

FOIA EXEMPTION 4 – TRADE SECRET AND CONFIDENTIAL COMMERCIAL INFORMATION

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1

1

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

2

2

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.

3

3

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.

4

4

(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.

5

5

Examples of Trade Secret Information

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

6

6

(2) Confidential Commercial Information

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

7

7

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?

8

8

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 – must be obtained from someone outside the government.
- For intra-government communications, look to Exemption 5.

9

9

Step 3 - Is the information “privileged or confidential?”

- On June 24, 2019, the Supreme Court altered the standard for “Confidential,” by rejecting the “competitive harm” test.
- **Before June 24, 2019:**
 - **For compelled submissions:** 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
 - **For voluntary submissions:** Critical Mass case applied (1992)
 - If the information “**would customarily not be released** to the public by the person from whom it was obtained,” then CCI.

10

10

Step 3 - Is the information “privileged or confidential?” *Argus*

- 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.

11

11

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.

12

Effects of *Argus*

- 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...
- Establishes new standard for "Confidential"
 - Requirement and forms of government assurance of privacy remain unclear and is already the source of litigation
 - OIP Guidance: <https://www.justice.gov/oip/blog/new-guidance-issued-exemption-4-foia>
- Agencies should revisit regulations, policies, SOPs and template communications

13

13

Decision Tree for CCI

Is the information **commercial or financial**?

- YES – Go to next step
- NO – Not CCI

Was the information obtained **from a person**? (As opposed to the gov't)

- YES – Go to next step
- NO – Not CCI

Does the submitter keep the information private or closely held? (*Argus*)

- YES – Go to next step
- NO – Not CCI

Did the gov't provide an express or implied assurance of confidentiality when the information was submitted to the gov't? (*Argus*)

- YES – Withhold as CCI
- NO – Go to next step

Were there express or implied indications at the time the information was submitted that the gov't would publicly disclose the information? (*Argus*)

- YES – Not CCI
- No – Withhold as CCI

14

14

Cases seeking to distinguish *Argus*

American Small Business League v. DOD, C 18-01979 WHA, U.S. Dist. Ct., N.D. California 11/24/2019

- **FOIA Improvement Act of 2016**
 - In 2016, Congress amended FOIA to add a “foreseeable harm” requirement, under which agencies “shall withhold information” under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i).
 - **HELD:** Under *Argus*, the plain and ordinary meaning of Exemption 4 indicates that the relevant protected interest is that of the information's *confidentiality*. *Plaintiff may not use the FOIA amendment to circumvent the Supreme Court's rejection of National Parks and foreseeable harm.*

15

15

Cases seeking to distinguish *Argus*

American Small Business League v. DOD (continued)

- **Also note:** *Government assessments and evaluations cannot be considered “confidential” information for purposes of Exemption 4. This includes, for example, the government's evaluations of a contractor's compliance with regulatory requirements, ratings, assessments of a contractor report's accuracy, and recommendations. Not from a person.*

16

16

Cases seeking to distinguish *Argus*

Center for Investigative Reporting v DOL, 18-cv-02414-DMR, U.S. Dist. Ct., N.D. California 6/4/2020

- The case deals with copies of OSHA Form 300A at DOL on employee accidents
- Chronology:
 - 1) OSHA expressly stated that it would “post the data” from Form 300A “on a publicly accessible Web Site” in rulemaking in 2016
 - 2) Asserted Exemption 4 as basis to withhold in June 2018
 - 3) OSHA withheld unspecified data in response to FOIA requests in October 2018
 - 4) OSHA publicly announced a change in how it views form 300A on its website in August 2019

17

17

Cases seeking to distinguish *Argus*

Center for Investigative Reporting v DOL (continued)

Customarily and actually treated as private by its owner

- In support of Exemption 4, OSHA points to comments by employers and trade groups that “they consider the submitted data to be confidential commercial information” and expressing concerns about the potential for harm if the information is released.
- However, as *Argus* makes clear, the court must examine whether the information **actually** is kept and treated as confidential, **not** whether the submitter considers it to be so.
- These comments do not speak to how the owners keep and treat the Form 300A information.
- Further, employers are required to post their completed Form 300As “in a conspicuous place or places where notices to employees are customarily posted” for a period of at least three months of the year following the year covered by the records.

18

18

Cases seeking to distinguish *Argus*

Center for Investigative Reporting v DOL (continued)

Government Assurance of Privacy

- OSHA expressly stated in rulemaking in 2016 that it would “post the data” from the electronic submissions of Forms 300, 301, and 300A “on a publicly accessible Web Site.”
- In support, it points to comments by employers and trade groups during the 2014 rulemaking process stating that “they consider the submitted data to be confidential commercial information” and expressing concerns about the potential for harm if the information is released

19

19

Cases seeking to distinguish *Argus*

Center for Investigative Reporting v DOL (continued)

HELD: Even if DOL had established that the Form 300A information is “**customarily and actually treated as private by its owner[s]**,” the information ceased to be confidential upon submission to the government because of OSHA’s **express indication at the time of submission that it would publicly disclose the information.**

Per Department of Justice guidelines:

“Of course, such notices [on agency websites] or communications [with submitters] could also explicitly notify submitters of the agency’s intention to *publicly disseminate* the information. In those situations, the information, when objectively viewed in context, would be deemed to have lost its “confidential” character under Exemption 4 upon its submission to the government, given that the submitter was on notice that it would be disclosed.”

20

20

Examples of CCI

Is it **Commercial**?

- 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

Is it **Confidential**?

So long as these are **customarily and actually** treated as private by its owner, and provided that the government did **not** indicate it would share the information at the time the information was submitted

21

21

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.

22

22

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

23

23

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.

24

24

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.

25

25

Effects of *Argus*, revisited

- Agencies should revisit regulations, policies, SOPs and template communications
 - **Remove** any references to **competitive harm** and *National Parks*
 - Train FOIA staff on new standard (old ways are ingrained)
 - Train affected staff on the new standard
 - Consider shifting some of the work to the submitter leveraging EO 12600 – **including helpful guidance**
 - In the training and guidance, consider honing in on what constitutes “Commercial or Financial”

26

26

Pre Disclosure Notification Sample

Exemption 4 permits withholding information that is both 1) confidential and 2) commercial or financial in nature. Before we can deny access to a FOIA requester under Exemption 4, we need an adequate and convincing written justification from you for withholding the material. Please use the general guidance set forth below in deciding whether to request that we withhold any information under Exemption 4.

Factors that determine whether your referenced materials are "Confidential":

- Does your organization customarily keep the information private or closely-held?
- Did the NIH provide an express or implied assurance of confidentiality when your organization shared the information?
- Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?

27

27

Sample Guidance in PDN (cont.)

Considerations that suggest the referenced materials are "Commercial or Financial" in nature:

Generally, we cannot withhold information in a research protocol unless the information contains proprietary or commercial information. Similarly, we generally release cost data contained in a grant application. **We often receive general statements that indicate the information is patentable, proprietary, or commercial, or that the information is pending publication or that its release would hinder one's ability to garner future funding.** However, the more supportable justifications involve specific facts relating to the commercial character of the research:

- Principal investigator's history as a commercial scientist
- Communications with a pharmaceutical company concerning the development of drugs based on the research at hand
- Filing of a patent application or formation of a for-profit company

28

28

Quiz

A company submitted commercial information to the government. The company customarily and actually treated the information as private. The government never responds. Is the information **Confidential**?

Does the submitter keep the information private or closely held? (*Argus*)

- YES – Go to next step
- NO – Not confidential

Did the gov't provide an express or implied assurance of confidentiality when the information was submitted to the gov't? (*Argus*)

- YES – Information is confidential
- NO – Go to next step

Were there express or implied indications at the time the information was submitted that the gov't would publicly disclose the information? (*Argus*)

- YES – Not confidential
- No – Information is confidential

29

29

Questions?

30

30