

PUBLICATION

Supreme Court Ruling Changes FOIA Standard to Better Protect Confidential Information

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The Supreme Court's June 24, 2019 decision in *Food Marketing Institute v. Argus Leader Media* makes it easier to protect trade secrets and confidential commercial or financial information provided to the government from public release under the Freedom of Information Act (FOIA).

FOIA, enacted in 1966, requires executive agencies to make certain agency records and information readily available to the public. FOIA also requires agencies to make records available upon request, provided the request includes a reasonable description of the requested records and complies with basic published FOIA rules. 5 U.S.C. § 552. Not all records are subject to public release. FOIA contains nine exemptions which protect certain categories of government records from release. One of the nine exemptions, Exemption 4, protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential" from release. 5 U.S.C. 552(b)(4). Exemption 4 is an important exemption because many individuals and organizations, such as government contractors, regularly provide the government with information that would harm their financial interests if released to the public – information that would be helpful to their competitors in particular.

Prior to the Court's decision earlier this week, those seeking to prevent the release of their trade secrets or confidential information provided to the government had to prove that the release would cause them "substantial competitive harm." *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In a 6-3 decision, the Court rejected the *National Parks* "substantial competitive harm standard" as inconsistent with the "ordinary meaning and structure" of FOIA. The court stated that *National Parks*' creation of the substantial competitive harm requirement "is a relic from a 'bygone era of statutory construction.'" *Food Marketing Institute* at p. 8.

One of Argus Leader Media's arguments in favor of keeping the substantial competitive harm requirement was that public policy dictates narrow construction of FOIA exemptions. The Court rejected the "narrow reading of exemptions" public policy argument and held that it had "no license to give [statutory] exemption[s] anything but a fair reading." *Id.* at p. 11.

In rejecting the substantial harm requirement, the Court relied on the common meaning of the word "confidential." To be confidential, information must (1) be normally kept private or closely held by the person imparting it and (2) the party receiving it must provide some assurance that it will remain secret. *Id.* at pp. 5-6. The Court held that when 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." *Id.* at p. 12.

Food Marketing Institute improves the likelihood that those who provide confidential information to the government will be able to protect their valuable trade secrets and other confidential information from release to the public. However, in order to secure the benefits of FOIA Exemption 4, those who provide such information to the government must take several common sense steps such as:

- Implement information security policies and procedures to (1) identify trade secrets and other confidential business information and (2) protect such information from release or disclosure.
- Ensure that policies and procedures include basic information security protections such as:
 - Marking documents as confidential and trade secret (If there is a likelihood the documents will be provided to the government, include language to the effect that this confidential information is exempt from release under the (b)(4) exemption of FOIA.).
 - Securing documents (Paper documents should be securely locked in a safe or vault. Electronic documents should be password protected, behind firewalls, etc.).
 - Limiting the number of people in the organization who have the "need to know" the information.
 - Requiring non-disclosure agreements before providing the information to anyone outside the organization.

Under the new standard, if an organization (1) has policies in place to protect trade secrets and other confidential information and (2) actually follows its policies, any confidential information provided to the government should be exempt from release under FOIA. If, on the other hand, information security policies are not followed and the information is only treated as confidential once a FOIA request is filed, the information will be released. If you have questions, please contact a member of the Baker Donelson [Government Contracts Group](#) or your existing Baker Donelson attorney.