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Department of Justice Issues New Guidance on Definition of "Confidential" under FOIA Exemption 4

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The Department of Justice ("DOJ") recently issued guidance defining the types of information that qualify as "confidential" under Exemption 4 of the Freedom of Information Act ("FOIA"). This guidance follows the Supreme Court's decision in *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 204 L.Ed.2d 742 (2019).

FOIA Exemption 4 and the *Argus Leader* Case

FOIA Exemption 4 generally permits federal agencies to withhold from public disclosure information consisting of "trade secrets and commercial financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). Critically, FOIA neither defines the term "confidential," nor provides any further guidance on the types of information that fall within the scope of FOIA Exemption 4.

In a 1974 decision, the D.C. Circuit held in *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 775 (D.C. Cir. 1974) that, to qualify as "confidential information," a contractor must demonstrate that disclosure of information would result in "substantial harm to the competitive position of the person from whom the information was obtained." The D.C. Circuit later revisited the *National Parks* test in *Critical Mass Energy Project v. NRC*, 931 F.2d 393 (D.C. Cir. 1991) (en banc), limiting the "substantial competitive harm" test to information submitted to a federal agency as a mandatory requirement. For information submitted voluntarily, the D.C. Circuit held that information may be considered "confidential" if such information was "of a kind that would customarily not be released to the public by the person from whom it was obtained." Satisfying these tests became an essential roadmap for contractors to prevent disclosure of its confidential information submitted to a federal agency pursuant to FOIA Exemption 4.

Earlier this year, the Supreme Court notably rejected the D.C. Circuit's *National Parks* and *Critical Mass* tests as a "casual disregard for the rules of statutory interpretation." In *Argus Leader*, the Court examined FOIA Exemption 4 utilizing a "plain meaning" textual analysis, and concluded that the term "confidential" as used in the statute encompasses a broader definition. Specifically, the Supreme Court set forth two separate circumstances in which information could be considered "confidential:"

1. Information disclosed to a federal agency that is "customarily kept private, or at least is closely held;" and

2. Information disclosed to a federal agency in which the receiving party provides "some assurance that it will remain secret."

DOJ Guidance Interpreting *Argus Leader*

DOJ recently issued guidance intended to provide clarity to federal agencies on how to implement the standard set forth in *Argus Leader* as it relates to FOIA Exemption 4. Since contractors routinely rely on FOIA Exemption 4 to prevent the public disclosure under FOIA of its confidential information, such as proprietary technical approaches or cost/price information, this guidance provides a useful roadmap. The DOJ guidance analyzes both circumstances described in *Argus Leader*:

- ***Whether the information is customarily treated as "confidential."*** DOJ specifically highlighted the importance of this factor based on *Argus Leader*, which explained: "[I]t is hard to see how information could be deemed confidential if its owner shares it freely." To determine whether information is customarily treated as confidential, DOJ advised agencies to seek information describing practices utilized by the submitter to keep such information private.

- ***Whether the federal agency provided some assurance the information will remain secret.*** Importantly, DOJ first acknowledged that a federal agency's assurance of confidentiality is not required under FOIA Exemption 4. Nevertheless, DOJ recognized that such an assurance of confidentiality may be "explicit or implicit." Express assurance may come in the form of direct communications from the federal agency, or in the form of regulations indicating that specific categories of information will not be disclosed. On the other hand, implied assurance may arise based on the federal agency's prior treatment of similar information, or the federal agency's long history of protecting certain categories of information. Under either circumstance, however, the DOJ guidance cautioned that "absent an express assurance by the agency, a submitter would not normally have a reasonable expectation of confidentiality for records the agency has historically disclosed."

To summarize its guidance, DOJ also provided a "Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential under Exemption 4 of the FOIA." This Step-by-Step Guide may be found here.

Take-Aways for Contractors

The *Argus Leader* case significantly altered the burden faced by contractors when wrestling with FOIA Exemption 4. Contractors are no longer required to demonstrate that the public disclosure of confidential information would result in substantial competitive harm. However,

contractors should begin implementing internal controls to ensure that they can demonstrate that certain categories of information provided to federal agencies are "customarily treated as confidential." Such controls may include:

1. develop internal policies and procedures regarding the safekeeping of confidential information;

2. implement data protection practices, such as including confidentiality/proprietary markings on documents; and

3. utilize nondisclosure agreements to restrict and govern the dissemination of confidential information when disclosure is necessary.

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