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Legal Sidebar

When Does the Government Have to Disclose Private Business Information in its Possession?

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On Monday, April 22, the Supreme Court heard oral arguments in *Food Marketing Institute (FMI) v. Argus Leader Media*, in which the Court is considering the scope of Exemption 4 of the Freedom of Information Act (FOIA). That exemption authorizes agencies to withhold from disclosure under FOIA "confidential" commercial or financial information that a non-governmental entity has supplied an agency. While Exemption 4 has generated significant case law in the lower federal courts, the Supreme Court has never—until now—considered the issue. Third parties regularly submit sensitive proprietary information to the federal government in a diverse array of contexts, including such varied situations as applications for government loans; applications for drug approvals by the Food and Drug Administration; military and other government contracts; and settlement negotiations with agencies. As a result, the Court's decision in *FMI* implicates a public policy debate about the scope of Exemption 4. On one hand, a narrow view of the exemption could affect private parties' willingness to share information submitted to the government under these and other contexts. At the same time, financial and commercial information may often be associated with federal programs and activities that implicate public health and safety, the allocation of federal funds, and other matters of public interest that may warrant public scrutiny. Accordingly, a decision that broadens agencies' discretion to withhold under Exemption 4 may effect a corresponding limitation on the public's access to such important data. In anticipation of the Court's decision in *FMI*, this Sidebar provides a general overview of Exemption 4 and *FMI*.

FOIA and Exemption 4

Congress enacted FOIA in 1966 by amending the Administrative Procedure Act (APA). Congress intended the 1966 law "'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" While the original APA contained requirements for agencies to make various documents publicly available, the exceptions to disclosure in the APA's public information section had, in the estimation of FOIA's drafters, "become the major statutory excuse for withholding Government records from public view." FOIA therefore established a general "presumption" of public accessibility to agency information. In this vein, FOIA directs agencies to disclose certain types of information

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affirmatively, whether in the *Federal Register* or on agency websites (or in other "electronic format[s]"). Moreover, federal agencies are generally required to make agency records "promptly available to any person" upon request, and agency decisions to withhold information are subject to review in federal district court.

But while FOIA's drafters intended to establish "a broad philosophy of 'freedom of information'" to protect certain private and governmental interests, they also exempted specific categories of information from the mandatory disclosure requirements of the new law. FOIA contains nine enumerated exemptions from disclosure that cover a range of different types of information, such as certain matters "compiled for law enforcement purposes" (Exemption 7) and information pertaining to specific reports of agencies that are "responsible for the regulation or supervision of financial institutions" (Exemption 8).

Exemption 4 of FOIA authorizes agencies to withhold certain financial or commercial records that non-governmental parties have provided to the government. (While Exemption 4 provides agencies with the *discretion* to withhold covered information, it should be noted that the Trade Secrets Act (TSA) imposes criminal penalties for the unlawful disclosure of many types of information covered by Exemption 4, affirmatively prohibiting certain agency disclosures.) Exemption 4 specifically states that agencies may exempt from disclosure "trade secrets and commercial or financial information [that are] obtained from a person and [are] privileged or confidential." FOIA, however, does not define what it means for information to be "confidential," and, therefore, the task of ascribing meaning to that term has fallen to the courts.

National Parks and the Meaning of "Confidential" in Exemption 4

The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) established the leading test for determining whether information is confidential under Exemption 4 in a 1974 case, *National Parks and Conservation Association v. Morton*. In *National Parks*, the D.C. Circuit determined, based on its reading of legislative history, that Exemption 4 was intended to protect the interests of the government in "encouraging cooperation . . . by persons having information useful to [government] officials," as well as those of "persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." Based on this understanding of the exemption's underlying purposes, the court held that information is "confidential" under Exemption 4 only if disclosure is likely to:

1. impair the government's ability to obtain necessary information in the future; or
2. cause "substantial harm" to the competitive position of the person from whom the information was obtained.

By confining the meaning of "confidential" to these two, specific situations, *National Parks* limits the grounds under which agencies may withhold commercial or financial information supplied by third parties, affording more public access to such information. Nearly twenty years later, in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, the D.C. Circuit limited the *National Parks* test to situations in which entities are *obligated* to provide commercial or financial information to an agency. If a submitter has voluntarily provided the government with financial or commercial information, such information, per *Critical Mass,* "is 'confidential' . . . if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Most federal courts of appeals have not, as of yet, embraced *Critical Mass*' modification of *National Parks*. Instead, other appellate courts have continued to apply *National Parks* to both voluntary and involuntary submissions of information.

Notwithstanding its widespread adoption by the lower federal courts, several commentators, judges, and even Members of the Supreme Court have criticized the *National Parks* test. Critics have contended, for example, that the *National Parks* test is divorced from the ordinary meaning of the word "confidential,"

which usually does not just refer to the two, specific criteria mentioned in that case. The test has also been criticized for creating legal uncertainty as a result of lower courts' varying and conflicting applications of the "substantial-competitive-harm" prong of the test. For example, in a 2015 dissent from denial of certiorari, Justice Thomas (joined by Justice Scalia) opined that *National Parks* is "an atextual test that has different limits in different" courts of appeals. He wrote that courts do not agree on whether "some defined competitive harm (like lost market share)" must be shown to prove likelihood of substantial competitive harm, or whether it is enough to show "that competitors' possible use of the information alone constitutes harm—even if this would not likely result in any negative consequences for the entity whose information was disclosed." According to Justice Thomas, such disagreements have generated lamentable "confusion" in the lower courts.

FMI v. Argus Leader Media

In *FMI*, the Supreme Court has been asked to abrogate the *National Parks* test. The case arises from a FOIA request for information pertaining to the Supplemental Nutrition Assistance Program (SNAP). A reporter with the *Argus Leader* (Argus), a Sioux Falls, South Dakota newspaper, requested from the U.S. Department of Agriculture (USDA) what is known as "store-level redemption data"—data on the amount of "money individual retailers receive[] from" SNAP beneficiaries' purchases. USDA denied the reporter's request and, on appeal in federal court, argued that the data were exempt from disclosure under Exemption 4. The district court concluded that the information did not satisfy the "substantial-competitive-harm" prong of the *National Parks* test, determining that "any potential competitive harm [to retailers] from the release of the requested SNAP data is speculative at best." The court, therefore, held that the information was not "confidential" under Exemption 4 and therefore needed to be disclosed. FMI, a food retail trade group representing members that participate in SNAP, intervened in the litigation and appealed to the U.S. Court of Appeals for the Eighth Circuit. The court of appeals, relying on *National Parks,* affirmed the district court's judgment, and FMI sought review by the Supreme Court.

Before the Supreme Court, FMI offers two arguments. (The U.S. Solicitor General has also filed a brief in support of FMI.) First, the trade group asks the Court to abrogate *National Parks* and argues that, in place of that judicially crafted two-part test, the Court should give the term "'confidential' . . . its ordinary meaning." Citing FOIA's legislative history, prior judicial decisions—including the Court's interpretation of "confidential" in the context of another FOIA exemption—and dictionary definitions, FMI argues that "confidential" information refers to "information that is kept private and not publicly disclosed," a broader class of information than that which is encompassed by *National Parks*. Echoing Justice Thomas's 2015 dissent, FMI argues that the *National Parks* test is "atextual" and responsible for multiple unnecessary inter- and intra-circuit splits on the application of the test. FMI claims that the store-level redemption data qualifies as confidential under the ordinary meaning of the word, asserting that "retailers carefully safeguard" this data and noting that USDA has "longstanding policies" assuring its confidentiality.

In the alternative, FMI contends that the Court should "[c]larify[] that the *National Parks* test is met when there is" merely "a reasonable possibility of financial or commercial harm—which, in the context of a business, means the possibility of diverted sales or profits." FMI's proposed test would expand Exemption 4's coverage and, FMI argues, have the salutary effect of "facilitat[ing] uniform application" by courts. Under this "clarification" of the *National Parks* test, FMI contends that USDA's trial evidence, which included testimony that publicizing retailers' store-level redemption data would cause "competitors [to] adjust their product selection and marketing to attract SNAP customers," clearly shows "a reasonable possibility that competitors could use . . . redemption data in ways resulting in harmful diversion of sales or profits."

Argus supports retaining the *National Parks* test. (Argus also contends that FMI does not have standing to appeal because the U.S. Solicitor General stated in its brief that "USDA would exercise [its] discretion to

disclose" the redemption data even if Exemption 4 could allow it to withhold, save for the fact that it perceived itself as barred from disclosing under another statute.) Specifically, Argus opines that "confidential" carries the meaning announced by *National Parks* because, among other things, at the time Exemption 4 was drafted, the term "trade secrets and other confidential commercial information" "was an established common-law term of art for non-public business information, disclosure of which would be tortious because it would cause competitive harm." Argus asserts that *National Parks*' "substantial-competitive-harm" prong embraces this understanding of "confidential," and that congressional enactment of over sixty "provisions that either expressly incorporate Exemption 4 . . . or enact a virtually identical standard" evince congressional ratification of *National Parks*.

FMI's Possible Impact

The Court's decision in *FMI* could have a significant impact beyond the context of public access to store-level SNAP redemption data. Were the Court to abrogate the *National Parks* test and adopt a broader definition of "confidential" information, Exemption 4 would allow agencies to withhold a larger swath of information from disclosure under FOIA. Critics of *National Parks* have asserted that the test "discourages businesses from disclosing information to the government" out of fear that the information will be made public and that adoption of a broader definition of "confidential" will instill greater confidence in entities that disclose sensitive proprietary information to federal agencies. On the other hand, because much of the information potentially within Exemption 4's ambit implicates important matters of public interest (as mentioned above), supporters of *National Parks* argue that adopting a definition that expands agencies' discretion to withhold information submitted by third parties would undermine the acknowledged goal of FOIA to "'contribut[e] significantly to public understanding *of the operations or activities of the government*.'"

At oral argument, the Justices asked each party probing questions that underscored the complexity and importance of the case. Justice Kagan, for example, asked counsel for Argus how the present case is different from the Court's 2011 decision in *Milner v. Department of the Navy*, in which an 8-1 Court (in an opinion by Justice Kagan) overturned another D.C. Circuit interpretation from the 1970s that the Court described as "ignor[ing] the plain meaning of the" FOIA exemption at issue and imposing a standard that had "no basis or referent in [the exemption's] language." Justice Gorsuch asked whether it was significant that "confidential" has been interpreted differently in the context of another FOIA exemption (Exemption 7(D)). On the other hand, Justice Ginsburg asked both FMI's counsel and counsel for the Solicitor General whether abrogating *National Parks* in favor of a broad definition of "confidentiality" was in conflict with FOIA's pro-disclosure aims.

Should Congress seek to provide clarity on this issue, there are several legislative options available to it. Congress can, akin to the TSA, pass legislation independent of FOIA that prohibits agencies from disclosing certain commercial or financial information supplied to it by third parties. It may also amend Exemption 4 itself. Depending on its view, it could incorporate a broad definition of "confidential" similar to FMI's into the exemption, codify the *National Parks* test, or adopt an entirely different test. It could take any of these approaches regardless of how the Court holds in *FMI*, as Congress can overturn Supreme Court decisions that are based on statutory interpretation. Indeed, Congress has previously amended FOIA in response to judicial decisions with which it has disagreed.

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