

Foreseeable Harm: An In-Depth Look

PRESENTED BY:
MATTHEW POLLACK, U.S. AGENCY FOR GLOBAL MEDIA
GUNITA SINGH, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

1

Agenda

- I. Overview
- II. Exemption 4
- III. Exemption 5
- IV. Exemption 7

2

2

Overview – The Statute

5 U.S.C. 552(a)(8)

(A) An agency shall –

(i) withhold information under this section only if –

- (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
- (II) disclosure is prohibited by law; and

...

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

3

3

Overview – History

Attorney General Janet Reno (1993): The Department of Justice will only defend decisions if "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."

Attorney General John Ashcroft (2001): The Department of Justice will defend agency decisions "unless they lack a sound legal basis."

Attorney General Eric Holder (2009): The Department of Justice will only defend decisions if "the agency reasonably foresees that disclosure would be harmful to an interest protected by one of the statutory exemptions."



4

4

Overview – Legislative History

"This ever-changing guidance is undoubtedly confusing to FOIA processors and requesters alike, and agencies need clearer guidance regarding when to withhold information covered by a discretionary FOIA exemption."

– Senate Report



5

5

Overview – Legislative History



"There is a growing and troubling trend towards relying on these discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure."

– Senate Report

"Federal agencies have made an effort to comply with the letter of the law, very few have complied with the spirit of the law. The presumption of openness puts that spirit into the letter of the law. Before claiming an exemption, agencies must first determine whether they could reasonably foresee an actual harm."

– House Report

6

6

Overview – Legislative History

"It places the burden on agencies to demonstrate why information may be withheld, instead of on the public to justify release."

- House Report

Agencies should "articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld."

- House Report



7

7

Overview – Application



Just because information technically qualifies for redaction under an exemption, that is not enough to redact it. The agency must also point to a specific harm that would flow from the release of the information.

Two step analysis:

1. Does the information fall within an exemption?
2. Is there a reasonably foreseeable harm that would flow from its release?

8

8

Overview – Application

Guidelines for application:

- Case-by-case basis, but can be made on a category-by-category basis.
- Focus on foreseeable harm. Mere "speculative or abstract fears" are not a sufficient basis for withholding.
- Identify the nature of the harm and the link between the specified harm and specific information in question.
- Consult subject matter experts.
- Consider reasonable segregation.
- Communicate in response letters to the requester that you considered foreseeable harm.

9

9

Overview – Application

For some exemptions, the harm is already included in the traditional analysis. For others, the amendment requires additional considerations.

- Baked in: Exemption 1, 4 (?), 6, 7
- No foreseeable harm analysis: Exemption 3
- Additional foreseeable harm analysis: Exemption 2, 5, 8, 9

10

10

Exemption 4: Commercial Information

Covers two categories of information:

- Trade Secrets; and
- Commercial or financial information
 - If obtained from a person; and
 - Privileged and confidential

11

11

Exemption 4: Commercial Information

This should be easy!

- The Supreme Court considered Exemption 4 after Congress codified the foreseeable harm standard.
- The Department of Justice said that harm is baked into the Exemption 4 analysis.



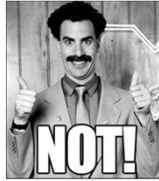
12

12

Exemption 4: Commercial Information

But it's not!

- The Supreme Court considered a request submitted prior to the 2016 FOIA amendments so did not address the foreseeable harm standard.
- The Department of Justice may(?) have been talking about the standard the Supreme Court jettisoned.



13

13

Exemption 4: Commercial Information

Exemption 4 and "baked in" harm before and after *Argus Leader*:

- Pre *Argus Leader*, if the government obtained information as part of a "required submission" it could only be considered confidential within the terms of the exemption if the government could show disclosure would impair its ability to collect similar information in the future or would cause "substantial competitive harm" to the submitter. No such showing was required for "voluntary" submissions.
- The *Argus Leader* court did not require any showing of harm to withhold otherwise confidential commercial information.

14

14

Exemption 4: Commercial Information

Harm is always present and foreseeable:

- "Ultimately, under *Food Marketing*, the plain and ordinary meaning of Exemption 4 indicates that the relevant protected interest is that of the information's confidentiality — that is, its private nature. Disclosure would necessarily destroy the private nature of the information, no matter the circumstance." *Am. Small Bus. League v. United States Dep't of Defense*, 411 F. Supp. 3d 824, 836 (N.D. Cal. 2019).

Some specific showing of "genuine harm" (taken from the *Argus Leader* concurrence / dissent):

- "The defendants must explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would harm an interest protected by this exemption, such as by causing 'genuine harm to [the submitter's] economic or business interests,' and thereby dissuading others from submitting similar information to the government." *Ctr. for Investigative Reporting v. United States Customs & Border Prot.*, 436 F. Supp. 3d 90, 113 (D.D.C. 2019).

15

15

Exemption 4: Commercial Information

Foreseeable Commercial of Financial Harm:

- "The interests protected by Exemption 4 are the submitter's commercial or financial interests in information that is of a type held in confidence and not disclosed to any member of the public by the person to whom it belongs. An agency in a FOIA case can therefore meet the foreseeable harm requirement of the FOIA Improvement Act by showing foreseeable commercial or financial harm to the submitter upon release of the contested information." *Seife v. Food & Drug Admin.*, 43 F.4th 231, 241-42 (2d Cir. 2022).
- Are we just back to Pre-Argus Leader?

16

16

Exemption 4: Commercial Information

Submitter-Notification Process and Foreseeable Commercial of Financial Harm:

- Many agencies use submitter notification processes to provide notice to a submitter that a third party requested their commercial information and that information may be released.
- Allows agencies to rely on submitters to provide its views on confidentiality and harm.

17

17

Exemption 4: Commercial Information

Should Harm Even Matter?

"Exemption 4 covers information prohibited from disclosure under the Trade Secrets Act and similar laws, and as such does not provide for discretionary disclosure under FOIA. As with other exemptions that are based on separate legal restrictions, it is understood that the foreseeable harm standard will not apply to most of the information falling under Exemption 4."

– Sen. Report

18

18

Exemption 4: Commercial Information

The Trade Secrets Act (18 U.S.C. 1905) prohibits the release of any 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."

It is a criminal statute that allows for fines, imprisonment, and removal from office.



19

19

Exemption 4: Commercial Information



Pre Argus Leader, courts held that the Trade Secrets Act was "co-extensive" with Exemption 4, and so if information fell within the scope of the Exemption, it was also within the scope of the Trade Secrets Act.

But its current status...

20

20

Exemption 4: Commercial Information

(A) An agency shall –

(i) withhold information under this section only if –

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) **disclosure is prohibited by law**; and

21

21

DISCUSSION

What should the answer be?

- There is always harm in releasing confidential information?
- Information should only be withheld if there is commercial harm?
- Why are we even talking about harm?

22

22

Exemption 5 Attorney-client privilege

Disclosing this information would undermine the attorney-client privilege, and would have a chilling effect on communication between agency employees who regularly process FOIA requests.

CBP's declaration in 2021 FOIA litigation



23

Exemption 5 Attorney-client privilege

An agency must "provide a **non-generalized** explanation on the foreseeable harm that would result from disclosure of attorney-client communications."

Reporters Comm. for Freedom of the Press v. Customs & Border Prot., 567 F. Supp. 3d 97 (D.D.C. 2021) (holding agency was required to disclose certain records withheld under the attorney-client privilege, but could withhold others)



24

Exemption 5 Deliberative process privilege

Reporters Comm. for Freedom of the Press v. FBI, 3 F.4th 350 (D.C. Cir. 2021)

Agency must make:

"a **focused and concrete** demonstration of why disclosure of the particular type of material at issue will, in the **specific** context of the agency action at issue, **actually** impede those same agency deliberations going forward. Naturally, this inquiry is context specific."



25

EXERCISE

"Disclosure of the information would severely undermine the Department's ability to efficiently and effectively investigate allegations of civil rights or civil liberties violations, and for its investigators and decision-makers to offer uninhibited opinions and recommendations on the matters at issue. Without continued assurance of confidentiality, our expert consultants would not provide the Department with the meaningful information it needs to properly investigate civil rights complaints. Maintaining the confidentiality of these types of pre-decisional and deliberative communications is critical for the Department to carry out its mission."

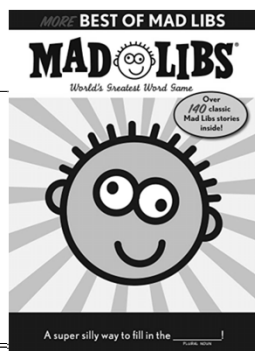
DHS Decl. in FOIA litigation ~ 2022

26

Exemption 5 Deliberative process privilege

Nat'l Pub. Radio v. DHS, No. 1:20-CV-2468-RCL, 2022 WL 4534730 (D.D.C. Sept. 28, 2022)

Agencies do **NOT** satisfy their obligation by turning a generalized justification . . . into a game of "Mad Libs" and fill[ing] in the blanks with the name of the agency and the things that it does. If such an exercise were sufficient, th[e] "reasonably foreseeable" harm requirement would be so easy to evade as to be essentially dead letter.



27

EXEMPTION 7

Harm analysis
already "baked in"
to statute –
What to do?



28

Exemption 7(C)

Harm already "baked in" to statute

Reporters Comm. for Freedom of Press v. FBI, No. CV 17-1701 (RC), 2022 WL 13840088, at *4 (D.D.C. Oct. 21, 2022)

◦ PSEUDONYMS

- "The FBI does not claim that the pseudonyms can be readily traced to or otherwise reveal the underlying individual's identity."



29

Exemption 7(C)

Reporters Comm. for Freedom of the Press v. DOJ,

No. CV 19-2847 (TFH), 2021 WL 5179237 (D.D.C. Nov. 8, 2021)

- FBI agent whose name = *already* in public domain: no basis for withholding
- BUT!
- "the FBI has sufficiently and specifically articulated the potential foreseeable harms that may result from disclosure of the identity of the unknown SA"



30

Exemption 7(E)



Citizens for Responsibility & Ethics in Wash. v. DHS, No. 20-CV-1400 (CRC), 2021 WL 950415 (D.D.C. Mar. 12, 2021)

- Records contained # of Secret Service agents assigned in support of an agency protectee
- agency proved “specific explanation of how disclosure of information **about the size of the President’s Secret Service detail would result in foreseeable risks of harm to agents and those they protect.**”
