

Supreme Court Strengthens Protection of Confidential Business Information Submitted to Federal Agencies

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Food Marketing Institute v. Argus Leader Media, decided June 24, 2019 by the Supreme Court, substantially expands the Freedom of Information Act exemption for confidential business information. The ruling is significant for clients in regulated industries that submit information to federal agencies, as described below. For additional information, please see our firm's Supreme Court and Appellate alert about the case, available [here](#).

The Freedom of Information Act establishes a general right of public access to information held by the federal government, subject to a number of enumerated exemptions. In *Food Marketing Institute*, the Supreme Court held that one such exemption, Exemption 4—"trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential"—covered information that its owner customarily and actually treated as private and the government assured would be treated as private.

In its opinion, which was authored by Justice Gorsuch, the Court interpreted "confidential" as used in Exemption 4 based on the "ordinary, contemporary, common meaning" of the term when Congress enacted the Freedom of Information Act in 1966. Justice Gorsuch consulted dictionary definitions from the early 1960s that suggested two conditions for information to be considered confidential. First, the information must be "customarily kept private, or at least closely held, by the person imparting it." Second, the party receiving the information "provides some assurance that it will remain secret." The Court left undecided the question of whether both conditions must be satisfied for Exemption 4 to apply because both conditions had been met in this case. At issue were names and addresses of retail stores that participate in the national food stamp program. It was undisputed that the information was customarily and actually not disclosed and the government had promised to keep it private.

Notably, *Food Marketing Institute* explicitly rejected the "substantial competitive harm" requirement that the D.C. Circuit adopted in *National Parks & Conservation Association v. Morton* in 1974. Many courts had applied that requirement, including the

Contact Information

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

Caroline L. Wolverton

Senior Counsel
cwolverton@akingump.com
Washington, D.C.
+1 202.887.4107

Howard R. Sklamberg

Partner
hsklamberg@akingump.com
Washington, D.C.
+1 202.887.4055

John R. Jacob

Partner
jjacob@akingump.com
Washington, D.C.
+1 202.887.4582

Nathan Brown

Partner
nabrown@akingump.com
Washington, D.C.
+1 202.887.4245

Susan H. Lent

Partner
slent@akingump.com
Washington, D.C.
+1 202.887.4558

David H. Quigley

Partner
dquigley@akingump.com
Washington, D.C.
+1 202.887.4339

Eighth Circuit in *Food Marketing Institute*, as had some agencies, for example, the Food and Drug Administration (FDA).

As a result of the Supreme Court's decision in *Food Marketing Institute*, business information submitted to agencies—like FDA, the Department of Health and Human Services, the Environmental Protection Agency, the Department of Transportation, the Department of Agriculture, and the Consumer Product Safety Commission—will be protected from disclosure under the Freedom of Information Act under Exemption 4, at least where the owner customarily and actually treats the information as private and the government provides some assurance that it will be kept confidential. This is a particularly beneficial development for entities providing business information to the federal government.

When submitting confidential business information to an agency, you should generally make clear that you customarily and actually treat that information as private and should request the agency's assurance that it will be kept private, particularly in areas where there is any doubt about whether the information is to be considered confidential or whether the agency will keep it private. You also should be aware that some agencies have their own policies for protecting confidential business information and you should make sure that you understand those rules and policies when providing information to the government.

If you have any questions about the *Food Marketing Institute* case or Freedom of Information Act issues, or need assistance with following best practices when providing confidential business information to the government, please let us know.

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