GROOM LAW GROUP

MEMORANDUM

March 19, 2019

TO: Pat Cleary
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FROM: Seth Perretta
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RE: Applicability of FOIA Exemption to Proposed Alternative Reporting Method

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This follows our memorandum of March 7, 2019 in which we opined that the Department of Labor ("DOL" or "Department") has the authority to issue guidance that would allow professional employer organizations ("PEOs") to file with the Department their required participating employer information on a confidential basis ("Proposed Alternative Reporting Method"). The purpose of this memorandum is to analyze the various exemptions under the Freedom of Information Act ("FOIA") to determine whether, in the event of a FOIA request, those exemptions might protect against the disclosure of a PEO's participating employer information.

Based on the case law and legislative history to FOIA, if the Department were to adopt the Proposed Alternative Reporting Method, the identities of the participating employers (including name and EIN) should be exempt under FOIA as confidential commercial information. Our analysis follows below.

- ***FOIA Exemption 4 Protects Confidential Commercial Information***

FOIA provides that any person has a right to obtain access to federal agency records, except to the extent that those records (or any portions thereof) are protected from public disclosure by one of nine exemptions.[1] 5 U.S.C. § 552. Although FOIA was designed to promote transparency, the Supreme Court has recognized that in enacting FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government'" to protect certain information. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2423).

As relevant here, FOIA Exemption 4 authorizes agencies to withhold documents that contain "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption is designed to protect individuals who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974) ("[Exemption 4] 'include[s] information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, ***where the Government***

[1] FOIA also contains three special law enforcement exclusions, which are not discussed in this memorandum. *See* 5 U.S.C. § 552(c).

has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.'") (quoting H.R. Rep. No. 89-1497, at 10 (1966)) (emphasis added).

Under FOIA Exemption 4, if the requested documents constitute "commercial or financial information,"[2] they are exempt from disclosure if they are "(1) commercial or financial, (2) obtained from a person, and (3) privileged and confidential." *Pub. Citizen*, 704 F.2d at 1290.

In determining whether information is "commercial" or "financial," courts give those words their ordinary meanings. *See Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982). Generally, records are "commercial" or "financial" so long as the submitter of the information has a "commercial interest" in them. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (defining commercial or financial information to include records that "reveal basic commercial operations," "relate to the income-producing aspects of a business," or bear upon the "commercial fortunes" of an organization).

Information is "obtained from a person" if the information was generated by individuals, corporations, or various other entities, but not if it was produced by the federal government. *See Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148 (2d Cir. 2010).

Finally, information submitted to the government involuntarily is "confidential" for purposes of FOIA Exemption 4 if "disclosure of the information is likely . . . (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." *Nat'l Parks*, 498 F.2d at 770. A submitter of information suffers competitive harm if the requested information has "commercial value to competitors." *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981). "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." *Id.* "Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government." *Id*.

Reviewing courts generally have held that where disclosure of commercial information would reveal a company's customer list, the information is protected under Exemption 4. *See, e.g.*, *Ctr. for Digital Democracy v. FTC*, 189 F. Supp. 3d 151, 167-68 (D.D.C. 2016) (holding that membership information submitted to FTC in annual reports fell within scope of Exemption 4 where "***competitors could use that information to poach customers***") (emphasis added); *100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115, 143 (D.D.C. 2017) (finding that release of information concerning company's customers was "confidential" under Exemption 4, as "***there is little doubt a competitor could rely on this information to [company's] detriment***") (emphasis added); *Pub. Citizen v. HHS*, 975 F. Supp. 2d 81, 117 (D.D.C. 2013) (holding that information was properly withheld under Exemption 4 where it was "obvious that the release of such information would be ***akin to releasing customer lists which could easily be used affirmatively by competitors to harm [company]***") (emphasis added).[3]

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[2] FOIA Exemption 4 also protects against disclosure of "trade secrets," which are defined for purposes of Exemption 4 as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Because trade commodities are not at issue here, we do not address the "trade secrets" prong of Exemption 4.

[3] *See also Burke Energy Corp. v. DOE*, 583 F. Supp. 507, 512 (D. Kan. 1984) (withholding documents under FOIA Exemption 4 in part because disclosure "would enable competitors to solicit [company's] customers"); *Ctr. For Pub. Integrity v. FCC*, 505 F. Supp. 2d 106, 115-16 (D.D.C. 2007) (withholding zip code data under Exemption 4 because disclosure could reveal to competitors "where customers had been acquired or lost"); *Doherty v. FTC*, No. 80-0513, 1981 WL 2094, at *2 (D.D.C. June 24, 1981) ("[T]he list of heat pump owners is confidential and, if disclosed, could

The legislative history to FOIA further evidences Congress' interest in protecting submitters of information from the competitive hardships that could arise from disclosure. "Essentially, Congress believed that information, considered private and confidential in business life, should not be compromised simply because the information was transferred to government." *New York Pub. Interest Research Grp. v. EPA*, 249 F. Supp. 2d 327, 332 (S.D.N.Y. 2003). In explaining the rationale behind Exemption 4, Congress specifically singled out customer lists as deserving of protection:

> This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, ***customer lists***, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

H. Rep. No. 89-1497, at 10 (1966) (emphasis added).

Here, the employer information contained in the Proposed Alternative Reporting Method should constitute confidential commercial or financial information under FOIA Exemption 4. The identities of individual employers in a PEO-sponsored MEP are indisputably "commercial or financial" information, as PEOs have a strong commercial interest in protecting the identities of their clients, which are ordinarily kept confidential from competitors. Additionally, if the federal government were to acquire PEO employer information, such information would clearly be "obtained from a person"—namely, the PEO corporation itself.

The existing case law and legislative history also supports a finding that the participating employer identities should be considered "confidential," in part, because disclosure would likely cause "substantial harm to the competitive position" of the disclosing PEOs. *Nat'l Parks*, 498 F.2d at 770. Disclosing the individual employers in a PEO-sponsored MEP amounts to a disclosure of the PEO's clients. Courts are likely to hold that this places the PEO at risk of competitive harm through poaching of the PEO's client base. Aside from outright poaching, other competitive harms would likely result from disclosure. For example, competitors could use PEO client information to evaluate the disclosing PEO's potential for growth in various geographic or product markets. Competitors could target areas in which the disclosing PEO is in a relatively weak competitive position, thereby attempting to exploit perceived advantages over the disclosing PEO. These competitive effects, we believe, are substantial enough to merit protection under FOIA Exemption 4.

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be used by competitors to pinpoint potential customers and thereby sell its product to known customers without incurring the cost of advertising throughout the entire market.") (quotation and citation omitted).

- ***Conclusion***

As the case law and legislative history indicate, FOIA Exemption 4 exists to protect precisely the kind of commercial information at issue here. Public disclosure of PEO client lists would cause substantial competitive harm to the disclosing PEO because competitors could then use that information to poach clients and exploit other competitive opportunities. Accordingly, we believe that, in the event of a FOIA request, the identities of a PEO's participating employers (including name and EIN) should be exempt under FOIA as confidential commercial information.