Supreme Court and Appellate Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Confidential Commercial or Financial Information Is Exempt from FOIA. No Showing of Substantial Competitive Harm Is Necessary.

June 25, 2019

Key Points

- The Supreme Court held that the ordinary meaning of "confidential"—used at the time Congress enacted the Freedom of Information Act (FOIA) in 1966—should control its meaning. Where commercial or financial information is treated as private by its owner and provided to the government under an assurance it will be kept confidential, the information is exempt from disclosure under FOIA Exemption 4.
- The Court rejected the requirement created by the D.C. Circuit in National Parks that "substantial competitive harm" must be shown.

Food Marketing Institute v. Argus Leader Media, No. 18-481

Background

The U.S. Department of Agriculture (USDA) issues participants of the Supplemental Nutrition Assistance Program (SNAP) cards—like a debit card—to buy food from participating retailers. When a participant buys food using their SNAP card, the USDA receives a record of that transaction, which is called a SNAP redemption. Respondent Argus Leader Media ("Argus"), which runs a newspaper in South Dakota, sought, under FOIA, annual SNAP redemption totals for stores that participate in the SNAP program. The USDA refused to provide the information, citing numerous exemptions to FOIA.

Argus sued the USDA in federal district court, which found that the USDA properly withheld the information under FOIA Exemption 3, which applies to information prohibited from disclosure by another federal law. On appeal, the 8th Circuit reversed, finding that Exemption 3 did not apply, and remanded the case to the district court.

On remand, the issue before the district court was whether Exemption 4—which covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential"—applied. The district court adopted the test used in the D.C. Circuit in *National Parks*, finding that "substantial competitive harm" is established if there is evidence of "actual competition and the likelihood of substantial competitive

Contact Information

If you have any questions concerning this aler, please contact:

Rex S. Heinke
Partner
rheinke@akingump.com
Los Angeles
+1 310.229.1030

Jenna Mersereau Nalchajian
Associate
jnalchajian@akingump.com
Los Angeles
+1 310.229.1079

injury." *National Parks & Conservation Assn. v. Morton,* 498 F.2d 765, 767 (D.C. Cir. 1974). Applying this standard, the district court entered judgment for Argus.

The 8th Circuit's Opinion

The 8th Circuit affirmed, applying the same test. It held that disclosing the information sought would not cause substantial competitive harm, but instead would "allow grocery retailers to make better business decisions." The 8th Circuit reasoned that "[i]f [commercial usefulness] were enough to invoke Exemption 4, commercial data would be exempt from disclosure any time it might prove useful in a competitive marketplace."

The U.S. Supreme Court's Opinion

In a 6-3 opinion by Justice Gorsuch, the Supreme Court reversed and remanded. The Court held that principles of statutory interpretation require courts first to construe undefined statutory terms using their common and ordinary meaning at the time the statute was enacted. If that inquiry yields an answer, courts must stop their analysis and accept that definition.

FOIA Exemption 4 shields from mandatory disclosure of "commercial or financial information obtained from a person and privileged or confidential." But FOIA nowhere defines "confidential." The Court found that, at the time FOIA was enacted in 1966, "confidential" meant (as it does now) "private" or "secret." Information communicated to another is confidential if two conditions are satisfied: (1) it is customarily kept private, or at least closely held, by the person imparting it, and (2) the party receiving it provides some assurance that it will remain secret.

The Court found that both conditions were satisfied. (The Court therefore did not need to decide whether satisfying only the first condition would qualify information as "confidential.") First, there is uncontested testimony that Petitioner's grocery retailers do not disclose store-level SNAP data or make it publicly available "in any way." Second, the government has long promised grocery retailers that it will keep their information private.

The Court added that no ordinary definition of "confidential" requires "substantial competitive harm." The Court rejected this definition, reasoning that the D.C. Circuit's statutory analysis in National Parks was improper, the decision has been met with widespread criticism (despite being adopted by other courts), and even the D.C. Circuit has distanced itself from National Parks.

The Court rejected Respondent's policy argument that "substantial competitive harm" should be required because FOIA exemptions should be narrowly construed. The Court reasoned that it has "no license to give statutory exemptions anything but a fair reading."

Conclusion

This decision greatly expands the type of information the government can refuse to provide in response to a FOIA request. This decision lowers the risk to private entities that the information they share with the government will later be publicly disclosed, especially to business competitors. However, to ensure confidentiality, anyone disclosing information to the government should seek the government's agreement that the information will remain confidential.