

U.S. Supreme Court Increases Protection for Confidential Business Information Shared with the Federal Government



Many companies that have submitted confidential business information to the federal government have learned the hard way that the Courts and federal agencies have not interpreted the word “confidential” under the Freedom of Information Act (FOIA) the same way businesses use that term in everyday life. On June 24, 2019, the U.S. Supreme Court brought a welcome dose of common sense to determining what information is confidential under FOIA Exemption 4. In *Food Marketing Institute v. Argus Leader Media*, the Supreme Court rejected widespread lower court decisions requiring that companies wishing to protect confidential business information must not only actually keep the information confidential, they also must show that they would suffer “substantial competitive harm” if the information were disclosed under FOIA. The Court rejected the substantial competitive harm test, and also aligned the standard for protecting the information submitted to the government regardless of whether the information is required or voluntarily provided.

Setting the Scene

The genesis for the *Food Marketing Institute* case was an Argus Leader Media FOIA request to the U.S. Department of Agriculture (USDA), asking for the names and addresses of all retail stores that participate in the national food-stamp program (the Supplemental Nutrition Assistance Program or SNAP) and each store’s annual SNAP redemption data for 5 years. Stores must provide such data to USDA to receive financial compensation under the program. USDA refused to disclose the store-level SNAP data, citing FOIA

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AUTHORS

Jamie Auslander
Principal
+1.202.789.6009
jauslander@bdlaw.com



Kathy Szmuszkovicz
Principal
+1.202.789.6037
kes@bdlaw.com



Eric Christensen
Of Counsel
+1.206.620.3025
echristensen@bdlaw.com



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Exemption 4, which protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U. S. C. §552(b)(4).

Argus Leader Media sued USDA to obtain the data. The district court applied the substantial competitive harm test, under which commercial information that a person must provide to the government 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.” The district court found that, although disclosing the information could cause competitive harm, the record did not demonstrate that disclosure would cause “substantial competitive harm.” It ordered disclosure.

Food Marketing Institute, a trade association representing grocery retailers, intervened and appealed. The Eighth Circuit affirmed, rejecting the argument that the Court should discard the “substantial competitive harm” test in favor of the “ordinary” meaning of the term “confidential.”

The U.S. Supreme Court Decision

The U.S. Supreme Court unanimously agreed that the existing Exemption 4 standard was too stringent. The Court’s 6-3 majority decision, written by Justice Gorsuch, held that information is “confidential” within the meaning of FOIA Exemption 4 “[a]t least” where it is “[1] both customarily and actually treated as private by its owner and [2] provided to the government under an assurance of privacy.” The Court also left open the possibility that the first condition could be sufficient.

Argus Leader Media had relied on the “substantial competitive harm” requirement first articulated in the D. C. Circuit’s decision in *National Parks & Conservation Assn. v. Morton*, 498 F. 2d 765 (1974), and since widely adopted by federal appellate and district courts and federal agencies. The Supreme Court instead looked to contemporary dictionaries, and explained that at the time of FOIA’s enactment, the term “confidential” meant “private” or “secret.” The Court criticized the D.C. Circuit for resorting to legislative history before consulting the statute’s text and structure and for relying heavily on statements from witnesses in congressional hearings years earlier on a different bill that was never enacted. The Court also faulted other courts that “fell in line” on the basis of “stare decisis” and “without much independent analysis.” It eliminated the case law’s far looser standard for withholding “voluntarily provided” information than compelled information, stating that the Court could not “discern a persuasive reason to afford the same statutory term two such radically different constructions.”

The majority rejected a third confidentiality condition supported by three partially dissenting Justices (Breyer, Ginsburg, and Sotomayor): “release of the information would cause genuine harm to the owner’s economic or business interests.” Even so, the partial dissent recognized the undesirability of lengthy evidentiary proceedings to demonstrate harm in FOIA cases (as in the present case).

The Court’s opinion is also noteworthy for upholding an industry trade association’s standing to intervene and appeal an adverse district court decision in the absence of a federal government appeal.

Implications Going Forward

The Supreme Court’s decision is a sea change in FOIA Exemption 4 case law and should lead to greater data protection and consistency in the courts’ and federal agencies’ application of FOIA. Federal agencies

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sending notices of FOIA requests to regulated entities will also need to revise their guidance, and potentially regulations, to lessen the burden for protecting information. Lastly, it should become easier for companies to file “reverse” FOIA lawsuits to enjoin agency decisions to disclose their information.

The protection of confidential business information is also frequently a source of concern for businesses that submit confidential information to state or local government agencies. State courts often look to cases construing FOIA as precedent, or at least persuasive authority, for interpretation of similar provisions in state open records laws. The Court’s opinion, therefore, may lay the groundwork for protecting confidential business information under state law as well as federal law.

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