ALERT MEMORANDUM

Supreme Court Invalidates the Requirement to Show "Substantial Competitive Harm" to Protect Private-Party Confidential Information Under FOIA Exemption 4

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On June 24, 2019, the Supreme Court of the United States issued an important decision limiting the circumstances under which a federal agency may be compelled to disclose "confidential" information the agency received from a private party, and which the agency seeks to withhold under the Freedom of Information Act ("FOIA"), specifically its Exemption 4. In *Food Marketing Institute v. Argus Leader Media*, the Court invalidated the "substantial competitive harm" test that circuit courts for decades applied as a necessary condition for information to receive confidential treatment under FOIA's Exemption 4. The Court held that imposition of a competitive harm requirement was inconsistent with the language of the statute. Rather, information may be protected by Exemption 4 where it has actually been treated as confidential, is of a kind traditionally treated as such, and was provided to the agency under assurances of confidential treatment.

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The decision should substantially reduce the burden to protect confidential information submitted to the federal government, and it highlights the importance of requesting confidential treatment at the time of submission. But the decision also raises questions about how agencies and courts will apply existing regulations that incorporate the "substantial competitive harm" test, and whether agencies will be required to revise such regulations or to justify disclosure decisions on other grounds.

1. Background

Argus Leader, a newspaper company in South Dakota, filed a FOIA request for data from the United States Department of Agriculture ("USDA") regarding (1) the names and addresses of all the retail stores that participate in the Supplemental Nutrition Assistance Program ("SNAP") and (2) each store's annual SNAP redemption data from fiscal years 2005 to 2010 ("store-level SNAP data"). The USDA released the names and addresses of retail stores, but it refused to disclose the store-level SNAP data. The USDA claimed FOIA Exemption 4, which states that FOIA "does not apply to matters that are. . . trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[1]

Argus sued the USDA in federal court to compel release of the store-level SNAP data. The Eighth Circuit, similar to other courts, had adopted the "competitive harm" test in regard to Exemption 4. Under this test, commercial information is regarded as "confidential" only if disclosure is "likely. . . to cause substantial harm to the competitive position of the person from whom the information was obtained."[2] After a two-day bench trial, the district court held that while "[c]ompetition in the grocery business is fierce" and evidence from trial showed that revealing store-level SNAP data could lead to competitive harm, disclosure would not give rise to the level of "causing *substantial* competitive harm."[3] Consequently, the district court ordered the USDA to disclose the information.

The USDA declined to appeal, but the Food Marketing Institute, a trade association that represents grocery retailers, intervened under Federal Rule of Civil Procedure 24(a) and pursued an appeal to the Eighth Circuit. The circuit court affirmed use of the "substantial competitive harm" test and affirmed the district court's holding. The Supreme Court granted certiorari.

2. The Court's Decision

The issue before the Court was how to define "confidential" information subject to protection under Exemption 4 and whether it is necessary to demonstrate "substantial competitive harm" to invoke that protection.[4]

In the absence of a definition of "confidential" in FOIA, the Court began its analysis by reference to the word's common and ordinary meaning at the time of FOIA's enactment, which the Court considered to be "private" or "secret."[5] Dictionary definitions suggested two avenues for information to become confidential. First, information that is given to another remains confidential "whenever it is customarily kept private, or at least closely held, by the person imparting it."[6] Second, information may continue to be considered confidential if the party who receives the information provides "some assurance that it will remain secret."[7] The Court reasoned that at least the first condition must be met for the information to be confidential under Exemption 4. It found that condition was satisfied in *Food Marketing Institute* based on the factual record established in the district court proceedings.[8] Moreover, the Court found it unnecessary to determine whether the second condition – a commitment by the recipient to maintain confidentiality – is a *legal* requirement because, as a factual matter, USDA regulations had long made such a commitment.[9]

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1 Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2000).

2 *Food Marketing Institute v. Argus Leader Media*, No. 18-481, 2019 WL 2570624, at *3 (S. Ct. June 24, 2019).

3 *Argus Leader Media v. United States Dept. of Agriculture*, 224 F.3d 827, 833-35 (D.S.D. 2016) (emphasis added).

4 The Court also considered and sustained the Food Marketing Institute's standing to pursue the appeal. *See Food Marketing*, 2019 WL 2570624 at *4.

5 *Food Marketing*, 2019 WL 2570624 at *4.

6 *Id.*

7 *Id.*

8 *See id.*

9 *See id.*

The Court noted that early appellate decisions construed "confidential" in ways that were consistent with the Court's interpretation.[10] That changed, however, in 1974 when the D.C. Circuit, in *National Parks & Conservation Association v. Morton*, added a requirement that the agency show that disclosure would cause "substantial competitive harm."[11] Following the D.C. Circuit's decision, various courts of appeals also adopted a "substantial competitive harm" test.[12]

Notwithstanding that the lower courts have followed *National Parks* in one form or another for 45 years, the Supreme Court roundly rejected it. Writing for six members of the Court, Justice Gorsuch criticized the D.C. Circuit's creation of the "substantial competitive harms test" based on its interpretation of legislative history as demonstrating a "casual disregard of the rules of statutory interpretation."[13] *Food Marketing Institute* held that a court must begin its analysis of statutory terms by referencing the ordinary meaning and structure of the law itself, and when this leads to a clear answer, the court must not go further.[14] The Court found that because there is "clear statutory language"[15] in FOIA, legislative history should never have been allowed to "muddy the meaning" of this language.[16] In support of this proposition, the Court noted other occasions when it had "refused to alter FOIA's plain terms on the strength only of arguments from legislative history."[17]

In conclusion, the Court held that "at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under the assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."[18] Because the store-level SNAP data met those two conditions, the judgment of the court of appeals that mandated disclosure was reversed.

3. Dissent

In a partial dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, concurred that the two criteria identified by the majority must be met, but argued that "there is a third: Release of such information must also cause genuine harm to the owner's economic or business interests."[19] Notably, however, Justice Breyer also rejected *National Park*'s stringent "substantial competitive harm" test. Just as had the majority, the dissent rejected the validity of engrafting such a requirement based on FOIA's language, legislative history, or purposes.[20] In the dissent's view, unlike the majority, requiring *some* showing of harm would be more consistent with FOIA's objective of promoting disclosure.[21] But unlike *National Parks*, the dissent would not require that the harm be substantial or necessarily competitive:

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10 *See Food Marketing*, 2019 WL 2570624 at *5, citing *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969); *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir 1971); *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 42 F.2d 578, 580, 582 (D.C. Cir 1970).

11 498 F.2d 765, 767 (1974).

12 *See Food Marketing*, 2019 WL 2570624 at *5, citing *Contract Freighters, Inc. v. Secretary of U.S. Dept. of Transp*., 260 F.3d 858, 861 (8th Cir. 2001). *See also, e.g.*, *Utah v. U.S. Department of Interior*, 256 F.3d 967, 971 (10th Cir. 2001); *Nadler v. FDIC*, 92 F.3d 93, 97 (2d Cir. 1997).

13 *See Food Marketing*, 2019 WL 2570624 at *5.

14 *See id.*, citing *Schindler Elevator Corp. v. United States ex. rel. Kirk*, 563 U.S. 401, 407 (2011); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

15 *See Food Marketing*, 2019 WL 2570624 at *5, citing *Milner v. Department of Navy*, 562 U.S. 562, 569 (2011).

16 *Id.*

17 *Id.*

18 *Id.* at *7.

19 *Id*. (Breyer, J., dissenting).

20 *See id.* at *8 (Breyer, J., dissenting).

21 *See id.* at *8-9 (Breyer, J., dissenting). The majority responded that this "boils down to a policy argument about the benefits of broad disclosure." *Food Marketing*, 2019 WL 2570624 at *7 (majority opinion).

"a private harm need not be 'substantial' as long as it is genuine."[22]

4. Observations

Food Marketing Institute marks a significant change in the approach to Exemption 4 and is likely to spawn a considerable amount of litigation in the lower courts. In the first instance, parties will likely litigate whether an assurance of confidential treatment is necessary to be able to invoke Exemption 4. The Court left open the questions whether such an assurance is necessary and, if so, how specific that assurance must be.

Correspondingly, parties opposing the use of Exemption 4 may point to agency regulations that require a showing of substantial competitive harm as a condition to confidential treatment. The SEC's regulations, for example, consider "[t]he adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business' competitive position."[23] EPA's regulation considers whether "[t]he business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position."[24] Parties seeking disclosure might argue that such regulations demonstrate that submitters could not have believed that they had an assurance of confidential treatment and, therefore, agencies must in most cases still satisfy the *National Parks* standard based on such regulations.

But it is reasonably clear that such agency regulations were adopted because it was thought that *National Parks* required them.[25] Now that the Supreme Court has unanimously thrown out *National Parks*, parties may well challenge the authority of agencies to rely on such regulations – and agencies might well decide to revise them.

Moreover, it is yet to be seen whether *Food Marketing Institute* will usher in a broader reconsideration of government disclosure, in an era in which privacy protection – both personal and corporate – is a recurring subject of public attention. While the general public may be less concerned with corporate privacy than with their own, there is growing recognition that "big data" can be used to whittle away at personal privacy. The federal government has many disparate needs to gather substantial amounts of data. Individuals and courts, and not only corporations, may have increasing concerns about the extent to which those data should be exported via FOIA and subject to private exploitation.

In this regard, it is notable that 40 years ago Justice Rehnquist, for a unanimous Court, opined that "FOIA is a purely a disclosure statute" and its exemptions only "demarcate[] the agency's obligation to disclose; [they] do[] not foreclose disclosure."[26] In rejecting *National Parks* today, the Supreme Court may fuel the views of those who may seek to have government agencies exercise their discretion more routinely to invoke Exemption 4 (or others) to bar the release of confidential or other information that FOIA says may be withheld.[27] Justice Rehnquist's opinion recognized the availability of the Administrative Procedure Act to challenge disclosure decisions,

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22 *Food Marketing*, 2019 WL 2570624 at *8 (Breyer, J., dissenting).

23 17 C.F.R. § 200.83(d)(2)(iv).

24 40 C.F.R. § 2.208(e)(1). *See generally* The United States Department of Justice, *Department of Justice Guide to the Freedom of Information Act*, 263, 273, March 7, 2019.

25 The United States Department of Justice, *Department of Justice Guide to the Freedom of Information Act*, 263, 273, March 7, 2019.

26 *Chrysler Corp. v. Brown*, 441 U.S. 281, 285, 292 (1979).

27 The Solicitor General of the United States filed a brief in *Food Marketing Institute* in which he argued, among other points, that "[t]he D.C. Circuit's *National Parks* test is atextual and wrong." Brief for the United States as Amicus Curiae Supporting Petitioner, No. 18-481, at 18.

and one basis for challenge is abuse of discretion.[28]

5. Conclusion

These controversial elements aside, *Food Marketing Institute* provides two clear guideposts to those who hope to benefit from it. First, those who submit confidential information to government agencies should designate and claim it as such. This can be done informally, but all or nearly all agencies have FOIA regulations that describe the means for doing so in a formal manner. Second, the submitter should seek assurance of confidential treatment where possible, including by invoking, when available, regulatory or statutory commitments of confidential treatment, such as those the Court found present in this case.

If such efforts are not successful, *Food Marketing Institute* opens many other avenues an interested litigant might pursue.

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[28] *See Chrysler Corp.*, 441 U.S. at 317-18.