



Recommendation 82-1

Exemption (b)(4) of the Freedom of Information Act

(Adopted June 17, 1982)

The Freedom of Information Act (FOIA) allows public access to the records of federal agencies, whether such records are generated by the agencies or obtained by the agencies from other sources, including private individuals. Large numbers of FOIA requests are made by or on behalf of commercial interests seeking to utilize the government's processes to acquire information that has been prepared at the expense of private firms and individuals and submitted to the government as part of a study or pursuant to a regulatory requirement or other government information-gathering program. Often the privately submitted government records subject to FOIA disclosure contain information which will lose value to the submitter if it is disclosed. This availability of FOIA as a tool for low-cost commercial information-gathering—or, in some instances, industrial espionage—needs to be limited.

Exemption (b)(4) of FOIA permits agencies, as a matter of discretion, to withhold trade secrets and commercial or financial information obtained from a person which is privileged or confidential. Although FOIA contains procedural safeguards and a right of judicial review for requesters of agency records, the Act is silent regarding the rights of submitters of information whose legitimate interests may be impaired as a result of public disclosure of their information. Submitters are insecure about the degree of protection their information will receive when it is in the government's possession, and agency collection of private information may be hindered due to reluctance on the part of submitters to trust that the government will not disclose valuable documents.

While the Administrative Conference strongly endorses the FOIA concept of exposure of the government's activities, the disclosure of information created by private persons involves different values. Private needs and public access desires are in conflict in this limited area of FOIA disclosures. Congress should amend exemption (b)(4), both to insure that the private rights of submitters of information are adequately protected and to provide for a more efficient decision-making process within the government for disposing of claims regarding the applicability of exemption (b)(4).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Scope of the Exemption

Information deserving protected treatment under exemption (b)(4) has four characteristics. First, it is "private" information; the records in the government's possession were created by a "person" and submitted to the government, rather than generated internally within an agency.¹ The information need not be "about" the submitter—an example is a submitter's analysis of market conditions in a market where the submitter does no business—but the information must be such that it is ordinarily considered to be the "property" of the submitter, i.e., except for the government's possession, the submitter has an exclusive right to dispose of the information.

Second, the information is, in the ordinary colloquial sense, "confidential". It is held by the government in confidence and is not already in the public domain as a result of lawful disclosure by the government or by others, nor is it required by law to be made public.

Third, the information will have value to the submitter that disclosure threatens to diminish. It should not be necessary for a submitter to prove that the value loss will be "substantial", or to demonstrate the precise manner in which persons receiving access to the information may use the information to cause injury to the submitter. Such requirements impose unreasonable burdens upon submitters, strain the capacity of the decisionmaking process, and do not produce predictable results. It should be enough that the submitter have a valuable interest in the information, and that disclosure may reasonably be expected to impair that interest. In this respect, due regard should be given both to the probability and to the magnitude of impairment; thus the greater the harm potentially resulting from disclosure, the less need a showing be made of the certainty of occurrence of the harm, and vice versa.

In addition to the traditional "commercial" and "financial" interests that may be jeopardized by the disclosure of confidential information, "business" information—a bit of commercially relevant information which alone appears insignificant but which, when combined with other bits, can reveal important business data—appropriately should come within exemption (b)(4). And "research" information, whether submitted by a commercial or

¹ In an instance where one government agency submits analogous information to another agency, the information should be considered "private" for these purposes. A government entity that operates in a commercial, and perhaps highly competitive, marketplace will have interests of the same kind as if it were privately owned, and should receive similar protection.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

non-commercial person, should be recognized to have value to the submitter and to be deserving of protection.

Fourth, the interests to be protected by (b)(4) must be "legitimate." The exemption should not be used to shield evidence of unlawful activities, fraud, waste, or government mismanagement. This condition is necessary to insure the availability of FOIA as an effective means of the public's oversight of government, while protecting those private interests that legitimately are not in the public domain.

Agencies currently have discretion, subject to the limitations of the Trade Secrets Act (18 U.S.C. 1905), to release a submitter's exempt (b)(4) information, even though disclosure might cause damage to the submitter. The Conference, believes, however, that valuable private information in the government's files should not be subject to release under FOIA, except where disclosure is necessary to prevent injury to an overriding public interest. This limited power of discretionary release should be exercised with caution, and agencies should conduct public interest inquiries only when a strong initial showing has been made that an adequate basis for discretionary disclosure is likely to exist.

Finally, the Conference proposes to clarify further the scope of agencies' discretion to disclose confidential information by amendment of the Trade Secrets Act to eliminate any potential conflict between the two acts and to establish FOIA as the statute controlling agency release of confidential information to a requester.

The Decisionmaking Process

Selecting administrative and judicial processes that will provide both fair and efficient resolution of particular controversies requires a careful examination of the institutional capabilities available for decisionmaking. A decision by the government whether to invoke exemption (b)(4) is not a typical agency program decision. In situations where a FOIA request involves contested (b)(4) information, agencies frequently act merely as stakeholders, and do not necessarily provide a proper forum for prompt and accurate decisionmaking. The matters to be decided often are outside the expertise of agency officials. For example, "impairment" of a protected interest could take the form of exposure of a secret manufacturing process, or it could be release of a consumer attitude survey that reveals the potential profitability of a new product, or it might involve disclosing the number of employees working on a particular assembly line where knowledge of the number could aid a competitor correctly to estimate manufacturing costs for the assembled product. Agency personnel most likely to be called upon



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

to evaluate claims of exempt status will be program officials or FOIA officers, neither of which is likely to have a fundamental appreciation of the value of private information in the commercial marketplace.

The interests of requesters of information under FOIA, including possible (b)(4) information, have been and will continue to be best served by providing speedy informal agency action followed by a right of de novo judicial review of adverse agency decisions. Prudence and justice require that, when submitters become involved in a FOIA request, the procedures and standards of decision-making be the same as for cases involving requesters only.

Considering these factors, the Administrative Conference favors informal agency processes sufficient to prevent inadvertent releases of exempt material to a requester, to join the issues adequately, and, when feasible, to provide a prompt resolution of disputes, coupled with rights for both submitters and requesters to obtain de novo review in the district courts of adverse agency decisions regarding the applicability of exemption (b)(4) to requested information.

The Conference stresses the importance of considering agency procedures in tandem with the scope of judicial review. In this recommendation, the Conference has taken care to match an informal agency process—i.e., one that does not result in the creation of a detailed agency record—with an opportunity for de novo judicial review unlimited in its scope to consider the matters at issue.

However, different factors apply to an agency determination to disclose, on the ground of preventing harm to an overriding public interest, information that is unquestionably exempt under (b)(4). In such an instance, the required balancing of interests—harm caused by non-disclosure against harm caused by disclosure—is more likely to result in the creation of a reviewable record. Here an agency may consider the public use to which the information will be put, as claimed by the requester, as well as all potential private uses of all users of the information, once it is disclosed. Balancing the public's needs against individual costs in this fashion involves matters appropriately committed to an agency's determination, and the Conference recommends that the scope of judicial review of an agency decision to disclose exempt (b)(4) information be limited to whether the agency action is "arbitrary or capricious."

The Conference rejected, after careful consideration, the possibility of creating a new judicial cause of action that would permit requesters to bring suit to compel an agency to



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

release exempt (b)(4) information. At present requesters have no right to compel disclosure of information falling within any of the FOIA exemptions, and a rule to the contrary regarding exemption (b)(4) would likely be accompanied by great confusion regarding the status of confidential information (a problem sought to be eliminated by this recommendation), and could well result in a flood of new FOIA litigation.

At the agency level, fundamental fairness requires that submitters be given notice of an intended agency release of their information whenever there is a reasonable possibility that the information is covered by exemption (b)(4). Such a notice requirement should be included within FOIA. Agency information gathering and handling procedures vary greatly, however, and the details of providing notice are more appropriately determined by individual agencies through the rulemaking process. Further, there is such a wide variation in the types of information subject to the exemption, and in the criteria appropriate to establish a claim of exempt status, that each agency should give individual consideration to techniques that will best facilitate its own disposition of determinations under the exemption.

The additional procedural protections recommended here will require that the statutory time limits in FOIA be adjusted accordingly, at least for documents involving the (b)(4) exemption. While the Conference makes no recommendation with respect to specific intervals of time, the interests of prompt agency response and government credibility will require that more realistic limits be set by Congress.

Nothing in this recommendation is intended to diminish the ability of requesters, whose rights are established independently under FOIA, to obtain access to non-exempt agency records. Requesters would remain entitled to disclosure of privately submitted agency records absent a determination that (b)(4)—or some other exemption—applies. Where an agency does not assert a claim of exempt status for a submitter's information, the burden will be on the submitter to assert a right to exempt treatment, to demonstrate the applicability of the exemption, and to persuade the agency or judicial decisionmaker that the information should not be disclosed.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recommendation

A. Scope of the Exemption

1. *Coverage.* Congress should amend exemption (b)(4) of FOIA to provide that the exemption applies to confidential information submitted to the government by a person and for which disclosure may reasonably be expected to impair the legitimate commercial, financial, business, or research interests of that person. (This recommendation is not intended to affect other laws that control the disclosure of specific agency records.)

2. *Discretion to Disclose.* The Act should be amended to eliminate agency discretion to disclose exempt (b)(4) information to a requester, except that agencies should be permitted to disclose otherwise exempt (b)(4) information (i) when the submitter agrees to waive exempt status, or (ii) when the agency finds that to withhold the information would injure an overriding public interest. To eliminate confusion caused by the interrelation of FOIA and the Trade Secrets Act (18 U.S.C. 1905) Congress should amend the Trade Secrets Act to make clear that it does not authorize withholding under exemption (b)(3) of FOIA and does not inhibit discretionary disclosure of material under exemption (b)(4).

B. Agency Procedures

1. *Notice.* Congress should amend FOIA to require that, prior to a final agency decision to disclose to a requester information that may fall within exemption (b)(4), the agency provide the submitter with notice adequate to permit the submitter to object to the disclosure. This amendment should also require that agencies specify by rule those instances in which a submitter is entitled to notice, the rules to include, at a minimum, instances in which, for the particular information requested, the submitter (i) has made a prior claim of exempt (b)(4) status, or (ii) had submitted the information under a promise of confidentiality, of (b)(4) treatment, or of notice of a FOIA request. In addition, agencies should consider whether, in some instances, it would be appropriate routinely to give notice to submitters of all requests for the submitters' data, so that the agencies will always have the benefit of the submitters' opinions on the applicability of (b)(4).

2. *Agency Information Handling Procedures.* Agencies should encourage the use of pre-marking by submitters to aid in the identification of materials that may be subject to exemption (b)(4). Congress should amend FOIA to authorize each agency to determine, by rule, whether pre-marking should be made a pre-condition for notice of pending disclosure; such rules should



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

be based on a consideration of the nature of information subject to (b)(4) as well as the characteristics of those who submit it. Agencies should investigate whether certain routinely collected categories of information may appropriately be designated by rule as ordinarily subject to disclosure without notice, or ordinarily subject to withholding under exemption (b)(4); an agency using categories established by rules must bear in mind that such rules, which may greatly facilitate the handling of large volumes of requests in some cases, cannot override the FOIA itself and must provide that, prior to making a final decision on disclosure, the agency will, upon specific request, review particular documents to determine their exempt status. Agencies that handle large volumes of requests for information likely to contain (b)(4) exempt material should consider establishing, by rule, the nature of substantiation that would ordinarily be required to support a claim of exempt (b)(4) status.

3. *Determination of Exempt Status.* Congress should amend FOIA to provide for written objections by a submitter in instances of contested (b)(4) determinations. In making determinations on the applicability of exemption (b)(4), agencies should use informal techniques, and should avoid utilizing time-consuming adversarial methods. During the decisionmaking process, agencies must be sensitive to the special problems of both submitters and requesters. Agency procedures must not disclose to a requester the basis of a claim of exempt status when disclosure of the basis itself would compromise the confidentiality of the information. On the other hand, agencies should bear in mind that a requester does not ordinarily have access to such information as may be necessary to challenge a submitter's claim of exempt status. In order to facilitate informal agency resolution of potential conflicts between requesters and submitters, agencies should provide that, whenever possible, a requester receive and be permitted to comment upon a submitter's written objections to release, and be permitted to be present at oral hearings, if any, on the subject, as long as this does not compromise the confidentiality of the information.

4. *Discretionary Release of Exempt Information.* Once information has been determined to be exempt under (b)(4), a FOIA requester desiring to obtain disclosure of the information on the ground that nondisclosure would injure an overriding public interest should bear a heavy burden to demonstrate with specificity the basis for the request. A pro forma assertion of public injury due to non-disclosure should not be sufficient to trigger an agency inquiry. In considering whether to exercise its limited discretion to disclose otherwise exempt (b)(4) material, an agency appropriately may consider all potential uses to which the disclosed information may be put, and should balance any probable public harm in non-disclosure against probable harm to the submitter, the government, and others due to disclosure.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

5. *Final Decision to Disclose.* Congress should amend FOIA to provide that a final agency decision to disclose information alleged by the submitter to be exempt under exemption (b)(4) be made by an agency official of a rank equivalent to that of the agency official authorized to deny a request for disclosure. Agencies should consider utilizing the same appeal process within the agency for submitter-contested cases as that used whenever a requester challenges a decision not to disclose.

6. *Agency Implementation.* Pending congressional enactment of the changes recommended herein, agencies should, to the extent permitted by law, immediately adopt all of the above proposals for improved agency procedures.

C. Judicial Review

1. *Cause of Action.* Congress should amend FOIA to provide that both submitters and requesters of a contested piece of (b)(4) information have a cause of action under FOIA, that each may intervene in suits brought by the other, and that opposing claims of submitter and requester can be resolved in a single forum.

2. *Scope of Review.* Congress should amend FOIA to provide that agency determinations regarding the applicability of exemption (b)(4) be subject to de novo consideration by the courts. Agency decisions to release exempt information, on the ground that non-disclosure would injure an overriding public interest, should be made reviewable at the instance of submitters of the information under the "arbitrary or capricious" standard in 5 U.S.C. 706(2)(A).

Citations:

47 FR 30702 (July 15, 1982)

___ FR _____ (2012)

1982 ACUS 1 (vol 1)

Note:

The President in 1987 issued Executive Order 12600, which requires agencies to follow procedures similar to those recommended by the Administrative Conference.