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Part 1: How much of My Business's Information Will Become Public as a Result of My Use of the Paycheck Protection Program?

Following Congressional support for a second round of funding for the Paycheck Protection Program (PPP), it has become apparent that the media—among other entities—will increasingly scrutinize companies who have accepted funding pursuant to a PPP Borrower Application. One way the public will find out which companies have availed themselves of the PPP is through a Freedom of Information Act (FOIA) request.[1]

The PPP Borrower Application itself provides guidance on the items of information that will be "automatically released" to the media (and the public) upon request under 5 U.S.C. 552:

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, the Small Business Association, SBA, must supply information reflected in agency files . . .Information about ***approved loans*** that *will be* ***automatically released includes, among other things, statistics on our loan programs . . . and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity***. Proprietary data on a borrower would not routinely be made available to third parties.

PPP Borrower Application at p.4. While certain items of information will be automatically released in response to a FOIA request after a borrower is approved for a PPP loan, what are the exceptions that will preclude public disclosure? And if there is future FOIA litigation, will confidential information disclosed become publicly available in discovery?

First, and notwithstanding the ***italicized*** items in the notice above, information will ***not*** be automatically released if it falls within the scope of 5 U.S.C. 552 exemptions. Relevantly,

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Exemption 4 states that “trade secrets and commercial or financial information obtained from a person and privileged or confidential” will not be released to any third-party request. 5 USC § 552(b)(4). This standard would likely cover most of the information submitted to a PPP lender that is not subject to “automatic release” as denoted in the italicized language above. For example, information related to Question 3 in the PPP Borrower Application—*i.e.,* “Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A”—may fall within Exemption 4. This is because such information would customarily be kept private and the SBA has provided some level of assurance that proprietary information will not be disclosed.

Further, and while the italicized verbiage expressly states that “names of the borrowers (and their officers, directors, stockholders or partners)” of approved loans will be “automatically released,” information regarding the specific percentage of ownership (being a question in the application) should not be disclosed to the public. The same would go for payroll costs. And it is worth noting that lenders have also been asking for information beyond that on the PPP Borrower Application. Depending on the proprietary nature of the information, this, too, may be considered confidential under Exemption 4 (or at least a strong argument to that effect could be mustered). For example, the SBA’s website states that financial statements, business plans, marketing strategy, fiscal projections, payroll information and corporate structure are generally not subject to disclosure to third parties.[2]

However, to determine whether these items of information are confidential—and to bring them within Exemption 4—it must be shown that the information is: (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. Judicial review from a court is the final arbiter of when information falls within the scope of Exemption 4. And whether information is confidential is the crux of much litigation given that FOIA does not define the term.

In *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), the U.S. Supreme Court recently construed the meaning of confidentiality—holding that “contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential”:

1. “information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it,” and

2. “information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.”

Id. at 2366. Unfortunately, the majority opinion expressly left open whether confidential information could lose its status “without assurances that the government will keep it private.” *Id*. Specifically, the Court left open whether condition (1) and condition (2) are both required to satisfy Exemption 4—or whether a strong showing on condition (1) would be enough. *Id.* In the end, the Court stated: “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.” *Id.* at 2366. Several district court decisions have commented on the ambiguity whether both conditions must be met, or whether only condition (1)—information is customarily kept private—can carry the day. *See Tokar v. United States DOJ*, 2019 U.S. Dist. LEXIS 219194, *10 (D.D.C., Dec. 10, 2019); *see also* Department of Justice Guidelines, titled: Exemption 4 After The Supreme Court's Ruling In Food Marketing Institute V. Argus Leader Media*, October 4, 2019.*

This ambiguity will raise the concern for future FOIA litigation until there is further judicial disposition on this issue.

Further, Exemption 3 could be relied upon to protect information in conjunction with the Bank Secrecy Act (BSA). Exemption 3 allows an agency to withhold from disclosure, *inter alia*, materials "specifically exempted from disclosure by statute ...." See 5 U.S.C. § 552(b)(3). The BSA would a statute that would fall within section 552(b)(3). Exemptions with the BSA preclude FOIA requests. Specifically, reports filed under BSA - 31 U.S.C. § 5311 would be exempt from disclosure including: (1) suspicious activity reports (SAR), (2) currency transaction reports (CTR), (3) reports of international transportation of currency or monetary instruments (CMIR), (4) reports of cash payment over $10,000 received in trade or business, and (5) reports of foreign bank and financial accounts (FBAR).

Second, whether confidential information in a PPP Borrower Application is discoverable is a novel question; though the reasoning in *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 894 (2006) provides guidance. There, the analysis centered on the Small Business Investment Company (SBIC) program offered by the Small Business Administration ("SBA")—a program that bears some similarities with the PPP loan program. Under the SBIC program, a successful applicant is granted a license to operate as a small venture capital resource for small businesses. The SBA guarantees the SBIC's securities in the event the SBIC fails, allowing the SBIC to better leverage capital investment. 15 U.S.C.S. § 681 *et seq*.

The Appellant claimed that its applications for an SBIC license had been denied on the basis of race.

As part of discovery, the Appellant sought financial information from SBIC applications consisting of all management assessment questionnaires (MAQs)—that were part of applications submitted to the SBA. The heart of the MAQ application included detailed descriptions of the applicant's proposed operations, investment strategies, expertise and proposed sources of capitalization, including general categories of anticipated investment funds. These were the items of information that were sought in discovery.

The Court rejected the Appellant's claim that the SBIC information was discoverable because it was SBA policy to treat SBIC application as confidential. The reasoning for denying disclosure was predicated on Exemption 4 and an expectation of privacy that inures in each SBIC application. Indeed, the Court expressly stated that information in each MAQ was of the kind that fell "under Exemption 4 of Section 552 of the Freedom of Information Act." *Id.* at 896. A protective order, preventing public disclosure, was granted over the confidential information that would have fallen within Exemption 4.

Takeaways:

Given the open question that *Food Marketing* left for district courts—and guidance from Appellate Courts on the scope of the confidentiality test—there may be merit in (1) identifying that submitted PPP materials are confidential, and (2) expressly stating in supporting PPP materials that the SBA has provided assurances that proprietary information will not be disclosed to the public. Such provisions provide evidence that would support the two-prong test in *Food Marketing*—and heighten the chances of the SBA informing a PPP Borrower when a FOIA request has been made of a PPP's borrower's information.

Please do not hesitate to contact the authors below for further information or legal advice in relation to this alert.*

[1] An alternative way of determining whether a public company has been approved a PPP loan is through their public filings such as annual, quarterly or period reports.

[2] In addition, the SBA website provides a list of items of information that will not be disclosed to the public (here).

**Of course, material in this alert is not legal advice. It should not be construed as such.*

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