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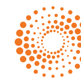
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Focus

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FEATURE COMMENT: *Argus Leader* After A Year In The Wild: Judicial Application Of FOIA Exemption 4 In The Post-*Argus Leader* World

In June 2019, the Supreme Court fundamentally reversed course from decades of Freedom of Information Act (FOIA) Exemption 4 case law in its decision in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019); 61 GC ¶ 213. In this ruling, the Supreme Court jettisoned (indeed, mocked and pilloried) the D.C. Circuit's long-standing principle that information was not protected by Exemption 4 unless its release was likely to cause "substantial competitive harm" to the submitter. Justice Gorsuch, in a straightforward deconstruction, found that harm was mentioned nowhere in Exemption 4, and should not be placed there by judges.

Argus has, as the Court no doubt intended, led many lower courts to apply a much simpler test for application of Exemption 4. Where the facts are as they were in *Argus*, i.e. where a submitter provides information to the Government that it otherwise keeps confidential, and the Government provides the submitter with an explicit assurance of confidentiality, the analysis is over, and the information is properly withheld. In these cases, following courts have required no showing that release of the material would cause competitive harm, explicitly citing *Argus* as overruling this prior test used by the D.C. Circuit in cases such as *National Parks*.

So far, so good, and so predictable, given the intentionally simple *Argus* analysis. The opinion in *Argus* is only 12 pages long, and is a good example of a case chosen for streamlined facts that enable the Court to render a basic principle clearly. But not every case will present the same facts as *Argus*; indeed few have. Therefore, the legacy of *Argus,* so far as it can be determined after 18 months in the wild, has included attempts by courts to wrestle with issues that the Court, either intentionally or not, left out of its intentionally simple analysis. While some cases have fit easily into the *Argus* mold, others have presented more complex circumstances, and courts and practitioners have had to fill in gaps and account for complications not presented by the original *Argus* facts. Courts have wrestled with whether affirmative assurances of confidentiality from the agency are needed, whether the submitter has demonstrated that submitted information has actually been kept confidential, whether the impact of the 2016 FOIA Improvement Act has an impact on *Argus*, and more.

Argus started in a gilded cage, its clean, simple facts allowing the Court to make a strong textualist point. In the 18 months since its release, however, it has evolved, and will continue to evolve as it is applied to less carefully chosen facts.

***Argus* in Captivity**—The Court in *Argus* overturned a broadly accepted, 45-year-old D.C. Circuit precedent establishing the framework for consideration of claims that information submitted to the Government should not be released under FOIA due to the application of Exemption 4, for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 USCA § 552(b)(4). Under this precedent, courts asked whether disclosure of submitted materials was likely either: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

The Supreme Court in *Argus* rejected this test as inconsistent with the plain language of Exemption 4, which contains no reference to competitive harm. Instead, the Court relied on the ordinary

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definition of “confidential” as merely “private or secret” as opposed to harmful. 139 S. Ct. at 2362–63. The Court identified two circumstances under which information might qualify as confidential: when it is “customarily kept private” or if it was provided under “some assurance that it will remain secret.” In *Argus*, the information was customarily kept confidential, and the agency explicitly assured the submitter that the information submitted would not be released. The Court held that under those circumstances, the information qualified for Exemption 4.

The decision in *Argus* provides as clear an illustration of a textualist approach to statutory interpretation as is likely to be found. Indeed, *Argus* has become a leading statement on this topic. According to Westlaw, *Argus* has been cited more than 40 times for its textualist lessons (Headnotes 13 and 7). This is more than twice as many citations as for its actual FOIA holding (Headnote 17). The argument for the *National Parks* test has some natural force in the context of FOIA as a disclosure statute. If the statute was intended to err on the side of disclosure, as it surely was, the D.C. Circuit’s harm test acted to prevent frivolous or reflexive assertions of protection. But Justice Gorsuch was having none of this, observing simply that the statute should mean what it said when it said FOIA did not apply to “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Harm does not appear, he observed, so it is not to be added.

Having said this much, he elected to say nothing else, leaving the elaboration and resolution of special cases to the lower courts. In the past 18 months, we have observed exactly that, and several unique post-*Argus* litigation themes have evolved. We discuss several of them below, though this is not an exhaustive list.

Are Assurances of Confidentiality Required?—In *Argus*, the Court held that where the Government provided explicit assurances of confidentiality, Exemption 4 could apply. *Argus*, 139 S. Ct. at 2362–63. Justice Gorsuch himself asked the natural follow-up question: “Can privately held information lose its confidential character for purposes of Exemption 4 if it’s communicated to the government ***without*** assurances that the government will keep it private?” Id. at 2363 (emphasis added). Having asked it, however, he gave no answer.

Predictably, this question has animated great concern in the wake of the decision, and it has occupied the attention not only of courts, but of the Department of Justice, which conducts FOIA litigation on behalf of the Government. Likely not wishing to impose new burdens on Government officials to police the FOIA status of every document they receive, DOJ in October of 2019 issued public guidance asserting that implicit, or constructive, assurances should qualify under the *Argus* test, and could be implied from a course of Government action or the regulations of an agency:

> [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.

See *www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media*.

Courts have addressed this issue in various ways, and have generally agreed with DOJ, when they have addressed the issue. Some courts have avoided stating clearly whether assurances are ***required***, preferring instead to find that assurances do exist, thus mooting the issue even without clear evidence. For example, in *Friends of Animals v. Bernhardt*, the agency provided the submitter privacy notices “assur[ing] submitters that their information will not be given, sold, or transferred to third parties ***except as required by law***.” 2020 WL 2041337, *11 (D. Colo. April 24, 2020) (emphasis added). Despite the provision in these notices allowing release of the submitted material “as required by law [i.e. FOIA,]” the court found the notices to be a direct assurance of confidentiality. The court avoided the issue by observing that “information *could* be disclosed pursuant to FOIA,” but that is “true of all information held by the government.” Id. (emphasis in original). In other words, the court found the notice to simultaneously mean nothing and to express an explicit assurance of confidentiality. By such means, the court avoided the need to fill in Justice Gorsuch’s blank with an explicit ruling.

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Several other courts dealing with cases without an affirmative assurance of confidentiality have grasped the nettle more firmly, and agreed with DOJ that implied assurances are sufficient and a relatively easy burden to meet. For example, in *Citizens for Responsibility and Ethics in Washington v. Dep't of Commerce*, the U.S. District Court for the District of Columbia (DDC) "assumed" that some assurance of confidentiality was required (without analysis) and that any such assurance could be express or implied. 2020 WL 4732095, *3 (D.D.C. Aug. 14, 2020). The court then found the "context" in which the submitter provided the information (emails containing business information sent to a public official "to grow its business in foreign markets") supported that the submitter did so under an implied assurance of confidentiality.

Another DDC judge applied the same analysis in *David H. Besson v. Dep't of Commerce*, holding that "context shows that the information was supplied under an implied assurance of confidentiality," without explaining whether or why such a finding was required for Exemption 4 withholding. 2020 WL 4500894, *5 (D.D.C. Aug. 5, 2020). In that case, the requisite "context" was simply that a private company provided sensitive commercial and financial information to the Government in the process of negotiating a cooperative research and development agreement, emphasizing how easy such an implied assurance is to demonstrate.

Acceptance of constructive or implied assurances appears to be the direction of the law, and it neatly addresses Justice Gorsuch's open question. The question of constructive assurance, however, places a litigable fact issue on the table that requesters have begun to exploit, and they will likely continue to do so. While we are aware of no cases denying Exemption 4 withholding to information because of an absence of assurances of confidentiality, the DDC seemed to come close to such a holding in rejecting a submitter's declarations that were supposed to establish confidentiality of submitted information for lack of sufficient foundation in *Ctr. for Investigative Reporting v. U.S. Customs and Border Prot.*, 436 F. Supp. 3d 90 (D.D.C. 2019). As a "deficiency" of the declarations (one among several), the chief judge of the DDC noted that "defendants have not satisfied a potential additional requirement recently highlighted by the Supreme Court"—assurances of confidentiality. Id. at 112. The chief judge found it not necessary to decide if such assurances were required at this juncture, but noted if it were required, defendants would have failed the requirement. Id.

Even though no court has applied the assurances of confidentiality prong of *Argus* to reject a withholding claim under Exemption 4, enough courts have utilized a "belt-and-suspenders" approach—finding implied assurances to exist, whether or not they are required—that submitters would be wise to fully brief and argue the existence of such assurances just in case. Critically, this should include preservation of documentation of agency course-of-dealing that can be used to establish that the agency agreed with (or did not object to) submitter markings and statements that material is being submitted with an expectation of confidentiality. If the agency has any regulations that govern confidentiality, these should be explicitly cited in all submission correspondence.

Increased Litigation Surrounding the Nature of Confidentiality—Under the previous *National Parks* analysis, the majority of complex fact-finding in FOIA cases arose under the competitive harm prong. Submitters introduced details regarding the relevant competitive landscape and sought to show through affidavits and expert testimony that the information to be released would either directly reveal competitively sensitive information, or that competitively sensitive information could be derived from the information sought. In cases like *McDonnell Douglas I* and *II*, the D.C. Circuit reviewed extensive analysis of pricing and other data to assess whether the released numbers could be used to derive conclusions that a competitor could use against a submitter in future competitions. See *McDonnell Douglas Corp. v. Nat'l. Aeronautics and Space Admin.*, 180 F.3d 303, 305 (D.C. Cir. 1999); 41 GC ¶ 313; *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F. 3d 1182, 1189 (D.C. Cir. 2004). These disputes over the impact of the requested release were the pivot around which the factual disputes in most FOIA litigation would turn.

After *Argus*'s rejection of the *National Parks* harm standard, this battle over details has been largely superseded (though, see below regarding the 2016 FOIA Amendments). The Court in *Argus* required only that the submitter demonstrate that the information in dispute "is both customarily and actually treated as private by its owner." *Argus Leader*, 139 S. Ct. at 2366. In many pre-*Argus* cases dealing with involuntarily submitted information (see

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discussion of *Critical Mass* below), the parties would simply stipulate to confidentiality and litigate harm. Since *Argus*, however, cases have arisen in which plaintiffs have demanded detailed discovery and proof that a company truly has treated its information as confidential.

These efforts have borne significant fruit in some cases. In *Am. Small Bus. League v. U.S. Dep't of Def.*, for example, the submitter provided various affidavits of company personnel with some authority over the documents in question. The plaintiff heavily attacked the details of these affidavits, and demanded depositions and document discovery to explore issues raised in the submissions. The court agreed and ordered full discovery on the question of confidentiality. 411 F. Supp. 3d 824, 830–33 (N.D. Cal. 2019).

More recently, in *WP Co. LLC d/b/a The Washington Post et al. v. U.S. Small Bus. Admin.*, the agency argued that non-confidential CARES Act loan data sought under FOIA could be used to derive different submitter information that is confidential. In an analysis reminiscent of the old *McDonnell Douglas*-era competitive harm cases, the DDC carefully assessed the agency's assertion that competitors could derive confidential information from the summaries and partial details contained in the requested documents. The court found the derivation of the supposedly confidential information to be too tenuous and ruled that Exemption 4 did not apply. 2020 WL 6504534 (D.D.C. Nov. 5, 2020) (finding no "clear mathematical relationship" necessarily revealing confidential information).

While in the immediate aftermath of *Argus*, some commentators predicted the end of fact-intensive litigation surrounding withholding under Exemption 4, that has proven to not be the case. See, e.g. Hoover, J., "Justices Expand Protection Of Confidential Contractor Info," Law360 ("Under this new standard, it will be much easier for contractors and other entities to fit within the exemption to disclosure. It will also be more difficult to use FOIA to collect business intelligence about competitors."). The *Argus* decision has simply shifted these detailed, extensive—and expensive—fights to other issues, from competitive harm to the nature of confidentiality and agency intent.

We note that the *Argus Leader* confidentiality standard shares much with the "voluntary disclosure" standard proposed as a gloss on the *National Parks* test by the D.C. Circuit in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992). In *Critical Mass*, the Circuit held that a voluntary submitter only had to show that its information was "of a kind that would customarily not be released to the public" to obtain Exemption 4 protection. *Critical Mass*, 975 F.2d at 879. Indeed, the legacy of *Argus Leader* could credibly be expressed as the erasure of the distinction between involuntarily and voluntarily submitted material, and the vindication of the *Critical Mass* standard. This is an appealing reading, as the judges that decided *Critical Mass* considered overruling *National Parks* on a similar basis to that which the Court eventually cited in *Argus Leader*—lack of textual support. See *Critical Mass*, 975 F.2d 882 (Randolph, J., concurring, implying that a court applying *National Parks* approaches "a point of departure that is genuinely not to be found within the language of the statute, [and] finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction."), quoting *NLRB v. Int'l Bhd. of Elec. Workers*, 481 U.S. 573, 597–98 (1987) (Scalia, J., concurring). The court in *Critical Mass* decided they could not overcome *stare decisis*, while the Supreme Court in *Argus* felt no such compunctions.

Impact of the 2016 FOIA Amendments— While the "substantial likelihood of competitive harm" *National Parks* standard was eliminated—declared baseless and incorrect—by the Court in *Argus*, another iteration of the harm test has arisen in post-*Argus* FOIA litigation based upon the amendments to FOIA passed within the 2016 FOIA Improvement Act. Under the terms of the 2016 Amendments, an agency may apply a FOIA exemption only when it "reasonably foresees that disclosure would harm an interest protected by" the exemption applied. 5 USCA § 552(a)(8)(i)(I). This standard of "reasonably foreseeing" some "harm" is phrased differently than the *National Parks* requirement for a "likelihood of substantial competitive harm," but FOIA plaintiffs have nevertheless sought—with some success—to argue that this language limits the reach of *Argus* (which related to pre-2016 Amendment requests). According to these plaintiffs, the Amendments apply a statutory harm standard to Exemption 4 nearly identical to the judge-made standard rejected by *Argus*, and essentially re-impose the *National Parks* standard upon all requests filed after the effective date of the Amendments (June 30, 2016).

The success of this argument depends in the first instance upon whether it is made at all. Many

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cases relating to post-2016 FOIA requests have applied *Argus* as removing the harm standard without any discussion of (or reference to) the 2016 Amendments, leaving open the question of whether the Amendments played any role in the case. See, e.g., *Friends of Animals v. Bernhardt*, 2020 WL 2041337 (D. Colo. April 24, 2020) (straightforward application of *Argus* with no mention of 2016 amendments); *WP Co. LLC d/b/a The Wash. Post et al. v. U.S. Small Bus. Admin.*, 2020 WL 6504534 (D.D.C. Nov. 5, 2020) (same).

Where courts have addressed this issue, plaintiffs have met some success—but by no means universally. In fact, two different judges in the Northern District of California reached directly opposing views on the matter. *Ctr. for Investigative Reporting v. U.S. Dep't of Labor* is the first case we are aware of to apply the 2016 Amendments post-*Argus* to require a showing of competitive harm, albeit in dicta. In that case, the court found that the "FOIA Improvement Act's 'foreseeable harm' requirement replaces to some extent the 'substantial competitive harm' test that the Supreme Court overruled" in *Argus* and requires defendants to "explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would harm an interest protected by this exemption, such as by causing 'genuine harm to [the submitter's] economic or business interests.' " 436 F. Supp. 3d 90, 113 (N.D. Cal. 2019) (quoting the *Argus* concurrence). Compare this to *Am. Small Bus. League v. U.S. Dep't of Def.*, *et al.*, in which the court squarely rejected plaintiff's assertion that the 2016 FOIA Amendments enshrined a mandatory harm test applicable to Exemption 4. 411 F. Supp. 3d 824, 835–36 (N.D. Cal. 2019) (finding "the Supreme Court expressly discredited that notion").

At this time, it is unclear how this question will be resolved, and what final impact the 2016 FOIA Amendments have upon the withholding analysis under *Argus* and Exemption 4, but this issue will likely resurface in cases going forward.

Best Practices and Pre-Release Consultation—For many companies, the practical impact of *Argus* has been to change the focus of submissions justifying the withholding of their confidential commercial information under Exemption 4 but not necessarily to reduce the burden of preparing these submissions. Upon *Argus*'s release, there was great speculation in the contracting and legal community about the end of significant Exemption 4 withholding disputes, as whether or not a company maintains certain information as confidential would seem to be a knowable and non-controversial fact. This has not turned out to be the case. As described above, Exemption 4 litigation thus far in the post-*Argus* world has retained its battle-of-the-declarations characteristic, with the focus of declarations merely changing from competitive harm to confidentiality.

Agencies have not been consistent in their approaches. Contractors have been surprised to receive pre-disclosure notifications from federal agencies post-*Argus* that continue to request a justification of withholding on the basis of competitive harm. Many of these seen by the authors have continued to cite *National Parks*. Whether these agencies have simply not updated their form notification letters or are taking a stand regarding the application of the 2016 FOIA Amendments is unclear, but *Argus*, and the disparate agency response to it, raise questions about what pre-disclosure consultation between agencies and requesters will look like in coming years.

Alert contractors have been caught in the middle, needing to justify withholding based on two standards—one asserted by the agency, and the other proclaimed by the Supreme Court. DOJ, meanwhile, has sought to define the new standard, issuing guidance instructing agencies to utilize pre-disclosure notifications to request submitters' views on the confidentiality of the requested materials, without referencing competitive harm. (See *www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media*.)

Conclusion—*Argus* precedent continues to evolve as courts adapt the unique facts of their cases to the sparse terms of the Supreme Court's holding. The issues above have arisen consistently, but other issues are as yet untested. What will happen if an agency not only issues a pre-release notice using the old standard, but bases its release decisions on it? What is the current relation between the Trade Secrets Act and Exemption 4? As DOJ has stated in its most updated Exemption 4 guide, "nearly every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be coextensive." See Department of Justice Guide to the Freedom of Information Act, "Exemption 4" at 18–19. However, the cases cited by DOJ, including *Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37 (D.C. Cir. 2008), and *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), are themselves

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explicitly based on *National Parks*. It seems likely this relationship will be recognized under the new interpretation, but this issue has not yet been tested. DOJ, for its part, has issued helpful statements on some of the flashpoints noted above, but these statements have not been adopted across the Government, and have not been fully tested by the courts.

The resulting uncertainty means that *Argus* has in many cases increased, rather than lessened, the burden on contractors seeking to protect their information. This is ironic given the expectations that *Argus* would render Exemption 4 protection easier to establish.

This Feature Comment was written for The Government Contractor by* Stuart Turner, Amanda Sherwood *and* Kristen Ittig*, members of Arnold & Porter's Government contracts practice and resident in the firm's Washington, D.C. office. Together with their colleagues, they counsel and litigate on behalf of Government contractors, including on FOIA matters.

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