CARLTON FIELDS

FOIA Competitive Injury Requirement Falls

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The Supreme Court's June decision in *Food Marketing Institute v. Argus Leader Media* has made it easier for federal entities to resist certain Freedom of Information Act requests for confidential business information that the government has obtained from private parties.

Under lower federal court interpretations dating back to the 1970s, one of the exemptions that the government has most frequently relied upon to deny such requests — "Exemption 4" — was under some circumstances available only if disclosure of the information would cause substantial "harm to the competitive position" of the party who provided the information to the government. Therefore, companies that have sought, for example, to prevent the SEC from disclosing their confidential information often have argued that such disclosure would cause the competitive harm, and companies filing FOIA requests for such information have asserted the absence of such harm.

Justice Gorsuch, writing for the Court, concluded that in creating the competitive harm standard, the lower courts had relied inappropriately on what they considered to be the Act's legislative history and had given too little consideration to the Act's actual language. The *Food Marketing Institute* decision is important both to companies seeking to obtain information from governmental entities and to those seeking to prevent the government from disclosing information. The decision changes the arguments that are potentially available to such companies, and in some cases may affect the governmental entity's determination whether the information in question should be disclosed.

Nevertheless, although *Food Marketing Institute* makes it easier for a governmental entity to withhold confidential business information when no competitive harm is shown, neither the Court's opinion nor the FOIA mandates that a governmental authority exercise this additional flexibility. Indeed, the SEC, for example, has a strong institutional mandate favoring disclosure of information about registrants that may be material, and it will be interesting to see how, if at all, the SEC now modifies its positions concerning FOIA requests and confidential treatment of information it receives from third parties.

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