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CLIENT ALERT

DOJ Issues FOIA Exemption 4 Guidance Following Argus Leader; Confirms That "Assurance of Confidentiality" At Time of Submission Not Currently Required

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Last week, the Department of Justice issued new guidance regarding the application of Exemption 4 to the Freedom of Information Act (FOIA) following the Supreme Court's decision this past June in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). (Crowell & Moring previously wrote about *Argus Leader* here.)

As a refresher, Exemption 4 allows agencies to withhold documents otherwise responsive to a FOIA request if the documents contain "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." For nearly 50 years prior to *Argus Leader*, courts held that Exemption 4 allowed documents to be withheld only if disclosure would result in "substantial competitive harm" to the submitter of that information. In *Argus Leader*, the Supreme Court rejected that test, holding that the inquiry for Exemption 4 purposes is simply whether the information is "confidential." The Court identified two factors potentially relevant to that inquiry: (1) whether the information customarily is kept confidential by the submitting party; and (2) whether the submitting party received some assurance from the government that the information would be kept confidential. DOJ's guidance speaks to the application of these two factors, and includes a "Step-By-Step Guide" for determining confidentiality after *Argus Leader*.

As to the first factor—whether the information is customarily treated as confidential—DOJ highlights the Supreme Court's holding that this condition is mandatory (because the information could not be withheld as confidential if the submitting party did not treat it as such). DOJ explains that agencies may assess whether such information is treated as confidential by considering "its own knowledge of the information, the submitter's practices, and/or [] the records themselves."

As for the second factor, DOJ's guidance makes two important points:

- ***First***, the Supreme Court did **not** hold that an assurance of confidentiality is a prerequisite for the invocation of Exemption 4. The Court expressly stated that it did not have occasion to address the question and therefore, according to DOJ's guidance, "it is yet unclear whether future judicial precedents governing Exemption 4 will require" an assurance.
- ***Second***, even if such an assurance is required, it may be implied. To determine whether an implied assurance has been given, agencies may "look to the context in which the information was provided to the government," and consider "the government's treatment of similar information and its broader treatment of information related to the program or initiative to which the information relates."
    - Accordingly, an agency's long history of not disclosing a certain type of information may "serve as an implied assurance to submitters" that their information would not be disclosed.
    - By contrast, "a submitter would not normally have a reasonable expectation of confidentiality for records the agency has historically disclosed."

- DOJ's Step-by-Step Guide instructs that, if "the government has effectively been silent" as to whether it would publicly disclose the information, "a submitter's practice of keeping the information private will be sufficient to warrant confidential status."

Although DOJ's guidance ostensibly is to assist agencies in navigating the new, post-*Argus Leader* landscape, it also provides a useful framework for entities that have non-government entities seeking to invoke Exemption 4 to demonstrate why otherwise responsive information should be withheld as confidential. Notably, until a post-*Argus Leader* decision finds that an assurance of confidentiality is a prerequisite for the invocation of Exemption 4, DOJ's guidance provides a compelling reminder that no such requirement currently exists.

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