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# FOIA Rules over the CWA – Short and Simple

By Steven L. Hoch / Jul 27, 2017

In what may be one of the shortest opinions of importance, the United States Court of Appeals for District of Columbia Circuit put an end to a Freedom of Information Act (FOIA) that closed down a challenge by the Environmental Integrity Project, Sierra Club, and Earthjustice who were seeking documents from the Environmental Protection Agency (EPA) that the agency had previously obtained from power plants under Section 308 of the Clean Water Act (CWA). Section 308 of the Clean Water Act authorizes the EPA to obtain records from power plants and states that those records “shall be available to the public” unless the EPA determines that the records “would divulge methods or processes entitled to protection as trade secrets.” 33 U.S.C. §§ 1318(a), (b). The problem is that Exemption 4 of FOIA authorizes agencies to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

In *Environmental Integrity Project v. EPA* 2017 WL 2324136 the court summarized the issue by noting that Exemption 4 exempts from disclosure both trade secrets and certain commercial and financial information. Section 308 exempts from disclosure only trade secrets, but it seemingly requires disclosure of commercial and financial information. So, who wins?

Shortcutting any esoterica, the court noted that Section 308 is the later statute here: Exemption 4 of FOIA was enacted in 1967, while Section 308 was enacted in 1972. Section 308 does not expressly supersede Exemption 4. They reasoned that if Congress had wanted Section 308 to supersede Exemption 4, Congress could have drafted express language to that effect, as it has in other statutes.

The environmental groups retort that the phrase “shall be available to the public” in Section 308 would be meaningless if Section 308 did not require disclosure in these circumstances. But the suggestion that Section 308 would be meaningless under our interpretation is not correct, at least in historical context. Under FOIA, federal courts may order agencies to disclose only “agency records.” 5 U.S.C. § 552(a)(4)(B). As of 1972 when Section 308 was enacted, it was not entirely clear that records obtained by the EPA from power plants would qualify as “agency records” subject to disclosure. *Forsham v. Harris*, (1980) 445 U.S. 169, 182–84. Absent Section 308, therefore, it would not have been clear whether records obtained from power plants were subject to disclosure under FOIA. Section 308 clarified that records obtained by the EPA from power plants under Section 308 are subject to FOIA. So Section 308 was not meaningless at the time that it was enacted.

Thus, in the end, Section 308 of the Clean Water Act does not expressly supersede Exemption 4 of FOIA. Therefore, the EPA permissibly invoked Exemption 4 to withhold the records at issue in this case.