

January 2021

In July of 2019, the U.S. Supreme Court voted 6-3 in *Food Marketing Institute v. Argus Leader Media* to redefine how the courts interpret the Freedom of Information Act's (FOIA) Exemption 4 for disclosure of "commercial or financial information obtained from a person and privileged or confidential." Before the Food Marketing decision, courts erroneously followed the D.C. Circuit's interpretation of Exemption 4's "confidential" standard in *National Parks*.<sup>1</sup> That standard requires a showing that the government's release of private data would likely cause substantial competitive harm to the submitter in order to justify withholding it from a FOIA. The court abandoned the flawed *National Parks* standard, which was rejected by every Justice on the Court, and provided businesses clarity and certainty regarding protections for confidential business information ("CBI").

### **Background:**

The Supreme Court decision followed a legal battle that started in 2011 after a reporter for the Argus Leader, a South Dakota newspaper, submitted a FOIA request to the Department of Agriculture seeking annual store-level Supplemental Nutrition Assistance Program (SNAP) redemption data for every SNAP-authorized food retail store in the country over a 5-year period. After USDA denied the request, the newspaper sued in federal district court. The newspaper won in the lower courts because USDA failed to prove that disclosure of store-level SNAP redemption data would cause retailers "substantial competitive harm," but the Supreme Court eventually put the dispute to rest. The Court held that FOIA Exemption 4 protects business data that is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy" and that SNAP redemption data clearly meets this test.

USDA's role with respect to SNAP retailers is primarily focused on eligibility and fraud prevention. The public has long had access to national and state level SNAP redemption data, which sheds ample light on USDA's activities with respect to SNAP-authorized retailers.

### **Position:**

The National Grocers Association (NGA) supports maintaining the Supreme Court's Food Marketing standard for when requested business data qualifies for Exemption 4 of FOIA. We support government transparency and the fundamentals of FOIA, but open government does not mean publicizing private businesses' confidential information. As a private partner with the federal government in the SNAP program, independent supermarkets operate under a promise that their sensitive, private information will remain confidential. Public availability of SNAP retailer data will harm competition within the independent supermarket industry. Should this information be publicly available, competitors could use it to target specific markets, forecast the potential business of new locations, and/or gain market share in existing locations. Availability of site-specific data would create a windfall of currently unavailable information for big box stores and large online retailers, who will gain a competitive advantage and poach the customers and revenues of smaller independent grocers.

NGA requests that Congress reject efforts to reinstate the *National Parks* "competitive harm" standard for determining when FOIA's Exemption 4 applies to business data shared with the government. Senate legislation, S. 2220, the Open and Responsive Government Act of 2019, seeks to reverse the Supreme Court's decision and reimpose a failed standard that has resulted in decades of FOIA litigation and unpredictable outcomes. If Congress pursues reforms to FOIA, we urge lawmakers to focus on improving transparency in government rather than undermining its relationships with private enterprise.

<sup>1</sup> *National Parks & Conservation Ass'n v. Morton*, 498 F2d 765 (DC Cir. 1974).

