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High Court Creates New FOIA Playing Field

By **Matthew Collette** (June 25, 2019, 7:46 PM EDT)


Matthew Collette

The U.S. Supreme Court's June 24 decision in Food Marketing Institute v. Argus Leader alters 40 years of Freedom of Information Act law governing the withholding of documents the government receives from outside sources (including businesses). Instead of showing that the company submitting the information must suffer "competitive harm" from its release, commercial information received from outside sources can be withheld if it is "customarily and actually treated as private by its owner and provided to the government under an assurance of privacy."[1]

The court's decision should make it easier for the government to withhold information submitted by businesses. But it also sets in motion a new litigation battleground in Exemption 4 cases, which will now turn on whether a governmental assurance of confidentiality is required (an issue left open in Food Marketing Institute) and whether the submitter has made a credible showing that the information is confidential.

Private Entities and the Freedom of Information Act

Private businesses, labor unions and individuals give commercial or financial information to the government under wide variety of circumstances. Numerous federal statutes require private entities to submit information in connection with government contracts, drug safety, banking and securities, labor statistics, environmental issues, and myriad other subjects. As pervasive as government regulation and oversight has become, it is likely that every major business in the U.S. (and many minor ones) submit commercial or financial information to the government.

Once information comes into the government's possession, in most cases that makes it an "agency record" subject to the Freedom of Information Act, 5 U.S.C. § 552.[2] FOIA generally requires federal agencies to release requested records to the public. However, FOIA Exemption 4 allows agencies to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[3]

In the early years of FOIA, courts held that information is "confidential" under Exemption 4 if the submitter would not normally release it to the public,[4] or if the government promised the submitter it would not release it.[5] That changed in 1974 with the U.S. Court of Appeals for the D.C. Circuit's decision in National Parks and Conservation Association v. Morton.[6] The National Parks court held that

information is “confidential” under Exemption 4 if its release would be likely “(1) to impair the Government’s ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”[7] Other circuits followed the D.C. Circuit’s lead.[8]

In 1992, the D.C. Circuit backtracked slightly. In Critical Mass Energy Project v. Nuclear Regulatory Commission,[9] the court limited National Parks to instances in which a business is "obliged to furnish" the information to the government.[10] Exemption 4 would protect commercial information submitted to the government voluntarily “if it is of a kind that the provider would not customarily release to the public.”[11]

Proving "Competitive Harm" Under the National Parks Test

The “competitive harm” requirement required release of information that many private business would treat as “confidential” if left to their own devices. For instance, some courts required the government to show “harm flowing from the affirmative use of proprietary information by competitors.”[12] Potential use of records by the general public, the media or an advocacy organization to embarrass or criticize the company was insufficient, even if that would cause competitive harm through the loss of customers.[13]

The “competitive harm” standard also required the extensive involvement of private entities in Exemption 4 cases. An executive order generally requires agencies to notify the submitter when a FOIA request might result in the disclosure of its information and to give the submitter a “reasonable period of time” to object.[14] And because proving competitive harm requires extensive knowledge of the relevant market and the way competitors might use the information, in most Exemption 4 cases detailed declarations from company representatives were necessary to make the case for competitive harm. Companies sometimes intervened in the litigation to protect their interests in confidentiality.[15]

As courts have moved more toward a strict plain language interpretation of statutes, the National Parks test has been the subject of increasing criticism. When the D.C. Circuit narrowed the test in Critical Mass, three judges joined a concurring opinion stating that National Parks was incorrectly decided.[16] The government in several recent briefs in the court of appeals and Supreme Court asserted that the test is inconsistent with the plain terms of the statute. And in 2015, Justice Clarence Thomas, dissenting from the denial of certiorari in New Hampshire Right to Life v. U.S. Department of Health and Human Services, argued forcefully that the National Parks test should be abandoned.[17]

The Food Marketing Institute Case

The Food Marketing Institute case arose from a FOIA request made to the U.S. Department of Agriculture by the Argus Leader, a newspaper in Sioux Falls, South Dakota. The newspaper sought data regarding the Supplemental Nutrition Assistance Program (commonly known as the food stamp program). The newspaper requested “store-level SNAP data” concerning yearly redemption amounts or sales figures submitted to USDA by SNAP retailers nationwide.[18]

The district court held that the USDA had failed to show that disclosure would likely cause competitive harm. The government did not appeal, but the Food Marketing Institute intervened and took the case to the court of appeals. After the court of appeals affirmed, the Supreme Court granted certiorari.

The Supreme Court reversed, holding that the data could be withheld under Exemption 4. The court described the National Parks “competitive harm” standard, finding it “a relic from a ‘bygone era of

statutory construction.'"[19] Chiding the National Parks court for relying on statements from witnesses at committee hearings when the language of the statute is clear, the court criticized the D.C. Circuit's "casual disregard for the rules of statutory interpretation."[20]

In place of National Parks, the court opted for a more "ordinary, contemporary, common meaning" of "confidential."[21] The court noted that contemporary dictionaries suggest two conditions "might" be required to fit the definition: (1) whenever [the information] is customarily private, or at least closely held, by the person imparting it"; or (2) "if the party receiving it provides some assurance that it will remain secret."[22] The court made clear that the first condition is required: "[I]t is hard to see how information could be deemed confidential if its owner shares it freely."[23] But the court ducked the second question, saying it did not need to decide whether a government assurance of confidentiality is required because that condition was met in this case anyway.[24]

The court summed up its ruling 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."[25]

The Future of FOIA Exemption 4 Litigation

Food Marketing Institute should make it easier for the government to withhold commercial information. Company affidavits will no longer provide detailed information on the competitive market and the potential harm but will instead focus on the company's customary practices to keep the information confidential. But there are unanswered questions left to be litigated, and the resulting case law may impact requesters and businesses in several ways.

Is a Government Promise of Secrecy Required?

The court left open the question whether "some assurance" from the government is required for the information to be treated as "confidential" under Exemption 4. This question will be hotly contested going forward.

Ironically, if the answer is "yes," one can imagine a world in which the Supreme Court's decision makes it more — not less – difficult to withhold information. Suppose a company submits highly sensitive, closely guarded information — the kind whose release would provide a feast for competitors and wreck the company — but without a government promise to keep it under wraps. Without such a promise, release will be required even if it would have met the National Parks competitive harm standard.

Businesses have several potential arguments against imposing such a promise requirement. D.C. Circuit cases law applying Critical Mass to voluntary submissions do not impose the additional requirement that the government promise confidentiality.[26] Moreover, requiring a government promise of confidentiality would have the odd result of allowing a government agency to control the application of FOIA. Similar types of information could be treated differently depending upon whether the agency made a promise of secrecy. An agency could even play favorites, making promises to one company but not a rival (although that might raise other legal issues).

Requesters may counter that truly "confidential" information requires both sides of the transaction to treat the information as confidential. Under that theory, the very act of handing over information without a promise that it will be kept secret shows that it is not to be treated as confidential. They may also posit that because FOIA is about the government's documents, any analysis of what is

"confidential" must approach the issue from the government's perspective as well. And the Supreme Court gave no indication that courts should follow the D.C. Circuit's Critical Mass line of authority that focuses only on the submitter's custom. In fact, the court cited two pre-National Parks case, both of which involved parties who received promises of confidentiality.

If a government promise or assurance is required, there will be litigation over what is enough to show that the promise was made. Must it be express or can it be implied? At least one early U.S. Court of Appeals for the Ninth Circuit case suggested that an implied promise is sufficient,[27] but other courts will be free to disagree. And can a company include a cover letter saying that it is submitting material with an understanding that it be kept confidential, and rely on the government's silence as an assurance of confidentiality?

It remains to be seen how the battle will play out in the courts. But until the issue is resolved definitively, wise corporate counsel will do their best to extract assurances from federal agencies that the information they send will remain confidential.

Litigation Over the Submitter's Customary Practices

The Food Marketing Institute case shifts the focus of litigation in most Exemption 4 cases from competitive harm to the submitter's internal practices. The shifting battleground will have significant consequences.

Although the volume of case law is minimal, cases decided under the Critical Mass standard for voluntary submissions will be instructive. The Supreme Court's requirement that the information be "both customarily and actually treated as private by its owner" is similar to the Critical Mass standard allowing withholding if the information is "of a kind that the provider would not customarily release to the public."[28]

What evidence will satisfy the agency's burden of proof? We know what was enough in Food Marketing Institute: testimony that the retailers did not disclose the data "or make it publicly available in any way," and that even within a company, "only small groups of employees usually have access to it."[29] Companies who submit affidavits attesting to both of these conditions are on solid ground, although subsequent cases will determine just how much circulation within a company will be too much.

It is also likely that the relevant "custom" will focus on how the company treats the information, and not what other companies in the industry do. The D.C. Circuit has indicated that courts should assess "how the particular party customarily treats the information, not how the industry as a whole treats the information."[30] The Supreme Court seems to have adopted a similar approach, referring to information "treated as private by its owner."[31]

Requesters likely will seek to undercut the submitter's claims of confidentiality by pointing to instances in which the company has released the same or similar information in the past, and by probing every disclosure of the information within and outside the company to support a claim that the information is not truly treated as confidential. Evidence of public disclosure of the same kind of information may support an inference that the company does not consider the information sensitive to protect. It is unlikely that necessary disclosures to employees or suppliers will be enough to forfeit Exemption 4 protection,[32] but the broader the disclosure the more likely the information will be held not to be confidential.

Matthew M. Collette is a partner at Massey & Gail LLP.

Disclosure: Collette previously served as deputy director of the appellate staff of the Civil Division at the Justice Department and senior counsel to the associate attorney general, but he had no personal or substantive role in this case. He participated in writing or editing several of the government's recent briefs, mentioned above, asserting that the National Parks test is inconsistent with the plain terms of the statute.

[1] Food Marketing Institute v. Argus Leader, No. 18-481 (S. Ct. June 24, 2019).

[2] "Agency records" under FOIA are records that are created or obtained by an agency, and under agency control at the time of the request. U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

[3] 5 U.S.C. § 552(b)(4).

[4] See, e.g., Sterling Drug, Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971).

[5] See GSA v. Benson, 415 F.2d 878, 881 (9th Cir. 1969); Sterling Drug, 450 F.2d at 709.

[6] 498 F.2d 765 (D.C. Cir. 1974).

[7] Id. at 770.

[8] See Critical Mass Energy Project v. Nuclear Regulator Comm'n, 975 F. 2d 871, 876 (en banc) (D.C. Cir. 1992) (collecting cases).

[9] 975 F.2d 871, 879 (D.C. Cir. 1992).

[10] Id. at 880.

[11] Id.

[12] Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (emphasis in original) (internal quotations omitted).

[13] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (fears that its employees may become "demoralized" insufficient); Public Citizen Health Res. Grp., 704 F.2d at 1291 n.30 (competitive injury flowing from "customer or employee disgruntlement" insufficient).

[14] Exec. Order 12,600, 52 FR 23781 (1987).

[15] When an agency plans to release documents that a private submitter believes would cause competitive harm, the submitter can bring a "reverse FOIA" suit under the Administrative Procedure

Act, 5 U.S.C. § 706, to prevent the agency from releasing the information. See Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008).

[16] See 975 F.2d at 880 (Randolph, J. concurring, joined by Silberman, J. and Sentelle, J.

[17] 136 S.Ct. 383 (2015) (Thomas, J., dissenting from the denial of certiorari).

[18] Food Marketing Inst., Slip op. at 2.

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

[20] Id. at 8.

[21] Id. at 5 (internal quotations omitted).

[22] Id.

[23] Id. at 6.

[24] Id.

[25] Id. at 12.

[26] See, e.g., Center for Auto Safety v. NHTSA, 244 F.3d 144, 151-52 (D.C. Cir. 2001); Critical Mass, 975 F.2d at 880-81.

[27] See Benson, 415 F.2d at 881.

[28] 975 F.2d at 880.

[29] Food Marketing Inst., slip op. at 6.

[30] Center for Auto Safety, 244 F.3d at 148.

[31] Food Marketing Inst., slip op. at 12 (emphasis added).

[32] Ctr. for Auto Safety v. NHTSA, 93 F. Supp. 2d 1, 17-18 (D.D.C. 2000) (“Limited disclosures, such as to suppliers and employees” remain confidential “as long as those disclosures are not made to the general public”)