LITIGATION & RISK MANAGEMENT

Supreme Court Strengthens Protection of "Confidential" Information Under FOIA

By Mitchell B. Goldberg and Peter E. Cooper

INTRODUCTION

Since 1967, the Freedom of Information Act ("FOIA") has provided the public the right to request access to records from any federal agency. Federal agencies are required to disclose any information requested under the FOIA unless it falls under one of nine statutory exemptions. FOIA Exemption 4 of the 5 U.S.C. §552(b)(4) prevents mandatory disclosure of "commercial or financial information obtained from a person [that is] privileged or confidential." However, the Act does not define the term "confidential." This has led to disputes over what kinds of information may be covered under Exemption 4.

In 1974, the U.S. Court of Appeals for the D.C. Circuit, in *National Parks & Conservation Assn. v. Morton*, 498 F. 2d 765 (1974), enunciated a test to determine which information could be protected from disclosure under Exemption 4. In addition to the specific requirements listed in the statute, the Court held that a court must satisfy itself that disclosure of the information is likely (1) to impair the government's ability to obtain necessary information in the future, or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. The second prong of this analysis (called the "substantial competitive harm" test) was subsequently adopted by many courts throughout the country. Thus, persons providing commercial or financial information to U.S. agencies on a "confidential" basis could not be secure that the disclosure would remain confidential, unless they could establish that disclosure would cause "substantial harm to [their] competitive position."

Recently, the U.S. Supreme Court in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), rejected the "competitive harm" test created by *National Parks.* This ruling may have significant implications for commercial entities that are asked to turn over "confidential" information, and to those who seek such information through FOIA requests to regulatory and government agencies.

CASE SUMMARY

The *Food Marketing* case arose out of a FOIA request made by the South Dakota *Argus Leader* newspaper for information from the U.S. Department of Agriculture (USDA) relating to retailer participation in the national food-stamp-program known as the Supplemental Nutrition Assistance Program (SNAP). Specifically, the *Argus Leader* sought each store's annual SNAP redemption data for certain years. Though the USDA released the names and addresses of participating stores, it invoked FOIA Exemption 4 and declined to disclose the requested store-level SNAP data. The USDA argued that the data constituted

"trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential" which was shielded by Exemption 4. Unsatisfied, the *Argus Leader* sued the USDA in federal court to compel release of the SNAP data requested.

After a two-day bench trial, the district court ordered disclosure, finding that it could not say that disclosure of the information would rise to the level of causing "substantial competitive harm" under the *National Parks* case. Though the USDA did not appeal, it alerted retailers to the decision so they could consider whether to intervene in the case. The Food Market Institute—a trade association representing retail grocery stores—successfully moved to intervene and filed its own appeal. Therein, the Food Market Institute argued that the U.S. Court of Appeals for the Eighth Circuit should discard the "substantial competitive harm" test. The Eighth Circuit rejected that argument and affirmed. The U.S. Supreme Court granted the Food Market Institute's request for a stay of the Eighth Circuit's mandate and its petition for *certiorari*.

In its June 2019 decision, the Supreme Court reversed the Eighth Circuit and district court rulings, holding that the SNAP data fell squarely within Exemption 4. In its ruling, the Supreme Court rejected the "substantial competitive harm" test in favor of the plain meaning of the language of statute. Because the uncontested testimony established that the SNAP data was not publicly available and the government has long promised retailers that it would keep their information private, the Supreme Court ruled that the SNAP data fell within contemporary dictionary definitions to be considered "confidential." The Court found that the holding in the *National Parks* case erroneously resorted to legislative history before consulting the statute's plain text, and more erroneously relied heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted into law. The Court further rejected *Argus Leader*'s public policy argument that FOIA exemptions should be narrowly construed to support disclosure. Rather, the Court stated that it cannot arbitrarily construct Exemption 4 by adding limitations found nowhere in its terms.

CASE SUMMARY

The Court's ruling in *Food Marketing Institute v. Argus Leader Media* offers significant reassurance to people and businesses that a disclosure of confidential information or trade secrets to federal agencies will not result in unwanted disclosure of that information in response to FOIA requests. It also increases the importance of asserting Exemption 4's protections whenever a person provides "commercial or financial information" to a federal agency.

We encourage people and companies to implement up-to-date information-handling policies and procedures to ensure that their confidential information and trade secrets cannot be challenged as falling outside the protections of Exemption 4. For legal guidance with updating information policies and procedures or assistance when responding to government inquiries, please call us at 312.372.1947.

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