

**FOIA EXEMPTION 4 – TRADE SECRET AND
CONFIDENTIAL COMMERCIAL
INFORMATION**

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Learning Objectives

- Understand the legal definitions of Trade Secret (TS) and Confidential Commercial Information (CCI)
- Understand the process for determining whether a record contains TS and CCI
- Recognize examples of TS and CCI
- Understand Executive Order 12600 and Submitter Notice Requirements

What is Exemption 4?

- Exemption 4 of the FOIA protects 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.

What is Exemption 4? (Con't)

- This exemption is intended to protect the interests of both the government and submitters of information:
 - Affords protection to those submitters who furnish commercial or financial information to the government by safeguarding them.
 - Encourages submitters to furnish useful commercial or financial information to the government and it correspondingly provides the government with an assurance that such information will be reliable so it can conduct its business.
- A mandatory withholding - **not** discretionary.

(1) Trade Secret Information

- Common law definition adopted by DC Circuit:
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.
- This definition requires that there be a "direct relationship" between the trade secret and the productive process.

Examples of Trade Secret Information

- Product formulations
- Chemical compositions
- Quality control procedures
- Sterilization and cleaning procedures
- Production procedures
- Blueprints
- Design specifications

Redaction Exercise #1 – TS

- A steel bushing with a brass insert holds the tip of the bit in place, as a cutting wheel slices an angled point onto the blank, which will eventually become the final product.

Redaction Exercise #2 – TS

- Each aspirin tablet should contain 74% filler and 0.05% water content after the drying step.

Redaction Exercise #3 – TS

- Each aspirin tablet should contain 74% filler and 0.05% water content after the drying step, as set out in the company website.

(2) Confidential Commercial Information

- Information that is:
 - Commercial or financial, and
 - Obtained from a person, and
 - That is privileged or confidential

Step 1 – Is the information “commercial or financial”?

- Use “ordinary meaning”
- As a rule, if it relates to business or trade, it is commercial or financial information.
 - Examples include: Information related to leases, prices, quantities and reserves, business decisions, names of key personnel, statements of work, financial situations, etc.
 - Does the submitter have a commercial interest in the information?

Step 2 – Is the information obtained from a person?

- Includes: Individuals, corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government (aka “submitters”).
- The federal government’s information is generally not protected by Exemption 4.

Step 3 - Is the information "privileged or confidential"?

- Before June 24, 2019:
 - National Parks case controlled (1974)
 - Impair the government's ability to obtain information?
 - Cause substantial competitive harm to the submitter?
 - Agency had to show the harm flows "from the affirmative use of proprietary information by competitors"
 - Often litigated; very fact-dependent
 - Critical Mass case applied (1992)
 - Voluntary vs Compelled submission
 - If voluntary + the information "would customarily not be released to the public by the person from whom it was obtained," then CCI.

Step 3 - Is the information "privileged or confidential"? Argus

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Step 3 - Is the information "privileged or confidential"?

- After June 24, 2019 - the Argus standard:
 - CCI if 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
 - "Must both of these conditions be met for information to be considered confidential under Exemption 4? At least the first condition has to be..."
 - "Can privately held information lose its confidential character... if it's communicated to the government without assurances that the government will keep it private? As it turns out, there's no need to resolve that question in this case..."
- The Supreme Court then cites caselaw supporting the concept of implied promise of confidentiality...

Food Marketing Institute vs Argus Leader Media, June 24, 2019

Decision Summary

Is the information commercial or financial?	<ul style="list-style-type: none">• YES – go to next step• NO – not CCI
Was the information obtained from a person?	<ul style="list-style-type: none">• YES – go to next step• NO – not CCI
Is the information customarily and actually treated as private by its owner (<i>Argus</i>)?	<ul style="list-style-type: none">• YES – go to next step• NO – not CCI
Is there a government assurance to protect the information (<i>Argus</i>)?	<ul style="list-style-type: none">• YES – Withhold as CCI• NO – Outcome remains unclear...

Examples of CCI

So long as these are customarily and actually treated as private by its owner and provided to the government under an assurance of privacy:

- SOPs (could also be TS)
- Customer/Supplier relationships (i.e. distribution channel information)
- Sales data
- Clinical trial data gathered by a drug company
- Consultants
- Contractor relationships
- Pending product approval records (could include TS)
- Future business plans
- Unit pricing and options that have not been exercised in a government contract

Redaction Exercise #1 – CCI

- USDA toured a chicken farm and prepared a report on its findings. The report included responses from company employees, names of machineries used in the farm, excerpts of company records, a description of the manufacturing processes, and comments intended for the USDA's superiors to facilitate an decision on the farm's compliance with laws and regulations.

Redaction Exercise #2 – CCI

- The firm notified the agency that by the end of the year, it intends to divest its unprofitable sales unit, but no offers have yet been received.

Redaction Exercise #3 – CCI

- The Department of Commerce prepares an internal report consolidating sales figures provided by the two top manufacturers.

CCI Redaction Exercise #4 – CCI

- A government contractor for the Pentagon plans to lay off 7% of its workforce in the next six months due to lack of demand. An article in the WSJ anticipates cuts and estimates they will total 5-10%.

Trade Secret or Confidential Commercial Information?

- Narrower concept than CCI – i.e., not all CCI is TS
- Public Citizen Health Research Group v. FDA
 - Public Citizen filed FOIA requests for clinical trial records involving medical devices used in cataract surgery.
 - The court reversed the holding of the district court in part by finding that reports, letters, and memos about these devices were not protected as TS because there was no direct relationship between the records and the manufacturing process (“tangential at best”).
 - The court nonetheless found some of the records to be subject to protection as CCI.

Examples of “new” CCI?

- So long as both *Argus* prongs are satisfied...
- Stay tuned for DOJ guidance on the government assurance prong!

Effects of *Argus*

- Establishes new standard for “Confidential”
 - Requirement of government assurance of privacy remains unclear and will likely be decided in lower courts
- Overturns decades’-old FOIA concepts:
 - ~~Substantial competitive harm~~
 - ~~Impair the government’s ability to obtain information?~~
 - ~~Voluntary vs Compelled submission~~
 - Should save the court some amount of nuanced litigation...
- Agencies should revisit regulations, policies, SOPs and template communications

Executive Order 12600

- Each agency's regulations must establish procedures by which business submitters may designate their information as CCI at the time of submission.
- These designations may be deemed to expire after a period of time designated in an agency's regulations.

Executive Order 12600 (con't)

- Also requires agencies subject to FOIA to establish procedures to notify submitters of records containing confidential commercial information when those records are requested under the FOIA (**Pre-disclosure notifications, "PDNs"**)
 - Useful given the remaining uncertainty in *Argus*
 - Note that the EO also relies on *National Parks* language...
- Agencies must afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure.
- Post-submission designations are permitted

Executive Order 12600 (con't)

- Agencies shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue.
- When the agency determines to disclose the requested records, the agency shall, within a reasonable number of days before the disclosure, give the submitter a written statement briefly explaining why the submitter's objections are not sustained (**Intent to Release letter**). This provides the submitter with time to seek court intervention through a "**reverse**" FOIA lawsuit.
- Agencies must notify the submitter when a FOIA requester brings a suit to compel disclosure.

Executive Order 12600 (con't)

- These requirements need not be followed if:
 - The agency determines that the information should not be disclosed;
 - The agency determines the information is already in the public domain;
 - Disclosure of the information is required by law (other than 5 U.S.C. 552);
 - The disclosure is required by an agency rule;
 - The information requested is not designated by the submitter as exempt from disclosure. However, EO provides for the same procedures "even in the absence of a designation, wherever an agency 'has reason to believe' that the disclosure could cause substantial competitive harm."
 - The designation made by the submitter appears obviously frivolous.

Questions?
