

The Volkswagen Testing Scandal and Related Crimes

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Abstract

Volkswagen AG (VW) and its subsidiaries created a global environmental business scandal when it deliberately engineered some 11 million diesel vehicles sold worldwide during the period 2009-15, including some 600,000 in the United States.

The vehicles had “defeat devices” designed to avoid air pollution testing standards. The devices worked only when the vehicles were undergoing government mandated emission testing, and not when the vehicles were otherwise being driven. When a “defeat device” stopped working in a vehicle, VW provided car dealers and mechanics with new cheating software “fixes.” As a result, VW “clean diesel” vehicles spewed out 35-40 times more nitrogen oxide, which is a potent greenhouse gas linked to climate change.

In 2017, VW pled guilty to three criminal felony counts (conspiracy to defraud, wire fraud, and criminal violation of the Clean Air Act) in the United States for using these defeat devices. The company paid the largest criminal fine (\$2.8 billion) ever levied by the federal government against a car manufacturer. Several executives also have been criminally charged, while others have been forced to resign. VW has also been sued civilly for breach of contract, breach of warranty, and violation of consumer protection laws. The company has paid \$30-40 billion in fines and compensation.

As part of its criminal plea agreement requiring significant business investment, VW was placed under an independent compliance monitor. Monitoring reports were forwarded to the Department of Justice (DOJ). But important parts of the reports remain largely secret, which is troubling because VW has struggled with transparency in implementing internal controls. Both the federal government and VW maintain that confidentiality is a necessary component to the monitoring, which is debatable given the nature of the criminal charges against VW, such as providing “false” and “incomplete” information.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(3) and (b)(1), generally requires government records, such as the VW monitoring reports, to be disclosed to the public unless a statutory or other exemption applies.

The proposed research will principally focus on the 2020 FOIA litigation to gain access to the monitoring and compliance information being withheld by the Department of Justice and VW. It will require examining the factual background to the emissions scandal, the criminal charges, and the specific details of the VW plea agreement with the DOJ. The topic is both timely and important.

“The federal court denied cross motions by the parties for summary judgment on Feb. 3, 2021, and the matter is still pending. The resolution of the dispute has been delayed and impacted by COVID-19”.

Keywords: environment, criminal charges, transparency, climate change, diesel vehicles, dieselgate.

Introduction

After more than \$30 billion in fines, numerous indicted executives and a guilty plea in the United States, you wouldn't think there was much more to learn about the Volkswagen emissions scandal. Wrong . . . facets of the scandal are still coming to light.
Jack Ewing, New York Times, July 26, 2019.

A. Overview: "Dieselgate"

This article examines the Volkswagen⁽¹⁾ environmental testing scandal, the resulting criminal charges and plea agreement with the Department of Justice (DOJ), and the application of the Freedom of Information Act to gain access to information about the scandal⁽²⁾. In the U.S. the scandal became popularly known as "Dieselgate". Because the defective VW vehicles were sold worldwide, the subject is also important to the international community⁽³⁾.

Pursuant to the criminal plea agreement with the DOJ, the company paid the largest fine (\$2.8 billion)⁽⁴⁾ ever levied by the federal government against a car manufacturer⁽⁵⁾. In addition to the fine, the agreement required the company to submit to the implementation of an independent monitoring program designed to assure that similar violations do not occur in the future.

Because the media is currently seeking access to the monitoring reports through litigation based on the Freedom of Information Act, the story continues to attract international and national interest.

Volkswagen and its subsidiaries created a global business scandal when it

- (1) VW is the parent company of some of the most recognizable global automobile brands, including Audi, Porsche, Bentley, Bugatti, and Lamborghini.
- (2) The Security and Exchange Commission (SEC) recently filed charges against VW for the violation of federal securities laws. For nearly a decade, VW and its affiliates sold, through a syndicate of banks, billions of dollars of asset-backed securities and bonds to investors without disclosing the emission cheating scheme. VW allegedly gave false and misleading answers to various U.S. banks and investors in response to questions concerning the scheme. The complaint seeks permanent injunctions, disgorgement of ill-gotten gains, and civil penalties. *U.S. S.E.C. v. Volkswagen AG*, 3:19-cv-1391 (filed 07/08/2019).
- (3) The scandal in the U.S. cast a broad spotlight on diesel emission violations in Europe, the United Kingdom, China, South Korea, and elsewhere. In Germany, for example, testers found that all but three of 53 models tested violated NOx limits. Thus, VW was not the only manufacturer violating the law.
- (4) The DOJ described VW's deception as "one of the largest corporate fraud schemes in the history of the U.S." (<http://www.reuters.com/article/us-volkswagen-emissions-idUSKBN16G2ZR>). Louis Freeh, the former director of the F.B.I., said in a report that the fine should have been "somewhere between \$34 billion and \$68 billion."
- (5) This is not the first time that defeat devices have been used. In 1998, the Environmental Protection Agency and the Department of Justice announced a settlement against major manufacturers of heavy diesels sold in the U.S.

engineered diesel vehicles to intentionally avoid clean air testing standards⁽⁶⁾. The company was motivated by the desire to achieve global dominance in the diesel automotive market, including in the U.S.

The key to the business plan was successfully marketing “clean diesel” vehicles in the environmentally conscious U.S. market. When VW realized that it could not design a diesel engine to meet both strict emission standards and sales targets,⁽⁷⁾ the company decided to cheat. As a result, VW created an economic, public relations, and litigation nightmare for the company⁽⁸⁾ and its customers⁽⁹⁾.

VW pled guilty to participating in a conspiracy to defraud the U.S. by using a software program in diesel vehicles to circumvent air pollution testing standards, to conceal material facts from regulators, to destroy documents related to the work-around scheme, and to import vehicles by using false statements in violation of the law⁽¹⁰⁾.

The unraveling of the scandal began in 2014 when graduate students at West Virginia University’s Center for Alternative Fuels, Engines and Emissions published a study showing that two of Volkswagen’s “light diesel” models⁽¹¹⁾, marketed and sold as “clean diesels,” emitted significantly higher amounts of pollution during normal road operation than during emission testing.

Following the publication of the study, VW further undermined its reputation by falsely representing to the Environmental Protection Agency (EPA) and to the California Air Resources Board (CARB) that the identified emission discrepancies were caused by “technical issues and unexpected in-use [driving] conditions”. The company knew these representations were false.

(6) Numerous VW executives and employees have been individually prosecuted, but those stories are beyond the scope of this article. Civil consumer litigation cases against VW, such as for breach of warranty, breach of contract, the violation of consumer protection law, also are not examined. Over a thousand civil cases have been consolidated as part of multidistrict litigation. *In re: Volkswagen “Clean Diesel” Marketing, Sales Practice, and Product Liability Litigation*, 3:15-md-2672-CRB (N.D. Cal.)

(7) Trapping diesel pollutants to U.S. standards presented a strategic business tradeoff. VW could meet the environmental standards, but this would reduce vehicle fuel efficiency and add to their price. This would make the vehicles more costly and less economically competitive.

(8) VW’s market capitalization and stock crashed when the company was forced to pay criminal and civil penalties, to make customer reimbursements, to pay repair costs, and to incur other charges.

(9) Reuters.com, Sept. 24, 2019, reports that German prosecutors have accused VW’s CEO of holding-back market moving information on rigged emission tests, raising fresh problems for the company. Criminal charges of stock manipulation against company officials are also pending.

(10) See Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 Univ. of Penn. J. of Bus. Law 797 (2013).

(11) The students were testing the VW Jetta and the Passat.

Subsequent testing by the EPA and CARB showed that Volkswagen's explanations did not account for the disparate emissions levels. Unsatisfied with the company's explanations, the two agencies threatened to withhold certificates of conformity for VW's 2016 model year light diesel cars, without which the company could not sell the cars in the U.S. Under the threat, Volkswagen admitted that its light diesel models released between 2009 and 2015 contained a computer programming "defeat device"⁽¹²⁾.

The device was designed so that when it sensed, and only when it sensed, an emissions compliance test in progress, the software in the vehicle altered the engine's performance. In the test mode the vehicle emitted the permissible levels of nitrogen oxide⁽¹³⁾. But when operating under normal "in-use" road conditions, the vehicles emitted up to 40 times the EPA-compliant levels of nitrogen oxide.

In 2015, the EPA issued a Notice of Violation that the vehicles violated the Clean Air Act, which provide uniform, national standards covering a wide range of pollutants and sources⁽¹⁴⁾. It alleged that Volkswagen Group of America, Volkswagen AG, and Audi AG⁽¹⁵⁾ used "software defeat devices" in vehicles marketed and sold as "clean diesel" vehicles⁽¹⁶⁾.

By the end of 2015, the emerging scandal quickly became front page news. Hundreds of private lawsuits were filed against VW, most of them class actions. The onslaught of litigation was so great that the judicial panel on multidistrict litigation (JPML) transferred all pending defeat device-related cases to Judge Charles Breyer in the Northern District of California for coordinated or consolidated proceedings. VW agreed to spend as much as \$10 billion to buy back cars from hundreds of thousands of U.S. owners and pay an additional \$5,000 to \$10,000 in compensation. In 2016, the U.S. joined the growing chorus of litigation by filing a civil enforcement action against VW in Michigan alleging violations of the Clean Air Act⁽¹⁷⁾.

(12) Federal Regulations define a "defeat device" as "an auxiliary emission device . . . that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use." 40 C.F.R. § 86.1803-01.

(13) Vehicle emissions are an important source of nitrogen oxide (NOx). It has damaging effects on human health and the environment when it reacts with other compounds in the atmosphere to form ozone and smog.

(14) Clean Air Act, 42 U.S.C. § 7401 *et seq.*

(15) Hereinafter collectively referred to as Volkswagen.

(16) Estimates are that VW's wrongdoing may lead to many premature deaths in the United States and Europe. *See* Public Health Impacts of Excess NOx Emissions from Volkswagen Diesel Passenger Vehicles in Germany, 12 *Env'tl. Res. Ltrs.* (2017).

(17) *United States v. Volkswagen AG*, 2016 WL 674979 (E.D. Mich. Jan. 4, 2016)

VW clearly knew the “clean diesel” vehicles did not and could not perform as promised. But by using the software “cheat device,” VW unlawfully obtained Certificates of Conformity⁽¹⁸⁾ from the EPA and CARB for diesel vehicles marketed and sold in the U.S. As a result, the company sold some 11 million “clean diesel” vehicles worldwide during the period 2009-15, including some 600,000 in the U.S.

B. Criminal Charges

The decision to prosecute a corporation for violating federal law rests with the DOJ. In contrast to civil enforcement by the federal government, criminal prosecutions are reserved for particularly egregious violations, or for cases that combine environmental violations with dishonesty or malicious motives. The determination that the violations were “knowingly” committed is a prosecution threshold, which VW had crossed.

Corporate criminal liability is usually limited to offenses (1) committed by the corporation’s officers, employees, or agents⁽¹⁹⁾, (2) within the scope of their employment, and (3) for the benefit of the corporation⁽²⁰⁾. The test for whether the action falls within the scope of employment is whether the acts are motivated in whole or in part to benefit the corporation⁽²¹⁾.

The DOJ found that these requirements were met. Thus, criminal charges were filed by the DOJ against VW in early 2017. Three months later, VW pled guilty to conspiracy to commit wire fraud and to violate the Clean Air Act (CAA)⁽²²⁾, obstruction of justice⁽²³⁾, and entry of goods by false statements⁽²⁴⁾. A judgment was entered against the company in April 2017⁽²⁵⁾. Although a corporation cannot be jailed, corporations face many of the same consequences as individuals, including being fined, placed on probation and monitored, and ordered to pay restitution.

(18) The Clean Air Act directs the Administrator to prescribe emission standards for new vehicles. Each model year must carry a certificate of compliance establishing that it complies with the relevant standards. 42 U.S.C. § 7522(a)(1); 40 C.F.R. § 86.1848-01. The EPA sets the national ambient air quality standards, and the states develop state implementation plans (SIP) pursuant to a federal-state cooperative plan.

(19) See, e.g., Restatement (Third) of Agency, section 2.04 (2006).

(20) *United States v. Singh*, 518 F.3d 236, 249-50 (4th Cir. 2008).

(21) In large corporations, such as VW, where responsibility is frequently divided among various levels and administrative branches, determining whether high-level executives have the prerequisite level of knowledge and intent to establish their criminal guilt beyond a reasonable doubt may be difficult.

(22) 18 U.S.C. § 371.

(23) 18 U.S.C. § 1512.

(24) 18 U.S.C. § 542.

(25) *United States v. Volkswagen*, 16-cr-20394 (E.D. Mich. 2017)

1. Conspiracy Law (18 U.S.C. § 371)

U.S. law contains numerous criminal conspiracy statutes. Regardless of the specific conspiracy statute, every conspiracy involves an agreement between two or more persons to commit some other crime. A typical conspiracy occurs where an official or employee either instructs another to commit the offense, aids and abets another, or takes some action after the fact to conceal the commission of the offense⁽²⁶⁾.

The commission of the substantive offense, such as the violation of the CAA, and the conspiracy to commit it are two separate and distinct offenses. Criminal conspiracies often are considered more reprehensible than the substantive violation to which it is devoted. As the Supreme Court has stated: “A collective criminal agreement (a partnership in crime) presents a greater potential threat to the public than individual delicts. «Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality»⁽²⁷⁾. Thus, the conspiracy to commit a crime is frequently treated as more dangerous to society than the underlying end to which it is directed.

The CAA makes criminal “knowingly” making false representations to regulators⁽²⁸⁾. The statute also makes it illegal for importers and manufacturers to import or manufacture any motor vehicle that does not meet the emissions standards, or to bypass emission control testing equipment⁽²⁹⁾.

The statute charged in the VW case prohibits a conspiracy to violate the CAA. It encompasses any conspiracy “for the purpose of impairing, obstructing, or defeating the lawful function of government”⁽³⁰⁾. Section 371 provides: “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or an agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each” shall be liable⁽³¹⁾.

The “offense clause” and “defraud clause” in the conspiracy statute describe different criminal offenses. The latter is designed to protect the integrity of its agencies, programs and policies. It also applies to financial or property loss,

(26) See, e.g., *United States v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010) (finding an automobile dealership responsible for the actions of its employees and agents for violating the criminal provisions of the federal Clean Water Act.)

(27) *Iannelli v. United States*, 420 U.S. 770 (1975).

(28) 42 U.S.C. § 7413(c)(2)(A).

(29) 42 U.S.C. § 7522.

(30) *Tanner v. United States*, 483 U.S. 107 (1987).

(31) Conspiracy to commit offense or to defraud the United States, 18 U.S.C. § 371.

but the government is not required to prove that an actual loss occurred⁽³²⁾. Therefore, if conspirators have engaged in dishonest practices in connection with a program administered by the EPA or another agency, the action would fall under the defraud clause.

2. Obstruction of Justice by Destruction of Evidence (18 U.S.C. § 1512)

Numerous federal laws prohibit the obstruction of justice. The overarching principle of the law is that the offending action impedes the lawful functioning of a government agency. VW was charged with violating Section 1512(c), which was enacted by Congress as part of an effort to stop corporate wrongdoing by prohibiting the destruction or concealment of evidence.

The statute specifically provides “whoever corruptly (1) alters, destroys, mutilates, or conceals a record, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding, or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so” is subject to prosecution. The offending conduct must have a causal link or connection to the “official proceeding” in order to be actionable.

The word “corruptly” connotes wrongfulness or impropriety⁽³³⁾. Intentionally providing false or misleading written information to the government falls within this section. Section 1512(c)(2) requires the government to prove that the defendant had notice of the official proceeding and acted with the intent to obstruct, influence, or impede the proceeding⁽³⁴⁾. This requirement was met in the VW case.

Section 1512(c) may be a trap for the unwary. It cautions businesses, as well as others, to establish documentation policies. The policies should specify what should be documented, retained, and destroyed to avoid running afoul of this section. In certain cases, the destruction of data can be a felony.

For example, the company Arthur Anderson, no longer exists as a “big five” accounting firm, because it directed Enron-related documents to be destroyed and subsequently was found guilty of obstruction of justice under this section⁽³⁵⁾.

(32) *Hammerschmidt v. United States*, 265 U.S. 182 (1924).

(33) *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996).

(34) *United States v. Khan*, 729 Fed. Appx. 236 (4th Cir. 2018), *cert. denied*, 139 S.Ct. 228 (2018).

(35) *Arthur Anderson, LLP v. United States*, 544 U.S. 696 (2005). The Court reversed the criminal conviction based on defective jury instructions on consciousness of criminal wrongdoing under 18 U.S.C. § 1512(b).

3. Importing Goods by Means of False Statements (18 U.S.C § 542)

Federal agencies rely upon companies to provide truthful information in order to make informed decisions. Consequently, numerous federal statutes deal with false statements. Section 542 prohibits knowingly and willingly providing false statements, concealment, or false documentation.

Its purpose is to preserve the integrity of the process by which foreign goods are imported into the U.S. by prohibiting falsely introducing or attempting to introduce imported merchandise into U.S. commerce⁽³⁶⁾. It “requires the proof of five elements: the statement, falsity, materiality, specific intent, and agency jurisdiction. A false statement is deemed material if it affects or facilitates the importation process⁽³⁷⁾. No requirement exists that the official or decision maker be deceived or relied on the false statement.

Dieselgate was not the case of an unsuspecting manufacturer and importer of automobiles. The false statements made by VW fell within three categories: 1) those made in thirty-one investor reports that touted the “environmentally friendly” vehicles; 2) those made in press releases; and, 3) those made on the compliance label affixed to the non-complying vehicles.

C. The Criminal Plea Agreement and Monitor’s Report

On March 17, 2017, the U.S. and VW entered into a plea agreement to resolve the criminal charges⁽³⁸⁾. VW also signed a civil consent decree with the state of California for penalties and injunctive relief related to the emissions scandal⁽³⁹⁾.

The plea agreement requires the monitor to assess, oversee, and monitor Volkswagen’s compliance with the terms of the agreement, and to “evaluate [the] implementation and enforcement of [the company’s] compliance and ethics program for the purpose of preventing future criminal fraud and environmental violations by the Company and its affiliates . . .”.

(36) *Id.*

(37) *See United States v. Bagnall*, 907 F.2d 432 (3d Cir. 1990).

(38) *United States v. Volkswagen AG*, 2-16-cr-20394 (E.D. Mich.)

(39) *In re: Volkswagen “Clean Diesel” Marketing, Sales Practice, and Product Liability Litigation*, 3:15-md-2672-CRB (N.D. Cal.). Larry D. Thompson is the Independent Compliance Monitor (ICM) in the criminal case, and the Independent Compliance Auditor (ICA) in the civil case. He has different responsibilities and reporting obligations, however. The Auditor reports are intended to inform the government and the public about the ICA’s understanding of actions taken by VW to address the specific, enumerated obligations and tasks outlined in the civil consent decrees. In contrast, the plea agreement reports include a broader evaluation of the “effectiveness” of the overall compliance program of VW and its subsidiaries and affiliates. Thus, the plea agreement reports are different from the auditor reports.

The mandate also includes “an assessment of the [VW] Board of Management’s and senior management’s commitment to, and effective implementation of, the Company’s corporate compliance and ethics program”. At the end of his three-year term, the monitor is required to certify whether the ethics and compliance program “is reasonably designed and implemented to prevent and detect violations of the anti-fraud and environmental laws.”

The written report requires “setting forth the Monitor’s assessment and, if necessary, making recommendations reasonably designed to improve the effectiveness of the Company’s program for ensuring compliance with anti-fraud and environmental laws.” The agreement also provides for additional regular reports from the monitor to DOJ and Volkswagen. The first report was submitted on March 30, 2018. The final report is due in 2020.

The annual reports contemplate “recommendations” that are “reasonably designed to improve the effectiveness of [VW’s] program for ensuring compliance with anti-fraud and environmental laws”⁽⁴⁰⁾. The focus is on assessing the design, implementation, and effectiveness of compliance, and the commitment of VW’s senior leadership to compliance with environmental laws and to the adoption of anti-fraud measures.

The company is required to disclose “all factual information not protected by a valid claim of attorney-client privilege, or attorney work product doctrine, or by the applicable law and regulations”. The DOJ may share, in its “sole discretion,” evidence with other government agencies.

The agreement contains the following limitation on disclosure: “The reports will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports may discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the monitor.

For these reasons, among others, the reports and contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the offices⁽⁴¹⁾ determine in their

(40) The distinction between the annual reports under the criminal plea agreement reports and civil consent decree reports is also reflected in the way the documents contemplate “findings” and “recommendations”. The consent decrees require that the annual reports include “findings that identify any non-compliance by the Volkswagen Parties with the requirements of Section V (Injunctive Relief for the Volkswagen Parties)” and “recommend[at]ions, as applicable, [for] actions for the Volkswagen Parties to take to achieve compliance.”

(41) Offices includes various governmental divisions (the Criminal Division, the U.S. Attorney’s office, the Environment and Natural Resources Division, and the Deputy Attorney General) of the DOJ. Plea Agreement, Rule 11, p.2.

sole discretion that it would be in the furtherance of the officers' discharge of their duties and responsibilities or *otherwise required by law* (emphasis added)⁽⁴²⁾.

D. The Freedom of Information Act (5 U.S.C. § 552)

The public has a vital interest in an open and transparent government⁽⁴³⁾. James Madison, the fourth president of the U.S., wisely counseled: «A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both». Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives⁽⁴⁴⁾. In the early 1900s, Supreme Court Justice Louis Brandeis also captured the sentiment of making the actions of government officials more visible to the public as a powerful way of stamping out corruption when he penned the famous saying, “sunlight is said to be the best disinfectant”⁽⁴⁵⁾.

As the government continues to collect vast amounts of information from the public, a tendency exists for it to shield the information behind a wall of secrecy⁽⁴⁶⁾. In a free society, openness and transparency must be preferred. Yet, public disclosure of information in some cases may harm the very citizens or companies that the government wants to protect. Therefore, a measured and flexible system to oversight and disclosure is needed.

The Freedom of Information Act (FOIA) is the principal statute that strikes the balance between the public demand for disclosure of federal agency records and legitimate limits⁽⁴⁷⁾. The balance it strikes between openness and secrecy has provided a useful model that has been copied by other countries⁽⁴⁸⁾.

In 2018, the plaintiffs filed a FOIA request with the DOJ for documents

(42) Plea Agreement, Exh. 3-14.

(43) Many countries have adopted freedom of information acts to facilitate access to government records. A few countries have issued decrees or used constitutional provisions to provide public access. Yet, the culture of secrecy in many countries remains strong, and thus a distinction exists between “law on the books” and “law in reality.”

(44) Letter from James Madison to W.T. Barry, Lieutenant Governor of Kentucky (Aug. 4, 1822).

(45) “Other People’s Money: and How the Bankers Use It,” (New York: Frederick A. Stokes Co., 1914), at 92.

(46) The continuing struggle between Congress and President Donald Trump over access to records and testimony illustrates this general tendency. Trump has consistently refused to allow executive branch personnel to testify or to release documents allowing oversight by Congress or the public. Trump has not been entirely successful, because FOIA has allowed the public to partially breach this wall of secrecy.

(47) 5 U.S.C. § 552 (a). FOIA applies only to executive branch agencies.

(48) David Banisar, The Freedom of Information Around the World 2006: A Global Survey Freedom of Access to Government Information Laws, SSRN Electronic Journal, September 2006.

related to the monitor's report. More specifically they requested: 1) A copy of all reports submitted to the Justice Department by the monitor under the criminal plea agreement and the independent compliance auditor; and, 2) A copy of all "factual evidence" presented by the law firm Jones Day to the Justice Department⁽⁴⁹⁾.

The DOJ failed to release the complete monitor's report, and the plaintiffs sued to get the above information in 2019⁽⁵⁰⁾. VW intervened in the litigation on its own behalf. The government maintains that the information it withheld was proper pursuant to the FOIA exceptions, whereas the plaintiffs disagree.

The FOIA statute creates the public right of access to executive branch records, subject to limited exceptions. When the statute was enacted in 1966, it reversed the previously held presumption that federal agency records were available to the public only on a "need-to-know" basis, which effectively constrained public access⁽⁵¹⁾. Congress jettisoned this obstacle when it enacted FOIA. Today, the law no longer requires the requester of government records to state how or why the request is made.

Many requests for documents and records are voluntarily met. The public's right to gain information held by a federal agency may be secured through litigation, however. Lawsuits for access to records, which are filed in federal district court, are typically resolved on cross motions for summary judgment⁽⁵²⁾. Motions may be granted if they contain detailed specificity, rather than simply conclusionary or boilerplate statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.

FOIA has gone through numerous changes and improvements since it was

(49) The U.S. law firm, Jones Day, was hired by VW to conduct an independent probe into the roots of the diesel-emissions scandal, review documents, and determine the responsibility for the misconduct. The report and its findings were reported to the DOJ and VW's supervisory board. This report may be covered by the FOIA work product doctrine. The law creates a rebuttable presumption that an adverse party generally may not discover or compel disclosure of oral or written materials prepared by or for an attorney in the course of legal representation, including in preparation for litigation. An adverse party may discover or compel disclosure, however, upon showing a "substantial need" or "undue hardship." Federal Rules of Civil Procedure, Rule 26(b)(3).

(50) *New York Times v. United States Department of Justice and Volkswagen*, 19-cv-1424 (S.D.N.Y. 2019).

(51) Congress enacted FOIA to overhaul the public disclosure section of the Administrative Procedure Act (5 U.S.C. § 1002), because the APA section had become more of a withholding statute than a disclosure statute.

(52) Under the Federal Rule of Civil Procedure 56, summary judgment shall be granted "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

enacted⁽⁵³⁾. The general purpose of FOIA continues to be the same, however. In *NLRB v. Fawish*⁽⁵⁴⁾, the Supreme Court explained that FOIA's basic purpose is to ensure an informed citizenry, which is vital to a functioning democracy. The statute promotes government accountability and operates as a safeguard against corruption by public officials. The statute continues to serve this public purpose by revealing fraud, waste, and abuse in the federal government and private sector.

The organization of FOIA is straightforward. Subsection (a) places a general obligation on the federal agency to make information available to the public and sets out specific modes of disclosure for certain classes of information⁽⁵⁵⁾. Subsection (b), which lists the statutory exemptions, simply provides that some records may not be subject to subsection (a) disclosure. Subsection (b) limits the obligation to disclose, but it does not foreclose discretionary agency disclosure⁽⁵⁶⁾.

Although FOIA litigation is often in the news, many disclosure issues are not controversial, such as requiring substantive agency rules and statements of public policy to be published in the Federal Register⁽⁵⁷⁾.

E. The Reasonably Foreseeable Harm Test

In 2016, Congress codified the “foreseeable harm” test that President Obama established by executive order⁽⁵⁸⁾. In part, Congress acted out of the concern that agencies were overusing the FOIA discretionary exemptions. Unless otherwise prohibited by law, FOIA now requires an agency to release records or materials, even though a request fits within an exemption, if the release would not harm an exemption-protected interest⁽⁵⁹⁾.

This “presumption of openness” means that an agency is required to specifically explain how the release would harm the protected interest. The allocation of

(53) 1974 Pub. L. No. 93-502, 88 Stat. 1561. 1976 Pub. L. No. 94-409, 90 Stat. 1241. 1978, 5 U.S.C. § 552 (a)(4)(F). 1984 Pub. L. No. 98-620, 98 Stat. 3335. 1986 Pub. L. No. 99-570, 100 Stat. 3207. 1996 Pub. L. No. 104-231, 110 Stat. 3048. 2003 Pub. L. No. 107-306, 116 Stat. 2383. 2007 Pub. L. No. 110-175, 121 Stat. 2524. 2009 Pub. L. No. 111-83, 123 Stat. 2142. 2016 Pub. L. No. 114-185, 130 Stat. 538.

(54) *NARA v. Fawish*, 541 U.S. 157, 171-71 (2004).

(55) 5 U.S.C. § 552(a).

(56) *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

(57) 5 U.S.C. § 552(a)(1).

(58) Memorandum on Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

(59) 5 U.S.C. § 552(a)(8)(A)(i)(I) establishes a “foreseeable harm” standard. An agency shall withhold information under this section only if the agency reasonably foresees that the disclosure would harm an interest protected by an exemption.

the burden of proof to justify the withholding is based on the superior access to the information. The government or submitter of the information knows what is being withheld, and therefore is in the best position to argue for the application of the exemption and the reason for refusing to disclose.

Should the burden be on the requester, the general purpose of the statute might easily be thwarted. This allocation of the burden of proof imposes an independent and meaningful burden on the agency.

Eric Holder, the attorney general at the time, explained that to realize the presumption of openness an agency should not withhold information simply because it could do so legally, or because it could demonstrate that the records fell within the technical or arguable scope of an exemption.

Rather, the DOJ would defend the denial of a FOIA request by an agency only if (1) the agency reasonably foresaw that the disclosure would harm an interest protected by one of the statutory exemptions, or (2) the disclosure was prohibited by law. Congress agreed with this approach when it adopted the foreseeable harm requirement in 2016⁽⁶⁰⁾.

As one might predict, the ability of federal agencies to withhold documents pursuant to the exemptions has resulted in a substantial body of law⁽⁶¹⁾. Much of the litigation has focused on the exemptions involving personal privacy, law enforcement interests, and national security. The Supreme Court and lower courts have issued numerous FOIA opinions⁽⁶²⁾.

Care must be exercised in applying this extensive body of law. Since 2016, FOIA requires that an agency release a record, even if it falls within the exemption, if releasing the record would not reasonably harm an exemption-based interest, and if its disclosure is not prohibited by law⁽⁶³⁾.

In enacting the FIOA Improvement Act, Congress' intent was to restrict agency discretion to withhold documents by enacting the "foreseeable harm" test⁽⁶⁴⁾. Although only a few district courts have addressed its application, some conclusions are possible.

(60) 5 U.S.C. § 552 (a)(8)(A)(i).

(61) 5 U.S.C. § 552(a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."

(62) See generally *Milner v. Dep't of the Navy*, 131 S.Ct. 1259 (2011).

(63) *Judicial Watch v. DOJ*, 2019 WL 4644029, at 3 (D.D.C. Sept. 24, 2019).

(64) *Center for Investigating Reporting v. U.S. Dep't Labor*, 2019 WL 6716352, at 6-7; *Am. Small Bus. League v. U.S. Dep't of Defense*, 2019 WL 6255353, at 7-8.

First, FIOA now imposes an independent statutory limitation on an agency's discretion to withhold documents even if they fall within an exemption. Second, an agency must identify the specific, identifiable harm that would ensue or be connected to the disclosure of the materials proposed to be withheld. Third, when grouping together like records for withholding, an agency must do more than providing merely boilerplate and generic statements of harm⁽⁶⁵⁾.

Fourth, a requester may consider it strategically advantageous to initially argue for the application of the foreseeable harm test rather than to argue about the scope and application of agency exemptions.

F. The Freedom of Information Act (FOIA) Exemptions

FOIA subsection (b) establishes nine categorical exemptions⁽⁶⁶⁾. The traditional view is the exceptions are narrowly construed based on the policy of the statute that favors disclosure. As a result, the burden rests upon the government, or the opponent to disclosure, to demonstrate that an exemption applies to the documents or records it seeks to withhold⁽⁶⁷⁾. The VW case raises the possible application of several specific exemptions.

1. Exemption 4

Exemption 4 is important to companies that submit proprietary or confidential information to government agencies. It protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential"⁽⁶⁸⁾. This exemption frequently is argued as the basis for resisting the release of information by an agency in response to a FOIA request.

Exemption 4 protects information from being disclosed by the government and by the submitters of information to the government. It applies to two distinct categories of information: (1) trade secrets⁽⁶⁹⁾; and (2) information that

(65) *Id.* at 4-5.

(66) 5 U.S.C. § 552(b).

(67) *Hamdan v. U.S. Department of Justice*, 797 F.3d 759, 772 (9th Cir. 2015).

(68) 5 U.S.C. § 552(b)(4).

(69) Courts have long recognized that the submitters of information covered by the Trade Secrets Act (18 U.S.C. § 1905) have a statutory right to confidentiality and protection outside FOIA. *Public Citizen Health v. FDA*, 704 F.2d 1280, 1284 (D.C.Cir. 1983) (finding a trade secret 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". Trade secret protection has been denied, however, for general information concerning a product's physical or performance characteristics or product formula when the release would not reveal the actual formula. Thus, for example, a car's airbag characteristics that are related to the end-product (such as the features of the air bag and how it performs) do not qualify as trade secrets.

is (a) commercial or financial⁽⁷⁰⁾, and (b) obtained from a person⁽⁷¹⁾, and (c) privileged and confidential. If the information does not fall within the trade secret category, it may fit within category (2), which is a potentially larger category of exempt information.

Determining whether the information is “confidential” has typically been the most challenging task for businesses seeking the exemption, because Congress did not define the word “confidential”. Over the years, the courts have applied various tests to determine its meaning.

Until recently, *National Parks & Conservation Association v. Morton* was the leading case on the statutory meaning of “confidential”⁽⁷²⁾. A two-part test existed for determining whether materials were “confidential”: If the disclosure would 1) impair the government’s ability to obtain the necessary information in the future, or 2) cause “substantial harm” to the competitive position of the submitter of the information. Information voluntarily submitted to the government was categorically protected as confidential providing it was not customarily disclosed to the public. The exemption was considered waived, however, when the information was commonly disclosed by the submitter.

In 2019, the Supreme Court swept away forty years of precedent in *Food Marketing Institute v. Argus Leader Media*⁽⁷³⁾. In doing so, the Court broadened the number of cases that are potentially exempt as “confidential”. It is important to realize, however, that this judicial expansion is constrained by the foreseeable harm test, which requires the government to meet its burden of showing that foreseeable harm would result from the release of the information⁽⁷⁴⁾.

The Food Marketing case involved a FOIA data request to the United States Department of Agriculture (USDA) by a South Dakota newspaper for grocery store information collected from transactions involving debit cards issued

(70) See, e.g., Department of Treasury, Freedom of Information Act Handbook (July 2010) (providing examples of commercial and financial records protected by Exemption 4.

(71) Submitting companies constitute “persons” because the definition includes corporations. 5 U.S.C. § 552(b)(4).

(72) *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

(73) *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019) (finding that SNAP retailers do not customarily disclose store-level SNAP data, and the Department of Agriculture had a history of promising retailers that it would keep store-level SNAP data confidential). The dissent argued that this statutory interpretation of the word “confidential” runs counter to the purpose of FOIA by incentivizing private entities and agencies to keep information private that would otherwise serve a public benefit. The majority was not persuaded, reasoning that it could not arbitrarily constrict Exemption 4 by adding limitations that are at odds with the statutory text.

(74) 5 U.S.C. § 552(a)(8)(A)(i)-(ii).

to recipients of the federal Supplemental Nutrition Assistance Program. The newspaper was investigating possible fraud in the administration of the program.

The USDA declined to disclose the data, and the plaintiff newspaper sued. The lower courts ordered the disclosure, because the Food Marketing Institute could not show the likelihood of substantial harm from the disclosure. Thus, applying the *National Parks* test, the lower courts held the data could not be withheld as “confidential.”

The *Food Marketing* decision overruled the *National Parks* test⁽⁷⁵⁾. The Supreme Court focused solely on the dictionary definition of the word “confidential” appearing in the statute. Because the statute did not define its meaning, Justice Neil Gorsuch, writing for the majority, gave meaning to the word “confidential” by relying on contemporary dictionaries⁽⁷⁶⁾.

He reasoned that the text or words used in the statute controlled, and not the use of supplemental extrinsic sources of information, such as the legislative history or an assumption about the legal drafter’s desires, that was the rationale in *National Parks*.

As a result of *Food Marketing*, if a private-sector submitter of information to an agency shows their efforts to keep the information private and receives assurance by the agency that the information will not be disclosed, the materials will be treated as “confidential”. Under the VW plea agreement, the company treated the information in the monitoring report as private.

Specifically, “VW would not release [the information] . . . publicly, given the sensitivity of this business information.” In addition, VW provided the information under assurances of privacy both from the government and from the monitor. The plea agreement expressly provides that the monitor’s report, and thus any commercial information contained in the report, would be kept confidential⁽⁷⁷⁾.

(75) The *Food Marketing* decision leaves several important questions unanswered, which will have to be sorted out in future litigation. First, whether it is necessary for the government to provide the assurance? Second, if required, must the assurance be given at the time the information is submitted to the agency? Third, if required, whether the assurance can be implied, or must be expressed?

(76) In the 1930s, the scholar Fredrick J. de Slooveère articulated what is today referred to as the contemporary textualist viewpoint: “The demand for certainty and predictability requires an objective basis for interpretation which can be obtained only by faithful reliance upon the natural or reasonable meanings of language.” Fredrick J. de Slooveère, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. Rev. 538, 541 (1934).

(77) 1:19-cv-01424-KPF, Document27, Filed10/18/19, Page27. See Plea Agreement 15.A & Ex. 3 | 23; Blackwell Decl. | 22.

As a general proposition, *Food Marketing* expands the meaning of “confidential,” and thereby makes it potentially easier for private records to be treated as exempt from disclosure. This expansion is apt to encourage businesses in government-regulated industries, who are often asked or required to submit information, to seek or demand assurances from the agencies that the information will not be disclosed. Although the effect of the decision will vary by each agency, the decision potentially reduces access to information available to the public⁽⁷⁸⁾. Media organizations, citizen watchdogs, and other businesses may find it more challenging to get their FOIA requests met by federal agencies without litigation.

The meaning of “commercial” in Exemption 4 has also proved troublesome. Courts have expressed different definitions of what is included. At the core, “commercial” includes records that reveal “basic commercial operations, such as sales statistics, profits and losses, inventories, or relate to the income-producing aspects of the business”⁽⁷⁹⁾. The information must have some intrinsic commercial value and serve a commercial or financial function that would be jeopardized if released.

The type or nature of the entity submitting the information does not control. For example, information about the recruitment efforts of a labor union may be exempt from disclosure even though labor unions do not have a profit motive as their primary aim. Similarly, the commercial status of the submitter is not dispositive.

In *100Reporters LLC v. United States Department of Justice*⁽⁸⁰⁾, a non-profit organization dedicated to investigative journalism brought a FOIA action to compel the issuance of records, which were generated by an independent compliance monitoring program and being withheld by the DOJ.

The Siemens company pled guilty to violating the Foreign Corrupt Practices Act regarding internal controls and the falsification of records. Under the plea agreement with the DOJ, an independent monitor was appointed to ensure that the company implemented effective compliance, anti-bribery and bookkeeping systems.

After reviewing the monitor’s reports, the court found that the DOJ’s redactions to the released reports were overbroad, because they covered materials that

(78) In the wake of the Supreme Court’s decision in *Argus Leader*, the word “confidential” used in Exemption 4 must be given its “ordinary” meaning.

(79) *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C.Cir. 1983).

(80) *100Reporters LLC v. U.S. Dep’t of Justice*, 316 F.Supp. 3d 124 (D.D.C. 2018).

were not commercial. They consisted mostly of general descriptions of Siemens' business activities. The court found that the monitor's process and methodology were not "instrumental" to the company's commercial interests.

The report also contained subsections unrelated to its commercial operations. Only those parts of the report related to the income producing aspects of the business operations qualified as commercial, and thus were covered by the exemption.

In the VW case, the monitor's report is not categorically exempt. The plea agreement gives the government the power to release it in the DOJ's "sole discretion"⁽⁸¹⁾. When the government retains such discretion, arguably no contractual assurance exists to support the proposition that the information will remain confidential.

Moreover, much of the information identified by VW and included in the monitor's report arguably does not qualify as commercial or financial. This includes such information as "findings, observations, and recommendations about environmental compliance, initiatives, employee discipline, a whistleblower initiative, and VW's code of conduct."

Finally, in understanding the VW case and the application of FOIA, it is important to realize that the FOIA Improvement Act of 2016 also added a provision on severability. "An agency shall . . . (i) consider whether partial disclosure of information is possible whenever the agency determines that full disclosure of a requested record is not possible . . . (ii) take reasonable steps necessary to segregate and release nonexempt information"⁽⁸²⁾.

In the recent case, *Center for Investigating Reporting v. U.S. Customs and Border Protection* (CPB)⁽⁸³⁾, the district court held that the foreseeable harm standard, based on the Improvement Act of 2016, applies to Exemption 4 cases. The FIOA request sought records related to President Trump's intention to build an updated wall on the Mexican border.

Among other claims, the government justified "redactions and withholdings" based on Exemption 4. The court rejected the government's claim of confidentiality. The government had not established that the information withheld fell within Exemption 4, and *a fortiori* failed to satisfy the "heightened" foreseeable harm requirement.

(81) Plea Agreement, Exh. 3-14.

(82) 5 U.S.C. § 552(a)(8)(A)(i)-(ii).

(83) *Center for Investigating Reporting v. U.S. Customs & Border Protection*, civil action 1:18-2901 (filed D.D.C. Dec. 11, 2018).

2. Exemption 5

The Supreme Court has made clear that Exemption 5 coverage is broad, and it encompasses both statutory privileges and those recognized by case law⁽⁸⁴⁾. The three most commonly asserted privileges from disclosure under this exemption are the “deliberative process privilege”⁽⁸⁵⁾, the attorney work-product privilege⁽⁸⁶⁾, and the attorney-client privilege⁽⁸⁷⁾.

The deliberative process exemption protects from disclosure “inter-agency or inter-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency”⁽⁸⁸⁾. The principle underlying the exemption is that the sound agency decision making is accomplished by encouraging the full and candid inter-agency discussion and shielding from disclosure certain communications. This exemption has been called the most used agency privilege and the source of most concern regarding overuse⁽⁸⁹⁾.

In administering the exemption, the first question is whether the requested record is classified as an “inter-agency or inter-agency memorandum”. Courts have construed the language “not be available by law” to exempt from disclosure those documents, and only those documents, that are normally privileged in the civil discovery context⁽⁹⁰⁾. Thus, in order to justify the nondisclosure, the agency must show that it seeks to withhold materials that would be generally protected in civil discovery.

(84) See *United States v. Weber Aircraft*, 465 U.S. 792, 800 (1984) (holding that the standard is whether the documents would be routinely disclosed in civil discovery principles).

(85) Some courts refer to this as the “executive privilege”. See, e.g., *Marriott v. U.S.*, 437 F.3d 1302, 1305 (Fed. Cir. 2006). The general purpose of the deliberative process privilege is to prevent injury to the quality of agency decision-making by 1) encouraging open, frank discussions on matters of policy between subordinates and superiors, 2) protecting against premature disclosure of proposed policies, and 3) avoiding public confusion of rationales that are not the factual basis for agency action.

(86) The attorney work-product privilege protects documents and memoranda prepared by an attorney in prelitigation and litigation counseling. The privilege has been incorporated into the Federal Rules of Civil procedure (Rule 26). Unlike the attorney-client privilege, it is not limited to communications between the attorney and the client.

(87) Confidential communications between an attorney and client relating to a legal matter for which the client has sought legal advice are protected. Unlike the work-product privilege, the privilege is not limited to litigation. The privilege may not extend to documents incorporated into an agency’s official policy.

(88) 5 U.S.C. § 552(b)(5).

(89) H.R. Rep. No. 114-391, at 10 (Some have taken to calling it the “withhold-it-because-you-want-to” exemption).

(90) *Zander v. DOJ*, 885 F. Supp. 2d 1, 15 (D.D.C. 2012) (holding that the attorney-client privilege should be given the same meaning in both the discovery and FOIA context to ensure that FOIA is not used as a supplement to civil discovery.)

The courts have traditionally required two factors to be met for the deliberative process privilege to apply. First, the communication must be pre-decisional, which means the communication must be prior to the agency action⁽⁹¹⁾. As a matter of policy, this requirement is intended to avoid public confusion that might result from disclosing information that was not the actual reason for the agency's action⁽⁹²⁾. A document is pre-decisional if it was prepared to assist an agency decision maker in arriving at a decision rather than supporting a decision already made.

Second, in addition to being pre-decisional, the material must be "deliberative". The material must be a direct part of the deliberative process making recommendations or expressing opinions on legal or policy matters. This essentially means that the communication must be intended to assist or facilitate the development of the agency's final position on the relevant issue. Fact-based information is not covered by the deliberative process privilege when the information is generally available for discovery⁽⁹³⁾.

Thus, factual materials must be separated from the deliberative materials. Such materials may fall under the deliberative exemption, however, when they are so thoroughly integrated with the materials to expose or cause harms to the agency's deliberations.

The VW monitor's report arguably does not fit within the deliberative process privilege. Non-government parties have their materials protected only when they operate as an arm of the agency to assist in decision making or to be a proxy for the agency⁽⁹⁴⁾. On the one hand, the monitor provides recommendations and advice to the DOJ to assist in determining compliance with the plea agreement. On the other hand, the monitor has no law enforcement or regulatory authority, and he was named and paid for by VW⁽⁹⁵⁾. Thus, the monitor has an independent duty to VW.

These considerations make it arguable that Exemption 5 does not apply. Moreover, it is difficult to see that the report satisfies the pre-decisional and

(91) The Supreme Court generally has held that post-decisional documents do not fall within Exemption 5. *NLRB v. Sears*, 421 U.S. 132, 153-54 (1975).

(92) *AFGE v. HHS*, 63 F. Supp. 2d 104 (D. Mass. 1999).

(93) *See, e.g., EPA v. Mink*, 410 U.S. 73, 91 (1973) (refusing to extend the deliberative process privilege to factual material otherwise available through discovery).

(94) *Welby, Brady, & Greenblatt v. U.S. Dep't of Human & Health Services*, 2016 WL 1718263 (S.D.N.Y. 2016).

(95) *But see, Fox News Network v. United States Dep't Treasury*, 739 F. Supp. 2d 515 (S.D.N.Y. 2010) (determining the third party "functioned enough like" the federal agency's own personnel to justify calling their communications inter-agency).

deliberative requirements prior to there being a reasonable possibility of additional enforcement action against VW for violating the plea agreement⁽⁹⁶⁾. In any event, the government has the responsibility to identify the deliberative process privilege, not the requester. In addition, the government has the burden of proof to show that “foreseeable harm” would result from the disclosure.

3. Exemptions 6 & 7(C)

Exemptions 6 and 7(C) protect personal privacy interests. When significant privacy concerns are present, the person requesting the information is required to establish a sufficient reason for the disclosure, and absent such a reason, the information should be protected from disclosure⁽⁹⁷⁾.

Exemption 6 operates to protect personnel and similar files⁽⁹⁸⁾ when disclosure would constitute a *clearly unwarranted invasion* of personal privacy⁽⁹⁹⁾, whereas 7(C) protects against the disclosure of information compiled for law enforcement purposes and the disclosure could *reasonably be expected* to invade “personal” privacy⁽¹⁰⁰⁾.

Exemption 7(C) operates as the law enforcement counterpart to non-law enforcement privacy protection afforded by Exemption 6. Despite the difference between the two exemptions, the privacy-interest inquiry is essentially the same. The fundamental difference between the exemptions lies in the magnitude or strength of the public interest needed to override the privacy interest⁽¹⁰¹⁾.

The application of both exemptions requires a balancing of the public interest in disclosure against the individual’s interest in keeping personal facts private. If no significant privacy interest is implicated, disclosure is warranted. The public interest is determined by the degree to which disclosure furthers the core purpose of FOIA. One area of common recurrence is an individual who provides law enforcement agencies with reports of illegal conduct. The courts often have recognized that a person’s privacy interest exists in such cases, especially when the fear a reprisal exists.

In *FCC v. AT&T*, the Supreme Court considered whether the word “personal”

(96) See *Judge Rotenberg Educational Center v. U.S. FDA*, 376 F. Supp.3d 47 (2019).

(97) See *NRA v. Favish*, 541 U.S. 157, 172 (2004).

(98) *U.S. Dep’t of State v. Washington Post*, 456 U.S. 595 (1982) (finding that Congress intended the words “similar file” to be interpreted broadly, not narrowly).

(99) 5 U.S.C. § 552(b)(6).

(100) 5 U.S.C. § 552(b)(7)(C).

(101) Exemption 7(C) allows the government greater latitude to withhold information than Exemption 6.

encompasses and protects corporations⁽¹⁰²⁾. As a matter of statutory construction, the Court limited the protection to individuals, and not to corporations as artificial persons. “When it comes to the word ‘personal,’ there is little to support the notion that it denotes corporations”.

4. Exemption 7(A)

Exemption 7(A) recognizes that an agency has a legitimate need to keep certain records confidential during an investigation for law enforcement purposes, such as the statements of confidential informants or other surveillance materials. The statute authorizes an agency to withhold “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings”⁽¹⁰³⁾.

The exemption may be invoked by the agency so long as the law enforcement proceeding is pending, prospective, or preventative. Once the enforcement proceeding is closed, the exemption may still apply providing some “related” criminal or civil enforcement proceeding is still pending.

But the Supreme Court has held that Exemption 7(A) is not a tool to indefinitely protect materials from being publicly disclosed simply because the materials are part of an investigatory file⁽¹⁰⁴⁾.

The release of the records or information also must be reasonably expected to cause some articulable harm to the enforcement proceeding. This determination necessitates a predictive assessment as to possible harm. The release of information, for example, that would aid terrorists in planning an attack would satisfy the articulable harm requirement as a risk to national security⁽¹⁰⁵⁾.

Courts have also found that an articulable harm may be established when the disclosure of the materials would prevent the agency from obtaining future investigative information⁽¹⁰⁶⁾.

In the VW case, it is not clear what the articulable harm would be from

(102) *FCC v. AT&T*, 562 U.S. 397, 403 (2011).

(103) 5 U.S.C. § 552(b)(7)(A).

(104) *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978). An agency may demonstrate that the disclosure of a class of documents, such as witness statements, would have the effect of interfering with the enforcement.

(105) *See, e.g., Center for National Sec. Studies*, 331 F.3d 918, 928 (D.C.C.A 2003)

(106) *Id.* at 930 (recognizing the potential future harm by publicly disclosing the name of an informant or witness).

releasing the monitor's report. The government has conceded that "there is little likelihood that VW as a corporate entity will stop cooperating with the DOJ or discover investigative methods" if the report is disclosed. Its continued cooperation is mandated by the plea agreement. Although it is possible that VW will cease to cooperate, no publicly released evidence suggests that this is likely.

The Supreme Court has recognized that Exemption 7(A) protects against disclosures that would create the risk that employees and other witnesses "may be reluctant to give statements at all"⁽¹⁰⁷⁾. But the argument that VW employees would be unwilling to cooperate as corporate whistleblowers similarly appears unpersuasive.

Many employee statements have already been included in the monitor's report, and VW has access to those statements⁽¹⁰⁸⁾. For any statements yet to be made, Exemption 7(A) is not intended as a backhanded mechanism to hide from public scrutiny embarrassing facts about a criminal defendant. In the final analysis, the government must convincingly explain how the release of the report would adversely affect its investigation.

G. Conclusion

The VW testing scandal is one of the biggest corporate fraud cases of our time⁽¹⁰⁹⁾. In the U.S., VW sold some 600,000 "clean diesel" vehicles during the period 2009-15 that were fraudulently designed to avoid pollution testing standards. In addition to installing software defeat devices intended to fool emission tests, VW obtained false certifications that the vehicles were compliant with the Clean Air Act, engaged in deceptive consumer marketing practices under the banner of "clean diesel" vehicles, and attempted to avoid corporate responsibility through a brazen coverup.

The article examines the unraveling of the scandal in the U.S., and the criminal charges brought by the DOJ against the company (conspiracy, obstruction of justice, and customs violations). In 2017, VW pled guilty to the charges, and paid the largest criminal penalty (\$2.8 billion) ever levied by the federal government against a car manufacturer.

(107) *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240-41 (1978).

(108) *Chesapeake Bay Foundation, Inc. v. ACE*, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (finding that the agency did not explain how its investigation would be impaired by the release of information that the target of the investigation already possesses).

(109) A surprising twist to the scandal is that it was uncovered by the independent testing and report published by the graduate students at the University of West Virginia.

The plea agreement requires VW to hire a monitor to write compliance reports. The final report is due in 2020. In 2019, the media filed a lawsuit under the Freedom of Information Act to access the reports. The DOJ and VW object to the release arguing FOIA exemptions 4, 5, 6, 7(A) and 7(C) apply. The article explores this claim, and the federal cases applying the “foreseeable harm” requirement added to FOIA by Congress in 2016.

The company damaged its reputation by placing its corporate success over human health⁽¹¹⁰⁾, the environment, and consumer confidence. But the damage is not limited to the U.S. VW created a global business scandal with continuing international repercussions because it sold 11 million “clean diesel” vehicles worldwide.

Dieselgate is a case study in the failure of ethical leadership that will be studied by students, lawyers, and businesses for years to come. But the last chapter has not yet been written. VW is facing a fresh round of scrutiny and negative publicity from regulatory and consumer litigation in 2021⁽¹¹¹⁾.

“The federal court denied cross motions by the parties for summary judgment on Feb. 3, 2021, and the matter is still pending. The resolution of the dispute has been delayed and impacted by COVID-19”.

(110) Dieselgate is an important environmental case. Vehicle emissions are known to aggravate health problems through chronic exposure. The diesel emissions from the non-compliant VW vehicles increased the incidence and severity of respiratory diseases such as bronchitis, pneumonia, and asthma. The excess pollution also has had an immeasurable impact on the health of the ecosystem.

(111) In late February 2020, those customers who did not join the class action settlement are set to begin their fraud trial against VW in California federal court. *In Re: Volkswagen “Clean Diesel” Marketing Sales Practices, and Products Liability Litigation*, 15-MD-02672 (N.D. Cal.). In a separate matter, the SEC has filed charges against VW for violating U.S. securities laws. *Supra* note 1.

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