

September 11, 2019

The Honorable Lindsey Graham  
Chairman  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member  
Senate Committee on the Judiciary  
125 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Graham and Ranking Member Feinstein:

As organizations representing a large cross-section of the U.S. business community, we are writing to voice our concerns with S. 2220, the *Open and Responsive Government Act of 2019*. We strongly oppose the bill's provision that would reverse the Supreme Court's recent decision, *Food Marketing Institute v. Argus Leader Media*, which provided clarity and certainty regarding protections for confidential business information (CBI) under the Freedom of Information Act (FOIA) Exemption 4.<sup>1</sup> Instead of promoting government transparency, this bill would reinstate the flawed "substantial competitive harm" standard, which was rejected by every Justice on the Court, and threatens the public disclosure of closely-guarded confidential commercial information.

This bill would do nothing to support government transparency; it would put companies who submit data to the government at risk of costly litigation in order to protect it. We all support government transparency, and the fundamentals of FOIA, but open government does not mean publicizing private businesses' confidential information. By making confidential information public, it becomes available to parties who may seek to misuse the information in order to harm the business. Congress specifically provided for this in FOIA Exemption 4, which exempts from disclosure "trade secrets and 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>2</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 request and has resulted in decades of FOIA litigation and unpredictable outcomes.

The Court's 6-3 decision ended the confusion wrought by the *National Parks* standard, as even the three Justices who filed their concurring/dissenting opinion agreed with the majority opinion that *National Parks* was wrongly decided. By eliminating the *National Parks* "substantial competitive harm" test, *Food Marketing* helps protect businesses from the misuse of their confidential information that is both customarily and actually treated as private, and also incentivizes the government to give assurances of privacy – which in turn will encourage data sharing between government and private parties and lead to more effective public-private partnerships. If Congress pursues reforms to FOIA, we urge lawmakers to focus on improving transparency in government rather than undermining its relationships with private enterprise. We

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<sup>1</sup> U.S.C. §552(b)(4)

<sup>2</sup> *National Parks & Conservation Ass'n v. Morton*, 498 F2d 765 (DC Cir. 1974).

respectfully request the Committee reject the flawed standard in S. 2220 and stand with our industries to protect confidential, sensitive business data.

Thank you for your consideration of our request.

Sincerely,

Alliance of Marine Mammal Parks and Aquariums  
American Farm Bureau Federation  
American Frozen Foods Association  
Corn Refiners Association  
Edison Electric Institute  
Food Marketing Institute  
Fur Information Council of America  
Grocery Manufacturers Association  
International Dairy Foods Association  
National Association of Biomedical Research  
National Association of Convenience Stores  
National Association of Manufactures  
National Cattlemen's Beef Association  
National Confectioners Association  
National Chicken Council  
National Grocers Association  
National Pork Producers Council  
National Restaurant Association  
National Retail Federation  
North American Meat Institute  
North American Millers' Association  
Retail Industry Leaders Association  
SNAC International  
United Egg Producers  
United States Association Of Reptile Keepers  
United States Chamber of Commerce  
Zoological Association of America

Cc: Members of the Senate Committee on the Judiciary