

**U.S. Environmental Protection Agency
Office of General Counsel
General Law Office
Class Determination 1-24:
Confidentiality of Certain Business Information Concerning
Contractors, Prospective Contractors, and Subcontractors**

U.S. Environmental Protection Agency (EPA) regulations establish procedures for determining whether business information submitted to the Agency and claimed as confidential may be released to the public. 40 C.F.R. part 2, subpart B. Business information that is entitled to confidential treatment is often referred to as “confidential business information,” or “CBI.” Under the Controlled Unclassified Information categorization program established by the National Archives and Records Administration, this type of information is referred to as “Proprietary Business Information” or “PBI.”¹

Under 40 C.F.R. § 2.207, EPA may make and issue “class determinations” concerning the confidentiality of business information with common characteristics that will result in identical treatment for each item. “The purpose of a class determination is simply to make known the Agency’s position regarding the manner in which information within the class will be treated under one or more of the provisions” of EPA’s regulations. 40 C.F.R. § 2.207(d).

In this class determination, EPA explains that certain information submitted by EPA contractors and prospective contractors shares common characteristics that necessarily will result in identical treatment with respect to CBI claims. If an EPA contractor or prospective contractor claims information it has submitted to the Agency as CBI, then EPA will follow the procedures at 40 C.F.R. §§ 2.204 and 2.205, including issuing a final confidentiality determination. This class determination may be used and incorporated in a final confidentiality determination issued under 40 C.F.R. §§ 2.204(b)(1), 2.204(d), 2.205(d), or 2.206. This class determination gives notice of the Agency’s position regarding the manner in which certain information within the class will be treated in response to FOIA requests or otherwise. This class determination supersedes Class Determination 1-95 as well as Class Determinations 2-78, 2-79, and 2-94.²

EPA is issuing this class determination for several reasons. First, Class Determination 1-95 is not consistent with the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media* (*Argus Leader*), 139 S. Ct. 2356 (2019). Second, EPA is updating Class Determination 1-95’s description of business information that may be entitled or not entitled to confidential treatment. For example, this class determination removes the presumption in Class Determination 1-95 that employee names as a class are entitled to confidential treatment.

¹ For simplicity, the term “CBI” will be used in this document.

² In 1978, the Agency issued Class Determination 2-78, concerning the confidentiality of business information contained in contract proposals submitted to the Agency. The class determination was refined and reissued in 1979 (Class Determination 2-79), in 1994 (Class Determination 2-94), and again in 1995 (Class Determination 1-95).

Scope of this Class Determination

As described in further detail below, this class determination covers certain types of information submitted to EPA by its contractors or prospective contractors both before and after a contract has been awarded.³ The class determination also includes information from EPA subcontractors or prospective subcontractors.

This class determination does not apply to the following:

- For information submitted after this class determination's effective date, any information where ten years have passed after submission.
- Any information more than ten years old when submitted to EPA, regardless of submittal date.
- Except as set forth above, information submitted to EPA by or on behalf of any person or entity that is not an EPA contractor or subcontractor. For example, information from a state contractor/subcontractor, a contractor for another federal agency, or a contractor for a third party (such as a business or non-profit organization) performing work pursuant to a federal consent decree or settlement, is beyond the scope of this class determination.

Information in these categories remains subject to applicable provisions in 40 C.F.R. part 2, subpart B.

Information Submitted by Agency Contractors, Prospective Contractors, and Their Subcontractors

As part of the EPA procurement process, contractors routinely submit proposals in response to Agency solicitations.⁴ These proposals often contain detailed information about how a contractor would complete the work solicited, what resources it would use in performance, information concerning its expertise and experience in the field, and past performance, as well as cost, pricing, and financial information.

During the performance of EPA contracts, contractors are required to submit various documents such as invoices, task order proposals, and deliverables, such as status reports and work plans that contain similar information to contractor proposals. At this stage, information in these documents could include how the EPA contractor completed the work, the specific resources utilized, proposals for future work, and breakdowns and aggregates of costs and price elements related to the work performed.

³ Refer to the Federal Acquisition Regulations for definitions of contract, subcontractors, and contractors. 48 C.F.R. §§ 3.502-1; 2.101.

⁴ This includes initial proposals; revised proposals; quotations; offers; and correspondence throughout the submission, negotiation, and award process.

Findings

Based on the discussion above and in accordance with 40 C.F.R. § 2.207, I find that:

1. The Agency possesses many documents submitted by prospective contractors and contractors containing information claimed to be CBI. The Agency routinely requires the submission of such documents by its contractors and prospective contractors and will continue to require such documents in the future.
2. Specific categories of information submitted to the Agency by its contractors and prospective contractors (including similar specific categories of information about a subcontractor but submitted by an EPA contractor or prospective contractor) share common characteristics that necessarily will result in identical treatment with respect to claims of business confidentiality. Where common characteristics exist, it is appropriate to treat such information on a class basis to determine whether the information is entitled to confidential treatment.
3. A class determination that such information is or is not entitled to confidential treatment will streamline the Agency's response to Freedom of Information Act (FOIA) requests and would further the purposes of the Act by increasing the Agency's ability to provide the American public with timely access to requested information, consistent with the rights of affected businesses to be protected from improper disclosure of confidential information.

Discussion

EPA applies Exemption 4 of the FOIA when evaluating confidentiality claims, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁵ For information to meet the requirements of Exemption 4, the Agency must find that the information either is a trade secret or CBI.

I. Trade Secret

A trade secret under the FOIA is "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities," where there is a "direct relationship" between the trade secret and the productive process.⁶ This class determination does not address trade secret claims.

⁵ 5 U.S.C. § 552(b)(4).

⁶ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

II. Confidential Business Information

As defined in the FOIA, CBI is information that is (1) obtained from a person, (2) commercial or financial information, and (3) privileged or confidential. 5 U.S.C. § 552(b)(4).

A. Obtained From a Person

The term “person” has been construed broadly to encompass a wide range of entities, including corporations, state governments, and foreign governments.⁷ Agency contractors and prospective contractors are thus “persons” within the meaning of FOIA Exemption 4. Information developed by the Agency or other parts of the federal government is not “obtained from a person” and hence is not entitled to confidential treatment.

B. Commercial or Financial Information

“Commercial or financial information” has been broadly interpreted to include records “that a business owner customarily keeps private because they ‘actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or [that] relate to the income-producing aspects of a business,’” as well as to information in which “the provider of the information has a commercial interest.”⁸ Companies will routinely include “commercial or financial information” in contract proposals, contracts, and ancillary documents, such as invoices, change orders, and similar communications that document transactions between the Agency and the contractor/prospective contractor. If a contractor or prospective contractor’s submission contains information about the financial terms of the proposed or awarded agreement, the financial condition of the prospective contractor, and its ability or plans to perform the work or supply the goods, that information is “commercial or financial information.”

C. Privileged or Confidential

The remaining question is whether the information is “privileged” or “confidential.” Based on past experience, EPA reasonably believes that the commercial information submitted to the Agency by EPA contractors and prospective contractors will not qualify as “privileged” for purposes of Exemption 4. Therefore, this determination focuses on whether the information is properly characterized as “confidential.”

The United States Supreme Court in *Argus Leader*, 139 S. Ct. 2356, 2366 (2019), addressed the definition of “confidential” as used in Exemption 4. The Court held that agencies should no

⁷ See, e.g., *Nadler v. FDIC*, 92 F.3d 93 (2d Cir. 1996).

⁸ *Citizens for Resp. & Ethics in Washington v. United States Dep’t of Just.*, 58 F.4th 1255, 1263 (D.C. Cir. 2023) (quoting *Pub. Citizen Health Research Group v. FDA*, 704 F. Supp. 2d 1280, 1290 (D.C. Cir. 1983) and *Baker & Hostetler LLP v. U.S. Dep’t of Com.*, 473 F.3d 312, 319 (D.C. Cir. 2006), respectively).

longer apply the “likelihood of substantial competitive harm” test from *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and that at least where “commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4.”⁹ Accordingly, this class determination does not evaluate competitive harm, but instead considers the conditions established by *Argus Leader* in deciding whether claimed information qualifies as confidential under FOIA Exemption 4.¹⁰ However, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) contains a likelihood of substantial competitive harm requirement for CBI claims. 42 U.S.C. § 9604(e)(7)(E)(iii). Accordingly, for CBI claims covering EPA contractor information submitted under CERCLA, EPA-contractors will be required to demonstrate that release of the information is likely to cause substantial harm to the businesses’ competitive positions.

Guidance on Treatment of Contractor Information

I. Information Entitled to Confidential Treatment

I have determined that the following class of information submitted by an EPA contractor or prospective contractor is presumptively entitled to confidential treatment where the information is private or at least closely held, where the information is not otherwise publicly available, and where disclosure of the information is not otherwise required by statute or regulation:

- A. Information that would disclose a contractor’s, subcontractor’s, prospective contractor’s or prospective subcontractor’s proposal that may include unit pricing, client information, marketing strategy, financial statements or structure, accounting methods, labor hourly rates, salaries, overhead costs, general and administrative costs, fees, profits, accounting methods, and potential plans to manage the project.
- B. Information that would disclose a contractor’s, subcontractor’s, prospective contractor’s or prospective subcontractor’s proprietary processes, devices, software or similar proprietary information submitted to the Agency.
- C. Contract deliverables that would reveal proprietary analytical methods, manufacturing processes, or algorithms.

⁹ *Argus Leader*, 139 S. Ct. at 2366.

¹⁰ See *Argus Leader*, 139 S. Ct. at 2366; see also Exemption 4 After the Supreme Court’s Ruling in *Food Marketing Institute v. Argus Leader Media and Accompanying Step-by-Step Guide*, United States Department of Justice, Office of Information Policy (Oct. 4, 2019) (available at <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>).

II. Information Not Entitled to Confidential Treatment

The following information is presumptively not private, nor closely held. Therefore, the information is not entitled to confidential treatment under this class determination. EPA may release this information without further notice to the submitter unless the submitter has asserted a CBI claim that is consistent with the procedures in the Agency's CBI regulations.

- A. Information concerning the identity and scope of work of any government contracts or grants performed by the submitter pursuant to the awarded contract.¹¹ This information is available to the public pursuant to the Federal Funding Accountability and Transparency Act, and through the Commerce Business Daily, the Federal Procurement Data System, and from specific government agencies.
- B. Information that the submitter has previously published or disclosed to the public, either in writing or verbally, regardless of the medium.
- C. Information in documents that are already publicly available, such as requests for proposals, other publicly available EPA documents, or published materials, whether in print or electronic.
- D. The following information is not entitled to confidential treatment after contract award unless the information could reasonably be used to reverse engineer information that is entitled to confidential treatment:
 - The aggregate cost (total of all costs and fees) of an awarded contract to the government. The aggregate cost of awarded contract options to the government.
 - Totals of labor effort expended, invoiced, or paid at any point during contract performance for work performed under the contract or for any discrete segment of such contract work.
 - Totals of costs incurred, invoiced, or paid at any point during contract performance for work performed under the contract or for any discrete segment of such contract work.
 - The aggregate of labor hours worked by all subcontractors and consultants and the aggregate of all costs incurred by them at any point during contract performance or for any discrete segment of such contract work.
- E. Information developed by the government, regardless of whether the information is subsequently contained in a document submitted to the Government by a contractor or prospective contractor.

¹¹ See www.usaspending.gov (Federal contract award information).

- F. Names and business contact information of Agency contractors or subcontractors or their employees or consultants of any contractor or subcontractor, unless sufficient countervailing factors exist. This category reflects, among other things, the fact that in the course of routine interaction with contractors and subcontractors with the Agency, the names of employees are revealed and not kept confidential.¹² Additionally, many employees and employers publicly post names and business contact information on the internet.

Effect of This Class Determination

The discussion in this document is intended solely as guidance and is not a final agency action subject to judicial review. It does not impose legally binding requirements on the EPA, state or tribal regulators, or any other party. An EPA office that is making a determination of whether business information covered by this class determination may be entitled to confidential treatment should follow the procedures in 40 C.F.R. part 2, subpart B, applying this class determination as guidance.

Jennifer Clark
Associate General Counsel for General Law

¹² See also *Besson v. United States Dep't of Commerce*, 480 F. Supp. 3d 105, 112 (D.D.C. 2020) (noting that courts in the D.C. Circuit “typically have not recognized a person’s identity as the type of ‘commercial information’ protected by Exemption 4”).