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Management Alert

Supreme Court Issues Decision Significantly Expanding the Scope of FOIA's Confidentiality Exemption

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On June 24, 2019, the Supreme Court issued its decision in *Food Marketing Institute v. Argus Leader Media* and resolved fractured circuit splits about the parameters for when the government may withhold information from a Freedom of Information Act ("FOIA") request based on responsive information being confidential or a trade secret. Earlier this year, we reported on this case when the Supreme Court granted *certiorari* and predicted that the case would have significant ramifications for the protections given to sensitive information submitted by companies to the government.

And it has. The Court did away with the former requirement that the company requesting confidential treatment demonstrate it would suffer "substantial competitive harm," which, in practice, could be quite costly to prove up and, as a practical matter, required the company to prove harm based on the occurrence of a hypothetical event. Now, an entity seeking shelter under FOIA's confidentiality exemption, Exemption 4, need only show that (1) the commercial or financial information is customarily *and* actually treated as private by its owner; and (2) that the information was provided to the government under an assurance of privacy. The decision creates a far more accommodating framework for entities seeking to protect information as confidential under FOIA Exemption 4.

FOIA Exemption 4

FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Prior to the FMI decision, the Supreme Court had never weighed in on what that meant, leaving a wide range of circuit-level decisions. 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 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 purposes of non-disclosure agreements.

But, in *National Parks & Conservation Association v. Morton* (1974), the D.C. Circuit adopted a much different and somewhat counterintuitive 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").

Most circuits adopted this test or something very similar to it, even though lower courts and litigants generally criticized the test as unmoored from any ordinary understanding of what qualified as confidential information. Although the Supreme

Court had previously declined to grant *certiorari* in cases where the test was challenged, that changed when it agreed to hear the FMI case.

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 likely 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 a reversal 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.

The Supreme Court Reverses the Eighth Circuit

In a 6-3 decision, the Supreme Court reversed the Eighth Circuit, holding that the *National Parks* test grafted requirements onto Exemption 4 that lacked any textual support. After quickly finding standing, the majority turned to the "ordinary, contemporary, common meaning" for the undefined term "confidential." From dictionary definitions, the Court viewed the core aspects of confidentiality as requiring that the information be "customarily kept private" or "closely held" and that the receiving party provide some assurance that it will remain secret.

The Court did not find any indication that confidentiality required the disclosing party to demonstrate that, if the information were shared, that some harm would result from the disclosure. Rather, the Court criticized *National Park*'s introduction of the "substantial competitive harm" test as a "relic from a 'bygone era of statutory construction'" that resulted from elevating legislative history over the statute's text and structure. The Court also found significant that subsequent cases had actually created two definitions of what qualified as "confidential" based on whether the disclosure was voluntary or involuntary. The Court did not address whether a party could disclose information to the government without requiring the government to keep it confidential and then later assert that it is confidential information protected under Exemption 4.

The three dissenting Justices agreed with the outcome and that the *National Parks* test had gone too far in requiring the disclosing party to prove harm but were of the view that the majority went too far in jettisoning from the test any harm requirement. The dissent advocated for the test to incorporate an additional element: whether release of the information

"will cause genuine harm to an owner's economic or business interests." The dissent considered this requirement to be more accommodating than *National Parks* while still preserving FOIA's preference for disclosure and narrow construction of its exemptions.

The Key Takeaways

The Court's decision has significant ramifications for industries that provide important, valuable data to the government, particularly where the confidential information is subject to a mandatory reporting or disclosure obligation. The decision also generally supports the proposition that companies can maintain property rights in their confidential information through written agreements (such as those used with employees and third parties) and that courts should give effect to those agreements.

As a result of this decision, government contractors will likely be able to protect more information that is disclosed to the government. In contrast, government contractors that regularly seek such information through FOIA requests may receive much less information in response.

Prior to disclosing confidential information, entities faced with a government request to disclose information should clearly identify and label confidential information as confidential and also seek to obtain written assurances from the government that such information will be treated as such. Entities should also review their internal policies and procedures to proactively identify materials that warrant confidential treatment and to establish procedures for how such materials should be handled when distributed to the government or other third parties. Of course, once implemented, all such policies should be vigilantly enforced so that such policies are not used as evidence of a company's non-compliance with its own procedures.

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