



UNITED STATES DEPARTMENT *of* JUSTICE

Exemption 4



Text of Exemption 4

Exemption 4 covers two categories of information:

- 1) Trade Secrets
- 2) Commercial or Financial Information
Obtained from a Person and Privileged
or Confidential

Collectively, these two categories are commonly referred to as Confidential Business Information or “CBI”



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



Trade Secrets

Narrow definition:

“a secret, commercially valuable plan, formula, process, or device that is used in making, preparing, compounding or processing of a trade commodity, and that can be said to be the end product of either innovation, or substantial effort.”*

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



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



Trade Secrets

Location of Trade Secrets

Expect to find Trade Secret Data in:

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



Commercial or Financial Information

Three part definition:

1. Commercial or financial info
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

1. Commercial or Financial Information

- Terms should be given their “ordinary meanings”
- Qualifies if submitter has a “commercial interest” in information

2. “Obtained From a Person”

- Any entity (other than a federal agency)
- Agency inspections; summaries
- Prices arrived at through negotiation
- Exemption 5, commercial privilege



Commercial or Financial Information

3. Privileged or Confidential

Privilege

“Privileged”: Attorney-Client, Attorney Work Product, Deliberative Process



Commercial or Financial Information

3. Privileged or Confidential

Confidential

In most judicial circuits, including D.C. Circuit, the definition of “confidential” hinges on the circumstances under which the information was received by the government



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: bidding on proposal
- 2) Whether the agency exercised its authority to require submission



Required Submissions

“Required” information is protected as confidential *if release would cause any of the following:*

- A. **Impair the agency’s ability to obtain similar information in the future (the “impairment” prong)**



Required Submissions

B. Likely cause substantial competitive harm to the person from whom the data was obtained (the “competitive harm” prong)

- Competitive harm = affirmative use of information by competitors
- No balancing of interests. Public interest irrelevant
- Age of documents is not dispositive
- If information in public domain, no competitive harm



Required Submissions

- C. Protects other governmental interests, such as compliance and program effectiveness (the “third prong”)**
- Intrinsically valuable records. Owners retain proprietary rights, if a FOIA release would result in substantial loss of market value
 - Example: copyrighted videos, manuals, software



Impairment, Competitive Harm, and Third Prong Tests

Referred to as National Parks test *

* National Parks & Conservation Association
v. Morton, 498 F. 2d 765 (D.C. Cir. 1974)

In 2nd and 9th Circuits, only the National Parks test applies.



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: Executive Order 12,600

- Must advise the submitter that a FOIA request has been made if 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: Executive Order 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: Executive Order 12,600

- Provide copies of the requested records. You may include a copy of the FOIA request as well.
- Advise requesters to identify specifically (by page, line, column, paragraph, etc.) any portion of information they believe meets the requirements of Exemption 4.



Submitter Notice: Executive Order 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 (not less than 10 business days from date of letter)



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.