The Death Knell That Wasn't: Public Access to Federal Contractor Employment Data after *Argus Leader Media*

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Federal government contractors collect hundreds of billions of taxpayer dollars annually and employ roughly a quarter of the U.S. workforce. They also provide important public goods and government services. But what, exactly, does the public have a "right to know" about federal contractors, and how can it access this information? These two questions are especially important in the context of employment law. Most federal contractors are bound by an executive order that prohibits them from discrimination in employment and requires them to submit employment-related data to the federal agency responsible for monitoring compliance and enforcing the law. For decades, this data has been subject to Freedom of Information Act (FOIA) requests filed by civil rights attorneys, the media, and other interested members of the public. However, contractors opposing the release of their employment data have argued that it is shielded from public disclosure by FOIA's Exemption 4, which protects confidential commercial or financial information submitted to the government by private persons.

In this Article, I explain the conflicting effects of the FOIA Improvement Act of 2016 (FIA), a bipartisan effort to increase government transparency, and Food Marketing Institute v. Argus Leader Media, *a 2019 Supreme Court decision that overturned the disclosure-friendly test agencies applied to determine whether Exemption 4 covered information requested under FOIA. In the wake of* Argus, *some legal commentators were quick to claim that the erasure of the test sounded the death knell for FOIA requests for private information, including federal contractor employment data. I argue that the*

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fallout from Argus *is not inevitable. Rather, by undermining case law suggesting agencies do not have discretion to release information covered by Exemption 4,* Argus *tacitly restores such discretion. Thus, agencies must apply a standard codified in the FIA to covered information. Ironically, applying the FIA's standard to covered information has the same effect as applying the pre-*Argus *test that agencies used to determine whether Exemption 4 covered the information. While* Argus *does not discuss the FIA because the FOIA request at issue was filed in 2011 and the FIA is not retroactive, the decision changes how agencies should interpret and apply the FIA's disclosure-friendly standard in Exemption 4 cases.*

INTRODUCTION

Federal contractors collect hundreds of billions of taxpayer dollars annually and employ roughly one-fifth of the U.S. workforce.[1] The government relies on contractors to provide public goods and administer a wide range of social services.[2] While the Freedom of Information Act

1. NAT'L EMP'T LAW PROJECT, DELIVERING FOR TAXPAYERS: TAKING ON CONTRACTOR FRAUD AND ABUSE AND IMPROVING JOBS FOR MILLIONS OF AMERICA'S WORKERS 1 (Sep. 2018), https://s27147.pcdn.co/wp-content/uploads/Delivering-for-Taxpayers-Taking-On-Contractor-Fraud-Abuse-Improving-Jobs.pdf [https://perma.cc/DSG4-YGS4]; Data Lab, *Contract Spending Analysis*, U.S. DEP'T OF TREASURY, https://datalab.usaspending.gov/contracts-over-time.html [https://web.archive.org/web/20200412155602/https://datalab.usaspending.gov/contracts-over-time.html] (last visited May 1, 2021) [hereinafter *Contract Spending Analysis*]; Data Lab, *Contract Federal Explorer*, U.S. DEP'T OF TREASURY, https://datalab.usaspending.gov/contract-explorer.html [https://perma.cc/E93X-RHW9] (last visited May 1, 2020) [hereinafter *Contract Explorer*].

2. *Contract Spending Analysis*, *supra* note 1; *Contract Explorer*, *supra* note 1. For a discussion of federal contractors and the privatization of public services, see generally PRIVATIZATION: THE PROVISION OF PUBLIC SERVICES BY THE PRIVATE SECTOR (Roger L. Kemp ed., 2007); E. S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS (1999); PAUL VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007); Ruben Berrios, *Government Contracts and Contractor Behavior*, 63 J. BUS. ETHICS 119 (2006); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Paul C. Light, *Outsourcing and the True Size of Government*, 33 PUB. CONT. L.J. 311 (2004).

("FOIA") recognizes the importance of transparency in government,[3] federal contractors are private entities, and they are therefore not subject to the same reporting and disclosure requirements as government agencies.[4] So, what does the public have a "right to know" about federal contractors, and how might it access this information?

As federal contractors grow in size and number, these two questions have become increasingly important in the context of employment law.[5] Most federal contractors are bound by an executive order that both prohibits them from discrimination in employment and requires them to submit employment-related data to the federal agency responsible for monitoring compliance and enforcing the law.[6] For decades, this data has been subject to FOIA requests filed by civil rights attorneys, the media, and other interested members of the public.[7] However, contractors opposing the release of their employment data have argued that it is shielded from disclosure by FOIA's Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[8]

I argue that Exemption 4 does not invariably protect this data from public disclosure. My argument holds notwithstanding *Food Marketing Institute v. Argus Leader Media*,[9] a Supreme Court decision curbing public access to private information submitted to the government.[10] The Court decided *Argus* in 2019, three years after Congress enacted the FOIA

3. *See generally* SUSAN D. GOLD, FREEDOM OF INFORMATION ACT (2011). For discussion of the history of FOIA, see *infra* Part III (reviewing case law interpreting FOIA and explaining the legislation's history and purpose).

4. Throughout this Article, I use "agency" or "agencies" in reference to government agencies.

5. *See, e.g.*, Paul K. Sonn & Tsedeye Gebreselassie, *The Road to Responsible Contracting Lessons from States and Cities for Ensuring that Federal Contracting Delivers Good Jobs and Quality Services*, 31 BERKELEY J. EMP. & LAB. L. 459 (2010) (surveying effective contracting policies at the local level and recommending reforms in the federal contracting system).

6. Jane Farrell, *The Promise of Executive Order 11246 "Equality as a Fact and Equality as a Result"*, 13 DEPAUL J. FOR SOC. JUST. 1, 6–7 (2020).

7. Walter B. Connolly & John C. Fox, *Employer Rights and Access to Documents under the Freedom of Information Act*, 46 FORDHAM L. REV. 203, 204 (1977); Lynne C. Hermle, *A Balanced Approach to Affirmative Action Discovery in Title VII Suits*, 32 HASTINGS L. J. 1013, 1014–15 (1981); *see generally* Gil A. Abramson & Elisabeth J. Lyons, *Protection of Employers' Records from Disclosure to Employees, Government Agencies, and Third Parties*, 41 LAB. L.J. 353, 355 (1990); Prospere S. Virden Jr. & Nancy A. Sutherland, *Releasability Under the Freedom of Information Act of Documents Submitted by Government Contractors*, 12 AIPLA Q. J. 50 (1984). *But see* Will Evans & Sinduja Rangarajan, *Hidden Figures How Silicon Valley Keeps Diversity Data Secret*, REVEAL (Oct. 19, 2017), https://www.revealnews.org/article/hidden-figures-how-silicon-valley-keeps-diversity-data-secret [https://perma.cc/D6KK-E966].

8. 5 U.S.C. § 552(b)(4) (2018); *see, e.g.*, Kevin R. McCarthy & John W. Kornmeier, *Maintaining the Confidentiality of Confidential Business Information Submitted to the Federal Government*, 36 BUS. L. 57, 76 (1980) (recommending making "Exemption 4 of the FOIA mandatory" to preserve "the confidentiality of confidential business information submitted to the federal government").

9. 139 S. Ct. 2356 (2019).

10. *Id.* at 2366 (holding that Exemption 4 information is "confidential" when it is "customarily and actually treated as private by its owner").

Improvement Act of 2016 (FIA), a bipartisan effort to promote disclosure and increase government transparency.[11] Although *Argus* does not discuss the FIA because the FOIA request at issue was filed in 2011 and the statute is not retroactive,[12] the decision changes how agencies should interpret and apply the FIA to Exemption 4 information. Specifically, *Argus* opens the door for agencies to apply the FIA's "foreseeable harm" standard to information covered by Exemption 4, and this standard prompts an agency to disclose covered information.

As the Supreme Court has observed, "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."[13] Access to information is "a structural necessity in a real democracy."[14] This is all the more important with respect to federal contractors, who are not directly accountable to the public and may more easily "pull curtains of secrecy around" their actions and decisions.[15] Application of the FIA's foreseeable harm standard to information covered by Exemption 4 follows logically from *Argus*, is consistent with legislative intent, and strengthens employment protections for people employed by federal contractors.

Part I of this Article provides an overview of my argument that Exemption 4 does not necessarily protect federal contract employment data from public disclosure. Part II explains federal contractor reporting obligations and the significance of public access to contractor employment data. Part III details the history and case law surrounding FOIA's Exemption 4, including the relationship between FOIA and the Trade Secrets Act (TSA), the effect of the FIA, and recent federal guidance on *Argus*. Finally, Part IV reviews the two arguments supporting my central claim: *Argus* opens the door for agencies to make discretionary disclosures under Exemption 4 and, accordingly, agencies should apply the foreseeable harm standard to covered information, including any federal contractor employment data. I conclude by explaining how parties requesting federal contractor employment data may successfully argue for disclosure.[16]

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

12. *Id.*; Jonathan Ellis, *How a South Dakota FOIA Request Landed in the U.S. Supreme Court*, ARGUS LEADER (Jan. 11, 2019), https://www.argusleader.com/story/news/2019/01/11/how-south-dakota-foia-request-landed-u-s-supreme-court-argus-leader-media/2516723002/ [https://perma.cc/UPE3-HTT4] .

13. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (discussing FOIA request and Exemption 7(a)).

14. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 172 (2004) (discussing FOIA request and Exemption 7(c)).

15. Press Release, White House, Statement by the President upon Signing S. 1160 (July 4, 1966), https://nsarchive2.gwu.edu/nsa/foia/FOIARelease66.pdf [https://perma.cc/FE2F-VTZB].

16. While this Article is tailored for people who want to access contractor employment data, many of these arguments are transferable to other situations involving FOIA's Exemption 4.

I. OVERVIEW

My argument that Exemption 4 does not necessarily protect federal contractor employment data from public disclosure is best illustrated by comparing Exemption 4 analyses before and after *Argus*. I also summarize this explanation in Figure 1. Before *Argus*, to determine whether FOIA's Exemption 4 covered requested information, the relevant agency would apply the judicially created "substantial competitive harm" test.[17] If Exemption 4 covered the information, the agency could not release it—end of story.[18]

Because FOIA is a disclosure statute dictating when disclosure is *required*, agencies ordinarily retain the authority to release information covered by an exemption—to make "discretionary disclosures."[19] However, at least prior to *Argus*, agencies lacked discretion to release Exemption 4 information because courts understood the TSA and Exemption 4 to cover the same information; in other words, courts have labelled these provisions "co-extensive" or "at least co-extensive."[20] The TSA criminalizes the release of covered information.[21] Thus, deeming the TSA "coextensive" with Exemption 4 effectively barred discretionary disclosures of Exemption 4 material because a government officer or employee would be criminally liable for the disclosure.[22]

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17. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), *abrogated by* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (establishing substantial competitive harm test). For a discussion of how the substantial competitive harm test operates, see *infra* Part III.A.1.

18. The party requesting the information could challenge the agency's determination in court. If the court disagreed with the agency's determination, the reviewing court would still need to determine whether Exemption 3, which covers information "specifically exempted from disclosure by statute," provided separate cover for the information. 5 U.S.C. § 552(b)(3) (2018).

19. For an early discussion of the nature of FOIA exemptions and the "discretionary disclosure" principle, see generally OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA UPDATE VOL. XV, NO. 2: APPLYING THE "FORESEEABLE HARM" STANDARD UNDER EXEMPTION FIVE (Jan. 1, 1994), https://www.justice.gov/oip/blog/foia-update-oip-guidance-applying-forseeable-harm-standard-under-exemption-five [https://perma.cc/3PEX-S3JB] [hereinafter FORESEEABLE HARM STANDARD]; *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 292–93 (1979) (holding that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and emphasizing that "the congressional concern [in enacting FOIA] was with the *agency*'s need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information").

20. McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1164 (D.C. Cir. 1995) (recognizing that the D.C. Circuit has stated the scope of the Trade Secrets Act (TSA) "is at least co-extensive with that of Exemption 4 of FOIA" and, consequently, "whenever a party succeeds in demonstrating that its materials fall within Exemption 4, the government is precluded from releasing the information by virtue of the Trade Secrets Act"); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1206–08 (4th Cir. 1976) (characterizing the TSA and Exemption 4 as "co-extensive").

21. Trade Secrets Act, 18 U.S.C. § 1905 (2018).

22. For a discussion of the case law finding Exemption 4 and the TSA the same or "coextensive," see *infra* Part III.A.2.

When the FIA went into effect in 2016, however, it weakened the general regime of exemptions by codifying the disclosure-friendly "foreseeable harm" standard, which was adopted as a Department of Justice (DOJ) policy requirement under President William J. Clinton and later abandoned during President George W. Bush's administration.[23] The foreseeable harm standard *requires* agencies to disclose information covered by a FOIA exemption unless doing so would foreseeably harm the interest protected by the exemption. To illustrate how this works, consider Exemption 5, which covers "privileged communications within or between agencies," including those protected by the "deliberative process privilege."[24] While Exemption 5 arguably covers even bare factual information shared among agencies, the purpose of the exemption is to "encourage the 'free and uninhibited exchange . . . of opinions, ideas, and points of view' within an agency's decisionmaking process."[25] Because releasing bare facts would not inhibit agency exchange of opinions or ideas, the foreseeable harm standard would weigh in favor of disclosing even covered information.[26]

However, the FIA's accompanying Senate Report suggests agencies should apply the foreseeable harm standard only to information covered by exemptions that allow "discretionary disclosures."[27] Thus, agencies have not applied the FIA's foreseeable harm standard to information covered by Exemption 4.

By changing the test to determine whether information is covered by Exemption 4, *Argus* upended this landscape. In place of the substantial competitive harm test, the Court held that information is "confidential" and

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23. *Compare* OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA UPDATE VOL. XIV, NO. 3: ATTORNEY GENERAL RENO'S FOIA MEMORANDUM (Oct. 4, 1993), https://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum [https://perma.cc/UR8A-GV4P] [hereinafter RENO MEMORANDUM] (establishing, under the Clinton Administration, the foreseeable harm standard and stating, "[w]here an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be") *with* OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES (Oct. 12, 2001), https://www.justice.gov/archive/oip/011012.htm [https://perma.cc/DS8C-UBBD] [hereinafter ASHCROFT MEMORANDUM] (permitting agencies to withhold information so long as decision rests on "sound legal basis"). The Obama Administration reestablished the foreseeable harm standard. OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf [https://perma.cc/78Q8-JET5] [hereinafter HOLDER MEMORANDUM].

24. FORESEEABLE HARM STANDARD, *supra* note 19.

25. *Id.* (quoting Ackerly v. Ley, 420 F.2d 1336, 1341 (D.C. Cir. 1969) and referencing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975), in which the Supreme Court observed that the purpose of the privilege "is to prevent injury to the quality of agency decisions").

26. *See id.* (quoting Army Times Pub. Co. v. Dep't of the Air Force, 998 F.2d 1067, 1072 (D.C. Cir. 1993)); Petrol. Info. Corp. v. U.S. Dep't of the Interior, 976 F.2d 1429, 1436 n.8 (D.C. Cir. 1992) (holding that Exemption 5 applies exclusively where disclosure "genuinely could be thought likely to diminish the candor of agency deliberations in the future").

27. S. REP. NO. 114-4, at 8 (2015).

protected by Exemption 4 when it is "customarily and actually treated as private by its owner . . . ." [28] The *Argus* decision thus expands the universe of information covered by Exemption 4—and appears to limit the amount of information the public can access. Some legal commentators were quick to claim that this decision sounded the death knell for FOIA requests for private information, including federal contractor employment data.[29]

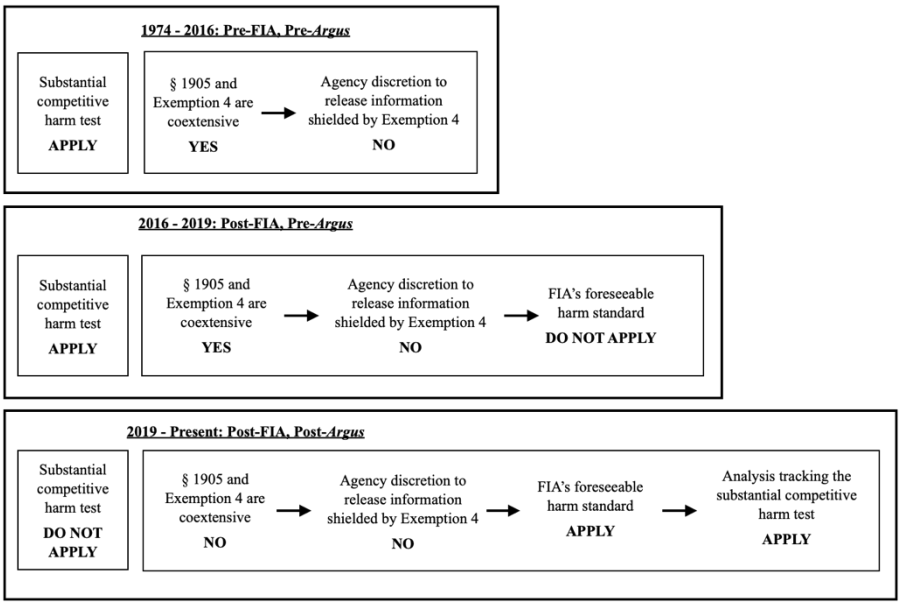
But these commentators overlook an important implication of the decision: because *Argus* hinged on the flawed method of statutory interpretation used to develop the substantial competitive harm test, its holding has no bearing on how to interpret the TSA. Thus, by changing only what is covered by Exemption 4, *Argus* decoupled Exemption 4 from the TSA, meaning the two are no longer coextensive.

By decoupling Exemption 4 from the TSA, *Argus* restores agency discretion to release information covered by Exemption 4, even where that information is separately covered by the TSA. Because agencies may therefore make discretionary disclosures, they must apply the FIA's foreseeable harm standard when evaluating FOIA requests for information covered by Exemption 4.

28. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019).

29. Rebecca Edelson et al., *OH SNAP! Supreme Court Rejects Substantial Competitive Harm Test For Key FOIA Exemption*, SHEPPARD MULLIN GOV'T CONTS. & INVESTIGATIONS BLOG (Jun. 26, 2019), https://www.governmentcontractslawblog.com/2019/06/articles/appeals/sc-rejects-substantial-competitive-harm [https://perma.cc/4VXG-ULPT]; Dan Kelly, *Good News for Federal Contractors—FOIA "Exemption 4" Protecting Confidential Information Gets Expansive Definition by U.S. Supreme Court in* Food Marketing Institute v. Argus Leader Media, MCCARTER & ENGLISH GOV'T CONTS. L. (Jun. 24, 2019), https://www.governmentcontractslaw.com/2019/06/good-news-for-federal-contractors-foia-exemption-4-protecting-confidential-information-gets-expansive-definition-by-u-s-supreme-court-in-food-marketing-institute-v-argus [https://perma.cc/PK4Z-4ABW]; Richard Moorhouse, Mike Gardner, Józef S. Przygrodzki & Brett A. Castellat, *U.S. Supreme Court Broadens FOIA Exemption 4 for Confidential' Materials*, NAT'L L. REV. (Jul. 22, 2019), https://www.natlawreview.com/article/us-supreme-court-broadens-foia-exemption-4-confidential-materials [https://perma.cc/953E-V2PF]; *SCOTUS Strengthens Protections for Federal Government Contractors Under FOIA*, PILIEROMAZZA BLOG (Aug. 9, 2019), https://www.pilieromazza.com/blog-scotus-strengthens-protections-for-federal-government-contractors-under-foia [https://perma.cc/JA28-2MTQ].

Figure 1. Exemption 4 Analysis, 1974 – Present



My claim that *Argus* restores agency discretion under Exemption 4—and therefore agencies should apply the FIA's standard—rests on two related, but independently sufficient, arguments. First, in deciding *Argus*, the Court significantly expanded the information protected by Exemption 4. However, the Court's holding in *Argus* did not address or change the scope of the TSA.[30] Thus, *Argus* also upended the case law interpreting the two provisions as coextensive. Of equal importance is that, outside of an Exemption 4 analysis, the TSA does not "erect a disclosure bar that is impervious to the mandate of FOIA."[31] In other words, once agency discretion is restored under

30. 139 S. Ct. at 2366.

31. FOIA's Exemption 3 allows agencies to withhold information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (2018). Crucially, courts have concluded that the TSA does not qualify as a nondisclosure statute under Exemption 3. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1141 (D.C. Cir. 1987) (holding that "the Trade Secrets Act does not, by virtue of Exemption 3, erect a disclosure bar that is impervious to the mandate of FOIA"). In other words, "the [TSA] has no independent force in cases where [FOIA] is involved." Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n, 750 F.2d 1394, 1402 (7th Cir. 1984) (quoting Posner, J.). For a discussion of how Exemption 3 operates, and which statutes carry independent force in a FOIA analysis, see OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA GUIDE, 2004 EDITION: EXEMPTION 3 (May 2004), https://www.justice.gov/oip/foia-guide-2004-edition-exemption-3 [https://perma.cc/W3G3-Z6N7]. For a full explanation of why the TSA does not serve as an independent bar on disclosure, see *infra* Part IV.A.1-2.

Exemption 4, the TSA does not serve as a separate bar on disclosure.[32] Agencies thus have discretion to disclose information covered by both Exemption 4 and, separately, the TSA, and they should apply the FIA's foreseeable harm standard to this information.

Second, in the wake of *Argus*, agencies would undermine legislative intent if they did not apply the FIA's foreseeable harm standard to information shielded by Exemption 4, including any federal contractor employment data. When Congress enacted the FIA in 2016, legislators assumed that agencies would apply the substantial competitive harm test to determine whether Exemption 4 covered the information. Crucially, this test mirrors the analysis triggered by the application of FIA's foreseeable harm standard.[33] Courts developed the substantial competitive harm test to answer the same questions agencies must ask when applying the FIA's standard: "What is the interest protected by the exemption, and would releasing the covered information harm that interest?"[34] Thus, before *Argus* overturned the substantial competitive harm test, the application of the FIA's foreseeable harm standard to information covered by Exemption 4 would have been redundant. Conversely, not applying the standard today would undermine legislative intent by shielding from disclosure a larger universe of information than Congress intended to protect.

II. EXECUTIVE ORDER 11246 AND FEDERAL CONTRACTOR EMPLOYMENT DATA

The implications of the FIA and the Supreme Court's decision in *Argus* all impact a historically contested Exemption 4 topic: federal contractor employment data. To that end, this Part explains the significance of the data that approximately two hundred thousand federal contractors must submit to the federal government regarding employment practices, per Executive Order 11246 (EO 11246).

A. Executive Order 11246's Data Collection Requirements

As a condition of doing business with the federal government, contractors are required to abide by a myriad of non-negotiable terms related

32. *See infra* Part IV.A.1-2 (explaining that the DOJ's view that Exemption 4 and the TSA are "coextensive" is based in case law and arguing that courts should reevaluate the "coextensive" nature of Exemption 4 and TSA in light of *Argus*, and because the two are distinguishable).

33. *See infra* Part IV.B (explaining why applying the FIA's foreseeable harm standard to Exemption 4 furthers Congress's legislative intent).

34. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 873 (D.C. Cir. 1992).

to the employment conditions of people they employ.[35] These include the requirements established by EO 11246,[36] which prohibits discrimination in employment on the basis of race, creed, color, national origin, sex, sexual orientation, and gender identity.[37] EO 11246 also requires most federal government contractors to collect data on the race, ethnicity, and sex of employees across over a dozen job categories, and submit this information to the Equal Employment Opportunity Commission (EEOC).[38] I term this data "diversity data."[39] The data serves to inform a contractor's affirmative action plan, which all contractors are required to maintain and implement.[40] The EEOC also shares this data with the U.S. Department of Labor,[41] which uses it to guide its enforcement of EO 11246. Prior to *Argus*, in reviewing agency decisions to disclose this data, courts traditionally agreed that the data was not exempt from disclosure under Exemption 4.[42]

Due to changes made towards the end of the Obama Administration, contractors were also required to submit data from 2017 and 2018 on pay ranges and hours worked.[43] This data was to be broken down by race, gender, and ethnicity for each occupational category.[44] I term this data "pay data."[45]

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35. Employer.gov, *Federal Contractor Requirements*, U.S. DEP'T OF LABOR, https://www.employer.gov/EmploymentIssues/Federal-contractor-requirements [https://perma.cc/TNV2-CL56] (last visited Mar. 15, 2021).

36. Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

37. 41 C.F.R. § 60-20.1 (2019); Office of Fed. Contract Compliance Programs, *Exec. Order 11246*, U.S. DEP'T OF LABOR, https://www.dol.gov/ofccp/paytransparency.html [https://perma.cc/6UP7-8647] (last visited May 16, 2019).

38. 41 C.F.R. § 60-1.7 (2019) (data collection requirements apply to contractors with more than fifty employees and with contracts of over $50,000); *see also* Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1962) (requiring federal contractors to furnish all data required "for purposes of investigation to ascertain compliance").

39. These employer surveys are known as EEO-1 Reports, and this data is termed Component 1 data. *EEO Data Collections*, EEOC, https://www.eeoc.gov/employers/reporting.cfm [http://perma.cc/49HX-4DM6] (last visited Feb. 7, 2021).

40. 41 C.F.R. § 60.2 (2019).

41. Jacqueline A. Berrien, *Coordination of Functions; Memorandum of Understanding*, EEOC, https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm [https://web.archive.org/web/20190416155846/https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm] (last visited May 16, 2019).

42. *See, e.g.*, CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152–53 (D.C. Cir. 1987).

43. Press Release, EEOC, EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports (Jan. 29, 2016), https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm [https://perma.cc/S9UN-3NUW] [hereinafter 2016 EEOC Press Release]; Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5116–18 (Feb. 1, 2016).

44. 2016 EEOC Press Release, *supra* note 43.

45. This pay and hours worked data is termed Component 2 data. Press Release, EEOC, EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection (July 16, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection [https://perma.cc/JJZ8-Q7RS] [hereinafter 2020 EEOC Press Release]. Private employers with one hundred or more employees must also submit employment data to the EEOC. Non-contractor employment data has additional protections from disclosure: "All reports and any information from individual reports

The Obama Administration's move to collect pay data was delayed under the Trump Administration, and it was subsequently limited to 2017 and 2018 data.[46] Furthermore, the Trump Administration's Office of Federal Contract Compliance Programs (OFCCP) announced that, after reviewing the parameters of the data collected, it had "determined that it [did] not find [pay] data necessary to accomplish its mission to ensure that federal contractors and subcontractors are not engaged in unlawful pay discrimination."[47] The agency also determined that analyzing the data would not be a "prudent use of agency resources."[48] Accordingly, it would "not receive [the data] from contractors."[49] Likewise, the EEOC announced it

are subject to the confidentiality provisions of Section 709(e) of Title VII, and may not be made public by the EEOC prior to the institution of any proceeding under Title VII involving the EEO-1 data . . . The confidentiality requirements allow the EEOC to publish only aggregated data, and only in a manner that does not reveal any particular filer's or any individual employee's personal information." EEOC, EEO-1 INSTRUCTION BOOKLET (2007), https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm [https://web.archive.org/web/20191205004653/https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm].

46. In August 2017, the Trump Administration's Office of Management and Budget (OMB) stayed the collection of pay data. The National Women's Law Center, a legal advocacy and research organization, responded by challenging the OMB's decision. Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget, 358 F. Supp. 3d 66 (D.D.C. 2019) . The National Women's Law Center prevailed, and in March 2019, U.S. District Court Judge Tanya S. Chutkan vacated OMB's stay of the pay data collection and directed the government to collect the 2017 and 2018 pay data. *Id.*; Connie N. Bertram & Jack Blum, *EEO-1 Update EEOC Requires Employers to Submit Pay Data By September 30, 2019*, NAT'L L. REV. (Apr. 8, 2019), https://www.natlawreview.com/article/eeo-1-update-eeoc-requires-employers-to-submit-pay-data-september-30-2019 [https://perma.cc/K8KR-TKAU]. Judge Chutkan reaffirmed this order in October 2019, despite the EEOC deciding it would not collect pay data in the future (e.g. for 2019, 2020, etc.). Lisa Nagele-Piazza, *EEOC Reduces Employee Pay Data Requirements*, SHRM (Sep. 11, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employers-should-review-eeo-1-guidance-before-pay-data-reporting-deadline.aspx [https://perma.cc/XR8R-7SR3]. In her October 2019 order, Judge Chutkan directed the EEOC to "take all steps necessary" to complete data collection for 2017 and 2018 by January 31, 2020. Order following decision was announced in court on Apr. 25, 2019. *Component 2 EEO-1 Online Filing System*, NORC AT THE UNIV. OF CHI., https://eeoccomp2.norc.org [https://web.archive.org/web/20191211081915/https://eeoccomp2.norc.org] (last visited May 1, 2020). As of February 6, 2020, the EEOC completed the required level of data collection pursuant to the court's April 2019 order and had no remaining obligations.

47. *See* Intention Not to Request, Accept, or Use Employer Information Report (EEO-1) Component 2 Data, 84 Fed. Reg. 64,932 (Nov. 25, 2019); Office of Fed. Contract Compliance Programs, *EEO-1 Report Frequently Asked Questions*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ofccp/faqs/eeo1-report#Q3 [https://perma.cc/6FDL-GB99] (last visited May 1, 2020) ("The data are not collected at a level of detail that would enable OFCCP to make comparisons among similarly situated employees, as required by the Title VII standards that OFCCP applies in administering and enforcing Executive Order 11246.").

48. Office of Fed. Contract Compliance Programs, *supra* note 47 ("Given these limitations of the EEO-1 Component 2 data, and the substantial amount of human capital and technical capacity it would require for OFCCP to analyze the data, incorporating EEO-1 Component 2 data into its program is not a prudent use of agency resources.").

49. *Id*. ("Accordingly, OFCCP will not receive EEO-1 Component 2 data from contractors. OFCCP already receives up-to-date, employee-level pay data from contractors that are selected for compliance evaluations, and it will continue to do so. OFCCP will also continue to receive EEO-1 Component 1 data (number of employees by job category, and by sex, race, and ethnicity) from contractors for purposes of

would delay the use of the data until the National Academies of Sciences, Engineering, and Medicine's Committee on National Statistics "conduct[ed] an independent assessment of the quality and utility of the [FY 2017 and 2018 data] collected."[50] The OFCCP's announcement was not legally binding, and the Biden Administration may change course by reverting to Obama-era policies and procedures, i.e. collecting and analyzing the data to aid in OFCCP enforcement efforts.[51]

Notably, the federal government's own diversity data is accessible online,[52] and federal employee pay data is also available as a matter of public record.[53]

B. The Significance of Federal Contractor Diversity and Pay Data

Today, EO 11246 applies to approximately two hundred thousand federal contractor establishments that, together, receive approximately half a trillion in taxpayer dollars each year.[54] Federal contractor diversity data and pay data have taken on added significance given the steady rise in outsourcing of government actions to private contractors.[55]

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reviewing their compliance with Executive Order 11246 and its implementing regulations, including the reporting requirements at 41 CFR 60-1.7.").

50. 2020 EEOC Press Release, *supra* note 45 ("The Information Quality Act requires the EEOC to assess and assure the quality and utility of data collected by the agency. In order to meet the requirements of the Information Quality Act, the assessment by CNSTAT will examine the fitness for use of the data, including the utility of pay bands in measuring pay disparities and potential statistical and analytically appropriate uses of the data. The CNSTAT assessment will also inform the EEOC's approach to future data collections.").

51. Office of Fed. Contractor Compliance Programs, *supra* note 47 ("The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies."). The Biden Administration will likely face pressure to resume data collection and analysis from dozens of civil rights organizations, all of whom signed onto a letter objecting to the Trump Administration's data policies. *E.g.*, *Letter from Civil Rights Groups Collection and Analysis of 2017 and 2018 EEO-1 Component 2 Pay Data*, LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS (Nov. 8, 2019), http://civilrightsdocs.info/pdf/policy/letters/2019/EEO-1_Component_2_Letter_11.8.19.pdf [https://perma.cc/2AKP-HD53]. Indeed, the Biden Administration removed language from OFCCP's website stating that the agency "determined that it [did] not find [pay] data necessary to accomplish its mission to ensure that federal contractors and subcontractors are not engaged in unlawful pay discrimination." EEO-1 Report Frequently Asked Questions, *supra* note 47.

52. *Diversity & Inclusion Federal Workforce At-A-Glance*, U.S. OFFICE OF PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/federal-workforce-at-a-glance [https://web.archive.org/web/20191222141721/https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/federal-workforce-at-a-glance] (last visited May 1, 2020).

53. *U.S. Federal Government Employee Lookup*, FEDERALPAY, https://www.federalpay.org/employees [https://perma.cc/D9F4-JG2K] (last visited Mar. 27, 2020).

54. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-750, EQUAL EMPLOYMENT OPPORTUNITY: STRENGTHENING OVERSIGHT COULD IMPROVE FEDERAL CONTRACTOR NONDISCRIMINATION COMPLIANCE (2016); *Contract Spending Analysis*, *supra* note 1; *Contract Explorer*, *supra* note 1.

55. *Contract Spending Analysis*, *supra* note 1.

Advocates have long recognized that public disclosure of diversity data is a valuable tool for deterring discrimination and motivating businesses to prioritize diversity in employment.[56] The data itself has also been used in numerous academic publications to study employment segregation by sex and race, the implications of more women joining the workforce, and job and industry segregation, among other issues.[57] More recently, a leading nonprofit news outlet requested the data for dozens of large Silicon Valley companies with the goal, in part, of evaluating whether the companies' public statements regarding employee diversity numbers were factually accurate.[58] According to one individual who worked on diversity initiatives at both Dropbox and Google, the release of diversity numbers "forces a conversation both externally and internally."[59] Making diversity data publicly available through FOIA requests thus increases contractor incentive to abide by EO 11246's mandate.

Federal contractor pay data from 2017 and 2018 could also prove useful for various reasons. While the federal government does not track the number of people working on federal contracts, one researcher estimates as many as twenty percent of all U.S. workers are employed by a federal contractor.[60] The data could thus prove valuable for understanding pay disparities across industries and sectors.[61] As with diversity data, publicizing the pay data could generate negative publicity and lead to voluntary changes in company policies.[62] Similarly, making the pay data public puts additional pressure on federal agencies to act on the data, whether through stepped-up enforcement or litigation.

If made public, federal contractors' pay data could also catalyze class action and civil rights litigation by drawing attention to companies with especially egregious gender or race pay gaps within certain job categories.[63] While disclosure of federal contractors' diversity data is central to ensuring

56. STEPHEN GASKILL, FED. GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 40–43 (1995).

57. *E.g.*, RONALD EDWARDS, BLISS CARTWRIGHT & BRENDA KYNE, EMPLOYER INFORMATION REPORT (EEO-1) (2007); Bliss Cartwright, Patrick Ronald Edwards & Qi Wang, *Job and Industry Gender Segregation NAICS Categories and EEO–1 Job Groups*, 134 MONTHLY LAB. REV., Nov. 2011, 37, 37; Fidan A. Kurtulus & Donald Tomaskovic-Devey, *Do Female Top Managers Help Women to Advance? A Panel Study Using EEO-1 Records*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 173 (2012); Corre L. Robinson, Tiffany Taylor, Donald Tomaskovic-Devey & Catherine Zimmer, *Studying Race or Ethnic and Sex Segregation at the Establishment Level Methodological Issues and Substantive Opportunities Using EEO-1 Reports*, 32 WORK & OCCUPATIONS 5 (2005).

58. Evans & Rangarajan, *supra* note 7.

59. *Id.*

60. NAT'L EMP'T LAW PROJECT, *supra* note 1.

61. Researchers and academics have used EEO-1 Component 1 data extensively. *See supra* note 57.

62. Evans & Rangarajan, *supra* note 7.

63. While sizable gender or race pay gaps within a job category may not be definitive proof of discrimination in employment, the data can reveal trends that may warrant further investigation.

compliance with anti-discrimination mandates on federal contracts, violating these mandates is not inherently costly to contractors because violators are seldom barred from future contracting and face no monetary penalty.[64] In contrast, a finding of systemic pay discrimination can be very costly for business establishments because contractors are required to provide monetary relief to harmed employees. For example, from fiscal years 2017 to 2020, the Department of Labor has, through affirmative litigation against employers, provided an annual average of $29.2 million in relief to over 138,000 class members.[65]

Of course, all of these hypotheticals regarding possible uses of federal contractor diversity and pay data are contingent upon the public's ability to access this information using FOIA requests. I address this issue next.

III. FOIA'S EXEMPTION 4: HISTORY, CASE LAW, AND THE MEANING OF "CONFIDENTIAL"

In 1966, Congress enacted FOIA to protect and clarify the public's right to government information.[66] In his signing statement, President Lyndon Johnson wrote, "The legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits."[67] Since its passage, the law has been amended several times, but its general contours remain the same, including the nine categories of exempted information.[68] These exemptions span

64. Between 2010 and 2015, there was an average of less than one debarment per year. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 54.

65. Author calculated this number using data from Office of Fed. Contract Compliance Programs, *OFCCP By the Numbers*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ofccp/about/data/accomplishments [https://perma.cc/VT3W-EAXK] (last visited April 18, 2021) (data on monetary relief available for download under the subheading *Fiscal Year Data Tables*).

66. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966); *see* S. REP. NO. 88-1219, at 8–10 (1964) ("It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure . . . .").

67. Press Release, White House, *supra* note 15 ("No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."). Although President Johnson initially opposed FOIA, he changed his tune once he realized it had ample support in the House and the Senate. *Freedom of Information at 40 LBJ Refused Ceremony, Undercut Bill with Signing Statement*, NAT'L SEC. ARCHIVE (July 4, 2006), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194 [https://perma.cc/J5JR-BDAA].

68. The exemptions apply to matters that are (1) required by Executive Order to be kept secret "in the interest of the national defense or foreign policy;" (2) related to agency personnel rules and practices; (3) "specifically exempted from disclosure by statute;" (4) "trade secrets and commercial or financial information obtained from a person and privileged or confidential;" (5) communications between agencies which would "not be available by law to a private party in litigation with the agency;" (6) personnel, medical files and related files whose disclosure would be an unwarranted invasion of personal privacy; (7) "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party;" (8) "contained in or related to examination, operating, or condition reports prepared by, on

information that is protected because it implicates national security, investigatory files pertaining to law enforcement, information explicitly exempted by another statute, and even geological data concerning wells and mines.

Exemption 4 of FOIA shields both "trade secrets" and "commercial or financial information obtained from a person and privileged or confidential."[69] "Trade secrets" is a well-understood term and the rationale behind protecting trade secrets is intuitive: they are valuable, and leaving them vulnerable to a FOIA request could deter entities from submitting required information to the government.[70] In contrast, Congress's decision to include "commercial or financial" information that is "privileged or confidential" in Exemption 4[71] left open questions about its legislative intent, what information qualifies as "commercial or financial," and how to define "confidential."

For decades, the controlling understanding of this latter part of Exemption 4, covering "commercial or financial information" that is "privileged or confidential," was the D.C. Circuit's "substantial competitive harm" test.[72] In this Part, I trace the history of Exemption 4 and the meaning of "confidential" through the Supreme Court's decision in *Argus*, which overturned the long-standing D.C. Circuit test.[73] I also discuss two statutes that bear on an agency's authority to disclose information covered by Exemption 4: the TSA and the FIA. Before expanding on this history, I first provide a brief primer on how a FOIA request for private information worked before *Argus*.

A. FOIA Exemption 4 Analysis Before Argus Leader Media

To illustrate how a FOIA request for private information worked before *Argus*, consider this simplified hypothetical: a government watchdog organization wants to access federal contractor data submitted to a federal agency. The organization starts the process by submitting a FOIA request for the data to the agency. To determine whether Exemption 4 covers the information, the agency applies the substantial competitive harm test.[74] Generally, this test asks whether disclosing the data to the public would harm

behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions;" and (9) data concerning wells. 5 U.S.C. § 5(b) (2018).

69. *Id.* § 552(b)(4). Under the Administrative Procedure Act, which FOIA modified, a "'person' includes an individual, partnership, corporation, association, or public or private organization other than an agency." *Id.* § 551(2).

70. 139 AM. JUR. PROOF OF FACTS 3D 241 (2021).

71. 5 U.S.C. § 552(b)(4) (2018).

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

73. For a discussion of *Argus*, see *infra* Part III.B.

74. For a discussion of the substantial competitive harm test, see *infra* Part III.A.1.

the contractor's competitive business interests. Because FOIA is a disclosure statute dictating when disclosure is *required*, agencies usually have discretion to disclose information covered by many of its exemptions.[75] In other words, agencies may make "discretionary disclosures."

If the agency determines that disclosing the data would *not* harm the contractor, the agency notifies the contractor that its data is not covered by Exemption 4 and that it plans to release the data. If the contractor disagrees with the agency's determination, it may challenge the decision by filing a so-called reverse FOIA lawsuit.[76] A court reviewing the agency's decision would also apply the substantial competitive harm test. If the court agreed with the agency's determination, the agency could hand the requested data over to the watchdog.

If the agency determines that disclosing the data *would* cause the contractor substantial competitive harm, the data is protected from disclosure by Exemption 4. Although agencies' calculus regarding whether to disclose information falling within the scope of other FOIA exemptions has varied with presidential administrations,[77] agencies could not disclose information covered by Exemption 4, for reasons I explain below. The following Parts illustrate where FOIA Exemption 4's disclosure regime originated and how the analysis has evolved with new case law and statutes.

1. Early Case Law: National Parks, Critical Mass Energy Project*, and the Substantial Competitive Harm Test*

The D.C. Circuit established the substantial competitive harm test in 1974 in *National Parks & Conservation Ass'n v. Morton*.[78] Nearly two decades later, the court modified the test in *Critical Mass Energy Project v. Nuclear Regulatory Commission*.[79] Lower courts followed the D.C. Circuit's lead until 2019, when the Supreme Court decided *Argus*.[80] While *Argus* overturned the substantial competitive harm test, the test mirrors the standard

75. FORESEEABLE HARM STANDARD, *supra* note 19.

76. OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT: REVERSE FOIA 15 (Oct. 9, 2019), https://www.justice.gov/oip/page/file/1197216/download [https://perma.cc/XJT3-GBLP] [hereinafter REVERSE FOIA].

77. *Compare* RENO MEMORANDUM, *supra* note 23 (establishing foreseeable harm standard and stating, "Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be") *with* ASHCROFT MEMORANDUM*, supra* note 23 (permitting agencies to withhold information so long as decision rests on sound legal basis). *See also* HOLDER MEMORANDUM, *supra* note 23 (reestablishing foreseeable harm standard).

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

79. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 875 (D.C. Cir. 1992) (modifying substantial competitive harm test by distinguishing between voluntary and involuntary disclosure).

80. For a discussion of *Argus*, see *infra* Part III.B.

I argue should apply to Exemption 4 information; thus, it is instructive to understand how it operates.

In *National Parks*, in which the National Parks and Conservation Association sought access to records regarding concession operations of the National Park Service, the D.C. Circuit created and explained the substantial competitive harm test.[81] Relying on legislative history, the D.C. Circuit held that information should be treated as "confidential" within the meaning of FOIA's Exemption 4 if disclosing it would either (1) impair the government's ability to obtain necessary information in the future, or (2) cause "substantial harm to the competitive position of the person from whom the information was obtained."[82] The appellate court remanded the case to district court to develop the record further and determine whether disclosure would harm the concessioner's competitive position.[83]

The D.C. Circuit later narrowed the applicability of the substantial competitive harm test in *Critical Mass Energy Project*, when a public interest organization opposed to nuclear energy sought to obtain safety reports that a nuclear industry group had voluntarily provided to the Nuclear Regulatory Commission (NRC). Sitting en banc, the court held "that Exemption 4 protects any financial or commercial information provided to the Government on a voluntary basis if it is of a kind that the provider would not customarily release to the public."[84] The court distinguished between voluntary and required government disclosures, reasoning that the substantial competitive harm test could have a chilling effect on voluntary disclosures.[85] The court noted, "It is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release."[86] Accordingly, the D.C. Circuit ruled that because the data was confidential and voluntarily provided to the NRC, the data was exempt. The Supreme Court denied a petition for certiorari to review the decision.[87]

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81. *Nat'l Parks & Conservation Ass'n*, 498 F.2d at 770.

82. *Id.*

83. *Id.* at 771.

84. *Critical Mass Energy Project,* 975 F.2d at 880.

85. *Id.* at 878 ("When a FOIA request is made for information that is furnished on a voluntary basis, however, we have identified a different aspect of the governmental interest in securing confidential information. . . . Where, however, the information is provided to the Government voluntarily, the presumption is that its interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation.").

86. *Id.* at 879.

87. OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, EXEMPTION 4 AFTER THE SUPREME COURT'S RULING IN *FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA* (2019), https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media [https://perma.cc/PK26-AC9M] [hereinafter AFTER *ARGUS LEADER MEDIA*].

Thus, after *Critical Mass Energy Project*, courts would only apply the substantial competitive harm test to financial or commercial information that persons were required to furnish to the federal government. All other financial or commercial information voluntarily provided was exempt from disclosure under FOIA so long as the submitter "customarily with[held]" it from the public.[88] To sharpen the line between "voluntary" and "required" submissions, the DOJ issued policy guidance based on the D.C. Circuit's underlying rationale in *Critical Mass Energy Project*.[89] The guidance concluded that voluntary participation in government contracting does not imply voluntary information sharing. Instead, agencies should focus on "whether submission of the information at issue was required for those who chose to participate,"[90] as with federal contractors' employment data.[91] Despite its narrowed application, the substantial competitive harm test continued to allow parties filing FOIA requests to overcome submitter objections and access private data submitted to the government.[92]

2. The Trade Secrets Act and Exemption 4

The relationship between FOIA and the TSA, also referred to as section 1905, is central to understanding why agencies are understood to lack discretion to release information protected by Exemption 4. This, in turn, bears on my claim that, after *Argus*, agencies do have discretion to disclose Exemption 4 information, and that they should apply the foreseeable harm

88. *Critical Mass Energy Project*, 975 F.2d at 880.

89. OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA GUIDE, 2004 EDITION: EXEMPTION 4 (May 2004), https://www.justice.gov/oip/foia-guide-2004-edition-exemption-4#:~:text=Exemption%204%20of%20the%20FOIA,government%20and%20submitters%20of%20information [https://perma.cc/73ML-PNYK][hereinafter EXEMPTION 4]; *see also* OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA UPDATE VOL. XIV, NO. 2: SUPREME COURT LETS CRITICAL MASS STAND (Jan. 1, 1993), https://www.justice.gov/oip/blog/foia-update-supreme-court-lets-critical-mass-stand [https://perma.cc/988G-Z6HH] [hereinafter SUPREME COURT LETS CRITICAL MASS STAND]; OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA UPDATE VOL. XIV, NO. 2: EXEMPTION 4 UNDER CRITICAL MASS: STEP-BY-STEP DECISIONMAKING (Jan. 1, 1993), https://www.justice.gov/oip/blog/foia-update-foia-counselor-exemption-4-under-critical-mass-step-step-decisionmaking [https://perma.cc/4BFL-HTY5].

90. EXEMPTION 4, *supra* note 89; SUPREME COURT LETS *CRITICAL MASS* STAND, *supra* note 89 (noting the important role that this guidance plays in the procurement process, as evidenced in part by the guidance's preparation alongside the Office of Federal Procurement Policy); *accord* Judicial Watch, Inc. v. Exp.-Imp. Bank, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (submission is deemed "required" when government "requires a private party to submit information as a condition of doing business with the government").

91. *See supra* Part II.A (discussing EO 11246's data collection requirements). Informal mandates that call for the submission of information as a condition of contracting are also "required" information, though "the existence of agency authority to require submission of information does not automatically mean such a submission is 'required'." EXEMPTION 4, *supra* note 89.

92. *See, e.g.*, Pub. Citizen v. U. S. Dep't of Health & Human Servs., 975 F. Supp. 2d 81, 89 (D.D.C. 2013) (challenging HHS withholding of records).

standard to determine whether disclosure is appropriate.[93] The Supreme Court addressed both FOIA and the TSA in *Chrysler Corp. v. Brown*, which was decided after *National Parks* but before *Critical Mass Energy*.[94]

Chrysler revolved around whether Chrysler Corporation, a government contractor, could challenge the federal government's decision to disclose the private employment information it had provided to the government pursuant to EO 11246. Unless "authorized by law," the TSA prohibits agencies from releasing information that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . ."[95] As the Court explained in *Chrysler*, the origins of the TSA can be traced to an 1864 law barring the "unauthorized disclosure of specified business information by Government revenue officers."[96] It was then re-enacted several times, modified, and eventually consolidated with two other statutes to form the Trade Secrets Act, enacted in 1948.[97]

While most FOIA exemptions allow the government to exercise discretion in releasing protected information, the Court held that the TSA removes the government's discretion to release information protected by Exemption 4 *and* the TSA, unless an agency adopts a legislative rule authorizing disclosure.[98] The Court explained that neither an interpretative regulation based in EO 11246 nor a general statement of agency policy can be the "authoriz[ation] by law" required by the TSA.[99] The Court also recognized a party's right to challenge an agency decision to release the information as arbitrary or capricious under the Administrative Procedure Act;[100] these challenges are known as "reverse FOIA" suits.[101] Crucially, however, the Court in *Chrysler* did not determine whether the employment data at issue was covered by Exemption 4 or the TSA, or the "relative ambits" of the two, and it remanded the question of whether the data was covered by

93. Agencies generally retain discretion to release information covered by a FOIA exemption, though there are some exceptions. OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA UPDATE VOL. VI, NO. 3: DISCRETIONARY DISCLOSURE AND EXEMPTION (Jan. 1, 1985), https://www.justice.gov/oip/blog/foia-update-oip-guidance-discretionary-disclosure-and-exemption-4 [https://perma.cc/2PJH-BZ2R].

94. Chrysler Corp. v. Brown, 441 U.S. 281, 317–19 (1979).

95. 18 U.S.C. § 1905 (2018).

96. *Chrysler Corp.*, 441 U.S. at 296–97.

97. *Id*. at 297–98.

98. *Id.* at 312–16.

99. *Id*.

100. Chrysler Corp. v. Brown, 441 U.S. 281, 316–19 (1979) ("For the reasons previously stated, we believe any disclosure that violates § 1905 is 'not in accordance with law' within the meaning of 5 U.S.C. § 706(2)(A).").

101. REVERSE FOIA, *supra* note 76.

the TSA to the Court of Appeals.[102] The Court thus left unanswered the question of whether all Exemption 4-covered information falls within the scope of the TSA.

Reverse FOIA lawsuits following *Chrysler* continued to grapple with the scope of the TSA and its relationship to FOIA's Exemption 4.[103] The D.C. Circuit "definitively" addressed these two issues in *CNA Financial Corp. v. Donovan*.[104] Like *Chrysler*, *CNA* was a reverse FOIA lawsuit involving a government contractor seeking review of an agency decision to release employment information collected pursuant to EO 11246. After extensive analysis of the TSA and relevant revisions, the court held that that the "scope of [the TSA] is at least co-extensive with that of Exemption 4 of FOIA" and "in the absence of a regulation effective to authorize disclosure, [the TSA] prohibits [the release of CNA's employment information that falls within Exemption 4]."[105]

Subsequent decisions have largely endorsed or affirmed *CNA*'s holding that the TSA and Exemption 4 are coextensive or "at least" coextensive,[106] and the Supreme Court has not engaged with this issue since *Chrysler*. Notably, *CNA* also addressed another important question: What is the relationship between the TSA and Exemption 3, which allows agencies to withhold information "specifically exempted from disclosure by statute"?[107] The court held that "the Trade Secrets Act does not, by virtue of Exemption 3, erect a disclosure bar that is impervious to the mandate of FOIA."[108] Thus, the TSA does not bear on a FOIA analysis except to prevent discretionary disclosures of Exemption 4 information. That is, the TSA is a bar on discretionary FOIA disclosures only because courts have understood Exemption 4 to cover the same information as the TSA, and disclosure of information covered by the latter would subject the discloser to criminal liability.

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102. *Chrysler Corp.*, 441 U.S. at 319 n.49.

103. Many of these opinions also include discussions regarding the relationship between the TSA and Exemption 3, which bars agencies disclosing anything "specifically exempted from disclosure by statute." Courts have concluded that the TSA does not qualify as a nondisclosure statute under Exemption 3.

104. 830 F.2d 1132, 1133–34 n.5 (D.C. Cir. 1987) ("We have acknowledged, and even indicated our views on, these questions in prior cases. . . . But we have been careful to note that these observations are dicta.")

105. *Id.* at 1151.

106. For list of cases, see *infra* note 167. *Cf.* Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n, 750 F 2d 1394, 1402 (7th Cir. 1984) ("Exemption 4 is broadly worded, and it is hard to believe that Congress wanted seekers after information to stub their toes on a rather obscure criminal statute [the TSA] almost certainly designed to protect that narrower category of trade secrets—secret formulas and the like—whose disclosure could be devastating to the owners and not just harmful.").

107. 5 U.S.C. § 552(b)(3) (2018).

108. *CNA Fin. Corp.*, 830 F.2d at 1141.

The claim that the TSA and Exemption 4 are coextensive has been the subject of past criticism,[109] but the question has taken on renewed importance in light of the FIA. Specifically, the FIA's foreseeable harm standard, discussed next, only applies to FOIA exemptions where an agency has discretion to release the information. Thus, a finding that the TSA and Exemption 4 are coextensive bars an agency from applying the foreseeable harm standard, which favors disclosure, to covered information.

3. The FIA's Foreseeable Harm Standard

Congress enacted the FIA to preserve the tradition of government transparency in the face of dwindling access to public records:[110] between 2008 and 2018, the percentage of FOIA requests denied rose steadily from 22 percent to 43 percent.[111] The popular bipartisan legislation applies to all FOIA requests filed after June 30, 2016,[112] and requires that, if complete disclosure is barred, agencies "consider whether partial disclosure of information is possible" and take steps to separate and release nonexempt information.[113] Most importantly, the legislation also prohibits agencies from withholding information unless "(1) the agency reasonably foresees that disclosure of the record would harm an interest protected by an exemption, or (2) the disclosure is prohibited by law."[114] The first prong is known as the foreseeable harm standard and, according to a Senate committee report on

109. Bernard Bell, Food Marketing Institute *A Preliminary Assessment (Part II)*, YALE J. ON REGUL.: NOTICE & COMMENT (July 8, 2019), https://www.yalejreg.com/nc/food-marketing-institute-a-preliminary-assessment-part-ii [https://perma.cc/Q54B-9NT7]; Stephen S. Madsen, *Protecting Confidential Business Information from Federal Agency Disclosure After* Chrysler Corp. v. Brown, 80 COLUM. L. REV. 109 (1980) ("Some commentators, and recently some members of Congress, have argued for a reading of section 1905 that would resolve the apparent inconsistency between it and the FOIA, while greatly altering the scope of protection available under *Chrysler*. Although by its terms section 1905 prohibits disclosures of confidential business information obtained by any federal officer or employee, it is actually a codification of three old anti-disclosure statutes applicable to personnel of the Internal Revenue Service, the Department of Commerce, and the Tariff Commission (now the International Trade Commission). Because the 1948 codification that produced section 1905 was intended to preserve prior law without substantive change, the commentators argue that, under accepted canons of statutory construction, the precodification language should control. In this view, section 1905 would only prohibit '[un]authorized' disclosures of confidential business information gathered by the three agencies mentioned above.") (citations omitted).

110. Brief for Reporters Committee for Freedom of the Press as Amici Curiae, Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 424 F. Supp. 3d 771 (N.D. Cal. 2019) (No. 28-1).

111. *Id*. at 3.

112. FOIA Improvement Act of 2016 § 5, Pub. L. 114-185, 130 Stats. 538, 544–45 (2016).

113. *Id.* § 2, 130 Stats. at 539 (amending 5 U.S.C. § 552).

114. *Id.* Prior to the FIA, there was no statute requiring agencies to disclose information. Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979). Rather, agencies followed DOJ directives. *See, e.g.*, RENO MEMORANDUM, *supra* note 23 (establishing foreseeable harm standard); ASHCROFT MEMORANDUM, *supra* note 23 (permitting agencies to withhold information so long as decision rests on sound legal basis); HOLDER MEMORANDUM, *supra* note 23 (reestablishing foreseeable harm standard).

the bill, it "applies only to those FOIA exemptions under which discretionary disclosures can be made."[115]

The Senate committee report does not explicitly include Exemption 4 in its list of exemptions that bar discretionary disclosures.[116] In fact, the report makes no reference at all to Exemption 4.[117] Rather, the report notes that "[s]everal FOIA exemptions by their own existing terms cover information that is prohibited from disclosure or exempt from disclosure under a law outside the four corners of FOIA." The report then cites to the DOJ's Guide to the Freedom of Information Act (the DOJ Guide) and reiterates that "information protected from disclosure by the Trade Secrets Act" may not be subject to discretionary disclosure.[118] Only upon reading the DOJ Guide itself do we find an explicit statement that the DOJ does not understand Exemption 4 to permit discretionary disclosures.[119] Notably, the DOJ's view is grounded in the case law finding Exemption 4 and the TSA "coextensive."[120]

If Exemption 4 bars discretionary disclosures, it also means an agency or court cannot apply the FIA's foreseeable harm standard to information covered by Exemption 4. Until recently, not applying the foreseeable standard to information covered by Exemption 4 would not have changed the outcome of a FOIA request because a reviewing agency would have applied the substantial competitive harm test. And, as I will explain,[121] this test tracks the FIA standard. Thus, it would be redundant for an agency to apply the FIA standard to information it had already determined Exemption 4 covered through application of the substantial competitive harm test. However, any risk of redundancy dissipated in 2019, with the Supreme Court's decision in *Argus*.

B. The Supreme Court's 2019 Decision in Argus Leader Media

Three years after Congress passed the FIA, the Supreme Court decided *Argus Leader Media*. In *Argus*, the South Dakota newspaper *Argus Leader* requested five years of data relating to the U.S. Department of Agriculture's (USDA) Supplemental Nutrition Assistance Program (SNAP).[122] The data requested included the names and locations of all retail stores participating in SNAP, along with the amount of SNAP benefits—or "taxpayer payments"—

115. S. REP. NO. 114-4, at 8 (2015).

116. *Id.* at 8–11.

117. *Id.* at 8.

118. *Id*. at 8 n.11.

119. EXEMPTION 4, *supra* note 89 ("Finally, it should be noted that the Trade Secrets Act . . . prohibits the unauthorized disclosure of all data protected by Exemption 4.").

120. For a discussion of the case law that the DOJ relied upon, see *infra* Part IV.A.1.

121. *See infra* Part IV.B (explaining why applying the FIA's standard to Exemption 4 information furthers legislative intent).

122. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. at 2361.

each store redeemed annually. The newspaper "felt the taxpayer payments would identify potential instances of food stamp fraud, as well as give more insight into food deserts and food insecurity in rural South Dakota. The payments would also identify which corporations make the most money in [SNAP]."[123] The USDA provided the names and locations of participating retail stores but declined to furnish data regarding the amount of SNAP benefits redeemed by each store, so the *Argus Leader* brought suit.

At trial,[124] the USDA testified that the store-level redemption data was protected under Exemption 4 because "retailers use models of consumer behavior to help choose new store locations and to plan sales strategies" and disclosing this information could "create a windfall for competitors."[125] However, the district court did not find it would cause *substantial* competitive harm and thus ruled in favor of the *Argus Leader.*[126] When the USDA declined to appeal the decision, the Food Marketing Institute, a trade group representing grocery stores, intervened. The Food Marketing Institute argued that the court should apply the dictionary definition of the term "confidential" and disregard the D.C. Circuit's *National Parks* substantial competitive harm test.[127] The issue went before the Eighth Circuit, where a panel of judges applied the substantial competitive harm test and affirmed the district court's decision.[128] The Food Marketing Institute petitioned the Supreme Court for review. The Court granted its petition for writ of certiorari on January 11, 2019.[129]

The Supreme Court focused on when "information provided to a federal agency qualif[ies] as 'confidential' under Exemption 4."[130] Because FOIA did not define the term, the Court looked to the term's "ordinary, contemporary, common meaning" in a Webster's New Collegiate Dictionary from the mid-1960s.[131] The meaning of the term "confidential" was, and remains, "private or secret."[132] The Court concluded that the substantial

123. Jonathan Ellis, *The* Argus Leader *is Arguing for Public Records at the U.S. Supreme Court on Monday. Here's Why.*, ARGUS LEADER (Apr. 17, 2019), https://www.argusleader.com/story/news/2019/04/17/freedom-of-information-act-supreme-court-public-records-snap-data/3485274002 [https://perma.cc/NJ6Q-ZVHX].

124. The USDA withheld information under both Exemptions 3 and 4. On appeal, the Eighth Circuit reversed and remanded because the court did not think the information was protected under Exemption 3. On remand, the USDA continued to argue before the district court for protection under Exemption 4, and that is the trial referenced here. Argus Leader Media v. USDA, 740 F.3d 1172, 1173 (8th Cir. 2014).

125. *Argus Leader Media*, 139 S. Ct. at 2361.

126. Argus Leader Media v. USDA, 224 F. Supp. 3d 827, 833–35 (D.S.D. 2016).

127. Argus Leader Media v. USDA, 889 F.3d 914, 916 n.4 (8th Cir. 2018).

128. *Id.* at 916.

129. AFTER *ARGUS LEADER MEDIA*, *supra* note 87.

130. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. at 2360.

131. *Id.* at 2362 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

132. *Id.* at 2363 (internal quotation marks omitted).

competitive harm test established in *National Parks* "disregard[ed] the rules of statutory interpretation."[133]

Writing for the majority, Justice Gorsuch observed that commercial or financial information is confidential when it "is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy."[134] Thus, because the government had "presumably" induced retailers to provide the disputed information in part by promising to keep the information private, the information was exempt from disclosure.[135]

Three justices filed an opinion concurring in part and dissenting in part. These justices agreed that *National Parks*' harm requirement went "too far" because "nothing in FOIA's language, purposes, or history" suggests that the harm need be "substantial" or that a showing of "competitive" harm excludes other types of harm. For instance, they noted that disclosure "might discourage customers from using a firm's products, but without substantial effect on its rivals," or "undermine a regulated firm that has no competitors." Yet they still argued in favor of including a harm requirement.[136] The dissenting justices suggested that a submitter should be required to show "genuine harm to [its] economic or business interests" if its information were to be released.[137]

C. Department of Justice Guidance Regarding Argus Leader Media

In addition to marking a stark departure from the substantial competitive harm test, the Court's decision in *Argus* left open another question: What constitutes "an assurance of privacy," and can it be implied? Five months after the Court issued its decision, the DOJ provided guidance on the new test.[138] The DOJ first referred to an earlier Supreme Court decision, *Department of Justice v. Landano*, which addressed when the government provides an "implied assurance of confidentiality."[139] After a detailed analysis of both *Landano* and *GSA v. Benson*,[140] a Ninth Circuit case that the

133. *Id.* at 2364.

134. *Id.* at 2366.

135. *Id.* at 2363 (citing Food Stamp Program Rule, 43 Fed. Reg. 43,272, 43,275 (Sept. 22, 1978) and Brief for U.S. as Amicus Curiae Supporting Petitioner at 27–30, Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019) (No. 18-481)).

136. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2367 (2019) (Breyer, Ginsburg & Sotomayor, JJ., concurring in part, dissenting in part).

137. *Id.*

138. OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, STEP-BY-STEP GUIDE FOR DETERMINING IF COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM A PERSON IS CONFIDENTIAL UNDER EXEMPTION 4 OF THE FOIA (2019), https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential [https://perma.cc/T2N9-99CF] [hereinafter GUIDE FOR CONFIDENTIALITY]; AFTER ARGUS LEADER MEDIA, *supra* note 87.

139. *Id.*; U.S. Dep't of Justice v. Landano, 508 U.S. 165, 172 (1993).

140. Gen. Servs. Admin. v. Benson, 415 F.2d 878, 881 (9th Cir. 1969) (appealing enjoinment of government agency from withholding records under Exemption 4).

Supreme Court had cited with approval in *Argus*, the DOJ suggested an Exemption 4 analysis proceed as follows.[141]

First, the agency must ask if the submitter customarily keeps the information private. If not, the information is not considered confidential under Exemption 4, and the agency may release it after notifying the submitting party. If the submitting party usually keeps the information private, the agency must ask whether it expressly or impliedly assured the submitting party it would keep the submitted information confidential.

An agency establishes an express assurance of confidentiality in one of three ways: (1) in "direct communications with the submitter," (2) through broader notices on agency websites, and (3) via regulations.[142] These notices or communications could also state an agency's intention to make the submitted information publicly available.

An agency can establish an implied assurance of confidentiality either through an affirmative statement implying confidentiality or through its silence on the matter. Implied assurances of confidentiality are evaluated using an objective test: if a reasonable party would believe that the agency had implicitly provided such assurance, the information is confidential. If not, the agency next asks whether there were "express or implied indications at the time the information was submitted that the government *would* publicly disclose the information." [143] If there were no indications, the information is confidential. That is, government silence leads to a presumption of confidentiality. However, if there were any indications the government would disclose the data, "the submitter could not reasonably expect confidentiality upon submission and so the information is *not* confidential under Exemption 4."[144] The guidance does not acknowledge or address the impact of the FIA.[145]

In summary, *Argus* and the DOJ's regulatory guidance point to a defeasible presumption of confidentiality if the submitter customarily keeps that information private. This understanding significantly expands what commercial and financial information is protected from disclosure by Exemption 4.

IV. AGENCY DISCRETION UNDER EXEMPTION 4 AFTER *ARGUS LEADER MEDIA*

After *Argus*, legal commentators claimed that the decision would curtail the public's ability to access the bulk of financial or commercial information

141. GUIDE FOR CONFIDENTIALITY, *supra* note 138.

142. AFTER *ARGUS LEADER MEDIA*, *supra* note 87.

143. GUIDE FOR CONFIDENTIALITY, *supra* note 138.

144. *Id.*

145. *Id.*

submitted to the government, including federal contractor employment data.[146] Fortunately for proponents of government transparency, *Argus* does not close the door on information covered by Exemption 4. Rather, *Argus* tacitly restores agency discretion to release information shielded by Exemption 4, thus authorizing agencies to apply the FIA's foreseeable harm standard to shielded information, including any federal contractor employment data.

My claim that agencies both have discretion and should apply the FIA's standard rests on two related, but independently sufficient, arguments, which this Part outlines.

A. Ripe for Reevaluation: The Relationship Between Exemption 4 and the TSA

My first argument is that the Supreme Court's decision in *Argus* should prompt courts to reevaluate the purportedly coextensive nature of Exemption 4 and the TSA.

As discussed,[147] the Senate committee report accompanying the FIA does not state that Exemption 4 bars discretionary disclosure.[148] Instead, the report cites to the DOJ Guide to support its statement that "[s]everal FOIA exemptions by their own existing terms cover information that is prohibited from disclosure or exempt from disclosure under a law outside the four corners of FOIA."[149] A parenthetical following this citation to the DOJ Guide notes that "information protected from disclosure by the Trade Secrets Act" is not subject to discretionary disclosure.[150]

While instructive, the DOJ Guide itself is not binding legal authority or precedent and does not have the force of law.[151] To support its view that the TSA prohibits discretionary disclosure of Exemption 4 information, the DOJ Guide cites exclusively to case law suggesting the two provisions are "coextensive."[152] It is thus important to look closely at the cases the DOJ Guide cites to determine whether *Argus* should change how we understand this relationship.

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146. *See supra* note 29 (listing legal commentators who claimed that *Argus* sounded the death knell for FOIA requests for private information, including federal contractor employment data).

147. *See supra* Part III.A.3 (discussing the FIA's accompanying senate report).

148. S. REP. NO. 114-4 (2015).

149. *Id*. at 8.

150. *Id.* at 8 n.11.

151. The DOJ describes the Guide as a "comprehensive legal treatise." OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, https://www.justice.gov/oip/doj-guide-freedom-information-act-0 [https://perma.cc/N7RQ-Q9KM] (last accessed Mar. 13, 2021).

152. EXEMPTION 4, *supra* note 89.

1. The DOJ's view that Exemption 4 and the TSA are "coextensive" is based in case law.

Before explaining why *Argus* should trigger courts to reevaluate the relationship between Exemption 4 and the TSA, I review how courts arrived at the conclusion that these statutory provisions are coextensive. I attempt to untangle this case law in order to show that the reasoning underpinning these decisions rests on shaky ground, and the decisions are thus ripe for reconsideration.

Recall,[153] the only Supreme Court precedent on point is *Chrysler*. However, the Court in *Chrysler* did not determine whether the employment data at issue fell under the umbrella of Exemption 4 or that of the TSA. Nor did the Court address the scope or ambits of the TSA,[154] only observing in a concluding footnote that

> although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of [section] 1905, and that therefore the FOIA might provide the necessary "authoriz[ation] by law" for purposes of [section] 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of [section] 1905.[155]

The Court's decision to leave this question unresolved passed the buck back to lower courts, which had been grappling with the question for nearly a decade.[156]

Illustrative of this ambiguity and the tenuous connection between the TSA and Exemption 4 is the Fourth Circuit's muddied 1976 decision in *Westinghouse Electricity Corp. v. Schlesinger*.[157] The dispute involved a government contractor that sought injunctive and declaratory relief against the disclosure of employment data and affirmative action plans it had submitted to the federal government pursuant to EO 11246.[158]

In the course of its meandering opinion, the Fourth Circuit cites to four cases from the D.C. Circuit and claims that those decisions demonstrate that the TSA and Exemption 4 provide equivalent protections for the same information—that they are "the same" or "co-extensive."[159] However, each of the four cases cited had a narrower holding than the Fourth Circuit

153. *See supra* Part III.A.2 (discussing the relationship between the TSA and FOIA).

154. Chrysler Corp. v. Brown, 441 U.S. 281, 319 (1979).

155. *Id.* at 319 n.49.

156. *E.g.*, Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 425 F.2d 578, 580 n.5 (D.C. Cir. 1970).

157. 542 F.2d 1190, 1195 (4th Cir. 1976).

158. *Id.* at 1195–96.

159. *Id.* at 1200, 1204 n.38 ("We group § 1905 and Exemption 4 together because it has been uniformly held that the scope of § 1905 and Exemption 4 of the FOIA are . . . 'the same[]' or . . . 'co-extensive.' Accordingly, material qualifying for exemption under [Exemption 4] falls within the material, disclosure of which is prohibited under § 1905.") (internal citations omitted).

recognized, and none held that the two provisions were necessarily "co-extensive."[160] Rather, the cases cited are best characterized as holding that, depending on the facts of the case, Exemption 4 and the TSA *may* be co-extensive, and that information covered by both may never be disclosed.[161] Reverse FOIA lawsuits following *Westinghouse* and *Chrysler* continued to grapple with the scope of the TSA, and its relationship to FOIA's Exemption 4.[162]

The D.C. Circuit "definitively" addressed the scope of the TSA and its relationship to FOIA's Exemption 4 in *CNA*, another reverse FOIA lawsuit.[163] To support its view that the scope of the TSA was "at least" co-extensive with that of Exemption 4, the *CNA* court cited three cases. However, the holding in each of these three cases is either narrower than the D.C. Circuit characterized or buttressed by the same conclusory reasoning as *Westinghouse*, if not by *Westinghouse* itself.[164] In a footnote, the D.C. Circuit

160. *Grumman*, 425 F.2d at 580 n.5 (noting in dicta that the TSA "merely creates a criminal sanction for the release of 'confidential information" and, "since this type of information is already protected from disclosure under [Exemption 4], section 1905 should not be read to expand this exemption, especially because [FOIA] requires that exemptions be narrowly construed"); Ditlow v. Volpe, 362 F. Supp. 1321, 1323–24 (D.D.C. 1973) (citing *Grumman* before addressing whether the National Highway and Traffic Safety Act (NHTSA) creates "a special, broader confidentiality for auto safety information than that available under exemption 4" and finding that the NHTSA "harmonizes with exemption 4 in protecting trade secrets and privileged or confidential financial or commercial information" and that "[*i*]*n this case*, exemption 3 is co-extensive with exemption 4 . . . ."") (emphasis added); Pharm. Mfrs. Ass'n v. Weinberger, 401 F. Supp. 444, 446 (D.D.C. 1975). ("It appears that both side[s] agree that the scope of coverage of [the TSA, Exemption 3, and] exemption four are, *for purposes of this suit*, the same.") (emphasis added); Charles River Park "A", Inc. v. Dep't of Hous. & Urban Dev., 519 F.2d 935, 941 n.7 (D.C. Cir. 1975) ("Since only the FOIA's fourth exemption deals with matters covered by section 1905, consideration of section 1905 in FOIA cases is appropriate only when the information falls both within the fourth exemption and under section 1904.").

161. The three-judge panel in *Westinghouse* ultimately affirmed the district court's grant of injunctive relief and denial of declaratory relief, though the holding is insignificant for the purposes of this discussion. The court held that (1) Exemption 3, which exempts anything "specifically exempted from disclosure by statute" includes the TSA, (2) the court had jurisdiction, (3) FOIA confers an implied right to invoke equity jurisdiction to prevent disclosure, and (4) the district court acted properly in receiving evidence intended to inform the court of the type of information at issue. *Westinghouse*, 542 F.2d at 1190. Notably, the first part of this holding was overruled by a 1976 amendment to FOIA. *See, e.g.*, Acumenics Research & Tech. v. U.S. Dep't of Justice, 843 F.2d 800, 806 (4th Cir. 1988) (observing that "if material did not come within the broad trade secrets exemption of the [FOIA], section 1905 would not justify withholding. . . .") (quoting H.R. REP. NO. 94-880, pt. 1, at 23 (1976)); *see also* United Tech. Corp. v. Marshall, 464 F. Supp. 845 (D. Conn. 1979) (observing that *Westinghouse* was overruled by the 1976 amendment).

162. Many of these opinions also include discussions regarding the relationship between the TSA and Exemption 3, which bars agencies disclosing anything "specifically exempted from disclosure by statute." Courts have concluded that the TSA does not qualify as a nondisclosure statute under Exemption 3. For a discussion of these cases and an explanation of why the TSA does provide independent cover for contractor diversity data, see *infra* Part V.A.1.

163. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133–34 (D.C. Cir. 1987).

164. The earliest case the D.C. Circuit cited is *Canal Ref. Co. v. Corrallo*, in which the court observed that "ample" precedent "supports the conclusion that Exemption 4 and § 1905 are coextensive." 616 F. Supp. 1035, 1042 (D.D.C. 1985). However, the "ample" precedent cited consists of the following four

also noted it was unnecessary to "define the outer limits" of the TSA in this case "[b]ecause FOIA would provide legal authorization for and compel disclosure of financial or commercial material that falls outside of Exemption 4."[165] In other words, the court appears to concede that financial or commercial information falling outside the scope of Exemption 4 but within that of the TSA can be disclosed under FOIA, but this scenario would not come to fruition because the two are co-extensive.[166] While subsequent decisions have endorsed or affirmed *CNA*'s holding that the TSA and Exemption 4 are coextensive, the flaws permeating the analysis in *CNA* echo across all of these decisions.[167]

The DOJ Guide observes that "nearly every court that has considered the issue has found the TSA and Exemption 4 to be 'coextensive'," so "the D.C. Circuit has held that if information falls within the scope of Exemption 4, it also falls within the scope of the Trade Secrets Act." [168] To support this claim, the Guide relies solely on case law grounded in *Westinghouse*, *CNA*,

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cases: (1) *General Motors Corp. v. Marshall*, 654 F.2d 294, 297 (4th Cir. 1981),which relied upon *Westinghouse*, (2) *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 686–87 (D.C. Cir. 1976), which did not address the co-extensiveness of the TSA and Exemption 4, (3) *CNA Financial Corp. v. Donovan*, C.A. No. 77-0808, slip op. at 10 (D.D.C. October 29, 1981), whose appeal had been docketed but not yet decided, and (4) *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 55 n.59 (D.C. Cir. 1981), which relied upon an academic article citing the same cases as *Westinghouse*. In *Worthington Compressors*, the court found that "if Exemption 4 does not apply and if [the TSA] is construed to be broader than Exemption 4 so as to apply to the information, FOIA may provide the necessary 'authorization by law' to satisfy [the TSA and permit release of the information]."662 F.2d 45 at 55 n.59. The second case the D.C. Circuit cited is *AT&T Info. Sys., Inc. v. Gen. Servs. Admin*., which observed only that both plaintiff and defendant in the case "recognize[d]" the TSA and Exemption 4 as "co-extensive." 627 F. Supp. 1396, 1404–05 (D.D.C. 1986).

Lastly, the D.C. Circuit suggested comparing these first two cases to *9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve. Sys*., a First Circuit opinion holding only that "if the government cannot prove that the requested documents are within FOIA exemption 4, their disclosure will not violate section 1905." 721 F.2d 1, 12 (1st Cir. 1983).

165. *CNA Fin. Corp.*, 830 F.2d at 1152 n.139.

166. Alternatively, it could be proactively disclosed, for example, if the information has been requested before and the agency anticipates it will be requested again. OFFICE OF INFO. POLICY., U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROACTIVE DISCLOSURES 9–22 (2019), https://www.justice.gov/oip/foia-guide/proactive_disclosures/download [https://perma.cc/A5UM-ZZ22].

167. *See, e.g.*, Frazee v. U.S. Forest Serv., 97 F.3d 367, 373 (9th Cir. 1996) (reverse FOIA suit holding that document not protected from disclosure under Exemption 4 is not exempt from disclosure under the TSA and relying upon Pac. Architects & Eng'rs Inc. v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990), which relies upon *Westinghouse*); Bartholdi Cable Co , Inc. v. FCC., 114 F 3d 274, 281 (D.C. Cir. 1997) (non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. §§ 701–706, holding that "we have held that information falling within Exemption 4 of FOIA also comes within the Trade Secrets Act" and citing *CNA Fin. Corp*., 830 F.2d at 1151); Can. Commercial Corp. v. Dep't of Air Force, 514 F.3d 37 (D.C. Cir. 2008) (quoting *CNA Fin. Corp*., 830 F.2d at 1151); McDonnell Douglas Corp. v. U.S. Dep't of Air Force, 375 F.3d 1182, 1185–86 (D.C. Cir. 2004) (same), *reh'g en banc denied*, No. 02-5342 (D.C. Cir. Dec. 16, 2004); Boeing Co. v. U.S. Dep't of Air Force, 616 F. Supp. 2d 40, 45 (D.C. Cir. 2009) (stating D.C. Circuit "has 'long held' that the Trade Secrets Act and Exemption 4 are coextensive" (quoting *CNA Fin. Corp* , 830 F.2d at 1151)); *see also* EXEMPTION 4, *supra* note 89.

168. *Id.*

or both. Given the flaws permeating all these cases—including the conclusory reasoning and overbroad construal of prior case law—it is clear that the "coextensive" nature of the TSA and Exemption 4 rests on shaky ground and is thus ripe for review.

2. Courts should reevaluate the "coextensive" nature of Exemption 4 and the TSA in light of Argus*, and because the two are distinguishable.*

The DOJ Guide also referenced a case that buttresses my argument that the Supreme Court's decision in *Argus* should prompt courts to reevaluate the purportedly coextensive nature of Exemption 4 and the TSA.[169]

The referenced case is *McDonnell Douglas Corp. v. Widnall*, which the D.C. Circuit decided in 1995.[170] In *Widnall*, McDonnell Douglas Corporation, a government contractor, sued to prevent the Air Force from releasing the prices of the contractor's satellite launch services.[171] McDonnell Douglas maintained that the prices "were protected from disclosure by the Trade Secrets Act" and "[i]ts argument relied upon the statement in [*CNA*] that the Trade Secrets Act was 'at least co-extensive' with Exemption 4."[172] In a footnote following this summary, the D.C. Circuit wrote, "Although we suppose it is possible that this statement is no longer accurate in light of our recently more expansive interpretation of the scope of Exemption 4 in [*Critical Mass Energy*], the Air Force has not argued that we should reconsider our understanding of the relationship between the two provisions."[173] In other words, the court acknowledged that its "at least co-extensive" language was already in doubt by a relatively minor expansion of Exemption 4 coverage. Likewise, if Exemption 4 is reinterpreted to shield a larger universe of information, this undoubtedly means it is no longer equally coextensive with the TSA. Common sense supports this conclusion: If two statutes are found to be "at least" coextensive or coextensive, but one of them is later broadened, how could they remain coextensive? Though it is dicta, the *Widnall* court's acknowledgement is logical and instructive.

Indeed, if the D.C. Circuit reasoned that *Critical Mass Energy*'s expanded understanding of what Exemption 4 shields from disclosure could trigger a reevaluation of its relationship to the TSA, *Argus* should have the same effect. As a reminder, *Critical Mass Energy* held that Exemption 4 protects any private financial or commercial information provided to an

169. *Id.*; *see also* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133–34 n.5 (D.C. Cir. 1987) (characterizing as "dicta" prior courts' observations on the scope of section 1905 and its relationship to Exemptions 3 and 4).

170. 57 F.3d 1162 (D.C. Cir. 1995).

171. *Id.* at 1162–63.

172. *Id.* at 1165.

173. *Id.* at 1165 n.2.

agency on a "voluntary basis."[174] The court's holding broadened Exemption 4's shield by protecting all information submitted voluntarily, even if the substantial competitive harm test would not have protected it. Likewise, *Argus* shields even more information from disclosure, overturning the substantial competitive harm test and protecting all financial and commercial information that "is both customarily and actually treated as private."[175] Thus, courts should reevaluate the relationship between Exemption 4 and the TSA.

Case law involving public access to court records also suggests that the text and terms of the TSA and Exemption 4 are distinguishable. Specifically, courts distinguish between confidential commercial or financial information and bona fide trade secrets. For example, the Third Circuit has held that "non-trade secret but confidential business information is not entitled to the same level of protection from disclosure as trade secret information."[176] Likewise, one district court held that "confidentiality alone does not transform business information into a trade secret."[177] The reasoning applied in these two cases is transferrable to the Exemption 4 and the TSA context, suggesting that the provisions are not interchangeable.

As legal scholar Bernard Bell has observed, "[t]here is little indication that the enacting Congresses actually considered the scope of the Trade Secrets Act and FOIA Exemption 4 coterminous."[178] Bell notes that the TSA was "adopted as a part of Congress'[s] general revision of the Criminal Code in 1948, 18 years before FOIA was adopted."[179] Furthermore, Exemption 4 does not discuss the TSA, and the accompanying congressional reports make no reference to the statute.[180] Finally, Exemption 4 itself contemplates both "trade secrets" and "commercial or financial information that is privileged or confidential," suggesting Congress understood the latter clause to cover something separate and apart from trade secrets, including those contemplated in the TSA.

In evaluating the relationship between the TSA and Exemption 4, courts should apply the rule of lenity.[181] A narrow reading of the rule of lenity "requires that an ambiguous criminal statute be construed narrowly only when a broad interpretation would penalize 'innocent' conduct."[182] It is

174. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 880 (D.C. Cir. 1992).

175. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. at 2366.

176. Littlejohn v. Bic Corp., 851 F.2d 673, 685 (3d Cir. 1988) (allowing public to gain access to confidential documents upon their admission into record).

177. PCT Int'l Inc. v. Holland Elecs., LLC, No. CV-12-01797-PHX-JAT, 2014 WL 6471419 at *2 (D. Ariz. Nov. 18, 2014) (granting in part and denying in part motion to seal).

178. Bell, *supra* note 109.

179. *Id.* (citing CNA Fin. Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987)).

180. *Id.*

181. *Id.*

182. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421 (2006).

settled law that the TSA is an ambiguous criminal statute,[183] so a broad interpretation of what the TSA protects from disclosure would penalize the otherwise "innocent" conduct of agencies disclosing private information in an effort to abide by FOIA or the FIA. Therefore, just as *Argus* suggests Exemption 4 and the TSA are not coextensive because the decision broadens the universe of information shielded by Exemption 4, the rule of lenity suggests they are not coextensive because it directs courts to construe the TSA in its narrowest terms.

3. What has prevented courts from questioning the relationship between Exemption 4 and the TSA?

One explanation as to why courts and requesting parties have not questioned the purportedly coextensive nature of Exemption 4 and the TSA is that the substantial competitive harm test adequately curbed the amount of information shielded from disclosure. The application of the substantial competitive harm test ensured Exemption 4 did not undermine the purpose of FOIA by shielding too much private information. While their reasoning may not have been explicit, courts were relying on a specific and narrow understanding of what is shielded by Exemption 4 in finding the two statutes "coextensive."[184] Thus, by markedly expanding the amount of financial and commercial information shielded by Exemption 4, *Argus* undermines the reasoning supporting the conclusion that the statutes are coextensive.

Another explanation is the Supreme Court's concluding footnote in *Chrysler*. In dicta, the Court observed "similarity of language between Exemption 4 and the substantive provisions of [the TSA]."[185] However, even a cursory review shows the text is easily distinguishable. The TSA prohibits, unless "authorized by law," agencies from releasing information that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association."[186] Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[187] The only common terms in the TSA and Exemption 4 are "trade secrets" and "confidential," with the latter term

183. United States v. Wallington, 889 F.2d 573, 577–78 (5th Cir. 1989) (interpreting section 1905 and applying rule of lenity because the text contains ambiguity (citing Liparota v. United States, 105 S. Ct. 2084, 2089 (1985))).

184. *See* Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1201 n.27 (4th Cir. 1976) ("Information 'confidential' under the test stated in [*National Parks*], is necessarily both within Exemption 4 of the FOIA, and the prohibition of [the TSA]." (citing Charles River Park "A", Inc. v. Dep't of Hous. & Urban Dev., 519 F 2d 935 (D.C. Cir. 1975))).

185. Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

186. 18 U.S.C. § 1905 (2018).

187. 5 U.S.C. § 552(b)(4) (2018).

referring specifically to "confidential statistical data."[188] Thus it is difficult to imagine the textualist court that overturned *National Parks* agreeing that the language is so similar as to render the two provisions coextensive.

B. Applying the FIA's Foreseeable Harm Standard to Exemption 4 Information Furthers Legislative Intent

Applying the FIA's foreseeable harm standard to information covered by Exemption 4, including any federal contractor employment data, aligns with the legislative intent behind both FOIA and the FIA. This weighs in favor of agencies and courts applying the FIA standard to an exemption that courts previously characterized as not permitting discretionary disclosures.

1. Legislative Intent: FOIA and Exemption 4

President Johnson's stated goal in signing FOIA into law was to pull back the "curtains of secrecy" around federal government decisions, and Congress recognized that this would extend to where private and public actions merge.[189] This is evidenced by the legislative history described in *National Parks* by the D.C. Circuit, which relied heavily on the debate surrounding FOIA's predecessor bill and two congressional reports.[190] It is also apparent in the larger context in which Congress enacted FOIA.

Before FOIA amended it in 1966, the Administrative Procedure Act allowed agencies broad discretion to withhold information for "good cause" and limited disclosure of public records "to persons properly and directly concerned."[191] Furthermore, there was "no remedy available to a citizen who

188. *Id*.

189. Press Release, White House, *supra* note 15. While discussing FOIA in the House of Representatives, elected officials did not dwell on its applicability to private information submitted to the government. This may be explained in part by the relatively small number of federal contractors at the time. *See generally* Donald F. Kettl, ESCAPING JURASSIC GOVERNMENT: HOW TO RECOVER AMERICA S LOST COMMITMENT TO COMPETENCE (2016); John J. DiIulio Jr., *Want Better, Smaller Government? Hire Another Million Federal Bureaucrats*, WASH. POST (Aug. 29, 2014), https://www.washingtonpost.com/opinions/wantbetter-smaller-governmenthire-1-million-more-federal-bureaucrats/2014/08/29/c0bc1480-2c72-11e4-994d-202962a9150c_story.html [https://perma.cc/Y67W-3GPT]. However, at least one Representative expressed concerns regarding corrupt bidding processes, citing one instance where "cost estimates submitted by contractors in connection with [a project] were withheld from the public even though it appeared that the firm which had won the lucrative contract had not submitted the lowest bid." 112 CONG. REC. 13,648, 13,658 (1966) ("For example, the cost estimates submitted by contractors in connection with the multimillion-dollar deep sea 'Mohole' project were withheld from the public even though it appeared that the firm which had won the lucrative contract had not submitted the lowest bid. Moreover, it was only as a result of searching inquiries by the press and Senator Kuchel (R., Cal.) that President Kennedy intervened to reverse the National Science Foundation's decision that It would not be 'in the public interest to disclose these estimates' . . . . Consider the contractor whose low bid has been summarily rejected without any logical explanation . . . .").

190. *See supra* text accompanying notes 81–83.

191. 112 CONG. REC. 13,644 (1966).

has been wrongfully denied access to the Government's public records."[192] When Congressman John Moss first introduced FOIA in 1955, its most vocal supporters were members of the news media frustrated by the Department of Defense's arbitrary use of heightened confidentiality classifications.[193] With time, public support for the legislation grew and advocates in Congress emphasized the public's "right to know what its Government is doing"[194] and to be able to access administrative information without encountering barriers comprised of "[b]ureaucratic gobbledygook."[195]

Since FOIA's passage, the Supreme Court has repeatedly recognized the significance of FOIA, observing that "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."[196] The Court has also stated that access to this knowledge is "a structural necessity in a real democracy."[197] The spirit animating FOIA and the Court's understanding of its goal favor disclosure, and thus support the application of the foreseeable harm standard to Exemption 4 information.

2. Legislative Intent: The FIA

In *Argus*' wake, failing to apply the FIA's foreseeable harm standard to Exemption 4 information, including any federal contractor employment data, would undermine legislative intent. When Congress enacted the FIA in 2016, legislators assumed that agencies would apply the substantial competitive harm test to determine whether information was covered by Exemption 4. Notably, applying the FIA's foreseeable harm standard to Exemption 4 information has a substantially similar effect on disclosure as using the substantial competitive harm test to evaluate whether information is covered by Exemption 4. Here's why: the FIA's standard directs agencies to release covered information unless doing so would harm an interest protected by the exemption covering that information. Thus, the FIA's standard requires agencies to ask, "What is the interest protected by the exemption?"

192. *Id*. at 13,642.

193. GOLD, *supra* note 3, at 37–42 (reporting that during congressional hearings, "several journalists testified . . . that federal agencies had 'invaded and flouted' the public's right to have access to government record" and pointed to the Defense Department as the "worst offender"). Today, the news media comprise only a small share of those making FOIA requests. Cory Schouten, *Who Files the Most FOIA Requests? It's Not Who You Think.*, COLUM. JOURNALISM REV. (Mar. 17, 2017), https://www.cjr.org/analysis/foia-report-media-journalists-business-mapper.php [https://perma.cc/SA8E-2UNQ].

194. 112 CONG. REC. 13,649.

195. *Id.* at 13,648.

196. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

197. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

Fortunately for agencies, the D.C. Circuit developed the substantial competitive harm test to answer this question as it pertains to Exemption 4.[198] In *National Parks*, the D.C. Circuit held that information should be treated as confidential if disclosing it would either (1) impair the government's ability to obtain necessary information in the future, or (2) cause "substantial harm to the competitive position of the person from whom the information was obtained."[199]

The D.C. Circuit relied on legislative history in developing this two-part test and found that Exemption 4 "has a dual purpose."[200] The court referenced floor debates on a predecessor bill,[201] as well as a Senate committee report,[202] both of which expressed concerns about protecting statistical information collected via government questionnaires. The court also noted that the House committee report's discussion of Exemption 4 contemplated "information which is given to an agency in confidence," and the report described the importance of being able to trust the government not to disclose information it stated it would protect.[203] The court therefore concluded that the first purpose of Exemption 4 is to ensure government policymakers can access necessary commercial and financial data by assuring submitters that all data will remain confidential.

According to the court's reading of legislative history, the second purpose of Exemption 4 is to "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication."[204] The court again cited the hearings on FOIA's predecessor bill, which did not initially include an exemption for trade secrets or commercial or financial information.[205] In response to this deficiency, a number of individuals expressed concerns about government officials disclosing information that could "be exploited by competitors" or "give competitors unfair advantage."[206] While the bill was

198. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 875-78 (D.C. Cir. 1992).

199. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

200. *Id.* at 767.

201. *Id.* (noting that during "debate on a predecessor to the bill which was ultimately enacted, senator Humphrey pointed out that sources of information relied upon by the Bureau of Labor Statistics would be 'seriously jeopardized' unless the information collected by the Bureau was exempt from disclosure" (citing 110 CONG. REC. 17,667 (1964))).

202. *Id.* at 768 ("This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquires . . . ." (citing S. REP. NO. 813, at 9 (1965))).

203. *Id.* ("[A] citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." (citing H. REP. NO. 1497, at 10 (1966))).

204. *Id.*

205. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

206. *Id.* Commentators specifically contemplated Small Business Administration loan applications and the business information that broadcasters are required to file with the Federal Communications

revised after hearings to include an exemption for "trade secrets and other information obtained from the public and customarily privileged or confidential," it did not pass the House of Representatives before the end of the session.[207] When the bill was reintroduced in the Senate the following year, its drafters had revised "other information" to read "financial or commercial information" and removed the word "customarily."[208] There was no explanation for these changes and minimal discussion of what information obtained pursuant to administrative regulation would be protected, except that data submitted in connection with any loan would be exempt.[209]

The D.C. Circuit's analysis is well-reasoned and substantive. To be sure, in *Argus*, the Supreme Court criticized the test that the D.C. Circuit developed, but the Court focused on the D.C. Circuit's flawed method of statutory interpretation. Rather than looking first to legislative history, the Court reasoned, the D.C. Circuit should have focused on the text of the statute—including the "ordinary meaning" of the term "confidential," which can be found in a dictionary.[210] Notably, the foreseeable harm standard established by the FIA *requires* agencies to look beyond the text of the statute.[211] Thus, a purely textualist reading of the exemption, which *Argus* required, would contravene Congressional intent.

Agencies and courts unwilling to apply the second prong of the substantial competitive harm test may find a middle ground in the opinion of the three justices concurring in part and dissenting in part in *Argus*. These

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Commission. *Id.* A representative of the DOJ also remarked on the possibility of deterring cooperation by companies who are not obliged to provide information by disclosing information and putting them at risk of competitive harm. *Id.* at 769 ("A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions . . . . Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors." (citing *Hearings on S. 1666 Before the Subcomm. on Admin. Practice & Procedure. of the Sen. Comm. on the Judiciary*, 88th Cong., 1st Sess. 1-2, at 199 (1964))).

207. *Nat'l Parks and Conservation Ass'n*, 498 F.2d at 769 (citing S. REP. NO. 1219, at 2 (1964).

208. *Id.*

209. *Id.* (citing S. REP. NO. 813, at 9 (1965)).

210. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. at 2362–63.

211. For example, consider how the foreseeable harm standard applies to information covered by Exemption 5, which encompasses "privileged communications within or between agencies," including those protected by the "deliberative process privilege." While Exemption 5 arguably covers even bare factual information shared among agencies, the purpose of the exemption is to protect candor in the government's decision-making process. Because releasing bare facts will not inhibit candor in agency communications, the foreseeable harm standard weighs in favor of disclosing this covered information. FORESEEABLE HARM STANDARD, *supra* note 19.

justices agreed that *National Parks*' harm requirement went "too far" because "nothing in FOIA's language, purposes, or history" suggests a harm need be "substantial."[212] Furthermore, a showing of "competitive" harm excludes other types of harm.[213] However, Justices Breyer, Ginsburg, and Sotomayor still argued in favor of including a harm requirement.[214] The Justices wrote, "[FOIA's] language permits, and the purpose, precedent, and context all suggest, an interpretation that insists upon some showing of harm."[215] Thus, they found Exemption 4 can be satisfied where a submitter can show "release of commercial or financial information will cause genuine harm to an owner's economic or business interests."[216] I term this the "genuine economic harm" inquiry. Notably, the harm must do more than "simply embarrass the information's owner."[217]

Whether an agency applying the FIA's foreseeable harm standard to Exemption 4 information chooses to follow the substantial competitive harm test or substitute the "genuine economic harm" inquiry for the test's second prong, the inquiry will focus on whether releasing the information would harm the information owner's economic or business interests.

My argument is further buttressed by the spirit motivating the FIA and Congress's decision to codify the foreseeable harm standard. In an amicus curiae brief submitted in support of *Center for Investigative Reporting v. U.S. Department of Labor*,[218] the Reporters Committee for Freedom of the Press (Reporters Committee) considered just that.[219] The case presented "one of the first instances" that a federal district court would interpret the FIA's foreseeable harm standard after *Argus* and in the context of Exemption 4.[220] The Reporters Committee observed that while *Argus* "redefined what information is covered by Exemption 4, it did not (and could not have) addressed [FIA requirements]."[221] Accordingly, the Reporters Committee sought to provide the court with information "regarding the legislative history, function, and application of the new foreseeable harm standard." [222]

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212. *Argus Leader Media*, 139 S. Ct. at 2367 (Breyer, Ginsburg & Sotomayor, JJ., concurring in part, dissenting in part).

213. *Id.*

214. *Id.* at 2368.

215. *Id.* at 2369.

216. *Id.*

217. *Id.* at 2368.

218. Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 424 F. Supp. 3d 771 (N.D. Cal. 2019). For a discussion of this case and the future of FOIA requests for federal contractor employment data, see *infra* Part V.A.

219. Brief for Reporters Committee for Freedom of the Press as Amici Curiae, *supra* note 110.

220. Motion of the Reporters Committee for Freedom of the Press to File Amicus Curiae Brief in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 424 F. Supp. 3d 771 (N.D. Cal. 2019) (No. 28).

221. *Id.* at 2.

222. *Id*.

The Reporters Committee noted that the FIA was enacted in part as a response to a rising tide of FOIA denials and a "culture of government secrecy" that "has served to undermine FOIA's fundamental promise."[223] Between 2008 and 2018 alone, the percentage of FOIA requests denied rose from 22 percent to 43 percent.[224] The brief also discussed Congress's decision to codify the foreseeable harm standard,[225] highlighting the robust provisions Congress drafted to encourage agencies to release information whenever possible. For example, the FIA's standard "requires agencies to make a specific showing with respect to each record it withholds."[226] In reviewing a record, an agency should consider its age, content, and character in determining whether its disclosure would foreseeably cause harm to an interest protected by an exemption.[227] Given that the Senate committee report stated that the FIA's standard "is not satisfied by abstract concern for 'reputational harms,'" it seems that Congress understood the FIA to require a stronger showing of harm to support nondisclosure.[228] Similarly, "[a]gencies should note that mere 'speculative or abstract fears,' or fear of embarrassment, are an insufficient basis for withholding information."[229] These statements all suggest Congress intended to maximize the information agencies disclose, and thus agencies should apply the disclosure-friendly foreseeable harm standard to Exemption 4 information.

V. THE FUTURE OF FOIA REQUESTS FOR FEDERAL CONTRACTOR EMPLOYMENT DATA

If courts are persuaded by the preceding arguments, they will recognize agency authority to make discretionary disclosures under Exemption 4. Here, I review how the application of the FIA's foreseeable harm standard to commercial or financial information that is privileged or confidential would operate when applied to a FOIA request for federal contractor employment data. I review the steps that agencies and courts must follow in analyzing a request for both federal contractor diversity data and pay data.

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223. Brief for Reporters Committee for Freedom of the Press as Amici Curiae, *supra* note 110, at 3 (citing 114 CONG. REC. S1494 (daily ed. Mar. 15, 2016) (statement of Sen. Grassley)).

224. *Id.*; *cf.* Bradley Pack, *FOIA Frustration Access to Government Records under the Bush Administration*, 46 ARIZ. L. REV. 815, 821 (2004) (noting the increasing denial of FOIA requests during the George W. Bush administration).

225. Brief for Reporters Committee for Freedom of the Press as Amici Curiae, *supra* at 110, at 4 ("[T]he [foreseeable harm] standard mandates that an agency may withhold information only if *it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law*." (quoting S. REP. NO. 114-4 at 7–8 (2015))).

226. *Id.* at 6.

227. *Id*. (citing S. REP. NO. 114-4, at 8).

228. *Id*. at 9 (citing S. REP. NO. 114-4, at 8).

229. *Id.*

Though not my focus here, debates over whether information falls under Exemption 4 often center around whether the information is even "commercial or financial," not just whether it is "confidential."[230] Accordingly, this Section addresses diversity data separately from pay data because the latter more clearly qualifies as "commercial or financial" information under Exemption 4.

A. The Future of FOIA Requests for Federal Contractor Diversity Data

My hypothetical draws facts from a recent case regarding public access to federal contractor diversity data, *Center for Investigative Reporting v. U.S. Department of Labor*.[231] Notably, the case did not address whether the requested information was confidential because the court did not find the information to be commercial or financial in nature. The case thus illustrates how FOIA requests operate and the importance of determining whether information is commercial or financial before analyzing whether it is confidential.

In 2018, an investigative media nonprofit submitted a FOIA request for diversity data from dozens of large tech companies.[232] The U.S. Department of Labor (DOL) notified thirty-six federal contractors that the nonprofit had requested their diversity data, and that they had thirty days to object to disclosure. [233] Twenty of the contractors filed timely objections to the release of their data. Later that year, DOL notified the objecting contractors of its finding that their data was exempt from disclosure pursuant to FOIA's Exemption 4.[234] In early 2019, the nonprofit challenged the agency's decision and filed action in federal district court.[235] Subsequently, some of the companies decided to release the information voluntarily, leaving just ten objecting companies.[236] DOL and the remaining companies argued that the information was both commercial and financial, but the court found it was neither.[237]

230. *See, e.g.*, Nat'l Bus. Aviation Ass'n v. Fed. Aviation Admin., 686 F. Supp. 2d 80, 86–87 (D.D.C. 2010) (holding that aircraft registration numbers are not sufficiently commercial, despite that some information could be deduced from them along with other publicly available documents); Chi. Tribune Co. v. Fed. Aviation Admin., No. 97 C 2363, 1998 WL 242611, at *3 (N.D. Ill. May 7, 1998) (finding that Federal Aviation Administration records regarding in-flight medical emergencies lack a "direct relationship with the operations of a commercial venture" and therefore do not qualify as exempt under Exemption 4).

231. 424 F. Supp. 3d 771 (N.D. Cal. 2019).

232. *Id.* at 773–74.

233. *Id.* at 774.

234. *Id.* at 774–75

235. *Id.* at 775.

236. *Id.*

237. With regards to commercial or financial, the court found that the diversity data only listed "the composition of their workforce broken down by gender, race/ethnicity, and general job category" and did not contain "salary information, sales figures, departmental staffing levels, or other identifying

Because the court did not find the information commercial or financial in nature, it did not need to evaluate whether the information was confidential, thus avoiding application of *Argus*' new test. The court nevertheless noted that at least one of the objecting companies had published data in its annual report that it attributed to a diversity report.[238] Thus, the court found "there [was] a significant possibility that at least some of the reports may not be [confidential]."[239] Furthermore, the FIA also requires agencies to consider making partial disclosures if full disclosure is not possible and to take steps to segregate and release nonexempt information.[240] The court thus noted that DOL erred in failing to pursue those steps, even if some of the requested information was shielded by Exemption 4.[241]

While the court concluded that the diversity data did not fall within the scope of Exemption 4, it is important to consider how the analysis would have changed if the court found the data was protected from disclosure. So, let's assume the diversity data was covered by Exemption 4—in other words, that it was both "commercial" (or "financial") and "confidential." How

information." *Id.* at 777. In response to arguments by DOL and submitters that the information concerned "labor strategy, demographics, recruiting, and allocations across its segments," and that this information would give competitors insight into related business strategies and operations, the court found that the data report was organized by job category (e.g. "Professionals," "Sales Workers," and "Craft Workers"), not division, department, or segment and thus did not lend itself to special organizational insights. DOL also argued that the "workforce data provided could make the company vulnerable to having 'diverse talent' poached by its competitors." *Id.* The court noted that, because the job categories were so general, and because there was no breakdown by department, release of the reports would not make it easier for competitors to lure talent. *Id.* at 778. The "Professionals" category alone "includes most jobs that require a bachelors or graduate degree," so the programmers, accountants, artists, and engineers at a company would all be lumped together. *Id.* Finally, the court rejected the Government's request that "the court find exempt any statistical information pertaining to employees simply because the business is a commercial enterprise." *Id.* at 779.

238. *Id.* at 778.

239. *Id.* at 780. Oddly, the court found that "[e]ven if the information was exempt, the Government ha[d] failed to carry its burden of showing that foreseeable harm [as set forth in the FIA] would result should the documents be released." *Id.* While this analysis is flawed insofar as the FIA's foreseeable harm standard should not be applied to Exemption 4 information (at least not without making the arguments set out in this Article), the court's subsequent analysis is notable. DOL failed to make any substantive arguments that release of the data would cause foreseeable harm, but it did argue that imposing the FIA's foreseeable harm standard would render *Argus* meaningless, and so the court should not apply it. *Id.* The court rebutted this claim, noting that the Supreme Court abrogated the competitive harm test because it "was fashioned from legislative history, rather than statute," and the FOIA request in *Argus* was filed before the FIA was enacted, so the standard was not applicable. *Id.*

240. *Id.* at 780; 5 U.S.C. § 552(a)(8)(A)(i) (2018).

241. *Ctr. for Investigative Reporting*, 424 F. Supp. 3d. at 779. The government declined to appeal, but Synopsys, Inc. filed a motion for leave to intervene on January 30, 2020. On February 4, 2020, the court considered Synopsys, Inc.'s motion for leave to intervene, an emergency motion to stay, and a motion to shorten time to hear the motion to stay. Ctr. for Investigative Reporting v. U.S. Dep't of Lab., No. 4:19-CV-01843-KAW, 2020 WL 554001, at *1 (N.D. Cal. Feb. 4, 2020). The court found the matter "suitable for resolution without oral argument" and granted the motion to shorten time and emergency motion to stay. *Id.* On August 11, 2020, Will Evans, a journalist at the Center for Investigative Reporting, filed an appeal in both cases in the Ninth Circuit (Case No. 20-16538).

would the application of the FIA's foreseeable harm standard operate? We can consider the arguments a contractor could bring against releasing its information.

1. The TSA does not provide independent cover for contractor diversity data.

The first argument a contractor could make is that the TSA still serves as a bar on discretionary disclosures. Therefore, if an agency finds information is covered by Exemption 4 under *Argus*, it must next ask if it is protected by the TSA before it applies the FIA's foreseeable harm standard. A contractor may argue that if the information is covered by the TSA, an agency does not have discretion to release it and thus should not apply the FIA's foreseeable harm standard. A requesting party could easily dispense with this argument for at least two reasons.

First, adding this step—a separate inquiry into whether the TSA protects the information—into the Exemption 4 analysis would undermine congressional intent. Prior to *Argus*, Congress assumed that Exemption 4 covered information (and thus the TSA precluded disclosure) only if that information qualified under the substantial competitive harm test.[242] Because the FIA's foreseeable harm standard effectively fills the overturned test's shoes, it is necessary to apply the FIA's standard to all information covered by Exemption 4, not just information that falls outside the purview of the TSA. This follows logically from the fact that, pre-*Argus*, Exemption 4 information was only coextensive with the TSA if it passed the substantial competitive harm test.

Second, FOIA's Exemption 3 allows agencies to withhold information "specifically exempted from disclosure by statute."[243] Crucially, courts have concluded that the TSA does not qualify as a nondisclosure statute under Exemption 3.[244] Thus, adding a step to the analysis that directs agencies to consider the TSA's coverage as separate from Exemption 4 would directly contravene precedent addressing Exemption 3 and the TSA by effectively turning the TSA into a nondisclosure statute. Likewise, the TSA has no

242. For a discussion of the FOIA Exemption 4 analysis prior to *Argus*, see *supra* Part III.A.

243. 5 U.S.C. § 552(b)(3).

244. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1141 (D.C. Cir. 1987) (holding that "the Trade Secrets Act does not, by virtue of Exemption 3, erect a disclosure bar that is impervious to the mandate of FOIA"); Anderson v. Dep't of Health & Human Servs., 907 F.2d 936, 949 (10th Cir. 1990) (observing that "broad and ill-defined wording of § 1905 fails to meet either of the requirements of Exemption 3"); Acumenics Research & Tech. v. U.S. Dep't of Justice, 843 F.2d 800, 805 n.6 (4th Cir. 1988) (determining there is "no basis" for argument that "even if the material here falls outside the scope of exemption (4), it is somehow still within the ambit of the Trade Secrets Act so that disclosure would be barred by exemption (3)").

bearing on a FOIA inquiry outside of an Exemption 4 analysis.[245] This is well established in case law, including reasoning from a Seventh Circuit reverse FOIA case, *General Electric Co. v. Nuclear Regulatory Commission*, [246] in which Judge Richard Posner wrote for the court, "If a supposed trade secret is not protected by [Exemption 4], the Freedom of Information Act requires its disclosure."[247] Of course, when Judge Posner wrote this, a "supposed trade secret" was only protected by Exemption 4 if it passed the substantial competitive harm test. Judge Posner then suggests that the Supreme Court in *Chrysler* "strongly hinted" that "the [TSA] has no independent force in cases where [FOIA] is involved."[248] He continued,

> [E]xemption 4 is broadly worded, and it is hard to believe that Congress wanted seekers after information to stub their toes on a rather obscure criminal statute [the TSA] almost certainly designed to protect that narrower category of trade secrets—secret formulas and the like—whose disclosure could be devastating to the owners and not just harmful.[249]

For these two reasons, a contractor's argument in favor of evaluating the protective scope of the TSA outside of the Exemption 4 analysis would fail. This brings us to the next step in the analysis: applying the FIA's foreseeable harm standard to diversity data.

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245. Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n, 750 F.2d 1394, 1402 (7th Cir. 1984) ("[T]he [TSA] has no independent force in cases where [FOIA] is involved . . . ."); Charles River Park "A", Inc. v. Dep't of Hous. & Urban Dev., 519 F.2d 935, 941 n.6 (D.C. Cir. 1975) ("[S]ince only the FOIA's fourth exemption deals with matters covered by section 1905, consideration of section 1905 in FOIA cases is appropriate only when the information falls both within the fourth exemption and under section 1905."); *Acumenics*, 843 F.2d at 805 n.6 (observing that "if material did not come within the broad trade secrets exemption of the [FOIA], section 1905 would not justify withholding").

246. 750 F.2d 1394.

247. *Id.* at 1401.

248. *Id.* at 1402.

249. *Id.* Judge Posner's reading of the TSA brings a distinct, but related, point: even if agencies were to consider and apply the TSA to information covered by *Argus*' expanded understanding of Exemption 4, the rule of lenity requires agencies to construe the TSA, a criminal statute, as narrowly as possible. *See* discussion of the rule of lenity *supra* Part IV.A.2. As a reminder, the TSA prohibits agencies from releasing information that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association," unless "authorized by law." 18 U.S.C. § 1905 (2018). While this text is about as clear as mud, two narrow readings would still permit the application of the foreseeable harm standard to Exemption 4 information. First, the FIA should be construed as providing the authorization by law required by section 1905. Second, while the TSA has been described as "oceanic" or "encyclopedic," there are other views that align more closely with those articulated by Judge Posner. *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987). These views are supported by the legislative history of the TSA, which merged three antecedent statutes, all of which addressed highly specific categories of information. While the D.C. Circuit ultimately rejected the narrowest reading of the TSA in *CNA*, the rule of lenity should lead courts to the narrowest reading the court articulated. *Id.* at 1150.

2. Applying the FIA's foreseeable harm standard to diversity data

As discussed, the FIA's standard requires an agency to show that foreseeable harm to an interest protected by Exemption 4 would result if the information was released.[250] This brings the analysis back full circle to the question of what interest or interests Exemption 4 protects, a question the D.C. Circuit addressed in *National Parks* and answered with the substantial competitive harm test.[251] Thus, the application of the foreseeable harm standard to information protected by Exemption 4 effectively triggers courts to apply the two-step substantial competitive harm test the Supreme Court rejected in *Argus*.[252] An agency or court may also substitute the second part of the test for the "genuine economic harm" inquiry suggested by the concurring justices in *Argus*.[253]

First, in evaluating whether disclosing the diversity data will "impair the Government's ability to obtain necessary information in the future," a court will need to consider the potential deterrent effect of disclosing the diversity data.[254] While some federal contractors may reconsider contracting with the government because they are concerned about their diversity data becoming public, the financial boon of receiving federal dollars likely outweighs such concerns.

Second, in evaluating whether the release of employment data would "cause substantial harm to the competitive position of the person from whom the information was obtained," it is difficult to articulate any argument that releasing diversity data would cause genuine economic harm, let alone substantial competitive harm.[255] This information could cause a company embarrassment if the data indicates that its hiring and employment practices have not achieved adequate diversity. However, as the concurring justices in *Argus* observed, the harm caused by disclosure must do more than "simply embarrass the information's owner."[256] The application of the FIA's foreseeable harm standard would thus lead agencies to disclose the requested data.

Finally, per the FIA, the agency must consider "whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible" and "take reasonable

250. 5 U.S.C. § 552(a)(8)(A)(i) (2018).

251. *See supra* Part III.A.1 (discussing origins of the substantial competitive harm test).

252. *Id*.

253. For a discussion of the origins of the genuine economic harm test, see *supra* Part IV.B.2.

254. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

255. *Id.* The district court opinion discussed *supra* Part V A is instructive here, as it addressed the argument that "workforce data provided could make the company vulnerable to having 'diverse talent' poached by its competitors." Ctr. for Investigative Reporting v. U.S. Dep't of Labor, 424 F. Supp. 3d 771, 777 (N.D. Cal. 2019).

256. Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. at 2368.

steps necessary to segregate and release nonexempt information."[257] Thus, even if disclosing the data would cause some economic harm, an agency would need to take steps to redact the documents to avoid this harm and disclose as much information as possible.

B. The Future of FOIA Requests for Federal Contractor Pay Data

This Section considers how an agency should analyze a FOIA request for federal contractor pay data by considering the possible outcome of a hypothetical future FOIA request for such data.[258]

1. Applying Argus *and related DOJ Guidance to federal contractor pay data*

Although courts should find that diversity data is not commercial or financial information,[259] DOL will likely consider pay data to be financial information because it includes data on wages and hours worked. Thus, in the event that DOL receives a FOIA request for pay data and the submitter objects to disclosure, the agency will likely follow the DOJ's suggested post-*Argus* Exemption 4 analysis and first ask if the submitter customarily keeps the information private.[260] Since pay data is seldom disclosed, it is reasonable to expect submitters will customarily keep the information private.

DOL will next examine whether the agency provided either an express or implied assurance that the information would be confidential when shared with the EEOC. In a Frequently Asked Questions document on pay data, the EEOC explains the existing legal protections for employers submitting pay data, noting that "FOIA [Exemption 4] may protect an employer's [data reports] from disclosure."[261] Similarly, the EEOC's relevant Instruction Booklet reads, "[DOL's OFCCP] . . . will protect the confidentiality of [pay] data to the maximum extent possible consistent with FOIA . . . ."[262]

If DOL does not read the EEOC's statements on its FAQ page as a self-referential assurance of privacy, it will next ask whether there were "express or implied indications at the time the information was submitted that the

257. 5 U.S.C. § 552(a)(8)(A)(i) (2018); *Ctr. for Investigative Reporting*, 424 F. Supp. 3d at 780..

258. For a discussion of the current status of federal contractor pay data collection and analysis, see *supra* Part II.A.

259. *See supra* Part V.A (discussing the future of FOIA requests for federal contractor data, explaining that the TSA does not provide independent cover for contractor diversity data, and applying the FIA's foreseeable harm standard to diversity data).

260. GUIDE FOR CONFIDENTIALITY, *supra* note 138.

261. Jeff Piell, *EEOC Issues FAQs on EEO-1 Component 2 Wage and Hour Data*, QUARLES & BRADY LLP: PUBL'NS & MEDIA (July 10, 2019), https://www.quarles.com/publications/eeoc-issues-faqs-on-eeo-1-component-2-wage-and-hour-data [https://perma.cc/DRV7-YXP4].

262. EEO-1 INSTRUCTION BOOKLET, *supra* note 45.

government *would* publicly disclose the information."[263] This area would likely be subject to debate in the event of litigation, as both the FAQ and Instruction Booklet suggest that this data could be disclosed in a FOIA request. However, the government does not indicate that it would voluntarily disclose the data. Thus, a reasonable person might understand the information to be confidential and non-disclosable. Furthermore, DOL's November 2019 announcement that it would no longer request or accept pay data from the EEOC suggests that 2017 and 2018 data will be inaccessible via FOIA request.[264] For the purposes of this analysis, let us assume that the pay data is covered by Exemption 4.

Although a contractor opposing release of its data might argue that the TSA provides independent protections for that data, agencies need not determine whether the TSA applies to Exemption 4 information before applying the foreseeable harm standard. As outlined above,[265] adding a separate inquiry into whether the TSA protects the information would undermine congressional intent. Further, FOIA's Exemption 3 allows agencies to withhold information "specifically exempted from disclosure by statute," but courts have concluded that the TSA is not a nondisclosure statute for Exemption 3 purposes. Because the TSA has no independent bearing on a FOIA inquiry, agencies and courts will apply the FIA's foreseeable harm standard.

2. Applying the FIA's foreseeable harm standard to pay data

The application of the FIA's foreseeable harm standard triggers the same question that the D.C. Circuit addressed in *National Parks*: What interests does Exemption 4 protect?[266] The substantial competitive harm test was developed to answer this question, so I apply it here. I also substitute the "genuine economic harm" inquiry suggested by the concurring justices in *Argus* for the test's second prong, which inquires whether disclosure would harm the contractor's competitive business interests.[267]

First, DOL must evaluate whether disclosing the pay data will "impair the ability of the Government to obtain this information in the future." [268] Of course, federal contractor employment data is not "necessary information" in the sense that the government needs it to operate or function. Rather, it is necessary to ensure that DOL can enforce EO 11246. However, DOL may consider whether releasing 2017 and 2018 pay data would deter businesses

263. GUIDE FOR CONFIDENTIALITY, *supra* note 138.

264. Intention Not to Request, Accept, or Use Employer Information Report (EEO-1) Component 2 Data, 84 Fed. Reg. at 64,933, *supra* note 47.

265. For a review of this argument, see *supra* Part IV.B.

266. *See* Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 766 (D.C. Cir. 1974).

267. For a discussion of the origins of the genuine economic harm test, see *supra* Part IV.B.2.

268. *Nat'l Parks & Conservation Ass'n,* 498 F.2d at 770.

from contracting with the government. Specifically, DOL may find that releasing old data could send a message to contractors that the government will disclose similar information in the future, if a future administration resumes collecting pay data. However, this possibility is unlikely to deter businesses from soliciting contracts for two reasons.

First, given the staggering amount of federal contracting dollars up for grabs, it is unlikely any business would forgo this potential revenue stream out of concern for publication of pay data.[269] Pay data reports are only required of contractors with over fifty employees and contracts over $50,000, which is not an insubstantial sum.[270]

Under the second prong of the substantial competitive harm test, DOL must determine whether releasing pay data from 2017 and 2018 would cause either "substantial harm to the competitive position of the person from whom the information was obtained"[271] or "genuine economic harm." Contractors might argue that disclosing the information would cause such harm—that releasing information about salary and hours worked would provide competitors with valuable information about business strategy and resource allocation. However, DOL will need to evaluate this possibility on a case-by-case basis and consider whether similarly broad pay data from a contractor is already publicly available elsewhere.

Contractors may also argue that the disclosure of this information is harmful because it leaves the company vulnerable to litigation and claims of pay discrimination in violation of the Equal Pay Act.[272] However, this does not necessarily place the company at a competitive disadvantage relative to other companies, and resolving such violations could have positive long-term effect on the business.[273] Furthermore, DOL should not protect data or information simply because it might reveal unlawful practices; on the contrary, corrupt and problematic behavior is what FOIA was enacted to deter and uncover.[274] Condoning this behavior also undermines EO 11246.[275]

Finally, per the FIA, DOL will need to consider whether any foreseeable harms could be avoided by partially disclosing some of the information.[276]

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269. *Contract Spending Analysis*, *supra* note 1; *Contract Explorer*, *supra* note 1.

270. 41 C.F.R. § 60-1.7 (2019).

271. *Nat'l Parks & Conservation Ass'n*, 498 F.2d at 770.

272. 29 U.S.C. § 206(d) (2018) (requiring employers to pay women and men equally for the same work).

273. Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Inst. For Int'l Econ., Working Paper No. 16-3, 2016) (finding that supporting policies that promote equality in the workplace may increase gender diversity and thus firm performance).

274. *See supra* Part IV.B.1 (discussing FOIA's legislative intent).

275. *See supra* Part II (reviewing the history of EO 11246 and its data collection requirements).

276. FOIA Improvement Act of 2016 § 2, Pub. L. No. 114-185, 130 Stat. 538, 539 (2016) (amending 5 U.S.C. § 552).

For example, could the data be generalized across all establishments, instead of just one? Or, for a party requesting data to conduct research, could it be anonymized? These are just two possible ways to advance transparency without deterring or harming contractors.

CONCLUSION

When the Supreme Court decided *Argus Leader Media*, it did not discuss the implications of substantially expanding the universe of information covered by Exemption 4. Nevertheless, the consequences are significant. By making Exemption 4 distinguishable from the TSA, the Court tacitly restored agency discretion to release information covered by Exemption 4. This grant of discretion also suggests agencies should apply the FIA's foreseeable harm standard to Exemption 4 information. Crucially, applying the FIA's standard to covered information has the same effect on disclosure as applying the substantial competitive harm test overturned in *Argus*. Though the Court neutralized any fallout from its decision, it also gave agencies a path to stay true to the spirit animating FOIA and the FIA: transparency and disclosure.