In a case of interest to auto industry companies, the U.S. Supreme Court has granted a petition for a writ of certiorari in a case that will result in the high court’s first opinion interpreting Exemption 4 to the federal Freedom of Information Act (“FOIA”) —the exemption companies use most frequently to protect sensitive business information. This case is of major interest to businesses, including those in the auto industry, because it could yield a blockbuster ruling easing the burden on businesses seeking to keep confidential their private information in the possession of the government. This could include, for example, information pertaining to compliance with emissions and safety regulations, government bids, safety information regarding self-driving cars or trucks, or other auto company submissions to federal regulators.
Exemption 4 protects from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Although Exemption 4 figures in less than 2% of denials of FOIA requests, it is of critical importance to business. Increasing amounts of internal business information ends up in the hands of government agencies, whether through companies taking advantage of growing privatization of government infrastructure and services or through escalating government regulatory demands for business information. At the same time, most FOIA request are commercial in nature—not uncommonly made by competitor of the company generating the requested information.

Users of Exemption 4 focus on its protection of “commercial or financial information” that is “confidential”, rather than harder-to-establish “trade secrets”. Classifying information as “commercial or financial” is straightforward, so most disputes center on whether the requested information is “confidential”. Although that term would seem to have a plain meaning, for decades its meaning has been governed by the so-called National Parks test derived from a 45 year-old court decision. In that case, the FOIA-prominent D.C. Circuit Court of Appeals ruled that business information will be considered “confidential” for Exemption 4 purposes only when disclosure either would impair the government’s future ability to obtain necessary information or likely would cause substantial harm to the competitive position of the company from which the information was obtained. Virtually all courts of appeal have adopted this test, sometimes with different formulations of the extent and likelihood of harm required, resulting in unpredictability over how the same information will be treated in different jurisdictions.

Background of Underlying Case

The National Parks test is fact-intensive, and successfully invoking it can be expensive as it often requires marshalling considerable evidence, including from subject matter experts, and a court battle. The case now in the Supreme Court is a good example. Food Marketing Institute (“FMI”) v. Argus Leader Media, cert. granted, (U.S. Jan. 11, 2019) (No. 18-481). In FMI, a South Dakota newspaper sought redemption data about the federal food stamp program from the Department of Agriculture. The agency refused to turn over the amount of redemptions at individual stores. After the Eight Circuit rejected the agency’s reliance on another exemption, the agency re-asserted Exemption 4. Many FOIA cases are resolved on summary judgment, but here the district court denied the agency’s motion based on Exemption 4. After a two-day bench trial involving multiple industry witnesses and expert testimony about the competitive value of the store-level data, the district court entered judgment for the newspaper, finding that the potential competitive harm was speculative and thus insufficient to pass muster under National Parks. The Eighth Circuit affirmed. It acknowledged that store level-data might be commercially useful, but that was held to be insufficient to establish the likelihood of substantial competitive harm required by National Parks.

The Supreme Court then granted cert to consider whether “confidential” in Exemption 4 applies to information that a business holds in confidence and does not publicly disseminate, even if substantial competitive harm for disclosure is not
proven. If the Court holds that competitive harm must be established, it also may resolve the different formulations of the *National Parks* test.

**What’s At Stake**

The Supreme Court’s ruling in *FMI* likely will be of considerable consequence, and not simply because it will be the first time that court has opined on Exemption 4. A Supreme Court ruling that jettisons the *National Parks* substantial competitive harm test in favor of a plain meaning interpretation of “confidential” would result in a sea change in the use of Exemption 4. First, such a ruling could expand—possibly dramatically—the universe of information covered by the exemption, although it is unclear whether the Supreme Court would rule that “confidential” simply means any information of any kind that a business has not made public. Nonetheless, the possible large scale of that expansion already is being decried by some, particularly when it comes to data about the spending of public money such as that in *FMI*. Second, a ruling rejecting the *National Parks* test will make responding to requests for business information cheaper and quicker, for both the responding agency and the business whose information was requested. This may allow agencies to re-direct their limited resources to reducing the overall time to respond to all requests. Third, abandonment of the *National Parks* test in favor of an ordinary meaning of “confidential” likely will make application of Exemption 4 more predictable, allowing companies to make more accurate judgments in deciding whether to do business with the government. Finally, while many state public record acts expressly incorporate the *National Parks* test in their analogous business information exemptions, a U.S. Supreme Court opinion rejecting that test would be influential in states whose exemptions are similar to Exemption 4.

**Conclusion**

*FMI* is one of the most important business-related cases on the Supreme Court’s docket this term as it could re-define the scope of Exemption 4 on which businesses rely heavily to protect their sensitive information. Oral argument likely will be in the spring. We will be watching those closely and will provide a further update then.

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