

United States Court of Appeals  
For the Eighth Circuit

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No. 17-1346

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Argus Leader Media, doing business as Argus Leader

*Plaintiff - Appellee*

v.

United States Department of Agriculture

*Defendant*

Food Marketing Institute

*Intervenor Defendant - Appellant*

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National Grocers Association

*Amicus on Behalf of Appellant(s)*

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Appeal from United States District Court  
for the District of South Dakota - Sioux Falls

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Submitted: March 14, 2018

Filed: May 8, 2018

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Before GRUENDER, BEAM, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

This case returns to us after a bench trial. Intervenor Food Marketing Institute (FMI) argues the district court<sup>1</sup> erred in finding that Exemption 4 to the Freedom of Information Act (FOIA) is inapplicable to data held by the U.S. Department of Agriculture (USDA).

Most of the relevant facts are set out in our previous opinion. See Argus Leader Media v. U.S. Dep’t of Agric., 740 F.3d 1172, 1173–75 (8th Cir. 2014). The data in question come from the Supplemental Nutrition Assistance Program (SNAP). The USDA issues SNAP participants a card (like a debit card) to use to buy food from participating retailers. When a participant buys food using their SNAP card, the USDA receives a record of that transaction, which is called a SNAP redemption. Argus Leader Media, a South Dakota newspaper, asked the USDA for annual SNAP redemption totals for stores that participate in the SNAP program (the “contested data”). The USDA refused, citing several FOIA exemptions. In our previous opinion, we held that Exemption 3 did not apply to the contested data, and remanded the case to the district court. Id. at 1176–77.

On remand the only issue was whether FOIA Exemption 4, which covers “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” 5 U.S.C. § 552(b)(4), applies to the contested data. Argus Leader and the USDA agreed that the contested data were commercial or financial information, and that they were not privileged.<sup>2</sup> To show the contested data were

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<sup>1</sup>The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

<sup>2</sup>The district court found that the contested data were obtained from a person, and neither party contests that finding on appeal.

“confidential,” the USDA had to prove that releasing the data was likely “(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” Madel v. U.S. Dep’t of Justice, 784 F.3d 448, 452 (8th Cir. 2015) (quoting Contract Freighters, Inc. v. Sec’y of U.S. Dep’t of Transp., 260 F.3d 858, 861 (8th Cir. 2001)). The USDA argued only the competitive position prong, so the question before the district court was whether releasing the contested data was likely to cause substantial harm to the competitive position of SNAP retailers.

The case went to bench trial. Both parties called experts to testify about the risks of disclosing the contested data. In its findings of fact and conclusions of law, the district court adopted a definition of competitive harm from the D.C. Circuit: “[C]ompetitive harm may be established if there is evidence of ‘actual competition and the likelihood of substantial competitive injury . . . .’” Argus Leader Media v. U.S. Dep’t of Agric., 224 F. Supp. 3d 827, 833 (D.S.D. 2016) (alteration in original) (quoting Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983)). Applying that standard, the district court found that the grocery retail industry was highly competitive, but that the USDA had not proved a likelihood of substantial competitive injury. Id. at 833–35. The court found the USDA’s claims of competitive injury were “speculative at best” because grocery retailers already had access to large quantities of data about their competitors, and existing models explained the majority of grocery customers’ behavior. Id. at 834. The court also found speculative the USDA’s assertion that stores with high SNAP redemptions would face stigma. Id.<sup>3</sup>

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<sup>3</sup>In addition, the district court opined that stigma “is not relevant in an Exemption 4 analysis because it is not a harm caused by a competitor.” Id. We need not determine the relevance, if any, of stigmatic injury in Exemption 4 cases because, as we explain, the evidence of stigma was insufficient to support a finding of substantial competitive harm alone or in combination with other evidence presented.

After the district court entered judgment for Argus Leader, the USDA decided not to appeal. FMI, a trade group representing grocery retailers, intervened and filed this appeal. FMI contests the district court’s findings of fact and application of the law to those facts.<sup>4</sup> “We accept the district court’s factual findings unless they are clearly erroneous, and we review the applicability of the FOIA exemption de novo.” Peltier v. F.B.I., 563 F.3d 754, 762 (8th Cir. 2009).

As to the facts, we see no clear error. FMI argues that the district court erred in finding that release of the contested data would have little effect on the grocery industry, and failed to give enough weight to its assertions that releasing the data would stigmatize some stores and cause stores to stop accepting SNAP. But record evidence showed that the contested data—which are nothing more than annual aggregations of SNAP redemptions—lacked the specificity needed to gain material insight into an individual store’s financial health, profit margins, inventory, marketing strategies, sales trends, or market share. FMI’s assumption that stores would be stigmatized was speculative and not supported by any other evidence in the record. There was also no meaningful evidence that retailers would end their SNAP participation if the contested data were released.

Applying the law to the facts, we find no basis for reversal. The trial evidence showed that the grocery industry is highly competitive, but is already rich with

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<sup>4</sup>FMI also argues in passing that the district court should not have used the D.C. Circuit standard to decide whether releasing the contested data is likely to cause substantial competitive harm. But FMI does not propose an alternate standard. Instead, it argues that the words of the statute—“privileged or confidential,” 5 U.S.C. § 552(b)(4)—can be given their dictionary definitions. FMI asserts that “confidential” means “secret,” so a record falls within Exemption 4 if it has previously been kept secret. We reject this argument as precluded by “the Supreme Court’s admonition that FOIA exemptions ‘must be narrowly construed.’” Argus Leader, 740 F.3d at 1176 (quoting Milner v. Dep’t of Navy, 562 U.S. 562, 565 (2011)). Under FMI’s reading, Exemption 4 would swallow FOIA nearly whole.

publically-available data that market participants (and prospective market entrants) use to model their competitors' sales. The evidence shows that releasing the contested data is likely to make these statistical models marginally more accurate. But the evidence does not support a finding that this marginal improvement in accuracy is likely to cause *substantial* competitive harm. The USDA's evidence showed only that more accurate information would allow grocery retailers to make better business decisions. If that were enough to invoke Exemption 4, commercial data would be exempt from disclosure any time it might prove useful in a competitive marketplace. A likelihood of commercial usefulness—without more—is not the same as a likelihood of substantial competitive harm. We agree with the district court and conclude that the USDA failed to establish that release of the contested data falls within Exemption 4's ambit.

In an effort to avoid this conclusion, FMI cites to our opinion in Madel. In that case, we affirmed Exemption 4's application to Drug Enforcement Administration (DEA) records pertaining to oxycodone transactions by private companies. See Madel, 784 F.3d at 451–53 (noting that one of the requested documents “contain[ed] information traceable to individual manufacturers and distributors, such as market shares in specific geographic areas, estimates of inventories, and sales” for the entire nation-wide market for oxycodone). We cited DEA declarations that the requested records “could be used to determine the companies’ market shares, inventory levels, and sales trends in particular areas” which might allow competitors “to target specific markets, forecast potential business of new locations, or to gain market share in existing locations, thereby gaining competitive advantage.” Id. at 453 (cleaned up). While these concerns appear to mirror those raised by the USDA in this case, Madel is distinguishable. In Madel, the data in question were sufficiently specific (records of individual companies’ sales of a particular drug) that their release was likely to provide a tangible competitive advantage. The contested data in this case, by contrast, are more general, and add little to the information already available to

retailers. Because the Madel data are not analogous to the data in this case, the result is different.<sup>5</sup>

For these reasons, we affirm the judgment of the district court.

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<sup>5</sup>We also note that Madel was decided on summary judgment. The government is entitled to summary judgment when its “affidavits provide specific information sufficient to place the documents within the exemption category, *if* this information is not contradicted in the record.” Id. at 452 (emphasis added) (quoting Quiñon v. FBI, 86 F.3d 1222, 1227 (D.C. Cir. 1996)). In Madel, the party seeking disclosure did not submit any evidence to rebut the government’s proffer. Id. at 453.

**United States Court of Appeals**  
***For The Eighth Circuit***  
Thomas F. Eagleton U.S. Courthouse  
111 South 10th Street, Room 24.329  
**St. Louis, Missouri 63102**

**Michael E. Gans**  
*Clerk of Court*

**VOICE (314) 244-2400**  
**FAX (314) 244-2780**  
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May 08, 2018

West Publishing  
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RE: 17-1346 Argus Leader Media v. Food Marketing Institute

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Gavin R. Villareal, of Austin, TX. The following attorney(s) appeared on the appellant brief; Daniel R. Fritz, of Sioux Falls, SD, and Thomas R. Phillips, Stephanie F. Cagniart, and Ellen Springer of Austin, TX.

Counsel who presented argument on behalf of the appellee was Jon E. Arneson, of Sioux Falls, SD.

The following attorney(s) appeared on the amicus brief; Stewart D. Fried and J. Mason Weeda, of Washington, DC.

The judge who heard the case in the district court was Honorable Karen E. Schreier. The judgment of the district court was entered on November 30, 2016.

If you have any questions concerning this case, please call this office.

Michael E. Gans  
Clerk of Court

MER

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 4:11-cv-04121-KES

**United States Court of Appeals**  
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[www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)

May 08, 2018

Mr. Gavin R. Villareal  
BAKER & BOTTS  
Suite 1500  
98 San Jacinto Boulevard  
Austin, TX 78701

RE: 17-1346 Argus Leader Media v. Food Marketing Institute

Dear Counsel:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review [Federal Rules of Appellate Procedure](#) and the [Eighth Circuit Rules](#) on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans  
Clerk of Court

MER

Enclosure(s)

cc: Mr. Jon E. Arneson  
Ms. Stephanie F. Cagniart  
Mr. Stewart D. Fried  
Mr. Daniel R. Fritz  
Mr. Thomas R. Phillips  
Mr. Matthew W. Thelen  
Mr. J. Mason Weeda

District Court/Agency Case Number(s): 4:11-cv-04121-KES