


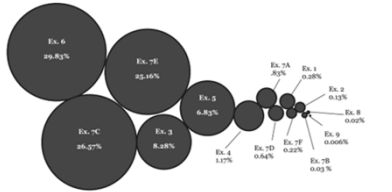



<h3>The Freedom of Information Act for FOIA Professionals</h3>			
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<h2>SCHEDULE</h2> <ul style="list-style-type: none"> ○ Overview ○ Trade Secrets ○ Confidential Commercial Information ○ Business Submitter Notifications ○ Foreseeable Harm ○ Litigation Considerations 		 
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<h2>EXEMPTION 4: OVERVIEW</h2>	
<p>Total Exemption Usage</p> 	
	

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EXEMPTION 4: OVERVIEW

Exemption 4 protects matters that are "trade secrets and commercial or financial information obtained from a person and is privileged or confidential" are exempt from disclosure.

It covers two categories of information:

- Trade Secrets; and
- Commercial or financial information
 - If obtained from a person; and
 - That is privileged and confidential



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EXEMPTION 4: OVERVIEW

PURPOSE

Encourages submitters to provide government with accurate, reliable information that is needed in the line of duty.

Provides assurances that the information will be safeguarded, protecting submitters from competitive disadvantage if disclosed.



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EXEMPTION 4: TRADE SECRETS

THE TRADE SECRETS ACT

Most FOIA exemptions are permissive: They allow an agency to withhold information, but an agency has discretionary power to release information even though it may fall within an exemption.

The Trade Secrets Act (18 U.S.C. 1905) prohibits the release of confidential commercial information and imposes a positive duty for the agency to redact all information that falls within the bounds of Exemption 4. It imposes penalties (fines, imprisonment) for anyone who divulges the type of information protected by the exemption. *There should be no discretionary releases of information that otherwise falls within the exemption.*



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EXEMPTION 4: TRADE SECRETS

THE TRADE SECRETS ACT

Trade Secrets Act vs. trade secrets

• The Trade Secrets Act covers more than trade secrets. It covers "any information coming to him in the course of his employment or official duties" which concerns "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof."

• Under Exemption 4, courts typically defines "trade secret" to mean "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."



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EXEMPTION 4: TRADE SECRETS

TRADE SECRETS

A trade secret is information that has economic value from not being known to or readily ascertainable by those who could gain value from its use or disclosure. It must relate to the production or manufacturing process.



- Essentially: Information that is economically valuable because it is kept secret.
- To qualify as a trade secret, the owner of the information must make reasonable efforts to maintain the secrecy of that information.



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EXEMPTION 4: TRADE SECRETS

TRADE SECRETS

Examples of Trade Secrets: customer lists, manufacturing methods, chemical processes, formulas, computer program code, marketing data and strategies, production procedures, blueprints for machines, design specifications, genetic information.

- Where are Trade Secrets located? Contracts, manufacturing specifications, product schematics and formulas, software, quality control data, and procedures.




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EXEMPTION 4: COMMERCIAL INFORMATION
 CONFIDENTIAL COMMERCIAL INFORMATION

Three-part definition:

- Commercial or financial;
- Obtained from a person; and
- Privileged or confidential.




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EXEMPTION 4: COMMERCIAL INFORMATION
 CONFIDENTIAL COMMERCIAL INFORMATION

Three-part definition:

- Commercial or financial;
 - Interpreted broadly: covers any information in which a third party has a "commercial interest."
- Obtained from a person; and
 - Also interpreted broadly: a "person" can be any individual, partnership, corporation, association or public or private organization other than the agency.
- Privileged or confidential.
 - Where commercial or financial information is (1) customarily and actually treated as private by its owner and (2) provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4.




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EXEMPTION 4: COMMERCIAL INFORMATION
 CONFIDENTIAL COMMERCIAL INFORMATION

"Must both of these conditions be met for information to be considered confidential under Exemption 4? At least the first condition has to be; it is hard to see how information could be deemed confidential if its owner shares it freely.

But what about the second condition: Can privately held information lose its confidential character for purposes of Exemption 4 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."**



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION

Department of Justice Guidance on Confidentiality after *Argus Leader*:

- (1) The business submitter must customarily keep the information private, and, either:
 - (a) The government provided an express or implied assurance of confidentiality when the information was shared with the government, or;
 - (b) There were no indications (expressed or implied) at the time the information was submitted that the government would publicly disclose the data.



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION

- (1) The business submitter must customarily keep the information private.

Consider:

- Practices utilized by the submitter to keep such information private
- Industry standards for keeping such information private
- The records themselves (either the nature of the records, or markings found thereon)

Consult:

- The business submitter
- Industry representatives
- Agency subject matter experts



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION

Customarily and Actually Keep the Information Private – Standard of Proof

- "Under *Food Marketing*, it appears that defendants need merely invoke the magic words — 'customarily and actually kept confidential' — to prevail. And, unless plaintiff can show that the information is in fact publicly available or possibly point to other competitors who release the information, defendants can readily ward off disclosure." *Am. Small Bus. League v. Dep't of Defense*, 411 F. Supp. 3d 824, 832 (N.D. Cal. 2019).
- "Conclusory statements by an agency official about what the agency official may believe about how a submitter customarily treats the information at issue are simply insufficient." *Ctr. for Investigative Reporting v. United States Customs & Border Prot.*, 436 F. Supp. 3d 90, 111 (D.D.C. 2019).
- "Most of the remaining objections are substantively deficient... They do not attest to specific facts indicating how each objector treats the relevant data." *Humane Soc'y Int'l v. United States Fish & Wildlife Serv.*, Civil Action No. 16-720, 2021 U.S. Dist. LEXIS 59429, at *10-11 (D.D.C. Mar. 29, 2021).



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION

Customarily and Actually Keep the Information Private – Affidavits

• "Agency affidavits must 'be made on personal knowledge.' Such personal knowledge can be demonstrated in various ways, including by relaying that the submitters themselves told the agency that the information is confidential. *Ctr. for Investigative Reporting v. United States Customs & Border Prot.*, 436 F. Supp. 3d 90, 110-11 (D.D.C. 2019).

• "Defendants submitted over a hundred separate objections from third parties claiming that their information is exempt under Exemption 4... Nearly all the objections the Service submitted were not notarized and were not made under the penalty of perjury, thereby constituting inadmissible hearsay." *Humane Soc'y Int'l v. United States Fish & Wildlife Serv.*, Civil Action No. 16-720, 2021 U.S. Dist. LEXIS 59429, at *10 (D.D.C. Mar. 29, 2021).



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION

- (2) (a) The government provided an express or implied assurance of confidentiality when the information was shared with the government, or;
 - **Express assurances** can be found in direct communications from the federal agency, general notices from the agency, or in regulations indicating that specific categories of information will not be disclosed.
 - **Implied assurances** depend on context. Consider the government's treatment of similar information and its broader treatment of information. For example, an agency's long history of protecting certain commercial or financial information can serve as an implied assurance to submitters that the agency will continue treating their records in the same manner.

(b) There were no indications (expressed or implied) at the time the information was submitted that the government would publicly disclose the data.



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION

• "Although several district courts have resolved Exemption 4 disputes since *Food Marketing*, none has held that this potential second prong must be met... This Court will not, and indeed cannot, be the first. The current law of the Circuit, which remains binding authority, is that information is confidential under Exemption 4 "if it is of a kind that would customarily not be released to the public by the person [or entity] from whom it was obtained."

• "The better approach would be that privately held information is generally confidential absent an express statement by the agency that it would not keep information private, or a clear implication to that effect (for example, a history of releasing the information at issue)."

Renewable Fuels Ass'n v. Environmental Prot. Agency, Civil Action No. 18-2031, 2021 U.S. Dist. LEXIS 21137, at *25-26 (D.D.C. Feb. 4, 2021).



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION

1. Does the submitter customarily keep the information private or closely-held?
 - If no, the information is *not* confidential.
 - If yes, answer question 2.
2. Did the government provide 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.
3. Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?
 - If no, the information is confidential.
 - If yes, the information is *not* confidential.



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION - BUSINESS SUBMITTER NOTIFICATIONS

Whether information is confidential may not be apparent to government personnel. **Executive Order 12,600** sets out a process through which agencies obtain information about records from submitters themselves.

Requires that agencies provide notification to submitters of confidential commercial information whenever an agency "determines that it may be required to disclose" such information under the FOIA.

Each agency has details of its own process in its regulations.



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EXEMPTION 4: COMMERCIAL INFORMATION
CONFIDENTIAL COMMERCIAL INFORMATION - BUSINESS SUBMITTER NOTIFICATIONS

Business submitter notifications can be helpful to support both withholdings and releases:

- Support **withholdings**, by borrowing expertise of submitters, avoiding hazard of inaccurately assessing submitter equities.
- Support **releases**, by building administrative record (crucial for "Reverse FOIA" litigation) reflecting agency's careful consideration.



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EXEMPTION 4: COMMERCIAL INFORMATION

CONFIDENTIAL COMMERCIAL INFORMATION - BUSINESS SUBMITTER NOTIFICATIONS

Provide notice to the business submitter where

- The business submitter has in good faith designated the information as commercially – or financially – sensitive information; or
- Agency has reason to believe that disclosure of the commercial information could reasonably be expected to cause substantial competitive harm.



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EXEMPTION 4: COMMERCIAL INFORMATION

CONFIDENTIAL COMMERCIAL INFORMATION - BUSINESS SUBMITTER NOTIFICATIONS

Notice is not required where

- Agency determines that the commercial information will not be disclosed.
- The commercial information has already been made public.
- Agency has already received the submitter's views on the same or similar records.
- Disclosure is required by another law or regulation.
- Release is required by another statute
- Agency determines that the designation is obviously frivolous



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EXEMPTION 4: COMMERCIAL INFORMATION

CONFIDENTIAL COMMERCIAL INFORMATION - BUSINESS SUBMITTER NOTIFICATIONS

Business submitter notifications provide notice to a business submitter that a third party requested their commercial information and that information may be released.

- Allow business submitters sufficient time to review the records and object to their disclosure (look at your agency's regulations for deadlines). Submitters should be advised to specifically identify (by page, line, paragraph, etc.) any information that they believe to be confidential and explain the grounds for which it should be withheld.
- Can be used simply to gather more information to make a more accurate assessment.
- Notice should also be provided to the requester to inform them of the procedure.



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EXEMPTION 4: COMMERCIAL INFORMATION

CONFIDENTIAL COMMERCIAL INFORMATION - BUSINESS SUBMITTER NOTIFICATIONS

If the submitter objects to the release, make an independent assessment as to whether those objections are justified.

- If you agree: withhold the information
- If you disagree, provide the submitter with written notice of the agency's intent to disclose:
 - Explaining why the objections were not sustained;
 - Describing the records and information to be released;
 - Identifying the proposed release date (at least 10 additional business days);
 - Explaining that a "reverse" FOIA lawsuit could enjoin the release of the records.
- No response is interpreted as no objection to the release of the material.



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EXEMPTION 4: COMMERCIAL INFORMATION

CONFIDENTIAL COMMERCIAL INFORMATION - REVERSE FOIA LAWSUITS

Business submitters can file a lawsuit against the government to enjoin the release of information it believes should not be released under Exemption 4.

- While most FOIA lawsuits seek to force the government to release additional information, reverse FOIA lawsuits seek to prevent the government from releasing information.
- Provide notice to the original requester of the pending suit.
- Immediately stop processing the request.
- If successful, the business submitter will obtain a court order preventing the agency from releasing the records or information at issue.



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EXEMPTION 4: FORESEEABLE HARM

HARM

Exemption 4 and Harm after *Argus Leader*:

- Under the old standard, the government had to show "substantial competitive harm" before withholding information obtained as a "required" submission. No such showing was required for "voluntary" submissions.
- The *Argus Leader* court did not require any showing of harm to withhold otherwise confidential commercial information.
- BUT, the statutory text of the FOIA prohibits an agency from releasing information unless the "agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."



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EXEMPTION 4: FORESEEABLE HARM

HARM

Harm is always present and foreseeable (the protected interest is the confidentiality):

- “Ultimately, under Food Marketing, the plain and ordinary meaning of Exemption 4 indicates that the relevant protected interest is that of the information’s confidentiality — that is, its private nature. Disclosure would necessarily destroy the private nature of the information, no matter the circumstance.” *Am. Small Bus. League v. United States Dep’t of Defense*, 411 F. Supp. 3d 824, 836 (N.D. Cal. 2019).

Some specific showing of “genuine harm” (the protected interest is the commercial harm):

- “The defendants must explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would harm an interest protected by this exemption, such as by causing [genuine harm to [the submitter’s] economic or business interests, and thereby dissuading others from submitting similar information to the government.” *Ctr. for Investigative Reporting v. United States Customs & Border Prot.*, 436 F. Supp. 3d 90, 113 (D.D.C. 2019).



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EXEMPTION 4: FORESEEABLE HARM

HARM

“The interests protected by Exemption 4 are the submitter’s commercial or financial interests in information that is of a type held in confidence and not disclosed to any member of the public by the person to whom it belongs. An agency in a FOIA case can therefore meet the foreseeable harm requirement of the FOIA Improvement Act by showing foreseeable commercial or financial harm to the submitter upon release of the contested information.”

Seife v. Food & Drug Admin., 43 F.4th 231, 241-42 (2d Cir. 2022).



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EXEMPTION 4: FORESEEABLE HARM

HARM

Should Harm Even Matter?

- (A) An agency shall –
- (i) withhold information under this section only if –
 - (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
 - (II) disclosure is prohibited by law; and



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EXEMPTION 4: FORESEEABLE HARM

HARM

The Trade Secrets Act (18 U.S.C. 1905) prohibits the release of any information that concerns or relates to "the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association."

It is a criminal statute that allows for fines, imprisonment, and removal from office.



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EXEMPTION 4: FORESEEABLE HARM

HARM

"Exemption 4 covers information prohibited from disclosure under the Trade Secrets Act and similar laws, and as such does not provide for discretionary disclosure under FOIA. As with other exemptions that are based on separate legal restrictions, it is understood that the foreseeable harm standard will not apply to most of the information falling under Exemption 4."

– Sen. Report



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EXEMPTION 4: FORESEEABLE HARM

HARM



Pre *Argus Leader*, courts held that the Trade Secrets Act was "co-extensive" with Exemption 4, and so if information fell within the scope of the Exemption, it was also within the scope of the Trade Secrets Act.

At least one court has indicated that the same is still true:

"Because Exemption 4 covers the file, the Trade Secrets Act precludes the disclosure of the file. And because the Trade Secrets Act bars federal employees from disclosing the file, the FOIA Improvement Act authorizes the defendants to withhold it from the plaintiffs." *Ama Systems v. U.S. Food & Drug Admin.*, 2024 WL 712465, at *9 (D. Md. Feb. 21, 2024).



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EXEMPTION 4: LITIGATION CONSIDERATIONS

LITIGATION CONSIDERATIONS

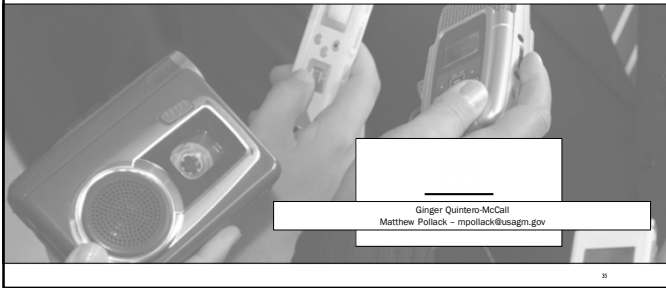
If a requester brings suit to uncover information redacted under Exemption 4, we must provide notice to the business submitter.

- The business submitter may wish to intervene and represent its own interests.
- The court may want an affidavit from the business submitter addressing confidentiality and harm.



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Questions?



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