

Landmark Supreme Court ruling on FOIA protection favors business

25 June 2019

Yesterday, 24 June 2019, the U.S. Supreme Court issued a landmark decision, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 915 (2019), that overturns a half-century of precedent and significantly expands the ability of businesses to block federal agencies from releasing their confidential information to the public under the Freedom of Information Act (FOIA). The decision eliminates a requirement established in *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) and generally followed by the federal courts that the party objecting to disclosure show "substantial competitive harm" to support withholding of information under FOIA Exemption 4. This is a significant change for federal contractors who share confidential and proprietary information with the government to compete for government awards, and for other reasons.

Background

FOIA generally gives the public, including reporters and competitors, the right to access federal agency records except to the extent the records are protected from disclosure by specific exemptions. These records may include documents received from businesses or documents created by civil servants that contain information received from businesses. FOIA Exemption 4 allows federal officials to withhold "confidential" "commercial or financial information" in the government's possession that has been obtained from third parties, such as businesses. Since the *National Parks* decision, lower courts have interpreted this exemption as allowing the withholding of confidential business records under FOIA only in cases where the private entity was required to provide the information to the government and disclosure would result in "substantial competitive harm."

Decision

Writing for a six-member majority, Justice Gorsuch opined that *National Parks* relied too heavily on the legislative history of FOIA, rather than focusing on the plain text of the law. Gorsuch explained that "the Court cannot arbitrarily constrict Exemption 4 by adding limitations found nowhere in its terms," and concluded that "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." In so doing, the court overturned long-standing precedent and ruled in favor of retailers seeking to prevent a South Dakota newspaper from obtaining store-level data on the redemption of food stamp benefits under the Supplemental Nutrition Assistance Program. There may be

debate in subsequent cases as to what constitutes an "assurance of privacy." It is unclear whether the agency must make an affirmative statement that it will treat the data as confidential or whether it will be sufficient that the submitter claims confidentiality and the agency does not object.

This decision is important to federal contractors as it increases the scope of exempt records and reduces the uncertainty as to whether particular withholdings would be upheld if challenged. Should you have any questions about this ruling or how it specifically impacts your business, please do not hesitate to contact our Government Contracts team.

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