

TWIMC on the OGIS FOIA Advisory Committee,

The recent decision in [FOOD MARKETING INSTITUTE v. ARGUS LEADER MEDIA](#) (the “Argus decision” or just “Argus” from now on) has substantially changed how FOIA Exemption 4 must be interpreted by FOIA offices. The new standard respects industry trade secrets much more profoundly than the previous standard. However, Argus hardly makes “trade secret” a universal denial wall. Our interactions with FOIA offices indicate that they do not always understand the important details of Argus, nor do they understand the context for decisions that must be made around Exemption 4. Our organization, CareSet Journal, regularly makes FOIA requests for interactions between the Federal Government and the healthcare industry. Given that a huge percentage of the Federal budget goes to Healthcare and Defense and that major portions of these expenses are spent on industry services, FOIA requests that seek to delineate how these government-industry relationships are handled is a critical component of government transparency. Therefore, it is critical for FOIA offices to have a clear understanding of what the implications of the Argus decision precisely are and what they are not when considering any FOIA request that touches on information provided to the Federal government by any government contractor.

We recommend that your committee ensure that FOIA offices have clear training and/or guidance on the implications of Argus. This comment will detail several misunderstandings that we specifically have experienced in our interactions with FOIA offices that should inform training and guidance. However, your committee should investigate to see if there are other misunderstandings of Argus that are regularly occurring in various FOIA offices. You should request details from all FOIA offices of any Argus-implicated Exemption 4 denials and determine if this decision is being properly used, or merely “name dropped” as a means to make inappropriate FOIA request denials.

First, it is not acceptable to simply assert that a given FOIA request response is covered as an industry trade secret as an unverified hypothesis by a FOIA officer. It is also not enough to reach this conclusion based on feedback from a single or a few members of an industry. To meet the Argus threshold, the industry as a whole must regard the information as a confidential trade secret, and typical members of the industry must take proactive steps to ensure that the information is not released. In Argus the standard is explicit (emphasis ours):

*Contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential: when the information is customarily kept private, or at least closely held, by the person imparting it; and when the party receiving the information provides some assurance that it will remain secret. 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.*

Despite this clear statement, we have had interactions with FOIA offices that indicate something can be a trade secret merely because the FOIA officer personally has a hypothesis that the information might be held confidential by some industry participant. The FOIA office seemed to regard it as our

responsibility to demonstrate that the industry did NOT routinely protect information that we requested, rather than their responsibility to have some evidence that an industry did regularly protect information.

Moreover, the Federal Government continues to be confused about the implications of the word “customarily” which is more explicitly discussed in *Sterling Drug Inc. v. Federal Trade Commission*, 450 F.2d 698 (D.C. Cir. 1971) and referenced in *Argus*.

The issue in *Argus* was not whether a single grocery store company kept its prices secret, but whether the grocery store industry as a whole typically protects this information from disclosure. That is what the word “customarily” must mean in the *Argus* context. Despite this, the Federal Government regularly interprets the word “customarily” to ask, “Does one single grocery store ‘regularly’ keep its information private?”. There are certainly several definitions of the word “custom”, but in this context it should not be considered merely a synonym for ‘consistently’.

But in the context of trade secrets, the correct definition of custom is “that which is typically done by other people”. The government uses the “regularly” interpretation when, for instance, the SEC put forward in its [consideration of regulating financial markets with the Form 13F](#).

It is not enough for a single or a few members of an industry to regard information it reports to the government to be “confidential” and not to be shared. The whole point of the word “customarily” in the context of a “trade secret” is to assert that this is an expectation that is shared across the industry. This is what the Food Marketing Institute demonstrated in *Argus*, and this is what it takes to assert that information is “customarily confidential”. It's not just Coca-Cola that keeps the formula for its soft drink a secret. Every beverage, food and restaurant company is protective of its recipes. It is not just Google that does not share what its users search for on its service. Every search engine prizes and protects that information. The notion that the term “trade secret” can mean “information that 99% of the members of the industry publish freely, but 1% does not publish, but protects regularly” is just nonsense, and yet seems to be regarded as an implication of the *Argus* decision.

One of the central tenets of the use of FOIA is to determine if industry is defrauding the government or the public. *Argus* should not be interpreted to mean “If you are a regulated hospital/defense contractor/investment firm and you are breaking the rules, but you regard your breaking of the rules to be a secret that you do not share, then you can label your reporting to the government as ‘confidential’. And if you assert that you take great care to ensure that the public, your customers and your competitors are not aware of your graft, then the Federal government will join you in keeping your fraud a secret”. A single entity trying to hide information is exactly what we are trying to prevent and is an invalid mechanism for establishing a trade secret. Which begs the question: “What is a valid mechanism for establishing that information is a trade secret?”

Obviously, a position statement from a major industry trade association that some information should be regarded as confidential and therefore a trade secret is a good indication that something is in fact a trade secret. This assertion was precisely what happened in the *Argus* case as the [Food Marketing Institute](#) (renamed to the [Food Industry Association](#)) made the assertion that this information was

protected by the industry and provided overwhelming evidence of this. If an industry trade association makes a claim like this, and provides evidence of the same, then this matches the specific facts considered under Argus. Given that, it would make sense for a FOIA office to consider a specific claim by a trade association, with supporting evidence provided by its members, as a valid claim that some class of information represents a trade secret in a given industry.

But there are other valid ways for a given FOIA office to determine that a certain piece of information counts as a confidential trade secret to an industry. For instance, any of the following might count:

- The majority of responses to a regulatory filing from an industry indicates that a certain piece of information should be considered at trade secret.
- An analysis of emails and other communications from an industry directly to government officials, shows that a statistically significant portion of the industry regards that information a trade secret. The bar for “statistically significant” should be high. So if the emails from industry participants were to show that 62.8% of 1000 industry companies regarded this as confidential, then it likely should count as a trade secret. 60% of the communications of 5 industry companies should clearly not count as evidence of a trade secret.
- An evaluation of a given industry's trade press articles going back in time several years or decades indicating that it was common practice to keep a specific class of information confidential.

Most importantly, there is nothing in Argus that indicates that it is up to the FOIA requestor to prove that information is not confidential if the FOIA office does not have any evidence that something is confidential. There is nothing at all in Argus that indicates that Trade Secret status should merely be presumed.

But let us suppose that the practical interpretation of Argus is that FOIA requestors must demonstrate that given information is not being treated as confidential. Or let us suppose that we proactively demonstrate this, just to ensure that FOIAs are processed quickly. If a requestor demonstrates evidence that information is commonly shared, and the FOIA office has no information to the contrary, that should be the end of the issue. We think requestors should be “innocent of violating Exemption 4 until proven guilty” but if this is unreasonable, then it is clear that requestors should be “no longer accused of being guilty of violating Exemption 4, having given a solid alibi”.

FOIA offices currently understand that they are in charge of adjudicating whether a FOIA request is adequately in the public interest, or whether a requestor deserves to be treated as a journalist or whether fee-waivers will be granted. Further, they understand that there are standards, best practices as well as specific facts at play in those decisions, and that those decisions are to be made in the context of evidence before them. Similarly, they need to understand that they are going to be making adjudications, based on evidence, on whether something is actually being treated by an industry as an industry trade secret. At least some of the time, what is happening is that “an assertion of the question of industry confidentiality

has been made, by someone for some reason, therefore we refuse this FOIA request under Argus”. This refusal to question whether something is actually a trade secret or not is wholly incorrect.

Moreover, it is inappropriate for any agency to arbitrarily make promises of confidentiality to an industry about information that it is collecting, and then use that promise as evidence the industry regards something to be confidential. FOIA Exemption 3 clearly articulates that it is a Congressional privilege to make laws that supersede FOIA and prevent information release on specific industry topics. Exemptions 8 and 9 are specific examples of Congress exercising that privilege in the FOIA law itself. In healthcare, for instance, there is considerable confidentiality afforded to disease outbreak information reported to the CDC that is outlined in Federal laws passed by Congress.

There is no consideration in FOIA for an agency to decide that industry-provided information should become exempt from FOIA. The notion that an agency can “promise confidentiality” to an industry that it regulates and then use that promise as evidence that regulatory enforcement data is confidential is a farcical interpretation of Argus. Such an interpretation would create a mechanism for any agency to decide when FOIA applies to industry-government data or when it does not, as they see fit. All any agency would need to do in order to deny any FOIA request on industry-government data that the agency did not want to release is simply to tell someone in the industry that they do not intend to release it. The purpose of FOIA is to specifically prevent regulator-industry secret keeping and instead to provide transparency on how industries are regulated and how tax dollars are spent. And yet, this is the practical interpretation of the Argus that we have had communicated to us by FOIA office representatives, “We decided to promise confidentiality to the industry, and as a result, the industry now regards this information as confidential” without any consideration given to the fact that before the promise was made, no one in the industry was treating the information as a secret, or even attempting to prevent the information from being released. In our case, we were initially denied access to industry information that the industry regularly and uniformly publicizes and celebrates in the open.

Argus cannot become a mechanism for the government to hide its activities, by using industry preference as an excuse. The interpretation currently being put forward is so contradictory that the government is holding that Argus can be used to hide its own activity, even when the industry in question prefers transparency.

In short, there is a formality of evaluations to determine the status of industry confidentiality that is implicitly included in the update to the Argus decision, that at least some FOIA offices are unaware of. A FOIA office should be confident that it is industry practice to protect information from disclosure before invoking Argus. The FOIA Committee should study the issue and discover if there are other mis-interpretations of Argus that are commonplace. Then it should take steps to ensure that a correct understanding of Argus has been communicated to FOIA offices and FOIA officers.

Regards,  
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