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Supreme Court Eases Path to Protecting Confidential Information From FOIA Disclosure

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The Supreme Court recently issued an opinion significantly reducing the showing companies must make to federal agencies to protect confidential business information from release under the Freedom of Information Act, 5 U.S.C. § 552. The court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), overturned a 1974 DC Circuit decision – the ubiquitous *National Parks* standard – that jurisdictions across the country have followed for decades, which required companies to establish that "substantial competitive harm would likely result" from disclosure. In *Argus*, the court held that companies need only show they have treated the information as private and, possibly, that they received assurances of privacy from the government upon submission; the court left open the question of whether such assurances are necessary. This marks a significant expansion of protection available to companies that provide information to the government.

Argus Leader, a newspaper in South Dakota, submitted a FOIA request to the United States Department of Agriculture seeking the names and addresses of retail stores that participate in the national food-stamp program, along with each store's annual redemption data. USDA refused to release the latter, citing FOIA Exemption 4, and litigation ensued in the Eighth Circuit. As the court described it, "[l]ike several other courts of appeals, the Eight Circuit has engrafted onto Exemption 4 a so-called 'competitive harm' test, under which commercial information cannot be deemed 'confidential' unless disclosure is 'likely… to cause substantial harm to the competitive position of the person from whom the information was obtained.'" Following this precedent, the district court found the potential competitive harm did not rise to the level of "substantial" and therefore ordered release. While the USDA did not appeal, the Food Marketing Institute, a trade association that represents grocery retailers, moved to intervene and appealed the decision. The Eight Circuit Court of Appeals affirmed, and the court granted certiorari.

Because FOIA does not define "confidential," the court looked to its plain meaning at the time of enactment in 1966. "The term 'confidential' meant then, as it does now, 'private' or 'secret.'" The court noted that two conditions might be required for disclosed information to qualify as confidential: (1) the person imparting the information customarily keeps it private, and (2) the person receiving it provides some assurance of continued privacy. The court affirmed the first condition, as "it is hard to see how information could be deemed confidential if its owner shares it freely." The court declined to resolve whether the second condition was necessary, because both were established in *Argus.*

The court noted the absence of any legitimate source for the DC Circuit's "substantial competitive harm" requirement, tracing its origin to the 1974 decision in *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765. There, the DC Circuit, "after a selective tour through the legislative history … concluded that 'commercial or financial matter is 'confidential' [only] if 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.'" A number of circuits followed suit.

However, the court held the DC Circuit's original analysis was contrary to cannons of statutory interpretation because the meaning of the statute was clear on its face. Not only did the DC Circuit resort to legislative history before examining FOIA's text, but also it relied on statements during congressional hearings on an unenacted law years earlier, which were themselves inconsistent with official committee reports. Since then, the DC Circuit retained the substantial competitive harm standard for companies *required* to

submit information to the government, but back peddled to a more traditional interpretation of the term "confidential" where a company submitted the information *voluntarily*, finding such information protected under Exemption 4 where the submitter would not customarily release such information to the public in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc). The court therefore rejected *National Parks*: "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."

Argus substantially lowers the standard for companies to claim Exemption 4 protection for confidential business information. Not all federal FOIA officers have yet fully integrated the change into the form letters they send when information is requested, however, sometimes including the now-overturned *National Parks* standard. Thus, it is important for companies and their counsel to ensure application of the correct standard when an agency is asked to disclose the company's confidential information and, at least until the issue is clarified in the courts, request government assurance of confidentiality up front.

For help with FOIA requests or responses, please contact David Mills and Erin Estevez in the DC office.

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