Updates
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Is the US Supreme Court's FOIA Decision a Game Changer for Companies Seeking to Prevent Disclosure of Proprietary Information?

In its recent decision in *Food Marketing Institute v. Argus Leader Media d/b/a Argus Leader*, No. 18-481, the U.S. Supreme Court rejected a decades-old legal standard for companies that wish to shield their business information from disclosure to the public under the Freedom of Information Act (FOIA). Although the Court's decision removes one cause of uncertainty for companies, it creates another. The Court adopts a new standard that may be difficult for companies to meet in the absence of regulations or binding agency policies that provide express assurances to private parties that information they provide to the government will be withheld from FOIA disclosure.

This update discusses the implications of *Food Marketing Institute* and key issues bearing on whether a company's proprietary information will be exempt from disclosure under FOIA.

The Court's Rejection of the D.C. Circuit's *National Parks* Standard

Under FOIA, a federal agency must generally make records in the agency's possession available to any person who submits a request for these records unless the records fall within an exemption in 5 U.S.C. § 552(b). Exemption 4 shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). FOIA does not define "confidential."

In a 1974 case, *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir 1974), the U.S. Court of Appeals for the D.C. Circuit held that commercial information cannot be deemed "confidential" under Exemption 4 unless its disclosure is likely to cause substantial harm to the competitive position of the person from whom the information is obtained. Other circuits adopted the *National Parks* test, resulting in litigation focusing on whether the disclosure of data would result in substantial harm to the data's owner. The *National Parks* test drew some criticism and the D.C. Circuit subsequently narrowed the applicability of this test in a later case, *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992).

In its June 24, 2019, decision in *Food Marketing Institute*, the Supreme Court repudiated the *National Parks* test. The Court held that the "substantial harm" standard had no support in FOIA's text. Instead, the Court concluded that information is "confidential" within the meaning of Exemption 4 "[a]t least" when it is both (1) customarily and actually treated as private by its owner and (2) provided to the government under an assurance of privacy. The Court cited dictionary definitions of the term "confidential" and rejected arguments based on extra-textual factors. Reversing the U.S. Court of Appeals for the Eighth Circuit's judgment, the Court found that Exemption 4 applied to certain information provided by retail stores that participate in the national food stamp program.

Implications of the Court's Decision

The Court's decision has important implications for a wide range of businesses that furnish business and financial data to the government, whether voluntarily or involuntarily.

- Generally, the decision eliminates substantial uncertainty regarding FOIA's Exemption 4 by resolving a split among the circuit courts and repudiating the *National Parks* standard. Government agencies responding to FOIA requests will no longer have to consider competitive harm when determining if Exemption 4 applies.
- Going forward, the key questions involving Exemption 4 will be whether information that a person or company provides to the government is both (1) customarily and actually treated as private by its owner, and (2) provided under an assurance of privacy. The Court's test does not consider whether the information is provided voluntarily or involuntarily.
- As to the first prong of the *Food Marketing Institute* test, companies furnishing information to federal agencies should consider explaining the extent to which information is private and customarily treated as private by the submitter. A company should also mark this information with a phrase such as "Exempt from Disclosure Under 5 U.S.C. § 552." As the Court notes, "it is hard to see how information could be deemed confidential if its owner shares it freely."
- The second prong of the Court's test may be problematic. It is unclear whether the government's assurances that information in its possession will be kept private is a necessary precondition to the application of Exemption 4. The Court declined to decide whether information loses its confidential character if it is communicated to the government without assurances that the government will keep it private. The Court stated that it found "no need" to resolve that question in *Food Marketing Institute* because the retailers participating in the food stamp program "clearly satisfy this condition" insofar as the government had "long promised" them that it will "keep their information private."
- In the absence of regulations or binding written agency policies or guidance making express assurances of confidentiality, the Court's "assurances" test may be challenging to satisfy. In *Food Marketing Institute*, the Court cited the U.S. Department of Agriculture's regulations governing the food stamp program. Those regulations provide that information furnished to the government by participating firms "may not be used or disclosed to anyone except for purposes directly connected with the administration and enforcement of the Food Stamp Act and these regulations." *See* 43 Fed. Reg. 43,272, 43,275 (1978).
- There are other regulations that contain assurances of confidentiality. For example, the regulations governing the Committee on Foreign Investment in the United States specify that any "information or documentary material" furnished to the committee shall be exempt from disclosure under FOIA except, among other things, as may be "relevant to any administrative or judicial action or proceeding." 31 C.F.R. § 800.702(a)-(b).
- However, there will be instances in which there is no such regulation or other formal written government assurances of confidentiality and this new interpretation of Exemption 4 may be challenging. In such circumstances, before providing proprietary data to a federal agency, a company should consider seeking the government's written assurances that the information will be kept confidential and subject to FOIA Exemption 4.
- Another open question is the extent to which the Court's decision may influence proceedings in which information may be disclosed to government agencies. The Court's opinion notes that FOIA furthers a governmental interest to the extent that it gives parties assurances about their data "so they will cooperate in federal programs and supply the [G]overnment with information vital to its work." In an *amicus* brief, the U.S. Chamber of Commerce argued that the *National Parks* test deterred companies from sharing information with the government and from participating in government programs mandating disclosure of confidential information. Whether the Supreme Court's rejection of the *National Parks* test brings about different incentives is far from clear.

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