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September 8, 2014

The Honorable Audrey Rowe
Administrator
Food and Nutrition Service
United States Department of Agriculture
Food and Nutrition Service
3101 Park Center Drive
Alexandria, VA 22301

Re: Request for Information: Supplemental Nutrition Assistance Program (SNAP);
Retailer Transaction Data
Docket No: FNS-2014-0030; Federal Register 45175

Dear Administrator Rowe:

On behalf of the National Association of Convenience Stores (“NACS”) and the Society of Independent Gasoline Marketers of America (“SIGMA”), I appreciate this opportunity to provide comments as the Food and Nutrition Service (“FNS” or the “Agency”) evaluates its response to the recent Eighth Circuit Court of Appeals decision regarding public disclosure of Supplemental Nutrition Assistance Program (“SNAP” or the “Program”) retailer transaction data.¹ NACS and SIGMA are grateful that FNS is considering stakeholder input. Convenience stores play an essential role in the Program, particularly in rural and deep urban communities that often have few other local options for purchasing food.

For the reasons laid out below, NACS and SIGMA members oppose the disclosure of aggregated SNAP redemption data at the individual store level. If released, this information would enable convenience stores’ actual and potential competitors to obtain valuable information that would be used to harm the stores’ competitive position. This information therefore constitutes confidential business information and, as such, is exempted from disclosure under the Freedom of Information Act (“FOIA” or the “Act”).

I. Background

NACS is an international trade association representing more than 2,200 retail and 1,600 supplier company members. Retail members represent more than 77,000 convenience stores worldwide. These retailers provide consumers with convenient locations to quickly purchase a

¹ 79 Fed. Reg. 45175 (August 4, 2014); *Argus Leader Media v. U.S. Dep’t of Agriculture*, 740 F.3d 1172 (8th Cir. 2014).

wide variety of items, including many foods and beverages that Congress and the Agency have determined may be purchased with SNAP benefits.

SIGMA represents a diverse membership of approximately 260 independent chain retailers and motor fuel marketers. Member retail outlets come in many forms, including traditional “gas stations” and convenience stores with gas pumps.

II. SNAP Retailer Redemption Data is Confidential Business Information under FOIA Exemption 4

NACS and SIGMA urge the Agency to oppose providing SNAP retailer redemption data in response to FOIA requests. Under FOIA, the government may refuse to disclose information that falls under one of the Act’s specified exemptions. FOIA Exemption 4 protects “matters that are . . . commercial or financial information obtained from a person and privileged or confidential.”² SNAP retailer redemption data falls within exemption 4 and should not be disclosed in response to a FOIA request.

A. Commercial or Financial Information Obtained from a Person

“Commercial” information as stated in Exemption 4 has been broadly interpreted by the courts.³ Indeed, “commercial” means anything “pertaining or relating to or dealing with commerce.”⁴ Courts have interpreted commercial information to include not only the basic operations or income-producing aspects of a business, but also more broadly to include any information in which the submitter has a “commercial interest.”⁵ Aggregated SNAP redemption data at the individual store level plainly constitutes commercial information within the meaning of Exemption 4 because retailers have a commercial and financial interest in this type of information, which relates directly to their businesses.

Moreover, the reach of Exemption 4 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 interests of the party that provided it.⁶

B. Privileged or Confidential

SNAP retailer redemption data is confidential within the meaning of FOIA Exemption 4. When commercial or financial information is obtained from a party involuntarily (as is the case with SNAP redemption data), it is considered to be confidential for purposes of Exemption 4 if

² 5 U.S.C. 552(b)(4)

³ See *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

⁴ *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978).

⁵ See *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (citations omitted); see also *Landfair v. U.S. Dep't of Army*, 645 F. Supp. 325, 327 (D.D.C. 1986) (“Examples of items generally regarded as commercial or financial information include: business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition.”).

⁶ See *Bd. Of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 405 (D.C. Cir. 1980). This is potentially relevant in the present issue because, as a technical matter, third-party processors rather than SNAP retailers typically handle and track electronic SNAP redemption information and transmit such data to FNS.

disclosure would “impair the Government’s ability to obtain necessary information in the future” or “cause substantial harm to the competitive position of the person from whom the information was obtained.”⁷

In the present case, public release of SNAP retailer redemption data would cause substantial harm to SNAP retailers’ competitive position.

1. *Competitive Harm*

i. **Substantial competitive harm is likely if SNAP redemption data is disclosed.**

Although FOIA implements a policy of broad disclosure, Congress also realized “that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused.”⁸ Exemption 4 protects from disclosure commercial or financial information that, if disclosed, would cause substantial competitive harm to the person from whom the information was obtained.⁹

The standard for establishing that information should be protected under Exemption 4 is that disclosure is likely to result in competitive harm. A “party opposing disclosure doesn’t have to show actual competitive harm. . . .”¹⁰ For example, a party need not demonstrate how a competing firm would use the disclosed information to “model exactly or pinpoint precisely [its] pricing strategy” in order to show a likelihood of competitive harm; “pinpoint precision is not required to inflict substantial competitive harm.”¹¹ Indeed, a party is not required to prove that substantial harm is “certain” to result from disclosure, but only that such harm is “likely.”¹²

To demonstrate a likelihood of substantial competitive harm, the agency must prove that (1) the submitters of the information “actually face competition” and (2) “substantial competitive injury [to the submitters] would likely result from disclosure.”¹³

⁷ See generally *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974).

⁸ *FBI v. Abramson*, 456 U.S. 615, 621 (1982); see also *Morton*, 498 F.2d at 770 (legislative history of FOIA “firmly supports the inference that [Exemption 4] is intended for the benefit of persons who supply information.”).

⁹ See generally *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 53 (D.C. Cir. 1981) (“[A]s a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.”).

¹⁰ *Southern Alliance for Clean Energy v. U.S. Dep’t of Energy*, 853 F. Supp. 2d 60, 71 (D.D.C. 2012) (internal quotation marks and citations omitted).

¹¹ *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004).

¹² *Id.* at 1187; see also *Gulf & W. Indus. V. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (“Actual competition and the likelihood of substantial competitive injury is all that need be shown.”).

¹³ *Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976).

ii. Actual competition exists in the convenience store channel of commerce

Actual competition unquestionably exists in the marketplace among convenience store retailers.¹⁴ In fact, this channel of commerce is one of the most intensely competitive in the entire retail space. As noted above, a substantial majority of the convenience store industry is comprised of single-store operators. These stores may operate under a corporate banner (such as Exxon or 7-11), but are often simply small business franchisees competing with one another. In 2013, there were approximately 151,282 convenience stores operating in the United States, 95,056 (62%) of which were operated by individuals operating a single store. On average, stores' total gross profit was \$67,778. After taxes, the average convenience store makes less than \$50,000 in profit. In 2013, the convenience store industry generated almost \$700 billion in total sales, representing approximately 2.5% of United States gross domestic product.

iii. Disclosure of SNAP redemption data would likely cause convenience store retailers substantial competitive harm

A SNAP retailer's redemption data would be valuable to its actual and potential competitors. As a general matter, from a business perspective, it would be *irresponsible* for retailers to neglect to discover their competitors' SNAP sales data. This information could provide both a snapshot of the current market for SNAP customers, as well as long-term trends that reflect a retailer's *overall* market strength beyond simply SNAP redemptions. These are valuable, closely held pieces of information. Making this information readily available to competitors would allow some retailers to gain competitive advantages over other retailers. This, of course, would cause substantial competitive harm to some SNAP retailers – and competitive benefits to others.

SNAP retailers' current competitors would be able to analyze a particular SNAP retailer's SNAP sales data and develop more targeted strategies for gaining some of that SNAP retailer's market share. For example, if a SNAP retailer's local competitor discovered that the SNAP retailer had substantially more SNAP sales than the local competitor, the local competitor could alter its strategy accordingly. This could include revising its marketing strategy to appeal more to SNAP customers (or, if it wasn't already, the local competitor could decide to start participating in the Program); it could also involve stocking a larger amount of SNAP-eligible items in the store than the competitor otherwise would stock. Alternatively, the local competitor could try to increase its appeal to non-SNAP customers and put out negative messages regarding the large number of SNAP customers that shop with the SNAP retailer.

Beyond providing a snapshot of the current retail market for SNAP sales, making redemption data publicly available would provide a window into changes in a retailer's sales over time. Accounting for external variables (such as increases or decreases in SNAP funding or the number of SNAP beneficiaries), SNAP redemption data is generally reflective of a store's overall in-store sales. If SNAP sales data increases consistently, it is likely that a store is

¹⁴ See *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (presence of one competitor sufficient to prove actual competition.); see also *Biles v. Dep't of Health and Human Servs.*, 931 F. Supp. 2d 211, 223 (D.D.C. 2013) (“‘Actual competition’ does not require high levels of competition, but only ‘actual’ competition.”).

performing well. Conversely, a diminution in SNAP sales data could, over time, reflect a store's weakening competitive position.

These short-term and long-term trends are *invaluable* to potential competitors considering investing in a particular market. The convenience store industry is extremely competitive. When a company or an entrepreneur considers opening a store in an area where there are competitors in close proximity, such company or entrepreneur will *inevitably* research their competitors' market strength before deciding whether it is worth establishing a competing enterprise. SNAP data will provide more specific sales data than competitors can get from other sources today. Simply having access to SNAP redemption data would help them, and thus *harm* their competitors. When such research uncovers a long-term trend of decreasing SNAP sales, it would be reasonable for the potential competitor to extrapolate from that trend that the store is vulnerable and its market position is weak. This would make it more likely that the potential competitor would open a competing store in an area, which in turn would harm the existing store's business prospects. The opposite, of course, is also true and these trends would alter the competitive landscape for all stores in an area.

Importantly, releasing aggregated SNAP sales data on a *company-wide* basis rather than at the individual *store-level* would not mitigate the competitive harm discussed above for a majority of convenience store owners. Indeed, more than 60% of NACS's membership is comprised of single-store operators. More than 70% of NACS's membership operates ten stores or less. For most of the industry, releasing company-wide data would be the same thing as releasing store-level data – and for many others it would be nearly as sensitive and useful to actual and potential competitors.

There is a plethora of case law that supports considering information analogous to SNAP redemption data confidential business information under Exemption 4. These cases recognize that “the law does not require the [Agency] to engage in a sophisticated economic analysis of the substantial competitive harm . . . that might result”¹⁵ and instead “embrace a common sense approach to this issue.”¹⁶

- In *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, the U.S. Court of Appeals for the D.C. Circuit upheld withholding letters describing favorable market conditions that “would help rivals to identify and exploit those companies' competitive weaknesses.”¹⁷
- In *Judicial Watch, Inc. v. Export-Import Bank*, the U.S. District Court for the District of Columbia upheld withholding contracts, financial statements, and customer lists because their disclosure could have substantially harmed the submitter's competitive position.¹⁸
- In *National Parks & Conservation Ass'n v. Kleppe*, the D.C. Circuit did not require disclosing information because “[d]isclosure would provide competitors with valuable

¹⁵ *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994); *see also* *Watkins v. U.S. Bureau of Customs and Border Protection*, 643 F.3d 1189, 1196 (9th Cir. 2011) (“[T]he Agency's affidavits provide a sufficient factual basis for the district court to conclude that the disclosure of the information [in question] poses a substantial likelihood of competitive injury to importers of . . . goods who zealously guard their supply chains.”).

¹⁶ *Watkins*, 643 F.3d at 1196.

¹⁷ 473 F.3d 312, 320 (D.C. Cir. 2006) (citation omitted).

¹⁸ 108 F. Supp. 2d 19, 31-32 (D.D.C. 2000).

insights into the operational strengths and weaknesses of a [company], while [its competitors] could continue in the customary manner of ‘playing their cards close to their chest.’”¹⁹

Similarly here, if SNAP redemption data is made public, SNAP retailers would be providing competitors with valuable insights into the SNAP retailers’ strengths and weaknesses, while non-SNAP retailers would not be required to disclose similar information.

- And in *Timken Co. v. U.S. Customs Serv.*, the U.S. District Court for the District of Columbia upheld withholding data reflecting sales between a parent company and its subsidiary because, even if disclosure of such data “would be insufficient, standing by itself, to allow computation of the cost of production, this cost would be ascertainable when coupled with other information”²⁰

iv. SNAP redemption data should not be released for transparency purposes because disclosure would further neither the purpose of FOIA nor the SNAP Program

Making SNAP redemption data public would not effectuate FOIA’s purpose. The public interest that Congress was seeking to protect in enacting FOIA has been articulated by the courts on multiple occasions: If through disclosure “the public would learn something directly about the workings of the *Government*, then the information should be disclosed unless it comes within a specific exemption.”²¹ Those who seek the release of information, however, may not “bolster the case for disclosure by claiming an additional public benefit [that] is not related to ‘what the government is up to’ and the [Supreme] Court has clearly stated that ‘whether disclosure of a . . . document . . . is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny rather than on the particular purpose for which the document is being requested.’ In other words, the public side of the balance is not a function of the identity of the requester, or of any potential negative consequences disclosure may have for the public, nor likewise of any collateral benefits of disclosure.”²²

Disclosing SNAP redemption data at the individual store level would simply shine a light on private businesses’ commercial operations and sales volumes, rather than providing insight into the workings of the government. In designing SNAP, Congress and FNS intended to permit beneficiaries to have substantial leeway as to when and where they may make their food purchases. The government’s role has been to set funding levels, determine beneficiary and retailer eligibility, establish items that can be purchased with benefits, and minimize fraud. Individual store level data does not provide insight regarding any of these governmental roles. The government’s funding levels and administration of the Program do not impact individual store-level SNAP transaction data – and release of that data would not provide the public insight

¹⁹ 547 F.2d 673, 684 (D.C. Cir. 1976).

²⁰ 491 F. Supp. 557, 559 (D.D.C. 1980); cf. *Jurewicz v. U.S. Dep’t of Agriculture*, 891 F. Supp. 2d 147, 154 (D.D.C. 2012) (permitting release of information when “similar information was already in the public domain”).

²¹ *Public Citizen Health Research Group v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999) (emphasis in original).

²² *Id.* (citing *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772 (1989) (other citations omitted)).

into government actions. Further, releasing individual store-level data will not shed any light on instances of fraud in the SNAP Program, nor would it shed any light on *which* SNAP-eligible products beneficiaries tend to purchase. Releasing store-level data would simply reflect choices that SNAP beneficiaries make. Such choices are not part of the government's decision-making or oversight.

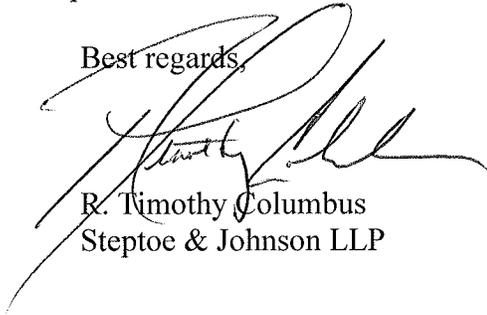
If a FOIA requester does seek information regarding government operations and the SNAP program, there are more direct ways to obtain it under FOIA.. For example, information could be sought regarding the government's documentation of its qualifications and oversight processes for SNAP retailers, or the government's process for discovering and responding to alleged instances of retailer fraud. But store-level transaction data reflects entirely on individual and private sector decisions – not government decisions.

To the extent there are benefits from making this information public, any such benefits are not within FOIA's scope.

III. Conclusion

NACS and SIGMA reiterate their gratitude for FNS seeking their input on this important matter. For the reasons stated above, they respectfully request that the confidential commercial information embodied in SNAP sales redemption data be withheld under FOIA exemption 4.

Best regards,



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