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FOIA Exemption 4 After *Argus Leader* And The FOIA Improvement Act

By Nathaniel E. Castellano[*]

Any company that submits confidential information to the U.S. Government should consider whether that information might be publicly released (to market competitors, the media, and civic society alike) pursuant to the Freedom of Information Act (FOIA).[1] They should also understand how to protect that information from release under FOIA Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[2] Updating prior resources,[3] this BRIEFING PAPER provides a comprehensive introduction and guide to protecting confidential business information using FOIA Exemption 4. The update is necessary, as this area of law has changed drastically in the past several years, due primarily to the U.S. Supreme Court's landmark 2019 decision in *Food Marketing Institute v. Argus Leader Media*,[4] the FOIA Improvement Act of 2016 (FIA),[5] and the many lower court decisions that have attempted to reconcile *Argus* and the FIA with the practical realities of FOIA practice and how companies share information with the Government.[6]

The Supreme Court's decision in *Argus Leader* upended the way that courts have traditionally analyzed whether information is "confidential" for purposes of FOIA Exemption 4 protection. However, the post-*Argus* swell of Exemption 4 litigation has given courts across the country opportunities to engage critically with all of the elements relevant to Exemption 4. For example, although the Supreme Court in *Argus Leader* did not address the "commercial or financial" aspect of Exemption 4 or the FIA, these issues repeatedly take central importance in the lower court cases that have grappled with Exemption 4 in the roughly three years since *Argus Leader.* Moreover, these decisions showcase deepening divides as to how district courts in the District of Columbia, Second, and Ninth Circuits approach Exemption 4 litigation. It is more important now

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than ever for FOIA practitioners to keep an eye trained on the Exemption 4 precedent developing in each jurisdiction.

This BRIEFING PAPER begins with context for FOIA and Exemption 4, and then walks through the mechanics of a FOIA Exemption 4 dispute, providing best practices and practical insights for how these matters typically progress. Next, the PAPER addresses the primary substantive elements that must be satisfied for information to be protected from release under FOIA Exemption 4, discussing in each instance how the analysis has been impacted by *Argus Leader*. Finally, the PAPER provides guidelines for companies relying on Exemption 4 to protect information submitted to the Government.

FOIA And Exemption 4

Among the most prominent of so-called "sunshine laws" designed to ensure transparency of Government operations, FOIA provides that all federal agency records are accessible to the public unless specifically exempt from this requirement. Critically, FOIA's right to access treats members of civic society and the media just the same as market competitors.[7] In doing so, however, FOIA attempts to strike a balance between the public's right to transparency and the undeniable need for the Government to be able to keep secrets and maintain confidence, as the Supreme Court has explained:

> This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA. "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." The Act's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' '' "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.". . .
>
> Despite these pronouncements of liberal congressional purpose, this Court has recognized that the statutory exemptions are intended to have meaningful reach and application. . .. [As the Court] observed: "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," and therefore provided the "specific exemptions under which disclosure could be refused." Recognizing past abuses, Congress sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." The Act's broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the "balance" Congress has struck.[8]

To accomplish its goal, FOIA identifies certain categories of information that agencies are automatically required to share with the public, including a description of the agency, its functions, its procedural and substantive rules, final agency opinions, etc.[9] Most importantly, at 5 U.S.C.A. § 552(a)(3), FOIA further requires that agencies must make available records that are requested by the public unless those records are exempt from mandatory disclosure under the FOIA exemptions listed in 5 U.S.C.A. § 552(b) or excluded from FOIA's scope under 5 U.S.C.A. § 552(c).

Editor: Valerie L. Gross

Briefing Papers® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. Periodical Postage paid at St. Paul, MN. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

There are nine categorical exemptions for information that may be withheld when requested at 5 U.S.C.A. § 552(b):

(1) "properly classified";

(2) "related solely to the internal personnel rules and practices of an agency";

(3) "specifically exempted from disclosure by statute" (subject to certain conditions);

(4) "trade secrets and commercial or financial information obtained from a person and privileged or confidential";

(5) records that would be privileged in court, including records less than 25 years old that describe the internal "deliberative process" of the Government;

(6) "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy";

(7) records "compiled for law enforcement purposes" (subject to certain conditions);

(8) compliance records of regulated financial institutions; or

(9) survey data regarding the location of wells.

If a requested record does fall within an exemption, however, agencies are not necessarily required to withhold the record.[10] There are important exceptions to this rule, including records that fall under Exemption 3, where a statute specifically exempts the records from disclosure. And, as discussed below, the Supreme Court has held that a combination of the Trade Secrets Act[11] and the Administrative Procedure Act (APA)[12] can be used to enjoin an agency from releasing documents that would fall within FOIA Exemption 4.[13] Nevertheless, there is still a question of what standard agencies must apply when deciding whether to release records that fall within an exemption.

Different administrations have imposed varying standards that agencies are expected to use when exercising discretion to release or withhold records under FOIA. Embracing a presumption towards transparency, the Obama administration directed agencies to apply a foreseeable harm standard before withholding requested records.[14] Through the FIA, Congress codified the foreseeable harm standard that prohibits agencies from withholding records "unless the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."[15] Although seemingly benign, this statutory amendment has repeatedly surfaced as a complicating factor in Exemption 4 litigation in recent years.

Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Setting aside the important but less frequently invoked exceptions for "trade secrets" and "privileged" information, to qualify for protection under Exemption 4, the information must meet three criteria: (1) qualify as "commercial or financial," (2) be "obtained from a person," and (3) be "confidential."[16]

Before addressing each of the substantive elements of Exemption 4 and how they are impacted (or not) by *Argus Leader* and the FIA, it is helpful to first walk through the procedural mechanics of a FOIA request and dispute.

Mechanics Of A FOIA Dispute

Submission Of Information

The first and arguably most important opportunity to protect the confidentiality of information submitted to the Government is at the time of submission. As discussed below, following *Argus Leader*, courts are increasingly interested in whether a submitter gives information to the Government with some implied or express assurance of confidentiality, where an implied assurance may be found from context surrounding the submission. One way for a submitter to contemporaneously evidence that information is submitted under an assurance of confidentiality is for the submitter to state an expectation of confidentiality before or at the time of submission. This can occur in several ways, for example in a cover email or letter stating that the

contents include confidential commercial information submitted with the expectation that the Government will keep the information confidential. If there is an explicit assurance of confidentiality that applies—e.g., a statute, regulation, agreement, or policy statement that prohibits public release—consider identifying that assurance of confidentiality at the time of submission.

Another best practice is to mark submissions with a legend, usually at the footer or header of each page, asserting that the document contains confidential commercial information and is not for public release. Not only will including these contemporaneous assertions and legends at the time of submission help satisfy the substantive *Argus Leader* standard, but they also serve a practical purpose of notifying busy FOIA officials that they should think twice and coordinate with the submitter before releasing information in response to a FOIA request. To be sure, these markings and other assertions of confidentiality are not necessarily dispositive to the outcome of a FOIA dispute, but they can set the tone for how the submissions will be viewed.

Agency Response To FOIA Request And Coordination With Submitter

Once information is submitted to the Government, that information may be requested. When an agency receives a FOIA request, the agency must provide the requester with a "determination" explaining, among other things, what the agency will and will not release and an explanation for withholding any records.[17] If the agency decides to withhold any requested records, the burden is on the agency to demonstrate that the redacted information falls within a FOIA exemption or exception.[18]

FOIA does not require pre-disclosure notification to submitters of confidential commercial information. However, in Executive Order 12,600, President Reagan directed agencies to establish procedures to provide submitters notice prior to release of information that is marked as protected under Exemption 4.[19] Prior to disclosing information that is marked as "confidential commercial information," the agency generally must provide the submitter with notice of pending disclosure and an opportunity to object. Unfortunately, the FIA did not include any amendment to codify the procedural protections provided by Executive Order 12,600. However, many agencies have implemented regulations that codify these procedures to protect information that would fall within Exemption 4.[20]

Assuming an agency does contact the submitter to provide notice of a FOIA request, the submitter should take advantage of this important opportunity to protect its information. Typically, the agency will send a boilerplate letter outlining the basics of FOIA Exemption 4, provide a copy of the request and the documents that the agency intends to release, and state expectations for the process moving forward. The process often entails a short deadline for the submitter to respond, identify any information that the submitter believes should be withheld, and provide factual and legal justification for withholding.

Despite the significant changes in the law applicable to FOIA Exemption 4 over the past several years, many agencies have not yet updated the materials that they send to submitters. Thus, these letters should be scrutinized to understand the extent to which the agency's FOIA officials are aware of the changes in legal standards. The submitter should immediately review the materials that the agency intends to release to identify information that should be withheld and collect supporting materials to justify withholding under the standards of FOIA Exemption 4 (detailed below).

The submitter's response to the agency should clearly identify the exact information that the submitter believes should be withheld. One way to accomplish this is to provide one copy of the records with highlighting to identify the specific information that the submitter wants withheld, and another copy of the same records with final redactions applied, so that the FOIA Official could send the applied redacted version to the requester without releasing any of the submitter's confidential commercial information.

While identifying the exact information to be withheld is necessary, it is not sufficient. The submitter should also take this opportunity to provide a detailed explanation for why it is inappropriate to release the information that the submitter wants withheld. This explanation will ideally include detailed factual and

legal support. The goal is to make the FOIA Official and agency counsel confident that the submitter is justified in asking that information be withheld, and confident that in the event of litigation a court will agree that withholding is appropriate (indeed, required).

De Novo Review Of Agency Decision To Withhold

If an agency decides to withhold requested records, the requester may pursue an administrative appeal or less formal means of challenging the agency's initial decision. If that fails, the requester may seek judicial review, where a district court will review the agency's decision, and the agency bears the burden of establishing that withholding is proper.[21] If the requester seeks judicial review, the submitter often may intervene in the proceedings to help defend the agency's decision to withhold.[22]

Reverse FOIA

But what happens when the agency does agree to release requested materials despite the submitter's objection that doing so would compromise confidential commercial information protected by Exemption 4? The submitter is left to initiate a so-called "reverse FOIA" action, suing the agency in federal court to enjoin disclosure.[23]

This unique remedy is available when FOIA Exemption 4 is involved because courts have explained that FOIA Exemption 4 is "at least co-extensive" with the Trade Secrets Act, which makes it a criminal offense for Government personnel to publicly disclose certain categories of information relating to private enterprise.[24] Accordingly, agency disclosure of information protected by the Trade Secrets Act will be set aside by courts under the APA as agency action that is not in accordance with law, unless the decision to release is made pursuant to independent statutory authority or substantive regulation.[25]

The party seeking to prevent disclosure in a reverse FOIA action bears the burden of justifying nondisclosure.[26] The agency's decision to release is reviewed deferentially and will not be set aside unless it is found to be arbitrary or capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law.[27] Given the judicial deference given to agency decisions, it is preferable to persuade an agency to withhold information with a detailed response to the notice of FOIA request and then intervene to support the agency's decision in the event that the requester sues for additional documents.

Exemption 4 After *Argus Leader* And The FIA

Having provided context for the structure of FOIA and the mechanics of a FOIA dispute, it is appropriate now to identify what information can and cannot be protected. The following subsections of the Paper address the primary elements that must be satisfied for information to be protected from release under Exemption 4: (1) the information must qualify as "commercial or financial," (2) the information must have been "obtained from a person," and (3) the information must be "confidential."

When the FIA passed in 2016, it was not obvious what impact, if any, the statute might have in relation to Exemption 4, as then-dominant case law generally required a similar inquiry of "foreseeable harm."[28] The Supreme Court's 2019 decision in *Argus Leader*, however, immediately promised to upend the status quo, while leaving unanswered many questions for agencies and lower courts to grapple with.[29] Notably, one of the many questions that *Argus Leader* left unanswered is how the Court's analysis might be impacted by the FIA's codification of the foreseeable harm standard, as the FIA did not apply to the specific FOIA request at issue in *Argus*. As expected, in the roughly three years since *Argus Leader,* we have seen agencies and lower courts attempt to reconcile FOIA practice with *Argus Leader* and the FIA.[30] Unfortunately, for now at least, Exemption 4 litigation is more complicated than ever, requiring FOIA practitioners and companies that exchange sensitive information with the Government to remain engaged with the constantly evolving legal landscape.

One of the most challenging aspects of Exemption 4 litigation in the wake of *Argus* is the many divisions

that are developing among district courts across the country, particularly in the D.C., Second, and Ninth Circuits. While a certain degree of forum shopping has always been relevant to FOIA litigation, for the past several decades, before *Argus Leader*, it was common to focus on precedent from the District of Columbia as the norm. FOIA provides that the District of Columbia is an appropriate forum for all FOIA cases.[31] "Because the clear majority of FOIA lawsuits are filed in the District of Columbia, the district court and the court of appeals there have developed a substantial body of expertise in FOIA matters that may be lacking in other jurisdictions."[32] Commenters have noted that, since the mid-1980s, "the rulings of the D.C. Circuit have arguably tended to favor the Government and not the requester."[33] This could be "because these judges hold practical experience involving the real problems of agency backlogs and the extent to which substantive submissions will be deemed sufficient."[34] District courts in other circuits, particularly the Ninth and Second, may be more favorable for requesters,[35] and it is never safe for counsel to assume that district courts in other circuits will adhere to even the most fundamental of D.C. Circuit FOIA precedent.[36] These divisions have become even more significant after *Argus Leader*.

"Commercial or Financial"

Whether information qualifies as "commercial or financial" is becoming one of the most significant points of division among the circuits. While the D.C. Circuit has historically taken a broad interpretation of this term, the Second Circuit has yet to endorse the full scope of the D.C. Circuit's interpretation. The division is particularly relevant when the information at issue relates to a company's compliance measures. While *Argus Leader* and the FIA do not directly impact whether information is "commercial or financial" they do seem to have invigorated Exemption 4 litigation around the country. This, in turn, appears to have given courts outside the D.C. Circuit opportunities to critically engage with the meaning of "commercial or financial." As shown by the decisions discussed below, several of those courts appear hesitant to fully embrace the same broad standard that is prevalent in the D.C. Circuit.

The D.C. Circuit interprets the phrase "commercial or financial" broadly.[37] Items commonly regarded as commercial or financial include business sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information of financial condition.[38] The D.C. Circuit has rejected the argument that commercial information must reveal commercial operations.[39] Instead, in the D.C. Circuit information is commercial if "it serves a commercial function or is of a commercial nature."[40] Most significantly, the D.C. Circuit considers information to be confidential when "the provider of the information has a commercial interest in the information submitted to the agency."[41] For example, in a recent decision the D.C. district court explained that the fact that a refinery submitted a certain type of petition relating to economic hardship qualifies as commercial or financial information because the company has a business interest in information that its competitors might use to their competitive advantage:

> Common sense counsels that an oil refinery has a "business interest" in the facts that it applied for, and either received or did not receive, a small-refinery exemption. As to the latter, whether a refinery is exempt from [Renewable Fuel Standard program] requirements or not directly affects how much renewable fuel it must blend into its annual production or importation of gasoline, and an entity's "basic business operations and techniques" are undoubtedly commercial. As to the separate fact that a refinery applied for an exemption, that fact too is commercial, as it shows that the refinery believed it suffered from, and attempted to establish, "unfavorable structural and economic conditions . . . that rise to the level of 'disproportional economic hardship.' '' There is an obvious "business interest" in information that reveals "favorable" (or unfavorable) "market conditions" that, if disclosed, "would help rivals identify and exploit a company's competitive weaknesses."[42]

Consistent with this precedent, companies litigating in the D.C. Circuit have successfully established that information about their compliance measures in highly regulated industries is commercial and financial information that can be protected under Exemption 4.[43] This makes sense under the broad "commercial interest" standard, as companies operating in highly regulated industries have a business interest in how they operate their businesses within the regulatory framework.

In the Second Circuit, however, the definition of "commercial or financial" is arguably more restrictive. A post-*Argus Leader* decision from the U.S. District Court for the Southern District of New York provides a detailed analysis, distinguishing D.C. district court decisions and concluding that information submitted about a company's compliance program could not qualify as commercial under Exemption 4.[44] The court's comparison of the Second Circuit and D.C. Circuit approaches to defining "commercial or financial" is instructive:

> Defendant and Intervenor cite to a line of decisions from the United States District Court for the District of Columbia that they believe stand for the proposition that information about [the submitter's] compliance program, as enumerated above, is "commercial" within the meaning of Exemption 4. Plaintiffs argue that, by asking this Court to echo the reasoning of several out-of-circuit district court cases, Defendant and Intervenor espouse an unduly broad "commercial interest" standard that has not been adopted in the Second Circuit.
>
> The Second Circuit has not yet addressed whether information about the implementation of a company's compliance program is itself "commercial" within the meaning of Exemption 4, as Defendant and Intervenor assert. But although the terms "commercial" and "financial" have not been precisely defined by the Second Circuit, courts in this Circuit have noted that Exemption 4 includes at least information that has "intrinsic commercial value," the disclosure of which would "jeopardize a commercial entity's commercial interests or reveal information about its ongoing operations."
>
> Regardless of whether the Second Circuit has adopted the "commercial interest" standard, the Court finds that the cases that Intervenor and Defendant cite do not establish that information about [the submitter's] compliance program, without more, is sufficiently commercial to warrant withholding. A review of these decisions reveals that, for the most part, these courts have determined that information about or related to a compliance program is subject to exemption only when it is intertwined with other information that can fairly be described as commercial. Thus, to withhold information related to a company's compliance program—such as "hiring, promotion, and disciplinary processes"; "training materials"; and "internal analyses of misconduct, compliance and related matters"—it must be intertwined with information that is commercial within the Second Circuit's arguably narrower interpretation of that word as "revealing basic commercial operations, such as sales statistics, profits and losses, and inventories, or relating to the income-producing aspects of a business."[45]

District courts in the Ninth Circuit have also shown some hesitancy to fully embrace the broad "commercial interest" standard. In another post-*Argus Leader* decision, the District Court for the Northern District of California rejected the Government's position that contractor submissions of standard Department of Labor forms regarding high-level employment diversity statistics qualify as commercial:

> Here, the EEO-1 reports require federal contractors to furnish the composition of their workforce broken down by gender, race/ethnicity, and general job category. There is no salary information, sales figures, or departmental staffing levels, or other identifying information in these reports. Rather, the diversity reports merely disclose the workforce composition. . ..
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> * * *
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> [T]he Government argues that "the various job categories as well as the number of people hired in each category are contained in the . . . reports is instrumental to each submitter's ability to carry out its commercial interests. Businesses cannot engage in commerce without the sufficient personnel in specified job categories, which is thus related to the businesses' commercial enterprise." Essentially, the Government is asking the Court [to] find exempt any statistical information pertaining to employees simply because the business is a commercial enterprise. This expansive interpretation has been rejected. At the hearing . . . the Government argued that that the information would reveal each submitting company's organizational chart, corporate structure, and how it allocates resources. As discussed above, it is impossible to discern a corporation's structure given the EEO-1's general job categories, and the furnished information is companywide rather than by department.
>
> Accordingly, in light of the absence of information pertaining to specific positions or departments, the Court finds that the Government has failed to make a showing that the demographic information contained in the EEO-1 reports is commercial.[46]

And, there are limits to the definition of commercial that apply in the D.C. Circuit as well. For example, in *Judicial Watch, Inc. v. U.S. Department of Health and Human Services*, the D.C. district court concluded that information identifying the commercial labs utilized by

a federal program participant did not qualify as commercial, because the agency's submissions did not provide a specific explanation of why the submitter "in fact has a commercial interest in the names and addresses of its contract labs," and the submitter did not intervene in the case to help bolster the agency's analysis.[47] However, as the D.C. district court reaffirmed shortly later in 2021, it is well established in the D.C. Circuit that "the identities of companies participating in a government program can also be commercial information depending on the context."[48] Thus, setting aside any difference in substantive standard, one lesson from all of these post-*Argus Leader* decisions is that submitters should provide the agency and court with detailed, specific explanations of the companies' commercial interest in materials to be withheld. Even in the D.C. Circuit, conclusory assertions of commercial interest will not suffice.

"Obtained From A Person"

The "obtained from a person" requirement is occasionally litigated but easily satisfied in almost all cases. "Person" is defined broadly to mean any individual or entity other than the Federal Government.[49] Information generated by the Federal Government itself is not obtained from a person; nevertheless, documents prepared by the Government can still come within Exemption 4 if they comprise summaries or reformulations of information supplied by a source outside the Government, such as contractor information contained in an audit report, or information arrived at through negotiation between a private party and the Government.[50] Exemption 4 covers information concerning third parties, so protection is available regardless of whether it pertains directly to the commercial interest of the submitter or to the commercial interests of another.[51]

There are, however, still disputes over this element. In a relatively novel Exemption 4 dispute over the identity of refineries that submitted petitions under a federal program, in *Renewable Fuels Association v. U.S. Environmental Protection Agency*, the U.S. District Court for the District of Columbia grappled with "whether a refinery's status as a petitioner for a small refinery [] exemption, or the grant or denial of that petition, constitutes 'information obtained from a person.' "[52] The court reasoned that, even though the fact of whether a petition was granted or denied was technically generated by the agency itself, the information still qualified as obtained from a person, because release of that agency-generated information would reveal that the refinery had submitted the petition.[53]

Displaying a more typical analysis of the "from a person" issue, in *Flyers Rights Education Fund v. Federal Aviation Administration*, the requesters argued that FAA "comments" made in response to information provided by a private company were generated by the Government and not obtained by a person.[54] Applying longstanding D.C. Circuit precedent, the court rejected this argument, agreeing with the FAA that its comments involved information obtained from a private party and, if released, would allow others to extrapolate that information submitted by a private party, thereby satisfying this element of Exemption 4.[55] While this result is consistent with longstanding FOIA practice and common sense, there are concerning out-of-circuit cases that seem to depart from this approach and question whether Exemption 4 can protect information generated by the Government that directly relates to and reveals otherwise confidential commercial information submitted by a private party.[56]

Confidentiality

Establishing confidentiality has traditionally been the most challenging element to meet when withholding information under FOIA Exemption 4. Confidentiality is also the element most significantly impacted by *Argus Leader*, and where most of the subsequent decisions have focused.

For decades, most courts followed the standard announced by the D.C. Circuit in *National Parks & Conservation Ass'n v. Morton*,[57] under which information submitted to the Government qualified as confidential only if release would likely have either of the following impacts: (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.[58] Exemption 4 disputes frequently required detailed,

fact-specific analyses of whether release of information was likely to result in competitive harm.[59]

In addition to complex arguments over whether the *National Parks* test was satisfied, parties would also dispute whether the *National Parks* test applied at all to a particular submission, which turned on whether the submission at issue was a mandatory or voluntary submission.[60] This additional layer of complexity was due to the D.C. Circuit's *en banc* holding in *Critical Mass Energy Project v. Nuclear Regulatory Commission* that the "substantial competitive harm" requirement applied only to mandatory submissions, and that submissions made on a voluntary basis must be withheld if the submitter "customarily" did not release such information to the public.[61]

In *Argus Leader*, the Supreme Court upended the confidentiality element of FOIA Exemption 4, rejecting the *National Parks* requirement to demonstrate likely substantial competitive harm.[62] The Court identified two circumstances under which information might qualify as confidential: First, "information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it," and second, "information might be considered confidential if the party receiving it provides some assurance that it will remain secret."[63] The Court confirmed that the first of these conditions must be satisfied, as "it is hard to see how information could be deemed confidential if its owner shares it freely."[64] The Court specifically declined to answer whether the second condition is necessary, *i.e.* whether "privately held information [can] *lose* its confidential character for purposes of Exemption 4 if it is communicated to the government without assurances that the government will keep it private."[65] And, as noted above, because the request at issue in *Argus Leader* was submitted before the FIA went into effect, the Court did not address how, if at all, Congress' codification of the foreseeable harm standard might impact the Exemption 4 analysis in future requests.

Several litigation themes and inflection points have emerged in the lower court cases that have dealt with Exemption 4 after *Argus Leader*.

First, to start with the lowest hanging fruit, some things never change: information that has already been publicly released cannot qualify as confidential. Several post-*Argus Leader* cases have reaffirmed this fundamental point, concluding that Exemption 4 cannot be used to protect information that is already publicly available. For example, in *Besson v. U.S. Department of Commerce*, the agency attempted to justify withholding portions of a contract's statement of work, but in doing so conceded that some portions of the statement of work "may be available in public documents," leading the court to quickly conclude that the concession precluded the agency from withholding the statement of work in its entirety.[66]

Second, because *Argus* shifted the focus of Exemption 4 from likelihood of competitive harm to confidentiality, submitters and agencies should expect and prepare for increased scrutiny of exactly how requested information is kept in confidence. In at least one post-*Argus Leader* case, a court granted the plaintiff's request to limited depositions and document discovery on the question of confidentiality based on unanswered questions raised in various affidavits that the submitter relied on to prove confidentiality.[67]

Several cases turn on circumstances where the requested information had not been posted publicly (e.g., available online), but the court found that the submitter regularly gave third parties access to the information in a way that precluded any claim of confidentiality. For example, the U.S. District Court for the Northern District of California held in *Animal Legal Defense Fund v. U.S. Food and Drug Administration* that information about egg safety and production in a hen house could not qualify as confidential where the information "could be viewed by every employee and supplier who visited the facilities" and even though "some employees were required to sign confidentiality agreements or otherwise lectured about confidentiality, there was nothing legally preventing employees from disclosing the Hen Housing Information to competitors or any other individual."[68] In another case from the Northern District of California, *Center of Investigative Reporting v. U.S. Department of Labor*, the court found that certain employment data could not be considered confidential when the company posted that information in its facilities for a large number of employees to see.[69]

To be sure—just because information is shared with certain employees and vendors does not preclude that information from being confidential. Indeed, confidential information is often shared with employees and third parties. The question is not whether information is shared but whether it is shared with sufficient protections in place to maintain confidentiality. As illustrated in another recent decision from the Northern District of California, *American Small Business League v. U.S. Department of Defense*, companies can demonstrate the confidentiality of information shared with third parties by providing evidence of, among other things: "(1) requiring employees and business partners to enter into confidentiality agreements; (2) using restrictive markings on documents and communications; (3) using secure, password-protected IT networks for the information at issue; and/or (4) limiting access to the information at issue on a 'need to know' basis."[70]

Third, unsurprisingly, many cases have addressed the question that the Supreme Court raised but declined to affirmatively answer: even if information is actually and customarily held in confidence, does Exemption 4 also require that the information be communicated to the Government with an assurance of confidentiality? To date, the author is not aware of any court that has found an assurance of confidentiality to be necessary.[71] Interestingly, several decisions from the D.C. district courts have held that they are barred by existing D.C. Circuit precedent from imposing any assurance of confidentiality requirement unless and until the D.C. Circuit or Supreme Court confirms that such assurance is required.[72]

Consistent with Department of Justice guidance issued after *Argus Leader*, if an agency affirmatively notifies a company that information will be published, then there is no assurance of confidentiality. As the District Court for the Northern District of California explained: "information loses its character of confidentiality where there is express agency notification that submitted information will be publicly disclosed."[73]

For the most part, courts have been lenient in finding that, assuming an assurance of confidentiality is required, an express or implied assurance exists. Courts have generally agreed with Department of Justice guidance that an assurance of confidentiality can be express or implied from context:

> [I]n the context of Exemption 4, agencies can look to the context in which the information was provided to the government to determine if there was an implied assurance of confidentiality. Factors to consider include the government's treatment of similar information and its broader treatment of information related to the program or initiative to which the information relates. For example, an agency's long history of protecting certain commercial or financial information can serve as an implied assurance to submitters that the agency will continue treating their records in the same manner.[74]

Courts have found that express assurances exist based on agency policy statements confirming that the type of information at issue will be kept confidential;[75] contractual agreements stating that the information at issue would be maintained in confidence;[76] letters from the Government stating that information would be kept confidential to the extent it qualifies for protection under Exemption 4;[77] and declarations describing explicit assurances of privacy provided by agencies at the time of submission.[78] Courts have found implied assurances in several contexts, including declarations as to how similar information is treated within the industry and relevant regulatory framework[79] and declarations describing steps the parties took at the time of submission and afterwards to ensure confidentiality, including secure transmission methods and confidentiality legends.[80]

The FIA

Finally, several courts have grappled with how, if at all, the FIA impacts the analysis of confidentiality under Exemption 4 after *Argus Leader*. Divisions are already apparent, with some courts finding that the FIA requires agencies to determine that release of information would cause foreseeable harm before withholding information under Exemption 4, and others finding that such an approach is an end-run around *Argus Leader* that effectively reinstates the *National Parks* competitive injury requirement. The District Court for the Southern District of New York recently summarized the competing issues succinctly:

> The application of FIA's foreseeable harm require-

> ment to FOIA's Exemption 4 has caused more controversy than perhaps anticipated, as courts have split in ascertaining the "harm" against which Exemption 4 is intended to protect. Plaintiffs press the Court to adopt the reasoning of a district court that viewed the foreseeable harm requirement as requiring an agency to explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would cause genuine harm to the submitter's economic or business interests, and thereby dissuade others from submitting similar information to the government. Pursuant to this interpretation, despite the Supreme Court striking down the "substantial competitive harm" test from *National Parks* in *Argus Leader*, Congress intended FIA's foreseeable harm standard to impose on agencies a requirement to demonstrate some form of competitive harm as a result of disclosure. In response, [the agency] contends that any test requiring competitive harm, especially in reliance on *National Parks*, finds no support in the statutory text or its legislative history and would be in direct contradiction to the Supreme Court's reasoning in *Argus Leader*. [The agency] would instead have the Court side with those district courts that have found the harm protected by Exemption 4 to be confidentiality itself, such that disclosure of any record falling within the scope of Exemption 4 would necessarily satisfy FIA's foreseeable harm requirement.[81]

Given these differing approaches regarding the FIA, which will likely take several years and perhaps another visit to the Supreme Court to resolve, in the meantime the safest course of action may be for agencies and submitters to assume that any Exemption 4 litigation might require a showing of competitive harm similar to what was required under the *National Parks* standard. Even if not required in relation to the FIA, submitters may benefit from presenting evidence and explanation of foreseeable harm in the event they need to request injunctive relief and establish irreparable harm to enjoin the release of information in a Reverse FOIA action.

Conclusion

In the nearly three years after the Supreme Court decided *Argus Leader*, district courts across the country have grappled with the implications. These cases highlight significant divisions among the district courts in different circuit courts of appeals and several open issues that will likely take years of additional litigation to resolve. FOIA practitioners and companies that submit confidential information to the Government should carefully follow these decisions as Exemption 4 continues to evolve in the wake of *Argus Leader*.

Guidelines

These *Guidelines* are intended to assist you in understanding FOIA Exemption 4. They are not, however, a substitute for professional representation in any specific situation.

1. Be sure to mark commercial and confidential information before submitting it to the Government, as that is the best way to ensure pre-disclosure notice and opportunity to respond under Executive Order 12,600 and relevant regulations.

2. In addition to marking, consider submitting confidential information with some form of cover letter or other documented acknowledgement stating that the information is submitted under the expectation that it will be kept confidential, identifying if possible the source of that expectation.

3. If an agency provides notice that marked records have been requested, work with the agency to explain why such documents should not be released. It is important that the agency have a well-reasoned explanation for withholding any information in any requested record.

4. If an agency provides notice that marked records have been requested, carefully examine the notice to ascertain whether the agency has updated its documents to reflect the *Argus* standard. Even if not expressly requested, consider providing a response that justifies withholding under *Argus* and the FIA.

5. Keep in mind that, in most cases, the agency is incentivized to release requested documents. Persuading the agency to withhold requested documents and potentially defend its actions in court will likely require considerable cooperation with and assistance by the submitter and its counsel.

6. Where possible, when asking an agency to withhold information in response to a FOIA request, carefully identify for the agency the exact information to be

withheld on a page-by-page, line-by-line, word-by-word basis. Consider providing one copy of the requested record with highlighting to show all information proposed for withholding and another copy with final redactions applied.

7. Do not assume that D.C. Circuit precedent will necessarily govern a FOIA Exemption 4 dispute and consider how decisions and standards from other circuits may impact the analysis for any given FOIA request or litigation.

ENDNOTES:

[1]5 U.S.C.A. § 552.

[2]5 U.S.C.A. § 552(b)(4).

[3]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589 (Spring 2017); Turner & Castellano, "FOIA Exemption 4," 17-7 Briefing Papers 1 (June 2017); Meagher & Bareis, "The Freedom of Information Act," 10-12 Briefing Papers 1 (Nov. 2010).

[4]Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019), 61 GC ¶ 199; see Nash, "Postscript IV: Exemption 4 of the Freedom of Information Act," 33 Nash & Cibinic Rep. NL ¶ 47 (Aug. 2019).

[5]FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

[6]Turner, Sherwood & Ittig, "Feature Comment: Argus Leader After a Year in the Wild: Judicial Application of FOIA Exemption 4 in the Post-Argus Leader World," 63 GC ¶ 9 (Jan. 13, 2021).

[7]See Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin., 185 F.3d 898, 904 (D.C. Cir. 1999) ("[T]he public interest side of the balance is not a function of the identity of the requester . . . or of any potential negative consequences disclosure may have for the public . . . nor likewise of any collateral benefits of disclosure.").

[8]John Doe Agency v. John Doe Corp., 493 U.S. 146, 151–53 (1989) (internal citations omitted).

[9]5 U.S.C.A. § 552(a).

[10]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 600–01 (Spring 2017).

[11]18 U.S.C.A. § 1905.

[12]5 U.S.C.A. § 706.

[13]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 602, 610–11 (Spring 2017).

[14]Office of Information Policy; Attorney General Memorandum for Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,879, 51,880 (Oct. 8, 2009); see Castellano, "Where Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 594–95 (Spring 2017).

[15]FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1)(D), 130 Stat. 538, 539 (2016) (adding 5 U.S.C.A. § 552(a)(8)); U.S. Dep't of Justice, Office of Information Policy, OIP Summary of the FOIA Improvement Act of 2016, https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016.

[16]5 U.S.C.A. § 552(b)(4).

[17]5 U.S.C.A. § 552(a)(6).

[18]U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991).

[19]Exec. Order No. 12,600 (June 23, 1987), §§ 1, 3, 5, 52 Fed. Reg. 23,781 (June 25, 1987).

[20]See, e.g., Department of Defense FOIA regulations, 32 C.F.R. § 286.10.

[21]5 U.S.C.A. § 552(a)(4)(B); see Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After The 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 609–10 (Spring 2017).

[22]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 609–10 (Spring 2017).

[23]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 610–12 (Spring 2017).

[24]18 U.S.C.A. § 1905; Canadian Com. Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008).

[25]Canadian Com. Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008); Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[26]Occidental Petrol. Corp. v. U.S. Sec. & Exch. Comm'n, 873 F.2d 325, 342 (D.C. Cir. 1989).

[27]5 U.S.C.A. § 706(2); United Techs. Corp. v. U.S. Dep't of Def., 601 F.3d 557 (D.C. Cir. 2010).

[28]Turner & Castellano, "FOIA Exemption 4," 17-7 Briefing Papers 1 (June 2017).

[29]Ittig, Lee, Turner, Castellano & Sherwood, "Feature Comment: The Supreme Court Reshapes FOIA Exemption 4," 61 GC ¶ 213 (July 24, 2019).

[30]Turner, Sherwood & Ittig, "Feature Comment: Argus Leader After a Year in the Wild: Judicial Application of FOIA Exemption 4 in the Post-Argus Leader World," 63 GC ¶ 9 (Jan. 13, 2021).

[31]5 U.S.C.A. § 552(a)(4)(B).

[32]Hamitt et al., Litigation Under the Federal Open Government Laws 382 (25th ed. 2010).

[33]Hamitt et al., Litigation Under the Federal Open Government Laws 382 (25th ed. 2010).

[34]Hamitt et al., Litigation Under the Federal Open Government Laws 382 (25th ed. 2010).

[35]Hamitt et al., Litigation Under the Federal Open Government Laws 382 (25th ed. 2010).

[36]Turner & Castellano, "FOIA Exemption 4," 17-7 Briefing Papers 1 (June 2017).

[37]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 603 (Spring 2017).

[38]U.S. Dep't of Justice, Office of Information Policy, Freedom of Information Act Reference Guide 266, 270–71.

[39]Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983).

[40]Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 38 (D.C. Cir. 2002).

[41]Jud. Watch, Inc. v. U.S. Dep't of Health & Human Servs., 525 F. Supp. 3d 90, 96 (D.D.C. 2021).

[42]Renewable Fuels Ass'n v. U.S. Envtl. Prot. Agency, 519 F. Supp. 3d 1, 8–9 (D.D.C. 2021) (internal citations omitted).

[43]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 614 (Spring 2017).

[44]N.Y. Times Co. v. U.S. Dep't of Justice, 19 Civ. 1424, 2021 WL 371784 (S.D.N.Y. Feb. 3, 2021).

[45]2021 WL 371784, at *9–10 (internal quotations, citations, and alterations omitted).

[46]Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 424 F. Supp. 3d 771, 776–79 (N.D. Cal. 2019).

[47]Jud. Watch, Inc., 525 F. Supp. 3d 90, 95–98.

[48]Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice, No. 19-cv-3626, 2021 WL 4502039, at *4–5 (D.D.C. Sept. 30, 2021).

[49]Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin., No. 19-3749, 2021 WL 4206594, at *5 (D.D.C. Sept. 16, 2021) (citing definition of "person" in 5 U.S.C.A. § 551(2)).

[50]2021 WL 4206594, at *5.

[51]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 603–04 (Spring 2017).

[52]Renewable Fuels Ass'n v. U.S. Envtl. Prot. Agency, 519 F. Supp. 3d 1, 9–10 (D.D.C. 2021) (quoting 5 U.S.C.A. § 552(b)(4)).

[53]519 F. Supp. 3d at 9–10.

[54]Flyers Rights Educ. Fund, Inc., 2021 WL 4206594, at *5.

[55]2021 WL 4206594, at *5.

[56]See Am. Small Bus. League v. U.S. Dep't of Def., 411 F. Supp. 3d 824, 830 (N.D. Cal. 2019); Turner & Castellano, "FOIA Exemption 4," 17-7 Briefing Papers 1 (June 2017).

[57]Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

[58]498 F.2d at 770.

[59]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 604–06 (Spring 2017).

[60]Castellano, "Where the Sunshine Meets the Shade: Using FOIA Exemption 4 To Protect Confidential Compliance Information After the 2016 FOIA Improvement Act," 46 Pub. Cont. L.J. 589, 604–07 (Spring 2017).

[61]Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879–80 (D.C. Cir. 1992) (en banc).

[62]Ittig, Lee, Turner, Castellano & Sherwood, "Feature Comment: The Supreme Court Reshapes FOIA Exemption 4," 61 GC ¶ 213 (July 24, 2019).

[63]Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019).

[64]139 S. Ct. at 2363.

[65]139 S. Ct. at 2363 (emphasis in original).

[66]Besson v. U.S. Dep't of Com., 480 F. Supp. 3d 105, 114–15 (D.D.C. 2020).

[67]Am. Small Bus. League v. U.S. Dep't of Def., 411 F. Supp. 3d 824, 830–33 (N.D. Cal. 2019).

[68]Animal Legal Def. Fund v. U.S. Food & Drug Admin., No. 12-cv-04376, 2021 WL 3270666, at *7–8 (N.D. Cal. Sept. 30, 2021).

[69]Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 470 F. Supp. 3d 1096, 1108–14 (N.D. Cal. 2020).

[70]Am. Small Bus. League, 411 F. Supp. 3d at 831; see Ctr. for Investigative Reporting, 470 F. Supp. at 1113.

[71]See e.g., Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin., No. 19-3749, 2021 WL 4206594, at *7 (D.D.C. Sept. 16, 2021).

[72]See e.g., Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv., No. 16-720, 2021 WL 1197726, at *5 (D.D.C. Mar. 29, 2021); Renewable Fuels Ass'n v. U.S. Envtl. Prot. Agency, 519 F. Supp. 3d 1, 11–12 (D.D.C. 2021).

[73]Ctr. for Investigative Reporting v. Dep't of Labor, No. 18-cv-02414-DMR, 2020 WL 2995209, at *5 (N.D. Cal. June 4, 2020); see also Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 470 F. Supp. 3d 1096, 1114 (N.D. Cal. 2020).

[74]U.S. Dep't of Justice, Office of Information Policy, Exemption 4 After the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media, https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media.

[75]Flyers Rights Educ. Fund, Inc. v. Fed. Aviation Admin., No. 19-3749, 2021 WL 4206594, at *8 (D.D.C. Sept. 16, 2021).

[76]Leopold v. U.S. Dep't of Justice, No. 19-3192, 2021 WL 124489, at *6 (D.D.C. Jan. 13, 2021); N.Y. Times Co. v. U.S. Dep't of Justice, No. 19-1424, 2021 WL 371784, at *14 (S.D.N.Y Feb. 3, 2021).

[77]N.Y. Times Co. v. U.S. Food & Drug Admin., 529 F. Supp. 3d 260, 285–86 (S.D.N.Y. 2021).

[78]Am. Small Bus. League v. U.S. Dep't of Def., 411 F. Supp. 3d 824, 833 (N.D. Cal. 2019).

[79]Flyers Rights Educ. Fund, Inc., 2021 WL 4206594, at *8; Siefe v. Food & Drug Admin., 492 F. Supp. 3d 269, 276 (S.D.N.Y. 2020).

[80]Am. Small Bus. League 411 F. Supp. 3d at 833–84.

[81]N.Y. Times Co., 529 F. Supp. 3d at 288 (internal citations, quotation, and alteration omitted).

NOTES:

BRIEFING PAPERS