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FEATURE COMMENT: The Supreme Court Reshapes FOIA Exemption 4

Companies submit to the Government all manner of business records that contain trade secrets or confidential commercial or financial information. The U.S. Supreme Court has fundamentally changed the legal landscape for companies seeking to prevent disclosure of such records under Freedom of Information Act (FOIA) Exemption 4. In *Food Mktg. Inst. v. Argus Leader Media,* 139 S. Ct. 2356 (June 24, 2019); 61 GC ¶ 199, the Court overturned a broadly accepted, 45-year old U.S. Court of Appeals for the District of Columbia precedent established in *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). *National Parks* held that to fall within the FOIA exemption for "confidential" materials, companies had to demonstrate that disclosure of mandatorily submitted materials would likely cause substantial competitive harm. For decades, *National Parks* provided the framework under which companies, agencies and courts analyzed FOIA's exemption for confidential commercial or financial information.

After *Argus*: "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*, 139 S. Ct. at 2366. No proof of competitive harm need be offered. In certain circumstances, the end of the "competitive harm" standard simplifies the test for withholding under FOIA Exemption 4, but important questions and potential risks remain. Most notably, the Court left open the question of whether Exemption 4 requires an assurance of confidentiality from the Government. Companies that submit valuable, competitively sensitive information to federal agencies should be aware of what will certainly be a developing area of jurisprudence. The Court has swept away the old structure; it remains to be seen what will fill the void.

This Feature Comment explains the *Argus* holding and its implications, and identifies the principal questions to be resolved. While most of these questions lack a clear answer, the Department of Justice brief submitted to the Supreme Court in *Argus* sheds some light on what the Government's position may be when interpreting *Argus* going forward.

Context: FOIA Exemption 4 Before *Argus*— FOIA provides that all federal agency records are accessible to the public unless specifically exempt from disclosure, and it permits the public a broad right to receive information that federal agencies hold, including information both generated by agencies and submitted to agencies by private parties. 5 USCA § 552(a). Recognizing that some information must legitimately be kept confidential, FOIA includes nine exemptions, ranging from personal information to internal Government deliberations and other categories. Id. § 552(b). The most relevant exemption for Government contractors, Exemption 4, allows agencies to withhold from release any documents containing "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Id. § 552(b)(4). While the language of FOIA exemptions is permissive—allowing rather than requiring agencies to withhold exempt information—courts have found that the Trade Secrets Act generally prohibits release of information covered by Exemption 4, and thus "a finding that requested material falls within Exemption 4 will be tantamount to a determination that the agency cannot reveal it." *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1144 (D.C. Cir. 1987).

Exemption 4 is critically important to companies that submit proprietary and confidential infor-

mation to Government agencies, as it is the primary mechanism by which companies submitting such information can prevent public release in response to a FOIA request. Recognizing the importance of protecting sensitive company information from public release, Executive Order 12600 requires agencies to give submitters notice and an opportunity to object before releasing information that may be covered by Exemption 4. 52 Fed. Reg. 23781 (June 23, 1987). If the agency disagrees with a company's assertion that certain information should be protected from release, it must give the submitter sufficient notice to allow the submitter to go to court and seek an injunction by filing a so-called "reverse FOIA" suit, on the theory that the agency decision to release information protected by FOIA Exemption 4 is actionable under the Administrative Procedure Act. See e.g., *Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008); 50 GC ¶ 74; *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

While there are several considerations relevant to qualifying for Exemption 4 protection, the most challenging has often been demonstrating that the information at issue qualifies as "confidential." In *National Parks*, the D.C. Circuit held that information submitted to the Government is confidential only "if disclosure of the information is likely to have either of the following effects: (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." 498 F.2d at 770. In *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, the D.C. Circuit, sitting en banc, later held 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. 975 F.2d 871, 884–85 (D.C. Cir. 1992). This created the so-called "*Critical Mass* distinction," which led to disputes over whether certain submissions (and categories of submission) were voluntary or involuntary, as submitters sought to avoid the more onerous *National Parks* test of likely substantial competitive harm. The Supreme Court's *Argus* decision sweeps away the *National Parks* test, making obsolete decades of precedent interpreting the "competitive harm" requirement and leaving uncertainty in its place.

Argus*: The Supreme Court Bulldozes *National Parks—In *Argus*, the Supreme Court rejected as inconsistent with the plain language of Exemption 4 the *National Parks* requirement to demonstrate likely substantial competitive harm. The Court gave no deference to the D.C. Circuit's prior reliance on legislative history, contemporaneous congressional debate transcripts, and similar documents, dismissing such reliance as "a relic from a bygone era of statutory construction." *Argus*, at 139 S. Ct. at 2363–65. The Court instead searched for, and did not find, any concern for competitive harm in the text of Exemption 4, and so rejected this implied requirement. In doing so, the Court effectively created a new test for withholding under Exemption 4, while leaving many of the particulars of that new test open for interpretation.

Argus arose in the context of a FOIA request to the U.S. Department of Agriculture (USDA) from a South Dakota newspaper seeking information about participants in the Supplemental Nutrition Assistance Program (SNAP). USDA declined to release store-level SNAP data, invoking FOIA Exemption 4. The Argus Leader sued USDA, seeking disclosure of the withheld data. Applying the *National Parks* test, which was controlling law in the district in which the lawsuit was brought, the district court held a bench trial to determine whether disclosure of the store-level SNAP data would cause substantial competitive harm to participating retailers, concluded that the retailers failed to establish that such substantial harm would occur, and ordered disclosure. The Court of Appeals for the Eighth Circuit affirmed. Id. at 2360–62. The Supreme Court granted certiorari to consider whether FOIA Exemption 4 requires a showing of substantial competitive harm, a question which, despite nearly five decades of lower court application of the *National Parks* test, the Supreme Court had never considered.

The Court, in a decision authored by Justice Gorsuch, reversed the 8th Circuit's decision and explicitly overruled *National Parks*. Justice Gorsuch first analyzed the plain language of Exemption 4 and the dictionary definition of the term "confidential" existing at the time FOIA was enacted in 1966, concluding: "The term 'confidential' meant then, as it does now, 'private' or 'secret.' " Id. at 2362–63. The decision identifies 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." Id.

Justice Gorsuch explained that the first of these conditions must be met to qualify for Exemption 4 protection, as "it is hard to see how information could be deemed confidential if its owner shares it freely." Id. at 2363. There was no dispute that this first condition was satisfied in the case at issue; the information withheld was not disclosed or made publicly available.

It was also undisputed that USDA had assured the retailers store-level SNAP information would be kept confidential, so the Court ended its inquiry there. The Court specifically declined to answer the question of: "Can privately held information *lose* its confidential character for purposes of Exemption 4 if it is communicated to the government without assurances that the government will keep in private?" Id. (emphasis in original).

***Argus* Simplifies Contractors' Burden for Establishing Exemption 4 Protection for Certain Categories of Information**—In certain respects, *Argus* has simplified the burden contractors face for establishing Exemption 4 protection. At a minimum, the *National Parks* substantial competitive harm showing is no longer required to assert that Exemption 4 applies. Contractors will no longer need to submit detailed declarations to agency FOIA offices providing a line-by-line explanation of the competitive harm that would follow release of the underlying information. That being said, concerns of competitive harm may still play a role in FOIA litigation, particularly when determining whether injunctive relief is warranted.

Argus also provides absolute clarity that for information to be protected under Exemption 4, it must actually be kept private by its owner. This was always the law. It remains important for companies to maintain information control procedures and document the existence and implementation of those procedures. Given the reconfirmed importance of this element of Exemption 4 analysis, contractors may take this opportunity to revisit their information control procedures and documentation thereof. Measures include:

- Review and revise as necessary internal company policies regarding information control;
- Ensure employee trainings emphasize the importance of information control and regular marking of confidential information;
- Revisit form non-disclosure agreements used when confidential information is provided to suppliers and customers.

If confidential treatment is established, and, as in *Argus*, the information is submitted with a Government assurance of confidentiality, then *Argus* makes clear that the information is protected by Exemption 4.

While, as discussed below, there are many open questions as to what may constitute an adequate assurance of confidentiality, in some cases, as in *Argus*, the assurance will be clear. That is particularly true where formal statutory, regulatory or contractual rights prevent the Government from releasing information. For example, multiple regulatory and contractual provisions limit federal agencies' authority to disclose technical data and computer software delivered to the Government with less than Unlimited Rights. As another example, for certain applications to market new drugs, Food and Drug Administration regulations provide: "If the existence of an unapproved application or abbreviated application has not been publicly disclosed or acknowledged, no data or information in the application or abbreviated application is available for public disclosure." 21 CFR § 314.430. There should be no doubt that such information is submitted with an assurance of confidentiality from the Government, and therefore, as long as that information is held in confidence by the submitter, it should be protected by Exemption 4 without further question.

Even absent an express statutory or regulatory regime providing for confidentiality as a matter of law, depending on the circumstances of any given submission, the Government may have provided an assurance of confidentiality by other means. In such cases, where the submitter holds information privately and submitted it to the Government with such an assurance of confidentiality, *Argus* holds that the information is protected under Exemption 4, regardless of any competitive harm that may result from disclosure.

Important Questions Remain—While the Court was clear that information may be protected under Exemption 4 when it is submitted to the Government with an assurance of confidentiality, the Court left open whether information submitted without such assurances merits protection. This threshold issue will likely take some time to filter through the courts. Courts requiring an assurance of confidentiality will need to further explore what constitutes an adequate assurance, which raises many complex questions. For example:

- For information submitted to the Government before *Argus*, does the 45 years of precedent

following *National Parks* itself provide the assurance of confidentiality needed to establish that the submitter had a reasonable (and, at least at the time, legally enforceable) expectation that the information would be held in confidence? In other words, if the purpose of the "assurance of confidentiality" inquiry is to ensure that a company did not waive confidentiality upon submission to the Government, can a company satisfy that standard by explaining that they submitted non-public, competitively sensitive information to the Government based on their understanding that, under decades of well-established pre-*Argus* precedent, agencies were prohibited from releasing such information based on the substantial competitive harm that would likely follow its release?

- Multiple cases have held that the Trade Secrets Act, 18 USCA § 1905, precludes agencies from releasing information protected by Exemption 4. But many of those cases addressed the *National Parks* harm standard. Are those cases still good law? Is the Trade Secrets Act itself an assurance of confidentiality for the types of information specified therein?
- In the absence of clear legal authority that assures confidentiality, what form of assurance will suffice? Contractors may consider seeking an express assurance of confidentiality from an agency before submitting confidential information. But asking for express assurance may in some cases only serve to invite an express rejection of confidentiality, or may simply be met with silence before an approaching deadline. Depending on the circumstances, submitters may choose to document contemporaneous indications that information is being submitted with confidentially, without going so far as to ask for a formal, written assurance. Will implicit assurance suffice? Can individual agency personnel provide the necessary assurances in any event? Which agency personnel have the authority to provide such assurance? Can the Government change its position after submission?
- For information that is actually held privately, can submitters create constructive assurance by marking information as submitted "under assurances of confidentiality" (for example, in a cover note or in a marking on submitted documents) based on prior practice or informal discussion with the Government? Will such statements provide a shield, be helpful but not dispositive, or be disregarded?

Courts may be reluctant to interpret Exemption 4 to require Government assurance of confidentiality, thus avoiding the need to resolve thorny issues such as those identified above. If an assurance *is* required, however, this could effectively allow agencies (potentially individual agency personnel acting on an ad hoc basis) to dictate what information is and is not entitled to Exemption 4 protection simply by granting or withholding assurance.

Argus also raises fundamental questions regarding how information previously protected under the *National Parks* and *Critical Mass* standards will be treated under the new standard. For example:

- How will line-item pricing be handled? Some agencies have long sought to release line-item pricing integrated into Government contracts. Applying *National Parks*, the D.C. Circuit consistently rejected these attempts on the basis that releasing confidential line-item pricing would cause competitive harm to the contractor that submitted the information. See, e.g., *Canadian Corp.*, 514 F.3d at 39. If, after *Argus*, courts interpret Exemption 4 to require an assurance of confidentiality, it is not certain whether line-item pricing will still be protected under Exemption 4. The agencies that have been fighting for the release of such pricing are unlikely to offer submitters an assurance of confidentiality. The fact that submission of this information is often a necessary aspect of submitting a proposal is undeniably relevant to the risk facing companies.
- How will mandatory submissions be handled? Although *Argus* did not address this issue, the distinction between voluntary submission and mandatory submission expressed in *Critical Mass* seems to have lost its original meaning. The premise of this distinction was that information companies are required to submit to the Government is protected in fewer circumstances than information voluntarily submitted, almost always requiring the submitter to demonstrate competitive harm to protect mandatory submissions. That distinction does not exist in the text of the FOIA statute. After *Argus*, if the Government denies assurances

of confidentiality for mandatory submissions, companies may be left in a riskier position than before: that of being required to submit information while not having any protection from release, no matter what competitive harm such release may cause.

- What is the relevance of whether release will harm the agency's interests? The *National Parks* test for confidentiality had two standards. Regardless of competitive harm to the submitter, information could be withheld under Exemption 4 based on a showing that the Government itself would be harmed by release of confidential commercial information, i.e., that release of information would impair an agency's ability to obtain similar information in the future. See, e.g., *Ctr. for Auto Safety v. Nat'l Hwy. Traffic Safety Admin*., 244 F.3d 144, 148 (D.C. Cir. 2001) ("when the Government receives information voluntarily, it has a strong interest in ensuring continued access, and therefore both the Government and private interests weigh against overly broad disclosure"). *Argus* did not address this aspect of *National Parks*. May agencies still withhold information under Exemption 4 if they determine that, regardless of any assurance of confidentiality, release of voluntarily submitted information would threaten the agency's ability to obtain that information in the future?

DOJ's Position in *Argus* Regarding Assurances of Confidentiality—If Exemption 4 protection is contingent on a Government assurance of confidentiality, an agency could potentially declare that information submitted under compulsion will be publicly released, regardless of its confidential nature. Certainly submitters will seek for ways to stop such release, challenging aspects of the agency's decision to withhold assurances of confidentiality, or other procedural aspects of the submission. While courts will ultimately have to decide these questions, much will turn on the positions agency FOIA offices and DOJ adopt.

Contractors may read much between the lines of the U.S.' amicus brief submitted to the Supreme Court during the *Argus* proceedings. 2019 WL 929184. DOJ urged the Court to interpret Exemption 4 using the dictionary definition of "confidential" and took the position that confidential treatment by the submitter alone is "likely insufficient in itself to render it 'confidential' in this particular context," concluding instead that the information at issue in *Argus* was confidential under Exemption 4 because it had been submitted with repeated assurances of confidentiality from USDA. Id. at *24–26. DOJ reasoned that, while the information in *Argus* was not customarily disclosed to the public, that confidential treatment alone would be insufficient in the context of SNAP-redemption data because that information "is information about *action taken by the government itself*, which may generally be disclosed to the public." Id. (emphasis in original). In other words: "if disclosure of the government's own actions would effectively disclose the information in question, no expectation of confidentiality would be objectively reasonable." Id. at *25.

In its brief, DOJ made a direct comparison to price information involving procurement contracts, noting that "[d]isclosure of the amount and source of government procurements is important to democratic accountability" and "allows an appropriately informed public debate about the expense of government action, the entities from which the government procures products and services, the payments they receive in return, and how such agency expenditures can affect winners and losers in the marketplace." Id. DOJ's direct reference to procurement data to support its position that confidential treatment alone may not always be sufficient to establish Exemption 4 protection might suggest that, in a post-*Argus* world, DOJ may support agency efforts to release procurement-related information, such as line-item pricing data, that had previously been protected by the D.C. Circuit under the *National Parks* competitive harm standard.

***Argus* Has Changed the Game, but We Don't Know the New Rules Yet**—*Argus* represents a sea change in FOIA case law, the full effects of which are yet to be seen. The end of the "substantial competitive harm" test could make withholding company information easier, as companies may only have to demonstrate the information is actually kept confidential in order to merit protection. Contractors should renew focus on internal confidentiality procedures, and carefully review their internal controls for safeguarding their most confidential information. This represents a timely opportunity for companies to establish internal procedures that will effectively protect all information submitted under an assurance of confidentiality, whether found in law, an explicit assurance, or otherwise. Where such assurance is in place, *Argus* offers

an open-and-shut case for withholding, so long as the information has been kept secure.

Where no such assurances are available, however, contractors must be prepared for uncertainty, at least in the near term. The tests governing such submissions are not yet established, and the extent of new risks (if any) are not yet known. Of course, companies must continue to submit information the Government requires, but should step up documentation of their discussions with the Government regarding such materials, and when accurate, assert confidentiality at every opportunity. Companies should document the process by which such information is customarily kept confidential, and should understand that the harm caused by a release may still be persuasive in an injunction proceeding, even if not a consideration in the Exemption 4 withholding analysis. Further development of case law in this area will hopefully resolve—or at least not add to—the uncertainties left by *Argus*.

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