

DOJ Issues New Guidance on Determining Whether Information Is “Confidential” Under FOIA Exemption 4

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In response to the Supreme Court of the United States’ decision in *Food Marketing Institute v. Argus Leader Media*, No. 18-481 (June 24, 2019), the U.S. Department of Justice’s Office of Information Policy (OIP) recently revised its guidance to government agencies responding to requests for information under the Freedom of Information Act (FOIA). The new guidance dramatically changes the analysis under which agencies determine whether information provided to the Government by individuals and companies (frequently government contractors) is considered “confidential” under FOIA Exemption 4, which shields from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” The new policy will make it easier for contractors to protect their information from public disclosure.

In *Argus Leader*, the Supreme Court overturned the long-standing test that required entities that had submitted information to the Government to demonstrate a likelihood that they would suffer substantial competitive harm from disclosure of their information for that information to be considered “confidential” and, thus, protected from release under FOIA Exemption 4. The Court held that “confidential” should instead be given its ordinary meaning of “private” or “secret” such that a party need show only that the information at issue is customarily kept private, or at least closely held, by the individual or company providing it to the Government for Exemption 4 to apply. Government assurances of keeping the information secret would also make the information “confidential” under Exemption 4.

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OIP's new step-by-step guidance closely tracks the Supreme Court's analysis. Agencies are instructed to ask three questions to determine whether information is "confidential" under Exemption 4:

1. Does the submitter customarily keep the information private or closely held?
2. Did the Government provide an express or implied assurance of confidentiality when the information was shared with the Government?
3. Were there express or implied indications at the time the information was submitted that the Government would publicly disclose the information?

If the answer to the first two questions is yes, the information is confidential under Exemption 4. Even if the Government did not provide specific assurances of confidentiality, however, the information will still be considered confidential under Exemption 4 as long as the answer to the third question is no. In other words, government silence as to whether information will be kept private is interpreted in the submitter's favor, and the submitter loses the expectation of confidentiality only when the Government has indicated the information will be disclosed.

Contractors whose information is the subject of a FOIA request should ensure that agencies are applying the correct standard when determining whether to release the data. Agencies that are still asking contractors to demonstrate the likelihood of substantial competitive harm to prevent disclosure of their information should be directed to the new OIP guidance.