

NARROWING FOIA'S EXEMPTION FOR BUSINESS SECRETS

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This essay examines the judicial aftermath of Food Marketing Institute v. Argus Leader Media, a controversial 2019 Supreme Court decision that broadened the Freedom of Information Act (FOIA) exemption for trade secrets and confidential commercial information ("Exemption 4"). This decision has made it easier for firms to hide damaging information from public view, frustrating the efforts of journalists and government watchdog groups that make FOIA requests to expose environmental harms, health risks, and failures of agency oversight. But two recent circuit court decisions highlight a promising path forward; they interpret Exemption 4 in ways that can mitigate Food Marketing's negative impact and align more closely with FOIA's disclosure-promoting goals.

INTRODUCTION

Government transparency is central to a healthy democracy. In 1966, the Freedom of Information Act (FOIA)¹ was enacted to “pierce the veil of administrative secrecy and [] open agency action to the light of public scrutiny.”² By providing the public with a judicially enforceable right of access to federal agency records, FOIA would help “hold the governors accountable to the governed”³—in theory, at least. In practice, FOIA often falls short of its lofty ambitions. Scholars offer many reasons for the disjuncture between FOIA’s laudable goal of transparency and the actual, maddening experiences of journalists, researchers, and watchdog groups who request information in the public’s interest.⁴

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1. Freedom of Information Act (FOIA), 5 U.S.C. § 552.

2. Dep’t of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting Rose v. Dep’t of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)).

3. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). When requests for information are denied, FOIA provides requesters an administrative appeals process and a remedy in federal courts. Judges review agency withholding decisions de novo, and agencies bear the burden of proof in defending nondisclosure. See 5 U.S.C. § 552(a)(4)–(a)(6) (2018).

4. See e.g., Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1361, 1371 (2016) (explaining that FOIA was “designed largely by [and] for journalists” so they could “use access to government information to provide knowledge to the public,” but describing how journalists’ efforts have been “crowded out” by profit-seeking FOIA requesters); David E.

While the FOIA system is no doubt flawed, one recent contributor to its goal-versus-reality chasm is the widening scope of its exemptions. FOIA requires a federal agency to disclose requested records unless the information is subject to one of nine enumerated exemptions. These exemptions reflect varied concerns—from national security to personal privacy to the geophysics of wells.⁵ Congress created these exemptions because “legitimate governmental and private interests could be harmed by release of certain types of information.”⁶ Historically, courts have counseled a “narrow” reading of FOIA’s exemptions in alignment with the statute’s disclosure mandate.⁷ But recent decisions have expanded their reach.⁸

This essay focuses on one of these broadened exemptions: Exemption 4. This exemption permits agencies to withhold two categories of private sector information in federal agency records: (1) “trade secrets” and (2) “commercial or financial information obtained from a person and privileged or confidential.”⁹ Or, as the latter category is more commonly referred to, “confidential commercial information” (CCI).¹⁰

Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099–1100 (2017) (describing FOIA’s deficiencies). Yet even those who highlight FOIA’s deficiencies acknowledge its important role in investigative reporting and, “through this reporting, fire alarm oversight by members of Congress.” *Id.* at 1138.

5. See 5 U.S.C. § 552(b) (2018). The exemptions cover records that (1) are classified “in the interest of national defense or foreign policy”; (2) are “related solely to the internal personnel rules and practices of an agency”; (3) are “specifically exempted from disclosure by [another] statute”; (4) are trade secrets or confidential commercial or financial information; (5) are inter-agency or intra-agency memoranda that would be privileged in ordinary litigation; (6) “would constitute a clearly unwarranted invasion of personal privacy” if disclosed; (7) are “compiled for law enforcement purposes” under certain circumstances; (8) are related to examinations of financial institutions; or (9) involve “geological or geophysical information” concerning wells. *Id.* These exemptions are exclusive under the Act. *Id.* § 552(d).

6. *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

7. See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (“[T]hese exemptions ‘must be narrowly construed.’” (citations omitted)); *Wash. Post Co. v. U.S. Dep’t of Health & Hum. Servs.*, 865 F.2d 320, 324 (D.C. Cir. 1989) (“FOIA exemptions . . . [are] to be read narrowly in light of the dominant disclosure motif expressed in the statute.”). Agencies must also release reasonably segregable, nonexempt portions of a partially exempt record. 5 U.S.C. § 552(b) (2018).

8. See, e.g., *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019); *U.S. Fish & Wildlife Serv. v. Sierra Club*, 141 S. Ct. 777 (2021). See also Adira Levine, *FOIA Disclosure and the Supreme Court*, 46 HARV. ENV’T. L. REV. 261, 285 (2022) (describing how the Court’s “broadening of FOIA’s exemptions” in these cases “likely foretells a future willingness to stray from the narrow reading of exemptions prescribed by the objectives and context of the statute and recognized in many judicial decisions over time”).

9. 5 U.S.C. § 552(b)(4).

10. See DOJ, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 4 21 (2021) [hereinafter DOJ FOIA GUIDE: EXEMPTION 4], <https://www.justice.gov/oip/page/file/1456996/dl?inline> [perma.cc/58H2-QV2S].

To be sure, agencies possess a great deal of information submitted by private entities. This information can educate the public about significant health and safety risks and whether agencies are adequately performing their crucial oversight functions.¹¹ Consider, for example, documents submitted by Boeing to the Federal Aviation Administration to obtain recertification of the 737 Max after two tragic crashes led to its grounding.¹² Or safety and efficacy information submitted to the Food and Drug Administration before its approval of a controversial new drug.¹³ Or data regarding worker injuries and fatalities at Amazon warehouses submitted to the Occupational Safety and Health Administration.¹⁴ In these and other examples, investigative journalists and watchdog groups have sought information through agency FOIA requests—often bumping up against Exemption 4 and assertions of confidentiality by regulated entities.

This is not to say that regulated entities have no legitimate interests in keeping commercially valuable information secret from competitors. Like all FOIA exemptions, Congress enacted Exemption 4 to achieve a “workable balance” between the statute’s important goal of disclosure and other governmental interests.¹⁵ By giving private parties some assurances regarding their proprietary information, Exemption 4 was meant to encourage their continued cooperation with government agencies.¹⁶ But like all of FOIA’s exemptions, Congress intended Exemption 4 to be read narrowly.¹⁷

As a result, for many decades, courts imposed meaningful constraints on both the trade secret and CCI categories of Exemption 4.¹⁸ To qualify as an exempt trade secret, the information typically had to be technical in

11. See *e.g.*, Christopher J. Morten, *Publicizing Corporate Secrets*, 171 U. PA. L. REV. 1319, 1321–25 (2023).

12. See *Flyers Rts. Educ. Fund v. FAA*, 71 F.4th 1051, 1053 (D.C. Cir. 2023) (“In this Freedom of Information Act suit, Flyers Rights Education Fund . . . seek[s] documents that the FAA relied upon during the recertification process.”). Boeing continues to come under scrutiny for malfunctions associated with its 737 Max passenger jets. See, *e.g.*, Mark Walker, *F.A.A. Chief Pledges ‘More Boots on the Ground’ to Monitor Boeing*, N.Y. TIMES (Feb. 6, 2024), <https://www.nytimes.com/2024/02/06/us/politics/faa-boeing-737-max-9.html> [perma.cc/E2P5-XFR8].

13. See Christopher J. Morten & Amy Kapczynski, *The Big Data Regulator, Rebooted: Why and How the FDA Can and Should Disclose Confidential Data on Prescription Drugs and Vaccines*, 109 CAL. L. REV. 493 (2021).

14. See *Ctr. for Investigative Reporting v. U.S. Dep’t of Lab.*, 470 F. Supp. 3d 1096 (N.D. Cal. 2020).

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

16. *Id.*

17. See *supra* text accompanying note 7.

18. See Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. REV. 462, 488–95 (2021) (examining how, prior to *Food Marketing*, courts interpreted Exemption 4’s two categories narrowly).

nature, “incorporat[ing] a direct relationship [to] . . . the productive process.”¹⁹ And while the CCI category was larger than the trade secret category,²⁰ information was usually not deemed “confidential” unless its release would cause the submitter “substantial” competitive harm.²¹ In this way, both prongs of Exemption 4—trade secrets and CCI—were kept in check. In 2019, however, the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media* jettisoned these constraints by adopting a far broader definition of “confidential.”²²

In *Food Marketing*, a reporter investigating possible fraud in the national food stamp program made a FOIA request to the Department of Agriculture that was denied on Exemption 4 grounds.²³ Both the district and circuit courts concluded that the agency had to disclose the information because it was neither a trade secret nor CCI, as its disclosure would not cause the submitting retailers substantial competitive harm.²⁴ The Supreme Court reversed, holding that information is “confidential” for Exemption 4 purposes “[a]t least” where it is “[1] both customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy.”²⁵ The Court left the test’s precise boundaries undefined, however, observing that “[a]t least the first condition has to be” met, but there was “no need to resolve” the question of whether the second condition did too as the submitters in this case had “clearly satisfi[ed]” it.²⁶ In short, information is “confidential” and can be withheld under Exemption 4 so long as the submitter (and possibly, the government) treat it as private.²⁷ A number of scholars (myself included)

19. Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining “trade secret” for Exemption 4 purposes as a “secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort”).

20. DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 10, at 4.

21. See 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 (2019) (holding that commercial information is “confidential” for purposes of Exemption 4 if “disclosure of the information is likely to . . . impair the Government’s ability to obtain necessary information in the future or . . . to cause substantial harm to the competitive position of the person from whom the information was obtained”).

22. *Food Mktg. Inst.*, 139 S. Ct. 2356, 2363 (2019). For a detailed discussion of Exemption 4, its evolution, and the impact of *Food Marketing*, see generally Varadarajan, *supra* note 18.

23. *Id.* at 2361. The newspaper was investigating SNAP-related fraud, and requested information related to store-level “redemption data,” which is data on the amount of money individual retailers receive from purchases made by SNAP’s beneficiaries. *Id.* at 2359–61. See also Varadarajan, *supra* note 18, at 496–500.

24. *Food Mktg. Inst.*, 139 S. Ct. at 2361–62.

25. *Id.* at 2366.

26. *Id.* at 2363.

27. *Id.*

have critiqued this new test for being too deferential to a firm's own secrecy customs. It will likely lead to more information, not less, being withheld from journalists, researchers, and watchdog groups, with significant consequences for public health, safety, and welfare.²⁸

Food Marketing was a step in the wrong direction—decidedly away from FOIA's transparency goals. But my goal in this essay is not to revisit these arguments, which I have made elsewhere and at length.²⁹ Instead, I examine two recent circuit decisions that offer some glimmers of hope for lessening *Food Marketing's* transparency blow, so to speak. The decisions of the D.C. Circuit in *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*³⁰ and the Second Circuit in *Seife v. U.S. Food and Drug Administration*³¹ offer a pathway for imposing more meaningful constraints on Exemption 4. Together, these decisions call for greater scrutiny of the supposed “commercial” nature of information and reinstate a harm inquiry before withholding requested information. If adopted more widely, they could lessen *Food Marketing's* transparency-reducing consequences.

I. SCRUTINIZING THE MEANING OF “COMMERCIAL”

The Supreme Court's decision in *Food Marketing* focused on the term “confidential.”³² But information must be more than just confidential to come within Exemption 4's scope. “Confidential” information must be “commercial or financial” in character and “obtained from a person.”³³ While many of these terms are undefined in the statute, some have proven less controversial than others. For example, “person” has been interpreted to mean basically any entity other than the federal government; thus, information created by the federal government does not fall within

28. See e.g., Varadarajan, *supra* note 18, at 500–01; Morten *supra* note 11, at 1349; Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337 (2021); Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1301 (2020) (observing that *Food Marketing* “expand[s] the scope of plausible Exemption 4 claims”). See also *Food Mktg. Inst.*, 139 S. Ct. at 2367–68 (Breyer, J., concurring in part and dissenting in part) (“[G]iven the temptation . . . to regard as secret all information that need not be disclosed, I fear the majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia.”).

29. See generally Varadarajan, *supra* note 18.

30. *Citizens for Resp. & Ethics in Wash. v. DOJ*, 58 F.4th 1255 (D.C. Cir. 2023).

31. *Seife v. FDA*, 43 F.4th 231 (2d Cir. 2022).

32. *Food Mktg. Inst.*, 139 S. Ct. at 2366.

33. 5 U.S.C. § 552(b)(4).

Exemption 4.³⁴ Disputes over the meaning of “financial” are also quite rare.³⁵

That has left “commercial” and “confidential” as the more contested definitional terrain of Exemption 4. As previously discussed, prior to *Food Marketing*, most courts defined information as “confidential” if its release would cause the submitter substantial competitive harm.³⁶ Because this test was not easy to satisfy (and certainly harder than its replacement in *Food Marketing*), disputing parties and adjudicating courts tended to focus their analysis on the issue of competitive harm. Was competitive harm *likely* if the information was released? Was it likely to be *substantial*?

Less ink was spilled on the other elements of the “confidential commercial information” category—notably, the “commercial” aspect of it. The second “C” in “CCI” was comparatively overlooked. And when requesters challenged the “commercial” character of withheld information, courts tended to define the term in broad (and tautological) ways—applying it to any information where the submitter had “a commercial interest.”³⁷

In the wake of *Food Marketing*, however, and its more lax test for “confidential” information, some courts are beginning to interrogate the meaning of “commercial.” They are making this once dormant term do some real definitional work.³⁸ One notable indication of this shift is the

34. See DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 10, at 10–11. Though, parties have disputed the extent to which agency-authored materials that incorporate information provided by third parties should be considered “obtained from a person.” See, e.g., *Flyers Rts. Educ. Fund v. FAA*, 71 F.4th 1051, 1056 (D.C. Cir. 2023) (“Exemption 4 protects information third parties provide even when the government incorporates that information into its own documents.”).

35. In many cases, the question of whether information is “financial” seems to be subsumed within the larger question of whether the information is “commercial.” Courts have held, however, that the term “financial” in Exemption 4 applies not just to “commercial financial information,” but also “personal financial information.” See *Wash. Post Co. v. U.S. Dep’t of Health & Hum. Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982).

36. See *supra* text accompanying notes 17–21.

37. See, e.g., *Baker & Hostetler LLP v. U.S. Dep’t of Com.*, 473 F.3d 312, 319–20 (D.C. Cir. 2006) (explaining that the term “reaches more broadly and applies (among other situations) when the provider of the information has a commercial interest in the information submitted to the agency”); DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 10, at 4–7 (noting the “widely accepted breadth” of the term “commercial” and citing cases).

38. See, e.g., *N.Y. Times Co. v. FDA*, 529 F. Supp. 3d 260, 276–79 (S.D.N.Y. 2021) (holding that consumer complaints regarding Juul e-cigarettes were not “commercial” information); *Ctr. for Investigative Reporting v. U.S. Dep’t of Lab.*, 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019) (holding that employment diversity data was not “commercial” information); *Besson v. U.S. Dep’t of Com.*, 480 F. Supp. 3d 105, 113 (D.D.C. 2020) (holding that the names of a principal investigator and project team members appearing in a Cooperative Research and Development Agreement do not constitute “commercial” information); *N.Y. Times Co. v. DOJ*, No. 19 Civ. 1424, 2021 WL 371784, at *9–10 (S.D.N.Y. Feb. 3, 2021) (explaining that information related to a “company’s compliance program,” including “hiring, promotion,

D.C. Circuit's 2023 decision in *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice (CREW)*.³⁹ In *CREW*, a government watchdog group made a FOIA request following the DOJ's 2019 announcement that it would resume federal executions after a two decade hiatus, using a new lethal agent, pentobarbital.⁴⁰ As part of this request, *CREW* sought records related to the Bureau of Prisons' "procurement of pentobarbital."⁴¹ Citing Exemption 4, the Bureau withheld as CCI "any information that could identify companies in the government's pentobarbital supply chain," including the names of any contractors involved.⁴² The district court sustained the agency's withholding, applying the new *Food Marketing* test.⁴³

On appeal, the D.C. Circuit reversed and remanded, citing, among other things, the Bureau's failure to demonstrate that the names of pentobarbital suppliers were "commercial" information within the meaning of Exemption 4.⁴⁴ The district court had deemed the withheld information to be "commercial" because it could subject the suppliers to negative publicity, possibly costing them business and leading them to exit the pentobarbital market.⁴⁵ On appeal, however, the D.C. Circuit rejected the Bureau's argument that Exemption 4 applied "whenever disclosure of confidential information, regardless of its character, could have commercial or financial repercussions."⁴⁶ Guided by Exemption 4's plain text, statutory context, history and precedent, the D.C. Circuit explained that

and disciplinary processes," "training materials," and "internal analysis of misconduct" is not "commercial").

39. *Citizens for Resp. & Ethics in Wash. v. DOJ (CREW)*, 58 F.4th 1255 (D.C. Cir. 2023).

40. *Id.* at 1260. This new execution procedure, using a lethal dose of pentobarbital, would replace a three-drug procedure that was used in the past. A bulk manufacturer and compounding pharmacy contracted with the Bureau to create an injectable solution. The Bureau executed thirteen people with pentobarbital between July 2020 and January 2021, after which the DOJ "announced a moratorium on federal executions." *Id.*

41. *Id.* at 1259. This request included "any notifications to or communications with vendors, solicitation information, requests for information, subcontracting leads, and contract awards." *Id.* at 1260.

42. *Id.* The information withheld by the Bureau "included the names of the Bureau's contractors as well as key terms from its pentobarbital contracts such as drug price, quantity, expiration dates, invoices, container units, lot numbers, purchase order/reference numbers, substance descriptions, drug concentration, and dates of purchase, service, and/or delivery." *Id.* "To justify its withholdings, the Bureau . . . did not provide declarations or affidavits from the contractors themselves." *Id.* at 1260-61.

43. *Id.* at 1261.

44. *Id.* at 1259.

45. *Id.* at 1261. The district court found the information to be "confidential" under the new *Food Marketing* test because "the companies themselves have typically kept the information private," and "the government agreed to keep the contractors' identities confidential to the greatest extent possible under law." *Id.*

46. *Id.* at 1263.

“commercial” information covers “information that, in and of itself, demonstrably pertains to the exchange of goods or services or the making of a profit.”⁴⁷ One cannot “rely on Exemption 4 where the withheld information only tenuously or indirectly concerns the exchange of goods or services or the making of a profit.”⁴⁸

In clarifying the boundaries of “commercial” information, the court emphasized that one should focus on the commercial nature of the information itself rather than its capacity to generate negative publicity.⁴⁹ Exemption 4 does “not protect against any and all commercial harm,” including assertions of harm “as a result of public scrutiny following disclosure.”⁵⁰ Applying this definition, the D.C. Circuit found the Bureau had not shown that “contractors’ names in and of themselves [we]re commercial” and the possibility of “public scrutiny” or “public opprobrium” upon disclosure did not make them so.⁵¹

Notably, the court emphasized the perverse consequences of adopting a broader reading of “commercial”—one that “converts ‘public scrutiny’ into a potential basis for withholding information”:

Under the Bureau’s approach, whenever public scrutiny might have reputational repercussions with potential knock-on commercial effects, the government and a contractor could shield information from public view simply by agreeing to keep it secret. That is not what Congress had in mind when it protected “citizens’ right to be informed about ‘what their government is up to.’”⁵²

Infusing the term “commercial” with real meaning can help cabin Exemption 4’s reach.⁵³ It can prevent the CCI category from being used as

47. *Id.* at 1265.

48. *Id.*

49. *Id.* at 1264–65, 1268 (“[W]ithheld information must be commercial in and of itself to qualify for withholding under Exemption 4; that disclosure might cause commercial repercussions does not suffice to show that information is ‘commercial’ under Exemption 4.”).

50. *Id.* at 1264.

51. *See id.* at 1266, 1269.

52. *Id.* at 1267–68 (“[I]t would stretch Exemption 4 to cover nearly any information that a business and the government agreed to keep secret, vitiating FOIA’s ability to shine light on public contracting.”).

53. Perhaps these developments in the FOIA litigation context might also influence courts’ interpretation of “independent economic value” in civil trade secrecy litigation. *See* UNIF. TRADE SECRETS ACT § 1(4) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1985). In the civil trade secrecy context, Camilla Hrdy argues that courts should more rigorously evaluate the “independent economic value” of information for which trade secret protection is sought. *See* Camilla A. Hrdy, *The Value in Secrecy*, 91 *FORDHAM L. REV.* 557, 600–02 (2022) (arguing that “embarrassing information that would be reputationally harmful” falls outside of the independent economic value requirement). For a discussion of definitional differences in the FOIA and civil trade secrecy litigation contexts, *see generally* Varadarajan, *supra* note 18.

an all-purpose cloak to shield from public view any reputationally damaging information contained in agency records. Applying similar reasoning to *CREW*, district courts have rejected arguments that “consumer complaints related to youth use” of Juul e-cigarettes submitted to the FDA or employee diversity data submitted by federal contractors to the Department of Labor are “commercial” information within the meaning of Exemption 4.⁵⁴ These and other cases suggest that a more scrutinizing assessment of information’s “commercial” nature can offer a promising path forward in the wake of *Food Marketing*.

II. RESUSCITATING A HARM ANALYSIS

An even more potent limitation on Exemption 4’s reach (and *Food Marketing*’s impact) may reside in the FOIA Improvement Act of 2016 (FIA).⁵⁵ This legislation added a “foreseeable harm” requirement to FOIA, instructing agencies to withhold information only if “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or the “disclosure is prohibited by law.”⁵⁶ So even if an exemption applies, an agency must release the requested record “if disclosure would not reasonably harm that exemption-protected interest—given [the record’s] age, content, and character.”⁵⁷

Indeed, the reason Congress enacted the FIA was “out of concern that ‘some agencies [were] overusing FOIA exemptions.’”⁵⁸ To help remedy this problem, the FIA’s foreseeable harm standard imposes an “additional, independent burden on the agency” to justify withholding “even if

54. *N.Y. Times Co. v. FDA*, 529 F. Supp. 3d 260, 276–79, 278 n.11 (S.D.N.Y. 2021) (rejecting defendant’s claim that “customer complaints about the physical characteristics or effects of Juul’s products” are not “commercial” information just because they “pertain to or are related to commerce”); *Ctr. for Investigative Reporting v. U.S. Dep’t of Lab.*, 424 F. Supp. 3d 771, 777–79 (N.D. Cal. 2019) (holding that basic employee demographic information provided by federal contractors was not “commercial” and expressing skepticism for “conclusory declarations” that such “workforce data . . . could make the company vulnerable to having its ‘diverse talent’ poached by its competitors”).

55. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (codified at 5 U.S.C. § 552).

56. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)(A)(i)); see also Varadarajan, *supra* note 18, at 508; Bernard Bell, *Food Marketing Institute: Office of Information Policy Guidance Released*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 9, 2019), <https://www.yalejreg.com/nc/food-marketing-institute-office-of-information-policy-guidance-released/> [perma.cc/Z2QY-6DNU]; Al-Amyr Sumar, *Unpacking FOIA’s “Foreseeable Harm” Standard*, COMM’NS L., Winter 2020, at 15 (discussing the origins of the “foreseeable harm standard and Congress’s impetus for codifying it”).

57. *Am. Small Bus. League v. U.S. Dep’t of Def.*, 411 F. Supp. 3d 824, 835 (N.D. Cal. 2019).

58. *Seife v. FDA*, 43 F.4th 231, 235 (2d Cir. 2022) (alteration in original) (quoting S. Rep. No. 114-4, at 2 (2015) as reprinted in 2016 U.S.C.C.A.N. 321, 322).

the information falls within one of the FOIA exemptions.”⁵⁹ Because the FIA does not apply retroactively, its foreseeable harm inquiry only applies in cases where a plaintiff requests documents after the June 30, 2016, enactment date.⁶⁰ The FOIA request in *Food Marketing* predated that, and the Supreme Court made no mention of the FIA in its Exemption 4 analysis.⁶¹

In the immediate aftermath of *Food Marketing*, some commentators speculated (or hoped, rather) that the decision would affect only a few pending cases where the FOIA request preceded the FIA’s enactment.⁶² But the DOJ’s subsequent guidance to agencies on Exemption 4 did not mention the FIA’s foreseeable harm analysis.⁶³ That left important questions to be answered by courts in the first instance: Does the FIA’s foreseeable harm analysis apply to Exemption 4 cases after *Food Marketing*? And if so, how should it apply—namely, what is the specific “interest protected by” Exemption 4 that disclosure would have to harm to justify withholding?

59. *Id.*

60. *Id.*

61. See Sumar, *supra* note 5656, at 18 (observing that the “Court’s opinion did not mention foreseeable harm . . . leaving it to lower courts to sort things out”).

62. See, e.g., Brief for Freedom of Information Act and First Amendment Scholars as *Amici Curiae* Supporting Respondents at 30, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (No. 18-481), 2019 WL 1418536, at *30 (“Because this case precedes the 2016 FOIA amendments, it only has the potential to affect nine cases.”); Beryl Lipton, *Supreme Court Ruling Draws Criticisms, Calls for Congressional Protection of FOIA*, MUCKROCK (July 2, 2019), <https://www.muckrock.com/news/archives/2019/jul/02/scotus-argus-leader-analysis> [perma.cc/L7RM-DBQX] (suggesting that the *Food Marketing* decision “should appropriately affect only a few pending federal court FOIA cases”).

63. See OFF. OF INFO. POL’Y, DOJ, EXEMPTION 4 AFTER THE SUPREME COURT’S RULING IN *FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA* (Oct. 4, 2019) (stating that government agencies need only consider (1) whether the submitter “customarily” treats the information as private, and (2) whether the government provided an “explicit or implicit” assurance of confidentiality); see also Bell, *supra* note 56 (noting that OIP’s guidance “does not even acknowledge the [FOIA Improvement Act] issue”). More recently, on March 15, 2022, Attorney General Garland issued new FOIA Guidelines reiterating the importance of the FIA’s “foreseeable harm” standard. See Memorandum from Merrick Garland, Att’y Gen., DOJ, to Heads of Exec. Dep’ts & Agencies, Freedom of Information Act Guidelines (Mar. 15, 2022) <https://www.justice.gov/ag/file/1208711-0/dl?inline> [perma.cc/A7V2-LMQN]; see also OFF. OF INFO. POL’Y, U.S. DOJ, OIP GUIDANCE: APPLYING A PRESUMPTION OF OPENNESS AND THE FORESEEABLE HARM STANDARD (Apr. 12, 2023) <https://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard> [perma.cc/8CAP-4LYY].

Until 2022, no circuit court had squarely addressed these questions.⁶⁴ Many district court decisions also failed to address these questions.⁶⁵ The ones that did adopted one of two approaches, exemplified in a pair of cases issued in the months after *Food Marketing*.⁶⁶

The first approach more or less reads the FIA out of existence in Exemption 4 cases. In *American Small Business League v. United States Department of Defense*, a district court considered a nonprofit organization's FOIA request for certain documents submitted by defense contractors relating to their small business subcontracting activities.⁶⁷ In challenging the agency's withholding of these documents, the plaintiff argued that the FIA applied and "effectively reinstate[d] the competitive harm test for Exemption 4."⁶⁸ The district court rejected this argument, reasoning that it would "not use the [FIA] to circumvent the Supreme Court's" new test and its clear rejection of the substantial competitive harm test.⁶⁹ As the court explained, the only "relevant" interest protected by Exemption 4 after *Food Marketing* is "the information's confidentiality — that is, its private nature."⁷⁰ And "[d]isclosure would necessarily destroy the private nature of the information, no matter the circumstance."⁷¹ To the extent courts embrace this approach and view the interest protected by Exemption 4 as confidentiality for its own sake (rather than to protect submitters from economic harm), the FIA will do nothing to lessen the impact of *Food Marketing*.⁷² Under such a reading, the FIA adds nothing at all.

The second approach takes the opposite view. In *Center for Investigative Reporting v. U.S. Customs and Border Protection*, a district court considered investigative journalists' request for documents from the Department of Homeland Security relating to its border wall contracting

64. A number of circuit court Exemption 4 decisions following *Food Marketing* make no mention of the FIA, despite the fact that the FOIA requests in those cases were made after the FIA's enactment. *See, e.g.*, *Flyers Rts. Educ. Fund, Inc. v. FAA* 71 F.4th 1051 (D.C. Cir. 2023); *Ryan L.L.C. v. U.S. Dep't of Interior*, No. 22-10373, 2022 WL 17250186 (5th Cir. 2022).

65. *See, e.g.*, *Zirvi v. U.S. Nat'l Insts. of Health*, Civ. No. 20-7648, 2022 WL 1261591 (D.N.J. 2022); *Majuc v. DOJ*, No. 18-cv-566, 2022 WL 266700 (D.D.C. 2022); *Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, 549 F. Supp. 3d 76 (D.D.C. 2021); *see also* *N.Y. Times Co. v. FDA*, 529 F. Supp. 3d 260, 288 (S.D.N.Y. 2021) (discussing the two approaches but refusing to "jump into this fray just yet").

66. *See* *Am. Small Bus. League v. U.S. Dep't of Def.*, 411 F. Supp. 3d 824, 835 (N.D. Cal. 2019); *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90 (D.D.C. 2019).

67. *Am. Small Bus. League*, 411 F. Supp. 3d at 827–28.

68. *Id.* at 835.

69. *Id.* at 836.

70. *Id.*

71. *Id.*

72. *Cf. Bell*, *supra* note 56 ("[I]f a 'foreseeable harm' analysis applies, and harm to submitters counts as a species of harm to be avoided, agencies may have to grapple with [the] issue of competitive harm.").

activities.⁷³ The agency invoked Exemption 4 as a basis for withholding.⁷⁴ In setting out the proper legal standard, the district court explained that under the FIA, a withholding agency would have to show that disclosure would harm an interest protected by Exemption 4, “such as by causing ‘genuine harm to [the submitter’s] economic or business interests.’ ”⁷⁵ The court observed that the FIA’s “‘foreseeable harm’ requirement replaces to some extent the ‘substantial competitive harm’ test that the Supreme Court overruled in *Food Marketing*.”⁷⁶

As of early 2024, only one circuit court has weighed in on this split, endorsing the second—and far more sensible—approach. In 2022, the Second Circuit held in *Seife v. FDA* that the FIA applies to Exemption 4 cases, and the interest protected by Exemption 4 is “the submitter’s commercial or financial interests.”⁷⁷ Therefore, “the FIA’s foreseeable harm requirement refers to harm to the submitter’s commercial or financial interests.”⁷⁸ In *Seife*, a science writer and journalism professor made a FOIA request to the FDA for certain documents submitted by a drug manufacturer, Sarepta Therapeutics, in securing accelerated approval for a muscular dystrophy drug.⁷⁹ The FDA redacted certain parts of the clinical study reports on Exemption 4 grounds.⁸⁰

The district court found these redactions to be proper because they “fell within Exemption 4 and met the [FIA’s] additional requirement” of showing that disclosure would cause foreseeable harm to the interests

73. *Ctr. for Investigative Reporting v. U.S. Customs and Border Prot.*, 436 F. Supp. 3d 90, 96 (D.D.C. 2019).

74. *Id.* at 97.

75. *Id.* at 113 (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019)).

76. *Id.*; see also *Ctr. for Investigative Reporting v. U.S. Dep’t of Lab.*, 424 F. Supp. 3d 771, 780 (N.D. Cal. 2019) (concluding that the FOIA Improvement Act’s “foreseeable harm standard applies to all exemptions” even after *Food Marketing*); *Leopold v. DOJ*, No. 19-3192, 2021 WL 124489, at *7 (D.D.C. Jan. 13, 2021) (applying a foreseeable harm standard).

77. *Seife v. FDA*, 43 F.4th 231, 234 (2d Cir. 2022).

78. *Id.* at 240.

79. *Id.* at 234. The approval of this drug triggered internal dispute within the FDA. “Accelerated approval [is] a special pathway for drugs treating serious conditions and providing a meaningful advantage over existing therapy. There was, however, intense internal conflict within the FDA over approval of [Sarepta’s drug.]” While several reviewers within the FDA “unanimously recommended that [the drug] not be approved due to deficiencies in Sarepta’s clinical studies,” their recommendation was overridden by the head of the Center for Drug Evaluation and Research—a decision that was ultimately upheld by the FDA Commissioner. *Id.* at 237. See also *Morten & Kapczynski*, *supra* note 13, at 526 (observing that Sarepta “charges close to \$1,000,000 per patient per year for [this drug] despite the fact that, even as of mid-2020, it had yet to generate any persuasive evidence that the drug actually works.”).

80. *Seife*, 43 F.4th at 234, 237.

protected by Exemption 4.⁸¹ But the district court did not “specify[] what those protected interests were.”⁸² In affirming the district court’s decision to apply the FIA, the Second Circuit observed that “[n]either the Supreme Court nor . . . any of our sister circuits has had occasion to consider the burden imposed by the FIA in an Exemption 4 case.”⁸³ The Second Circuit did, however, note the “two primary competing district court interpretations of the interests protected by Exemption 4”—that is, the split discussed above.⁸⁴

After considering the “ordinary meaning and structure of Exemption 4,” as well as the “broader context of the statute as a whole,” the Second Circuit held that the specific interests protected by Exemption 4 are the “commercial or financial interests of the submitter in information that is of a type held in confidence.”⁸⁵ As the Second Circuit explained, because Exemption 4 only protects “confidential information that is commercial or financial in nature,” the statute “contemplates harm specifically to [the submitter’s] commercial or financial interests.”⁸⁶

The Second Circuit explicitly rejected the reasoning in *American Small Business League*—that the interest protected by Exemption 4 is simply the confidentiality of the information itself—as being “belied by both the structure of the statute and common sense.”⁸⁷

Congress expressly enacted the FIA to address situations where information would fall within an exemption and yet no harm would result from disclosure, emphasizing that in those circumstances the information must be disclosed . . . The foreseeable harm requirement must be met independently from the elements of the exemption; otherwise, the FIA adds nothing.⁸⁸

Nor was the Second Circuit persuaded (as the district court was in *American Small Business League*) that the Supreme Court’s *Food Marketing* decision counseled a contrary view that the interest protected by Exemption 4 is simply “confidentiality.” As the Second Circuit noted, the Supreme Court ignored that question altogether. It “did not once mention the FIA or what interests Exemption 4 protects” in *Food Marketing*; instead, that case answered “an entirely different question” about the meaning of “an isolated term,” confidentiality.⁸⁹

81. *Id.* at 234.

82. *Id.* at 234, 238.

83. *Id.* at 235.

84. *Id.* at 239.

85. *Id.* at 240.

86. *Id.*

87. *Id.* at 241.

88. *Id.*

89. *See id.*

Under *Seife's* reading, Exemption 4's protected interests are "the submitter's commercial or financial interests, and the FIA's foreseeable harm requirement refers to harm to the submitter's commercial or financial interests."⁹⁰ Consequently, any "agency in a FOIA case can . . . meet the foreseeable harm requirement of the FIA by showing foreseeable commercial or financial harm to the submitter upon release of the contested information."⁹¹ While this harm inquiry does not mimic the pre-*Food Marketing* "substantial" competitive harm inquiry (i.e., the harm to commercial interests need not be "substantial"), it nonetheless brings *some* analysis of harm back into the fold.⁹² To the extent that courts more widely embrace *Seife's* reasoning, that will help cabin Exemption 4's reach and blunt the impact of *Food Marketing*, which jettisoned any analysis of likely commercial harm to the submitter.

CONCLUSION

Despite its flaws, FOIA serves a pivotal purpose. I join the chorus of scholars advocating for more proactive agency disclosure instead of relying exclusively on FOIA requests.⁹³ But agencies' willingness (and allocated resources) to embrace more proactive disclosure models varies from administration to administration.⁹⁴ Against these ever-shifting political winds, FOIA remains an important backstop. When agencies do not

90. *Id.* at 240.

91. *Id.* at 241–42. Applying this analysis to the facts before it, the Second Circuit found that the defendants' supporting submission described "in reasonably specific detail" why the redacted information's release "would harm Sarepta's commercial or financial interests." *Id.* at 242. The Second Circuit noted that "[w]hile Seife makes numerous policy arguments favoring disclosure, FOIA does not have an exception for cases where public health may be served by disclosure." *Id.* at 244. Indeed, scholars have called for more proactive FDA disclosures of the clinical data they possess in the interest of public health. *See generally* Morten, *supra* note 11; Morten & Kapczynski, *supra* note 13.

92. In a similar vein, the dissenting justices in *Food Marketing* advocated for the addition of a harm inquiry to the majority's test—where the "[r]elease of such information must also cause genuine harm to the owner's economic or business interests." *Food Marketing*, 139 S. Ct. at 2367–68 (Breyer, J., concurring in part and dissenting in part) (expressing reservations about the "stringent" burden that the "substantial competitive harm" test placed on submitters, but expressing strong concern about the majority's decision to eliminate the question of economic harm altogether).

93. *See e.g.*, Morten *supra* note 11, at 1330 (advocating "agency-administered programs of information publicity that do not simply disclose information to all comers, unconditionally, but instead cultivate carefully bounded 'gardens' of information"); Pozen *supra* note 4, at 1101, 1107–08 (advocating a "forward-looking legislative approach" that "look[s] beyond . . . FOIA" to "affirmative disclosure requirements"); Morten & Kapczynski, *supra* note 13 (arguing in favor of proactive disclosure of clinical trial data by the FDA).

94. *See* Morten *supra* note 11, at 1344 (describing various examples and observing that "under the Trump administration, multiple federal regulators that had historically cultivated important proactive disclosure programs ended them," some of which "have not been revived under President Biden"). *See also* Ctr. for Investigative Reporting v. U.S. Dep't

voluntarily let the public's scrutinizing eyes in, FOIA insists that they do. To have any hope of doing this effectively, FOIA's exemptions must stay narrow—as they were intended.

Food Marketing has widened the reach of Exemption 4. But two recent circuit decisions from the D.C. and Second Circuits highlight ways to narrow it once again—even absent legislative intervention.⁹⁵ By interrogating the meaning of “commercial” information and applying the FIA’s “foreseeable harm” inquiry to require a showing of likely commercial harm to the submitter before withholding information, these decisions offer a promising path forward. They counsel agencies and courts to look well beyond the confidentiality customs and privacy preferences of submitting firms (and receiving agencies) in their Exemption 4 decisions. If widely followed, these decisions can help mitigate the damage of *Food Marketing* and narrow Exemption 4’s reach to align more closely with FOIA’s disclosure-promoting goals.

of Lab., 470 F. Supp. 3d 1096, 1101–02 (N.D. Cal. 2020) (describing the Trump administration reversal of certain proactive disclosure programs at OSHA related to workplace injury information reported by large employers that were introduced during the Obama administration).

95. Legislative attempts to reinstate *National Parks*’ “substantial competitive harm” standard in Exemption 4 withholding decisions after *Food Marketing* have been unsuccessful. See Open and Responsive Government Act, S. 2220, 116th Cong. (2019); S. 2220 (116th): *Open and Responsive Government Act of 2019*, GOVTRACK (Sept. 2, 2019), <https://www.govtrack.us/congress/bills/116/s2220/summary> [perma.cc/RZ94-URMQ]; see also Press Release, Chuck Grassley, Senator, U.S. Senate, Grassley, Leahy, Cornyn, Feinstein Introduce Bill to Reinforce Transparency in Wake of Supreme Court FOIA Decision and Recent Regulations (July 23, 2019), <https://www.grassley.senate.gov/news/news-releases/grassley-leahy-cornyn-feinstein-introduce-bill-reinforce-transparency-wake> [perma.cc/P59K-T2KE].