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PERSPECTIVE

Access to a competitor's confidential information?

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The Freedom of Information Act permits members of the public to obtain copies of documents held by the United States government. Critical to those who give the government access to their proprietary information (e.g., bidders on government contracts) are FOIA's exemptions from the public's general right to access. FOIA's exemptions address a variety of disparate subjects, such as national defense secrets. One exemption that is of great importance to many businesses is the exemption that excludes from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (referred to as "Exemption 4").

Government contractors routinely disclose to the government their confidential information on the assumption that such information is exempt from disclosure (e.g., in bids or proposals to be responsive to a solicitation, or under data rights clauses requiring contractors to submit technical data or computer software as contract deliverables). Should a competitor seek the release of a rival contractor's competitive information through a FOIA request, the rival contractor would have to persuade the government not to release it or to obtain a court injunction prohibiting its release. In either case, Exemption 4 may offer the rival contractor a basis to argue against disclosure. However, whether it succeeds on preventing the disclosure on this basis may depend on judicial construction of Exemption 4's meaning and scope.

The U.S. Supreme Court is expected to interpret Exemption 4 in the near future, and its decision may be a gamechanger for businesses which rely on the exemption for

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protection of their confidential information. On Jan. 11, the Supreme Court granted a petition for writ of certiorari over *Argus Leader Media v. U.S. Department of Agriculture*, 889 F.3d 914 (8th Cir. 2018). The case (retitled *Food Marketing Institute v. Argus Leader Media* (FMI) on appeal) concerns a FOIA request made by a newspaper to the U.S. Department of Agriculture, seeking the yearly Supplemental Nutrition Assistance Program sales figures for every grocery store participating in the program. SNAP is a federal aid program that allows recipients to purchase food from participating retailers using a debit-like card. When food is bought using the card, the USDA receives a record of that transaction, called a SNAP redemption. It is the yearly totals of these redemptions that are at issue in *FMI*.

After the trial court ruled that the USDA could not invoke Exemption 4 to prevent release of the data, FMI intervened and appealed to the 8th U.S. Circuit Court of Appeals. The circuit court affirmed, reasoning that to be "confidential" under Exemption 4, the information must be such that disclosure likely would (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. The court held that the redemption data did not satisfy the competitive position prong of this test because although the information could be useful, that was insufficient to show FMI's

members likely would experience competitive harm by the information's release.

The court rejected FMI's argument that "confidential" as used in Exemption 4 should be construed as meaning "secret." This issue may be hotly contested in the Supreme Court proceedings; FMI's position has been embraced in at least nine amici curiae briefs filed to date. For the government contracting community, the resolution of this issue could have significant ramifications. If the Supreme Court were to adopt FMI's position, then the government could shield a contractor's secret information without showing that disclosure would impair the government's ability to obtain necessary information in the future or likely cause substantial competitive harm to the contractor. Demonstrating a likelihood of substantial harm from the proposed disclosure often

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can be a tall order to satisfy. It is akin to what a trade secret holder ordinarily must show to obtain an injunction against misappropriation — namely, if not enjoined, the threatened conduct will cause it irreparable harm.

Moreover, the decision by the Supreme Court may resolve a split among the courts concerning the scope of Exemption 4. Some courts have applied the test used by the 8th Circuit, but only when information is "required" to be provided to the government. What is considered a "required" submission in the government contracting context is often subject to dispute. The Supreme

Court's adoption of a plain meaning definition of "confidential" as "secret" may moot the need to resolve such disputes.

However it rules, the Supreme Court's decision likely will affect Exemption 4's application for years to come. It may affect contractors differently. If a contractor is seeking to block competitor access to its confidential information, a decision requiring a showing of competitive harm may make it more difficult for the contractor. If a contractor is seeking to gain access to a competitor's confidential information, such a decision by the Supreme Court may make it easier for the contractor. Consequently, government contractors should watch for the Supreme Court's decision in *FMI*.

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