

35 Civil Society Groups Endorse the Open and Responsive Government Act (S. 2220)

September 19, 2019

United States Senate
Washington, DC 20510

Dear Honorable Senators,

The undersigned groups urge you to co-sponsor bipartisan legislation, the Open and Responsive Government Act (S. 2220) introduced by U.S. Sens. Chuck Grassley (R-Iowa), Patrick Leahy (D-Vt.), John Cornyn (R-Texas), and Dianne Feinstein (D-Calif.). In a recent U.S. Supreme Court decision, *Food Marketing Institute v. Argus Leader Media (FMI)*, the Court drastically expanded the scope of FOIA's exemption 4, threatening the public's access to vital public health and safety information. This legislation would restore access under the Freedom of Information Act (FOIA) to information that has been disclosed for decades to FOIA requestors but could now be hidden from public view.

Exemption 4 exempts from FOIA's disclosure requirement "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In longstanding precedent, courts had held that "confidential" commercial information is primarily information the disclosure of which would likely "cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In *FMI*, the Court greatly expanded the scope of "confidential" information under exemption 4, holding that the exemption covers information that is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy" (but leaving open the question of whether the exemption applies where only the first prong is met). By adopting this much broader definition, the Court expanded exemption 4 in such a way that the public may now have access only to information that is already openly shared. As a result, vital health and safety information about the environment, foods, drugs, and other products, as well as government spending waste, may be shielded from public oversight.

To ensure that watchdog organizations, the media, and the public still have access to vital information submitted by non-governmental actors, Congress must promptly amend FOIA to reinforce transparency and ensure that the interpretation of "confidential" commercial information that had widely been accepted throughout the federal courts of appeals, is once again the law. The Open and Responsive Government Act (S. 2222) would do that by codifying the primary holding of *National Parks* and its

progeny that commercial information is exempt as “confidential” under exemption 4 *only* if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

We urge you to support this commonsense bill to restore a longstanding FOIA interpretation and public access to the sorts of information on which we have relied for years to keep consumers safe and government accountable.

Respectfully,

American Civil Liberties Union
American Federation of Teachers
Association of Alternative Newsmedia
Campaign for Accountability
Cause of Action Institute
Center for Biological Diversity
Center for Responsive Politics
Center for Science and Democracy at the Union of Concerned Scientists
Centro de Periodismo Investigativo (Puerto Rico)
Citizens for Responsibility and Ethics in Washington (CREW)
Consumer Action
Demand Progress
Electronic Privacy Information Center (EPIC)
Essential Information
Food & Water Watch
Government Accountability Project
Government Information Watch
Greenpeace USA
Human Rights Watch
Jobs to Move America
National Immigration Law Center
National Security Archive
National Security Counselors
News Leaders Association
News Media Alliance
Open the Government
Project On Government Oversight
Project South
Prostasia Foundation
Public Citizen
Public Employees for Environmental Responsibility
R Street Institute
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
Society of Professional Journalists