U.C.L.A. Law Review

Business Secrecy Expansion and FOIA

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ABSTRACT

Expansive trade secrecy claims (such as those regarding voting machine software and government contractor pricing) can negatively impact government transparency and democratic accountability. In one important context—Freedom of Information Act (FOIA) cases—courts have addressed these concerns by imposing constraints on the definition of "trade secrets" and "confidential" commercial information that can be lawfully withheld from requesters, such as journalists and watchdog groups, under FOIA's Exemption 4. But, the U.S. Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader Media* toppled these constraints. Wiping away four decades of circuit court precedent, the Court held that commercial information can be withheld under Exemption 4, provided that the submitter customarily treated it as private. Prior to this decision, such information typically could not be withheld unless its disclosure would cause the submitter substantial competitive harm. *Food Marketing*'s permissive new standard will dramatically expand the private sector's ability to shield from public view information provided to the government.

This Article is the first to explore *Food Marketing* and its consequences through the lens of trade secrecy law. I demonstrate that *Food Marketing*'s expansion of exempt business secrets under FOIA is consistent with the broader pattern of trade secrecy expansion in common and statutory law. In both contexts—FOIA and civil trade secret litigation—courts have replaced strict constraints on the definition of proprietary secrets with a more open-ended analysis that focuses on a firm's privacy practices and preferences. This newfound consistency is ironic, given that courts considering FOIA requests spent many decades rejecting the more expansive definition of trade secrecy in civil litigation and opting instead for a narrower definition that aligned with FOIA's disclosure mandate. Ultimately, I suggest that *Food Marketing*'s new test may sweep even more broadly than its civil trade secrecy counterpart, for the latter's focus on employee-defendants comes with inherent restrictions on firms' overbroad claims that the FOIA context lacks. These differences and FOIA's unique role in promoting government accountability suggest the need for additional constraints on firms' assertions of business secrecy.

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For helpful comments and conversations, I thank Charles Tait Graves, Camilla Hrdy, Sonia Katyal, Margaret Kwoka, David Levine,

Michael Risch, Elizabeth Rowe, Sharon Sandeen, Christopher Seaman, and participants at the 2020 Washington & Lee School of Law's Trade Secrets and Information Policy Roundtable, the 2020 Academy of Legal Studies in Business Annual Conference, and the 2020 Intellectual Property Scholars Conference at Stanford Law School. All errors are my own.

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INTRODUCTION

Trade secrecy, the branch of law that allows businesses to guard commercially valuable information, has expanded dramatically over the past several decades.[1] Both in terms of subject matter and economic relevance, trade secrecy has grown far beyond its humble roots.[2] Originating as an outcrop of nineteenth century unfair competition law, early American trade secret cases featured limited subject matter—such as technical information regarding manufacturing processes, designs, and formulas—and breaches of confidence that led to competitive injury.[3] Yet the landscape today is quite different. Legal and technological changes have created an environment in which firms invoke trade secrecy to protect all manner of information[4]—from source code to pricing information to employee diversity statistics.[5] The growing importance of trade

1. *See, e.g.*, David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 145–46 (2007) (describing trade secrecy's "expansion in recent decades"); David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1107–09 (2012) (describing the "expanding" scope of trade secrets); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 806 (2015) ("[C]ontemporary trade secrets have expanded both in subject matter, the type of information that can be deemed trade secret, and protection, the type of activities that are deemed misappropriation." (emphasis omitted)).
2. *See* Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 3 (2017) ("Trade secrets are the most pervasive form of intellectual property in the modern economy.").
3. *See infra* Subpart I.A.
4. *See* Levine, *supra* note 1, at 155 ("[V]irtually all information that may, in some more than trivial way, have any value to a company could qualify as a trade secret.").
5. *See, e.g.*, Sonia K. Katyal, *The Paradox of Source Code Secrecy*, 104 CORNELL L. REV. 1183, 1187 (2019) (discussing firms' increased "rel[iance] on trade secrecy to protect source code"); Levine, *supra* note 1 at 180–83 (discussing the invocation of trade secrecy to protect source code related to the operation of voting machines); Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343, 1358–68 (2018) (source code relating to criminal justice technologies); Annemarie Bridy, *Trade Secret Prices and High-Tech Devices: How Medical Device Manufacturers Are Seeking to Sustain Profits by Propertizing Prices*, 17 TEX. INTELL. PROP. L.J. 187, 188–89 (2009) (pricing information related to medical devices); Robin Feldman & Charles Tait Graves, *Naked Price and Pharmaceutical Trade Secret Overreach*, 22 YALE J.L. & TECH. 61, 77–79 (2020) (drug pricing information in the pharmaceutical supply chain); Jamillah Bowman Williams, *Why Companies Shouldn't Be Allowed to Treat Their Diversity Numbers as Trade Secrets*, HARV. BUS. REV. (Feb. 15, 2019), https://hbr.org/2019/02/ why-companies-shouldnt-be-allowed-to-treat-their-diversity-numbers-as-trade-secrets [https://perma.cc/35QE-ZZGD] (employee diversity statistics).

secrecy to firms is underscored by the rapid growth in trade secrecy litigation over the past several decades.[6]

Trade secrecy's expansion has, in turn, triggered numerous critiques. Since most litigated cases involve departing employees,[7] critics of trade secrecy's expansion often emphasize its negative impact on innovation, competition, and employee mobility. Namely, as firms claim trade secrecy over all manner of information, employees may fear leaving their jobs and utilizing their skills in new ones.[8] But in recent years, trade secrecy's expansion has given rise to a new and salient set of critiques, highlighting the government's increasing reliance on private vendors to perform public functions and situations far removed from the paradigmatic "departing employee-competitor" scenario that shaped trade secret law's development.[9]

In the modern age, government entities rely on the private sector to provide everything from detention facilities to voting machines to breathalyzer tests to decision-making algorithms that assess Medicaid benefits, bail determinations, and public teacher performance.[10] In such contexts, firms' assertions of secrecy over information like source code and pricing data trigger concerns that go beyond competition or innovation. In such contexts, expansive secrecy claims implicate government transparency and democratic accountability.[11] When these

6. *See, e.g.*, David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum & Jill Weader, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 293, 301–02 (2009) (finding that trade secret litigation in federal court doubled every decade over the prior thirty years even as federal litigation overall had decreased).

7. *See, e.g.*, David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum & Jill Weader, *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 GONZ. L. REV. 57, 68–69 (2010) (finding that in 77 percent of state appellate decisions between 1995 and 2009, the alleged misappropriator of trade secrets was an employee or former employee).

8. *See* Charles Duhigg, *Did Uber Steal Google's Intellectual Property?*, NEW YORKER (Oct. 15, 2018), https://www.newyorker.com/magazine/2018/10/22/did-uber-steal-googles-intellectual-property [https://perma.cc/ZUH3-APRW] ("The fact that trade secrets are hard to define breeds paranoia. Do we own the knowledge inside our heads . . . ?"); *see also infra* Subpart I.D.

9. *See, e.g.*, Katyal, *supra* note 5, at 1237 ("When automated decision making and trade secrecy facilitates this intermingling of public and private, it produces a crisis of transparency."); Levine, *supra* note 1, at 137 ("Private businesses are increasingly displacing the government in providing and operating public infrastructure, but . . . are utilizing commercial law standards and norms, including the key tool of trade secrecy, to do so."); Danielle Keats Citron, *Open Code Governance*, 2008 U. CHI. LEGAL F. 355, 356–59 (2008) (explaining that while "[a]gencies increasingly transfer crucial responsibilities to computer systems," proprietary secrecy impedes "critical administrative law values of participation, political accountability, and expertise").

10. *See infra* Subpart I.D.

11. *See* Hannah Bloch-Wehba, *Access to Algorithms*, 88 FORDHAM L. REV. 1265, 1272 (2020) ("The primary obstacle to transparency is the pervasive practice of invoking trade secrecy to shield the methodologies of automated decision-making from scrutiny."); Levine, *supra* note 1, at 135

important interests are at stake, commentators have suggested that a different set of rules regarding business secrecy should apply.

Interestingly, for over forty years, a different set of rules *did* apply—at least, in one important context, the Freedom of Information Act (FOIA).[12] In FOIA cases, courts have long imposed certain constraints on expansive assertions of business secrecy. Unlike civil trade secrecy laws, U.S. Congress enacted FOIA specifically to address concerns of government transparency and accountability—to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[13] With the assistance of journalists and watchdog groups, FOIA was intended 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."[14]

FOIA's broad right of access has, however, always been subject to certain enumerated exemptions[15] intended to balance the "right of the public to know" with other "legitimate governmental and private interests."[16] To that end, Exemption 4 of FOIA authorizes agencies to withhold (1) "trade secrets," and (2) "confidential" commercial information.[17] Though, the statute defines neither category.[18] For over four decades, circuit courts interpreted these two categories of business secrets somewhat narrowly, imposing definitional constraints that followed FOIA's broad disclosure mandate and resisted the trend of trade secrecy expansion in common law and state statutory law.[19]

(arguing that "trade secrecy must give way to traditional notions of transparency and accountability when it comes to the provision of public infrastructure"). Many of these situations also implicate due process concerns. *See, e.g.*, Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 19 (2014) (urging due process safeguards when "individual decisions [are] based on algorithmic predictions"); Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1249 (2008) (describing how "[a]utomated systems jeopardize due process norms").

12. Freedom of Information Act, 5 U.S.C. § 552 (2018).
13. U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976)).
14. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); *see also* Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1361, 1371 (2016) (explaining that FOIA was "designed largely by journalists, for journalists, and with the particular goal in mind that journalists would use access to government information to provide knowledge to the public," but also describing how journalists' efforts have been "crowded out" by profit-seeking FOIA requesters).
15. 5 U.S.C. § 552(b) (2018). FOIA's nine enumerated exemptions address interests such as national security, personal and medical privacy, and law enforcement investigations.
16. John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989).
17. 5 U.S.C. § 552(b)(4) (authorizing agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential").
18. *Id.*
19. *See infra* Subpart II.B.

As to the first category, FOIA cases restricted the term "trade secrets" to information with "a direct relationship [to] the productive process."[20] In this way, courts embraced technical subject matter constraints, akin to courts' decisions in an earlier era of trade secret litigation.[21] As to the second category, commercial information could not be withheld as "confidential" unless its release would cause the submitter "substantial" competitive harm.[22] Significantly, this analysis focused on harm flowing from competitors' "affirmative use" of disclosed information, rather than reputational and other noncommercial consequences.[23] In tandem, these two definitional constraints (while imperfect) helped to keep the larger forces of trade secrecy expansionism at bay for FOIA purposes.

Or at least—they did. In 2019, the U.S. Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*[24] upended these constraints. Wiping away forty years of precedent, the Court held that information qualifies as "confidential" and can be withheld under Exemption 4 so long as the submitter (and, possibly, the government) treat it that way.[25] Competitive harm (or any harm) is irrelevant. And while the decision makes no mention of the "trade secret" category, by expanding "confidential" commercial information to align more closely with firms' privacy preferences, the decision's practical effect is to collapse the two.[26]

20. Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining a 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"); *see also* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 13 (D.D.C. 2000) ("[A] more restrictive definition of 'trade secret' was necessary in FOIA cases, one that encompasses only the productive process itself, rather than collateral business matters, which would properly fall under the 'commercial information' prong of Exemption 4.").
21. *See infra* Subpart II.A.
22. *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).
23. *See, e.g.*, CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154–55 (D.C. Cir. 1987) (focusing on "harm flowing from the affirmative use of proprietary information by competitors") (quoting *Pub. Citizen v. FDA*, 704 F.2d 1280 at 1291 n.30).
24. 139 S. Ct. 2356 (2019).
25. *Id.* at 2363. The Court held 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." *Id.* at 2366. In this phrasing, the Court left the precise boundaries of test undefined, observing: "At least the first of these conditions must be met; it is hard to see how information could be deemed confidential if its owner shares it freely. But the Court need not resolve whether both conditions are necessary because both conditions are clearly met here." *Id.* at 2359 (syllabus).
26. *See infra* Subpart III.A.

Following this decision, agencies will likely withhold a wider swath of private sector information from FOIA's disclosure mandate. As the dissenting justices in *Food Marketing* warned, placing the designation of confidentiality entirely in the hands of the parties involved will no doubt tempt them to shield information from public view—whether due to "convenience, skittishness, or bureaucratic inertia."[27] The broadening of Exemption 4 may, in turn, frustrate the ability of media outlets and other watchdog groups to access and report on information relevant to the public interest.[28]

Commentators have critiqued this decision on various fronts, including its deficiencies as a matter of statutory interpretation.[29] In this Article, however, I consider the Supreme Court's *Food Marketing* decision and its potential consequences from a different angle. I use the lens of trade secrecy scholarship and history to demonstrate that this decision is, on the one hand, consistent with the broader story of trade secrecy expansion. And yet, expanding business secrecy in the FOIA context, as *Food Marketing* does, is particularly worrisome—not only because it directly implicates government accountability, but also because FOIA requests, due to their procedural posture, lack some of the inherent safeguards of civil trade secrecy litigation.[30]

Part I sets the stage for this discussion by describing the basics of trade secrecy, its legal evolution and expansion over time, and some consequences of that expansion. Part II shifts focus to FOIA litigation, examining circuit courts' prior interpretation of Exemption 4 which resisted the broader tide of trade secrecy expansion. This Part also examines the Supreme Court's recent *Food Marketing* decision and its aftermath.

As Part III argues, the *Food Marketing* decision fits the broader pattern of trade secrecy expansion. Namely, the decision's likely practical effect is to collapse the two Exemption 4 categories—"trade secrets" and "confidential" commercial

27. *Food Mktg. Inst.*, 139 S. Ct. at 2368 (Breyer, J., concurring in part and dissenting in part); *see also infra* Subpart II.C.

28. *See, e.g.*, DANIEL J. SHEFFNER, CONG. RSCH. SERV., LSB10294, WHEN DOES THE GOVERNMENT HAVE TO DISCLOSE PRIVATE BUSINESS INFORMATION IN ITS POSSESSION? 2 (2019), https://fas.org/sgp/crs/secrecy/LSB10294.pdf [https://perma.cc/VU6L-DC5L] ("[F]inancial and commercial information may often be associated with federal programs and activities that implicate public health and safety, the allocation of federal funds, and other matters of public interest that may warrant public scrutiny." (citations omitted)); *see also infra* Subpart II.C.

29. *See, e.g.*, Mark Fenster, *Opinion Analysis: Court Gives Broad Meaning to "Confidential" in FOIA Exemption for Commercial and Financial Information*, SCOTUSBLOG (June 24, 2019, 7:48 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-gives-broad-meaning-to-confidential-in-foia-exemption-for-commercial-and-financial-information [https://perma.cc/Y5GY-5KHB].

30. *See infra* Subpart III.B.

information—into one more open-ended category that asks primarily whether the submitter treats the information as secret. Likewise, civil trade secrecy laws have, over time, exchanged strict definitional constraints on proprietary business secrets for a similar analysis. This Article seeks to emphasize the irony of this newfound consistency between FOIA Exemption 4 and civil trade secrecy, given that FOIA courts have spent forty years resisting this very consistency.

Even more troubling, Exemption 4 may now cast an even more expansive net than its civil trade secrecy counterpart. The civil trade secret litigation context—with its focus on departing employees—carries certain inherent limits on trade secrecy scope that the FOIA context lacks. Part III explains how, in practice, FOIA's recognition of business secrecy may now sweep even more broadly than its civil trade secret law counterpart. These differences underscore the need for additional checks on submitters' assertions of confidentiality (and agency deference to those assertions) under FOIA.

Ultimately, *Food Marketing* and its aftermath illustrate why we should care about the loss of clear definitional constraints on proprietary secrets—especially within the FOIA context, but perhaps even outside of it. While government transparency concerns are particularly pressing in the FOIA context, scholars have persuasively demonstrated how, even in the civil trade secrecy litigation context, expansive secrecy claims can impede government transparency and accountability.[31] Thus, Part III concludes by considering possible reforms to address this tension, both within the FOIA context (when this tension is most acute) and in trade secret law more generally.

I. THE EVOLUTION AND EXPANSION OF TRADE SECRECY

A. Trade Secrecy: An Overview

Trade secret law imposes liability on those who "misappropriate" trade secrets—meaning, those who acquire secrets through "improper means," or use or disclose them in breach of a confidentiality duty.[32] Because trade secrets cover intangible information, they are often grouped with other types of intellectual property, such as patents and copyrights.[33] But the origin story of trade secrecy

31. *See infra* Subpart I.D.

32. *See* 18 U.S.C. § 1839(5) (2018); UNIF. TRADE SECRETS ACT § 1(2) (UNIF. L. COMM'N 1985). Third parties can also commit misappropriation if they "knew or had reason to know" that the information had previously been obtained through improper means or in violation of a confidentiality duty. 18 U.S.C. § 1839(5)(B)(ii) (2018).

33. *See, e.g.*, 1 ROGER M. MILGRIM & ERIC E. BENSEN, MILGRIM ON TRADE SECRETS § 2.01 (2020) (describing trade secrets as intellectual property); Almeling, *supra* note 1, at 1095 (describing

protection in the United States is quite different. Unlike patent and copyright law, which have long been grounded in federal statutes,[34] trade secret protection grew out of nineteenth century common law and unfair competition principles.[35] By the mid-twentieth century, trade secrecy's core principles and doctrines were reflected in the 1939 Restatement (First) of Torts (Restatement First).[36] And by the end of twentieth century, nearly every state had enacted a version of the Uniform Trade Secret Act (UTSA), a model state statute promulgated to help promote uniformity in trade secret law.[37] In recent decades, trade secrets have also become the subject of federal statutes, including most recently the Defend Trade Secrets Act of 2016 (DTSA).[38]

During the course of trade secrecy's evolution from a decentralized product of individual states' common law to the subject of state and federal statutes, the rationales for protecting this category of intangible information have not always been clear.[39] Some courts and commentators have emphasized "commercial morality" and the deterrence of wrongful acts as key rationales behind trade secrecy protection.[40] Others have emphasized trade secrecy's role in encouraging

"[t]rade secret law [as] the newest and least developed of the 'big four' types of intellectual property []: patents, copyrights, trademarks, and trade secrets").

34. *See* U.S. CONST. art. I, § 8, cl. 8 (providing that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); Patent Act of 1790, ch. 8, 1 Stat. 109–112 (repealed 1793); Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1802).

35. For a detailed history of the evolution of trade secret law in the United States, see generally Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493 (2010).

36. RESTATEMENT (FIRST) OF TORTS §§ 757–59 (AM. L. INST. 1939).

37. UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1985). The Uniform Trade Secrets Act (UTSA), a model state statute, was issued by the National Conference of Commissioners on Uniform State Laws in 1979. As of this writing, nearly every state has adopted the UTSA; New York is the notable exception. *See Trade Secrets Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 [https://perma.cc/9YHS-DMUZ] (last visited Mar. 5, 2021). *See infra* Subpart I.B for further discussion of the UTSA and its application.

38. *See* Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended at 18 U.S.C. §§ 1836–1839 (2018)). The Defend Trade Secrets Act (DTSA) amends the Economic Espionage Act of 1996 to provide a federal cause of action for trade secret misappropriation. 18 U.S.C. § 1836(b) (2018). Before the DTSA, civil trade secret claims were the exclusive province of state laws. *See infra* Subpart I.B.

39. *See* Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 312–14 (2008) (describing this theoretical confusion); Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 246 (1998) (describing and critiquing the various policy justifications for trade secret law).

40. *See, e.g.*, E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1015 (5th Cir. 1970) (emphasizing trade secrecy's aim "to recognize and enforce higher standards of commercial morality in the business world" (quoting Hyde Corp. v. Huffines, 314 S.W.2d 763, 773 (Tex.

the production and efficient sharing of socially valuable information—utilitarian rationales akin to patent and copyright law.[41] These debates continue.[42]

Yet over the course of its not-quite-two-hundred year history, one fact is clear. Trade secrecy's trajectory has been one of expansion. Over time, trade secret laws have come to apply to a wider and wider array of subject matter. Under modern statutes, almost any type of technical or business information can be protected as a trade secret.[43] To obtain protection, a trade secret owner need not apply for protection nor register trade secrets with any federal or state agency. Consequently, a firm's secrecy efforts and designations of confidentiality often drive the identification of trade secrets—both during and in advance of litigation.[44] And unlike other types of intellectual property, trade secrets do not have a set expiration date; instead, they typically expire when the protected information becomes publicly disclosed.[45] As the subject matter of trade secrecy protections has expanded, so too has the private sector's reliance upon and litigation over this category of proprietary information. The Subparts below describe the legal evolution of trade secrecy protection, its increasing importance to firms, and some problematic consequences of that expansion.

B. The Legal Evolution of Trade Secrecy: From Common Law to Statutory Law

The development of trade secret doctrine—from early cases in the nineteenth century to the Restatement First to its modern incarnation in state and federal

1958))); Menell, *supra* note 2, at 14 ("Trade secret law has long been grounded in what has been termed 'commercial morality.'").

41. *See* David D. Friedman, William M. Landes & Richard A. Posner, *Some Economics of Trade Secret Law*, J. ECON. PERSPS., Winter 1991, at 61, 64 (contending that trade secrecy "supplements the patent system" and is "congruent with the basic economic explanation for patent protection—that it provides a means of internalizing the benefits of innovation"); Lemley, *supra* note 39, at 329 (arguing that trade secrets should be understood as intellectual property rights because they share "two critical features . . . with other IP rights—they promote inventive activity and they promote disclosure of those inventions").

42. *See, e.g.*, Robert G. Bone, *The (Still) Shaky Foundations of Trade Secret Law*, 92 TEX. L. REV. 1803, 1807–08 (2014). In any case, the U.S. Supreme Court recognized each of these rationales in a landmark case holding that federal patent law does not preempt state trade secret protection. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481, 484–85 (1974).

43. Any information can come within trade secrecy's definition, so long as it: (1) "derives independent economic value, actual or potential, from not being generally known," and (2) "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." UNIF. TRADE SECRETS ACT § 1(4) (UNIF. L. COMM'N 1985); *see also* 18 U.S.C. § 1839(3) (2018).

44. *See* Katyal, *supra* note 5, at 1214 ("There is no central office to register trade secrets; a mere assertion of trade secrecy is all that is needed in order to keep that information from the public.").

45. *See* 1 MILGRIM, *supra* note 33, at § 1.05.

statutes—reflects various shifts that have "substantially expanded the potential application of the [doctrine] to virtually any form of information connected to a business."[46] I focus on two of these shifts here. One linked trade secret subject matter to the concept of economic or commercial value rather than concrete technical innovations.[47] The other unmoored the definition of a trade secret from the requirement that it be "continuous[ly] use[d]" in one's business.[48]

To understand the conceptual distance that trade secrecy doctrine has traveled, it is useful to start at the beginning—with the early cases. In the nineteenth century, American trade secret law began to emerge from the common law of unfair competition.[49] In these early cases, trade secrecy protections were typically limited to secret manufacturing processes, designs and formulas. For example, a landmark case from this early period, *Peabody v. Norfolk*, involved a secret process for "manufactur[ing] gunny cloth from jute butts."[50] As the court explained, if one "invents or discovers, and keeps secret, a *process of manufacture*, whether a proper subject for a patent or not" he will be "protect[ed] against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons."[51]

To this end, Annemarie Bridy has observed that while early reported decisions did not provide a specific definition for trade secrets, "the great majority of . . . cases involved claims for secret manufacturing processes."[52] And when claimants sought protection over "other types of secret business information," such as customer lists or pricing data, courts were usually (though not always)

46. Levine, *supra* note 1, at 156; *see also* Bone, *supra* note 39, at 248 (observing that "almost anything can qualify as a trade secret, provided it has the potential to generate commercial value").

47. *See* Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 757 (2002) (describing the law's shift in focus from "specific concrete technical innovations" to the concept of "economic value," making "the definition of trade secret almost infinitely expandable"); Bridy, *supra* note 5, at 195–99 (describing this evolution).

48. Levine, *supra* note 1, at 154 (alteration in original); *see also* Bridy, *supra* note 5, at 206–07.

49. *See* Sandeen, *supra* note 35, at 498–502 (describing early American trade secret cases).

50. Peabody v. Norfolk, 98 Mass. 452, 453 (1868). Gunny cloth is a coarse fabric made from jute plant fibers. In *Peabody*, an engineer employed by Peabody and under a duty of confidentiality left his employment to help others "build another factory for the manufacture of gunny cloth from jute butts," and furnished them with "Peabody's secret process of manufacturing." *Id.* at 454. Similarly, the first recognized trade secret case in the U.S. involved the "secret manner of manufacturing chocolate." Vickery v. Welch, 36 Mass. 523, 524 (1837).

51. *Peabody*, 98 Mass. at 458 (emphasis added).

52. Bridy, *supra* note 5, at 194–96 & n.37 (describing and listing cases). *See*, *e.g.*, Salomon v. Hertz, 2 A. 379, 380 (N.J. Ch. 1886) (discussing "secret and peculiar methods and processes for making Cordovan leather"); Cincinnati Bell Foundry Co. v. Dodds, 10 Ohio Dec. Reprint 154, 154 (Super. Ct. 1887) (discussing "a secret process for the manufacture of bells").

skeptical.[53] Further contributing to early trade secret law's limited purview was a standing requirement of sorts.[54] As Sharon Sandeen has explained, because trade secrecy sprouted from the common law of unfair competition, early courts were "reluctant to grant relief to plaintiffs who were not in competition with the alleged wrongdoer."[55] In these (and other) ways, early American courts tended to restrict trade secret liability to situations involving limited technical subject matter and direct competitive injury.

Over time, these constraints loosened, as reflected in the 1939 Restatement First.[56] The Restatement First attempted to summarize common law trade secrecy principles in the early twentieth century.[57] It defined trade secrets quite broadly, as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[58] This would potentially cover not just the limited technical subject matter of early cases, but a wider range of nontechnical, business information.[59] Yet even the Restatement First's arguably

53. Bridy, *supra* note 5, at 195–97 (describing cases). *See, e.g.*, *In re* Bolster, 110 P. 547, 548 (Wash. 1910) (explaining that "[t]he term 'trade secret' as it is usually understood means a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some article of trade having a commercial value. It is rarely, if ever, used to denote the mere privacy with which an ordinary commercial business is carried on").

54. *See* Sandeen, *supra* note 35, at 500.

55. *Id. See, e.g.*, *Peabody*, 98 Mass. at 461 (granting relief against a competitor using the plaintiff's secret information to build a gunny cloth factory).

56. RESTATEMENT (FIRST) OF TORTS §§ 757–59 (AM. L. INST. 1939).

57. *See* Almeling, *supra* note 1, at 1096–97 (describing the "Restatement [as] mark[ing] a critical turning point for trade secret law . . . . quickly bec[oming] the legal standard, as nearly every reported trade secret case cited the Restatement. But due to [its] nonbinding nature . . . trade secret law remained geographically inconsistent, developing unevenly from state to state").

58. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. L. INST. 1939).

59. *See id.* (describing trade secrets as including information "relat[ing] to the sale of goods or to other operations in the business," such as "a list of specialized customers, or a method of bookkeeping or other office management"). Rather than delineate specific subject matter, the Restatement First listed six factors for courts to consider in assessing the existence of a trade secret, including:

> (1) the extent to which the information is known outside of [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in [the plaintiff's] business; (3) the extent of measures taken by [the plaintiff] to guard the secrecy of the information; (4) the value of the information to [the plaintiff] and to his [or her] competitors; (5) the amount of effort or money expended by [the plaintiff] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.

looser definition retained a significant constraint: information had to be "continuous[ly] use[d] in the operation of the business."[60]

The continuous use requirement bore a certain logic. That is, if a firm was not using the information in its business, then another's use or disclosure of it was far less likely to cause economic harm. And because of this requirement of continuity, "single or ephemeral events in the conduct of the business," like certain pricing information[61] would not come within the Restatement First's definition.[62] Nor would information regarding business failures (so-called "negative know-how"), as it would not be continuously used in a business's operation.[63] Moreover, in defining "trade secrets," the Restatement First distinguished this term from a more amorphous category of "confidential business information," that was addressed in a separate section and offered far more limited options for relief.[64]

By the end of the twentieth century, however, the Restatement's role as a "primary source" for understanding trade secrecy law in the United States had been largely displaced.[65] In 1979, four decades after the Restatement First's

60. *Id.*

61. *Id.* (explaining that "single or ephemeral events in the conduct of the business [like] . . . the amount or other terms of a secret bid for a contract or the salary of certain employees" would not be protectable).

62. *See* Bridy, *supra* note 5, at 207 ("Absent the related requirements of continuous use and non-ephemerality, there is no doctrinal bar to including prices paid within the scope of trade secret protection . . . .").

63. *See* Charles Tait Graves, *The Law of Negative Knowledge: A Critique*, 15 TEX. INTELL. PROP. L.J. 387, 394 (2007) ("Because the Restatement required that a trade secret must be something in use by the plaintiff, it implicitly ruled out most negative know-how because parties will not continue to use information they believe to be mistaken.").

64. RESTATEMENT (FIRST) OF TORTS § 759 (AM. L. INST. 1939) ("One who, *for the purpose of advancing a rival business interest, procures by improper means* information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information." (emphasis added)). Although this Subpart does not use the term "confidential business information," the Restatement comments explain the information covered by this category must "relate to matters in his business" and generally "be of a secret or confidential character." *Id.* at cmt. b. Notably, in addressing the "[l]imitations of this section," the Restatement explained that "it does not deal with . . . the procuring of information about business matters for the purpose of advancing an interest other than a rival business interest, as, for example, . . . a newspaper's interest in news about trade or manufacture." *Id.* at cmt. a. Nor was injunctive relief available in the confidential business information context as it was for trade secrets. *See* Edmund W. Kitch, *The Expansion of Trade Secrecy Protection and the Mobility of Management Employees: A New Problem for the Law*, 47 S.C. L. REV. 659, 661 (1996).

65. *See* Sandeen, *supra* note 35, at 502. *See also* Bridy, *supra* note 5, at 198–99 ("Until the promulgation of the UTSA in the early 1970s and its eventual adoption in most states, the First Restatement was the sole authority to which most courts looked to define the scope of trade secret protection . . . ."). *Cf.* Bone, *supra* note 39, at 247 (noting the ongoing influence of the Restatement's formulation).

publication, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Trade Secrets Act (UTSA) to help promote uniformity in trade secret law.[66] Nearly every state has adopted it in some form.[67]

The UTSA breaks with the Restatement First in notable ways.[68] Significantly, the UTSA's definition of trade secrets is arguably broader than its predecessor.[69] Under the UTSA, there are essentially three requirements for proving a trade secret exists.[70] First, the information must be a "secret" that is not "generally known" or "readily ascertainable" to others in the relevant industry.[71] So firms may not claim any exclusivity over published or well-known industry information.[72] Second, the information must derive "independent economic value, actual or potential from not being generally known."[73] And third, the information must be subject to reasonable secrecy efforts by the owner.[74]

Notably absent from this definition is the Restatement First's requirement that the information be continuously used in one's business. Under the UTSA definition, even a secret's "potential" economic value is sufficient to merit protection.[75] As the comments to the UTSA explain, this "broader definition . . . extends protection to a plaintiff who has not yet had an opportunity

66. UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1985).
67. *See supra* note 37 and accompanying text.
68. *See* Sandeen, *supra* note 35, at 542–43 (describing the various differences between the UTSA and Restatement First).
69. *See* Menell, *supra* note 2, at 16 ("The UTSA defines the scope of eligible trade secret protection expansively . . . ."); Bridy, *supra* note 5, at 193 (describing how the "UTSA expanded the potential reach of trade secrecy"); Almeling, *supra* note 1, at 1106–07 (describing the "continually expanding" definition of trade secrets post-UTSA). *But see* Sandeen, *supra* note 35, at 542–43 (suggesting that the UTSA "made it more difficult to establish a meritorious case by more clearly defining the essential elements of a [trade secret] cause of action").
70. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. L. COMM'N 1985) (defining "trade secret" to "mean[] information, including a formula, pattern, compilation, program, device, method, technique, or process," that "derives independent economic value, actual or potential, from not being generally known [or] readily ascertainable" and is the subject of reasonable secrecy efforts).
71. *Id.*
72. *Id.* § 1 cmt. Even the earliest trade secrecy cases did not extend protection to information that was generally known to the public. *See, e.g.*, Nat'l Tube Co. v. E. Tube Co., 13 Ohio C.C. 468, 470 (Ohio Ct. App. 1902) (observing that "if the idea of these patterns is known generally to the world, or at least to the people interested in that kind and character of business, then it cannot be a trade secret").
73. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM'N 1985).
74. *Id.* Reasonable secrecy efforts can take different forms in different contexts, including both physical and contractual means. *See generally* Deepa Varadarajan, *Trade Secret Precautions, Possession, and Notice*, 68 HASTINGS L.J. 357 (2017) (discussing the reasonable secrecy efforts requirement).
75. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. L. COMM'N 1985).

or acquired the means to put the trade secret to use."[76] Relying on the UTSA's broader definition, owners have asserted trade secrecy claims over information whose economic value "is merely a 'hypothetical possibility.'"[77] And while the UTSA eliminates the Restatement First's separate category of protectable "confidential business information,"[78] much of this information potentially falls within the UTSA's broader definition of trade secrets.[79]

Following the UTSA, state statutes primarily governed civil trade secret liability. In 2016, however, Congress enacted the Defend Trade Secrets Act

76. *Id.* § 1 cmt. ("The definition of 'trade secret' contains a reasonable departure from the Restatement of Torts (First) definition which required that a trade secret be 'continuously used in one's business.' The broader definition in the proposed Act extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use. The definition includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will *not* work could be of great value to a competitor.").

77. Levine, *supra* note 1, at 154–55 (describing the protection of potentially valuable trade secrets as "affect[ing] a sea change in the contours of trade secrecy," because under the UTSA's definition, "a trade secret could include information that had not even been established in the business as commercially useful"). *But see* Sandeen, *supra* note 35, at 527–28 (acknowledging but disagreeing with "the conventional wisdom . . . that the UTSA broadened the scope of information that is protectable under trade secret law by deleting the Restatement First's requirements that the protected information be non-ephemeral and used in one's business").

78. *See supra* note 64 and accompanying text. The UTSA preempts other common law causes of action designed to provide civil remedies for misusing business information that does not qualify for trade secret protection. UNIF. TRADE SECRETS ACT § 7 (UNIF. L. COMM'N 1985). *See* Charles Tait Graves & Elizabeth Tippett, *UTSA Preemption and the Public Domain: How Courts Have Overlooked Patent Preemption of State Law Claims Alleging Employee Wrongdoing*, 65 RUTGERS L. REV. 59, 72 (2012) (describing how the "majority of courts that have considered UTSA preemption . . . have ruled that the UTSA displaces alternative state law tort claims that seek to hold the defendant liable for misusing the plaintiff's information").

79. *See* Kitch, *supra* note 64, at 662 (observing that the UTSA "eliminates the distinction between information that is a trade secret and other confidential information. All secret information of economic value falls within the definition of trade secrets." (citations omitted)). In 1995, the American Law Institute drafted the Restatement (Third) of Unfair Competition (Restatement Third). Several sections of the Restatement Third address the subject of trade secrecy. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 39–45 (AM. L. INST. 1995). Similar to the UTSA, the Restatement Third defines trade secrets expansively as "any information that *can be used* in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an *actual or potential economic advantage* over others." *Id.* § 39 (emphasis added). In comments, the Restatement Third explains that the economic advantage a trade secret provides to its owner "need not be great," and it would "suffic[e] if the secret provides an advantage that is more than trivial." *Id.* at cmt. e. Also, "following the lead of the [UTSA]," the Restatement Third "eliminates the distinction between information that is a trade secret and other confidential information." Kitch, *supra* note 64, at 662.

(DTSA), introducing a federal civil claim for trade secret misappropriation.[80] Like the UTSA, the DTSA defines trade secrets broadly to include "all forms and types of financial, business, scientific, technical, economic, or engineering information," and incorporates the same three basic elements for establishing a protectable trade secret as the UTSA.[81] Commentators have pointed to the DTSA as a further example of trade secrecy's modern expansion.[82]

C. Firms' Increasing Reliance on Trade Secrecy

Not only has the legal definition of trade secrets expanded over the course of its history, but so too has the economic importance of trade secrets. That firms increasingly rely on trade secret protection to protect intangible assets is evidenced by survey data.[83] It is also evidenced by the dramatic increase in civil litigation rates

80. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended at 18 U.S.C. §§ 1836–1839 (2018); *see also supra* text accompanying note 38.

81. 18 U.S.C. § 1839(3) (2018) ("[T]he term 'trade secret' means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information . . . ."). For a discussion of the similarities and differences between the DTSA and UTSA, *see* Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 BERKELEY TECH. L.J. 829, 887–911 (2017).

82. *See, e.g.*, Orly Lobel, *The DTSA and the New Secrecy Ecology*, 1 BUS., ENTREPRENEURSHIP & TAX L. REV. 369, 370 (2017) ("[T]he DTSA defines trade secrets and what constitutes misappropriation more expansively."). Because the DTSA was enacted pursuant to Congress's Commerce Clause power, it includes language regarding "use[] in commerce." 18 U.S.C. § 1839(7) (2018). It provides: "An owner of a trade secret that is misappropriated may bring a civil action under this subsection *if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce*." 18 U.S.C. § 1836(b)(1) (2018) (emphasis added). While this is a notable difference from the UTSA, it is unlikely to be as restrictive as the Restatement First's continuous commercial use requirement. *See* Sandeen & Seaman, *supra* note 81, at 894 (observing that "the DTSA requires proof of intent to use, but this phrase is not defined, raising questions about how such intent will be established and whether it needs to be 'bona fide' like the Lanham Act requires").

83. *See* Andrea Contigiani & David H. Hsu, *How Trade Secrets Hurt Innovation*, HARV. BUS. REV. (Jan. 29, 2019), https://hbr.org/2019/01/how-trade-secrets-hurt-innovation [https://perma.cc/3VVY-A5UW] ("[S]tudies show that when asked about their [intellectual property protection] strategies, both managers of large enterprises and entrepreneurs often respond that other tools are more important than patents. In particular, trade secrecy . . . is considered an increasingly important defense strategy and source of competitive advantage."); JOHN R. THOMAS, CONG. RSCH. SERV., R41391, THE ROLE OF TRADE SECRETS IN INNOVATION POLICY (2014), https://fas.org/sgp/crs/secrecy/R41391.pdf [https://perma.cc/9J6V-37EW]

for trade secrecy.[84] A confluence of factors has contributed to trade secrecy's increased economic importance.

One factor is the doctrinal expansion of trade secrecy discussed above, which has moved towards a more flexible and broad definition of trade secret subject matter.[85] Another factor is the increased mobility of the American worker over time—no longer a "'company man,' devoting [one's] career to a single employer."[86] As workers go from job to job, they have increased opportunities to take employers' trade secrets with them, whether intentionally or not.[87]

Technological changes have also played a significant role in several ways. Notably, digital technology has made the misappropriation of information easier. Compare the ease of downloading thousands of documents on a flash drive with hauling stacks of paper blueprints.[88] At the same time, technological changes have also made intangible assets more important to firms.[89] In particular, the emergence of software in the latter half of the twentieth century has contributed to trade secrecy's rising importance to firms.[90] Due in part to the "uncertain and

("As the United States continues its shift to a knowledge- and service-based economy, the strength and competitiveness of domestic firms increasingly depends upon their know-how and intangible assets. Trade secrets are the form of intellectual property that protects this sort of confidential information."); Katyal, *supra* note 5, at 1211 & n.152 (observing that "[s]urveys have shown that company executives rank trade secrets as the area of primary importance in their intellectual property portfolios" and citing studies).

84. *See* Almeling, *supra* note 1, at 1092 ("Over the past three decades, trade secret litigation in federal courts has grown exponentially, doubling roughly every decade, while federal litigation has decreased overall," and in state courts, "trade secret litigation . . . has increased at a rate faster than that of state litigation in general.").

85. *See, e.g.*, *id.* at 1106–07 (describing the "widespread adoption of the UTSA" and the "flexible definition of trade secrets" as reasons contributing to trade secrecy's expansion, for "the category of material falling within this definition is continually expanding").

86. *Id.* at 1094; *see also* BUREAU LAB. STAT., U.S. DEP'T OF LAB., NUMBER OF JOBS, LABOR MARKET EXPERIENCE, AND EARNINGS GROWTH: RESULTS FROM A NATIONAL LONGITUDINAL SURVEY (Aug. 22, 2019), https://www.bls.gov/news.release/pdf/nlsoy.pdf [https://perma.cc/5LVS-V9VA] ("Individuals born from 1957 to 1964 held an average of 12.3 jobs from ages 18 to 52.").

87. *See* Almeling, *supra* note 1, at 1094.

88. *See, e.g.*, *id.* at 1098–99; Victoria A. Cundiff, *Reasonable Measures to Protect Trade Secrets in a Digital Environment*, 49 IDEA 359, 361 (2009) ("The digital world is no friend to trade secrets.").

89. *See* Almeling, *supra* note 1, at 1093 ("The intangible assets of the 500 companies that make up the S&P 500 comprised 17 percent of the companies' total value in 1975, 32 percent of total value in 1985, 68 percent of total value in 1995, 80 percent of total value in 2005, and 81 percent of total value in 2009.").

90. *See* Katyal, *supra* note 5, at 1196 (discussing the "leaps and bounds" growth of the computer industry and mass market software beginning in the 1960s and 1970s, as well as the increasing complexity of software in the decades following).

porous boundaries" of patent and copyright protection for software, firms routinely rely on trade secrecy to protect source code.[91]

Relatedly, various changes to patent law over the past few decades have helped make trade secrecy a more compelling option for protecting various categories of information, such as software and business methods.[92] Unlike patent law, trade secret law does not cover situations when a defendant has "reverse engineered" a product to discover a secret or has independently created the same information.[93] Thus, the conventional wisdom has been that when a firm has a choice between the protections of a patent or trade secrecy for a particular innovation, they will choose patent for its more robust protections.[94] Indeed, this conventional wisdom was central to the Supreme Court's landmark holding in *Kewanee Oil Co. v. Bicron Corp.* that federal patent law did not preempt state trade secrecy laws.[95] Yet, various changes to patent law in recent decades, including the Supreme Court's narrowing of patentable subject matter, may have shifted this calculus towards trade secrecy.[96] And since patents require a formal application process, they have always been more costly to obtain than trade secrets.[97]

91. *Id.* at 1187, 1189 (observing that "source code is largely dominated by trade secrecy" and offering explanations for this dominance).

92. *See, e.g.*, Almeling, *supra* note 1, at 1112 ("Recent U.S. patent law developments have tilted the balance between whether a business should pursue patents or trade secrets."); Katyal, *supra* note 5, at 1191 ("Since the boundaries of software patentability have also narrowed, trade secrecy becomes an even more attractive default avenue for protection, essentially displacing all other possibilities.").

93. The ability to reverse engineer—that is, "starting with the known product and working backward to divine the process which aided in its development or manufacture"—has long been viewed as an important limitation on owners' trade secret rights. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

94. *See id.* at 489–90 (citing trade secrecy's weaker protections, which permit reverse engineering and independent development, as reasons why "no reasonable risk of deterrence from patent application by those who can reasonably expect to be granted patents exists"); *see also* Katyal, *supra* note 5, at 1231–32 (describing *Kewanee* as standing for a "foundational presumption" that innovators prefer patentability over trade secrecy).

95. *Kewanee Oil Co.*, 416 U.S. at 493.

96. *See, e.g.*, Alice Corp. v. CLS Bank Int'l., 573 U.S. 208 (2014); Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66 (2012); Bilski v. Kappos, 561 U.S. 593 (2010); *see also* Almeling, *supra* note 1, at 1112–16 (describing these patentable subject matter cases, as well as other recent changes to patent law that might encourage companies to choose trade secret law over patent law).

97. *See, e.g.*, David S. Levine & Ted Sichelman, *Why Do Startups Use Trade Secrets?*, 94 NOTRE DAME L. REV. 751, 761–62 (2018); Katyal, *supra* note 5, at 1214 ("[T]rade secrecy reduces significant administrative and judicial costs associated with acquiring a patent.").

D. Critiques and Consequences of Trade Secrecy Expansion

A complex mix of factors, both legal and technological, has pushed firms towards trade secrecy over the last several decades. In response, commentators have expressed various concerns—most often, relating to innovation, competition, and employee mobility.[98] Such concerns stem from the factual posture of most litigated trade secrecy cases. That is, even as trade secrecy litigation rates have increased, the vast majority of cases feature the "classic" scenario of an employee, former employee, or business partner who is alleged to have misappropriated a trade secret for commercial ends.[99] As firms claim protection over a wider array of information, individuals may be deterred from leaving their existing jobs, creating new startups, or utilizing their knowledge and training in subsequent employment.[100] Even if employers' trade secret claims are not successful, they can nonetheless create a chilling effect by forcing defendants to litigate even marginal claims.[101] To be sure, these are significant concerns.

Yet in recent years, a burgeoning strain of scholarship has emphasized cases that depart from the classic trade secrecy fact pattern and implicate a different set of concerns.[102] Does the broad and open-ended definition of trade secrets that

98. *See e.g.*, Contigiani & Hsu, *supra* note 83 ("[S]trengthening employers' trade secrecy protection can backfire by dampening inventors' productivity and hurting innovation in the long run."); Lobel, *supra* note 1, at 852 (critiquing the expansion of "human capital law," including the "expansion of the type of confidential information as protected trade secrets," as harmful to employee mobility, innovation, and competition); Kitch, *supra* note 64, at 664 (describing the tension between expanded trade secrecy protections and employee mobility); Joseph P. Fishman & Deepa Varadarajan, *Similar Secrets*, 167 U. PA. L. REV. 1051, 1058 (2019) (highlighting innovation concerns); Camilla A. Hrdy, *The General Knowledge, Skill, and Experience Paradox*, 60 B.C. L. REV. 2409, 2418 (2019) (highlighting employee mobility concerns).

99. *See, e.g.*, Almeling, Snyder, Sapoznikow, McCollum & Weader, *supra* note 7, at 68–69 (finding that in 77 percent of state appellate decisions between 1995 and 2009, the alleged misappropriator was an employee or former employee); Almeling, *supra* note 1, at 1101 (citing prior empirical studies to observe that "current and former employees are the groups most often sued for trade secret misappropriation").

100. *See, e.g.*, Lobel, *supra* note 1, at 852; Fishman & Varadarajan, *supra* note 98, at 1058.

101. *See, e.g.*, Levine, *supra* note 1, at 180 (discussing the "chilling effect" due to the "need for a defendant to expend time and energy" litigating even "marginal claim[s] that some . . . information might qualify as a trade secret").

102. *See, e.g.*, Feldman & Graves, *supra* note 5, at 82 ("Although overbroad trade secrecy assertions are not new, the problem now extends far beyond traditional civil litigation disputes between former employers and departing employees—the customary domain of trade secret law."); Katyal, *supra* note 5, at 1247 (observing that while "[t]he typical defendant in trade secrecy cases involves a competitor who has allegedly misappropriated the plaintiff's trade secret for profit and unfair competition[,]" some recent cases "demonstrate . . . core differences from the classic cases," such as when a "defendant's motivation is not to compete with a trade

developed in the civil litigation context—and specifically, in the context of departing employees and competitive uses—have additional consequences when applied outside of this context? Increasingly, the answer seems to be a resounding "yes."

For example, Peter Menell has described how firms have invoked trade secrecy to prevent employee whistleblowers from reporting suspected illegal conduct to law enforcement officials, and its problematic chilling effect.[103] Whistleblowers generally do not "seek[] to divulge a company's innovative process technology to competitors," but instead, "they are driven by moral and social desires to prevent, halt, or rectify illegal activity."[104] In a similar vein, firms invoke trade secrecy to avoid scrutiny by government regulators or negative publicity by news media outlets—even when the public has a significant interest in learning the information.[105] David Levine has described this conflict in the context of voting machine software.[106] In one notable case, the voting machine vendor Diebold invoked trade secrecy to try to avoid a state law requirement giving regulators access to voting machine software, including its source code, in order to assess the machines' security and reliability.[107] Rather than comply with this law, Diebold sued the state, arguing that trade secrecy insulated the company from disclosing source code.[108]

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secret holder but [is] rather . . . . for the purposes of disclosure to the public or . . . investigation of bias").

103. *See* Menell, *supra* note 2, at 7 (describing examples of companies suing whistleblowers for disclosing proprietary information in the course of reporting suspected illegal conduct and explaining how, in the absence of a safe harbor, "many employees and contractors are not prepared to risk the tremendous personal and professional costs of reporting illegal activity").

104. *Id.* at 45.

105. *See, e.g.*, Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 779, 812–13 (2007) (describing cases involving news media defendants that "obtain trade secrets without participating in their misappropriation and who desire to publicly disclose these secrets as newsworthy contributions to public discourse").

106. *See* Levine, *supra* note 1, at 180–83.

107. *Id.* at 180 ("In November 2005, Diebold refused to comply with a North Carolina law that requires vendors of electronic voting machines to place, among other items, 'all software that is relevant to functionality, setup, configuration, and operation of the voting system,' including its source code, 'in escrow with an independent escrow agent approved by the State Board of Elections.'").

108. *Id.* at 180–83; *see also id.* at 183 (observing that "immediately after Diebold refused to comply with the law, and in the face of their refusal to do so, the [Board of Elections] in effect nullified the law and actually *approved* Diebold as a vendor, noting that none of the winning applicants could comply with the law's requirement that all source code be placed in escrow," and that "ultimately, the only fact that prevented the use of Diebold's machines in North Carolina was Diebold's decision to withdraw from the state"); Katyal, *supra* note 5, at 1241 ("In more than one voting issue, assertions of trade secrecy prevented election officials from releasing software to independent auditors to enable review and testing.").

Others have highlighted similar examples of regulatory obfuscation in the environmental context. For example, Mary Lyndon has described how firms use trade secrecy to resist disclosing the composition and health effects of discharged chemicals in various contexts, from hydraulic fracking to chemical spills.[109] More recently, Robin Feldman and Charles Tait Graves have highlighted similar tactics in the context of prescription medicines, when "[m]iddle players in the drug distribution chain . . . insist that their pricing arrangements with pharmaceutical manufacturers constitute 'trade secrets'" to avoid scrutiny from state regulators and consumers in the face of rising drug costs.[110]

In many of these examples, firms' invocation of trade secrecy can impede effective government oversight of private activities. These tensions have become more apparent over the past several decades, as the government's regulatory role has increased. During an earlier era of trade secrecy protection, "the government occupied a relatively small presence in the general economy and social policy."[111] But "[o]ver the course of the past century and a half—encompassing the Progressive, New Deal, civil rights, environmental protection, and information eras—the federal and state governments have assumed a much larger" regulatory role.[112]

Not only has the government's regulatory role expanded over time, but so too has the government's delegation of various functions to private entities.[113] In the

109. Mary L. Lyndon, *Trade Secrets and Information Access in Environmental Law*, *in* THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH 442 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011). In one telling example involving a chemical leak in West Virginia's Elk River that left 300,000 residents without usable water, Freedom Industries, the supplier of coal processing compounds that caused the leak, was able to successfully delay disclosing the chemical makeup of these compounds to regulators. *See* Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401, 1442–43 (2014).

110. Feldman & Graves, *supra* note 5, at 64, 66–67 (arguing that this kind of "naked price" information for drugs does not merit trade secret protection); *see also* Bridy, *supra* note 5, at 191 (describing how medical device manufacturers attempt to keep pricing information secret in order to prevent hospitals from shopping around and holding down costs for consumers).

111. Menell, *supra* note 2, at 9.

112. *Id.*; *see also id.* at 62–63 ("[T]he uncritical breadth of trade secret protection . . . has not kept pace with the greater protections for civil rights, workplace safety, public health, and environmental protection, as well as the expanded role of the government in the economy—from military procurement to public infrastructure, health, and safety, and regulation of financial markets.").

113. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (describing the "extent of private involvement in the performance of government activities"); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 383–85 (2006) ("Over the past twenty years, the U.S. government has increasingly contracted with private organizations to perform a variety of functions—from health care, to education, to welfare, to prison management."); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1740 (2002) ("The broad trend to privatize

modern age, government entities rely on the private sector to provide everything from detention facilities to voting machines to breathalyzer tests to decision-making algorithms that assess Medicaid benefits, bail determinations, and public teacher performance.[114] Recent scholarship highlights how, in these contexts, firms' assertions of trade secrecy over information like source code and vendor pricing data can not only impact the government's oversight function but also the public's oversight function[115]—to understand government decision making and "to hold the governors accountable to the governed."[116]

In the next Part, I focus on one area of law where courts have often been called upon to balance firms' legitimate interests in business secrecy against the public's interest in disclosure: FOIA. Interestingly, in this context, courts have historically tried to resist the tide of trade secrecy expansion that Part I has described. Instead, in the FOIA context, courts have long applied stricter definitional constraints on proprietary business secrets that can be shielded from disclosure.[117] This notable difference between FOIA cases and civil trade secrecy litigation has led some critics of trade secrecy's expansion to point approvingly to FOIA's narrower definitions.[118] But as the following Part demonstrates, FOIA's four-decade blockade against trade secrecy expansion is now crumbling.

government programs is already having a substantial impact on programs that serve the poor . . . ."); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230–31 (2003) (defining "privatization" as "the range of efforts by governments to move public functions into private hands and to use market-style competition"); Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1688–93 (2002) (describing "the privatization of prisons and social services for the poor").

114. *See* Bloch-Wehba, *supra* note 11, at 1273 (tracing the "emerging use of, and challenges to, proprietary, automated decision systems in health care, criminal justice, and education"); Levine, *supra* note 1, at 137–39 (describing government reliance on private entities to provide public infrastructure, including voting machines); Citron, *supra* note 9, at 360–61 (describing government reliance on private vendors' electronic voting systems); Katyal, *supra* note 5, at 1185–86 (describing how "algorithms are pervasive throughout public law, employed in predictive policing analysis, family court delinquency proceedings, tax audits, parole decisions, DNA and forensic science techniques, and matters involving Medicaid, other government benefits, and educator evaluations").

115. *See, e.g.*, Bloch-Wehba, *supra* note 11, at 1268–69; Citron, *supra* note 9, at 356–57.

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

117. *See, e.g,* Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

118. *See, e.g.*, Levine, *supra* note 1, 168–69; *id.* at 163 (observing that "FOIA's specifically tailored exemptions from public disclosure—considered in the context of a default position of transparency—are far more suited to private entities engaged in the provision of public infrastructure than the broad doctrine of trade secrecy"); Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1696 (2019) (lauding the "narrow definition" of trade secret for FOIA purposes, as it "supports the argument that workforce diversity data . . . should not be treated as a trade secret and withheld under Exemption 4").

II. FOIA'S EXEMPTION 4 AND *FOOD MARKETING*'S EXPANSION OF BUSINESS SECRECY

The underlying rationales behind trade secret law are to promote commercial morality, innovation, and efficient sharing of information—depending on your point of view.[119] In this sense, protecting secrecy for its own sake is not the end goal of trade secrecy law. But in order to gain the benefits of the law's protections, a firm must zealously guard the secrecy of information. In this way, trade secret law is oriented towards secrecy and opacity.[120] The orientation of FOIA, however, is the opposite: to promote disclosure. As the Supreme Court has often reiterated, "disclosure, not secrecy, is the dominant objective" of FOIA.[121]

As the following Subparts describe, reconciling the two areas of law has not been an easy task for courts. For roughly four decades, courts have interpreted FOIA's exemption for "trade secrets" and "confidential" commercial information in ways that resisted the broader trend of trade secrecy expansion in civil litigation.[122] But with the Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader Media*,[123] that is no longer the case.

A. FOIA and Exemption 4: An Overview

Congress enacted FOIA in 1966 to provide the public with a right of access, enforceable in court, to federal agency records. FOIA is often described "as a means for citizens to know 'what their [g]overnment is up to.'"[124] As the Supreme Court has noted, "[t]his phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy."[125] With the assistance of journalists and watchdog groups, FOIA helps "hold the governors accountable to the governed."[126] In practice, FOIA does not always live

119. *See supra* text accompanying notes 39–42.
120. Katyal, *supra* note 5, at 1188 (observing that while "[c]opyright and patent law are oriented toward a spectrum that values dissemination and the circulation of ideas . . . . trade secrecy is motivated by opacity and seclusion").
121. Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976); John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989).
122. *See infra* Subpart II.B.
123. 139 S. Ct. 2356 (2019).
124. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 171 (2004).
125. *Id.* at 171–72.
126. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). *See also* Kwoka, *supra* note 14, at 1361, 1371 (explaining that FOIA was "designed largely by journalists, for journalists, and with the particular goal in mind that journalists would use access to government information to provide knowledge to the public," but also describing how journalists' efforts have been "crowded out" by profit-seeking FOIA requesters).

up to its loftiest goals.[127] Yet policymakers, journalists, and government watchdog groups nonetheless deem it "an indispensable tool in protecting the people's right to know."[128]

Under FOIA's broad disclosure mandate, a federal agency must disclose requested records unless the information is subject to one of nine enumerated exemptions.[129] Congress created these exemptions because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information . . . ."[130] These exemptions, however, are intended to be read narrowly, in light of the statute's emphasis on disclosure.[131] When requests for information are denied, FOIA not only provides an administrative appeals process, but also affords requesters a remedy in federal courts, where judges review agency withholding decisions de novo, and agencies bear the burden of proof in defending nondisclosure.[132]

127. *See, e.g.*, Kwoka, *supra* note 14; David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1099–1100 (2017) (arguing that FOIA "has proven deficient in significant respects," due in large part to the fact that it extends "access rights to 'any person' . . . mak[ing] it an entitlement program with no eligibility criteria"). Yet even those who highlight FOIA's deficiencies acknowledge that its "strongest arguments . . . center on its ability to assist investigative reporting and, through this reporting, fire alarm oversight by members of Congress." *Id.* at 1138 (noting many examples of journalists relying on FOIA "to clarify, corroborate, and deepen their work on hundreds of significant stories about problematic agency behaviors").

128. *Open Government: Reinvigorating the Freedom of Information Act: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary). President Obama, on his first full day in office, described FOIA as "the most prominent expression of a profound national commitment to ensuring an open Government." Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009).

129. *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).

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

131. *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. HHS, 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).

132. *See* 5 U.S.C. § 552(a)(4)–(a)(6) (2018). Subsequent to FOIA's enactment, "the courts created certain additional procedural devices, such as the requirement that agencies provide FOIA plaintiffs and the court a description of the withheld information—and how it qualifies for protection under one of the FOIA's exemptions . . . ." U.S. DEP'T OF JUST.,

The focus of this analysis is Exemption 4, which authorizes agencies to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential . . . ."[133] Thus, it covers "two distinct categories" of private sector information in federal agency records: (1) "trade secrets"; and (2) information that is (a) "commercial or financial," (b) "obtained from a person," and (c) "privileged or confidential."[134] The statute, however, does not define many of these terms. Information that is publicly available is not protected by Exemption 4.[135]

Exemption 4 was enacted to recognize the interests of both the government and information submitters.[136] While journalists were the intended beneficiaries of FOIA, many businesses use it "to seek out agency records that may shed light on the activities of regulators, competitors, customers, or markets—especially when those records, once obtained, need not be shared with others."[137] In recognizing submitters' confidentiality interests, however, Exemption 4 was "intended to stimulate information sharing with the government, not to shield government decision-making from public scrutiny."[138]

In general, FOIA's exemptions are permissive rather than mandatory; that is, agencies may, but do not have to, withhold information that falls within an exemption.[139] But, several courts have held that the Trade Secrets Act,[140] a criminal

GUIDE TO THE FREEDOM OF INFORMATION ACT, INTRODUCTION 7 (2020), https://www.justice.gov/oip/page/file/1248371/download [https://perma.cc/HL6M-SPF8]. *See also* Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973) (determining that an agency's burden "could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the [agency's] refusal justification with the actual portions of the document").

133. 5 U.S.C. § 552(b)(4) (2018).

134. U.S. DEP'T OF JUST., GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 4, at 1 (2019), https://www.justice.gov/oip/page/file/1207891/download [https://perma.cc/EB8Z-JZT9] [hereinafter DOJ FOIA GUIDE: EXEMPTION 4].

135. *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a *sine qua non* of Exemption 4.").

136. *See* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) ("[W]hen Congress enacted FOIA it sought a 'workable balance' between disclosure and other governmental interests—interests that may include providing private parties with sufficient assurances about the treatment of their proprietary information so they will cooperate in federal programs and supply the government with information vital to its work."); DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 1.

137. Pozen, *supra* note 127, at 1113. *See also* Kwoka, *supra* note 14 at 1364–65.

138. Bloch-Wehba, *supra* note 11, at 1300.

139. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 293–94 (1979) (explaining that FOIA's "exemptions were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure").

140. 18 U.S.C. § 1905 (2006) ("Whoever, being an officer or employee of the United States or of any department or agency thereof . . . publishes, divulges, discloses, or makes known in

statute, prohibits agencies from releasing information covered by Exemption 4.[141] Thus, a "finding that requested material falls within [Exemption 4] will be tantamount to a determination that the[] agenc[y] cannot reveal it."[142] Before releasing information that may be covered by Exemption 4, agencies typically notify submitters and provide them an opportunity to object.[143] When an agency disagrees with a submitter's objection and plans to release the information, the

any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information 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 . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.").

141. DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 18 ("[N]early every court that has considered the issue has found the Trade Secrets Act and Exemption 4 to be 'coextensive.'"); *see also id.* at 18 n.92. *See*, *e.g.*, McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1164 (D.C. Cir. 1995) (stating that "the scope of the Trade Secrets Act 'is at least co-extensive with that of Exemption 4 of FOIA'" and "[c]onsequently, 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."). Though, at least a few courts and commentators have questioned this interpretation of the Trade Secrets Act as being coextensive with Exemption 4. *See*, *e.g.*, Gen. Elec. Co. v. U.S. Nuclear Regul. 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 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."); 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/Y9P2-5BP2] (arguing that while "[c]ourts have generally considered the scope of section 1905 and Exemption 4 coterminous[,]. . . . [t]here is little indication that the enacting Congresses actually considered the scope of the Trade Secrets Act and FOIA Exemption 4 coterminous . . . . [and] [t]he cases that find the statutes coterminous offer little supporting analysis"). Even though "the Trade Secrets Act does limit *ad hoc* agency decisions to release information covered by the Act, it does *not* prohibit an agency from adopting a legislative rule authorizing disclosure of information covered by the Act." *Id.* (citing Chrysler Corp. v. Brown, 441 U.S. 281, 312–16 (1979)).

142. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144 (D.C. Cir. 1987); *see also* Canadian Com. Corp. v. Dep't of the Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (explaining that "unless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4"); McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1185–86 (D.C. Cir. 2004) (finding that the Trade Secrets Act "effectively prohibits an agency from releasing information subject to [Exemption 4]").

143. *See* Predisclosure Notification Procedures for Confidential Commercial Information, 52 Fed. Reg. 23781, 23782 (June 23, 1987). *See also* Bloch-Wehba, *supra* note 11, at 1301 ("Agencies normally notify government contractors when information that may be confidential is sought under FOIA.").

submitter can seek to enjoin the agency from releasing that information by filing a "reverse FOIA" suit.[144]

B. Circuit Court Caselaw Prior to *Food Marketing*: Resisting the Tide of Trade Secrecy Expansion

The Subparts below examine circuit courts' pre-*Food Marketing* interpretation of Exemption 4's two categories: (1) "trade secrets" and (2) "confidential" commercial information. Circuit courts interpreted these categories in distinct and narrow ways. That is, courts imposed definitional constraints on both categories, following FOIA's broad disclosure mandate and resisting the trajectory of trade secrecy expansion in common law and state statutory law.

1. Defining "Trade Secrets" Under Exemption 4

The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has long played a significant role in interpreting FOIA's terms. In 1983, the D.C. Circuit purposely adopted a "narrower" definition of trade secrets.[145] In *Public Citizen Health Research Group v. FDA*, a nonprofit consumer advocacy group requested certain safety data submitted by manufacturers of intraocular lenses to the FDA.[146] The agency withheld the requested documents on the ground that they constituted trade secrets under FOIA's Exemption 4.[147] The district court agreed, applying the Restatement First's definition of trade secrets.[148] On appeal, the D.C. Circuit reversed and remanded, concluding that this definition was "overly broad" for FOIA purposes.[149]

In reaching this conclusion, the D.C. Circuit noted that at various points in time "trade secrets" have been "defined both broadly and narrowly at common law."[150] The court observed that under common law's "more

144. *See* Canadian Com. Corp., 514 F.3d at 39; Frazee v. U.S. Forest Serv., 97 F.3d 367, 373 (9th Cir. 1996).
145. Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).
146. *Id.* at 1282. Specifically, the advocacy group filed FOIA requests covering "clinical test information submitted by the manufacturers to the FDA," including "reports of complications and adverse reactions" in studies of intraocular lenses (IOLs). *Id.* at 1283. These FOIA requests were made in order to assist the group in "monitoring the FDA's regulation of IOLs and promoting public understanding of the advantages and risks of IOLs . . . ." *Id.*
147. *Id.*
148. *Id.* The Uniform Trade Secrets Act was issued only a few years before this decision. *See supra* note 37 and accompanying text.
149. *Pub. Citizen v. FDA*, 704 F.2d at 1282.
150. *Id.* at 1286.

restrictive definition," trade secret status is reserved for "information involving 'the productive process itself, as opposed to collateral matters of business confidentiality such as pricing and sales volume data, sources of supply and customer lists.'"[151] While acknowledging that the Restatement First's broader definition was "widely relied-upon" in civil trade secret litigation, the court nonetheless declined to apply it in the FOIA context.[152] Notably, the court "repudiate[d] the broad *Restatement* approach . . . as inconsistent with the language of the FOIA and its underlying policies."[153] Instead, the court defined trade secrets for Exemption 4 purposes in its "narrower common law sense, which incorporates a direct relationship between the information at issue and the productive process."[154] Accordingly, a trade secret for FOIA purposes is 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."[155]

Among the reasons that the court opted for a narrower definition was a recognition that:

> [T]he *Restatement* definition, tailored as it is to protecting businesses from breaches of contract and confidence by departing employees and others under fiduciary obligations is ill-suited for the public law context in which FOIA determinations must be made.[156]

The court also noted that a broad definition of trade secrets would "render[] meaningless" the "confidential" commercial information prong of Exemption 4.[157]

Most courts have followed *Public Citizen*'s definition of trade secrets for FOIA purposes[158]—one that is far narrower than the Restatement First's definition and that of subsequent federal and state trade secrecy statutes.[159] FOIA's narrower

151. *Id.* at 1286–87 (citing Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WIS. L. REV. 207, 230 (1981)).
152. *Id.* at 1286.
153. *Id.* at 1288.
154. *Id.*
155. *Id.* While this definition from *Public Citizen* has existed for decades, "[v]ery little case law exists which interprets and applies" it. Taylor v. Babbitt, 760 F. Supp. 2d 80, 88 (D.D.C. 2011) (quoting Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 14 n.5 (D.D.C. 2000)). The meaning of the terms "secret" and "commercially valuable" have never been "precise[ly] defin[ed]" in subsequent circuit caselaw. *Id. See infra* text accompanying notes 265–69.
156. *Pub. Citizen v. FDA*, 704 F.2d at 1289.
157. *Id.*
158. *See* DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 2 n.5 (listing cases). *See also* Anderson v. HHS, 907 F.2d 936, 944 (10th Cir. 1990) (agreeing with the "D.C. Circuit's narrow definition [of trade secret] because . . . it is more consistent with the policies behind the FOIA").
159. *See supra* Subpart I.B.

definition harkens back to the early era of trade secrecy litigation, with its focus on more limited, technical subject matter related to the manufacturing process.[160] In this vein, the "trade secret" prong of Exemption 4 has exempted a variety of "product manufacturing and design information" from disclosure.[161] But information that is not "directly related to the production process"—for instance, "collateral business matters,"[162] such as customer lists, pricing information, and safety data—is not a "trade secret" for Exemption 4 purposes (even though it would arguably fall under civil trade secrecy's broader definition).[163]

When requested documents fall within this narrower definition of trade secrets, "they are exempt from disclosure, and no further inquiry is necessary."[164] If not, the information may nonetheless qualify as "confidential" commercial information under the second Exemption 4 category discussed below.[165] Because trade secrets are defined narrowly for FOIA purposes, most of the litigation surrounding Exemption 4 concerns this "second, much larger category."[166]

2. Defining "Confidential" Commercial Information Under Exemption 4

The second category of Exemption 4 is limited to "commercial or financial" information, "obtained from a person," which is "privileged or confidential."[167] The phase "commercial or financial" does not present much of a hurdle, as courts

160. *See supra* text accompanying notes 49–52.

161. DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 3 & n.11 (listing cases). *See, e.g.*, Appleton v. FDA, 451 F. Supp. 2d 129, 141 (D.D.C. 2006) (applying Exemption 4's "trade secret" definition to "drug product manufacturing information [and] . . . drug chemical composition"); Pac. Sky Supply, Inc. v. Dep't of the Air Force, No. 86-2044, 1987 WL 25456, at *1 (D.D.C. Nov. 20, 1987) (applying Exemption 4's "trade secret" definition to design "drawings of airplane fuel pumps").

162. Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 13–14 (D.D.C. 2000).

163. *See* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 151 (D.C. Cir. 2001) (finding that information addressing "the physical and performance characteristics of airbags, [and] not how airbags are manufactured . . . cannot qualify as trade secrets"); Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (explaining that the "reports, letters, and memorandums" regarding clinical trial data and the health and safety of the IOLs contained information whose "relationship . . . to the productive process is tangential at best," and thus did not fall under the definition of "trade secrets" for Exemption 4 purposes).

164. *Pub. Citizen v. FDA*, 704 F.2d at 1286.

165. *Id.* at 1290 (explaining that the requested safety information could potentially fall under the second prong of Exemption 4: "confidential" commercial information).

166. DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 4 (explaining that "[t]he overwhelming majority of Exemption 4 cases focus" on this second category).

167. 5 U.S.C. § 552(b)(4).

have held that a wide variety of information related to business or trade qualifies.[168] As for the phrase "obtained from a person," essentially any entity other than the federal government qualifies as a "person" under Exemption 4.[169] Information that the federal government has itself generated does not fall within Exemption 4.[170]

Thus, for this second category of Exemption 4 information, the difficult question has tended to be: when is information "confidential"?[171] In 1974, the D.C. Circuit adopted a highly influential definition of "confidential" information in *National Parks & Conservation Association v. Morton*.[172] In *National Parks*, an environmental advocacy group sought certain financial information that companies operating concessions in national parks had submitted to the National Parks Service.[173] The issue was whether the financial information was exempt from disclosure under Exemption 4.[174] In interpreting the term "confidential," the court considered the legislative history of Exemption 4, which reflected a concern both for the government's interest in encouraging the cooperation of private parties, as well as the interests of the private parties that submit information.[175]

168. DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 4 & n.15 (explaining that "[c]ourts have little difficulty in regarding information as 'commercial or financial' if it relates to business or trade," and listing cases). The scope of "commercial" information has been broadly applied to records containing information in which the submitter has "a commercial interest." Baker & Hostetler LLP v. U.S. Dep't of Com., 473 F.3d 312, 319 (D.C. Cir. 2006)). *Cf.* Pub. Citizen v. HHS, 975 F. Supp. 2d 81, 100, 106–07 (D.D.C. 2013) (rejecting a submitter's argument that it had a commercial interest in "all records that relate to every aspect of the company's trade or business," and explaining that the information's potential to harm a submitter's reputation does not "convert the information into 'commercial' under Exemption 4").

169. DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 10–11.

170. *Id. See also* Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 404 (D.C. Cir. 1980) (concluding that the scope of Exemption 4 is "restrict[ed]" to information that has "not been generated within the Government").

171. The term "privileged" information is not meant to be synonymous with "confidential" information. *See* Wash. Post Co. v. HHS, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982). Although very few cases have explored the meaning of "privileged" information under Exemption 4, it has been interpreted to refer to specific privileges like "attorney-client and doctor-patient privileges." DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 15.

172. 498 F.2d 765 (D.C. Cir. 1974).

173. *Id.* at 770 ("The financial information sought by appellant consists of audits conducted upon the books of companies operating concessions in national parks, annual financial statements filed by the concessioners with the National Park Service and other financial information.").

174. *Id.* at 766.

175. *Id.* at 767–70 (concluding that the legislative history "firmly supports the inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which gather it"). "Apart from encouraging cooperation with the Government by persons having information useful to officials, [Exemption 4] serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Id.* at 768.

In light of these dual interests, the D.C. Circuit held that information is "confidential" for Exemption 4 purposes in two specific situations: when the disclosure 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."[176] In adopting this "substantial competitive harm" standard, the D.C. Circuit opted for an "objective standard" that would help further the legislative purpose of the exemption.[177] An objective standard would require courts to press beyond an inquiry into the submitter's own customs and secrecy practices.[178] This test was widely adopted by other courts.[179]

Under this standard, "[c]onclusory and generalized allegations of substantial competitive harm" would not be sufficient to prevent the information's release.[180] While parties opposing disclosure would not have to show "actual competitive harm," they would typically have to show "actual competition" and a "likelihood of substantial competitive injury" if the information were released.[181] Moreover, under the *National Parks* standard, courts limited the competitive harm analysis "to harm flowing from the affirmative use of proprietary information by competitors . . . . [and not] simply *any* injury to competitive position."[182]

176. *Id.* at 770. In *National Parks*, the D.C. Circuit "remanded to the district court for the purpose of determining whether public disclosure of the information in question poses the likelihood of substantial harm to the competitive positions of the parties from whom it has been obtained." *Id.* at 771.

177. *See* OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., OIP GUIDANCE: EXEMPTION 4 AFTER THE SUPREME COURT'S RULING IN FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA (Oct. 4, 2019) [hereinafter OIP GUIDANCE: EXEMPTION 4], https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media [https://perma.cc/S7X6-BLS7].

178. *See Nat'l Parks*, 498 F.2d at 766–67. *See also* Critical Mass Energy Project v. Nuclear Regul. Comm'n, 975 F.2d 871, 882 (D.C. Cir. 1992) (en banc) (Ginsburg, J., dissenting) (explaining that the *National Parks* test for confidentiality is an "objective one" because it "requires the court to press beyond the inquiry '[w]hether particular information would customarily be disclosed to the public by the person from whom it was obtained.'").

179. *See Critical Mass*, 975 F.2d at 876 (noting the "widespread acceptance of *National Parks* by other circuits").

180. Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

181. *Id. See also* Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1196 (9th Cir. 2011); Inner City Press v. Bd. of Governors, 380 F. Supp. 2d 211, 219 (S.D.N.Y. 2005), *aff'd*, 463 F.3d 239 (2d Cir. 2006).

182. *Pub. Citizen v. FDA*, 704 F.2d at 1291–92, 1291 n.30 (emphasis added). *See also Watkins*, 643 F.3d at 1195 ("Competitive harm analysis is . . . limited to harm flowing from the affirmative use of proprietary information by *competitors*. Competitive harm should not be taken to mean simply any injury to competitive position . . . ." (emphasis in original) (internal citation omitted)); Physicians Comm. for Responsible Med. v. Nat'l Insts. of Health, 326 F. Supp. 2d. 19, 26 (D.D.C. 2004) (finding that defendants did not demonstrate "substantial harm . . . . flowing from the affirmative use of proprietary information by competitors");

Thus, to the extent that a submitter's claim of alleged harm from the information's disclosure related to "unfavorable publicity" or the "anticipated displeasure of its employees," courts made clear that these were not the kind of "competitive" harms that Exemption 4 was meant to address.[183] Such was the case in *CNA Financial Corp. v. Donovan* when an insurance company doing business with the federal government objected to the disclosure of information "demonstrating its performance in hiring, promoting, and otherwise utilizing women and minorities, as well as its affirmative action goals for the future."[184]

Despite widespread adoption of the "substantial competitive injury" test, it nonetheless generated criticism over the years. Critics of the test emphasized its deviation from the ordinary textual meaning of the word "confidential"—that is, without reference to FOIA's underlying policy goals and legislative history—as well as courts' sometimes inconsistent requirements for demonstrating substantial competitive harm.[185] In fact, two decades after *National Parks*, the D.C. Circuit qualified its own holding in a divided en banc decision, *Critical Mass Energy Project v. Nuclear Regulatory Commission*.[186] Citing concern over the "[g]overnment's interest . . . in ensuring [the] continued availability" of information that "is volunteered,"[187] the D.C. Circuit confined its substantial competitive harm inquiry to situations in which private entities were obligated to provide the information to the agency.[188] For voluntary submissions, information would be deemed "confidential" if it "would customarily not be released to the

United Techs. Corp. v. U.S. Dep't of Def., 601 F.3d 557, 564 (D.C. Cir. 2010) ("Exemption 4 does not guard against mere embarrassment in the marketplace or reputational injury . . . .").

183. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154–55 (D.C. Cir. 1987).

184. *Id.* at 1134. In response to a FOIA request for these documents by a nonprofit advocacy organization called Women Employed, CNA initiated a reverse FOIA action, citing Exemption 4. *Id.* at 1134–35. In assessing whether the disclosure of the materials would cause "substantial competitive harm," the court rejected CNA arguments that disclosure would create competitive harm through adverse publicity and decreased employee morale—and deemed other arguments too speculative. *Id.* at 1136, 1154.

185. *See* SHEFFNER, *supra* note 28, at 3 (describing these critiques).

186. 975 F.2d 871 (D.C. Cir. 1992) (en banc).

187. *Id.* at 878 ("A distinction between voluntary and compelled information must also be made when applying the 'competitive injury' prong. In the latter case, there is a presumption that the Government's interest is not threatened by disclosure because it secures the information by mandate; and as the harm to the private interest (commercial disadvantage) is the only factor weighing against FOIA's presumption of disclosure, that interest must be significant.").

188. *Id.* at 879 ("[W]hile we reaffirm the *National Parks* test for determining the confidentiality of information submitted under compulsion, we conclude that financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.").

public by the person from whom it was obtained."[189] This modification came over a strongly-worded dissent, authored by Justice Ginsburg (at that time, Judge Ginsburg), criticizing the majority for replacing an "objective" test with a "subjective" one, based on the submitter's "confidentiality custom."[190] Yet even after *Critical Mass*, the D.C. Circuit applied the "substantial competitive harm" test to the large volume of involuntary submissions made by private parties to government agencies. And most appellate courts "continued to apply [the] *National Parks* [standard] to both voluntary and involuntary submissions of information."[191]

Though, this is not to say that the "substantial competitive harm" standard has always pushed toward disclosure. In the context of contractor pricing information, for example, the results have been mixed.[192] In the initial decades after *National Parks*, "contract price and other unit prices that the [g]overnment paid for products and services" were "generally disclosed to the requester" for failure to meet the "substantial competitive harm" standard.[193] Subsequent D.C. Circuit decisions, however, have held that certain kinds of line-item pricing information in vendor contracts meet the substantial competitive harm standard

189. *Id.*

190. *Id.* at 883 (Ginsburg, J., dissenting) ("The court today asserts that its revision of the *National Parks* test 'is objective.' (citation omitted) That is true to the extent that my colleagues demand more than the stampmark 'Confidential' to shield a document: the provider must have a confidentiality custom and the agency must prove that custom. But the court's slackened test is not 'objective' in the sense vital . . . . No longer is there to be an independent judicial check on the reasonableness of the provider's custom and the consonance of that custom with the purposes of exemption 4 and of the Act of which the exemption is part. To the extent that the court allows providers to render categories of information confidential merely by withholding them from the public long enough to show a custom, the revised test is fairly typed 'subjective' and substantially departs from *National Parks*.").

191. SHEFFNER, *supra* note 28, at 3 (observing that "[m]ost federal courts of appeals [did] not . . . embrace[] *Critical Mass*' modification of *National Parks*"). *See also* John C. Brinkerhoff Jr., *FOIA's Common Law*, 36 YALE J. ON REGUL. 575, 585 (2019) ("[E]very circuit to consider the issue has followed the *National Parks* framework."); Pac. Architects & Eng'rs Inc. v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990); Acumenics Rsch. & Tech. v. U.S. Dep't of Just., 843 F.2d 800, 807 (4th Cir. 1988); Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (observing that "a number of courts of appeals . . . adopted variants of the *National Parks* test").

192. *Cf.* Feldman & Graves, *supra* note 5, at 93–94 (critiquing, in particular, courts' application of the "substantial competitive harm" standard in the contractor pricing context).

193. Gregory H. McClure, *The Treatment of Contract Prices Under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 PUB. CONT. L.J. 185, 186, 199 (2002). "[T]he vast majority of case law demonstrates that contract prices that submitters seek to protect do not meet the criteria of FOIA Exemption 4 because (1) the prices do not fit within the FOIA definition of trade secrets, and (2) submitters are generally unable to show that substantial competitive injury is likely to result from disclosure." *Id.* at 194–95.

because they could "inform[] the bids of [a firm's] rivals in the event that the contract is rebid."[194]

Nonetheless, other circuits have continued to view such arguments regarding contractor pricing critically under the "substantial competitive harm" standard. In one notable example, a New York district court rejected a similar argument in a case where a nonprofit public interest organization was denied information by the Department of Homeland Security and Immigration and Customs Enforcement regarding "unit prices, bed-day rates and staffing plans in government contracts with private detention facility contractors."[195] The court observed: "At issue in this case is the disclosure of financial information underlying government policy regarding immigration detention and incarceration, a controversial area of public debate where the public has the right to be informed."[196] The court determined that there was an insufficient showing of competitive harm—only "speculative explanations and conclusory statements about the competitive nature of the industry and the ease with which competitors could reverse-engineer pricing information . . . [and] underbid them on future bids."[197] In this and many other cases, the substantial competitive harm test has imposed a meaningful, objective constraint on broad assertions of business secrecy—one that looks well beyond a firm's own privacy customs and preferences.

194. McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1190 (D.C. Cir. 2004) (denying the Air Force the authority to disclose prices for certain line items in its contract with McDonnell Douglas for aircraft maintenance and repair). *See also* Canadian Com. Corp. v. Dep't. of the Air Force, 514 F.3d 37, 38 (D.C. Cir. 2008) (preventing the Air Force from releasing line item pricing information in Canadian Commercial Corp.'s contract to provide services to the Air Force); David Allen Dulaney, *Where's the Harm? Release Unit Prices in Awarded Contracts Under the Freedom of Information Act*, ARMY LAW., Nov. 2010, at 37.

195. Det. Watch Network v. U.S. Immigr. & Customs Enf't, 215 F. Supp. 3d 256, 259 (S.D.N.Y. 2016).

196. *Id.* at 266.

197. *Id.* at 264. Citing Judge Garland's dissent in *McDonnell Douglas*, the court noted:

> Disclosure of pricing information, in particular, is consistent with the purposes of FOIA. The contract prices at issue "[a]re not mere offer or bid prices; they are prices that the government agreed to pay, and that it did pay, for specified services that it purchased from the company. Disclosure of such information permits the public to evaluate whether the government is receiving value for taxpayer funds, or whether the contract is instead an instance of waste, fraud, or abuse of the public trust . . . . Such disclosure thus comes within the core purpose of FOIA: to inform citizens about 'what their government is up to.'"

Id. at 266 (quoting *McDonnell Douglas*, 375 F.3d at 1195 (Garland, J., dissenting)).

C. The Supreme Court's *Food Marketing* Decision and its Aftermath

In June 2019, the Supreme Court shifted the longstanding definitional terrain of Exemption 4 in *Food Marketing Institute v. Argus Leader Media*.[198] In *Food Marketing*, a reporter with a South Dakota newspaper, *Argus Leader*, made a FOIA request with the Department of Agriculture (USDA) seeking information pertaining to the national food stamp program, known as the Supplemental Nutrition Assistance Program (SNAP).[199] The newspaper was investigating SNAP-related fraud.[200] The 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.[201] The USDA withheld the information under Exemption 4.[202] The newspaper sued the USDA in federal court to compel release of the data.[203]

Because this data would not satisfy the productive process-oriented definition of trade secrets, the issue was whether it fell within the confidential commercial information prong of Exemption 4.[204] The district court held it did not, and therefore had to be disclosed.[205] Applying the "substantial competitive harm" test from *National Parks*, the district court concluded that any competitive harm from the release of the requested SNAP data would not be substantial.[206] Food Marketing Institute, a food retail group representing the retailers that participate in SNAP, intervened and appealed to the Eight Circuit.[207] The appellate court affirmed, once again relying on the *National Parks* "substantial competitive harm" test.[208]

The Supreme Court reversed, abrogating and replacing the "substantial competitive harm" test.[209] In rejecting this longstanding test, the Court focused

198. 139 S. Ct. 2356 (2019).
199. *Id.* at 2361.
200. *See* Fenster, *supra* note 29.
201. *Food Mktg. Inst.*, 139 S. Ct. at 2361.
202. *Id.* The USDA also initially invoked Exemption 3 (exemption from disclosure by another statute), in conjunction with 7 U.S.C. § 2018(c), a statute that protects some SNAP-related data. However, "the Eight Circuit reversed and remanded, finding that the withheld . . . data did not fall within [the] withholding provision of Section 2018(c)." OIP GUIDANCE: EXEMPTION 4, *supra* note 177 (citing Argus Leader Media v. U.S. Dep't of Agric., 740 F.3d 1172, 1173 (8th Cir. 2014)).
203. *Food Mktg. Inst.*, 139 S. Ct. at 2361.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 2362.
208. *Id.*
209. *Id.* at 2361.

exclusively on the "ordinary, contemporary, common meaning" of the term "confidential" at the time FOIA was enacted.[210] Invoking contemporary dictionaries and rejecting the D.C. Circuit's reliance in *National Parks* on legislative history that "mudd[ied]" the meaning of "clear statutory language,"[211] the Court concluded that information is "confidential" for Exemption 4 purposes "at least" when two conditions are present. These conditions are that the information is: (1) "customarily and actually treated as private by its owner" and (2) "provided to the government under an assurance of privacy."[212]

The Court determined that satisfaction of the first condition must always be met for information to be confidential, for "it is hard to see how information could be deemed confidential if its owner shares it freely."[213] The Court also found that this condition was met in *Food Marketing* because retailers customarily did not disclose store level SNAP data or make it publicly available in any way.[214] The Court pointed to evidence introduced at trial that "retailers closely guard store-level SNAP data"[215] and "only small groups of employees usually have access to it."[216] Unresolved and left for another day was the question of whether satisfying the first condition alone could, in and of itself, render information "confidential" for Exemption 4 purposes.[217] Because both conditions were satisfied in this case, the Court did not resolve the issue.[218] Apparently, the USDA had "a long history, through its promulgation of regulations, of promising retailers that it would keep the store-level SNAP data confidential."[219] The court also did not address whether the government's assurance of privacy need be explicit.[220] Thus, at the end of the day, the Supreme Court adopted a test for "confidential"

210. *Id.* at 2362.
211. *Id.* at 2364–65 (concluding that *National Parks*'s "approach is a relic from a 'bygone era of statutory construction.'").
212. *Id.* at 2366.
213. *Id.* at 2363 ("Must both of these conditions be met for information to be considered confidential under Exemption 4? At least the first condition has to be; it is hard to see how information could be deemed confidential if its owner shares it freely.").
214. *Id.* at 2363.
215. *Id.* at 2361.
216. *Id.* at 2363.
217. *Id.* (explaining that "there's no need to resolve that question in this case," because the retailers' data satisfied both conditions).
218. *Id.*
219. OIP GUIDANCE: EXEMPTION 4, *supra* note 177. *See Food Mktg. Inst.*, 139 S. Ct. at 2363 (citing 43 Fed. Reg. 43275 (1978)) ("Presumably to induce retailers to participate in SNAP and provide store-level information it finds useful to its admin[i]stration of the program, the government has long promised them that it will keep their information private.").
220. *See infra* Subpart III.C.2.

information that looks primarily at whether the information is public and if the submitter has engaged in efforts to keep it secret.

While the dissenting justices in *Food Marketing* had some reservations about the "stringent" burden that the "substantial competitive harm" test placed on submitters, they expressed strong concern about the majority's test that overlooked the question of economic harm altogether.[221] Emphasizing the "broad disclosure" mandate of FOIA and the oft-repeated holding that exemptions must be "narrowly construed," the dissent questioned the majority's reliance on a firm's own secrecy practices, observing:

> The whole point of FOIA is to give the public access to information it cannot otherwise obtain. So the fact that private actors have "customarily and actually treated" commercial information as secret cannot be enough to justify nondisclosure. After all, where information is already publicly available, people do not submit FOIA requests—they use Google.[222]

Nor did the dissent find much comfort in the (unresolved) second condition of a "government's assurance of privacy." Here, too, the dissent was skeptical, observing:

> Nor would a statute designed to take from the government the power to unilaterally decide what information the public can view put such determinative weight on the government's preference for secrecy . . . . [*A*] *tool used to probe the relationship between government and business should not be unavailable whenever government and business wish it so*.[223]

By and large, commentators have expressed a near uniform belief that the result of *Food Marketing* will be to expand the scope of plausible Exemption 4 claims.[224] Because this case was recently decided, the extent of its impact is still

221. *Food Mktg. Inst.*, 139 S. Ct. at 2367–68 (Breyer, J., concurring in part and dissenting in part). *Food Marketing*'s dissenting justices would have added a third condition to the majority's definition of confidentiality: the "[r]elease of such information must also cause genuine harm to the owner's economic or business interests." *Id.* at 2367. As the dissent explained: "The Exemption's focus on 'commercial' or 'financial' information, for instance, implies that the harm caused by disclosure must do more than, say, simply embarrass the information's owner. It must cause some genuine harm to an owner's economic or business interests." *Id.* at 2368.

222. *Id.* at 2368.

223. *Id.* (emphasis added) (citations omitted).

224. *See id.* ("[G]iven the temptation, common across the private and public sectors, 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."); *see also* Bloch-Wehba, *supra* note 11, at 1301 (observing that the result of *Food Marketing* "is to expand the scope of plausible Exemption 4 claims"); SHEFFNER, *supra* note 28,

coming into view. Nor is it clear how stringently *Food Marketing*'s conditions will be applied by lower courts—particularly, the second-and-unresolved "government assurance of privacy" condition.[225] Yet recent applications of the *Food Marketing* test by district courts suggest that concerns over the expanded reach of Exemption 4 are justified.

In *American Small Business League v. U.S. Department of Defense*, a nonprofit organization sought the release of various documents relating to the subcontracting goals, policies, and amounts awarded to small businesses by prime contractors on Department of Defense (DOD) contracts.[226] A California district court found the information to be "confidential" under Exemption 4 because "the companies customarily and actually treated" such information as confidential and they shared it with the DOD "under the implied assurance of privacy."[227] The court was nonetheless "sympathetic to plaintiff's steep uphill battle under the new Exemption 4 standard."[228] To this end, the court mused: "unless plaintiff can show that the information is in fact publicly available or

at 4 (explaining that abrogation of the *National Parks* test "would allow agencies to withhold a larger swath of information from disclosure under FOIA"); 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 [https://perma.cc/E334-PZL7] ("*Food Marketing* supports the conclusion that . . . virtually any commercial or financial information provided to the government [is] subject to withholding . . . .").

225. The Department of Justice recently issued guidance on this subject, explaining that such an assurance from the government can be "explicit" or "implicit." OIP GUIDANCE: EXEMPTION 4, *supra* note 177; *see also* OFF. OF INFO. POL'Y, U.S. DEP'T OF JUST., OIP GUIDANCE: STEP-BY-STEP GUIDE FOR DETERMINING IF COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM A PERSON IS CONFIDENTIAL UNDER EXEMPTION 4 OF THE FOIA (Oct. 7, 2019), https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential [https://perma.cc/N6VC-SVSF] [hereinafter OIP GUIDANCE: STEP-BY-STEP GUIDE]. When the government's assurance of privacy is explicit—for example, memorialized in a statute—subsequent disclosure by an agency may also give rise to a Fifth Amendment takings claim. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (explaining that because a statute "explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use[,] [t]his explicit governmental guarantee formed the basis of a reasonable investment-backed expectation"). For a discussion of how the Takings Clause might apply in the context of regulatory disclosure, 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 CALIF. L. REV. 493, 552–55 (2021).

226. Am. Small Bus. League v. U.S. Dep't of Def., 411 F. Supp. 3d 824, 827–28 (N.D. Cal. 2019).

227. *Id.* at 830.

228. *Id.* at 832.

possibly point to other competitors who release the information, defendants can readily ward off disclosure."[229]

In another set of recent cases involving employee injury information provided by Amazon and other firms to the Occupational Safety and Health Administration (OSHA), district courts observed changes in agency withholding behavior after *Food Marketing*.[230] While before *Food Marketing*, OSHA "routinely released" certain standardized forms reporting workplace injuries and illnesses, "after *Food Marketing* . . . OSHA reevaluated its policy and . . . now contends that [these] forms contain confidential commercial data which should be withheld under FOIA Exemption 4."[231] Thus, the available data points so far suggest that *Food Marketing* will expand the private sector's ability to shield information provided to the government from disclosure, frustrating the ability of journalists and government watchdog groups to exercise their crucial oversight function.

III. THE PERILS OF CONSISTENCY (AND INCONSISTENCY) BETWEEN FOIA EXEMPTION 4 AND CIVIL TRADE SECRECY—AND PATHWAYS FOR REFORM

What has thus far gone unnoticed—and what this Article seeks to emphasize—is that the *Food Marketing* decision is largely in keeping with the modern evolution and expansion of trade secrecy protections. That is, in both the FOIA and civil trade secrecy law contexts, strict definitional constraints on proprietary business secrets have been replaced by an analysis focusing on the nonpublic nature of information and a firm's secrecy customs. Perhaps the greatest irony is that after decades of FOIA courts resisting the tide of trade secrecy expansion, the newly defined Exemption 4 may cast an even broader net than its civil trade secrecy counterpart. For the civil trade secret litigation context—with

229. *Id.* The judge went on to note: "[T]he undersigned judge has learned in twenty-five years of practice and twenty years as a judge how prolifically companies claim confidentiality, including over documents that, once scrutinized, contain standard fare blather and even publicly available information. Nevertheless, we are not writing on a clean slate. *Food Marketing* mandates this result." *Id.* at 832–33. *See also* N.Y. Times Co. v. U.S. FDA, No. 19-cv-4740, 2021 WL 1178126, at *12 (S.D.N.Y. Mar. 29, 2021) (observing that "[w]hile there has been little time in which to interpret the Supreme Court's new standard for confidentiality under Exemption 4, it appears most courts have found it to be significantly less demanding than the prior 'substantial competitive harm' test.").

230. *See* Ctr. for Investigative Reporting v. U.S. Dep't of Lab., No. 19-cv-05603, 2020 WL 3639646, at *6 (N.D. Cal. July 6, 2020); Ctr. for Investigative Reporting v. U.S. Dep't of Lab., 424 F. Supp. 3d 771, 775 (N.D. Cal. 2019).

231. *Ctr. for Investigative Reporting*, 2020 WL 3639646, at *6.

its focus on departing employees—carries certain inherent limits on the scope of trade secrecy protections that the FOIA context lacks.

The Subparts below consider both of these dynamics—how *Food Marketing*'s expanded definition of "confidential" commercial information will render Exemption 4's narrower "trade secrecy" definition irrelevant, and how FOIA's recognition of business secrecy may sweep even more broadly than its civil trade secret law counterpart. These dynamics underscore the need for additional checks on submitters' assertions of confidentiality and agency deference to those assertions under FOIA. Ultimately, *Food Marketing* and its aftermath illustrate why we should care about the loss of clear definitional constraints on proprietary secrets—especially within the FOIA context, but even outside of it.[232] In both contexts, FOIA and civil trade secrecy litigation, expansive secrecy claims can conflict with government transparency and accountability. To that end, this Part concludes by considering possible reforms to address this tension, both within the FOIA context (where it is most pressing) and in trade secret law more generally.

A. How *Food Marketing*'s Broadened "Confidential" Information Category Will Render Exemption 4's "Trade Secret" Category Irrelevant

For several decades, there has been little definitional consistency between the scope of FOIA's Exemption 4 and trade secrecy law. In fact, as the D.C. Circuit made clear in *Public Citizen*,[233] this definitional disparity was a carefully calibrated choice. Namely, a definition that was "tailored . . . to protecting businesses from breaches of contract and confidence by departing employees and others under fiduciary obligations [was] ill-suited for the public law context in which FOIA determinations must be made."[234] *Food Marketing* has, however, brought the two areas closer than ever before.

To be clear, the *Food Marketing* decision scarcely mentions the term "trade secrets." Nor does it explicitly alter the narrower "production process"-related definition adopted in *Public Citizen*.[235] Yet even before *Food Marketing*, very few FOIA cases invoked the "trade secrets" category of Exemption 4. Given the difficulties of satisfying *Public Citizen*'s narrow definition of trade secrets, the vast

232. *See supra* Subpart I.D.
233. Pub. Citizen Health Rsch. Grp. v. FDA., 704 F.2d 1280 (D.C. Cir. 1983).
234. *Id.* at 1289.
235. *See supra* text accompanying notes 154–55.

majority of Exemption 4 cases involved the "confidential" commercial information category.[236]

By removing the constraint of "substantial competitive harm" from the "confidential" information category and replacing it with a test that more or less aligns with a firm's reasonable secrecy efforts, *Food Marketing*'s practical effect is to collapse the two Exemption 4 categories. For all practical purposes, there is now one broad category that fixates primarily on whether requested information is, in fact, public, and if not, whether the submitter treats the information as secret. After all, why would a submitter or agency defending nondisclosure try to squeeze through a small definitional hole—FOIA's narrow definition of "trade secret"—when a far larger one has become available—the expanded definition of "confidential" commercial information?

After *Food Marketing*, it is fair to say the two safeguards that FOIA cases had long erected against trade secrecy expansionism—the constraints of limited subject matter and a competitive harm inquiry—which seemed to harken back to an earlier era of common law trade secrecy, have crumbled. In *Food Marketing*'s wake, Exemption 4 has more or less fallen into line with the broader trend of trade secrecy expansionism.

B. How *Food Marketing*'s Definition May Lock Up Even More Information Than Civil Trade Secrecy's Definition

Thus far, this Article has emphasized the ways in which the *Food Marketing* decision has brought FOIA's definition of proprietary business information closer to that of modern trade secrecy statutes. But in its application, the scope of the new Exemption 4 may sweep even more broadly than its civil trade secrecy counterpart. There are three main reasons why this is likely to be true.

First, because most civil trade secrecy cases arise within the classic "departing employee-competitor" scenario, broad assertions of trade secrecy are tempered to some degree by an employee's own "general knowledge, skill and experience."[237] The "'general knowledge, skill and experience' gained by an employee during . . . employment cannot be claimed as a trade secret by [the] employer."[238] Even if this constraint has not always been consistently or correctly

236. *See supra* text accompanying note 166.
237. *See, e.g.*, Rohm & Haas Co. v. Adco Chem. Co., 689 F.2d 424, 432 (3d Cir. 1982).
238. *Id.* For a comprehensive discussion of this feature of trade secrecy law, see generally Hrdy, *supra* note 98 (discussing several case examples).

applied by courts,[239] it can nonetheless counter the definitional breadth of trade secrets in individual cases. Thus, in a case like *American Can Co. v. Mansukhani*,[240] the Seventh Circuit concluded that the defendant's high level of skill as a chemist significantly narrowed the scope of the plaintiff's trade secret in a commercial jet ink formula.[241] In the FOIA context, however, there is no such counterweight to broad assertions of business secrecy. Under *Food Marketing*'s new standard, a submitter's privacy customs are the primary and—depending on how the second "government assurance" condition shakes out—possibly, exclusive focus of the inquiry.

Secondly, while trade secrecy statutes make clear that even nonpublic information that is known within the relevant industry is not protectable,[242] the new *Food Marketing* standard fixates on publicly known, rather than industry known, information. As the commentary to the UTSA has long emphasized:

> The language "not being generally known . . ." does not require that information be generally known to the public for trade secret rights to be lost. If the principal persons who can obtain economic benefit from information are aware of it, there is no trade secret. A method of casting metal, for example, may be unknown to the general public [b]ut readily known within the foundry industry.[243]

In many civil trade secrecy cases, the plaintiff firm claims protection for information that is not publicly known, but a defendant (the alleged misappropriator) nonetheless prevails because it can show that a sufficient number of competitors within the industry are aware of it.[244] It is knowledge within an industry, rather than by the public at large, that is most relevant in these cases.

By contrast, under the new analysis in *Food Marketing*, it seems plausible (if not likely) that information unknown to the general public but known within

239. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 reporters' note cmt. d (AM. L. INST. 1995) (listing cases "illustrating the difficulties inherent in distinguishing the general skill and knowledge of a former employee from the trade secrets of a former employer"); Hrdy, *supra* note 98, at 2415.

240. 742 F.2d 314 (7th Cir. 1984).

241. *Id.* at 329–30 (explaining that "the scope of American Can's trade secrets was extremely narrow" and that "Mansukhani has substantial skill, knowledge and experience in formulating commercial jet inks, [which] he is entitled to use . . . to compete against American Can" (emphasis omitted)); *see also* Fishman & Varadarajan, *supra* note 98, at 1088–89 (discussing this case).

242. *See* UNIF. TRADE SECRETS ACT § 1 cmt. (UNIF. L. COMM'N 1985).

243. *Id.*; *see also* Sandeen, *supra* note 35, at 523 (suggesting that the UTSA definition "goes one step further" than the common law "by emphasizing that even when information is not known by the general public it cannot be a trade secret if it is generally known within an industry").

244. *See* UNIF. TRADE SECRETS ACT § 1 cmt (UNIF. L. COMM'N 1985).

an industry can fall under Exemption 4—so long as the submitter engaged in efforts to guard its secrecy.[245] Notably, in "step by step" guidance issued by the Department of Justice to "aid agencies in making [Exemption 4 withholding] determination[s]" post–*Food Marketing*,[246] there is no mention of whether nonpublic information is known within an industry. Instead, the relevant question is whether "the submitter customarily keep[s] the information private or closely-held"—an inquiry that "may in appropriate contexts be determined from industry practices concerning the information."[247] In trade secrecy litigation, however, even if a number of competitors within an industry try to keep the same information secret as a matter of custom, the fact that it is known throughout the industry means it is no longer a protectable trade secret. "Industry-known" information is as unprotectable as "publicly-known" information under trade secret law. That does not appear to be the case for FOIA Exemption 4 purposes.

Moreover, the procedural dynamics of FOIA litigation make the withholding of nonpublic-but-industry-known-information more likely. For example, in civil trade secret litigation, a defendant will try to demonstrate that even if the plaintiff's information is not generally known to the public, it is nonetheless known within a relevant industry and thus not a trade secret. Presented with expert testimony on both sides, a factfinder in trade secrecy litigation will assess whether information that falls short of "public" knowledge is nonetheless industry knowledge. In the FOIA context, however, resource-strapped agencies are more likely to defer to a submitter's assertions that any nonpublic information should be withheld.[248] And courts, in turn, often defer to agency withholding decisions, despite Congress's mandate that they engage in de novo review.[249]

Finally, civil trade secret statutes require that the information at issue "derives *independent economic value* . . . from not being generally known to . . . other

245. *See supra* text accompanying notes 212–16.

246. OIP GUIDANCE: EXEMPTION 4, *supra* note 177.

247. OIP GUIDANCE: STEP-BY-STEP GUIDE, *supra* note 225.

248. *See, e.g.*, David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1832–33 (2008) (describing how agencies routinely defer to companies' claims of secrecy and confidentiality).

249. *See, e.g.*, Katie Townsend & Adam A. Marshall, *Striking the Right Balance: Weighing the Public Interest in Access to Agency Records Under the Freedom of Information Act*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 226, 232–33 (David E. Pozen & Michael Schudson, eds., 2018) (describing high rates of judicial approval of agencies' nondisclosure decisions, as well as the "procedural and structural advantages that agencies enjoy over plaintiffs"); Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 187–88 (2013) (positing that "contrary to Congress's purpose, the judiciary has created a de facto system of deference in its judicial review of FOIA cases").

persons who can obtain economic value from its disclosure or use . . . ."[250] The requirement of "independent economic value" has not always been well-understood or consistently applied by courts.[251] But it was intended to serve as a meaningful limit on plaintiffs' assertions of trade secrecy.[252] Camilla Hrdy and Mark Lemley have emphasized the significance of this "independent economic value" requirement.[253] It means that the information imparts economic value to the trade secret owner at the time of a defendant's alleged misappropriation—and not just some theoretical value in the abstract. And if it does not, then the trade secret should be deemed "abandoned."[254] In other words, "a trade secret expires when the owner no longer derives 'independent economic value' . . . from keeping the information a secret."[255] So for example, if a trade secret owner exits the market, then even if the secret information is still "valuable to someone," it "isn't valuable to the company anymore," and thus fails the test of "independent economic value."[256]

Unlike civil trade secrecy law, the new *Food Marketing* test does not really ask whether the requested information has commercial value to the submitter.[257] As previously noted, while the second category of Exemption 4 is limited to "commercial or financial" information, the term "commercial" has proven to be a minimal hurdle in most cases.[258] The prior "substantial competitive

250. UNIF. TRADE SECRETS ACT § 1(4)(i) (UNIF. L. COMM'N 1985) (emphasis added); *see also* 18 U.S.C. § 1839(3)(b) (2018).

251. *See* Eric E. Johnson, *Trade Secret Subject Matter*, 33 HAMLINE L. REV. 545, 557 (2010) (observing that "the meaning of . . . 'independent economic value' has been contested in many reported cases[,] [b]ut a review of them is not terrifically illuminating"); *see also* Camilla A. Hrdy & Mark A. Lemley, *Abandoning Trade Secrets*, 73 STAN. L. REV. 1, 31–32 (2021) (describing the importance of this requirement but observing how courts misapply it).

252. *See*, *e.g.*, Sandeen, *supra* note 35, at 525–26 (noting that "[t]he economic value requirement of the UTSA was not simply a definitional flourish but was specifically designed to . . . ensure that a claim for relief was not provided for . . . information of little import," and further noting that the UTSA drafters viewed the terms "economic value" and "commercial value" as synonymous); Johnson, *supra* note 251, at 547, 557 (arguing that the "independent economic value" requirement is "intended to be key limiting language" and suggesting that "a putative trade secret has independent economic value if it would be valuable to another firm for the same reason that the secret is valuable to the plaintiff and if the secret is capable of persisting despite the plaintiff's changed circumstances").

253. Hrdy & Lemley, *supra* note 251, at 7 (emphasizing the role that independent economic value "plays in setting a trade secret's end date").

254. *Id.*

255. *Id.* at 4.

256. *Id.* at 6 (emphasis omitted).

257. *See supra* Subpart II.C.

258. *See supra* text accompanying note 168. While the term "commercial" information in Exemption 4 has historically been given a "widely accepted breadth," DOJ FOIA GUIDE: EXEMPTION 4, *supra* note 134, at 7, perhaps courts will be more willing to scrutinize this breadth in the wake of *Food Marketing*. For example, in a recent case involving the disclosure of employment diversity data

harm" test would, of course, have winnowed out information that no longer had any commercial value to the submitter. And notably, *Public Citizen*'s test for Exemption 4 "trade secrets" incorporates a "commercial value" requirement.[259] Though, as previously discussed, in the wake of *Food Marketing*, the trade secret category of Exemption 4 is likely to become irrelevant.[260] Thus, under the new *Food Marketing* test, a submitter can prevent FOIA disclosure of information that would likely fail to satisfy the independent economic value requirement under civil trade secrecy law.

Consider, for instance, how a FOIA case like *Taylor v. Babbitt*[261] might be resolved under the new *Food Marketing* test. In *Taylor*, the plaintiff sought design specifications for a 1930s era antique aircraft.[262] The Federal Aviation Administration (FAA) denied the request on the grounds that the specifications were trade secrets under Exemption 4.[263] The aircraft manufacturer that had submitted these design specifications to the FAA in the 1930s for certification purposes objected to their disclosure several decades later, even though it "no longer manufacture[d] aircraft," the technical information had become "obsolete," and was no longer useful in manufacturing aircraft.[264]

A key issue in the dispute was whether the materials were "commercially valuable," as required by *Public Citizen*'s definition of Exemption 4 "trade

that federal contractors were required to submit to the government, a district court held that such information was not "commercial" within the meaning of Exemption 4. *See* Ctr. for Investigative Reporting v. U.S. Dep't of Lab., 424 F. Supp. 3d 771, 773, 779 (N.D. Cal. 2019) (rejecting such an "expansive interpretation" of "commercial" that would cover "any statistical information pertaining to employees simply because the business is a commercial enterprise"). *See also* Besson v. U.S. Dep't of Com., 480 F. Supp. 3d 105, 113 (D.D.C. 2020) (holding that the mere names of a principal investigator and project team members appearing in a Cooperative Research and Development Agreement do not constitute "commercial" information for purposes of Exemption 4); N.Y. Times Co. v. U.S. Dep't of Just., No. 19-civ-1424, 2021 WL 371784 (S.D.N.Y. Feb. 3, 2021) at *9–10 (explaining that information related to a "company's compliance program," including "hiring, promotion, and disciplinary processes," "training materials," and "internal analyses of misconduct" is not "commercial" within the meaning of Exemption 4).

259. Pub. Citizen Health Rsch. Grp. v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining a "trade secret" for FOIA 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" (emphasis added)).

260. *See supra* Subpart III.A.

261. 760 F. Supp. 2d 80 (D.D.C. 2011).

262. *Id.* at 82–83.

263. *Id.* at 81.

264. *Id.* at 83, 89.

secrets."[265] Although *Public Citizen* did not define this phrase, the Supreme Court had previously observed that "the value of a trade secret lies in the *competitive advantage it gives its owner over competitors*."[266] By contrast, "obsolete information that provides no competitive advantage is not commercially valuable and cannot constitute a trade secret."[267] Because the certification materials no longer conferred a commercial advantage on the submitter, they could not be withheld as trade secrets under Exemption 4.[268] Nor would the *National Parks* test for "confidential" commercial information have helped the submitter in this case, for the disclosure of obsolete information would not cause the submitter substantial competitive injury.[269] But in the wake of *Food Marketing*, if the owner keeps treating information as confidential, it is less likely to matter that the information has lost commercial value to the owner at the time a FOIA request is made. In failing to assess the ongoing economic value of information to the submitter, Exemption 4 can sweep more broadly than its civil trade secret law counterpart.

C. Potential Mechanisms Within FOIA to Reign in Broad Assertions of Confidentiality

Despite Exemption 4's newfound breadth under *Food Marketing*, certain mechanisms within FOIA may nonetheless help cabin its reach and mediate the tension between business secrecy and government accountability. The impact of these mechanisms will depend, however, on the willingness of policymakers, agencies, and courts to reign in private parties' assertions of business secrecy.

265. *Id.* at 86. Another disputed issue in this case was whether the information was "secret," given that a prior letter from the plaintiff decades earlier authorized the FAA to "loan" the design materials to "outside parties without any obligation to maintain the confidentiality of the information." *Id.* at 86–87. The court concluded that the materials were also not "secret" and thus did not constitute trade secrets for purposes of Exemption 4. *Id.* at 88. As a result, both the information's lack of secrecy and lack of commercial value supported the court's conclusion. *Id.* at 90.

266. *Id.* at 88 (emphasis added) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 n.15 (1984)).

267. *Id.* at 88–89 (observing that "even if the . . . certification materials may be valuable within the antique aircraft market, there is no evidence that these materials are commercially valuable to [the submitter] with respect to any business interest it has").

268. *Id.* at 88.

269. Indeed, citing the "confidential" information prong of Exemption 4, the court noted that the "FAA may not rely merely on broad conclusions that the disclosure of the [designs] would negatively impact [the submitter's] competitive position in th[e] market." *Id.* at 89.

1. FOIA Improvement Act's "Foreseeable Harm" Requirement

One potential limit on the breadth of Exemption 4 post–*Food Marketing* is the FOIA Improvement Act of 2016.[270] This legislation added a "foreseeable harm" requirement to FOIA. Under this requirement, agencies "shall withhold information" under FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or the "disclosure is prohibited by law."[271] Thus, even if an exemption is applicable, an agency has to release a record "if disclosure would not reasonably harm that exemption-protected interest—given its age, content, and character."[272] Because the FOIA Improvement Act does not apply retroactively, the "foreseeable harm" standard would only apply in cases where a plaintiff requests documents after the enactment date—June 30, 2016.[273]

The FOIA request in *Food Marketing* predated the 2016 FOIA Improvement Act, and the Supreme Court did not address the issue of how the "foreseeable harm" requirement impacts the new Exemption 4 analysis.[274] As a result, some commentators have speculated that the Supreme Court's *Food Marketing* decision will impact only a few pending federal court FOIA cases—those cases where the FOIA request preceded the FOIA Improvement Act.[275] Despite commentators' suggestion that *Food Marketing*'s impact will be so limited, the DOJ's most recent guidance to agencies post–*Food Marketing* makes no mention of the "foreseeable harm" inquiry.[276] In fact, it fails to even acknowledge the FOIA Improvement

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

271. 5 U.S.C. § 552(a)(8)(A)(i); FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 Stat. 538, 539. *See also* Bell, *supra* note 141; Al-Amyn Sumar, *Unpacking FOIA's "Foreseeable Harm" Standard*, COMMC'NS LAW., Winter 2020, at 15, 15 (discussing the origins of the "foreseeable harm standard and Congress's impetus for codifying it").

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

273. *Id.*

274. *See* Sumar, *supra* note 271, at 18 (observing that the "Court's opinion did not mention foreseeable harm . . . leaving it to lower courts to sort things out").

275. *See, e.g.*, Brief of Amici Curiae for Freedom of Information Act and First Amendment Scholars in Support of Respondent 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 [https://perma.cc/PYS6-PRJA] (suggesting that the *Food Marketing* decision "should appropriately affect only a few pending federal court FOIA cases").

276. *See* OIP GUIDANCE: EXEMPTION 4, *supra* note 177 (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).

Act.[277] And thus far, few court decisions have addressed this issue in the context of Exemption 4.[278]

Notably, one of the first district court opinions to apply the *Food Marketing* standard explicitly rejected such a "foreseeable harm" limitation. In *American Small Business League*,[279] the plaintiff FOIA requesters argued that the FOIA Improvement Act of 2016 "effectively reinstate[s] the competitive harm test for Exemption 4."[280] The court rejected this argument, explaining that it would "not use the FOIA amendment to circumvent the Supreme Court's rejection of *National Parks*[]."[281] The court reasoned that after *Food Marketing*, the only "relevant" interest protected by Exemption 4 is "that of the information's *confidentiality*—that is, its private nature."[282] And "[d]isclosure would necessarily destroy the private nature of the information, no matter the circumstance."[283]

Other district courts have taken the opposite view: that "[t]he FOIA Improvement Act's 'foreseeable harm' requirement replaces to some extent the 'substantial competitive harm' test that the Supreme Court overruled in *Food Marketing*."[284] In *Center for Investigative Reporting v. U.S. Customs and Border Protection*, the district court explained that to meet the foreseeable harm requirement, the disclosure would have to "harm an interest protected by [Exemption 4], such as by causing 'genuine harm to [the submitter's] economic or business interests."[285]

If courts view the relevant interest protected by Exemption 4 as being confidentiality for its own sake—and not in the service of shielding submitters from competitive or economic harm—then the FOIA Improvement Act will

277. *Id. See also* Bell, *supra* note 224 (noting that OIP's guidance "does not even acknowledge the [FOIA Improvement Act] issue").
278. *See* Bell, *supra* note 141 (observing that "the 'foreseeable harm' provision has rarely been interpreted in the three years since its codification"); Sumar, *supra* note 271, at 18 (noting that courts are just "beginning to tackle" this issue).
279. *See supra* text accompanying notes 226–29.
280. Am. Small Bus. League v. U.S. Dep't of Def., 411 F. Supp. 3d 824, 835 (N.D. Cal. 2019) (arguing that "agencies must show that disclosure would cause foreseeable competitive harm").
281. *Id.* at 836.
282. *Id.*
283. *Id.*
284. Ctr. for Investigative Reporting v. U.S. Customs & Border Prot., 436 F. Supp. 3d 90, 113 (D.D.C. 2019). *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. U.S. Dep't of Just., No. 19-3192, 2021 WL 124489, at *7 (D.D.C. Jan. 13, 2021) (applying a foreseeable harm standard).
285. *Ctr. for Investigative Reporting*, 436 F. Supp. at 113.

offer little check on the definitional breadth of *Food Marketing*'s new standard.[286] It remains to be seen whether other courts will adopt a similar interpretation to that of *American Small Business League*, or if they will interpret the "foreseeable harm" requirement to more or less approximate *National Parks*'s competitive harm inquiry.

2. Making Disclosure Obligations Explicit in Government Contracts

Another potential limitation on the breadth of information that will be withheld under the *Food Marketing* test resides in its second—and more tenuous—prong. Notably, the Supreme Court did not resolve the issue of whether the government's assurance of confidentiality to a submitter is required for commercial information to be "confidential" under Exemption 4.[287] Lower courts adjudicating Exemption 4 disputes after *Food Marketing* have also not resolved the issue.[288]

However, recent DOJ guidance instructs agencies to consider this second condition of a government's assurance of confidentiality—while noting that "it is yet unclear whether future judicial precedents governing Exemption 4 will require that both conditions exist."[289] For the time being then, the DOJ instructs agencies to consider both (1) whether the submitter "customarily treat[s] the information as private," and (2) whether the government provided an "explicit or implicit" assurance of confidentiality.[290] While the meaning of these latter terms is

286. *Cf.* Bell, *supra* note 224 (explaining that "if 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").

287. *See supra* text accompanying notes 217–18.

288. *See* Renewable Fuels Ass'n v. U.S. EPA, No. 18-2031, 2021 WL 602913, at *7 (D.D.C. Feb. 16, 2021) (observing that district courts considering Exemption 4 disputes since *Food Marketing* have not resolved the issue of whether the "potential second prong"—a government assurance of privacy—"must be met").

289. *See* OIP GUIDANCE: EXEMPTION 4, *supra* note 177 ("In light of that current legal uncertainty, agencies should as a matter of sound administrative practice consider both conditions in the process of determining whether to invoke Exemption 4's protection for 'confidential' commercial or financial information."). *See also* Bell, *supra* note 224 ("*Food Marketing* supports the conclusion that only the submitter's practice of keeping the information secret is critical in deciding whether Exemption 4 applies, making virtually any commercial or financial information provided to the government subject to withholding pursuant to Exemption 4. By adopting the assumption that to satisfy Exemption 4 information must be provided with an assurance of confidentiality[,] . . . OIP has cabined the potentially broad scope of the Court's decision.").

290. OIP GUIDANCE: EXEMPTION 4, *supra* note 177. *See also* Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Com., No. 1:18-cv-03022, 2020 WL 4732095, at *3 (D.D.C. Aug. 14, 2020) ("Assuming that Exemption 4 can be satisfied here only if [the agency] gave [the submitter]

somewhat fluid (especially an "implied" assurance of confidentiality),[291] if an agency "explicitly notif[ies] submitters of the agency's intention to *publicly disseminate* the information," there is no plausible claim of confidentiality.[292]

Thus, so long as the government's assurances of confidentiality continue to matter to the analysis, agencies should impose clear disclosure obligations on the private entities with whom it contracts. Before *Food Marketing* (and certainly after), a number of commentators have highlighted the importance of insisting on disclosure in government contracts.[293] Danielle Citron, for example, has advocated an "open code model," in which agencies "insist that government contractors . . . [and] vendors make transparent the source code for critical systems to facilitate public feedback and executive oversight," or alternatively "legislators . . . mandate open code systems."[294] Others have called for "agencies to include contractual provisions incorporating FOIA [disclosure obligations] in any outsourcing contract they negotiate."[295]

At the federal level, some policymakers have called for imposing disclosure obligations on private vendors in government contracts—for example, when contracting with private detention facility providers.[296] At the state level, too,

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some assurance of confidential treatment, that assurance of confidentiality could have been either express or implied." (citation omitted)).

291. OIP Guidance states that "[a]n express assurance of confidentiality can be established in several ways," including "in direct communications with the submitter, as well as through general notices on agency websites or . . . through regulations indicating that information will not be publicly disclosed." OIP GUIDANCE: EXEMPTION 4, *supra* note 177. As for "an implied assurance of confidentiality[,] . . . . agencies can look to the context in which the information was provided to the government . . . . [and] the government's treatment of similar information." *Id.*

292. *Id.* ("In those situations, the information, when objectively viewed in context, would be deemed to have lost its 'confidential' character under Exemption 4 upon its submission to the government, given that the submitter was on notice that it would be disclosed."). *See also* WP Co. v. U.S. Small Bus. Admin., 502 F. Supp. 3d 1, 16 (D.D.C. 2020) (rejecting the Small Business Association's invocation of Exemption 4 to withhold loan amount and borrower name information related to the Paycheck Protection Program and highlighting the fact that the government "loan application expressly notified potential borrowers . . . that their names and loan amounts would be 'automatically released' upon a FOIA request"); Am. Soc'y for the Prevention of Cruelty to Animals v. Animal and Plant Health Inspection Serv., No. 19-civ-3112, 2021 WL 1163627, at *5 (S.D.N.Y. Mar. 25, 2021) ("Exemption 4 does not apply when an agency publicly acknowledges that it will not treat information as confidential").

293. *See, e.g.*, Citron, *supra* note 9, at 371–73; Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 463 (2019) (urging "agencies to include contractual provisions incorporating FOIA [disclosure obligations] in any outsourcing contract they negotiate"); Bloch-Wehba, *supra* note 11, at 1307–08.

294. Citron, *supra* note 9, at 371–73.

295. Aman & Rookard, *supra* note 293, at 463. *See also* Bloch-Wehba, *supra* note 11, at 1307–08.

296. *See, e.g.*, Private Prison Information Act of 2016, S. 3422, 114th Cong. § 3(d)(2)(A) (2016) (mandating that private prisons with federal inmates and detainees be bound by

policymakers have sponsored legislation promoting transparency through government contracting practices.[297] Even outside of the FOIA context (and perhaps, in reaction to the "backward" rather than "forward-looking" nature of FOIA requests),[298] scholars have increasingly urged greater reliance on ex ante disclosure mechanisms to address situations when proprietary business secrets implicate government transparency.[299]

D. Strengthening Definitional Constraints in FOIA Exemption 4 . . . and Beyond

Another way to guard against overbroad assertions of secrecy—both in the FOIA Exemption 4 context and in trade secret law more generally—is to strengthen constraints on the definition of protectable information. This could take various forms, including statutory "safe harbors," or more broadly, the imposition of some kind of "commercial harm" requirement as a condition of proprietary secrecy. The goal of this Subpart is not to offer a specific legislative proposal that is perfectly calibrated to identify welfare-enhancing disclosures and exclude those that are not. Rather, this Subpart offers a broad conceptual sketch of some initial steps the law might take to mediate the tension between private parties' assertions of business secrecy and government accountability.

1. Enacting Statutory Safe Harbors

When the subject matter of propriety information threatens to become too open-ended, one potential policy approach is to enact specific, targeted safe harbors. Such safe harbors exempt certain types of information from the

FOIA); Press Release, Ben Cardin, Senator, U.S. Senate, Cardin Introduces Legislation to Hold Private Prisons Accountable for Treatment of Federal Inmates (Nov. 5, 2019), https://www.cardin.senate.gov/newsroom/press/release/cardin-introduces-legislation-to-hold-private-prisons-accountable-for-treatment-of-federal-inmates [https://perma.cc/R8A7-LBST]. *See also* Aman & Rookard, *supra* note 293, at 452–53 (discussing this legislation as "leav[ing] no room for debate that private prison operators would be subject to the full panoply of FOIA disclosure requirements and protections").

297. *See* Bloch-Wehba, *supra* note 11, at 1307–08 (discussing example of a draft Washington State bill, H.R. 1655, which provides that "procurement contracts for automated decision systems cannot contain nondisclosure provisions or other obstacles to transparency").

298. *See* Pozen, *supra* note 127, at 1101, 1107–08 (advocating a "forward-looking legislative approach" that "look[s] beyond . . . FOIA" to "affirmative disclosure requirements").

299. *See, e.g.*, Katyal, *supra* note 5, at 1253 (discussing "'ex ante' solutions," "which aim to[] proactively incentivize disclosure of source code for limited public access"); Morten & Kapczynski, *supra* note 225, at 497–98 (arguing in favor of proactive disclosure of clinical trial data by the FDA).

definition of intellectual property or immunize potential defendants from liability in particular use or disclosure contexts. Copyright law, for example, has a number of such statutory safe harbors for particular types or uses of protected works—including an exemption for government-created works.[300] By contrast, trade secret law does not typically include such statutory safe harbors—either particular types of information that are automatically exempt from protection or specific disclosure contexts that are immune from liability.

In recent years, however, policymakers have demonstrated an increased willingness to reign in trade secrecy's definitional breadth through targeted, statutory safe harbors. A notable example is the federal DTSA's inclusion of an explicit "whistle-blower" immunity provision. This provision immunizes whistleblowers from liability "under any Federal or State trade secret law for the disclosure of a trade secret" when they report confidential information to government officials or attorneys "solely for the purpose of reporting or investigating a suspected violation of law."[301] The senators who introduced these provisions emphasized the need to "ensure that employers and other entities cannot bully whistleblowers . . . by threatening them with a lawsuit for trade secret theft."[302]

More recently, legislators have proposed limitations to trade secrecy evidentiary privileges in the criminal justice context. This legislation is intended to protect defendants' access to evidence in criminal proceedings, such as "source code and other information necessary to exercise their confrontational and due process rights when algorithms are used to analyze evidence in their case."[303] In a

300. *See, e.g.*, 17 U.S.C. § 105 (2018) (exempting government-created works from copyright protection); 17 U.S.C. § 110 (2018) (immunizing from liability public performances of copyrighted works made for in-person education, of nondramatic musical or literary works in the course of religious services, or within certain small-scale commercial establishments).

301. 18 U.S.C. § 1833(b)(1) (2018). *See also* Peter S. Menell, *Misconstruing Whistleblower Immunity Under the Defend Trade Secrets Act*, 1 NEV. L.J.F. 92, 95 (2017) (criticizing recent caselaw for treating the whistleblower provisions as an affirmative defense rather than immunity from liability).

302. 162 CONG. REC. S1636 (daily ed. Apr. 4, 2016) (statement of Sen. Leahy). For a detailed discussion of the legislative history behind these whistleblower provisions, see Peter S. Menell, *The Defend Trade Secrets Act Whistleblower Immunity Provision: A Legislative History*, 1 BUS., ENTREPRENEURSHIP & TAX L. REV. 398, 419–25 (2017).

303. Press Release, Mark Takano, Representative, U.S. House of Representatives, Rep. Takano Introduces the Justice in Forensic Algorithms Act to Protect Defendants' Due Process Rights in the Criminal Justice System (Sept. 17, 2019), https://takano.house.gov/newsroom/press-releases/rep-takano-introduces-the-justice-in-forensic-algorithms-act-to-protect-defendants-due-process-rights-in-the-criminal-justice-system [https://perma.cc/KX9Y-X7SF]. In September 2019, Representative Mark Takano introduced the "Justice in Forensic Algorithms Act" to promote defense access to evidence in criminal proceedings. The bill would amend the Federal Rules of Evidence to "prohibit[] the use of trade secrets privileges to prevent defendants

similar vein, commentators have recommended technology-specific safe harbors for voting machines, breathalyzer tests, and other kinds of "public infrastructure" that private parties provide to the government.[304] In such contexts, David Levine argues that trade secret protection should not be available to restrict public access to information, and instead, private parties should rely on patent protection alone.[305] Similarly, in the realm of public health, commentators have argued that certain kinds of pricing information for drugs and medical devices should be excluded from trade secret protection.[306]

When there is sufficient legislative will to enact safe harbors, they offer the benefit of clarity. That is, "they are specific enough to raise few questions as to the scope of their applicability."[307] The drawback of such granular exemptions, however, is that they may be too narrow and underinclusive.[308]

2. Resuscitating Definitional Constraints

Thus, perhaps in addition to the kind of context- and technology-specific safe harbors described above, *Food Marketing* and its aftermath may highlight the need for more generally applicable constraints on protectable business secrets. To this end, resuscitating a requirement of commercial harm stemming from affirmative use by competitors may be an appropriate step in reigning in broad assertions of business secrecy.

In the FOIA context, a group of senators have sponsored bipartisan legislation—the Open and Responsive Government Act—to reinstate *National Parks*'s "substantial competitive harm" standard for Exemption 4 withholding decisions.[309] The dissenting justices in *Food Marketing* suggested a somewhat

from challenging the evidence used against them." *Id.*; Justice in Forensic Algorithms Act of 2019, H.R. 4368, 116th Cong. (2019). *See also* Bloch-Wehba, *supra* note 11, at 1311–12 (discussing this bill).

304. *See* Levine, *supra* note 1, at 189 (arguing in favor of "abandoning trade secrecy for private entities engaged in public infrastructure and limiting protection to that which is patentable").

305. *Id.* at 188–90.

306. *See* Bridy, *supra* note 5 (arguing that trade secret protection for certain medical device pricing data should be precluded and describing the extent of government payments to device manufacturers through Medicare, Medicaid, and other government health programs); Feldman & Graves, *supra* note 5, at 67, 70 (arguing that "naked price information" for pharmaceuticals "is not a good candidate for trade secret status," and describing how "Medicare spending for branded drugs rose 62%" between 2011 and 2015).

307. David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1834–35 (2013) (discussing this benefit in the context of copyright exemptions).

308. *Id.*

309. Open and Responsive Government Act of 2019, S. 2220, 116th Cong. (2019). *See S. 2220: Open and Responsive Government Act of 2019*, GOVTRACK, https://www.govtrack.us/congress/bills/116/s2220/summary [https://perma.cc/ZET3-2EB5] (last

different formulation of the test. In addition to proving that information is "customarily and actually treated as private by its owner," and "provided to the government under an assurance of privacy,"[310] the dissent would have added a third condition: that "[r]elease of such information must also cause genuine harm to the owner's economic or business interests."[311] Though the dissent was careful to note that "the harm caused by disclosure must do more than, say, simply embarrass the information's owner."[312]

This Article is agnostic on the specific articulation of such a standard—whether "substantial competitive injury" or "commercial harm stemming from affirmative use by competitors" or "genuine harm to the owner's economic interests." Yet requiring a submitter to offer some articulation of economic harm stemming from the disclosure of requested information would be a step in the right direction. Or short of a harm condition, perhaps policymakers and courts should consider strengthening the hitherto anemic definition of "commercial" information for Exemption 4 purposes.[313] Requiring a more robust demonstration of the information's commercial value would more readily allow for the disclosure of certain categories of information that cause reputational rather than commercial harm, like workplace injury data.[314] It would also allow for the disclosure of information that no longer has commercial value to

updated Sept. 2, 2019) (explaining that this "Act is a bipartisan bill that would put back the previous precedent into the Freedom of Information Act, once again only allowing the government to withhold information from a FOIA request under exemption #4 if it would cause a 'substantial competitive harm' to a company. It was introduced in the Senate on July 23, [2019,] less than a month after the Supreme Court decision, as bill number S. 2220 by Sen. Chuck Grassley (R-IA). . . . [and] awaits a potential vote in the Senate Judiciary Committee"). *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 [https://perma.cc/HEQ3-6CQ3] (observing that the Supreme Court's *Food Marketing* ruling, by "setting aside" *National Parks*'s substantial competitive harm standard, "significantly broadens the scope of Exemption 4, making it more difficult for the media and general public to learn about government programs and hold accountable those who administer them").

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

311. *Id.* at 2367 (Breyer, J., concurring in part and dissenting in part). The dissenting justices viewed the "competitive harm" phrasing from *National Parks* as too limited, for "disclosure of confidential information can cause a business serious harm in ways not so directly linked to competition"—for example, "[i]t could mean increased potential competition." *Id.*

312. *Id.* at 2368.

313. *See supra* notes 168 and 258, and accompanying text.

314. *See supra* notes 168 and 258, and accompanying text. *See also* Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion,* 109 GEO. L. J. 1337, 1411 (2021) (arguing that the term "commercial" should be read "to focus on information pertinent to marketplace competition . . . in order to place meaningful boundaries around what can be protected").

the submitter—either because the submitter has exited the market since first submitting the information or the information has since become obsolete, or for some other reason.[315]

And while government transparency concerns are most pressing in the FOIA context, similar tensions exist in civil trade secrecy law.[316] Thus, perhaps in civil trade secrecy, too, courts and policymakers should consider proposals to strengthen the "independent economic value" requirement,[317] or require a demonstration of foreseeable economic harm as part of the trade secret liability inquiry.[318]

CONCLUSION

Despite civil trade secrecy's dramatic expansion over the past century, courts interpreting the terms "trade secret" and "confidential" commercial information for FOIA Exemption 4 purposes have long taken a narrower path. In light of FOIA's critical goal of ensuring a well-informed citizenry, courts have historically imposed certain constraints on firms' assertions of business secrecy. That changed, seemingly overnight, after the Supreme Court's 2019 *Food Marketing Institute v. Argus Leader Media* decision. Upending four decades of circuit court precedent, the Court held that information can be withheld from FOIA disclosure as "confidential" so long as the submitter (and possibly, the government) treats it as private. Whether the disclosure will cause the submitter competitive harm (or any harm) is no longer relevant to the analysis. Instead, what matters most is a company's own privacy practices and preferences. As a consequence of this decision, agencies are likely to withhold a wider swath of private sector information from FOIA's disclosure mandate, impacting the ability of journalists and watchdog groups to access and report on information relevant to the public interest.

315. *See supra* text accompanying notes 257–69.

316. *See supra* Subpart I.D.

317. *See* Johnson, *supra* note 251, at 547 (arguing that "a putative trade secret has independent economic value if it would be valuable to another firm for the same reason that the secret is valuable to the plaintiff and if the secret is capable of persisting despite the plaintiff's changed circumstances"); Hrdy & Lemley, *supra* note 251, at 7 (arguing that courts "underappreciate the role that" the independent economic value requirement "plays in setting a trade secret's end date").

318. *Cf.* Fishman & Varadarajan, *supra* note 98, at 1057 (arguing that a defendant should not be liable for civil trade secret misappropriation unless it is exploiting material elements of the plaintiff's trade secret "in a market that the plaintiff actually foresaw or, given industry trends, could reasonably have foreseen," and thus "[m]erely relying on a secret as a launching pad for developing a genuinely dissimilar good, or operating in a remote and unanticipatable market, [sh]ould remain permissible").

This Article demonstrated how *Food Marketing*'s new test is, on the one hand, consistent with the broader trend of trade secrecy expansion in civil litigation. In both contexts, courts have replaced strict constraints on the definition of protectable information with a more open-ended inquiry that fixates on a firm's own privacy practices. At the same time, *Food Marketing*'s test may cast an even more expansive net than its civil trade secrecy counterpart. Notably, the civil trade secret litigation context, with its focus on departing employees, imposes some restraints on the scope of business secrets that FOIA's procedural context lacks. These differences, as well as FOIA's unique role in promoting government accountability, underscore the need for additional constraints on firms' assertions of confidentiality under FOIA. The *Food Marketing* decision and its aftermath highlight the need for clear definitional limits on proprietary secrets—certainly within the FOIA context, but perhaps even outside of it, in trade secret law more generally.