

TO DISCLOSE OR NOT TO DISCLOSE? D.C. CIRCUIT RESOLVES CLASH BETWEEN FOIA'S EXEMPTION 4 AND SECTION 308 OF THE CLEAN WATER ACT

Date: 15 June 2017

Environment, Land and Natural Resources Alert

By: Anthony R. Holtzman, Tad J. Macfarlan

The U.S. Court of Appeals for the D.C. Circuit recently issued a significant decision addressing the interplay between a confidentiality provision in the Freedom of Information Act ("FOIA"), known as "Exemption 4," and a conflicting public disclosure provision in Section 308 of the Clean Water Act. The opinion reveals that, in some instances, federal agencies may rely on Exemption 4 to refrain from publicly disclosing confidential commercial and financial information that they received from regulated entities, even though it appears that, under a provision in another statute, they are required to disclose the information.

Exemption 4 of FOIA authorizes agencies to withhold from requesters all "trade secrets *and* commercial or financial information obtained from a person and privileged or confidential."^[1] Section 308 of the Clean Water Act, on the other hand, authorizes the Environmental Protection Agency ("EPA") to obtain certain records from regulated entities and provides that those records "shall be available to the public" unless the agency determines that disclosing them "would divulge methods or processes entitled to protection as trade secrets."^[2] Examining these provisions together, as the D.C. Circuit observed in *Environmental Integrity Project v. Environmental Protection Agency*,^[3] reveals that they conflict with one another in certain situations. Specifically, FOIA Exemption 4 exempts both trade secrets *and* certain confidential commercial and financial information from public disclosure, while Section 308 exempts trade secrets but requires the disclosure of all commercial and financial information (regardless of confidentiality).

This issue came to a head in *Environmental Integrity Project*, where several environmental groups requested records from EPA that, under Section 308, the agency had obtained from power plants. The records contained data regarding, among other things, the amounts of pollutants that specific plants had released, the incremental costs of removing pollutants from wastewater that specific plants had generated, and the performance of certain wastewater treatment technologies. "All parties agree," the court explained, "that the records requested by the environmental groups do not qualify as trade secrets (which are exempt under both Section 308 and Exemption 4), but do qualify as 'commercial or financial information' under Exemption 4[.]"^[4] The records were therefore exempt from disclosure under Exemption 4 but subject to mandatory disclosure under Section 308.

In determining which provision controlled, the court said that "[t]he Administrative Procedure Act" ("APA") — which includes FOIA — "directly answers that question."^[5] The court explained that Section 559 of the APA provides that a "[s]ubsequent statute may not be held to supersede or modify" FOIA "except to the extent that it does so *expressly*."^[6] And because Section 308 "does not expressly supersede Exemption 4" (even though

Section 308 was later enacted), the controlling provision was Exemption 4 and EPA "permissibly invoked [it] to deny the environmental groups' FOIA request."^[7]

The D.C. Circuit therefore concluded that Section 559 of the APA changes the rules of statutory construction that would otherwise apply to resolving a conflict between Exemption 4 and other statutory provisions. Instead of directing that the more recent and specific provision controls, Section 559 provides that Exemption 4, as the older and more general provision, is controlling unless the more recent, specific provision expressly states otherwise. This interpretation is binding in the D.C. Circuit, and, although it is not binding elsewhere, federal courts in other circuits will likely treat it as persuasive authority. Members of the regulated community should keep it in mind when they provide confidential business records to federal agencies. The records may appear to be subject to mandatory public disclosure under a given statutory provision, but if the provision does not state otherwise, they may actually be exempt from disclosure under Exemption 4.

In order to take advantage of the FOIA exemption, businesses, in submitting information to a federal agency, must comply with the agency's procedures for designating the information as "confidential." For example, EPA has developed detailed rules for asserting the confidentiality of business information that is submitted to it pursuant to the Clean Water Act and the other environmental statutes it administers.^[8] These rules also detail the procedures for defending confidentiality claims if and when records that were designated as confidential become subject to potential disclosure pursuant to a live public records request. Regulated entities should adhere carefully to these processes when providing sensitive business information to the agencies they interact with on a day-to-day basis.

NOTES:

- ^[1] 5 U.S.C. § 552(b)(4) (emphasis added).
- ^[2] 33 U.S.C. § 1318(a)–(b).
- ^[3] No. 16-5109, ___ A.3d ___ (May 30, 2017).
- ^[4] Slip op. at 2.
- ^[5] *Id.* at 3.
- ^[6] 5 U.S.C. § 559 (emphasis added).
- ^[7] Slip op. at 3.
- ^[8] See 40 C.F.R. Part 2, Subpart B.

KEY CONTACTS



ANTHONY R. HOLTZMAN
PARTNER

HARRISBURG
+1.717.231.4570
ANTHONY.HOLTZMAN@KLGATES.COM



TAD J. MACFARLAN
PARTNER

HARRISBURG
+1.717.231.4513
TAD.MACFARLAN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.