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OH SNAP! Supreme Court Rejects Substantial Competitive Harm Test For Key FOIA Exemption

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On June 24, 2019, the Supreme Court ruled that Exemption 4 of the Freedom of Information Act ("FOIA"), which protects from public disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," does not require a showing of substantial competitive harm for information to qualify as "confidential." The Court's ruling represents a sea-change in how the Government must protect information under this important exemption.

As discussed in our previous blog article, the case – Food Marketing Institute v. Argus Leader Media, 588 U.S. ___ (2019) ("*FMI*") – involved a FOIA request made by Argus Leader Media, a South Dakota newspaper, to the U.S. Department of Agriculture ("USDA"), seeking the yearly Supplemental Nutrition Assistance Program ("SNAP") sales figures for every grocery store participating in the program. After the USDA refused to release the store-level SNAP data, citing FOIA Exemption 4, Argus filed suit, resulting in both the trial court and the Eighth Circuit ruling in its favor. In so ruling, the lower courts applied the test first enunciated in the D.C. Circuit decision *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 (D.C. 1974), which required a showing that disclosure of commercial or financial information likely would cause substantial harm to the competitive position of the person from whom the information was obtained as a condition to the applicability of Exemption 4.

In a 6-3 majority opinion authored by Justice Gorsuch, the Supreme Court rejected the substantial competitive harm test set forth in *National Parks*. In interpreting the meaning of the term "confidential" used in Exemption 4, the Court looked to what that term's ordinary, contemporary, and common meaning was when Congress enacted the FOIA in 1966. The Court found the term "confidential" meant then, as it does now, "private" or "secret."

The Court then explained how contemporary dictionaries suggest two conditions might be required for information communicated to another to be considered "confidential." First, information communicated to another remains confidential whenever customarily it is kept private, or at least

closely held, by the person imparting it. Second, information might be considered confidential only if the party receiving it provides some assurances it will remain secret.

As to which of these conditions must be met for information to be considered confidential under Exemption 4, the Court held that "[a]t least the first condition has to be [met]; it is hard to see how information could be deemed confidential if its owner shares it freely." However, the Supreme Court declined to resolve whether privately held information loses its confidential character for purposes of Exemption 4 if it is communicated to the Government without assurances the Government will keep it private, because resolution of that issue was not presented in the case. Rather, it was undisputed that the Government had long promised FMI's retailers it would keep their information private. In other words, the Court left open the question of whether a party could disclose information to the Government without requiring the Government to keep it confidential and then later assert in response to a FOIA request that it is "confidential" information subject to Exemption 4.

The Court proceeded to explain "substantial competitive harm" is notably lacking from dictionary definitions of, and early case law interpreting, "confidential" as used in Exemption 4. The substantial competitive harm test traced its origin to what the Supreme Court characterized as a "selective tour through the legislative history" conducted by the D.C. Circuit in *National Parks*. The D.C. Circuit heavily relied on statements from witnesses in Congressional hearings years earlier on a different bill that was never enacted into law, which failed to comport with the official committee reports that are consistent with the plain and ordinary meaning of "confidential" as "private" or "secret." In addition, the Court noted how *National Parks* has drawn considerable criticism over the years, including from the D.C. Circuit itself. Finally, the Court found unpersuasive Argus' attempts to salvage the substantial competitive harm test, rejecting in turn Argus' arguments that "confidential" has a specialized common law meaning consistent with the test, that Congress ratified the test, or that public policy favors the test.

Consequently, because it is "a relic from a 'bygone era of statutory construction,'" the Court declined to adopt the substantial competitive harm test set forth in *National Parks*. Instead, the Supreme Court held, "[a]t 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."

Justices Breyer, Ginsburg, and Sotomayor filed a separate opinion concurring with the majority's decision to reject the substantial competitive harm test, but nonetheless dissented on the basis that "some" genuine harm to the owner of the information must be shown before it is exempt from public disclosure. In addressing the dissenting opinion, the majority concluded it boiled down to a policy argument about the benefits of broad disclosure – an argument the majority declined to endorse.

The Supreme Court's rejection of the substantial competitive harm test may benefit Government contractors seeking to protect from public disclosure their confidential information delivered to the Government. Under *FMI*, such contractors should not have to worry about whether they can show "substantial" competitive harm to prevent disclosure of their proprietary information in response to a FOIA request (assuming that they can demonstrate that customarily they treat the information as private and they provided the information to the Government under an assurance of privacy). However, for contractors seeking to obtain information about their competitors through use of the FOIA process, the Supreme Court's ruling may present a significant hurdle. No longer can they insist that the competitor seeking to resist disclosure must demonstrate competitive harm – let alone substantial competitive harm.

For instance, if a FOIA requester seeks copies of a contractor's proposal submitted in response to a solicitation, the contractor could maintain that the standard set forth in *FMI* is satisfied to prevent disclosure, regardless of whether competitive harm is present. Proposals are submitted with restrictive legends recognized by the Federal Acquisition Regulation, conveying in effect that the contractor customarily and actually keeps the information contained in the proposal secret (*FMI*'s first condition). Additionally, by allowing the affixation of such legends, the Government implicitly assures the contractor it will keep the proposal information confidential (*FMI*'s second condition). Thus, Exemption 4 should apply without the contractor having to demonstrate competitive harm if the Government were to disclose the proposal.

Conversely, the same outcome may not result if the FOIA requester seeks copies of a contract awarded to a contractor – a common scenario faced by today's Government contractors. In that case, the contractor would argue any proprietary information contained in the contract is customarily kept secret by the contractor, thereby satisfying *FMI*'s first condition. But in the absence of a restrictive legend affixed to the contract itself, the contractor may be unable to satisfy the potential second condition acknowledged by *FMI* (*i.e.*, the Government's assurance of confidentiality). *FMI* leaves open whether the contractor could still advocate for Exemption 4's applicability under those circumstances (*e.g.*, by relying upon the first condition as triggering its applicability alone, or perhaps by relying upon the first condition in conjunction with a showing of "some" competitive harm if the information were disclosed, akin to what the dissenting opinion in *FMI* would have required). Nonetheless, contractors facing a FOIA request seeking their awarded contracts can depend upon *FMI* to stand, at a minimum, for the proposition that *National Parks*' "substantial competitive harm" test is no longer the test for nondisclosure.

Accordingly, one area of continued interest to all Government contractors will be the ramifications of the Supreme Court's decision not to resolve whether information must satisfy **both** of the conditions of confidentiality set forth in *FMI*. The Court undoubtedly held information must meet one condition – namely, information customarily must be kept private, or at least closely held, by the person imparting it – to qualify for the exemption. But the Court left open the question of whether confidential information loses its confidentiality if the Government does not assure it will keep it private. This is important because, as many Government contractors know, the Government traditionally will not assure the privacy of data delivered to it with either no or incorrect data rights legends, meaning such data would not satisfy this second condition of confidentiality. Rather, the Government treats such data as having been conveyed with unlimited rights, including the right of the Government to furnish the data to anyone and everyone in its unfettered discretion. It also is possible that courts may conclude in the future that a contractor which delivered unmarked or incorrectly marked data did not take reasonable steps to keep its data secret, thereby failing to satisfy even the first condition of confidentiality set forth in *FMI*.

Thus, contractors should follow closely how lower courts will apply *FMI*, particularly as to whether they will require for Exemption 4's application: (1) satisfaction of one or both conditions of confidentiality, or (2) a showing of "some" competitive harm if the second condition cannot be satisfied. And as always, contractors should take all reasonable steps to maintain the confidential nature of their confidential information. Unless and until the courts hold that the second condition is not required to be met under Exemption 4, those reasonable steps include attempting to obtain the Government's assurances that it will treat the contractor's information as confidential.

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