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U.S. Supreme Court Broadens FOIA Exemption 4 for 'Confidential' Materials

On June 24, 2019, the U.S. Supreme Court in *Food Marketing Institute v. Argus Leader Media* expanded the Freedom of Information Act's (FOIA) Exemption 4, excluding from disclosure pursuant to a FOIA request material containing "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). Prior case law had limited Exemption 4 to a required application of a "competitive harm" test under which commercial information could not be deemed confidential unless disclosure was "likely…to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In a 6-3 decision authored by Justice Gorsuch, the Supreme Court rejected the "substantial competitive harm" test in its entirety.

Application of Exemption 4 begins when a business or other private entity either voluntarily provides the government certain information as part of a proposal for a contract or grant, or is otherwise required to provide the government materials under a statute or regulation, and the business marks the materials "confidential" when submitting them to the government. The information is later requested through FOIA, and the government agency withholds the materials designated "confidential (either on its own accord or at the request of the party that provided the materials). A fight ensues whether the information falls under Exemption 4.

This situation arose when Argus Leader Media, a South Dakota newspaper, filed a FOIA request with the Department of Agriculture (USDA), seeking the names and addresses of all retail stores that participate in the national food-stamp program (SNAP), and each store's annual SNAP redemption data from fiscal years 2005 to 2010. Invoking Exemption 4, USDA declined to disclose the stove-level SNAP data. Argus sued USDA. Following the *National Parks* precedent, the district court employed the "competitive harm" test, and determined that, while revealing the data could cause competitive harm, disclosure would not definitively cause "substantial competitive harm," and ordered disclosure.

Petitioner Food Marketing Institute, a trade association representing grocery retailers, intervened and filed an appeal. The Eighth Circuit affirmed, rejecting the Institute's argument that the "substantive competitive harm" test should be rejected in favor of the ordinary meaning of the term "confidential" used in the statutory language of Exemption 4.

The Supreme Court reversed the Eighth Circuit, describing *National Parks* as a "relic from a bygone era of statutory construction." Slip op. at 8. The Court instead focused on the statute's plain language, and the "ordinary, contemporary, common meaning" of the term "confidential" when Congress enacted FOIA. The Court held the contemporary dictionary definitions of "confidential" established at least one condition to be met for the material to qualify as "confidential" – that the material "must be customarily kept private, or at least closely held, by the person imparting it." *Id.* at 6. Another possible condition the Court notes is that when the party receiving the information provides some assurance that the material will be kept confidential. *Id.*; however, the Court did not resolve whether this second condition is required. In this case, the Court held the information was "confidential" because (1) the retailers did not share the SNAP data or make it public in any way; and (2) it did not lose confidentiality by being shared with USDA because the agency had promised to keep the information private. *Id.* at 6. As the Court summarized the outcome:

> At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within the meaning of Exemption 4. Because the store-level SNAP data at issue here is confidential under that construction, the judgment of the court of appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Id. at 12.

The impact of this decision on parties providing the government sensitive, private commercial, or financial information cannot be overstated. The Court's rejection of the "substantial harm" test provides parties providing internal business information to the government broader protection for the information they submit. Rather than having to show they would suffer "substantial harm" from the release of the information, the party must only show that they made efforts to keep the information private, and possibly show they received some assurances the information would not be released (as noted, this may not even be required). No longer subject to an esoteric analysis of harm, the government must treat confidential business information in the same manner as the party providing it.

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