

On 9/10/2021, I [requested records related to data on work stoppages from January, 2021 through August, 2021 from the Federal Mediation and Conciliation Service](#) (FMCS).

This data had been previously published on the FMCS's website [since at least 2015](#). The FMCS published monthly updates through the end of 2020. In the beginning of 2021, the historical data was removed from the website and no new data has been published in 2021.

On 9/14/2021, the [FMCS responded to my Freedom of Information Act request with a full denial](#), citing two exemptions that allowed the FMCS to withhold the requested records: FOIA exemption 4 and FOIA exemption 5.

Both of these exemptions do not apply to the requested records, and I request that decision to deny my record request be set aside.

I now respond to the claimed exemptions in detail.

FOIA Exemption 4

First, FMCS claims that the records are exempt under FOIA Exemption 4.

Some of the records are exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). The mediation privilege is well recognized under Exemption 4. "The exemption would assure the confidentiality of information obtained by the government through material submitted and disclosure made in procedures such as the mediation of labor-management controversies." H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966); *Accord: American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 869 n.14 (2nd Cir. 1978); Cf., *Harowe Servo Controls, Inc.*, 250 NLRB 958 n.2 (1989).

The FMCS supports this claim of exemption with a citation to

1. [A committee report explaining some of the language of the original FOIA bill](#),
2. [A US District Court decision on a FOIA lawsuit brought by an airline against a labor mediation board](#),
3. [A Decision and Order of the National Labor Relation Board in a case where FOIA is not a central issue](#)

The Committee Report intended to exempt only trade secrets and commercial or financial information, not all information disclosed in a labor-management mediation

The FMCS starts by claiming that the committee report indicates that it was the intent of congress that "material submitted and disclosure made in procedures such as the mediation of labor-management controversies" should be covered under the FOIA exemption 4. This is an overdrawn characterization, perhaps proceeding from a misquote of the source material.

The fuller quote from the committee report is as follows:

4. Trade secrets and commercial or financial information obtained from any person and privileged or confidential: 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.

Here, the committee report is contemplating exempting trade secrets and commercial or financial information, such as the commercial and financial information that might be disclosed in a labor-management mediation. The committee is not attempting to say that all information disclosed in labor-management mediation is exempt, just as it is not attempting to say that all information obtained through a questionnaire is exempt.

The US District Court decision does not indicate that work stoppage information is a trade secret nor commercial or financial information

In *American Airlines, Inc. v. National Mediation Bd.*, the United States District Court, S.D. New York took up the question of whether the number of authorization cards that the International Brotherhood of Teamsters filed with the National Mediation Board expressing employee interest in being represented by Teamsters were covered by FOIA exemption 4.

In that case, the parties agreed that the number of authorization cards was not a trade secret.

The court then turned to a question about whether the number of authorization cards were protected commercial or financial information. They articulated that in order for the number of authorization cards to be exempt a three pronged test would have to be met. The information would have to be (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential.

The court started with the question of whether the number of authorization cards was commercial or financial. The court decided that the information was not commercial or financial, and further tests were not needed.

The FMCS cannot draw the conclusion that since the court decided that the number of authorization cards was not commercial or financial information and so not covered under FOIA exemption 4, that the existence of a work stoppage is commercial or financial information is covered by the exemption.

The National Labor Relation Board's decision does not bear on the applicability of FOIA Exemption 4

In *Harowe Servo Controls, Inc.*, the Board's only discussion of FOIA does not pertain to FOIA exemption 4. The only discussion of FOIA is the board's admonishment that

[the employer's] repeated attempts to obtain by pretrial discovery information clearly exempted under the Freedom of Information Act (e.g., all recommendations made by members of the General Counsel's staff in the prosecution of this case) and its persistent efforts to compel testimony by a Federal mediator who had attended bargaining sessions between the Respondent and the Union, which is clearly prohibited by public policy, resulted in substantial delays in setting this case for hearing.

Recommendations made by members of a General Counsel's staff may be exempt but they are not exempt under FOIA exemption 4. They are not trade secrets and commercial or financial information obtained from any person and privileged or confidential.

Harowe Servo Controls, Inc. provides no support to the claim that work stoppage information should be covered by FOIA exemption 4.

FOIA Exemption 5

Second, the FMCS claims the work stoppage information is exempt under FOIA exemption 5.

Some responsive records contain staff analyses, opinions and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision-making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5, 5 U.S.C. §552 (b)(5). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S.C 132 (1975).

According to a [snapshot of the FMCS's website](#), the previously published work stoppage data was "a list of work stoppages FMCS mediators enter into the FMCS case system." Extracting a limited number of fields about a work stoppage from a case management system does not reveal or constitute staff analyses, opinions or recommendations. The bare facts of work stoppages are not covered by FOIA exemption 5.