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The Freedom of Information Act ensures a right of public access to information held by the executive branch. That right of access is constrained, however, by nine statutory exemptions. The line between disclosure and exemption frequently gives rise to litigation.

To be sure, litigation over whether an exemption precludes disclosure can be mundane. But in 2019, FOIA litigation got a little more exciting, as decisions by the U.S. Supreme Court–*Food Marketing Institute v. Argus Leader Media*–and the U.S. Court of Appeals for the Ninth Circuit–*Rojas v. Federal Aviation Administration*–fundamentally altered (or at least threatened to alter) the scope of two FOIA exemptions.

These decisions raised new questions about what constitutes "confidential business information" and whether government communications with third parties can, under any circumstances, constitute "intra-agency" communications for purposes of preserving privilege. The following article explores these two decisions and their implications for private parties seeking to obtain or withhold information under FOIA.

Exemption 4

Exemption 4 protects from public disclosure trade secrets and "commercial or financial information obtained from a person [that is] privileged or confidential." To justify withholding confidential business information under Exemption 4, the information at issue must be commercial or financial, obtained from a person, and privileged or confidential. The first two requirements are easily satisfied: records are considered "commercial or financial" provided they relate to a business or trade and the submitter possesses a commercial interest in the information contained in those records. And information is "obtained from a person" if submitted to the government by a third party. Until last year, however, demonstrating that information was "confidential" had proven much more difficult.

Argus

First, some history. In 1974, a decision from the U.S. Court of Appeals for the District of Columbia established what would become a 45-year benchmark for the meaning of confidentiality under Exemption 4. In *National Parks & Conservation Association v. Morton*, the D.C. Circuit articulated a two-prong test: information was "confidential" for purposes of the exemption only if its disclosure would "impair the [g]overnment's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." Following *National Parks*, the so-dubbed "substantial competitive harm" test was adopted by courts nationwide.

In 2019, however, the Supreme Court soundly rejected that test in *Argus*. Given the widespread embrace of *National Parks* in the lower courts, there was no reason to believe the Supreme Court would have any interest in the case. Yet it did, and upon review, the Court repudiated the "substantial competitive harm" test in its entirety. The Court criticized the test as being the result of a "selective tour" of FOIA's legislative history from a "bygone era of statutory construction," and for expanding the definition of "confidential" beyond the term's ordinary meaning. According to the Court, "confidential," as used when FOIA was drafted, "meant then, as it does now, 'private' or 'secret.'"

Using that definition, the Court identified two conditions that might inform the propriety of the government's withholding of documents under Exemption 4. First, "information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it." Second, "information might be considered confidential only if the party receiving it provides some assurance that it will remain secret."

Finding it "hard to see how information could be deemed confidential if its owner shares it freely," the Court held that the first condition must always be satisfied to justify an Exemption 4 withholding. The Court did not resolve, however, the necessity of the second condition, because in the case before it, a regulation had provided just such an assurance about the information that was sought. Ultimately, the Court held that "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."

Argus thus made it easier to demonstrate that information submitted is "confidential" by jettisoning any requirement for a showing of "substantial competitive harm" resulting from its disclosure. But the decision left unresolved the question of whether a submitter must receive an assurance of confidentiality from the government to invoke Exemption 4, and, if so, whether that assurance must be express or may be implied. This question may remain unanswered for the foreseeable future as agencies and courts begin to interpret and apply the new standard.

Initial Returns

Following *Argus*, the Department of Justice published guidance with "workable rules" to determine the propriety of a post-*Argus* Exemption 4 withholding. DOJ's guidance instructs agencies to consider not only whether the submitter keeps the information at issue confidential, but also whether the submitter received an assurance of confidentiality from the government at the time of submission. At the same time, DOJ's guidance expressly notes that *Argus* did not actually hold that an assurance of confidentiality at the time of submission is required, and that "it is yet unclear whether future judicial precedents governing Exemption 4 will require" an assurance.

DOJ's guidance states that "the party imparting the information … should customarily treat the information as private." That seems simple enough. The second condition—that the submitter receive an assurance of confidentiality from the government—requires a more nuanced analysis. And while *Argus* did not discuss what such an assurance, if required, must look like, DOJ instructs that an "assurance of confidentiality" may be either express or implied. "An express assurance of confidentiality can be established" by "direct communications with the submitter … general notices on agency websites, or, as in *Argus Leader*, through regulations indicating the information will not be publicly disclosed." An implied assurance, meanwhile, depends, in large part, on context, "[f]or example, an agency's long history of protecting certain commercial or financial information." The availability of an implied assurance, of course, provides a submitter with greater ability to argue that it did in fact receive an assurance at the time of submission.

District courts have also begun to construe *Argus*. At issue in *Am. Small Bus. League v. U.S. Dep't of Def.*, 411 F. Supp. 3d 824 (N.D. Cal. 2019), was a FOIA request submitted by the American Small Business League to the Department of Defense seeking the release of 2,000 pages of documents related to a number of defense contractors' participation in the DOD's Comprehensive Small Business Test Program, which was established to increase subcontracting opportunities for small businesses. DOD withheld certain responsive documents pursuant to Exemption 4. Several months before the *Argus* decision, the *ASBL* court denied cross motions for summary judgment, finding a genuine issue of material fact on whether the disclosure of the contested information would cause the contractor competitive harm.

In the wake of *Argus*, DOD and one of the contractors (which had intervened) filed a second motion for summary judgment, arguing that the contested information irrefutably had been kept confidential by the contractor and that DOD had assured the information would be kept confidential by the government. Subject to several exceptions for information that was actually generated by the government (i.e., not obtained from the contractors), the district court found that the "bulk" of the documents at issue were "confidential" as articulated by the Supreme Court in *Argus*, and that ASBL had failed to put forth evidence "to create a genuine issue of fact as to the information's confidentiality."

The district court also held that "assuming without deciding that the 'assurance of privacy' requirement applies here," an implied assurance was sufficient, and the government had demonstrated such an assurance had been provided based upon DOD's interactions with the contractors at the time the requested information was submitted.

The *ASBL* decision supports the view that *Argus* made it easier for the government to justify withholding documents under Exemption 4. Indeed, the court stated that "defendants need merely invoke the magic words—'customarily and actually kept confidential'—to prevail." In that court's view, requestors now face a "steep uphill battle under the new Exemption 4 standard."

Not everyone agrees. In *Center for Investigative Reporting v. U.S. Customs and Border Protection*, No. 18-2901 (D.D.C. Dec. 31, 2019), the Center for Investigative Reporting challenged the U.S. Customs and Border Protection's response to a FOIA request seeking records related to two CBP requests for proposals "to design and build prototypes for a new border wall on the U.S.-Mexico border near Chula Vista, California." CBP withheld a "small amount of Exemption [4] information" from 110 pages of responsive emails from contractors asking questions and expressing concerns about the RFPs. CIR argued that although the information sought may have been "commercial" and "obtained from a person" as required by Exemption 4, it was not "confidential."

The district court agreed. It held that CBP failed to provide an adequate foundation to support its confidentiality claims because CBP did not, for instance, demonstrate that the submitters had identified what parts of the emails were confidential, nor was there a general understanding that this information would be kept confidential. The court also found that CBP based its confidentiality claim on "how the industry as a whole treats the information," contravening the requirement that an agency show "how the particular party customarily treats the information."

Finally, the court found that CBP had failed to show that it gave the submitting parties an assurance of confidentiality sufficient to justify an Exemption 4 withholding. Although that part of the court's decision was not essential to its decision denying the government summary judgment, it suggests that the "assurance" question is likely to become a flashpoint in FOIA Exemption 4 litigation until the question is resolved in the appellate courts.

FOIA Improvement Act of 2016

The *ASBL* and *CIR* cases showcase one other post-*Argus* flashpoint. In both cases, the plaintiffs argued that notwithstanding *Argus*, the FOIA Improvement Act of 2016 requires that–before applying a FOIA exemption to withhold requested information–the government must show that it is "reasonably foresee[able]" that disclosure would "harm an interest protected by" the exemption.

Argus considered a FOIA request submitted prior to the enactment of the FIA, and therefore the Supreme Court did not consider the FIA or its impact on the application of Exemption 4. In *ASBL*, the plaintiff argued that the government had to demonstrate that it was "reasonably foreseeable" that the disclosure of the documents in question would result in competitive harm to the submitter, no different than under the *National Parks* "substantial competitive harm" test.

The *ASBL* court rejected this argument, explaining that the FIA was not a vehicle "to circumvent the Supreme Court's rejection of *National Parks*," "the relevant protected interest" under Exemption 4 for purposes of the FIA is the information's confidentiality itself, and "[d]isclosure would necessarily destroy the private nature of the information, no matter the circumstance."

In *CIR*, however, the court reached the opposite conclusion. Although the court did not expressly equate the FIA's "foreseeable harm" standard with the National Parks "competitive harm" test, the court stated that in light of the FIA, to withhold documents pursuant to Exemption 4, the government would have to show it believed "genuine harm" would befall the submitter's "economic or business interests" for the exemption to apply. Another court in the Northern District of California expressed the same sentiment, stating (in dicta) that the "FIA codifies the requirement that the agency articulate a foreseeable harm to an interest protected by an exemption that would result from disclosure" and observing that the government did not attempt to make such a showing. See *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, No. 4:19-cv-01843-KAW (N.D. Cal. Dec. 10, 2019). If there is any daylight between the FIA's "foreseeable harm" standard and the *National Parks* test, it is not obvious. This is another question to be resolved by the appellate courts in the wake of *Argus*.

FOIA Exemption 5

While the Supreme Court was busy making new law on Exemption 4, the Ninth Circuit Court of Appeals took on Exemption 5. Exemption 5 protects "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 generally protects documents that would be deemed privileged in the civil discovery context.

Although Exemption 5's coverage is broad, documents must meet the threshold requirement of being either "inter-agency or intra-agency memorandums or letters." FOIA defines the term "agency" to include "any executive department, military department, [g]overnment corporation, [g]overnment controlled corporation, or other establishment in the executive branch … or any independent regulatory agency." Nevertheless, many courts of appeals have held that in certain circumstances, communications between a non-governmental third party, working at the direction of the government, may qualify as "intra-agency" for purposes of Exemption 5. This so-called "consultant corollary" allows agencies to protect communications with non-governmental experts. While it has acknowledged the lower courts' use of the consultant corollary, the Supreme Court has never expressly adopted it. See *U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

In relevant guidance, DOJ has explained that, "[i]n these cases, courts have emphasized that the agencies sought this outside advice, and that in providing their expertise, the consultants effectively functioned as agency employees, providing the agencies with advice similar to what it might have received from an employee."

Despite the near unanimous recognition of the consultant corollary among the courts of appeal, in 2019, the Ninth Circuit declined to adopt it. In *Rojas*, the court held that the consultant corollary was "contrary to Exemption 5's text and FOIA's purpose to require broad disclosure." The case concerned a FOIA request seeking information regarding a test used by the Federal Aviation Administration to screen air traffic control candidates. The FAA refused, citing Exemption 5. The district court granted summary judgment in favor of the FAA, finding the agency properly withheld as attorney work product under Exemption 5 nine pages of documents relating to the screening test that a third-party company prepared at the direction of FAA attorneys.

In reversing, the Ninth Circuit explained that "[b]y its plain terms, Exemption 5 applies only to records that the government creates and retains" and as a result, a "third-party consultant … is not an agency as that word is used in FOIA, generally, or Exemption 5, particularly." The court further held that the "consultant corollary allows the government to withhold more documents than contemplated by Exemption 5, contrary to FOIA's policy favoring disclosure and its mandate to interpret exemptions narrowly." And although the Ninth Circuit acknowledged that its ruling would grant FOIA requesters access to material that might be privileged in the civil discovery context, the court was "not convinced that the potential harm to the government warrants adopting the consultant corollary's broad reading of Exemption 5."

Although the Supreme Court has rejected any suggestion that parties litigating against the government "can obtain through … FOIA material that is normally privileged," the Ninth Circuit's decision in *Rojas* permits just that. Communications between the government and third parties working at the government's direction have been recognized as privileged communications in civil litigation. The dissent worried that the majority's decision would allow parties litigating against the government to circumvent the government's legitimate claims of work product and attorney client privilege, even beyond the "consultant corollary" context.

That is unlikely to happen soon, however. On Jan. 30, 2020, the Ninth Circuit granted a DOJ petition to have *Rojas* reheard *en banc*. See *Rojas v. Fed. Aviation Admin.*, 948 F.3d 952 (9th Cir. 2020).

Observations

Argus and *Rojas* have upended (or, in the case of *Rojas*, at least startled) the traditional understandings of Exemptions 4 and 5. And as is so often true, those decisions raised as many questions as they answered.

For all of *Argus*'s wisdom in rejecting the *National Parks* test, the Court's decision itself muddied the water by asking—without answering—the question of whether the government must show it gave the submitter of information an assurance of confidentiality or privacy. But if an assurance is required, as a practical matter, an implied assurance must suffice. The U.S. government receives reams of information from non-governmental parties every year related to the myriad programs that make up the vast federal administrative state. It would be unrealistic to expect federal agencies—through contracting officers or other agency program officers receiving information—to provide express "assurances" of confidentiality every time they receive information from a private party.

Indeed, it is mind-boggling even to contemplate the resources that would require. Nor is it reasonable to expect agency FOIA offices to assess the confidentiality of information and provide any such assurance of confidentiality at the point of intake—that is not the role of FOIA offices and, again, the resources it would take to implement such a review would be staggering and impracticable.

FOIA itself already provides built-in assurances of privacy. Exemption 4 exists to protect information that customarily is not made public. And the implementing regulations of all federal agencies already provide assurances to submitters that, if their records are ever the subject of a FOIA request, they will be afforded the opportunity to object to disclosure on grounds of confidentiality before the records are released.

It is for that reason that entities submitting confidential information to the government are encouraged to stamp their records as "CBI" or the like, to trigger Exemption 4 review if necessary. It should only matter that information was confidential at the time of its submission, kept confidential by the agency in the normal course and, in the face of a FOIA

request, the submitting party is provided an opportunity to argue against that information's disclosure. No further "assurances" should be required.

For now at least, the DOJ guidance noted above seems to strike the right balance. Although the authors believe it is unnecessary to refer to it as an "assurance" of confidentiality, the idea that such an assurance can be shown through the agency's course of dealing makes sense. After all, if the agency routinely makes the submitter's information available to the public, there would be no need for the FOIA request in the first place because the information would already be available. Exemption 4 exists precisely for the situations—frequent at that—where the agency has not made a submitter's confidential information available to the general public. Nonetheless, we expect the "assurance" question to spark plenty of FOIA litigation going forward.

So too, will the import of the FIA. Its "foreseeable harm" requirement already has provided FOIA requestors with a basis to argue that Exemption 4 continues to require a showing of competitive harm notwithstanding the Supreme Court's decision in *Argus*. And although that argument should be rejected out of hand precisely because it argues for the functional repudiation of the Supreme Court's rejection of the *National Parks* test, as noted above, the argument has had some success.

We expect that, upon appellate review, the *Argus* definition of "confidential" will be read in harmony with the FIA's "foreseeable harm" requirement—for purposes of Exemption 4, the foreseeable harm resulting from disclosure is to the confidentiality of the information itself. No further showing of "competitive harm" should be required. To hold otherwise would be to cabin *Argus*, a decision issued in 2019, to only FOIA requests submitted prior to the 2016 implementation of the FIA. It should suffice that the Supreme Court likely would not have revisited and rejected the 45-year-old *National Parks* test if it thought that test would be re-imposed almost immediately.

As for Exemption 5, the salient question is whether FOIA may be used as a tool to access otherwise privileged communications between the government and third parties. As noted above, it is not clear that was ever the intent of FOIA, but that is the import of the initial *Rojas* decision. Depending on how the Ninth Circuit rules following its *en banc* review, the Supreme Court may once again be called upon to weigh in on a prominent FOIA exemption.