



There are 99 federal agencies that are subject to the Freedom of Information Act (FOIA) and—according to the Justice Department's [Office of Information Policy \(OIP\)](#)—there are also 99 sets of FOIA regulations.

As Congress contemplates a move to further [legislate](#) agency responses to FOIA demands, the OIP is commencing an interagency effort this Spring to draft a single regulation to iron out inconsistencies among the varied federal practices. Additionally, a number of federal agencies have moved to adopt the [FOIAOnline](#) website, which allows users to submit FOIA requests online and track the progress of those requests. The renewed attention to FOIA and—relatedly—denials of FOIA requests, highlights the risks that accompany document productions made to federal authorities. Consider the not-uncommon scenario:

- Your Company gets subpoenaed by the federal government.

- You produced thousands, if not hundreds of thousands, of Company records.
- Now, your documents are subject to a FOIA request and possible public dissemination.

*Is there any way to protect against this?*

**FOIA Exemption 4: Confidential Commercial Information Is Excluded from Disclosure** If documents contain "confidential commercial information," they could be protected from disclosure under [FOIA Exemption 4](#). Exemption 4 prohibits the federal government from disclosing trade secrets and **commercial or financial information** that is privileged or confidential. **What is "Commercial" or "Financial" Information?** "Commercial" is defined broadly and can encompass many different types of documents, provided that the information relates to business or trade or serves a commercial function. "Financial" information has been held to apply not just to economic data generated by corporations or other business entities, but also to personal financial information. Examples of items regarded as commercial or financial information include: business sales statistics, research data, technical designs, profit and loss data, overhead and operating costs, and information on financial condition. **What is "Confidential" Information?** There is no uniform definition of "confidential" information, but courts apply two principal tests to determine whether requested information is confidential for purposes of Exemption 4:

- **"Impairment" Test** – disclosure would impair the government's ability to obtain necessary information in the future; or
- **"Competitive Harm" Test** – disclosure would cause substantial harm to the competitive position of the person (or entity) from whom the information was obtained. To withhold Company documents from disclosure, it must be demonstrated that there is actual competition in the marketplace for the information you want withheld, and your Company will likely be harmed if the information is released.

#### **Practice Tips to Help Protect Confidential Commercial Information:**

- Productions to the federal government can be marked confidential with a caption that requests confidential treatment under FOIA. For example, the Security and Exchange Commission's Rule 83 ([17 CFR 200.83](#)) provides a procedure by which persons submitting information may request that it be withheld when requested under FOIA. The Commodity Futures Trading Commission provides a similar procedure under Commission Regulation 145.9 ([17 CFR 145.9](#)).
- If the federal agency receives a FOIA request, it is required to have objection procedures available. Usually, the agency must provide written notice and reasonable time to respond.
- In the event of a potential disclosure decision, it is advisable to submit a detailed written statement specifying the basis for objection to any part of public disclosure and why the documents are confidential commercial information. A declaration from someone within your Company to support the argument for competitive harm could be included to highlight the consequences to your Company if the documents are released.

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