SCOTUS Expands Scope of FOIA Trade Secrets and Commercial Information Exemption

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The Supreme Court has updated an important Freedom of Information Act ("**FOIA**") exemption for the digital age. In ***Food Marketing Institute v. Argus Leader Media***, the Supreme Court this week significantly expanded the scope of FOIA Exemption 4. FOIA Exemption 4 is the exemption most commonly claimed by private-sector entities when seeking to protect competitively sensitive information that must be disclosed to a federal agency. It shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[1] Beginning with a D.C. Circuit decision in 1974, *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), courts have interpreted FOIA Exemption 4 narrowly. For commercial or financial information to be "confidential," a number of federal courts of appeals have required a showing of "substantial competitive harm" from disclosure. Proving "substantial competitive harm" has proven difficult in practice, and, in this digital age, there is an increasing awareness that information and data are valuable. The majority opinion in *Food Marketing*, written by Justice Gorsuch, squarely repudiated the "substantial competitive harm" test in favor of a less difficult standard, thereby broadening Exemption 4.

It is significant that the justices were unanimous in rejecting the "substantial competitive harm" test. They disagreed about whether harm has any role to play in Exemption 4. In an opinion concurring in part and dissenting in part, Justice Breyer explained that he "would clarify that a private harm need not be 'substantial' so long as it is genuine."[2] In contrast, the majority wouldn't apply a harm test at all, arguing that such a test is not supported by the statute. Instead, the majority explained its test as follows:

> 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.[3]

In announcing this test, the majority described the D.C. Circuit's *National Parks* decision—which created the "substantial competitive harm" test—as "a relic from a 'bygone era of statutory construction'" because of its selective use of legislative history.[4] Noting that *National Parks* had been criticized over the years, including by the D.C. Circuit itself, the Supreme Court explained that it could not square the "substantial competitive harm" test with the text and structure of FOIA.[5] Nor was the Court persuaded by policy

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[1] 5 U.S.C. § 552(b)(4).

[2] *Food Mktg.*, slip op. at 3 (Breyer, J., concurring in part and dissenting in part). Of course, FOIA plays an important function "as a means for citizens to know 'what their Government is up to.'" *Nat. Archives and Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). Congress appropriately "sought to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966)). The *Food Marketing* majority and dissent disagree about how to strike that balance, but it is clear that both recognize that "legitimate governmental and private interests could be harmed by release of certain types of information." *Id.* (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)).

[3] *Food Mktg.*, slip op. at 12 (majority opinion).

[4] *Id.*, at 8 (quoting Brief for United States as *Amicus Curiae* at 19).

[5] *Id.*, at 7–10.

arguments for greater disclosure, reiterating that "important interests [are] served by [FOIA's] exemptions"[6] and interpreting Exemption 4 more broadly than the numerous courts of appeals adhering to *National Parks*.

The Supreme Court's reformulated test for whether information is "confidential" significantly enlarges the scope of Exemption 4, at least for circumstances in which information is shared with the government under assurances that the government will keep that information private. The Court's test in *Food Marketing* would find "confidential" any information that is customarily and actually treated as private, regardless whether there is actual competition and likely competitive injury upon disclosure.[7] This is welcome news for private-sector entities that often find themselves in the position of submitting sensitive commercial or financial information to the federal government, providing comfort that their information may not be released under FOIA irrespective of whether they can demonstrate substantial harm from disclosure.

The *Food Marketing* majority left for another day the question whether Exemption 4 applies when information is shared with the government without assurances that the government will keep that information private. Because the information provided to the government in *Food Marketing* was clearly provided with such assurances, the Court found no need to reach that question to resolve the case before it.[8] One can only hope that this admirable example of judicial restraint does not, itself, unleash a wave of litigation. The practical reality is that most FOIA issues are not resolved in the courts but instead by thousands of day-to-day decisions by the FOIA professionals who work at federal agencies. There is no definition or mention of assurances of privacy in the FOIA statute. While it is unknown how the test for assurances will develop, the prudent approach is that parties sharing information should now mention an assurance of privacy—based on the grounding statute, regulations or agency guidance, or on private discussions with the agency—in all confidential treatment requests.

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[6] *Id.*, at 11 (quoting *Abramson*, 456 U.S. at 630–31).

[7] The now-rejected "substantial competitive harm" test required "a showing of actual competition and a likelihood of substantial competitive injury." *People for the Ethical Treatment of Animals v. U.S. Dep't of Health & Human Servs.*, 901 F.3d 343, 350 (D.C. Cir. 2018). This was a more taxing burden than the *Food Marketing* standard, even though there was no need "to show actual competitive harm." *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979).

[8] *Food Mktg.*, slip op. at 6–7.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Michael S. Flynn	+1 212 450 4766	michael.flynn@davispolk.com
Randall D. Guynn	+1 212 450 4239	randall.guynn@davispolk.com
Michael Kaplan	+1 212 450 4111	michael.kaplan@davispolk.com
Neil H. MacBride	+1 202 962 7030	neil.macbride@davispolk.com
Paul J. Nathanson	+1 202 962 7055	paul.nathanson@davispolk.com
Annette L. Nazareth	+1 202 962 7075	annette.nazareth@davispolk.com

Davis Polk

Margaret E. Tahyar	+1 212 450 4379	margaret.tahyar@davispolk.com
Eric B. Lewin	+1 212 450 3701	eric.lewin@davispolk.com