair v. U.S. Dep't of the Army, 645 F. Supp. 325, 327 (D.D.C. 1986).

⁴⁴ See, e.g., Nadler v. FDIC, 92 F.3d 93, 95 (2d Cir. 1996) (stating that term "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency" (quoting definition found in Administrative Procedure Act, 5 U.S.C. § 551(2) (2006))); Dow Jones Co. v. FERC, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (same).

⁴⁵ See, e.g., Flight Safety Servs. v. Dep't of Labor, 326 F.3d 607, 611 (5th Cir. 2003) (per curiam) (business establishments); Stone v. Exp.-Imp. Bank, 552 F.2d 132, 137 (5th Cir. 1977) (foreign government agency); Flathead Joint Bd. of Control v. U.S. Dep't of the Interior, 309 F. Supp. 2d 1217, 1221 (D. Mont. 2004) (Indian tribes (citing Indian Law Res. Ctr. v. Dep't of the Interior, 477 F. Supp. 144, 146 (D.D.C. 1979) (holding that an Indian tribe, "as a corporation that is not part of the Federal Government, is plainly a person within the meaning of the Act"))), appeal dismissed, No. 04-35230 (9th Cir. Feb. 11, 2005); Lepelletier v. FDIC, 977 F. Supp. 456, 459 (D.D.C. 1997) (banks), aff'd in part, rev'd in part & remanded on other grounds, 164 F.3d 37 (D.C. Cir. 1999); Hustead v. Norwood, 529 F. Supp. 323, 326 (S.D. Fla. 1981) (state government). See generally Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1189 (D. Colo. 2001) (rejecting Apache Tribe's claim of confidentiality for information "accumulated by the Tribe [pursuant to a cooperative agreement] that would otherwise be submitted by [oil and gas] lessees directly to the agency," and concluding that although the lessees could invoke Exemption 4, the Tribe could not), appeal dismissed, No. 01-1347 (10th Cir. Sept. 4, 2001).

⁴⁶ 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. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (citing Board of Trade and protecting safety reports submitted by power-plant consortium based on commercial interests of member utility companies), vacated en banc on other grounds, 975 F.2d 871 (D.C. Cir. 1992); see, e.g., Miami Herald Publ'g Co. v. SBA, 670 F.2d 610, 614 & n.7 (5th Cir. 1982) (analyzing Exemption 4 argument raised on behalf of borrowers even though no Exemption 4 argument was raised for lenders, who actually had "directly" supplied requested loan agreements to agency); see also DOJ FOIA Regulations, 28 C.F.R. § 16.8(a)(2) (2008) (defining a "submitter" as "any person or entity from whom the Department obtains business information, directly or indirectly").

4's coverage.⁴⁷ Such information might possibly be protectible under Exemption 5, though, which incorporates a qualified privilege for sensitive commercial or financial information generated by the government.⁴⁸ (For a further discussion of the "commercial privilege," see Exemption 5, Other Privileges, below.)

⁴⁷ 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"); Pohlman, Inc. v. SBA, No. 4:03-01241, slip op. at 20 (E.D. Mo. Sept. 30, 2005) (finding that information prepared by consultants hired by the agency and information generated by the agency in the course of its involvement with its borrowers was not "'obtained from a person'"); Allnet Commc'n Servs. v. FCC, 800 F. Supp. 984, 988 (D.D.C. 1992) (declaring that "person" under Exemption 4 "refers to a wide range of entities including corporations, associations and public or private organizations other than agencies"), aff'd, No. 92-5351 (D.C. Cir. May 27, 1994); see also, e.g., Maydak v. DOJ, 254 F. Supp. 2d 23, 49 (D.D.C. 2003), renewed motion for summary judgment granted in part & denied in part on other grounds, 362 F. Supp. 2d 316 (D.D.C. 2005); Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 28 (D.D.C. 2000); Buffalo Evening News, Inc. v. SBA, 666 F. Supp. 467, 469 (W.D.N.Y. 1987); Consumers Union v. VA, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

⁴⁸ See Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 360 (1979); Haswell v. Nat'l R.R. Passenger Corp., No. 05-723, slip op. at 7 (D. Ariz. May 1, 2007) (citing Fed. Open Mkt. Comm., 443 U.S. at 240, but then ruling that the commercial privilege fell within Exemption 4), aff'd, 310 F. App'x 184 (9th Cir. 2009); Morrison-Knudsen Co. v. Dep't of the Army of the U.S., 595 F. Supp. 352, 354-56 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985).

Documents prepared by the government can still come within Exemption 4, however, if they simply contain summaries or reformulations of information supplied by a source outside the government,⁴⁹ or contain information obtained through a plant inspection.⁵⁰ 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."⁵¹ Similarly, the District Court for the District of Columbia has held that the fact that particular information is "arrived at through negotiation" with the government does not necessarily preclude it from being regarded as "obtained from a person."⁵²

⁴⁹ See, e.g., OSHA Data/C.I.H., Inc. v. U.S. Dep't of Labor, 220 F.3d 153, 162 n.23 (3d Cir. 2000) (ratio calculated by agency, but based upon "individual components" supplied by private-sector employers); Gulf & W. Indus. v. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979) (contractor information contained in agency audit report); 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, 219 F.R.D. at 170, 176 (power plant information obtained by agency staff through interviews with "employees or representatives" of companies); Matthews v. USPS, No. 92-1208-CV-W-8, slip op. at 6 (W.D. Mo. Apr. 15, 1994) (technical drawings prepared by agency personnel, but based upon information supplied by computer company). But see Phila. Newspapers, Inc. v. HHS, 69 F. Supp. 2d 63, 67 (D.D.C. 1999) (characterizing an agency audit as "not simply a summary or reformulation of information supplied by a source outside the government" and finding that an analysis "prepared by the government" is not "obtained from a person" and so "may not be withheld under Exemption 4"), appeal dismissed per stipulation, No. 99-5335 (D.C. Cir. Mar. 17, 2000).

⁵⁰ See, e.g., Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1076 (9th Cir. 2004) (quality assessment of raisins, "including weight, color, size, sugar content, and moisture" reflected in "Line Check Sheets" prepared by USDA inspectors during plant visits); Mulloy v. Consumer Prod. Safety Comm'n, No. 85-645, 1985 U.S. Dist. LEXIS 17194, at *2 (S.D. Ohio Aug. 2, 1985) (manufacturing and sales data compiled in establishment inspection report prepared by Commission investigator after on-site visit to plant), aff'd, No. 85-3720 (6th Cir. July 22, 1986).

⁵¹ See High Country Citizens Alliance v. Clarke, No. 04-CV-00749, 2005 WL 2453955, at *5 (D. Colo. Sept. 29, 2005); Merit Energy Co. v. U.S. Dep't of the Interior, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001), appeal dismissed, No. 01-1347 (10th Cir. Sept. 4, 2001); Silverberg v. HHS, No. 89-2743, 1991 WL 633740, at *2 (D.D.C. June 14, 1991), appeal dismissed per stipulation, No. 91-5255 (D.C. Cir. Sept. 2, 1993); Daniels Mfg. Corp. v. DOD, No. 85-291, slip op. at 4 (M.D. Fla. June 3, 1986). But see Consumers Union, 301 F. Supp. at 803 (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).

⁵² Pub. Citizen Health Research Group v. NIH, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the agency, that did "not alter the fact that the licensee is the ultimate source of [the] information," inasmuch as the licensee "must provide the information in the first instance"); cf. In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 102-03 (D.D.C. 2008) (concluding that "incentive award" payments negotiated by the parties were not "obtained from a person," because agency "nowhere demonstrated that the contractor was the source of information in the first instance and not the agency").

"Confidential" Information

The third requirement of Exemption 4 is met if the submitted information is "privileged or confidential." On June 24, 2019, the Supreme Court issued its opinion in [Food Mktg. Inst. v. Argus Leader Media](#), 139 S. Ct. 915 (2019), which examines the definition of the term confidential under Exemption 4. The Court's decision overturns the definition established over forty years ago in [Nat'l Parks & Conservation Ass'n v. Morton](#), 498 F.2d 765 (D.C. Cir. 1974). The Department of Justice is currently in the process of formulating guidance on the impact of the Court's decision and will update this section once that guidance has been issued. In the meantime, agencies are always welcome to seek advice through OIP's [FOIA Counselor Service](#) if they have questions about the Court's decision.

Privileged Information

The term "privileged" in Exemption 4 has been utilized by some courts as an alternative for protecting nonconfidential commercial or financial information. Indeed, the Court of Appeals for the District of Columbia Circuit has indicated that this term should not be treated as being merely synonymous with "confidential," particularly in light of the legislative history's explicit reference to certain privileges, e.g., the attorney-client and doctor-patient privileges.⁵³¹ Nevertheless, during the FOIA's first two decades, only two district court decisions discussed "privilege" in the Exemption 4 context.

In one case, the court upheld the Department of the Interior's withholding of detailed statements by law firms of work that they had done for the Hopi Indians on the ground that they were "privileged" because of their work-product nature within the meaning of Exemption 4: "The vouchers reveal strategies developed by Hopi counsel in anticipation of preventing or preparing for legal action to safeguard tribal interests. Such communications are entitled to protection as attorney work product."⁵³² In the second case, a legal memorandum prepared for a utility company by its attorney qualified as legal advice protectible under Exemption 4 as subject to the attorney-client privilege.⁵³³ In both of these cases the information was also withheld as "confidential."

⁵³¹ [Wash. Post Co. v. HHS](#), 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

⁵³² [Indian Law Res. Ctr. v. Dep't of the Interior](#), 477 F. Supp. 144, 148 (D.D.C. 1979).

⁵³³ [Miller, Anderson, Nash, Yerke & Wiener v. DOE](#), 499 F. Supp. 767, 771 (D. Or. 1980).

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.⁵³⁴ In a brief opinion, one court recognized Exemption 4 protection for settlement negotiation documents, but did not expressly characterize them as "privileged."⁵³⁵ Another court subsequently recognized Exemption 4 protection for documents subject to the critical self-evaluative privilege.⁵³⁶

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.⁵³⁷ 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,"⁵³⁸ were protected by the attorney-client privilege.⁵³⁹ 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."⁵⁴⁰

⁵³⁴ 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).

⁵³⁵ M/A-COM Info. Sys. v. HHS, 656 F. Supp. 691, 692 (D.D.C. 1986); 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. Performance Aftermarket Parts Group v. TI Group Automotive Sys., No. H-05-4251, 2007 WL 1428628 at *3 (S.D. Tex. May 11, 2007) (observing that Sixth's Circuit decision in Goodyear Tire & Rubber Co. "has not been widely followed," and concluding that "no 'settlement negotiations' privilege exists") (non-FOIA case); In re Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 208 10 (D.D.C. 2005) (refusing to recognize settlement negotiations privilege) (non-FOIA case), aff'd in part on other grounds, 439 F.3d 740, 754-55 (D.C. Cir. 2006) (finding it unnecessary to decide whether federal settlement negotiations privilege exists, because proponent of privilege failed to meet its burden to show that disputed documents were created for purpose of settlement discussions).

⁵³⁶ Wash. Post Co. v. DOJ, No. 84-3581, 1987 U.S. Dist. LEXIS 14936, at *21 (D.D.C. Sept. 25, 1987) (magistrate's recommendation), adopted, No. 84-3581 (D.D.C. Dec. 15, 1987), rev'd in part on other grounds & remanded, 863 F.2d 96, 99 (D.C. Cir. 1988). But cf. Kan. Gas & Elec. Co. v. NRC, No. 87-2748, slip op. at 4 (D.D.C. July 2, 1993) (holding that because self-critical analysis privilege had been rejected previously in state court proceeding brought to suppress disclosure of documents, "doctrine of collateral estoppel" precluded "relitigation" of that claim in federal court) (reverse FOIA suit).

⁵³⁷ McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235, 237, 242-43 (E.D. Mo. 1996) (alternative holding) (reverse FOIA suit), appeal dismissed, No. 96-2662 (8th Cir. Aug. 29, 1996).

⁵³⁸ Id. at 237.

⁵³⁹ Id. at 242-43.

⁵⁴⁰ Id. at 243.

On the other hand, the Court of Appeals for the Tenth Circuit has held that documents subject to a state protective order entered pursuant to the State of Utah's equivalent of Rule 26(c)(7) of the Federal Rules of Civil Procedure -- which permits courts to issue orders denying or otherwise limiting the manner in which discovery is conducted so that a trade secret or other confidential commercial information is not disclosed or is only disclosed in a certain way -- were not "privileged" for purposes of Exemption 4.⁵⁴¹ While observing that discovery privileges "may constitute an additional ground for nondisclosure" under Exemption 4, the Tenth Circuit noted that those other privileges were for information "not otherwise specifically embodied in the language of Exemption 4."⁵⁴² By contrast, it concluded, recognition of a privilege for materials protected by a protective order under Rule 26(c)(7) "would be redundant and would substantially duplicate Exemption 4's explicit coverage of 'trade secrets

⁵⁴¹ Anderson v. HHS, 907 F.2d 936, 945 (10th Cir. 1990).

⁵⁴² Id.

and commercial or financial information."⁵⁴³ Additionally, the Court of Appeals for the Fifth Circuit has "decline[d] to hold that the [FOIA] creates a lender-borrower privilege," despite the express reference to such a privilege in Exemption 4's legislative history.⁵⁴⁴ (For a further discussion of atypical privileges, see Exemption 5, Other Privileges, below.)

Interrelation with the Trade Secrets Act

Finally, it should be noted that the Trade Secrets Act⁵⁴⁵ -- a broadly worded criminal statute -- prohibits the disclosure of much more than simply "trade secret" information and instead prohibits the unauthorized disclosure of all data protected by Exemption 4.⁵⁴⁶ (See the discussion of this statute under Exemption 3, Statutes Found Not to Qualify Under Exemption 3, above.) Indeed, the Court of Appeals for the District of Columbia Circuit and nearly every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be "coextensive."⁵⁴⁷ Thus, the 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.⁵⁴⁸

⁵⁴³ Id.

⁵⁴⁴ Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir. 1985).

⁵⁴⁵ 18 U.S.C. § 1905 (2006).

⁵⁴⁶ See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987) (noting that the Trade Secrets Act "appears to cover practically any commercial or financial data collected by any federal employee from any source" and that the "comprehensive catalogue of items" listed in the Act "accomplishes essentially the same thing as if it had simply referred to 'all officially collected commercial information' or 'all business and financial data received'") (reverse FOIA suit).

⁵⁴⁷ See CNA, 830 F.2d 1132, accord Canadian Commercial Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (quoting CNA) (reverse FOIA suit); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1185-86 (D.C. Cir. 2004) (same) (reverse FOIA suit), reh'g en banc denied, No. 02-5342 (D.C. Cir. Dec. 16, 2004); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997) (citing CNA and declaring: "[W]e have held that information falling within Exemption 4 of FOIA also comes within the Trade Secrets Act.") (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, No. 05-365, 2009 WL 1373813, at *4 (D.D.C. May 18, 2009) (noting that D.C. Circuit "has 'long held' that the Trade Secrets Act and Exemption 4 are coextensive") (reverse FOIA suit). But see McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1165 n.2 (D.C. Cir. 1995) (noting in dicta that the court "suppose[s] it is possible that this statement [from CNA] is no longer accurate in light of [the court's] recently more expansive interpretation of the scope of Exemption 4" in Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992)) (non-FOIA case brought under Administrative Procedure Act); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984) (reverse FOIA suit).

⁵⁴⁸ CNA, 830 F.2d at 1151-52; see also Canadian Commercial, 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 (continued...)

The Trade Secrets Act, however, does not preclude disclosure of information "otherwise protected" by that statute, if the disclosure is "authorized by law."⁵⁴⁹ (For a further discussion of this point, see Reverse FOIA, below.) For that reason, the D.C. Circuit has concluded that it need not "attempt to define the outer limits" of the Trade Secrets Act -- i.e., whether information falling outside the scope of Exemption 4 was nonetheless still within the scope of the Trade Secrets Act -- because the FOIA itself would provide authorization for release of any information falling outside the scope of an exemption.⁵⁵⁰

(...continued)

Exemption 4"); McDonnell Douglas, 375 F.3d at 1185-86 (finding that the Trade Secrets Act "effectively prohibits an agency from releasing information subject to [Exemption 4]"); Bartholdi, 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, 2009 WL 1373813 at *4 (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").

⁵⁴⁹ Bartholdi, 114 F.3d at 281 (quoting Trade Secrets Act).

⁵⁵⁰ CNA, 830 F.2d at 1152 n.139; see also Chrysler Corp. v. Brown, 441 U.S. 281, 318-19 & n.49 (1979) (noting in dicta that "there is a theoretical possibility that material might be outside Exemption 4 yet within the [Trade Secrets Act]," but acknowledging that "that possibility is at most of limited practical significance"); Frazee v. U.S. Forest Serv., 97 F.3d 367, 373 (9th Cir. 1996) (holding that because requested document was "not protected from disclosure under Exemption 4," it also was "not exempt from disclosure under the Trade Secrets Act") (reverse FOIA suit).

The practical effect of the Trade Secrets Act is to limit an agency's ability to make a discretionary release of otherwise exempt material, as a submitter could argue that a proposed release of such information would constitute "a serious abuse of agency discretion" redressable through a reverse FOIA suit.⁵⁵¹ Thus, in the absence of a statute or properly promulgated regulation giving the agency authority to release the information-- which would remove the disclosure prohibition of the Trade Secrets Act -- a determination by an agency that information falls within Exemption 4 is "tantamount" to a decision that it cannot be released.⁵⁵²

⁵⁵¹ Nat'l Org. for Women v. Soc. Sec. Admin., 736 F.2d 727, 743 (D.C. Cir. 1984) (Robinson, J., concurring); accord McDonnell Douglas, 57 F.3d at 1164 (holding that the Trade Secrets Act "can be relied upon in challenging agency action that violates its terms as 'contrary to law' within the meaning of the Administrative Procedure Act"); Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (reverse FOIA suit); Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975) (reverse FOIA suit); see also FOIA Update, Vol. VI, No. 3, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4") (advising that the Trade Secrets Act is "barrier to the disclosure of any information that falls within the protection of Exemption 4"); accord FOIA Post, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09)

⁵⁵² CNA, 830 F.2d at 1144.