



UNITED STATES DEPARTMENT *of* JUSTICE

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# 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 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, 570 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) <sup>6</sup>



## 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





## Q1: Which of the Following Could be Trade Secrets?

- a) Manufacturing process for vehicles
- b) General information not tied to the production process regarding the physical characteristics of a tool
- c) Process of chemical composition of drugs
- d) Blueprints including the design, materials, dimensions of aircraft
- e) Geometry of an aircraft where the company has granted permission to disclose the information to the public



## 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*



## 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)



**Q2: Is a corporation a person for Ex. 4  
“obtained from a person” purposes?**



# Privileged

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





## Confidential

The Supreme Court recently examined the definition of confidential under Exemption 4 and overturned the standard that was applied for over 40 years.

Food Mktg. Inst. v. Argus Leader Media,  
139 S. Ct. 915 (2019).



## OLD Exemption 4

### Part 1

Trade Secrets

Required Submission

#### **Protected If:**

Impairment

Substantial Competitive Harm

Other Government or Private Interests

### Part 2

Commercial/Financial  
Obtained From A Person  
Privileged/ **Confidential**

Voluntary Submission

#### **Protected If:**

Customarily Not Released by  
Submitter



**New Exemption 4**

**Part 1**

Trade Secrets

**Part 2**

Commercial/Financial  
Obtained From A Person  
Privileged/ Confidential

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Food Mktg. Inst. v. Argus  
Leader Media, 139 S. Ct.  
915 (2019)



## Food Marketing Institute v. Argus Leader Media – Procedural Background

The requester sought from USDA data reflecting individual retail stores' aggregate annual dollar amount of Supplemental Nutrition Assistance Program (SNAP) benefits that the store redeems under the Program.



# Food Marketing Institute v. Argus Leader Media – Procedural Background

- District court affirmed the protection of this data under Exemption 3
- Eight Circuit reversed and remanded
- After remand, USDA determined the information was withholdable under Exemption 4. Plaintiff challenged this determination.



## Food Marketing Institute v. Argus Leader Media – Procedural Background

- Applying *National Parks*, after a two-day bench trial the District Court found that Exemption 4 did not apply because any potential competitive harm was “speculative at best”
- USDA decides not to appeal



# Food Marketing Institute v. Argus Leader Media – Procedural Background

- Food Marketing Institute (FMI) intervenes and appeals to the Eighth Circuit
- The Eight Circuit affirms rejecting FMI's contention that the term “confidential” should reflect its dictionary definition



## Food Marketing Institute v. Argus Leader Media – Issue before the Supreme Court

How should the term “confidential” be defined when determining the applicability of Exemption 4?

Is there any textual basis for the definition of “confidential” under *National Parks* in the FOIA?





## Food Marketing Institute v. Argus Leader Media – Government’s Position

- The *National Parks* test is atextual and courts should apply the ordinary meaning of the term confidential.
- Using its dictionary definition, information is confidential if it is communicated in confidence or in secret.



## Food Marketing Institute v. Argus Leader Media – Government’s Position

Two ways information could be confidential:

1. Based on its treatment outside of the government, i.e., where it “would customarily not be released to the public by the person from whom it was obtained.”
2. Based on how the agency receives it, i.e., where it was given to the agency in confidence.



## Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 915 (2019)

“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.”



## OIP Guidance

In light of legal uncertainty, as sound practice, agencies should consider both conditions in process of determining “confidentiality” for Exemption 4 purposes.



## OIP Guidance

1) Does the submitter customarily keep the information private or closely-held?

If no, the information is not “confidential” under Exemption 4 (an express holding of Argus).

If yes, answer question 2.



## OIP Guidance

2) Did the government provide either an express or implied assurance of confidentiality when the information was shared with the government?

If no, answer question 3.

If yes, the information is confidential under Exemption 4 (an express holding of Argus):<sup>9</sup>



## OIP Guidance

3) Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?



## OIP Guidance

If no, the information is "confidential" under Exemption 4 (the government has effectively been silent – so a submitter's practice of keeping the information private will be sufficient to warrant confidential status).





## OIP Guidance

If yes, and no other sufficient countervailing factors exist, the submitter could not reasonably expect confidentiality upon submission and so the information is not confidential under Exemption 4.



## OIP Guidance

<https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>

<https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential>



## Trade Secrets Act - 18 U.S.C. § 1905

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



## Submitter Notice: E.O. 12,600

- Submitters can often be in a better position than the agency to answer questions relevant to an Exemption 4 inquiry (e.g., whether “information is both customarily and actually treated as private by its owner.”)
- Executive Order 12,600 (1987) and agency regulations set out process for agencies to gather information about records directly from submitters, when making determinations under Exemption 4.



## Submitter Notice: E.O. 12,600

- Although E.O. 12,600 speaks in language of “substantial competitive harm” as relevant legal test, and that test has been overruled, the submitter notice process is still entirely appropriate for agencies to continue to use when determining whether information is “confidential” under the test articulated in FMI v. Argus Leader (2019).



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**Questions?**