

# BRIEFING PAPERS®

## SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### FOIA Exemption 4

By Stuart Turner & Nathaniel Castellano\*

The Freedom of Information Act (FOIA)<sup>1</sup> is an attempt to balance the Government's need for transparency and confidentiality. In the name of transparency, FOIA provides for public disclosure of most Government records, regardless of the requester's intentions. To maintain confidentiality, FOIA's general grant of transparency into Government records is counterbalanced by several exemptions that allow agencies to withhold certain information.<sup>2</sup>

These exemptions have been extensively utilized and litigated by contractors seeking to protect their information and obtain information submitted by their competitors. The rules and standards governing FOIA and its exemptions arise from judicial decisions, agency regulations, and statements by the Executive Branch. President Obama did not shy away from this debate; on his first day in office, he signed a memorandum directing agencies to employ a "presumption of openness" in FOIA decisions.<sup>3</sup> The FOIA Improvement Act of 2016, signed near the end of President Obama's term, tilts the balance further in favor of transparency by codifying the Obama administration's presumption of openness and increasing scrutiny of agency decisions to keep certain records confidential.<sup>4</sup>

At the same time that these bookends from the Obama administration compel agencies to disclose more information, they also add strain to agency resources and FOIA officials. The modern FOIA system serves purposes well beyond the well-intentioned goal of Government transparency and has become a significant tool for obtaining business intelligence. Indeed, since the Act's passage in 1966, FOIA administration has become a profession of its own, spawning an ecosystem of research firms and strategy consultants that use FOIA to build inventories of documents and data regarding federal procurement that they sell to competitors in the federal market. If the Government has your company's data, chances are someone eventually will request it. And the determination of whether to release it is in the hands of an overworked cadre of federal FOIA officials who have been repeatedly instructed to err on the side of disclosure and are wary of the additional scrutiny that will likely follow any decision to withhold requested records.

\*Stuart Turner is Counsel at Arnold & Porter Kaye Scholer LLP and experienced in all aspects of Government contracting, including FOIA litigation. Nathan Castellano, an associate at A&PKS, graduated from the George Washington University Law School as a Murray Schooner Procurement Scholar and recently completed a clerkship at the U.S. Court of Appeals for the Federal Circuit.

### IN THIS ISSUE:

The Contractor's Dilemma	2
Introduction To FOIA & The Sunshine Laws	3
FOIA's General Structure	4
FOIA Exemption 4	6
The Mechanics Of Requesting, Disclosing & Objecting	9
Conclusion	10
Guidelines	11



THOMSON REUTERS®

It is thus more important now than ever for companies that submit information to the Government to understand the risk of disclosure pursuant to a FOIA request and know the procedures available to maintain confidentiality through assertion of FOIA's exemptions.<sup>5</sup> With that end in mind, this BRIEFING PAPER focuses on the protections offered by FOIA Exemption 4,<sup>6</sup> which Congress included to protect confidential commercial information submitted to the Government by the companies with which the Government does business.

The PAPER begins by discussing the risks associated with disclosure of information to the Government, including recent cases related to protecting information submitted pursuant to the mandatory terms of a compliance settlement agreement. Then, it provides a discussion of the FOIA process and the means by which contractors can protect information protected by Exemption 4. Relevant changes brought by the FOIA Improvement Act of 2016 are identified throughout. The PAPER concludes with several guidelines to help protect information that falls under Exemption 4.

## The Contractor's Dilemma

Federal procurement contractors constantly submit highly valuable, confidential information to their Government customer. Once in Government hands, these documents are subject to FOIA and to the agency's determination of whether a FOIA exemption applies.

The fate of submitted compliance data provides a critical—and sobering—example. The modern business of Government contracting is the business of compliance. A key contested issue in current FOIA jurisprudence is the treatment of information submitted to the Government in the course of a contractors' compliance duties. There are multiple categories of compliance information, from reports on contract activity to proprietary meta-details about how a contractor has implemented its compliance program. At any

given time, the Government holds reams of precious data regarding its contractors' compliance measures and internal controls. Public release of such information can be devastating for the contractor it concerns and lucrative for its competitors.

Given the consequences of noncompliance, it is understandable that contractors are willing to invest enormously in "gold standard" compliance programs and internal controls. These mechanisms are often the only way to meet the obligations for responsible self-monitoring and internal awareness imposed by enforcement statutes such as the False Claims Act (FCA)<sup>7</sup> and Foreign Corrupt Practices Act (FCPA)<sup>8</sup> and regulations such as the Federal Acquisition Regulation (FAR) rules governing suspension or debarment.<sup>9</sup> These programs are sophisticated and expensive to design. It is therefore not surprising that companies may value a peek at their competitors' compliance programs.

For various reasons, usually well-advised, contractors often submit information to the Government detailing their compliance methods. In some cases, this is in response to a solicitation or a request from an agency inspector general office or as a prophylactic measure designed to help establish present responsibility. Allegations of wrongdoing may lead to formal or informal exchanges, including formal settlement discussions, where a contractor voluntarily discloses information about its internal controls to demonstrate that an offense did not occur or that a penalty is not warranted. Following such exchanges, administrative and criminal enforcement actions often result in agreements that require contractors to alter or expand compliance programs, obtain third-party monitors, and periodically report their efforts to the Government.<sup>10</sup> All of this information potentially provides multiple valuable insights to competitors of the submitter.

Thankfully, two relatively recent decisions from the U.S.

---

Editor: Valerie L. Gross

©2017 Thomson Reuters. All rights reserved.

For authorization to photocopy, please contact the **West's Copyright Clearance Center** at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or **West's Copyright Services** at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

*Briefing Papers*® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. Periodical Postage paid at St. Paul, MN. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

District Court for the District of Columbia (DDC)—*Public Citizen I* and *Public Citizen II*—recognize the important commercial and confidential nature of compliance information submitted pursuant to administrative settlement agreements.<sup>11</sup>

Compliance materials are but one category of critical information that is put into play under FOIA. Cost and pricing data, supply chain and logistical information, descriptions of performance methods, and technical data and trade secrets all are routinely provided to the Government. To prevent this sensitive information from being publicly disclosed pursuant to a FOIA request, contractors must be vigilant in asserting that the information they submit to agencies constitutes confidential commercial information and thus falls within the protections of FOIA Exemption 4. The burden of doing so is increased by the FOIA Improvement Act of 2016, which codifies the Obama administration’s “presumption of openness” for requested records and provides additional scrutiny into agency decisions to withhold records pursuant to FOIA’s exemptions.<sup>12</sup>

Unfortunately, in making these pro-transparency amendments, Congress neglected to codify the counterbalancing provisions of President Reagan’s Executive Order 12,600, issued in 1987, which helps companies maintain the confidentiality of information that falls within the scope of Exemption 4.<sup>13</sup> Of note, the 2016 Act did not codify the obligation expressed in Executive Order 12,600 to consult with the submitter regarding the application of Exemption 4. This obligation remains, but it is subject to subsequent executive revision. While the ultimate effect of the 2016 FOIA amendments are yet unknown, it is likely that contractors will have to resort more often to litigation to prevent disclosure of the confidential commercial records.

Before delving into the mechanics of protecting information covered by Exemption 4, it is necessary to introduce FOIA in the context of its peer sunshine laws and explain the balance FOIA attempts to reach between transparency and confidentiality.

## Introduction To FOIA & The Sunshine Laws

As future Justice Louis Brandeis wrote in 1914, “sunlight is said to be the best of disinfectants.”<sup>14</sup> FOIA is best understood as one of many so-called “sunshine laws” designed to make the operation of Government more transparent to the public by bringing light into its internal operations.<sup>15</sup> FOIA was signed by President Lyndon Johnson

and enacted on Independence Day, July 4, 1966.<sup>16</sup> It was intended to enhance the weak disclosure provisions of the Administrative Procedure Act (APA),<sup>17</sup> but the initial version was generally considered to be insignificant.<sup>18</sup> FOIA did not become the foundational sunshine law it is today until strengthening amendments in 1974 and 1976.<sup>19</sup> That same decade brought a quick succession of other sunshine laws, including the Federal Advisory Committee Act (1972), the Privacy Act (1974), the Government in Sunshine Act (1976), and the Presidential Records Act (1978).<sup>20</sup> These federal acts were themselves mirrored by state legislation, so that all 50 states and the District of Columbia currently have some form of public document access statute on the books.<sup>21</sup>

Notwithstanding the undeniable benefits of these sunshine laws, the desire for Government transparency is countered by the Government’s legitimate need to keep secrets and maintain confidences. As even the staunchest transparency advocates agree, some information must be kept secret to protect national security interests and personal privacy. Less recognized, but nonetheless critical, is the Government’s need to ensure confidentiality to private citizens and business interests that submit valuable information in the course of their dealings with the Government.<sup>22</sup> Such interests have laws of their own—e.g., the Privacy Act,<sup>23</sup> Trade Secrets Act,<sup>24</sup> etc. The difficulty raised by sunshine laws is striking a balance between what citizens have a right to know and what submitters have a right to protect.

FOIA attempts this balancing act by providing a blanket right of access to Government records, subject to several counterbalancing exemptions for information that agencies are not required to release.<sup>25</sup> The Supreme Court has recognized and explained this dynamic as follows:

This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. “Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.” The Act’s “basic purpose reflected ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.’ ” “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” . . .

Despite these pronouncements of liberal congressional purpose, this Court has recognized that the statutory exemptions are intended to have meaningful reach and

application. . . . [As the Court] observed: “Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information,” and therefore provided the “specific exemptions under which disclosure could be refused.” Recognizing past abuses, Congress sought “to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.” The Act’s broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the “balance” Congress has struck.<sup>26</sup>

One critical feature of FOIA’s design is that its right of access is not dependent on the identity or motives of the requester; members of civic society and the media are treated just the same as market competitors.<sup>27</sup> That feature compounds the need for companies that submit valuable commercial information to the Government to be confident that the Government can maintain the confidentiality of those records. For most contractors doing business with and submitting information to the Government, the most important counterbalance to FOIA’s presumption of transparency is Exemption 4, which protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>28</sup>

The following sections of this PAPER introduce the nuts and bolts of FOIA and Exemption 4, identifying the most relevant changes brought by the FOIA Improvement Act of 2016. Note that this PAPER relies on precedent primarily from the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit. While forum shopping is relevant to FOIA litigation, FOIA provides that the District of Columbia is an appropriate forum for all FOIA cases.<sup>29</sup> “Because the clear majority of FOIA lawsuits are filed in the District of Columbia, the district court and the court of appeals there have developed a substantial body of expertise in FOIA matters that may be lacking in other jurisdictions.”<sup>30</sup> Commenters have noted that, since the mid-1980s, “the rulings of the D.C. Circuit have arguably tended to favor the government and not the requester.”<sup>31</sup> This could be “because these judges hold practical experience involving the real problems of agency backlogs and the extent to which substantive submissions will be deemed sufficient.”<sup>32</sup>

District courts in other circuits, particularly the Ninth and Second, may be more favorable for requesters,<sup>33</sup> and it is never safe for counsel to assume that district courts in other circuits will adhere to even the most fundamental of D.C. Circuit FOIA precedent. This is perhaps best illustrated by a

recent—and frankly, shocking—decision issued by the U.S. District Court for the Southern District of New York.<sup>34</sup> Despite the D.C. Circuit’s longstanding, fundamental holdings that FOIA Exemption 4 may apply to pricing and other proprietary information integrated into Government contracts, the district court reached the exact opposite conclusion.<sup>35</sup> In analysis that would strike dumb any practitioner remotely familiar with the FOIA standards applied by the D.C. Circuit, the N.Y. district court reasoned that the requested information was neither “obtained from a person” nor “confidential,” as the Government—not the contractor—drafted the contract.<sup>36</sup> This flies in the face of multiple decisions confirming the integration of submitted material into a Government document does not remove Exemption 4 protection. The contractor whose information was at issue did not intervene before the district court, and the Government did not appeal its loss there. Thus, when the contractor attempted to appeal to the Second Circuit, its appeal was dismissed for lack of independent standing.<sup>37</sup> The authors of this PAPER doubt this errant and unreviewed decision will materially impact FOIA practice, but it serves as a strong reminder to never assume that every forum will follow the D.C. Circuit’s lead on FOIA issues.

## FOIA’s General Structure

### Right To Records—5 U.S.C.A. § 552(a)

FOIA provides that all federal agency records are accessible to the public unless specifically exempt from this requirement. In 5 U.S.C.A. § 552(a), FOIA provides three broad grants of information that agencies must share with the public. The first, in 5 U.S.C.A. § 552(a)(1), requires automatic publication of general information about the agency in the Federal Register, such as a description of the agency’s organization, function, procedural and substantive rules, and statements of policy. The second, in 5 U.S.C.A. § 552(a)(2), requires agencies to routinely provide for public inspection and copying of certain information, including final agency opinions and orders, specific policy statements, and staff manuals and instructions. The FOIA Improvement Act of 2016 amended 5 U.S.C.A. § 552(a)(2) to require agencies to “make available for public inspection *in an electronic format*” records “that have been requested three or more times.”<sup>38</sup>

The third grant of information, in 5 U.S.C.A. § 552(a)(3), is the most important for the purposes of this PAPER. It provides that records not made automatically available under the paragraphs (a)(1) and (a)(2) can be requested by



the public. These requested records must be made available unless they are exempt from mandatory disclosure under the FOIA exemptions listed in 5 U.S.C.A. § 552(b) or excluded from FOIA's scope under § 5 U.S.C.A. § 552(c).

#### Exemptions & Exclusions—5 U.S.C.A. § 552(b)-(c)

In 5 U.S.C.A. § 552(b), FOIA provides nine categorical exemptions of information that may be withheld when records are requested. The nine exemptions cover records that are:

- (1) “properly classified”;
- (2) “related solely to the internal personnel rules and practices of an agency”;
- (3) “specifically exempted from disclosure by statute” (subject to certain conditions);
- (4) “trade secrets and commercial or financial information obtained from a person and privileged or confidential”;
- (5) records that would be privileged in court, including records less than 25 years old that describe the internal “deliberative process” of the Government;
- (6) “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”;
- (7) records “compiled for law enforcement purposes” (subject to certain conditions);
- (8) compliance records of regulated financial institutions; or
- (9) survey data regarding the location of wells.

In 5 U.S.C.A. § 552(c), FOIA establishes three categories of law enforcement-related information that may not be disclosed.

The exemptions of 5 U.S.C.A. § 552(b) are considered “explicitly exclusive.” In other words, if a record does not qualify for an exemption, an agency has no discretion to withhold it, unless it falls within one of the exclusions of 5 U.S.C.A. § 552(c).<sup>39</sup>

#### Codification Of The Foreseeable Harm Standard

Even when requested information does fall within an exemption and nondisclosure can be justified, agencies usually have discretion to release the requested records. In other

words, FOIA does not require agencies to withhold exempt records.<sup>40</sup> The general discretion to release exempt documents may be restricted by other statutes. For example, some statutes, known as “Exemption 3 statutes” expressly provide that certain records are not subject to FOIA under any circumstances.<sup>41</sup> For example, of particular relevance to contractors, unsuccessful proposals for a procurement are exempted from FOIA by statute and thus exempt under 5 U.S.C.A. § 552(b)(3).<sup>42</sup> As explained in detail below, a combination of the Trade Secrets Act<sup>43</sup> and the APA<sup>44</sup> precludes agencies from releasing information that falls within FOIA Exemption 4.

Given the element of agency discretion involved in the decision to withhold or release information that is protected by an exemption, a lot turns on the standard agencies use when making the decision to disclose. Historically, that standard has been set by executive order under each administration. Following up its initial FOIA memorandum, the Obama administration in October 2009 directed agencies to apply a foreseeable harm standard before withholding requested records. The memorandum stated that an agency may withhold records only if it “reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions” or “disclosure is prohibited by law.”<sup>45</sup>

This standard was not unprecedented—under President Clinton, Attorney General Reno implemented a similar foreseeable harm standard in a 1993 memorandum: “It shall be the policy of the [Department of Justice (DOJ)] to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.”<sup>46</sup> Reno’s memo was superseded by Attorney General Ashcroft’s memo, issued in 2001 under the Bush administration, which notified agencies that discretionary decisions to disclose should be made only “after full and deliberate consideration by the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information,” and further provided that agencies “can be assured” the DOJ will defend agency decisions to withhold records “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”<sup>47</sup> The Ashcroft memo was styled from Attorney General Smith’s equally protective orders under the Reagan administration in the 1980s.<sup>48</sup> The Reagan administration went even further, and in 1987 through Executive Order 12,600 required agencies

to provide procedural protections to submitters of information marked as commercial and confidential.<sup>49</sup>

Perhaps the most important result of the FOIA Improvement Act of 2016 is that it codifies the Obama administration's foreseeable harm standard that prohibits agencies from withholding records "unless the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."<sup>50</sup> Unfortunately, as noted earlier in this PAPER, the 2016 Act does not codify the procedural protections provided to submitters of confidential commercial information, which are still rooted in Reagan's Executive Order 12,600. Executive Order 12,600 is still legally binding, for now, but any subsequent administration could unilaterally weaken or supersede entirely Reagan's pro-submitter FOIA policies.<sup>51</sup>

## FOIA Exemption 4

FOIA Exemption 4 covers two categories of information—trade secrets and commercial or financial information that is privileged or confidential.<sup>52</sup> The purpose of Exemption 4 is to "encourage individuals to provide certain kinds of confidential information to the Government."<sup>53</sup> This is meant to benefit both those submitting information and those receiving it.<sup>54</sup> As DOJ's FOIA Guide explains, Exemption 4 provides agencies with an assurance that required submissions will be reliable, and it protects those who are required to submit information by safeguarding them from the competitive disadvantages that could result from disclosure.<sup>55</sup>

To qualify for protection under Exemption 4, the information must be either:

- (A) a trade secret, or
- (B) information that is:
  - (1) "commercial or financial,"
  - (2) obtained from a person, and
  - (3) either:
    - (a) privileged, or
    - (b) confidential.<sup>56</sup>

Trade secret protection is important, and operates according to specific rules and legal tests. For the purposes of FOIA, however, Exemption 4 is considered "co-extensive" with the Trade Secrets Act.<sup>57</sup> In other words, the Trade Secrets Act is consistent with, and supports, the protections of FOIA and "effectively prohibits an agency from releasing information subject to [Exemption 4]."<sup>58</sup>

Most cases turn on the second category of information protected by Exemption 4, and the remainder of this PAPER is devoted to that topic. The second category of information covered by Exemption 4 is (1) commercial or financial information, (2) obtained from a person, and (3) either (a) privileged or (b) confidential. The following sections address each of the elements in turn.

### "Commercial Or Financial"

The D.C. Circuit interprets the phrase "commercial or financial" broadly. Information that relates to business or trade will usually qualify. Items commonly regarded as commercial or financial include business sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information of financial condition.<sup>59</sup>

The D.C. Circuit has rejected the argument that commercial information must reveal commercial operations.<sup>60</sup> Instead, information is commercial if "it serves a commercial function or is of a commercial nature."<sup>61</sup> The scope of commercial information also encompasses records revealing business operations that a submitter has a commercial interest in. As recognized most recently by the DDC in *Public Citizen I*, in highly regulated industries, companies have a commercial interest in information about their business operations that are "instrumental" for legal compliance.<sup>62</sup>

### "Obtained From A Person"

As stated in the DOJ FOIA Reference Guide, the "obtained from a person" requirement is "quite easily met in almost all circumstances."<sup>63</sup> "Person" is defined broadly to mean any submitting individual or entity of any type other than the Federal Government.<sup>64</sup> Information generated by the Federal Government itself is not obtained from a person.<sup>65</sup> Nevertheless, documents prepared by the Government can still come within Exemption 4 if they comprise summaries or reformulations of information supplied by a source outside the Government, such as contractor information contained in an audit report, or information arrived at through negotiation between a private party and the Government.<sup>66</sup> Exemption 4 covers information concerning third parties, so protection is available regardless of whether it pertains directly to the commercial interest of the submitter or to the commercial interests of another.<sup>67</sup>

### Either "Privileged Or Confidential"

The terms "privileged" and "confidential" are not synon-

ymous; these are two independent and alternative qualifications. Most Exemption 4 litigation turns on whether information is confidential. There are some cases dealing with information protected pursuant to the attorney-client privilege, but there is not yet any definitive statement of which privileges will qualify information for protection under Exemption 4.<sup>68</sup> The following sections of this PAPER address confidentiality.

### Confidentiality: The *Critical Mass* Distinction

To determine whether information is confidential (and thus protected), one of two tests may apply, depending on whether the submission was *mandatory* or *voluntary*.<sup>69</sup> This is the so-called “*Critical Mass* distinction.” In *Critical Mass Energy Project v. Nuclear Regulatory Commission*, the D.C. Circuit, sitting *en banc*, distinguished voluntary submissions from mandatory submissions.<sup>70</sup> The confidentiality standard for mandatory submissions had already been established by the D.C. Circuit in *National Parks & Conservation Association v. Morton*.<sup>71</sup> Wherever possible, submitters should always seek to categorize submissions as voluntary, as the *Critical Mass* decision establishes a much lower bar to qualify voluntary submissions as confidential and thus protected by Exemption 4.

The circuit court in *Critical Mass* reasoned that voluntary and mandatory submissions each implicate different interests of the Government and the submitter. For mandatory submissions, the Government’s interest is ensuring the reliability of submitted information, while the submitter’s interest is the commercial disadvantage of having that information released to competitors. For voluntary submissions, the circuit court sought to defend the Government’s need for voluntary participation in exchanges with the Government. In short, if submitters may choose whether or not to submit information to the Government, they are far less likely to do so if it will be subject to release under FOIA.<sup>72</sup>

Voluntarily submitted information is withheld under Exemption 4 if it meets a straightforward test that relates only to the submitter itself—*i.e.* “if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.”<sup>73</sup> As stated by the DOJ FOIA Reference Guide, voluntarily submitted information is categorically protected unless it is customarily disclosed to the public by the submitter.<sup>74</sup> This is an objective test, which usually only involves “perfunctory” analysis.<sup>75</sup>

Involuntarily submitted information, however, may only be protected if the submitter demonstrates that release of the

information would damage the submitter in the competitive marketplace. Under the *National Parks* test, information submitted involuntarily is confidential only “if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”<sup>76</sup> Respectively, these are referred to as the “impairment prong” and the “competitive harm prong.” The D.C. Circuit has left open whether there may be a third prong to the *National Parks* test that embodies other governmental interests, such as compliance or program effectiveness.

The importance of the impairment prong was diminished by *Critical Mass*, but there are still circumstances where disclosure of involuntarily submitted information could threaten the reliability of such data submissions in the future.<sup>77</sup> Most cases turn on the competitive harm prong, under which information is confidential if disclosure is likely “to cause substantial harm to the competitive position of the person from whom the information was obtained.”<sup>78</sup> A key aspect of this test is that the relevant harm is “limited to harm flowing from the affirmative use of proprietary information by competitors,” and this “should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement” or “embarrassing” disclosures.<sup>79</sup>

The agency need not show that the release of documents would cause actual competitive harm. It is enough to demonstrate that there is (1) actual competition in the relevant market and (2) a likelihood of competitive injury if the information were released. The likelihood of competitive harm can be shown in relation to the overall competition the submitter faces, not only competition for the disputed contract. An agency’s determination of whether disclosure will result in substantial competitive harm is a predictive, factual judgment not capable of exact proof, so courts usually will show deference. But, the agency’s findings can be successfully challenged by identifying technical information in the requested document and explaining how competitors can use that information in their own operations. If such evidence is presented, the agency will have to elaborate on its conclusion that no substantial competitive harm is likely.<sup>80</sup>

In *Public Citizen II*, the DDC explained that in highly regulated and competitive industries, information detailing a company’s compliance activities can satisfy the *National*

*Parks* test. The basis for its reasoning was that, in such highly regulated industries, compliance is essentially a means of competition by investing in reduced exposure to liability. In that sense, successful compliance practices are “a free roadmap as to what works [in the industry] without violating the legal framework of regulatory enforcement and laws that govern the industry, and what activities to avoid, and release of this roadmap would allow competitors to avoid incurring the experiential or monitoring costs [the submitters incurred] in gaining the information.”<sup>81</sup>

There should be no doubt that Government contractors would be subject to the same analysis afforded to pharmaceutical industries. Nevertheless, when making the case that the DDC’s approach in the *Public Citizen* cases should be extended to contractors, it may help to note the district court’s analysis is implicitly supported by the D.C. Circuit’s holding in *Worthington Compressors, Inc. v. Costle*:

Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA’s principal aim of promoting openness in government.<sup>82</sup>

Indeed, the DDC relied on *Worthington Compressors* to justify finding competitive harm.<sup>83</sup>

### Confidentiality: Determining Which Test Applies

Perhaps the most difficult aspect of determining whether information is confidential is categorizing the submission as voluntary or involuntary. Much of the confusion in this area of law has been attributed to the DOJ’s decision to treat most contract-related submissions as mandatory. For example, even though the decision to submit a proposal is voluntary, unit prices generally are considered mandatory submissions. Some contract-related submissions have been distinguished from unit pricing and treated as voluntary submissions, such as line item pricing, rate ceilings, and other detailed pricing information.<sup>84</sup>

The determination as to whether a submission is mandatory is contextual and often depends on both the agency’s actual legal authority and the language of the request or demand for information. If a submission is required for participation in a voluntary program, then it will be treated as a mandatory submission. The information can be required

by a broad range of formal and informal authorities that condition participation in a program on submission of information. However, just because an agency has authority to require submissions does not automatically mean that all resulting submissions are required; the authority must actually be used to compel the submission. The determination of whether an agency’s authority to compel submission was used is an objective determination, not subjective; the agencies’ actual legal authority is controlling, not the parties’ beliefs or intentions. Therefore, if an agency improperly makes a demand for submission, then the submission is voluntary because it could be ignored without penalty.<sup>85</sup>

Submitters engaged in negotiations with the agency over protection of their information, or subsequent “reverse FOIA” litigation, must often argue on two fronts. Their primary assertion will be that all of the information was submitted voluntarily and thus should be generally exempt under the lenient *Critical Mass* standard. However, they will also argue in the alternative that, even if their submission was made involuntarily it still qualifies as confidential under the *National Parks* test. The former theory generally applies broadly to the circumstances of the submission and does not require a document-by-document showing. The latter, however, requires a document-by-document, even page-by-page, accounting of the potential competitive harm presented by the information proposed for release.

An example from one recent case is instructive. In *Associated Press v. U.S. Department of State*, Judge Leon of the DDC issued a brief memorandum decision considering the Exemption 4 treatment of various documents submitted by defense contractors BAE Systems plc & BAE Systems, Inc. to the Department of State.<sup>86</sup> In an effort to resolve an enforcement proceeding through settlement, BAE Systems submitted extensive documentation to the agency.<sup>87</sup> These documents were requested by Associated Press, and the Department of State refused to release them. BAE Systems intervened to support the agency. While it may seem obvious that settlement documents are submitted voluntarily, the plaintiff, Associated Press, argued strenuously that because BAE Systems was very interested in obtaining the objective of the settlement (resolution of the enforcement action), the *Critical Mass* reasoning did not apply, and BAE Systems would have engaged in the settlement regardless of whether the information would be released.

Judge Leon found that the documents were protectable under both standards. As a whole, the submitted documents were protected because BAE Systems was not legally obli-



gated or compelled to provide the documents, and the information was of a kind that would customarily not be released to the public. Judge Leon also found that, individually, the documents as redacted protected competitively sensitive information.<sup>88</sup> BAE Systems engaged in a “belt and suspenders” approach, whereby the submitter made the clearest case it could for general protection, but nevertheless engaged in individual analysis of the documents.

It is difficult for submitters to avoid such a conservative strategy, despite the significant effort required. And, it should be noted, submitters are not the defendants in a FOIA suit filed by a requester, agencies are. Often, agencies have their own reasons to want certain submissions to be categorized as mandatory and may resist assertions of voluntary status. For example, an agency may be reluctant to argue that documents were voluntarily submitted because the agency lacked legal authority to compel their submission. The voluntary standard is tempting in its directness and broad sweep, but requesters will challenge any such assertion, and agencies may decline to support such submitter arguments. If a submitter fails to present a case for competitive harm, that argument will be waived, and the information will be released if the court finds it was involuntarily submitted.

## The Mechanics Of Requesting, Disclosing & Objecting

The mechanisms by which FOIA requests are made, responded to, and challenged are equally important as the substantive law regarding what is exempt from disclosure. The following sections of this PAPER provide this procedural information in the context of a request for information that the submitter considers to be protected by Exemption 4. The first issue concerns the agency’s response to the request. The second is what, if any, notice and opportunity to respond the agency owes the submitter prior to disclosure. Then there is a potential for litigation. For records the agency decides to withhold, the requester may appeal within the agency and then seek judicial review. For records the agency plans to release, the submitter may file a “reverse” FOIA action to enjoin the agency’s disclosure.

In either a FOIA intervention or in a reverse-FOIA case, the submitter is not in a head-to-head dispute with the requester. These litigations are, in essence, challenges and defenses to administrative determinations. The actions and positions taken by submitters *during the period of review prior to an agency’s decision to release* are therefore critical

to a court’s assessment of the agency’s determinations on questions of voluntariness, competitive harm, and other critical issues. If the submitter does not provide the agency with sufficient information to justify withholding prior to the agency’s decision, a court may not allow that submitter to expand the record with new information or defenses.

It is therefore critical to fully engage with the agency as early as possible to arm the agency with the strongest possible arguments for protection. Specific arguments, tied to real, tangible harms are critical in the effort to get the agency on your side regarding the importance of your data. FOIA officials reasonably expect the submitters to provide the information and argument necessary to overcome the presumption of openness and the requirement that application of any exemption be “reasonably foreseeable.” In short, submitters must remember that in many cases the easiest thing for an agency to do is simply release your data. Submitters must present solid reasons why such releases are improper, or else FOIA officials will reasonably find that no barrier to release exists.

### Response To Requester

In response to a request for records, the agency must provide a “determination” that includes at least four elements: (1) notice of what the agency will and will not release; (2) an explanation for withholding any records; (3) notice of the requester’s various rights to appeal; and (4) an explanation of any fees charged.<sup>89</sup> If the agency decides to withhold any requested records, the burden is on the agency to demonstrate that the redacted information falls within a FOIA exemption.<sup>90</sup>

There are also judicially created procedures for how an agency must search for requested records. Principally, courts will require agencies to establish that their search for records was “reasonably calculated to uncover all relevant documents,” but there is no requirement that the search be perfect.<sup>91</sup> Courts also will require an agency to provide a so-called *Vaughn* index to explain their search process; identify records discovered; explain what, if any, records were withheld; and provide a justification for any withholding.<sup>92</sup>

The FOIA Improvement Act of 2016 codifies additional protections for requesters. It affirmatively requires agencies to “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.”<sup>93</sup> It also requires agencies to “take reasonable steps necessary to segregate and release nonexempt information,” although this provi-

sion does not require disclosure of information otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under Exemption 3.<sup>94</sup> Finally, the 2016 amendments provide additional administrative review processes whereby the requester has a right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.<sup>95</sup> These additional interagency review processes may make initial agency decisionmakers less comfortable withholding requested records for fear of scrutiny.

### Notice To Submitter

FOIA does not require predisclosure notification to submitters of confidential commercial information. However, in Executive Order 12,600, President Reagan directed agencies to establish procedures to provide submitters notice prior to release of information that is marked as protected under Exemption 4. Prior to disclosing information that is marked as “confidential commercial information,” the agency generally must provide the submitter with notice of pending disclosure and an opportunity to object. The order provides six circumstances where notice is not required; for example, when the requested information is already public and when release is required by law. Agencies are not required to provide the submitter a hearing prior to release. If the agency decides to disclose marked information, the agency must provide the submitting party a written statement explaining why its objections were not sustained. This notice must be provided a reasonable number of days prior to disclosure.<sup>96</sup> As noted above, the FOIA Improvement Act of 2016 did not include any amendment to codify or protect the procedural protections provided by Executive Order 12,600. As such, those procedural protections could be unilaterally changed or eliminated by executive order at any time.

### De Novo Review Of Agency Decision To Withhold

If an agency decides to withhold requested records, the requester’s traditional recourse is to file a formal administrative appeal.<sup>97</sup> If that fails, the requester may seek judicial review, where a district court will review the agency’s decision *de novo*, and the agency bears the burden of establishing that withholding is proper.<sup>98</sup> If the requester seeks judicial review, the submitter often may intervene in the proceedings to help defend the agency’s decision to withhold.<sup>99</sup>

### Reverse FOIA

In “reverse” FOIA cases, a party that has submitted infor-

mation protected by Exemption 4 to the Government sues in federal court to prevent disclosure of that information in response to a FOIA request. This remedy is unique to information protected by Exemption 4. Most other exemptions leave the agency with discretion to release exempt records. However, as noted earlier in this PAPER, FOIA Exemption 4 has been held to be “at least co-extensive” with the Trade Secrets Act, which makes it a criminal offense for Government personnel to publicly disclose financial information or information relating to the business processes of a commercial organization.<sup>100</sup> Agency disclosure of information protected by the Trade Secrets Act will be set aside by courts under the APA as agency action that is not in accordance with law, unless the decision to release is made pursuant to independent statutory authority or substantive regulation.<sup>101</sup>

Obtaining relief in a reverse FOIA action is an uphill battle. The party seeking to prevent disclosure bears the burden of justifying nondisclosure.<sup>102</sup> The agency’s decision to release is reviewed deferentially pursuant to the APA, 5 U.S.C.A. § 706.<sup>103</sup> Under that standard, the agency’s decision to disclose will not be set aside unless it is found to be arbitrary or capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law.<sup>104</sup> Review will be based only on the administrative record, unless the court finds that the agency’s procedures were “severely defective.”<sup>105</sup> In some cases, a deficient or defective record will result in a court remanding the issue to the agency.<sup>106</sup>

If an appropriate record is created, providing the agency’s rationale for releasing the documents, the courts will not substitute the agency’s judgment with their own; they will verify only that the agency examined the relevant data and articulated a satisfactory explanation for its action. A court will set aside the agency’s action only if there is a clear error in judgment, the agency failed to consider an important aspect of the problem, the agency offered an explanation for disclosure that was contrary to the evidence before it, or the action is so implausible that it could not be ascribed to a difference in view.<sup>107</sup>

### Conclusion

FOIA’s broad grant of transparency into Government records creates a risk that contractors’ confidential commercial information may be publicly released. The FOIA Improvement Act of 2016 tilts the scales further in favor of transparency. Therefore, it is critical that contractors understand the scope of FOIA Exemption 4 and the means

by which they can guard against the release of information that falls within its protections.

## Guidelines

These *Guidelines* are intended to assist you in understanding FOIA Exemption 4. They are not, however, a substitute for professional representation in any specific situation.

1. Be sure to mark commercial and confidential information before submitting it to the Government, as that triggers the rights to predisclosure notice and opportunity to respond under Executive Order 12,600. If you do not treat information as confidential within your organization, including implementing and training your employees regarding tangible safeguards against release, it will likely not be entitled to protection as confidential by the Government.

2. If an agency provides notice that marked records have been requested, work with the agency to explain why such documents should not be released. It is important that the agency have a well-reasoned explanation for withholding any information in any requested record.

3. Don't conflate confidentiality and commerciality. They are independent elements, and both must be established. Just because a document relates to your business does not mean that it is entitled to protection under FOIA.

4. Be sure to argue that requested records were submitted voluntarily and are thus subject to the more lenient *Critical Mass* test for determining confidentiality.

5. Also be sure to argue in the alternative that, even if the documents are found to be submitted involuntarily, they are still exempt because they satisfy the *National Parks* test for likelihood of competitive harm. This will likely require a document-by-document, perhaps even line-by-line, analysis.

6. Keep in mind that, in most cases, the agency is incentivized and to release requested documents. Persuading the agency to withhold requested documents and potentially defend its actions in court will likely require considerable cooperation with and assistance by the submitter and its counsel.

## ENDNOTES:

<sup>15</sup> U.S.C.A. § 552. See generally Meagher & Bareis, "The Freedom of Information Act," 10-12 Briefing Papers 1 (Nov. 2010).

<sup>25</sup> U.S.C.A. § 552(b).

<sup>3</sup>"In the face of doubt, openness prevails. . . . All agencies should adopt a presumption in favor of disclosure. . . ." Presidential Memorandum: Freedom of Information Act (Jan. 21, 2009), 74 Fed. Reg. 4683 (Jan. 26, 2009); see 51 GC ¶ 106; Nash, "Freedom of Information Act: The Policy Changes Again," 23 Nash & Cibinic Rep. ¶ 25 (May 2009).

<sup>4</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

<sup>5</sup>See generally Castellano, "Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589 (Spring 2017).

<sup>6</sup>5 U.S.C.A. § 552(b) (exempting from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential").

<sup>7</sup>31 U.S.C.A. §§ 3729-3733.

<sup>8</sup>15 U.S.C.A. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff.

<sup>9</sup>FAR subpt. 9.4.

<sup>10</sup>See generally Castellano, "Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 591-93 (Spring 2017).

<sup>11</sup>Pub. Citizen v. U.S. Dep't of Health & Human Servs. (Public Citizen I), 975 F. Supp. 2d 81, 89 (D.D.C. 2013); Pub. Citizen v. U.S. Dep't of Health & Human Servs. (Public Citizen II), 66 F. Supp. 3d 196, 205-06 (D.D.C. 2014).

<sup>12</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016). For a summary of the Act's changes prepared by the White House, see Press Release, The White House, Fact Sheet: Steps Toward Openness and Transparency in Government (June 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-new-steps-toward-ensuring-openness-and-transparency> [<https://perma.cc/GJ5G-F777>]. For a summary prepared by the DOJ's Office of Information Policy (OIP), including a redlined version of FOIA reflecting the 2016 amendments, see OIP Summary of the FOIA Improvement Act of 2016, U.S. Dep't Justice (Aug. 17, 2016), <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> [<https://perma.cc/WPS7-U4NH>].

<sup>13</sup>Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987). See generally Castellano, "Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 595-96 (Spring 2017).

<sup>14</sup>Brandeis, Other People's Money and How the Bankers Use It 92 (Frederick A. Stokes Co. 1914).

<sup>15</sup>See generally Castellano, "Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589 (Spring 2017).

<sup>16</sup>For the history of FOIA, see generally U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 5-10, available at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>; Hamitt et al., Litigation Under the Federal Open Government Laws

9-22 (25th ed. 2010); Subcomm. on Admin. Practice & Procedure of the S. Judiciary Comm., 93d Cong., Freedom of Information Act Source Book, S. Doc. No. 93-82 (Comm. Print 1974).

<sup>17</sup>5 U.S.C.A. § 551 et seq.

<sup>18</sup>See Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 802–03 (1967).

<sup>19</sup>See Hamitt et al., *Litigation Under the Federal Open Government Laws 10-12* (25th ed. 2010); Arnold, *Secrecy in the Sunshine Era: The Promise and Failures of U.S. Open Government Laws 2* (2014).

<sup>20</sup>Arnold, *Secrecy in the Sunshine Era: The Promise and Failures of U.S. Open Government Laws 2-3* (2014).

<sup>21</sup>See Reporters Committee for Freedom of the Press, *Open Government Guide*, <https://www.rcfp.org/open-government-guide>.

<sup>22</sup>Coglianesi, Zeckhauser & Parson, “Seeking Truth for Power: Informational Strategy and Regulatory Policymaking,” 89 Minn. L. Rev. 277, 335–37 (2004).

<sup>23</sup>5 U.S.C.A. § 552a.

<sup>24</sup>18 U.S.C.A. § 1905.

<sup>25</sup>Rainey, “Stare Decisis and Statutory Interpretation: An Argument for a Complete Overruling of the National Parks Test,” 61 Geo. Wash. L. Rev. 1430, 1433 (1993); see also H.R. Rep. No. 89-1497, at 6 (1966) (“It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. . . . This bill strikes a balance considering all these interests.”); S. Rep. No. 89-813, at 3 (1965) (“At the same time that a broad philosophy of ‘freedom of information’ is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files. . . . Success [of FOIA] lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.”).

<sup>26</sup>*John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151–53 (1989) (internal citations omitted).

<sup>27</sup>See *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874–75 (D.C. Cir. 1989); *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 630–31 (1982); *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999) (“[T]he public interest side of the balance is not a function of the identity of the requester. . . or of any potential negative consequences disclosure may have for the public. . . nor likewise of any collateral benefits of disclosure.”).

<sup>28</sup>5 U.S.C.A. § 552(b)(4); see Castellano, “Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act,” 46 Pub. Cont. L. J. 589, 601–07 (Spring 2017).

<sup>29</sup>5 U.S.C.A. § 552(a)(4)(B).

<sup>30</sup>Hamitt et al., *Litigation Under the Federal Open Government Laws 382* (25th ed. 2010).

<sup>31</sup>Hamitt et al., *Litigation Under the Federal Open Government Laws 382* (25th ed. 2010).

<sup>32</sup>Hamitt et al., *Litigation Under the Federal Open Government Laws 382* (25th ed. 2010).

<sup>33</sup>Hamitt et al., *Litigation Under the Federal Open Government Laws 382* (25th ed. 2010).

<sup>34</sup>*Detention Watch Network v. U.S. Immigration & Customs Enforcement*, 215 F. Supp. 3d. 256 (S.D.N.Y. 2016); see also *Wilmington Star-News, Inc. v. New Hanover Reg’l Med. Ctr., Inc.*, 480 S.E.2d 53, 57 (N.C. App. 1997).

<sup>35</sup>*Detention Watch Network v. U.S. Immigration & Customs Enforcement*, 215 F. Supp. 3d. 256, 261–62 (S.D.N.Y. 2016).

<sup>36</sup>*Detention Watch Network v. U.S. Immigration & Customs Enforcement*, 215 F. Supp. 3d. 256, 261–66 (S.D.N.Y. 2016).

<sup>37</sup>*Detention Watch Network v. Corrections Corp. of Am.*, No. 16-3141, 14-cv-583 (2d. Cir. Feb. 8, 2017).

<sup>38</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(A), 130 Stat. 538 (2016) (emphasis added); U.S. Dep’t of Justice, Office of Information Policy, OIP Summary of the FOIA Improvement Act of 2016, <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>.

<sup>39</sup>5 U.S.C.A. § 522(d); *Adm’r, Fed. Aviation Admin. v. Robertson*, 422 U.S. 255, 262 (1975).

<sup>40</sup>Hamitt et al., *Litigation Under the Federal Open Government Laws 8* (25th ed. 2010); *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

<sup>41</sup>Hamitt et al., *Litigation Under the Federal Open Government Laws 91* (25th ed. 2010).

<sup>42</sup>See 41 U.S.C.A. § 4702 (civilian agencies); 10 U.S.C.A. § 2305(g) (defense agencies).

<sup>43</sup>18 U.S.C.A. § 1905.

<sup>44</sup>5 U.S.C.A. § 551 et seq.

<sup>45</sup>Office of Information Policy; Attorney General Memorandum for Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,879, 51,880 (Oct. 8, 2009); see Castellano, “Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act,” 46 Pub. Cont. L.J. 589, 594–95 (Spring 2017).

<sup>46</sup>Arnold, *Secrecy in the Sunshine Era: The Promise and Failures of U.S. Open Government Laws 66–67* (2014) (internal citations and quotations omitted).

<sup>47</sup>Arnold, *Secrecy in the Sunshine Era: The Promise and Failures of U.S. Open Government Laws 66–67* (2014) (internal citations and quotations omitted).

<sup>48</sup>Arnold, *Secrecy in the Sunshine Era: The Promise and Failures of U.S. Open Government Laws 66–67* (2014) (internal citations and quotations omitted).

<sup>49</sup>Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987); see Castellano, “Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act,” 46 Pub. Cont. L.J. 589, 595 (Spring 2017).



<sup>50</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(D), 130 Stat. 538, 539 (2016); U.S. Dep't of Justice, Office of Information Policy, OIP Summary of the FOIA Improvement Act of 2016, <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>.

<sup>51</sup>See generally Castellano, "Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 595–96 (Spring 2017).

<sup>52</sup>5 U.S.C.A. § 552(b)(4).

<sup>53</sup>*Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

<sup>54</sup>See, e.g., *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974) (finding that FOIA's legislative history supports inference that it is intended for the benefit of persons who supply information as well as the agencies which collect it).

<sup>55</sup>U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 263.

<sup>56</sup>5 U.S.C.A. § 552(b)(4).

<sup>57</sup>*Canadian Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008) (finding Trade Secrets Act, 18 U.S.C.A. § 1905, and Exemption 4 to be "co-extensive").

<sup>58</sup>*McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1185–86 (D.C. Cir. 2004).

<sup>59</sup>U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 266, 270–71.

<sup>60</sup>*Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

<sup>61</sup>*Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002).

<sup>62</sup>*Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 975 F. Supp. 2d 81, 99–100 (D.D.C. 2013). See generally Castellano, "Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 603 (Spring 2017).

<sup>63</sup>U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 271.

<sup>64</sup>*Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000).

<sup>65</sup>*Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980).

<sup>66</sup>*Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 529–30 (D.C. Cir. 1979).

<sup>67</sup>*Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 405 (D.C. Cir. 1980).

<sup>68</sup>See Hamitt et al., *Litigation Under the Federal Open Government Laws* 118–19 (25th ed. 2010).

<sup>69</sup>U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 276–77; *McDonnell Douglas Corp. v. Nat'l Aeronautics and Space Admin.*, 180 F.3d 303, 304–05 (D.C. Cir. 1999).

<sup>70</sup>*Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc).

<sup>71</sup>*Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>72</sup>*Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 877–79 (D.C. Cir. 1992) (en banc).

<sup>73</sup>*Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 884–85 (D.C. Cir. 1992) (en banc).

<sup>74</sup>U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 277.

<sup>75</sup>U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 294–97.

<sup>76</sup>*Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (internal footnote omitted).

<sup>77</sup>See Hamitt et al., *Litigation Under the Federal Open Government Laws* 125–28 (25th ed. 2010) (discussing the significance of impairment); see also *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 29 (D.D.C. 2000).

<sup>78</sup>*Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

<sup>79</sup>*Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

<sup>80</sup>Hamitt et al., *Litigation Under the Federal Open Government Laws* 129–30 (25th ed. 2010); *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563–66 (D.C. Cir. 2010).

<sup>81</sup>*Pub. Citizen v. U.S. Dep't of Health & Human Servs. (Public Citizen II)*, 66 F. Supp. 3d 196, 209–10 (D.D.C. 2014).

<sup>82</sup>*Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

<sup>83</sup>*Pub. Citizen v. U.S. Dep't of Health & Human Servs. (Public Citizen II)*, 66 F. Supp. 3d 196, 213–14 (D.D.C. 2014).

<sup>84</sup>See U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 286 & n.154; Hamitt et al., *Litigation Under the Federal Open Government Laws* 139 (25th ed. 2010) (citing extensive case law).

<sup>85</sup>See U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 279, 285–86; *Pub. Citizen v. U.S. Dep't of Health & Human Servs. (Public Citizen I)*, 975 F. Supp. 2d 81, 111 n.20 (D.D.C. 2013).

<sup>86</sup>*Associated Press v. U.S. Dep't of State*, No. 15-CV-345 (RJL), 2016 WL 6476932 (D.D.C. Nov. 1, 2016).

<sup>87</sup>*Associated Press v. U.S. Dep't of State*, No. 15-CV-345 (RJL), 2016 WL 6476932, at \*2 (D.D.C. Nov. 1, 2016).

<sup>88</sup>*Associated Press v. U.S. Dep't of State*, No. 15-CV-345 (RJL), 2016 WL 6476932, at \*2 (D.D.C. Nov. 1, 2016).

<sup>89</sup>5 U.S.C.A. § 552(a)(6); see Hamitt et al., *Litigation Under the Federal Open Government Laws* 39 (25th ed. 2010).

<sup>90</sup>*U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991).

<sup>91</sup>*Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

<sup>92</sup>Hamitt et al., *Litigation Under the Federal Open*

Government Laws 391–96 (25th ed. 2010); *Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973).

<sup>93</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(D), 130 Stat. 538, 539 (2016) (codified at 5 U.S.C.A. § 552(a)(8)(A)(ii)(I)).

<sup>94</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(D), 130 Stat. 538, 539 (2016) (codified at 5 U.S.C.A. § 552(a)(8)(A)(ii)(II), (B)).

<sup>95</sup>FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(C), 130 Stat. 538, 539 (2016) (codified at 5 U.S.C.A. § 552(a)(6)(A)(i)(III)(bb)).

<sup>96</sup>Exec. Order No. 12,600, §§ 1, 3, 5, 52 Fed. Reg. 23,781 (June 23, 1987).

<sup>97</sup>See generally *Hamitt et al.*, *Litigation Under the Federal Open Government Laws* 43–49 (25th ed. 2010).

<sup>98</sup>See U.S. Dep’t of Justice, Office of Information Policy, *Freedom of Information Act Reference Guide* 6 (citing 5 U.S.C.A. § 552(a)(4)(B)-(C)); *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

<sup>99</sup>*Hamitt et al.*, *Litigation Under the Federal Open Government Laws* 384 (25th ed. 2010); *100Reporters LLC v. U.S. Dep’t of Justice*, 307 F.R.D. 269, 274, 277–78

(D.D.C. 2014).

<sup>100</sup>18 U.S.C.A. § 1905; *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

<sup>101</sup>*Hamitt et al.*, *Litigation Under the Federal Open Government Laws* 106, 135–36 (25th ed. 2010); *Canadian Commercial Corp. v. Dep’t of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

<sup>102</sup>*Occidental Petrol. Corp. v. U.S. Sec. & Exch. Comm’n*, 873 F.2d 325, 342 (D.C. Cir. 1989).

<sup>103</sup>*ERG Transit Sys. (USA), Inc. v. Wash. Metro. Area Transit Auth.*, 593 F. Supp. 2d 249, 252 (D.D.C. 2009).

<sup>104</sup>5 U.S.C.A. § 706(2); *United Techs. Corp. v. U.S. Dep’t of Def.*, 601 F.3d 557 (D.C. Cir. 2010).

<sup>105</sup>*Hamitt et al.*, *Litigation Under the Federal Open Government Laws* 140–42 (25th ed. 2010).

<sup>106</sup>*McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1167 (D.C. Cir. 1995).

<sup>107</sup>*Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44 (1983).

## NOTES:

## BRIEFING PAPERS