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We Are Beginning To See Effects Of High Court FOIA Ruling

By **Kevin Barnett and Nooree Lee** (August 25, 2020, 3:00 PM EDT)

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It has been a year since the U.S. Supreme Court's Food Marketing Institute v. Argus Leader Media crafted a new standard for determining confidential information exempt from disclosure under Freedom of Information Act Exemption 4. Trial courts have started to weigh in on how the decision will impact the FOIA landscape.

From these early decisions, three trends have emerged: (1) courts have protected more information than previously protected; (2) courts have required agencies to show confidentiality using much the same information required under the old standard; and (3) courts have been reluctant to tackle open questions about whether to require agencies to show assurances of confidentiality or foreseeable harm.

Background

In Food Marketing Institute, the Supreme Court abandoned the well-established "substantial competitive harm" test first set forth in the U.S. Court of Appeals for the D.C. Circuit's 1974 decision in National Parks Conservation Association v. Morton and the 40 years of case law applying it in favor of a plain meaning interpretation of "confidential."[1]

In Food Marketing Institute, the Supreme Court held that the information at issue was confidential because the information (1) is "customarily kept private, or at least closely held" by the submitting party and (2) disclosed based on "some assurance that it will remain secret."[2] The court explained that the first prong was mandatory, but expressly declined to answer whether government assurance was also a prerequisite.[3]

In response, the U.S. Department of Justice Office of Information Policy issued new guidance addressing the impact of the decision on Exemption 4.[4] The guidance instructed agencies to determine confidentiality based on both (1) how submitters treat information and (2) the presence of explicit or implied government assurances.

According to the guidance, explicit assurances refer to direct communications with the agency, notices on an agency website, or statutory/regulatory information.[5] It also suggests that contractors can establish implied assurances of confidentiality from the "generic circumstances" of how the government

treats similar information.[6]

Emerging Trends

Over the past year, district courts have started to define the boundaries of the new Food Marketing standard. There are three key trends from these early district court cases: (1) courts have protected more information; (2) courts generally expected companies to provide the same types of evidence; and (3) courts avoided opining on difficult legal questions.

First, courts have applied the new standard broadly to encompass information that may have been outside the protection of the old competitive-harm test.

In fact, the U.S. District Court for the Northern District of California confirmed, in American Small Business League v. U.S. Department of Defense, that "the new standard presents a 'steep uphill battle' for plaintiffs seeking disclosure of information."[7] Courts have even held that information remains "closely held" despite disclosures outside the company as long as it is not released to the public.[8]

Yet despite this apparent broadening of the Exemption 4 standard by Food Marketing Institute, Exemption 4 still has limits, and public release will still result in loss of confidentiality.[9]

Second, while courts have applied the new standard broadly to encompass more information the old competitive-harm test, they are generally looking for companies to submit the same type of evidence to show whether Exemption 4 applies.

American Small Business League is illustrative. In that case, the court found that the defense contractors actually and customarily kept their small business subcontracting plans private by (1) using confidentiality agreements for employees and business partners; (2) placing restrictive markings on documents and communications; (3) using secure, password-protected information technology networks; and (4) restricting access to the information on a need-to-know basis.[10]

Under the old regime, companies would point to this type of confidential treatment as a proxy for proving competitive harm. Now, the confidential treatment is the test unto itself.

Third, courts have thus far side stepped deciding the thorny legal question left open by the Supreme Court: whether Exemption 4 requires government assurances of confidentiality. In most cases, courts have either "assumed without deciding" that this prong was mandatory or determined there was no need to resolve the question.

Although, in Gellman v. U.S. Department of Homeland Security, the U.S. District Court for the District of Columbia combined the two prongs and treated the lack of any assurances of confidentiality as one factor in determining if the information was actually and customarily kept private.[11] In another case, Center for Investigative Reporting v. U.S. Department of Labor, the U.S. District Court for the Northern District of California relied on the DOJ's guidance to determine that information did not qualify as confidential because it was provided without assurances of confidentiality.[12]

When addressing the merits, courts have found assurances of confidentiality in a wide range of agency actions and practices between the parties.

For example, courts have found assurances when agencies used secure portals to transfer documents to

the contractors and anonymized information before using it at a public congressional hearing.[13] They have also held that an agency provided such assurances by adding privacy notices to forms that stated the information would be disclosed in accordance with FOIA, a notable decision given that many agencies already provide such notices on standard forms.[14]

Even nonaction can provide the necessary assurances. In American Small Business League, the court ruled that the agency provided assurances of confidentiality when "[t]he government received documents from the companies with restrictive markings of confidentiality without ever suggesting anything to the contrary."[15]

In addition, courts have yet to resolve how the FOIA Improvement Act of 2016's foreseeable harm standard applies in Exemption 4 cases. The foreseeable harm test requires the agency to explain why disclosing the information at issue would harm the interests protected by the relevant exemption.[16] Food Marketing Institute did not address this requirement because the FOIA request at issue predated the 2016 amendment, leaving the question to the lower courts.[17]

The U.S. District Court for the District of Columbia held, in Center for Investigative Reporting v. U.S. Customs and Border Protection, that this new requirement applied a competitive-harm-like test where the agency had to show that it was foreseeable that disclosure would harm the interest protected by Exemption 4 — namely the financial and competitive interests of the submitter.[18]

The U.S. District Court for the Northern District of California disagreed in American Small Business League, finding that the foreseeable harm standard was an illusory obstacle in Exemption 4 cases because disclosure would necessarily destroy (and thus harm) the relevant interest protected by Exemption 4: confidentiality.[19]

The remaining decisions addressing post-2016 requests did not reach that step of the analysis[20] or simply ignored the foreseeable harm standard altogether.[21]

Key Takeaways for Government Contractors

Given these recent lower court decisions, prudent contractors can aim to help establish confidentiality and gather evidence of express or implied assurances of confidentiality from the government.

Lay the groundwork for establishing confidentiality.

Courts have tended to rely on the first part of the Food Marketing Institute standard — whether the contractor treats the information as confidential. Given that, proactive contractors should consider these steps:

- Limit employee access to confidential information on a need-to-know basis and document restricted access.
- Require confidentiality and nondisclosure agreements when sharing information with employees and third parties alike.
- Establish written company policies prohibiting unauthorized disclosure.
- Mark documents confirming confidentiality or FOIA exempt status.

- Develop and maintain secure, password-protected portals to store and transmit documents.
- Request the agency use secure, password-protected portals to exchange documents.

Gather evidence showing assurance of confidentiality.

While no consensus currently exists about whether information can lose its confidentiality without government assurances of privacy, contractors can help establish express or implied assurances if they:

- Heed any markings on forms being submitted or agency statements about public disclosure.
- Obtain explicit and direct assurances from relevant agency employees that the agency considers the information confidential.
- Update restrictive legends on documents to reflect the contractor's understanding that the government is receiving the information under an assurance of confidentiality.
- Respond timely to any submitter notification letters or notices saying that the agency intends to release some of the company's information.
- Insist on transmitting the documents to the government through secure IT portals.
- Document assurances that the agency will keep the information confidential, including through memoranda that describe oral communications with agency officials.
- Monitor how the government treats the information both internally and in public settings.

While these early cases provide a helpful guide, many open questions remain about applying the Food Marketing standard. We will continue to watch how district courts apply the new test and wait eagerly for appellate courts to hand down their first opinions, particularly relating to assurances of privacy and the foreseeable harm standard.

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[1] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019).

[2] Id.

[3] Id.

[4] Dep't of Justice, Office of Information Policy, Exemption 4 after the Supreme Court's Ruling in Food

Marketing Institute v. Argus Leader Media (Oct. 4, 2019), available online at https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media.

[5] Id.

[6] Id.

[7] Am. Small Bus. League v. U.S. Dep't of Defense, 411 F. Supp. 3d 824, 831-35 (N.D. Cal. 2019).

[8] Gellman v. Dep't of Homeland Sec., No. 16-cv-635, 2020 WL 1323896, *11 (D.D.C. Mar. 20, 2020) (finding that copyrighted format, design, and organization of bulletins summarizing intelligence news reports when prepared under contract by a non-governmental vendor for distribution to agency employees remained confidential); Stevens v. U.S. Dep't of State, No. 17 C 2494, 2020 WL 1330653, *8 (N.D. Ill. Mar. 23, 2020) (holding that a professor's teaching materials remained confidential because the professor only provided them to paying students, not the public).

[9] Ctr. for Investigative Reporting v. U.S. Customs & Border Protection, No. 18-cv-2901, 2020 WL 7373663, *13 (D.D.C. Dec. 31, 2019) (determining that emails submitted to CBP lacked confidentiality because a public-facing email account was not "confidential by default."); Shapiro v. Dep't of Justice, No. 12-cv-313, 2020 WL 3615511, *26 (D.D.C. July 2, 2020) (information is not confidential when it has been released into the public domain); see also Besson v. Dep't of Commerce, No. 18-cv-02527, 2020 WL 4500894, *4 (D.D.C. Aug. 5, 2020) (denying summary judgment because of disputed facts about documents being in the public domain)

[10] 411 F. Supp. 3d at 832.

[11] Gellman, 2020 WL 1323896, at *11 n.12.

[12] Ctr. for Investigative Reporting v. Dep't of Labor, No 18-cv-0214-DMR, 2020 WL 2995209, *5 (N.D. Cal. June 4, 2020) (agency did not provide assurances of confidentiality when it said that it would post the relevant information on a publicly accessible website).

[13] Am. Small Bus. League, 411 F. Supp. 3d at 834-35.

[14] Friends of Animals v. Bernhardt, No. 19-cv-01443-MEH, 2020 WL 2041337, *11 (D. Colo. April 24, 2020) (reasoning that the statement assured the contractor that FOIA's Exemption 4 would protect any confidential information).

[15] Am. Small Bus. League, 411 F. Supp. 3d at 833.

[16] 5 U.S.C. §552(a)(8)(A)(i).

[17] See FOIA Improvement Act of 2016, § 6, Pub. L. 114-185 ("[T]he amendments made by this Act ... shall apply to any [FOIA] request ... made after [June 30, 2016]").

[18] Ctr. for Investigative Reporting v. Customs & Border Protection, 436 F. Supp. 3d 90, 106-07 (D.D.C. 2019).

[19] See Am. Small Bus. League, 411 F. Supp. 3d at 835-36.

[20] See, e.g., Ctr. for Investigative Reporting v. Dep't of Labor, No 18-cv-0214-DMR, 2020 WL 2995209, *5 (N.D. Cal. June 4, 2020) (stating that because agency failed to meet its burden, "the court does not reach the parties' arguments about ... whether the foreseeable harm standard ... is satisfied").

[21] See, e.g., Friends of Animals, 2020 WL 2041337 (D. Colo. April 24, 2020); (upholding agency's use of Exemption 4 without mentioning foreseeable harm standard); Besson, 2020 WL 4500894 (D.D.C. Aug. 5, 2020) (same). The remaining decisions likely omitted discussion of the foreseeable harm standard because the FOIA request(s) at issue pre-dated the FOIA Improvement Act's June 30, 2016 effective date.