



THE VOICE OF FOOD RETAIL

Feeding Families  Enriching Lives

The Honorable Audrey Rowe
Administrator
Food and Nutrition Service
Department of Agriculture
3101 Park Center Drive
Alexandria, VA 22302

September 8, 2014

Docket No: FNS-2014-0030; Federal Register 45175

**RE: Request for Information: Supplemental Nutrition Assistance Program (SNAP);
Retailer Transaction Data**

Dear Administrator Rowe:

On Monday, August 4, 2014, the United States Department of Agriculture (“USDA”), Food and Nutrition Service (“FNS”) published a Request for Information (“RFI”): Supplemental Nutrition Assistance Program (“SNAP” or “the Program”); Retailer Transaction Data in the Federal Register.¹ The RFI is being issued in response to a decision by the U.S. Court of Appeals for the Eighth Circuit², which held that annual SNAP retailer redemption data did not fall within the withholding exemption under the Freedom of Information Act (“FOIA”) and therefore must be disclosed unless it qualifies for another FOIA exception. FNS recognizes that despite the court’s decision the agency must also consider whether this redemption data constitutes confidential business information.

FMI appreciates the opportunity to comment on this important matter.

FMI proudly advocates on behalf of the food retail industry. FMI’s U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost \$770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation, visit www.fmifoundation.org.

¹ 79 Fed. Reg. 45175 (August 4, 2014).

² *Argus Leader Media v. U.S. Department of Agriculture*, 740 F.3d 1172 (8th Cir. 2014).

Background

Food retailers who participate in SNAP are required to submit annual applications, which are administered by FNS through its nationwide network of field offices. Any retailer that would like to accept SNAP benefits (EBT) must hold a valid permit and be licensed to participate in the Program. The submission of information is a mandatory pre-requisite for participation in SNAP. In 1978, FNS published a final rule affirming that the information furnished by food retailers was to remain confidential as required by section 9 (c) of the Food Stamp Act (“The Act”). On February 2011, *Argus Leader*, a South Dakota newspaper submitted a FOIA request for all SNAP authorized retailer redemption data from 2005-2010. Relying on the 1978 rule, FNS denied the FOIA request prompting *Argus Leader* to challenge FNS’ interpretation of the Act in a lawsuit. FNS’ position was initially upheld in the district court but was overturned by the Eighth Circuit on appeal. The Eighth Circuit held that the requested information did not fall within the withholding contemplated by Section 9 (c) of the Act and therefore the requested information was not exempt from disclosure under Exemption 3. The court did not address whether the information would be exempt from disclosure under another provision of FOIA, specifically whether SNAP redemption data would constitute confidential business information under Exemption 4.³

The SNAP Program is a Crucial Safety Net for Low-Income Participants

The supermarket industry, which FMI represents, is proud to be a private sector partner with federal and state governments in an effective, efficient way to reduce hunger and improve access to healthy food for our nation’s poor. Serving 14% of the population, the SNAP program provides critical assistance to over 45 million people, almost half of whom are children.⁴ FMI members provide innumerable goods and services under SNAP and the government relies heavily on retailers accepting SNAP benefits to provide food for low-income recipients across the country. A large number of FMI members were SNAP-authorized retailers from 2005 through 2010 and continue to support the program. In fiscal year 2013, supermarkets and superstores redeemed a significant portion of all SNAP benefits.⁵ FNS reports that in 2013, almost \$76 billion in client benefits were redeemed in the 252,962 participating stores, farmers markets, and others authorized retailers who accept SNAP. FMI members are an integral part of SNAP-authorized retailers, without whom the program would not run as effectively.

SNAP Retailer Redemption Data should not be disclosed under FOIA Exemption 4

The Freedom of Information Act (FOIA) provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such are protected from public disclosure by one of the nine exemptions prescribed in the Act. Exemption 4 under FOIA protects two distinct categories of information in federal agency records: “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”⁶

³ 5 U.S.C. 552(b)(4).

⁴ “Putting Healthy Food Within Reach” USDA SNAP Report 2013.

⁵ *Id.*

⁶ 5 U.S.C. 552(b)(4).

In reviewing the legislative history of Exemption 4, it is clear that the objective is to prohibit the public disclosure of confidential business information that would damage or disrupt a particular company or industry. Exemption 4 serves two very important interests: that of the government in efficient operation and the protection for those persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.⁷ “The exemption affords protection to those submitters who are required to furnish financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.”⁸

There was vast discussion about the importance of protecting this type of information during the 1963 FOIA hearings. For example, during hearings on S. 1666,⁹ a representative from the treasury stated that “we can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.” A member of the subcommittee which conducted the hearings raised the issue again with respect to Small Business Administration loan applications: “I am thinking of a situation, for example, where the company couldn't qualify for funds, and they have exposed their predicament to the world and it might give competitors unfair advantage to know their weak condition at that time. I wonder if there might be some cases where it might be in the public interest if all the facts about a company were not made public.”¹⁰ In light of the context in which the exemption was drafted, it is clear that individual SNAP retailer redemption data is the precise type of highly sensitive sales and profit data the exemption seeks to protect.

SNAP Redemption Data is Commercial Information Obtained from a Person

If information relates to business or trade, courts have little difficulty in considering it "commercial or financial."¹¹ The Court of Appeals for the District of Columbia Circuit has firmly held that these terms should be given their "ordinary meanings" and has specifically rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations," holding instead that records are commercial so long as the submitter has a "commercial interest" in them.¹² Individual SNAP redemption data constitutes commercial information because retailers have a commercial or financial interest in sales information which directly relates to their business.

⁷ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

⁸ See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (recognizing fundamental societal value of "protecting sensitive business information").

⁹ The text of this bill, as introduced, appears in Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 1-2 (1964) (hereafter, 1963 Hearings).

¹⁰ *Id.*

¹¹ See, e.g., *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (information relating "to business decisions and practices regarding the sale of power, and the operation and maintenance" of generators (quoting agency declaration)).

¹² *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

For purposes of Exemption 4, the term “person” refers to individuals as well as to a wide range of entities, including corporations and state governments, who provide information to the government. Courts have further expanded the reach of Exemption 4 to explain that it is “sufficiently broad to encompass financial and commercial information concerning a third party” and protection is therefore available regardless of whether the information pertains directly to the commercial interests of the party that provided it -- as is typically the case -- or pertains to the commercial interests of another.¹³ Participating SNAP retailers clearly fall within the definition of a person, which includes individuals and corporations who provide confidential information to the government in applications and annual SNAP redemption data. Thus, whether or not individual store SNAP redemption data is submitted directly by a retailer or is done through third-party EBT transactions, retailers would still be considered a person for purposes of Exemption 4.

Individual Store SNAP Retail Redemption Data is Commercial Information

The second requirement under Exemption 4 requires the information submitted to be of a commercial nature. Under this prong, the person submitting the information to the government must show that they actually face competition. The food retail industry is a fiercely competitive market and supermarkets face meaningful day-to-day competition with their competitors who offer similar goods and services both within and outside certain geographical areas. Current profit margins in the industry are approximately one percent,¹⁴ on average, and individual retailers are constantly trying to establish methods for increasing volume and sales to remain competitive. Intense competition over the past two decades in the U.S. food marketing system has spurred innovations and cost efficiencies.¹⁵ Consumers have access to a wider range of products, services, and store formats that appeal to their preferences for convenience and quality.¹⁶ The food retail industry is changing and has seen a recent shift from the traditional grocery store to other food retail formats. “In response to an eroding market share, traditional grocers are expanding the number and types of product offerings, designing new store formats, and using innovative in-store technologies.”¹⁷ “Globalization has meant that domestic retailers face increasing competition from foreign retailers operating in the United States. As food companies strive to maintain market share in the domestic food economy, largely limited by population growth, consumers are the beneficiaries of this heightened competition through diverse product offerings, new and improved services, and competitive prices.”¹⁸

Individual Store SNAP Retail Redemption Data Constitutes Confidential Business Information

¹³ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

¹⁴ Food Retailing Industry Speaks, Food Marketing Institute, 2013

¹⁵ *Twenty Years of Competition Reshape the U.S. Food Marketing System*, Stephen Martinez and Philip Kaufman, United State Department of Agriculture, Economic Research Service, April 1, 2008.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

The test for determining whether information is confidential has been adopted by the courts and is referred to as the *National Parks* test.¹⁹ Information is "confidential" under this prong if disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."²⁰ Actual competitive harm need not be demonstrated for purposes of the competitive harm prong; rather, the evidence of "actual competition and a likelihood of substantial competitive injury" is all that need be shown.²¹ As stated above, food retailers face significant competition with very slim margins. FMI believes that individual store SNAP redemption data constitutes confidential business information, which, if disclosed, would result in significant competitive harm to the food retail industry and should therefore be withheld under Exemption 4 of FOIA. Numerous types of competitive injury have been identified by the courts as properly cognizable under the competitive harm prong, including the harms generally caused by disclosure of: "(1) detailed financial information, such as a company's assets, liabilities, and net worth;²² (2) a company's actual costs, break-even calculations, profits and profit rates; (3) data describing a company's workforce that would reveal labor costs, profit margins, and competitive vulnerability;²³ (4) a company's selling prices, purchase activity and freight charges; and (5)²⁴ market share, type of product, and volume of sales."²⁵ These last two competitive harms would clearly result from the required disclosure of store level SNAP redemption data.

The disclosure of individual store SNAP redemption data is proprietary information that could be used by supermarkets to analyze a competitor's current vulnerabilities, market share for SNAP participants and volume of sales that would result in significant harm to the competitive position of participating retailers. Disclosure would provide companies with valuable insights into the operational strengths and weaknesses of their competitors resulting in selective pricing, market concentration, expansion plans and possible take-over bids facilitated by knowledge of the financial information sought. Suppliers, contractors, labor unions and creditors too could use such information to bargain for higher prices, wages or interest rates, while the competitor's or suppliers unregulated information would not be similarly exposed.²⁶

FMI notes that the information sought by the *Argus Leader* is not of the type that is disclosed through any other required public filings. For example, public companies are only required to disclose total sales figures for the entire company, not store level information. 10Ks and other financial filings do not disclose individual store sales, traffic numbers or store transactional information. Further, independent and non-public food retailers do not have to disclose overall

¹⁹ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

²⁰ *Id.*

²¹ *See generally Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

²² *See, e.g., Nat'l Parks*, 547 F.2d at 684.

²³ *See, e.g., Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D.Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976).

²⁴ *Lion Raisins*, 354 F.3d at 1081.

²⁵ Department of Justice Guide to the Freedom of Information Act (2008).

²⁶ *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770, 162 U.S. App. D.C. 223 (D.C. Cir. 1974).

or individual store sales at all. Disclosing SNAP redemption data for a non-public company would result in a significant departure from current practice and would provide competitors access to valuable, confidential sales data giving competitors a direct avenue into a private retailer's earnings. FMI members are similarly concerned that if the type of proprietary information sought is disclosed for a public company immediately prior to a quarterly filing with the SEC, investors and the public alike will use the valuable information to predict a company's earnings resulting in market changes and fluctuation in stock price.

Additionally, if individual SNAP data is disclosed, retailers will have prized information on redemption data geographically that could prompt and inform a competitor's expansion strategy into new markets with a large number of SNAP recipients. For example, if a retailer discovers that their competitor redeems 60% of the total SNAP benefits in a particular area they could develop targeted marketing and business strategies to increase market share and convert current SNAP recipients. Further, our members are concerned that disclosure of individual store SNAP redemption data could have a chilling effect on participation in the program by those most in need. In fact, some retailers indicate that the competitive harm caused by disclosure would lead to their departure from SNAP entirely. A large number of withdrawing SNAP retailers will ultimately result in diminished access for SNAP recipients and consolidation of participating stores.

The Disclosure of Individual Retailer SNAP Redemption Data would be Duplicative and Impose Unnecessary Costs in Government Administration of the Program with little Corresponding Benefit to the Public

FMI urges FNS to consider the important role our members play in providing essential nutrition benefits to low-income populations. Public disclosure of individual retail SNAP redemption information would result in significant competitive harm to FMI members. It would create challenging and unnecessary burdens in administration of the program and a potential reduction in the number of recipients and participating retailers while providing no additional savings or value to the program.

FMI does not believe that disclosure of redemption data at the individual store level would improve the administration or enforcement of SNAP requirements. In the Act, Congress specifically limits disclosure of information received from applicants and participating SNAP retailers. USDA already publishes a State-by-State breakdown on the amount of benefits and percentage of authorized firms under SNAP. Additionally, existing USDA data breaks down reimbursement data by retailer type on an annual basis. There are 25 firm types, with classifications differentiated by sales volume, ratio of food sales, or whether firms specialize in one staple food group. Reporting and disclosing store level data on a monthly basis would

significantly burden the administration of SNAP and would be an unfortunate use of such limited resources in administration and enforcement of the program.

Disclosure would create an unprecedented and unreasonable public information request in violation of long standing practices and criteria under FOIA that is certain to influence FOIA requests for years to come. FMI SNAP retailers are already required to meet stringent and comprehensive standards set by USDA to become authorized and therefore eligible to participate in the Program. Qualification is rigorous and requires significant documentation that includes verification of tax returns and tax filings. Tax filings and individual sales data information by definition are: "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;" as expressly exempted from public request at FOIA.²⁷ We respectfully submit that the USDA's current policy of protecting the confidentiality of proprietary retailer financial information be maintained and, if needed, strengthened to clarify its policy in light of the *Argus Leader* litigation.

Similarly, FMI believes that Congress did not intend for SNAP redemption data to be public information under Section 9(c) of the Act. FMI agrees with FNS' interpretation and final rule codifying the interpretation that Section 9 (c) prohibits the use or disclosure of "information furnished by firms,... including their redemption of coupons... except for purposes directly connected with the administration and enforcement of the Food Stamp Act and it's corresponding regulations."²⁸

Should Aggregated Annual SNAP Redemption Data at the Individual Store Level be Released for Transparency Purposes?

Transparency and public accountability are of the utmost importance for retailers and our customers. FMI members are responding by providing with increased access to information on food, nutrition and the products that they carry – one example being the industry's voluntary Facts Up Front initiative to provide key information via icons on the front of packaging. Transparency that improves the efficiency of the program or the availability of important attributes of a product like nutrients or allergens may have value to customers and taxpayers. However, FMI does not see how disclosure of individual store SNAP redemption data will result in greater transparency in SNAP administration or greater value to customers, agencies or retailers. As stated above, the disclosure of the information sought will result in greater costs and challenges for administering states without a corresponding benefit to the public. SNAP redemption data is already publically available by retail sector, state and locality and the competitive harm that would result from disclosure strongly outweighs the potential for minimal benefit to the petitioner for use in a published story.

²⁷ 5 U.S.C. 552 (b)(4).

²⁸ 79 Fed. Reg. 45175.

September 8, 2014

Docket No: FNS-2014-0030; Federal Register 45175

Page 8 of 8

FMI appreciates the opportunity to comment on this important matter. Please do not hesitate to contact me at sbarnes@fmi.org or (202) 220-0614 if you have any questions.

Sincerely,

Stephanie Barnes

Regulatory Counsel