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FMI v. *Argus Leader Media* — Supreme Court Broadens Scope of FOIA Exemption

Court Holds That, Under FOIA, the Federal Government May Not Disclose Commercial Information That a Corporation Has Kept Private and Provided to the Government Under an Assurance of Privacy

SUMMARY

Yesterday, in a widely watched federal Freedom of Information Act ("FOIA") case, the U.S. Supreme Court held that commercial information submitted to the federal government qualifies as "confidential" under Exemption 4 when, at a minimum, it is "actually" and "customarily" "kept private" and the federal government provides assurances to the submitter that the information will be maintained in confidence.[1] This standard rejects the rule developed in the D.C. Circuit, and subsequently adopted by multiple other circuits, which required a showing that the federal government's disclosure of the information would likely inflict "substantial competitive harm" on the submitter to qualify for this exemption.[2] The new test affords greater protection to commercial information submitted to the federal government and may reduce the cost of opposing requests for disclosure by eliminating the need to prove competitive harm.

BACKGROUND

FOIA enables members of the public to request and obtain federal government records. To balance transparency against other governmental interests, the Act makes all public records presumptively available for disclosure, but carves out certain categories of exempt information that agencies may choose to withhold.[3] Specifically, as relevant here, FOIA Exemption 4 excludes "trade secrets and commercial or financial information obtained from a person that is privileged and confidential."[4]

At issue in *Argus* was the national food stamp program, known as the Supplemental Nutrition Assistance Program ("SNAP"). SNAP is administered by the U.S. Department of Agriculture (the "Department").[5]

When SNAP recipients use their benefit cards at participating retailers, those retailers transfer SNAP sales data to the Department. As a result, the Department possesses a substantial volume of sales data specific to each participating store.

Argus Leader, a local newspaper in Sioux Falls, South Dakota, sought disclosure under FOIA of the names and addresses of all participating stores, as well as store-level redemption data. In response, the Department released the names and addresses, but declined to release the store-level data, reasoning that it fell within Exemption 4.[6] The newspaper then brought suit challenging the Department's determination. The district court agreed with Argus Leader, ruling that the information must be disclosed.[7] To reach this result, the court applied a test first articulated by the D.C. Circuit in 1974 in *National Parks & Conservation Association* v. *Morton*.[8] Under *National Parks*, information is not "confidential" unless its disclosure is likely either to "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."[9]

The Department chose not to appeal, and the Food Marketing Institute ("FMI"), a grocery trade association whose members participated in SNAP, intervened to continue defending the litigation. On appeal, the Eighth Circuit, which also applied the *National Parks* test, agreed with the district court that the store-level SNAP data was not "confidential" under Exemption 4.[10] The Supreme Court granted *certiorari* to decide whether the *National Parks* test represented a correct interpretation of Exemption 4 and, if so, whether that test was satisfied on the facts of the case.

THE SUPREME COURT'S DECISION

In a 6-3 opinion, the Supreme Court sided with FMI and rejected the *National Parks* test.[11] In determining what constitutes "confidential" information under Exemption 4, the majority relied primarily on the statute's plain text, looking to dictionary definitions and judicial decisions from FOIA's 1966 enactment to ascertain the term's meaning.[12] The Court held that, at a minimum, the information at stake must be "actually" and "customarily" "kept private" in order to qualify for protection under Exemption 4.[13] On the facts at issue, this standard was easily satisfied—there was no dispute that the participating stores maintained the SNAP information in confidence. The Court further suggested that information might not be considered confidential unless the receiving party "provides some assurance that it will remain secret."[14] But the majority ruled that it need not definitively resolve this question, because the Department had, in fact, provided such assurances to retailers participating in SNAP.[15]

After articulating the proper standard for Exemption 4, the Court went on to reject the *National Parks* test and its requirement of "substantial competitive harm," finding that both lacked support in the text or structure of FOIA. The majority also criticized the *National Parks* court's methodology, and in particular its reliance on legislative history in derogation of the plain text.[16] Finally, the Court rebuffed Argus Leader's argument (based on language from prior Supreme Court decisions) that FOIA exemptions

should be "narrowly construed" to give effect to the statute's general policy of disclosure.[17] In the Court's view, FOIA strikes a balance between disclosure and government interests in withholding, and its exemptions should accordingly be given a "fair reading."[18]

Justice Breyer, joined by Justices Ginsburg and Sotomayor, concurred in part and dissented in part. He agreed that the *National Parks* test was overly demanding and that the majority opinion articulated two necessary elements for Exemption 4 withholding. But he contended that Exemption 4 additionally requires a showing of "genuine harm to an owner's economic or business interests."[19] Justice Breyer would have remanded the case to the lower courts to determine whether FMI had shown this additional requirement of "genuine harm."[20]

IMPLICATIONS

Following the Court's decision in *Argus*, commercial information submitted to the government by the private sector will be protected, at a minimum, when it "is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy."[21] Compared to the *National Parks* test, this standard will not only make it easier to obtain protection under Exemption 4, but should also reduce costs by avoiding litigation over the existence of substantial competitive harm.

Under the new test, agencies may require proof that the information at issue is kept confidential, and may not simply accept a submitter's general assertion that it is. Practices such as limiting the internal distribution of the information at issue, using protective legends, and using non-disclosure agreements may be helpful in establishing confidentiality. *See, e.g.*, *Airline Pilots Ass'n, Int'l* v. *United States Postal Serv*., 2004 WL 5050900, at *5 (D.D.C. June 24, 2004) (finding that "customarily kept confidential" standard was met where the submitter's declaration described how the requested records were subject to "very limited disclosure within the organization").

One point of uncertainty going forward is whether the second prong suggested in the Court's opinion—that the government provide assurance that the submitter's information will be held in confidence—is in fact a prerequisite for application of Exemption 4. To ensure they satisfy this prong to the extent it applies, businesses should, where possible, obtain an assurance of confidentiality before providing sensitive information to the government.

On a broader level, the decision is also significant insofar as it makes clear that FOIA exemptions should be construed consistent with their plain text, rather than "narrowly," as some prior decisions had suggested.[22] Notably, however, many states and localities have their own statutes requiring the disclosure of public records and it is unclear what impact, if any, the holding in *Argus* will have on future interpretations of state law.

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ENDNOTES

1 *Food Mktg. Inst.* v. *Argus Leader Media*, __ U.S. __ (2019), No. 18-481, slip op. at 5, 12 (June 24, 2019).

2 *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also* Dep't of Justice, Guide to the Freedom of Information Act 274 (2019) (describing *National Parks* as "the leading case on the issue").

3 5 U.S.C. § 552(a)(3), (b).

4 5 U.S.C. § 552(b)(4).

5 7 U.S.C. § 2011.

6 *Food Mktg. Inst.*, slip op. at 2.

7 *Argus Leader Media* v. *U.S. Dep't of Agric.*, 224 F. Supp. 3d 827, 832-33 (D.S.D. 2016).

8 *National Parks*, 498 F.2d at 770.

9 *Id.*

10 *Argus Leader Media* v. *U.S. Dept. of Agric.*, 889 F.3d 914, 915 (8th Cir. 2018). The first prong of *National Parks* was not raised by the government and was accordingly not considered by the Eighth Circuit. *Id.*

11 As a threshold matter, the Court ruled that FMI had standing to bring suit because its member-retailers would suffer at least some redressable competitive injury from disclosure of the store-level SNAP data. *Food Mktg. Inst.*, slip op. at 4-5.

12 *Id*. at 5.

13 *Id.* at 5, 12.

14 *Id.* at 5.

15 *Id*. at 6.

16 *Id*. at 7.

17 *Id.* at 11.

18 *Id*. (quoting *Encino Motorcars, LLC* v. *Navarro*, 584 U.S. __ (2018) (slip op. at 9)).

19 Slip op. at 1 (Breyer, J., concurring in part and dissenting in part).

20 *Id.* at 5.

21 Slip op. at 12 (majority opinion).

22 *Id.* at 11.

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