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Supreme Court grants cert. to interpret meaning of 'confidential' or 'trade secret' under FOIA

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On January 11, 2019, the Supreme Court accepted *certiorari* to reconcile fractured circuit tests on when the government may withhold information from a Freedom of Information Act ("FOIA") request based on responsive information being confidential or a trade secret.

The case has major potential ramifications for the protections given to sensitive information submitted by companies to the government.

FOIA EXEMPTION 4

FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." The Supreme Court has never weighed in on what that means, although plenty of lower courts have done so. And there's not a lot of consensus.

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In early decisions, the courts adhered to the ordinary, everyday usage of the term "confidential," viewing it as commercial or financial information that the person (or entity) would not want in the public sphere. A company's price lists would be one such example. This interpretation generally comports with the understanding of what constitutes "confidential information" for the purpose of non-disclosure agreements.

But, in *National Parks & Conservation Association v. Morton* (1974), the D.C. Circuit adopted a far more searching test, holding that the government may invoke FOIA Exemption 4 and refuse disclosure of so-called confidential information requested under FOIA only if the disclosure is likely either to (1) impair the government's ability to obtain necessary information in the future ("impairment"); or (2) cause substantial harm to the competitive position of the person from whom the information was originally obtained ("competitive harm").

Decided more than 45 years ago, the *National Parks* test has been widely adopted by other circuits and remains the standard today. To be sure, it has been modified over the years, including by the D.C. Circuit, itself, in an *en banc* decision that added a new layer to the analysis: whether the claimed confidential information was compelled or voluntary submitted.

But with local differences aside, *National Parks* has been the standard by which FOIA Exemption 4 has been evaluated and interpreted. After a nearly 50-year run, *National Parks*' influence appears to be coming to an end.

By the end of the Supreme Court's 2019 term, *Food Marketing Institute v. Argus Leader Media,* 889 F.3d 914 (8th Cir. 2018), *cert. granted,* --- S. Ct. ----, 2019 WL 166877 (U.S. Jan. 11, 2019) (No. 18-481), is positioned to be the lead case that will take over as the defining case for what FOIA Exemption 4 actually means.

And, because Exemption 4 uses common legal and business words such as "trade secrets" and "commercial or financial information," an even more textually focused Supreme Court may recalibrate the scope of Exemption 4's test away from a FOIA-specific understanding of what constitutes "confidential information" and "trade secrets."

As such, we are calling it first: We believe that *Food Marketing Institute* may well prove to be among the most important business decisions issued by the Court in 2019, especially for those who do business or interface with the government.

THE FOOD MARKETING INSTITUTE CASE

The Argus Leader, a South Dakota newspaper, submitted a FOIA request to the United States Department of Agriculture ("USDA") seeking the name, unique identifier, address, store type and the yearly Supplemental Nutrition Assistance Program ("SNAP") sales figures for every store in the United States.

The USDA produced all the data requested, except for the yearly revenue, which it withheld under Exemption 4. After exhausting its administrative remedies, Argus sued the USDA in district court.

The district court initially granted summary judgment in the government's favor. The Eighth Circuit reversed and instructed the district court to consider whether releasing store-level SNAP data would be likely to result in substantial harm to the stores that submitted the data.

After a two-day bench trial, the district court ruled in favor of Argus and in support of the data's release. The USDA made known that it intended to release the data to Argus, which in turn caused Food

Marketing Institute ("FMI") to obtain leave to intervene and then file an appeal.

Now on appeal for the second time, the Eighth Circuit affirmed the district court's judgment. The circuit court found that, although the SNAP data could be commercially useful, that was not enough to show that FMI's members, retail food stores that participate in SNAP, and others would experience a substantial likelihood of competitive harm.

FMI then filed for *certiorari* and asked the Supreme Court to abandon the competitive harm test or, alternatively, apply the test and find that the district court and circuit court erred.

FMI urged the Court to reject the D.C. Circuit's *National Parks* test and instead apply the plain meaning of the term "confidential," as the D.C. Circuit had done when determining what constituted "commercial or financial" information.

FMI objected to *National Parks*' focus on whether the information's release would cause "substantial competitive harm," which represents an inversion of the test when assessing whether information is confidential or a trade secret: whether the information provides a competitive advantage by virtue of the information not being broadly known.

As FMI argued in its petition, this can create circumstances where information qualifies as a trade secret under the applicable Uniform Trade Secrets Act but not under FOIA.

Given how much sensitive information is submitted to the government (whether voluntarily or by compulsion) getting clarity on what constitutes a trade secret or commercial or financial information can be a game changer in (i) how FOIA is processed, (ii) whether a company should be more or less accommodating when complying with voluntary requests, and (iii) perhaps what information is submitted to the government in the first place.

THE KEY TAKEAWAY

The FMI case has implications far beyond the grocery store; any adjustments to the meaning of FOIA Exemption 4 has significant ramifications for any industry that provides important, valuable data to the government, whether voluntarily, under compulsion (say, via grand jury or administrative subpoena) or as part of reporting obligations.

For anyone or entity that does business or interfaces with the government, the Supreme Court's decision in *Food Marketing Institute* will be one to closely watch.

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