

Exemption 4 in a Nutshell

WHAT TO KNOW: HERE'S THE DEFINITION:

Under Exemption 4 of the Freedom of Information Act (FOIA), agencies can withhold two types of information:

1. **A trade secret** (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 when there is a direct relationship between the information at issue and the productive process); or
2. **Information** that is:
 - Related to business or trade, serving a commercial function, or of a commercial nature;
 - Obtained from a person (essentially any individual or entity outside the federal government); and
 - Privileged or confidential.
 - If the submitter voluntarily provided information, it will be considered confidential if it is the kind of information that the submitter would not customarily release to the public.
 - If the government required the submitter to provide the information, it will be considered confidential if disclosure is likely to either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter.

WHAT TO DO: HERE'S THE PROCESS:

When a bureau has reason to suspect or believe that information responsive to a FOIA request may be protected under Exemption 4, the Department's FOIA regulations, found in [43 C.F.R. Part 2](#), address the following questions:

- **§ 2.26** **How will the bureau interact with the submitter of possibly confidential information?**
 - ⇒ The submitter may designate confidential information at the time of submission.
 - ⇒ If the bureau can't readily determine whether information is confidential they must consult with the submitter under [§ 2.27](#).

- **[§ 2.27](#) When will the bureau notify a submitter of a request for their possibly confidential information?**
 - ⇒ The bureau must promptly notify a submitter if:
 - The submitter designated the requested information as considered protected under Exemption 4; or
 - The bureau believes the requested information may be protected under Exemption 4.
 - ⇒ Exceptions:
 - If a large number of submitters are involved, the bureau may publish a notice in a manner reasonably calculated to reach their attention; and
 - Circumstances discussed in [§ 2.29](#).
- **[§ 2.28](#) What information will the bureau include when it notifies a submitter of a request for their possibly confidential information?**
 - ⇒ 8 specific items are required.
 - ⇒ Don't reinvent the wheel—using standard language may be appropriate.
- **[§ 2.29](#) When will the bureau not notify a submitter of a request for their possibly confidential information?**
 - ⇒ When the information has been lawfully published or officially made available to the public; or
 - ⇒ Disclosure is required by another statute or regulation.
- **[§ 2.30](#) How and when may a submitter object to the disclosure of confidential information?**
 - ⇒ The bureau must request a detailed, written statement specifying all grounds for withholding the particular information under any FOIA exemption.
 - The submitter gets a minimum of 10 workdays to respond;
 - A submitter who does not respond within the time period specified is considered to have no objection to disclosure of the information; and
 - Responses received after response period do not have to be considered.

- **§ 2.31 What must a submitter include in a detailed Exemption 4 objection statement?**

⇒ A specific and detailed discussion of:

- Why the information is a trade secret; or
- Whether the submitter voluntarily provided the information or the government required the information to be submitted.
 - If it voluntarily submitted the information, it must explain how the information fits into a category of information that it customarily does not release to the public.
 - If it was required to submit the information, it must explain how substantial competitive or other business harm would likely result from its release.
 - To demonstrate that disclosure is likely to cause substantial competitive harm, it must explain how it:
 - Faces actual competition (including a detailed explanation of who its competitors are and the nature of the competition); and
 - Would suffer substantial competitive injury from disclosure (including a specific explanation of how disclosure of each category of information that it objects to disclosing on this basis would provide its competitors with valuable insights into its operation, give competitors pricing advantages over it, unfairly advantage competitors in future business negotiations, or any other information that sufficiently explains the substantial competitive injury that would likely result from disclosure).

⇒ It must also include:

- Contact information; and
- A certification that:
 - Any information it objects to disclosing is confidential;
 - It has not disclosed the information to the public; and
 - The information is not routinely available to the public from other sources.

⇒ The bureau may inform the submitter that it does not have to discuss some of the categories of information listed above.

- The bureau cannot waive the certification requirement.

- **[§ 2.32](#)** How will the bureau consider the submitter's objections?
 - ⇒ Carefully.

- **[§ 2.33](#)** What if the bureau determines it will disclose information over the submitter's objections?
 - ⇒ Must give the submitter:
 - Detailed information; and
 - At least a 10 workday notice. This provides an opportunity for the submitter to file a reverse FOIA suit.

- **[§ 2.34](#)** Will a submitter be notified of a FOIA lawsuit?
 - ⇒ Yes.

- **[§ 2.35](#)** Will the requester receive notification of activities involving the submitter?
 - ⇒ Yes.

- **[§ 2.36](#)** Can a bureau release information protected by Exemption 4?
 - ⇒ No. Discretionary releases of material covered by Exemption 4 are not permitted.
 - [The Trade Secrets Act, 18 U.S.C. § 1905](#), a statute which establishes criminal penalties for disclosure of the same sorts of information covered by Exemption 4, prevents the discretionary release of information covered by Exemption 4.