



United States Department of Justice *Office of Information Policy*

Exemption 4 of the FOIA



Text of Exemption 4

- Exemption 4 covers two categories of information:
 - (1) Trade Secrets
 - (2) Commercial or Financial Information Obtain from a Person and Privileged or Confidential
- ** Collectively, these two categories are commonly referred to as Confidential Business Information or “CBI”

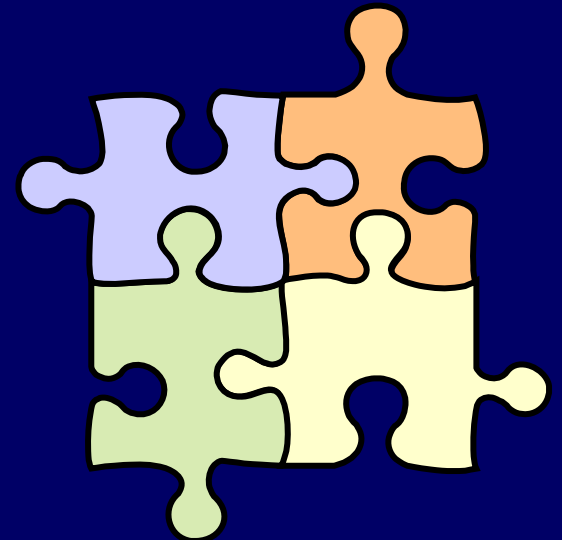
Purpose of Exemption 4

The exemption protects the interests of both the gov't and the submitter/owner of the information.

- Encourages submitters to provide gov't with confidential information, that is accurate and reliable; and
- Provides assurance 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

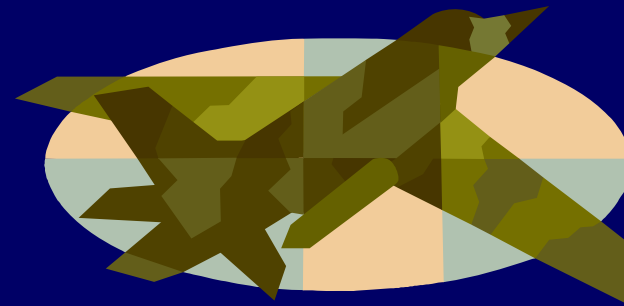
Narrow definition:

“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 trade secret



Location of Trade Secrets

- **Expect to find TS 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 . . .

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

Confidential, Commercial Information (cont.)

3. Privileged or Confidential

Privilege

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

Confidential, Commercial Information (cont.)

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 gov’t

➔ “Required” vs. “Voluntary”

Required vs. Voluntary (cont.)

- “Required” = 2 part test:

(1) Legal authority to obtain info

> Whether the submitter’s participation in a gov’t 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 following:*

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

Required Submissions (cont.)

(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 (cont.)

(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 in substantial loss of market value
 - Ex: copyrighted videos, manuals, software

Impairment, Competitive Harm, and Third Prong Tests

Referred to as Nat'l Parks test *

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

In 2nd & 9th Circuits, only the Nat'l 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 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 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 & comment**

Submitter Notice (cont.)

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

Submitter Notice (cont.)

- **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.

