APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-1346

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellee

v.

United States Department of Agriculture

Defendant

Food Marketing Institute

Intervenor Defendant - Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

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

Submitted: March 14, 2018
Filed: May 8, 2018

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[1] 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.[2] To show the contested data were "confidential," the USDA had to

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[1] The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

[2] The district court found that the contested data were obtained from a person, and neither party contests that finding on appeal.

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.[3]

[3] 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

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.[4] "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,

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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.

[4] 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.

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 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.[5]

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

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[5] 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.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 05/08/18)

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellee

v.

United States Department of Agriculture

Defendant

Food Marketing Institute

Intervenor Defendant - Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

JUDGMENT

Before GRUENDER, BEAM and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 08, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 11/30/16)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

MEMORANDUM OPINION
AND ORDER

Plaintiff, Argus Leader Media, brings this Freedom of Information Act (FOIA) suit against defendant, United States Department of Agriculture (USDA). Argus seeks data on the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. The USDA opposes releasing the data based on FOIA Exemption 4, arguing that such disclosure would cause substantial competitive harm to grocery stores participating in SNAP. This court disagrees and holds that disclosure of the requested data will not cause

substantial competitive harm to SNAP retailers. The data should be disclosed under FOIA.

BACKGROUND

The USDA administers SNAP through the Food and Nutrition Service, an agency within the USDA. The purpose of SNAP is to give children and needy families access to food and nutrition education. When SNAP households redeem their benefits, the transaction looks like a customer using a debit card. The SNAP household pays for its groceries by swiping a benefits card and entering a PIN number. A third-party processor verifies that the SNAP account has available benefits and then approves or denies the transaction. If the transaction is approved, the third-party processor then transfers money from the SNAP household's account to the retailer's bank and sends the redemption data to the Food and Nutrition Service.

Argus, in 2011, made a FOIA request to the Food and Nutrition Service. Argus sought a variety of SNAP data– including yearly spending totals at individual retail locations. About two weeks later, the Food and Nutrition Service provided some of the requested information and withheld the remainder citing FOIA Exemptions 3 and 4. Argus then filed an administrative appeal. Before the USDA formally denied the appeal, Argus filed this action.

The USDA, in 2012, filed its first motion for summary judgment. This court granted the USDA's motion and held that Exemption 3 of FOIA applied to the undisclosed data. The Eighth Circuit Court of Appeals reversed and remanded the case. In 2015, the USDA filed its second motion for summary judgment, arguing FOIA Exemptions 4 and 6 applied to the requested data. This court denied the motion and scheduled the case for a bench trial. Before trial, the USDA withdrew its Exemption 6 argument, and the parties stipulated that the only issue

remaining for the court to decide was whether Exemption 4 applied to yearly SNAP revenues for individual stores.

The bench trial began on May 24, 2016. A number of Food and Nutrition Service employees testified about the collection of SNAP data. Witnesses also testified about the potential harm in disclosing the requested data, including the USDA's witness Joey Hays. Hays is the President and Owner of Dyer Foods Incorporated, a supermarket chain that started in Dyer, Tennessee and has expanded to 13 locations. Hays has spent 35 years in the grocery business. Hays testified that individual store SNAP sales data is not public information and that release of the data would cause competitive harm to his business because competitors could use the information against him. On cross examination, however, Hays admitted that releasing the SNAP data would not give competitors a store's total profits. Hays also admitted that much of a store's business is already visible to the public such as product selection and price. Hays further testified that Wal-Mart has already saturated his market, even without the requested SNAP information.

Andrew Johnstone, Associate General Counsel for Sears Holdings Management Corporation, also testified for the USDA. Johnstone echoed Hays's comments that the grocery business is especially competitive because the profit margins are low. Johnstone testified that if the requested SNAP data was disclosed it would help competitors take away business from Kmart stores. Finally, Johnstone noted the potential stigma that might result from publishing SNAP data. Specifically, Johnstone was concerned that landlords would not renew their lease agreements if the data showed that KMart stores had high SNAP sales. On cross examination, Johnstone testified that store data is already publically available to market researchers. Such data includes a store's location, products, and pricing. Johnstone also

testified that if the SNAP information was released, it would be released regarding all SNAP retailers.

Peter Larkin, President and CEO of the National Grocers Association, testified that profit margins in the grocery industry are roughly 1% before tax. He also testified that a 2014 study found profit margins to be $0.0091 on every dollar. Thus, grocery stores must have a high sales volume to make a profit. Larkin also testified that individual store SNAP data is not available currently to the public, and Larkin reasoned that injecting new sales information into the public domain could impact stores because competitors could target high dollar SNAP locations and build new stores in that area. On cross examination, Larkin admitted that a number of factors play a role in a customer's decision to shop at a grocery store such as better produce, convenient location, unique products, or better customer service. Larkin also testified that disclosing SNAP data would not be the same as disclosing a store's profits or net sales.

Gwen Forman, Senior Vice President of Marketing at Cumberland Farms, theorized that SNAP data is valuable because it confirms whether or not a store's practices are successful. Although the public sees a store's advertising and customer outreach, a competitor cannot confirm whether the store's strategy is effective. Releasing SNAP data—Forman argues—allows competitors to gauge whether a store's marketing strategy is effective. On cross examination, Forman admitted that a number of other factors also determine whether a store is ultimately successful at a given location. SNAP data alone will not determine a store's future plans or business strategy.

Argus's first witness was Dr. Richard Volpe, an Assistant Professor in the Agribusiness Department at California Polytechnic State University. Dr. Volpe testified that a variety of store data is already public. For

example, a store's prices, level of activity, layout, and assortment of products are visible to anyone visiting the store. This data is already being collected and is available to retailers. Dr. Volpe also addressed concerns about benchmarking, the practice of analyzing a store's sales over a period of years. Dr. Volpe explained a benchmarking analysis of SNAP data has limited value because a store's increased SNAP revenue may be attributable to a number of factors such as increased prices, change in customer demographics, or increased number of SNAP customers. Because additional data is necessary to determine the reason for increased SNAP sales, the release of individual store SNAP data would not cause competitive harm.

Argus's next witness was Dr. Ryan Sougstad, Associate Professor of Business Administration at Augustana University. Dr. Sougstad testified about how companies use data to come to decisions. Dr. Sougstad testified that individual retailer SNAP data would not likely play a significant role in helping businesses decide where to locate stores. On cross examination, Dr. Sougstad admitted that he was unable to determine to what degree stores would be less profitable if the requested SNAP data was released, but he believed any economic harm would be marginal.

The USDA's one rebuttal witness, Bruce Kondracki, Vice President of Market Insights and Consumer Research at Dakota Worldwide Corporation, testified about market analysis in the food industry. Kondracki explained that grocery stores use model forecasts to determine where to add locations and that releasing SNAP data could improve the accuracy of these models. Kondracki also testified that the addition of new stores does not necessarily mean customers quit frequenting their current store, but customers may spend less money at their current store.

LEGAL STANDARD

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enf't Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 562 U.S. at 565. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coal. for Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1208 (8th Cir. 2008) (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993). "The government bears the burden of proving by a preponderance of the evidence that a withheld document falls within one of the exemptions." *Enviro Tech Int'l, Inc. v. U.S. EPA*, 371 F.3d 370, 374 (7th Cir. 2004) (citing § 552(a)(4)(B)). This court has made all of its factual determinations by a preponderance of the evidence.

DISCUSSION

The exemption at issue here is FOIA Exemption 4. The Eighth Circuit Court of Appeals has explained that "[t]he plain language of [Exemption 4] exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975) (internal

quotation omitted). Neither party has argued that the requested SNAP data is a trade secret, so the issue before the court is whether the requested FOIA information is (1) commercial or financial; (2) obtained from a person; and (3) privileged or confidential. The parties have stipulated that the information is commercial or financial, so only the remaining two elements are discussed below.

A. The SNAP information is obtained from a person.

The Supreme Court has explained that information is "obtained from a person" if the "information [is] obtained outside the Government." *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979). In *FCC v. AT&T*, 562 U.S. 397, 408-09 (2011), the Supreme Court held a corporation was a person under Exemption 4 analysis. Argus asserts that because SNAP is a government program, the requested SNAP data is obtained from inside the government. The government is giving SNAP benefits to qualifying households, and the government then tracks where the SNAP households are spending their benefits. Argus contends that the government is essentially keeping track of its own spending. Thus, Argus's position is that all of the redemption data is generated and collected by the government and that the SNAP data is obtained from the government.

The Eighth Circuit Court of Appeals has already held that Exemption 3 does not apply to this case In that opinion, the Eighth Circuit held that the requested information is " 'obtained' from third-party payment processors, not from individual retailers." Docket 44 at 6 (citations omitted). This conclusion is supported by the testimony from the Food and Nutrition Service employees. Neither party disputes that it is the third-party processor who verifies whether the SNAP household has available SNAP benefits and that the third-

party processor submits the redemption data to the Food and Nutrition Service. Based on the Eighth Circuit's ruling and the testimony at trial, this court finds that the requested information is obtained from a person, namely the third-party processors who facilitate the SNAP transactions.

B. The SNAP information is not privileged or confidential.

Information is confidential if "disclosure of the information is likely to have either of the following effects: (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." *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).[1] This test, which the Eighth Circuit Court of Appeals adopted from the District of Columbia Court of Appeals, is commonly known as the *National Parks* test and "has been widely recognized and applied by the circuit courts when construing Exemption 4." *Id.* Because the parties agree that prong 1 of the *National Parks* test is inapplicable, only prong 2 is addressed. Docket 61 at 19-20.

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[1] Another test is used if the person or entity submitting information is acting voluntarily. That test is inapplicable here, however, because SNAP retailers are required to disclose EBT data if they want to be compensated. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (holding a bid to do government work is not voluntary under Exemption 4 because the bid must be submitted in order to win the contract); *see also* Defendant's Memorandum in Support of Motion for Summary Judgment, Docket 61 at 19 (stating "[T]he agency's position is that the information here is required to be submitted.")

The Eighth Circuit Court of Appeals has not articulated the showing necessary for a party to prove that release of information would cause substantial harm under prong 2. But the District of Columbia Circuit has found that prong 2 competitive harm may be established if there is evidence of "actual competition and the likelihood of substantial competitive injury . . . ." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (internal quotation omitted).[2] Competitive harm is limited to "harm flowing from the use of proprietary information *by competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . ." *Id.* n. 30. When assessing the potential for competitive harm, a court may consider the nature of the material sought, the competitive circumstances surrounding the disclosure, and credible opinion testimony. *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976). Although a party opposing disclosure "need not 'show actual competitive harm,' " conclusory and generalized allegations—standing alone—are not sufficient. *Food & Drug Admin.*, 704 F.2d at 1291.

1. Actual competition

Competition in the grocery business is fierce. This conclusion is supported by the testimony of Joey Hays, Andrew Johnstone, Peter Larkin, Gwen Forman, and Bruce Kondracki. Johnstone noted that competition in the grocery business has increased with the entrance of new competitors, and Larkin provided testimony that the profit margins in the grocery industry are at $0.0091 on

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[2] *See also Sharkey v. Food & Drug Admin.*, 250 Fed. Appx. 284, 288 (11th Cir. 2007).

every dollar spent. Kondracki also explained competition is not measured solely in terms of lost customers, but in lost dollars to other stores. Kondracki testified the entrance of a new store into an existing market can cause a significant loss in business. Based on this testimony, the court finds that the grocery industry has actual competition.

2. Likelihood of substantial competitive harm

The competitive harms alleged by the USDA fall into two main categories: (1) harms arising from competitors using SNAP data to lure away customers from other businesses and (2) harms arising from the potential stigma associated with being a high volume SNAP retailer. Forman's testimony encapsulated the retailers' overarching concerns of the former. Forman explained how competitors could use SNAP data to choose the locations of new stores, evaluate an existing store's overall success, and ultimately cut into another store's profits. Hays, Johnstone, Larkin, and Kondracki all gave testimony supporting this conclusion that disclosure of individual store redemption data could cause competitive harm because competitors in the grocery business could use the information to target an existing store's customers.

This analysis, however, is incomplete. Competitors in the grocery industry already use a variety of publicly available information to make decisions. This information includes a store's location, layout, pricing, product selection, and customer traffic. Dr. Volpe and Dr. Sougstad both noted that while SNAP information may provide some insight into a store's overall financial health, the data is a small piece in a much larger picture—disclosure would have a nominal effect on competition in the grocery industry. Kondracki's models of consumer behavior appear to support this point. Kondracki testified

that the current market models can reach correlations of .9 or .99. This appears to indicate that while SNAP data may be beneficial, it would not add significant insights into the grocery industry. This conclusion is further supported by the testimony of Hays. Hays testified that competitors such as Wal Mart have already saturated the market where he competes. Wal Mart took these actions without the requested SNAP data. This court concludes that any potential competitive harm from the release of the requested SNAP data is speculative at best.

The second concern the USDA voiced to releasing SNAP data was the potential stigma SNAP households and SNAP retailers might face. As noted above, this type of harm is not relevant in an Exemption 4 analysis because it is not a harm caused by a competitor. Even if stigma was relevant, the USDA's evidence on potential stigma was not sufficient to meet its burden. Although Johnstone testified that high SNAP sales revenue might affect a landlord's decision to rent its commercial space to a retailer, it seems unlikely that a landlord would be unaware of its tenant's customer base. Johnstone also did not provide any evidence of the likelihood of this contingency occurring. At best, Johnstone's claims are speculative. Furthermore, the remaining witnesses did not explain how high or low SNAP sales would harm their stores. For example, although a high volume of SNAP sales might encourage a competitor to enter that geographical market, an equally compelling conclusion is that the competitor may decide to stay away from that market. Another equally compelling conclusion is that SNAP sales will have no or little effect on a store's decision to expand into new sites. This is because a variety of factors influence a store's decision to open a new location including: cost of real estate, location of real estate, the business's long-term financial plan and goals, and other

factors. This court finds that the competitive harms associated with stigma are also speculative.

The USDA, in its post-trial reply brief, cited three cases to support its claim that releasing the requested SNAP data would cause competitive harm. Each case, however, is distinguishable from the present litigation because the plaintiffs in the other cases asked for data that would give greater insights into the company's workings. In *Kleppe*, 547 F.2d at 379-80, plaintiffs sought information about company assets, liabilities, net worth, balance sheet information, future and existing projects, and operating capacity. In *Public Citizen Health Research Group*, 209 F. Supp. 2d at 40-41, plaintiffs requested the negotiated royalty rates between private researchers and the government. Finally, in *Sharkey v. Food & Drug Administration*, 250 Fed. Appx. 284, 288-290 (11th Cir. 2007), plaintiffs sought information that would result in the disclosure of domestic market share and sales volume. Here, the requested SNAP data does not provide the same insights into store profitability. SNAP sales are merely a part of the store's total revenue. SNAP data does not disclose a store's profit margins, net income, or net worth. SNAP data also does not disclose how a company bids on government contracts or negotiates with the federal government. In essence, SNAP data is merely a bill from the retailer to the government. As the USDA acknowledges, this type of data is regularly disclosed, and disclosure is consistent with FOIA's underlying purpose. Docket 125 at 5-6. Because of the speculative nature of the USDA's claims and FOIA's preference for transparency and disclosure, this court finds that the release of SNAP data will not likely cause substantial competitive harm to SNAP stores. The data should be disclosed.

CONCLUSION

The USDA has failed to meet its burden to show that Argus's FOIA request falls within Exemption 4 because the USDA did not prove that release of the requested data was confidential. Specifically, USDA did not show that release of the requested information would cause substantial competitive harm if it was disclosed. Thus, it is

ORDERED that judgment will be entered in favor of Argus and against USDA in accordance with this memorandum opinion and order.

DATED this 30th day of November, 2016.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 11/30/16)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT

Pursuant to the court's Memorandum Opinion and Order, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of plaintiff, Argus Leader Media, d/b/a Argus Leader, and against defendant, United States Department of Agriculture.

DATED this 30th day of November, 2016.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121-KES

(Filed 09/27/12)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Argus Leader Media, d/b/a Argus Leader, brought this claim under the Freedom of Information Act (FOIA) to obtain information in the possession of defendant, the United States Department of Agriculture (USDA). Docket 1. After USDA provided some, but not all, of the requested information, Argus Leader requested that a *Vaughn* Index be filed to explain why USDA did not provide the withheld information. Docket 12. USDA resists that motion and claims that a *Vaughn* Index is not necessary because USDA offered detailed affidavits that

sufficiently explained its decision to withhold the information. Docket 15. USDA also moves for summary judgment and argues that its decision to withhold redemption data was appropriate in this case because the material was protected under exemption 3 to the FOIA and should not be released. Docket 18. Argus Leader resists that motion and requests that the redemption data be disclosed because that information is not what Congress meant to exempt under the claimed statute. Docket 33. For the following reasons, USDA's motion for summary judgment is granted.

BACKGROUND

The relevant facts of this dispute, viewed in the light most favorable to the nonmoving party on the motion for summary judgment, Argus Leader Media, d/b/a Argus Leader, are as follows:

On February 1, 2011, Argus Leader emailed a request for specific records to the email address for the Food and Nutrition Service (FNS), which is an agency of the USDA. USDA enforces the Food and Nutrition Act of 2008 (FNA or the Act) in addition to other statutes. The information that Argus Leader requested related to the Supplemental Nutrition Assistance Program (SNAP), or what was formerly known as the food stamp program. The request sought SNAP retail store records from 2005 through 2010 that included: each store's identifier or unique ID number, the store name, the store address, the store type, and the yearly redemption amounts or Electronic Benefit Transfer (EBT[1]) sales figures for each participating store. Docket 22 ¶ 11.

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[1] The term food stamps is the label for SNAP benefits that is most familiar to the public. Docket 21 ¶ 7. Many store owners or clients also know or understand their benefits as "EBT," and FNS often uses

While FNS administers the FNA and its regulations and standards, the Benefit Redemption Division (BRD) is the component within FNS that oversees the EBT system. Through the EBT system, SNAP recipients receive an EBT debit card that keeps track of their monthly benefits and is the object that gives them access to food and other qualifying items under SNAP. BRD also ensures that only those retailers that qualify to participate in SNAP do so, and it regulates the retailers who are not in compliance with the regulations and policies designated under the program. BRD is responsible for maintaining the EBT system in a manner that ensures it is responsive to its clients, the states it serves, and the federal government.

The specific requested data still at issue is redemption data—all other data was provided to Argus Leader or was deemed nonessential by Argus Leader. Redemption data is the dollar amount of goods that each retailer sells to SNAP beneficiaries and subsequently redeems from the federal government in a given year. It is one type of information that is generated and stored in a technology system overseen by BRD, which is called the Store Tracking and Redemption System (STARS). Redemption data is "only obtained when a retailer is authorized to accept SNAP cards and processes a SNAP transaction." Docket 21 ¶ 20. Redemption data, however, is only generated for each retailer during the time frame that the retailer would be authorized to participate in SNAP. For instance, if a SNAP retailer is authorized to participate in the program but makes no EBT sales, then the redemption data amount is $0. Docket 21 ¶ 21.

After receiving Argus Leader's request, FNS contacted BRD to collect the data that Argus Leader sought. BRD conducted a search within the STARS

SNAP-EBT in its publications and information. Food stamps, SNAP, and SNAP-EBT all mean the same thing. Docket 21 ¶ 7.

database and gathered records that were pertinent to the request but not subject to a FOIA exemption. BRD produced a CD that contained 321,988 SNAP files viewable on a Microsoft Excel worksheet. FNS sent that CD and a letter to Argus Leader and explained that the agency was not including some of the requested information (like redemption data) because those records were exempt from disclosure pursuant to the Freedom of Information Act Exemptions 3 and 4 and 5 U.S.C. § 552(b)(3) and (b)(4). Docket 22 ¶ 15. FNS also informed Argus Leader of its right to appeal. Argus Leader contacted a representative for FNS and stated that it had received the letter, but the CD only contained 65,536 retailer records. Argus Leader also requested that FNS resend the information in a text format.

On March 3, 2011, Argus Leader submitted its appeal of FNS's decision to withhold the redemption data, which was filed with the FNS Freedom of Information Act Service Center within the Information Management Branch. The appeal worked its way through internal departments and eventually was submitted for legal review on April 13, 2011. On June 13, 2011, FNS received a letter from Argus Leader stating that it would initiate legal action under FOIA if it did not receive a response to its appeal within ten days. Docket 22 ¶ 26. On July 19, 2011, Argus Leader received an unofficial response from FNS via email that attempted to clarify why the requested information was withheld. Meanwhile, the appeal denial was working its way through the federal system and was prepared for final signatures from those who could officially deny the appeal.

Argus Leader filed its complaint on August 26, 2011, and the denial of Argus Leader's appeal was never sent. Docket 1. Argus Leader moved for a *Vaughn* Index on March 5, 2012. Docket 12. USDA responded to that motion and stated that its reasons for the denial of specific

discovery were already expressed in the documents submitted in this case, and a *Vaughn* Index was not necessary. Docket 15. USDA also moved for summary judgment on the issue of whether it needed to provide FNS numbers and redemption totals to Argus Leader. Docket 18. The parties reached a stipulation that the issue of FNS numbers was no longer relevant, and the only issue before the court was whether USDA had to provide Argus Leader with the redemption data for the five years requested. Docket 31. The court approved the stipulation. Docket 32. On May 23, 2012, Argus Leader filed its opposition to the motion for summary judgment and claimed that the redemption data was not the type of information that was intended to be withheld under exemption 3. Docket 33.

STANDARD OF REVIEW

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact." (internal quotations omitted)). The moving party must inform the court of the basis for its motion and also identify the portion of the record that shows that there is no genuine issue in dispute. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citation omitted).

Once the moving party has met its initial burden, the nonmoving party must establish "that a fact . . . is genuinely disputed" either "by citing to particular parts of

materials in the record," or by "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c). "The nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). For purposes of summary judgment, the facts, and inferences drawn from those facts, are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

On a motion for summary judgment in a Freedom of Information Act case, the record is still viewed in the light most favorable to the nonmoving party to determine if issues of material fact remain in dispute to determine if "the moving party is entitled to judgment as a matter of law." *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1208 (8th Cir. 2008) (citations omitted). In FOIA cases, the agency has the burden to prove " 'that it has fully discharged its obligations under FOIA.' " *Id.* (quoting *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1382 (8th Cir. 1985) (citing *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983))). "Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved." *Mace v. E.E.O.C.*, 37 F. Supp. 2d 1144, 1146 (E.D. Mo. 1999) (citations omitted). *See also Nielsen v. U.S. Bureau of Land Mgmt.*, 252 F.R.D. 499, 503 (D. Minn. 2008) ("Summary judgment is the preferred procedural vehicle for resolving FOIA disputes.") (citing *Evans v. U.S. Dep't of Personnel Mgmt.*, 276 F. Supp. 2d 34, 37 (D.D.C. 2003)).

DISCUSSION

Argus Leader first argues that it is entitled to a *Vaughn* Index to understand USDA's explanation for the withholding of redemption data. USDA claims that the affidavits and other supporting documents have sufficiently stated its reasoning for denying the FOIA material, that the exemption being claimed is clear, and that an index is unnecessary. Argus Leader also claims that exemption 3 does not apply in this case because USDA cannot show that the claimed statute is a withholding statute or that the redemption data is the type of information that Congress meant to withhold under the claimed statute. USDA argues that § 2018(c) is clearly a withholding statute and that redemption data is information within the purview of 7 U.S.C. § 2018(c); therefore, the requested data was properly withheld under exemption 3.

I. *Vaughn* Index

Argus Leader argues that it is entitled to a *Vaughn* Index, which is a detailed list or index of the material withheld by USDA and usually contains a precise rationale of the reasons for withholding. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). "Although there are instances where *Vaughn* index may be necessary for proper review, a *Vaughn* index is not required as a matter of course." *May v. I.R.S.*, Civ. No. 90-1123, 1991 WL 328041, at *2 (W.D. Mo. 1991) (citing *Barney v. I.R.S.*, 618 F.2d 1268, 1272 (8th Cir. 1980)). *See also Minier v. Cent. Intelligence Agency*, 88 F.3d 796, 804 (9th Cir. 1996) ("[W]hen the affidavit submitted by an agency is sufficient to establish that the requested documents should not be disclosed, a *Vaughn* index is not required . . . Moreover, when a FOIA requester has sufficient information to present a full legal argument, there is no need for a *Vaughn* index.").

> The typical *Vaughn* Index:
>
> provides a specific factual description of each document sought by the FOIA requester. Specifically, such an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

Mo. Coal., 542 F.3d at 1209-10 (quoting *In re Dep't of Justice*, 999 F.2d 1302, 1306 (8th Cir. 1993)). *Vaughn* indices serve two purposes: (1) "to ensure an 'effectively helpless' party's right to information 'is not submerged beneath governmental obfuscation and mischaracterization,' " and (2) "to 'permit the court system effectively and efficiently to evaluate the factual nature of disputed information.' " *Mo. Coalition*, 542 F.3d at 1209 (citing *Vaughn*, 484 F.2d at 826).

"Generally, a more substantial *Vaughn* index-one that provides for each document requested a specific explanation as to why an exemption applies–is preferable to a bare bones index." *Mo. Coalition*, 542 F.3d at 1210. Although courts routinely conduct an in camera review of the documents at issue, such inspection should be limited because it is " 'contrary to the traditional judicial role of deciding issues in an adversarial context upon evidence openly produced in court.' " *Barney*, 618 F.2d at 1272 (quoting *Cox v. U.S. Dep't of Justice*, 576 F.2d 1302, 1311 (8th Cir. 1978)). "If the material is fairly described and the reason for nondisclosure is adequately stated and supported by the law, the agency's position should be upheld without in camera inspection." *Mo. Coalition*, 542 F.3d at 1210 (citation omitted).

> When analyzing whether an exemption to FOIA applies:
>
> A court's primary role . . . is to review the adequacy of the affidavits and other evidence presented by the Government in support of its position . . . . If the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the Government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.

Barney, 618 F.2d at 1272 (citing Cox, 576 F.2d at 1312). A *Vaughn* Index is not mandatory, but "[i]f the Court cannot evaluate the propriety of the claimed exemptions on the record before it, it may order the agency to submit more detailed affidavits or a *Vaughn* index, or even review documents *in camera*." *Gavin v. U.S. Sec. & Exch. Comm'n*, Civ. No. 04-4522, 2006 WL 2975310, at *2 (D. Minn. Oct. 16, 2006) (citing *Barney*, 618 F.2d at 1272; *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 n.2 (9th Cir. 1997); *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). "Boilerplate or conclusory affidavits, standing alone, are insufficient to show that no genuine issue of fact exists as to the applicability of a FOIA exemption." *Mo. Coalition*, 542 F.3d at 1210 (citation omitted).

The affidavits submitted in this case by Susan Modine, Jennifer Weatherly, and Andrea Gold described redemption data in detail—how it is gathered, used, and why it should remain withheld. USDA specifically stated which exemptions to FOIA prevented disclosure and also discussed 7 U.S.C. § 2018, the statute that enumerates why the redemption data must be protected. And the

remaining data associated with the redemption data, like store name and other identifiers, was already provided to Argus Leader. Moreover, this is the type of case where a *Vaughn* Index would not improve Argus Leader's specific factual understanding of the documents sought because both parties know what is sought, and the redemption information is not a mystery to the agency or the requester. The information is a monetary amount that is redeemed each year for the grocery or wholesale food store in question. This is not the sort of information where a *Vaughn* Index would give the requester useful information that would help with the litigation because the information is a number and nothing more.[2]

The affidavits and briefs in support of USDA's motion were sufficient information for Argus Leader to make its legal argument and sufficient to aid the court in its legal determinations in this case. *See Mo. Coalition*, 542 F.3d at 1210 ("Such an index allows both the district court and the requesting party to evaluate the decision to withhold records and ensure compliance with FOIA."); *see also Miller*, 779 F.2d at 1387 (finding that an agency meets its burden by offering affidavits that explain why the documents were subject to an exemption). For these reasons, Argus Leader's request for a *Vaughn* Index is denied because it is unnecessary and duplicative in this case.

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[2] Because the information requested, redemption data, is one number for each store, the court finds that this information is not the type that is segregable. "In every case, the district court must make an express finding on the issue of segregability." *Missouri Coalition*, 542 F.3d at 1212 (citations omitted). The court finds that USDA already provided to Argus Leader the information that could be separated without triggering protection under the exemption and that the redemption data was reasonably separated from the remainder of the information at that time.

Now the court will analyze whether USDA properly withheld the redemption data under exemption 3, whether 7 U.S.C. § 2018 is properly classified as a withholding statute, and if redemption data is intended to be withheld under that statute.

II. Freedom of Information Act

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enforcement Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, ___ U.S. ____, 131 S. Ct. 1259, 1262 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 131 S. Ct. at 1262. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coalition*, 542 F.3d at 1208 (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden[3] is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993).

The exemption presently at issue is commonly known as FOIA exemption 3. This exemption exempts from disclosure matters that are precluded from release by another statute, if that statute either:

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[3] The agency retains the burden of justifying its decision to withhold any documents in light of the purposes of FOIA and to promote public access to government documents. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citations omitted).

> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

5 U.S.C. § 552(b)(3)(A). "When determining whether FOIA exemption 3 is applicable, the court first decides if a statute is a withholding statute and then determines 'whether the information sought after falls within the boundaries of the non-disclosure statute.' " *Cent. Platte*, 643 F.3d at 1146 (quoting *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 332 (D.C. Cir. 1987)). "Exemption 3 is different from other FOIA exemptions because 'its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.' " *Id.* (citing *Goland v. C.I.A.*, 607 F.2d 339, 350 (D.C. Cir. 1978)).

USDA argues that 7 U.S.C. § 2018, which discusses the approval of retailers' participation in SNAP, is the withholding statute applicable to this case. The Eighth Circuit Court of Appeals has not expressly ruled upon whether § 2018 qualifies as an exempting or withholding statute under the two-part criteria mandated by § 552(b)(3), nor have any other district courts within the Eighth Circuit or elsewhere. First, the court must determine whether § 2018 is properly characterized as a withholding statute.

A. Withholding Statute

Because the court must determine whether the statute is a withholding statute that meets the requirements of exemption 3, the focus is whether there is clear language

within § 2018 that "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or provides criteria for withholding the information. 5 U.S.C. § 552(b)(3)(A)(i)-(ii). "To determine whether a statute is a withholding statute that prohibits disclosure, the court looks at the language of the statute on its face." *Zanoni v. U.S. Dep't of Agric.*, 605 F. Supp. 2d 230, 236 (D.D.C. 2009) (citing *Reporters Comm. for Freedom of Press v. U.S. Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987)). The language of the statute at issue provides:

> (c) Information submitted by applicants; safeguards, disclosure to and use by State agencies
>
> **Regulations issued pursuant to this chapter shall require an applicant retail food store or wholesale food concern to submit information, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to whether such applicant qualifies, or continues to qualify, for approval under the provisions of this chapter or the regulations issued pursuant to this chapter.** The regulations may require retail food stores and wholesale food concerns to provide written authorization for the Secretary to verify all relevant tax filings with appropriate agencies and to obtain corroborating documentation from other sources so that the accuracy of information provided by the stores and concerns may be verified. **Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection to purposes directly connected with administration and enforcement of the**

> **provisions of this chapter** or the regulations issued pursuant to this chapter, except that such information may be disclosed to and used by Federal law enforcement and investigative agencies and law enforcement and investigative agencies of a State government for the purposes of administering or enforcing this chapter or any other Federal or State law and the regulations issued under this chapter or such law, and State agencies that administer the special supplemental nutrition program for women, infants and children, authorized under section 17 of the Child Nutrition Act of 1966 [42 U.S.C.A. § 1786], for purposes of administering the provisions of that Act [42 U.S.C.A. § 1771 et seq.] and the regulations issued under that Act. **Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any information obtained under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.** The regulations shall establish the criteria to be used by the Secretary to determine whether the information is needed. The regulations shall not prohibit the audit and examination of such information by the Comptroller General of the United States authorized by any other provision of law.

7 U.S.C. § 2018(c) (emphasis added).

The specific section that states that "[a]ny person who publishes, divulges, discloses, or makes known . . . any information obtained under this subsection shall be fined . . . or imprisoned[,]" directs that disclosure of information is prohibited and gives little discretion to the

agency as to how the information can be disseminated. 7 U.S.C. § 2018(c). Further, the language that gives the agency authority to promulgate regulations purports "to provide for safeguards which limit the use or disclosure of information obtained under the authority granted by this subsection[.]" Additionally, the only time that it is acceptable to release information obtained under the statute is if it is either for administrative or enforcement purposes or to investigate criminal activity. That restriction and the statutory language that discusses safeguarding or punishment for releasing information is the type of language that, on its face, is indicative of a withholding statute. *See* 5 U.S.C. § 552(b)(3) (requiring "that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]").

Additionally, Argus Leader does not specifically deny that § 2018 qualifies as a withholding statute; rather, its focus is that redemption data is not the type of information that was meant to be withheld under § 2018. Argus Leader admits that the language within § 2018 "arguably suffices to cross the Exemption 3's threshold." Docket 33 at 8. This admission, coupled with the plain language of the statute, leads to the conclusion that § 2018 would qualify as a withholding statute under exemption 3. The next inquiry is whether the yearly redemption data is the sort of information that Congress meant for USDA to withhold under the plain language of § 2018.

B. Information Within the Scope of Withholding Statute

Second, the court must determine whether the information sought after falls within the boundaries of the non-disclosure statute. The language of the statute at issue states that those food retail stores or wholesale food

concerns that wish to participate in SNAP must "submit information, which may include relevant income and sales tax filing documents[.]" 7 U.S.C. § 2018(c). It is immediately following this language that the first mention of withholding of information occurs within the statute. "Regulations issued pursuant to this chapter shall provide for safeguards which *limit the use or disclosure of information* ***obtained*** *under the authority granted by this subsection* to purposes directly connected with administration and enforcement of the provisions of this chapter . . .," except information provided to Federal or state law enforcement and investigative agencies. 7 U.S.C. § 2018(c) (emphasis added). The statute then describes the criminal punishment for any person who discloses, publishes, divulges, or makes known "*any information* **obtained** under this subsection."

The type of information that is to be withheld under the plain language of the statute is *any information*, which can include "relevant income and sales tax filing documents," that the federal government receives from a SNAP participant or a verifying agency or source. Thus, the precise question is whether redemption data or the amount of money that each store makes through SNAP purchases would satisfy any of these types of "information" noted in the statute or information that was obtained from a verifying agency via § 2018 authority.

Redemption data is the amount of SNAP benefits that are redeemed at a store in a given year, thus, the amount of money that the United States government credits to that retailer's bank account in a given year. SNAP beneficiaries have an EBT card, which acts similar to a debit card to purchase eligible food at certain stores authorized by FNS. For a transaction to occur, the customer swipes the EBT card in a point-of-sale device just like a debit card and enters a four-digit personal identification number. Docket 20 ¶ 9. The retail clerk

enters the amount of the purchase into the point-of-sale device and as long as the customer has sufficient balance to cover the cost, that amount is deducted[4] from the customer's EBT-SNAP account.

SNAP redemption data is either gathered by state EBT vendors or by subcontractors who provide the service. Docket 21 ¶¶ 19-20. State EBT vendors track and monitor SNAP benefit accounts, process any transactions, and eventually facilitate payment to the retail locations. Docket 21 ¶ 20. EBT vendors send files of all SNAP transactions to FNS, and retailers are identified solely by their unique FNS number. This information is loaded in the STARS database for sorting and filing and becomes the official record or redemption data for each retailer. Docket 21 ¶ 20. Soon after the customer's initial purchase, usually within two days, that same amount is credited to the retailer's bank account as redemption for the sale. Docket 20 ¶ 9. "This credit to the retailer's bank account is what" is known as redemptions. Docket 20 ¶ 9.

The way that FNS and other federal agencies use redemption data is to monitor compliance by participating retailers because excessive redemption amounts could be indicative of potential participation violations or could be a cause for sanctions. Docket 21 ¶ 21. FNS also uses redemption data to identify and remove retailers that are no longer actively participating in SNAP. "Redemption records are also an important element in the overall process of reconciling federal funds expended for SNAP."

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[4] The point-of-sale device communicates with a processor to electronically verify that the FNS number, or the unique identifier for that retailer within the SNAP and STARS database, is active and valid and that the customer has a sufficient balance to cover the purchase. Docket 21 ¶ 18. If either the FNS number is invalid or the balance is insufficient, then the transaction is denied at the point-of-sale. If both are accepted, then the transaction is authorized.

Docket 21 ¶ 21. Redemption data is inherently tied to FNS numbers or the unique identifying number assigned to retailers by FNS. All redemption data is attached to the retailer via that FNS number and the number is needed to process the original transaction and its subsequent repayment. Docket 21 ¶ 21.

USDA claims that "SNAP redemption data may only be disclosed as allowed by statute and that disclosure is limited to use connected with administration and enforcement of the provisions of the FNA or regulations issued pursuant to the FNA." Docket 21 ¶ 21. At specific points, the language of § 2018 refers to *any* information, or information obtained under the subsection, or "relevant income and sales tax filing documents." Redemption data is more than likely included under all three of those descriptions.

The language of § 2018 requires that applicants in SNAP submit information, including relevant income and sales tax filing documents, that allows the government to determine if the applicant qualifies or continues to qualify for participation in the SNAP program. This type of information, especially to determine if a retailer *continues* to qualify for SNAP participation, includes the amount of income (redemption data) each retailer derived from SNAP and the federal government. The government also has to verify tax information, which includes yearly income such as the redemption amount or benefits redeemed and paid to each retailer by the government. Although Congress has not expressly deemed redemption information as essential data to be included under § 2018, the statutory language encompasses this type of income and tax information because redemption data naturally falls under either term's broad umbrella. Because § 2018 is a withholding statute and redemption data is the type of information reached by the plain language of the statute, it was appropriate for USDA to withhold said data under

exemption 3 in light of the fact that the Argus Leader is not a state or federal law enforcement agency and was not conducting an internal agency audit.

Argus Leader argues that the redemption data is not included under § 2018 because that information is collected by state or outside businesses, who then send it to USDA and its subsidiaries to insert into the STARS system. Argus Leader claims that because the information is not provided by the retailers who are applicants for new or continued participation in SNAP, it is not included as "information" under § 2018. Argus Leader also asserts that because there is no request for redemption data on the application form for SNAP participation, the redemption data is outside the purview of the statute and not exempt under exemption 3. The court disagrees. As previously discussed, redemption data is the type of information that can be obtained under the authority of § 2018. The amount of EBT benefits a store provides or for which it is reimbursed is the type of information that retailers give to the federal government to continue its participation in SNAP or to renew its previously expired participation.

Because Congress established narrow criteria for when information under § 2018 could be released and redemption data is included under Congress's broad description of what constitutes "information" under § 2018, the redemption data was properly withheld. There are no genuine disputes of material fact. The court finds that USDA's decision to withhold the requested information was reasonable and exemption 3 applies; therefore, summary judgment is appropriate.

C. Legislative History

The court can also consider the legislative history of § 2018 in its consideration of whether the redemption data is the type that is meant to be withheld under exemption

3. *See N.L.R.B.*, 437 U.S. at 223-34 (looking to the legislative history to confirm the court's observation regarding the application of an exemption to FOIA). The legislative history of § 2018, which was amended in 1994 to expand the release of otherwise withheld information to law enforcement entities only, lends additional support to the court's conclusion that the redemption data was properly withheld.

Before the 1994 amendment to the Food Stamp Act of 1977, release of information under § 2018 was extremely restrictive. The purpose of the amendment was to "permit[] the use and disclosure of information provided by stores to State and Federal law enforcement and investigative agencies for the purposes of administering or enforcing the Food Stamp Act or any other Federal or State law and establishes penalties against persons who misuse any of the information[.]" Food Stamp Program Improvements Act of 1994, Pub. L. No. 103-225, H.R. Rep. No. 103-352, 1994 U.S.C.C.A.N. 39, 40. Prior to the 1994 amendment, the use of any of that information was restricted "to persons directly connected with the administration and enforcement of the Food Stamp Program" or those who administered WIC. *Id.* This language further demonstrates that all types of information that relate to tax, income, or redemption data that is correlated with participation in SNAP is to be withheld in all instances except internal administrative purposes or for law enforcement's use.

Under the plain language of § 2018, not only is the statute a withholding statute, but Congress intended to exempt redemption data from disclosure. For that reason, USDA has carried its burden and shown that exemption 3 applies to this case, and the agency properly withheld information that was covered under one of the narrow exemptions to the FOIA. *See Ray*, 502 U.S. at 173 ("Consistent with this purpose, as well as the plain

language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents."). There are no genuine issues of material fact in dispute, and summary judgment is appropriate.

CONCLUSION

Because USDA submitted detailed affidavits and briefs in support of its motion for summary judgment that justified its denial of the release of the redemption data records, the court finds that it is unnecessary and duplicative to require USDA to submit a *Vaughn* Index under the facts of this case. USDA has shown that § 2018 is a withholding statute under exemption 3 to the Freedom of Information Act. The plain language of the statute and its legislative history also indicates that redemption data is the type of information that was meant to be withheld under § 2018. USDA's decision to withhold the information was proper. Accordingly, it is

ORDERED that Argus Leader's motion for a *Vaughn* Index (Docket 12) is denied.

IT IS FURTHER ORDERED that USDA's motion for summary judgment (Docket 18) is granted.

Dated September 27, 2012.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121-KES

(Filed 09/27/12)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

JUDGMENT

Pursuant to the Order Granting Defendant's Motion for Summary Judgment, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of defendant, United States Department of Agriculture, and against plaintiff, Argus Leader Media, d/b/a Argus Leader.

Dated September 27, 2012.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-3765

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellant

v.

United States Department of Agriculture

Defendant - Appellee

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

Submitted: October 23, 2013
Filed: January 28, 2014

Before RILEY, Chief Judge, COLLOTON and KELLY, Circuit Judges.

RILEY, Chief Judge.

Formerly known as the Food Stamp Program, the Supplemental Nutrition Assistance Program (SNAP or program) is one of America's largest and fastest-growing welfare arrangements: between 2007 and 2011, spending "more than doubled . . . from about $30 billion to $72 billion."[1] Amid increasing public scrutiny of this burgeoning program, a Sioux Falls, South Dakota, newspaper called the Argus Leader (Argus) wondered how much money individual retailers received from taxpayers each year through the program. Invoking the federal law meant to bring disclosure sunlight to the government bureaucracy, Argus requested this spending information from the U.S. Department of Agriculture (department or USDA) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Cf. Louis D. Brandeis, Other People's Money 92 (1914) ("Sunlight is said to be the best of disinfectants."). With little explanation, the department refused disclosure.

After an internal administrative appeal proved fruitless, Argus brought a FOIA suit in the District of South Dakota. The department moved for summary judgment, contending the information was exempt from disclosure under 5 U.S.C. § 552(b)(3)—known as FOIA Exemption 3—and 7 U.S.C. § 2018(c). Looking to legislative history and accepting the department's statutory interpretation, the district court found the spending information exempt from disclosure and granted the department's motion. Argus appeals. Concluding the statutory text plainly precludes the department from

[1] Congr. Budget Office, The Supplemental Nutrition Assistance Program 5 (2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/04-19-SNAP.pdf.

shielding the spending information under Exemption 3, we reverse.

I. BACKGROUND

The Food Stamp Act of 1964, Pub. L. No. 88–525, 78 Stat. 703, launched the program with a $75 million appropriation in its first year, rising to $200 million in its third. See id. § 16(a), 78 Stat. at 709. In fiscal year 2012, the program's total cost exceeded $78 billion, with more than 46 million people—over fifteen percent of the U.S. population—receiving benefits.[2] Most benefits go to needy families: 76 percent of SNAP households include "a child, an elderly person, or a disabled person" and "these households received 83 percent of all benefits."[3] An estimated $858 million per year is "trafficked," meaning "SNAP recipients sell their benefits for cash at a discount to food retailers," and approximately ten percent of participating retailers engage in trafficking.[4]

A. Administrative Proceedings

On February 1, 2011, Argus sent a letter to the department requesting "yearly redemption amounts, or EBT sales figures, for each store" participating in the program between fiscal years 2005 and 2010.

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[2] See Food & Nutrition Service (FNS), SNAP Monthly Data (Nov. 8, 2013), http://www.fns.usda.gov/pd/34SNAPmonthly.htm; FNS, SNAP Annual Summary (Nov. 8, 2013), http://www.fns.usda.gov/pd/SNAPsummary.htm; see also Phil Izzo, Food-Stamp Use Rises; Some 15% Get Benefits, Wall St. J., Aug. 9, 2013, http://blogs.wsj.com/economics/2013/08/09/food-stamp-use-rises-some-15- of-u-sgets-benefits.

[3] FNS, USDA, Characteristics of SNAP Households: Fiscal Year 2011, at xv (2012), available at http://www.fns.usda.gov/sites/default/files/2011Characteristics.pdf.

[4] USDA, The Extent of Trafficking in the SNAP: 2009-2011, at ii (2013), available at http://www.fns.usda.gov/sites/default/files/Trafficking2009.pdf.

Beneficiaries receive an electronic benefit transfer (EBT) card, which functions like a debit card. To use the card at a participating retailer, beneficiaries swipe their EBT card and enter a four-digit personal identification number at checkout. As with any other debit card transaction, a third-party processor deducts the transaction amount from the beneficiary's account and credits it to the retailer's account. Such third-party processors "handle and track [program] benefit accounts," then send transaction data to the department. Although the days when retailers had to redeem physical food stamps have long passed, the department still refers to this electronic process as a "redemption." After receiving transaction data from the third-party processors, the department loads each retailer's aggregated data into a government database.

The department appears to concede that it could use this database to supply the information requested by Argus. The department simply refuses to do so. In an undated letter received February 17, 2011, the department revealed the names and addresses of all participating retailers, but withheld "all other information . . . under 5 U.S.C. [§] 552(b)(3) and (b)(4)." In a letter dated February 25, 2011, Argus appealed this withholding. The department denied the appeal in another undated letter.

B. Article III Proceedings

On August 26, 2011, Argus filed a complaint under 5 U.S.C. § 552(a)(4)(B) in federal court seeking to compel the department to provide the withheld information. The department moved for summary judgment, invoking Exemption 3, 5 U.S.C. § 552(b)(3).

On September 27, 2012, the district court granted the department's motion. First, the district court decided 7 U.S.C. § 2018 qualified as a withholding statute under

Exemption 3. Second, the district court found the retailer spending information was exempt from disclosure because it was "the type of information that can be obtained under the authority of § 2018"—though, in practice, it is not obtained from the individual retailers. (Emphasis added). Consulting legislative history, the district court thought a 1994 amendment to § 2018 "demonstrate[d] that all types of information that relate to tax, income, or redemption data that is [sic] correlated with participation in [the program] is to be withheld in all instances except internal administrative purposes or for law enforcement's use." The district court determined the department was entitled to withhold the data. Argus appeals, invoking our jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

We "perform[] a *de novo* review of the grant of summary judgment in a FOIA case." Mo. ex rel. Garstang v. U.S. Dep't of Interior, 297 F.3d 745, 749 (8th Cir. 2002). A government agency is not entitled to summary judgment in a FOIA case unless "the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." Miller v. U.S. Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985). "In order to discharge this burden, the agency 'must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is *wholly exempt* from the Act's inspection requirements.'" Id. at 1382-83 (emphasis added) (quoting Nat'l Cable Television Ass'n, Inc. v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

A. Statutory Text

"Our analysis begins, as always, with the statutory text." United States v. Gonzales, 520 U.S. 1, 4 (1997). The

relevant text of FOIA Exemption 3 allows agencies to withhold information that is

> *specifically exempted* from disclosure by statute (other than [5 U.S.C. § 552b]), if that statute—
>
> (A)(i) *requires* that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) *establishes* particular criteria for withholding or refers to particular types of matters to be withheld[.[5]]

5 U.S.C. § 552(b)(3) (emphasis added). The department contends the spending information is "specifically exempted" by 7 U.S.C. § 2018(c). Argus does not dispute that § 2018(c) is a withholding statute (i.e., one that "requires," "establishes," or "refers" to non-discretionary or particular withholding of information).

Instead, Argus challenges the district court's conclusion that program spending information falls within the withholding contemplated by § 2018(c). Again, we look to the relevant statutory text:

> (c) Information *submitted by applicants*; safeguards; disclosure to and use by State agencies
>
> Regulations issued pursuant to this chapter shall require *an applicant retail food store or wholesale food concern to submit information*, which may include relevant income and sales tax filing documents, which will permit a determination to be made as to *whether such applicant qualifies, or continues to qualify*, for approval . . . . Regulations issued pursuant to this chapter shall provide for safeguards which limit the use or disclosure of

[5] There is one additional requirement not applicable to this case.

> *information obtained under the authority granted by this subsection* . . . . Any person who publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by Federal law (including a regulation) any *information obtained under this subsection* shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

7 U.S.C. § 2018(c) (emphasis added).

Because the retailer spending information is not "submit[ted]" by "an applicant retail food store or wholesale food concern," id., the information is not exempt from disclosure. The department, not any retailer, generates the information, and the underlying data is "obtained" from third-party payment processors, not from individual retailers. See, e.g., Brian A. Garner's Modern American Usage 74 (3d ed. 2009) (defining "obtain" as "to get, acquire"); Webster's Third New Int'l Dictionary 1559 (1993) (defining "obtain" as "to gain or attain possession or disposal of"). Neither of the forms used to determine whether a given retailer "qualifies" or "continues to qualify" as a program participant asks for the spending information. These plain textual reasons for rejecting the department's position mean we need not rely on the Supreme Court's admonition that FOIA exemptions "must be 'narrowly construed,'" Milner v. Dep't of Navy, 562 U.S. ____, ____, 131 S. Ct. 1259, 1262 (2011) (quoting FBI v. Abramson, 456 U.S. 615, 630 (1982)), to conclude retailer spending information is not "obtained under the authority granted by" § 2018(c).

Our plain reading is further confirmed by the subsection heading, which refers to "Information *submitted by applicants*." 7 U.S.C. § 2018(c) (emphasis added). A subsection "heading cannot substitute for the operative text of the statute." Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008). But

"statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" Id. (quoting Porter v. Nussle, 534 U.S. 516, 528 (2002)). Even if the statutory text left any ambiguity, the heading would resolve that doubt in favor of disclosure.

The district court's contrary conclusion stemmed from a misreading of the statute. First, the district court singled out the term "any information," interpreting the statute to require withholding of all information—regardless of its source—used to determine whether "a retailer qualifies or continues to qualify for participation in the [program]." Yet the statute makes clear that only information obtained under § 2018(c)—submitted by a retailer—is exempted. When the statute says "obtained" it means "obtained," not "can be obtained," as the district court reasoned. (Emphasis added). "Congress expresses its purpose by words. It is for [courts] to ascertain—neither to add nor to subtract, neither to delete nor to distort." 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951). Here, however else the spending information could be obtained, the department actually obtained it from third-party payment processors, not the retailers themselves.

Second, the district court thought the spending information qualified as "relevant income and sales tax filing documents." The district court opined, "Although Congress has not expressly deemed redemption information as essential data to be included under § 2018, the statutory language encompasses this type of income and tax information because redemption data naturally falls under either term's broad umbrella." Again, the district court departed from the plain text of the statute, which refers to "income and sales tax *filing documents*." 7 U.S.C. § 2018(c) (emphasis added). These words—confirmed by the requirement to "provide written authorization for the Secretary to verify all relevant tax

filings with *appropriate agencies*"—plainly refer to tax documents filed with relevant state, local, and federal tax authorities. Id. (emphasis added). Echoing the Supreme Court, we "have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) (internal quotation omitted); see, e.g., Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc., 651 F.3d 857, 862 (8th Cir. 2011). The spending information is not a tax filing document, so the district court's "broad umbrella" cannot shade the spending information from the sunlight.

B. Statutory History

Although "the authoritative statement is the statutory text, not the legislative history," Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005), we recognize that the district court relied in part on the legislative history. While resolving this case purely on textual grounds, we observe "for those who find legislative history useful," United States v. Tinklenberg, 563 U.S. ____, ___, 131 S. Ct. 2007, 2015 (2011), that this history is more fairly read to support Argus' position.

First, Congress has clearly indicated its intent to involve the public in counteracting fraud perpetrated by retailers participating in the program. See, e.g., Food Stamp and Commodity Distribution Amendments of 1981, Pub. L. No. 97–98, § 1314, 95 Stat. 1213, 1285 (codified as amended at 7 U.S.C. § 2018(e)).

Second, the statutory history reveals that redemptions were historically governed not by § 2018(c), but by an entirely different section: 7 U.S.C. § 2019. See Food Stamp Act of 1977, Pub. L. No. 95–113, sec. 1301, § 10, 91 Stat. 913, 969 (codified as amended at 7 U.S.C. § 2019).

Thus, Congress apparently never expected the department to obtain redemption data, used to generate the requested spending information, "under the authority granted by [§ 2018(c)]." 7 U.S.C. § 2018(c).

Noting the history of § 2018(c) but relying on its plain text, we conclude Exemption 3 cannot prevent Argus from "pierc[ing] the veil of administrative secrecy and . . . open[ing] [the department's] action[s] to the light of public scrutiny." Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal quotation omitted).

III. CONCLUSION

We reverse and remand for further proceedings consistent with this opinion.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3765

(Filed 01/28/14)

Argus Leader Media, doing business as Argus Leader

Plaintiff - Appellant

v.

United States Department of Agriculture

Defendant - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

January 28, 2014

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 09/30/15)

ARGUS LEADER MEDIA, d/b/a Argus Leader,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Argus Leader Media, d/b/a Argus Leader, brought this action under the Freedom of Information Act (FOIA) against defendant, United States Department of Agriculture (USDA), seeking disclosure of information related to the Supplemental Nutrition Assistance Program (SNAP), formerly known as the food stamp program. Docket 1. USDA moves for summary judgment and argues that its decision to withhold information is supported by exemptions 4 and 6 to the FOIA. Docket 61. Argus Leader resists USDA's motion and argues neither

exemption applies. Docket 73. For the following reasons, USDA's motion for summary judgment is denied.

BACKGROUND

The facts viewed in the light most favorable to Argus Leader are as follows:

On February 1, 2011, Argus Leader made a FOIA request for documents from the Food and Nutrition Service (FNS), which is an agency of the USDA. FNS administers the Food and Nutrition Act of 2008 and other federal statutes designed to facilitate the operation of SNAP. Argus Leader's request for information sought SNAP retail store records from 2005 through 2010 that included: each store's identifier or unique ID number, the store name, the store address, the store type, and the yearly redemption amounts or Electronic Benefit Transfer (EBT[1]) sales figures for each participating store. Docket 60 at 3. At this point in the litigation, Argus Leader only seeks information about the yearly redemption amounts paid to each participating store. All other data was either provided to Argus Leader or deemed nonessential by Argus Leader.

The Benefit Redemption Division (BRD), a component within FNS, oversees an EBT system which allows SNAP beneficiaries to use their SNAP benefits at participating retailers. Through the EBT system, BRD is able to track each SNAP beneficiary's account and ensure that each retailer is paid for SNAP purchases. The EBT system functions like other debit cards. A SNAP beneficiary is given an EBT card. At checkout, the SNAP beneficiary

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[1] The term food stamps is the label for SNAP benefits that is most familiar to the public. Docket 21 ¶ 7. Many store owners or clients also know or understand their benefits as "EBT," and FNS often uses SNAP-EBT in its publications and information. Food stamps, SNAP, and SNAP-EBT all mean the same thing. Docket 21 ¶ 7.

swipes his or her EBT card on the store's point-of-sale device. The device then communicates with a processor and electronically verifies that the retailer is a SNAP participant and that the SNAP beneficiary has a sufficient balance in his or her account to cover the purchase. If the retailer is not a SNAP participant or there are insufficient funds in the beneficiary's account, the transaction is denied at the point-of-sale.

All of the SNAP payment information that is generated is stored in a technology system overseen by BRD called the Store Tracking and Redemption System (STARS). Redemption data is obtained only when a retailer is authorized to accept SNAP cards and processes a SNAP transaction. Redemption data is generated for each retailer only during the time frame that the retailer would be authorized to participate in SNAP. The STARS system keeps track of the total amount of EBT dollars spent at a participating SNAP retailer in a given year. For instance, if a SNAP retailer is authorized to participate in the program but makes no EBT sales, then the redemption data amount is $0. Argus Leader seeks to recover this store specific data.

On February 1, 2011, Argus Leader made its request for documents from FNS. After receiving Argus Leader's request, FNS contacted BRD to collect the data that Argus Leader sought. BRD conducted a search within the STARS database and gathered records that were pertinent to the request but not subject to a FOIA exemption. BRD produced a CD that contained 321,988 SNAP files viewable on a Microsoft Excel worksheet. FNS sent that CD and a letter to Argus Leader and explained that the agency was not including some of the requested information (like redemption data) because those records were exempt from disclosure pursuant to the FOIA exemptions 3 and 4, codified at 5 U.S.C. § 552(b)(3) and (b)(4). Docket 22 ¶ 15. FNS also informed

Argus Leader of its right to appeal. Argus Leader contacted a representative for FNS and stated that it had received the letter, but the CD only contained 65,536 retailer records. Argus Leader also requested that FNS resend the information in a text format.

On March 3, 2011, Argus Leader appealed FNS's decision to withhold the redemption data to the FNS Freedom of Information Act Service Center within the Information Management Branch. The appeal worked its way through internal departments and eventually was submitted for legal review on April 13, 2011. On June 13, 2011, FNS received a letter from Argus Leader stating that it would initiate legal action under FOIA if it did not receive a response to its appeal within ten days. Docket 22 ¶ 26. On July 19, 2011, Argus Leader received an unofficial response from FNS via email that attempted to clarify why the requested information was withheld. Meanwhile, the appeal denial was prepared for final signatures from those who could officially deny the appeal.

Argus Leader filed its complaint in this court on August 26, 2011, and the denial of Argus Leader's administrative appeal was never sent. Docket 1. USDA moved for summary judgment on the issue of whether it needed to provide FNS numbers and redemption totals to Argus Leader. Docket 18. The parties stipulated that the issue of FNS numbers was no longer relevant and the only issue remaining before the court was whether USDA had to provide Argus Leader with the redemption data for the five years requested. Docket 31. The court approved the stipulation. Docket 32. On May 23, 2012, Argus Leader filed its opposition to the motion for summary judgment with regard to the remaining issue and claimed that the redemption data was not the type of information that was intended to be withheld under exemption 3 to the FOIA. Docket 33. The court ruled in favor of USDA and found that exemption 3 applied to the requested data. On March

25, 2014, the Eighth Circuit Court of Appeals reversed and held that exemption 3 did not apply. Docket 44.

After the Court of Appeals' ruling, the USDA published a request for information in the Federal Register on August 4, 2014. FNS contacted SNAP retailers to determine whether SNAP retailers thought disclosure of aggregated SNAP redemption data for individual stores should be disclosed. Of the 321,988 potential SNAP retailers contacted, only 323 responded, and 73 percent of respondents were opposed to disclosing individual store redemption data.

USDA followed up with fifteen SNAP retailers that filed affidavits stating why individual store redemption amounts should not be disclosed. Affiants stated the disclosure of individual store data could cause predatory competition, put a stigma on SNAP retailers, and cause other commercial harms. After receiving this data, USDA filed its second motion for summary judgment arguing that exemptions 4 and 6 to the FOIA applied to the requested information. Docket 58; Docket 61.

STANDARD OF REVIEW

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.*, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact." (internal quotations omitted)). The moving party must inform the court of the basis for its motion and also identify the portion of the record that shows that there is no genuine issue in dispute. *Hartnagel v.*

Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citation omitted).

Once the moving party has met its initial burden, the nonmoving party must establish "that a fact . . . is genuinely disputed" either by "citing to particular parts of materials in the record," or by "showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c). "The nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). For purposes of summary judgment, the facts and inferences drawn from those facts are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

On a motion for summary judgment in a FOIA case, the record is still viewed in the light most favorable to the nonmoving party to determine if issues of material fact remain in dispute and to determine if "the moving party is entitled to judgment as a matter of law." *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1209 (8th Cir. 2008) (citations omitted). In FOIA cases, the agency has the burden to prove " 'that it has fully discharged its obligations under FOIA.' " *Id.* (quoting *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1382 (8th Cir. 1985)).

DISCUSSION

" 'Congress intended FOIA to permit access to official information long shielded unnecessarily from public view.' " *Hulstein v. Drug Enf't Admin.*, 671 F.3d 690, 694 (8th Cir. 2012) (quoting *Milner v. Dep't of Navy*, 562 U.S.

562, 565 (2011)). "FOIA generally mandates broad disclosure of government records." *Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric.*, 643 F.3d 1142, 1146 (8th Cir. 2011) (citations omitted). FOIA requires that an agency offer records upon request unless they are the sort of records protected by one of the nine exemptions under the Act. *Milner*, 562 U.S. at 565. The exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act." *Mo. Coalition*, 542 F.3d at 1208 (citations omitted). The district court engages in a de novo review of an agency's decision to deny a request for information under FOIA, and the burden[2] is upon the agency to show that the specific exemption applies. 5 U.S.C. § 552(a)(4)(B); *In re Dep't of Justice*, 999 F.2d 1302, 1305 (8th Cir. 1993).

I. Exemption 4

USDA argues it is not required to disclose yearly redemption amounts for individual SNAP retailers because such information would be "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). The Eighth Circuit Court of Appeals has explained that exemption 4 applies to "information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975). Information is confidential if "disclosure of the information is likely to have either of the following effects: (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

[2] The agency retains the burden of justifying its decision to withhold any documents in light of the purposes of FOIA and to promote public access to government documents. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (citations omitted).

information was obtained." *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.*, 260 F.3d 858, 861 (8th Cir. 2001) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).[3] This test, which the Eighth Circuit Court of Appeals adopted, is commonly known as the *National Parks* test. This test "has been widely recognized and applied by the circuit courts when construing Exemption 4." *Id.*

In its most recent opinion about exemption 4, the Eighth Circuit Court of Appeals stated, "To claim an exemption [under exemption 4], an agency must 'provide affidavits which justify the claimed exclusion of each document by correlating the purpose for exemption with the actual portion of the document which is alleged to be exempt.' " *Madel v. U.S. Dep't of Justice*, 784 F.3d 448, 452 (8th Cir. 2015) (quoting *Miller*, 779 F.2d at 1387 (8th Cir. 1985)). "[G]eneralized allegations cannot establish that disclosure of financial reports would cause substantial competitive harm." *Contract Freighters*, 260 F.3d at 863. If each element of the exemption is not met, then the exemption does not apply.

When viewing the facts in a light most favorable to Argus Leader, summary judgment must be denied. Under the *National Parks* test, USDA must show that disclosure of an individual store's yearly redemption data is likely "to cause substantial harm to the competitive position" of the individual store. Because USDA received a small percentage of responses from SNAP retailers,

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[3] Another test is used if the person or entity submitting information is doing so voluntarily. That test is inapplicable here, however, because SNAP retailers are required to disclose EBT data if they want to be compensated. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997) (holding a bid to do government work is not voluntary under exemption 4 because the bid must be submitted in order to win the contract).

there is evidence that supports the inference that the majority of SNAP retailers are not concerned about any competitive harm that might stem from the disclosure of individual store data. A reasonable fact-finder could also find that a number of factors influence marketplace competition and that simply disclosing the amount of EBT dollars spent at a particular location is not sufficient to influence the marketplace. Because there is a reasonable dispute as to whether the disclosure of individual store redemption data is likely to cause substantial competitive harm to SNAP retailers, summary judgment is denied.[4]

II. Exemption 6

USDA further argues that exemption 6 applies to at least "individual retailer redemption data of sole proprietor and closely held corporations . . . ." Docket 61 at 31. Under 5 U.S.C. § 552(b), government agencies may decline to disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As explained by the Eighth Circuit Court of Appeals, the heart of the analysis is a balancing test between "the privacy interest of the individual against the public interest in disclosure." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1185 (8th Cir. 2000); *see also Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229-33 (D.C. Cir. 2008) (using a four step analysis that balances the individual's privacy interest against the public's interest in disclosure). USDA argues disclosure of individual store redemption data could reveal private information about "at least a portion of the owner's personal finances" and that disclosure could

[4] It should be noted that the disclosure of individual store redemption data may not affect each store in the same way. For example, disclosing individual store data to the public could benefit certain SNAP retailers. Therefore, USDA must specifically state how the disclosure of SNAP data could adversely affect specific stores.

also cause competitive harm to these businesses. Docket 61 at 33 (quoting *Multi Ag Media*, 515 F.3d at 1229-30). USDA also argues that such disclosure outweighs the public's interest because the public already has access to redemption data broken down into region, state, county, and zip code (when available). *Id.* at 35.

When viewing the facts in the light most favorable to Argus Leader, summary judgment cannot be granted. There is evidence that the public's interest in disclosure outweighs the individual's privacy. For example, disclosure of individual store redemption data does not disclose individual finances because the data would not disclose what percentage of the retailer's sales are credited to SNAP or how much the retailer profits after deducting expenses. *See Multi Ag Media*, 515 F.3d at 1229-33. Additionally, as stated above, a reasonable fact-finder could conclude that there is no threat of competitive harm with the disclosure of individual store data. Also, there is a great public interest in full disclosure of the parameters of the SNAP program. When weighing the interests of retailers against the public's interest in a transparent government, the latter prevails. Thus, summary judgment is denied as to exemption 6.

CONCLUSION

Because questions of fact remain on the issues of whether substantial competitive harm is likely if individual store redemption data is disclosed and whether individual privacy interests outweigh the public's interest in a transparent government, summary judgment is denied. Accordingly it is

ORDERED that USDA's motion for summary judgment (Docket 58) is denied.

Dated September 30th, 2015

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

4:11-CV-04121-KES

(Filed 01/30/17)

ARGUS LEADER MEDIA, d/b/a Argus Leader

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant,

FOOD MARKETING INSTITUTE,

Intervenor.

ORDER GRANTING EMERGENCY MOTION TO INTERVENE, STAY JUDGMENT, AND EXTEND TIME TO FILE AN APPEAL

Intervenor, Food Marketing Institute (FMI), brings this emergency motion to intervene in this litigation, to stay the court's November 30, 2016 judgment, and to extend the deadline to file a notice of appeal. Argus has

responded to FMI's motions, and the court grants FMI's motions.

BACKGROUND

Argus Leader Media filed a complaint on August 26, 2011, seeking data on the Supplemental Nutrition Assistance Program (SNAP) that is administered by the United States Department of Agriculture (USDA). Docket 1. USDA opposed disclosure of the requested data. The issue before this court was whether Argus was entitled to the data under the Freedom of Information Act (FOIA). During the course of litigation, USDA filed its first motion for summary judgment, limiting its argument to FOIA Exemption 5. Dockets 18 and 23. The court granted USDA's motion and entered judgment in favor of USDA. Dockets 38 and 39. Argus appealed the court's ruling, and the Eighth Circuit Court of Appeals reversed this court's decision and remanded the case for further proceedings. Dockets 44 and 45.

USDA then filed its second motion for summary judgment, arguing that FOIA Exemptions 4 and 6 applied to Argus's request for SNAP data. Dockets 58 and 61. USDA later withdrew its contention that FOIA Exemption 6 applied. Docket 99 at 1. The court denied USDA's motion for summary judgment. Docket 80. On May 25, 2016, the court began a bench trial on whether Exemption 4 applied to Argus's request. Dockets 99 and 111. Following trial, the court ruled on November 30, 2016, that FOIA Exemption 4 did not apply. Dockets 127 and 128. Throughout the litigation of this case, USDA has argued that Argus's request for SNAP data should be denied.

On January 19, 2017, USDA notified SNAP-authorized retailers that, based on the court's judgment, USDA will disclose the requested SNAP information to Argus. Docket 139 at 2. Members of the Food Marketing

Institute (FMI)—who are also authorized SNAP retailers—now object to USDA's release of the SNAP data. *Id.* FMI moves to intervene in this case and requests that the court stay its judgment and extend the deadline to file an appeal. Docket 138.

MOTION TO INTERVNE

FMI seeks to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Because the court grants FMI's motion on these grounds, the court does not address FMI's argument that it may permissively intervene under Federal Rule of Civil Procedure 24(b)(1)(B).

I. LEGAL STANDARD

For a party to intervene in litigation, the party must establish Article III standing and satisfy the requirements of Rule 24. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009) (citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996)). To establish Article III standing, a party "must clearly allege facts showing an injury in fact, which is an injury to a legally protected interest that is 'concrete, particularized, and either actual or imminent.' " *Id.* at 834 (citing *Curry v. Regent of the Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999)). "An association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *Owner–Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 831 F.3d 961, 967 (8th Cir. 2016) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

A party has a right to intervene in litigation under Rule 24 if the following criteria are met: "(1) [the party] has a recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties." *South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) (citing *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997)).

Rule 24 also requires that the party file a timely motion. Fed. R. Civ. P. 24. To determine whether a motion is timely, the court considers (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Academy*, 643 F.3d 1088, 1094 (8th Cir. 2011) (citing *United States v. Ritchie*, 620 F.3d 824, 832 (8th Cir. 2010); *see also United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995)).

II. DISCUSSION

A. Article III standing

In *American Farm Bureau Federation v. EPA*, 836 F.3d 963 (2016), the Eighth Circuit Court of Appeals addressed the requirements for standing for associations. The court held that the American Farm Bureau Federation and the National Pork Producers Council had standing to challenge the release of their members' personal data under FOIA. *Id.* at 968. The Eighth Circuit reasoned that the federal government's "nonconsensual dissemination of personal information" was a sufficient basis to establish a "concrete and particularized injury in fact," giving the associations standing. *Id.* at 968.

Based on *Farm Bureau*, this court finds that FMI has established Article III standing. Similar to the associations in Farm Bureau, FMI has shown that its members would otherwise have standing to sue in their own right because of the potential nonconsensual dissemination of private information. The private nature of the information and its potential disclosure gives FMI members a concrete, particularized legal interest to protect. FMI has also shown that the interests it seeks to protect are germane to FMI's purpose. FMI is an organization that "advocates for food retailers" and "their commercial interests," and the release of SNAP data directly impacts those commercial interests. Docket 139 at 4. Lastly, FMI has shown that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. FMI is appealing the application of a FOIA exemption, and the court is able to rule on the application of the exemption without testimony of FMI members. For these reasons, FMI has established Article III standing.

B. Rule 24(a)(2) requirements

FMI has also met the requirements of Rule 24(a)(2). FMI's motion is timely because the association only recently discovered that USDA would not be appealing this court's ruling. Although much of the litigation has already been completed, FMI's interests were sufficiently represented by USDA. It was not until USDA decided to refrain from filing an appeal that FMI needed to intervene. Nothing about the litigation up to this point would have changed if FMI had been a party from the outset. Because FMI has a valid reason for its delay in seeking intervention and no prejudice will result, the court finds that FMI's motion is timely. Furthermore, FMI has an interest in the subject matter of this litigation because its members are directly impacted by the release of the

requested SNAP information. FMI's interest in protecting its members' financial data would be impaired by USDA's decision to disclose the data and not appeal this court's ruling, and USDA no longer represents FMI's interests because USDA plans to release the requested SNAP data. Because both the requirements of Article III and Rule 24 are met, FMI may intervene in this case.

MOTION TO STAY JUDGMENT

I. LEGAL STANDARD

When ruling on a motion for a stay pending appeal, the court must consider (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits; (2) the threat of irreparable harm to the moving party absent a stay; (3) whether issuance of a stay pending appeal would substantially injure the other parties in the proceeding; and (4) the effect on the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See also Iowa Utils., Bd. v. FCC*, 109 F.3d 418, 424 (8th Cir.1996). The Second Circuit Court of Appeals and the Sixth Circuit Court of Appeals have recognized that "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). Or "[s]imply stated, more of one excuses less of the other." *Id.* (quoting *Griepentrog*, 945 F.2d at 153; *cf. In re Reval AC, Inc.*, 802 F.3d 558, 569-73 (3d Cir. 2015) (finding factors are interconnected).

II. DISCUSSION

The issue before the court was whether FOIA Exemption 4 applied to individual SNAP retailer redemption data. The issue appears to be one of first impression in the Eighth Circuit Court of Appeals.

Because there is not a clearly established answer to this issue, FMI could succeed in an appeal. The disclosure of the requested SNAP data could also cause irreparable harm to FMI members—that is the issue FMI seeks to appeal. And once the data is disclosed, it cannot be unseen. In contrast, Argus and the public will not suffer irreparable harm if the data is not disclosed immediately. Assuming Argus prevails on appeal, Argus will have access to the SNAP data and will be able to publish news articles based on the information. Any harm would be temporary and not irreparable. Based on these considerations, the court grants FMI's motion to stay judgment.

Federal Rule of Civil Procedure 62(d) also states that "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond." Here, FMI's motion to stay judgment and desire to appeal directly impacts the litigation expenses Argus must incur. Because Argus may be able to recover attorney fees if it prevails on appeal, this court orders that FMI post a $20,000 bond. The stay will take effect upon posting of the bond.

MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL

FMI moves for a 30-day extension to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5)(A). Because FMI did not learn of its need to intervene in this case until January 19, 2017, good cause exists to give FMI a 15-day extension to file its appeal.

CONCLUSION

This court grants FMI's motion to intervene because FMI has established Article III standing and has met the

requirements of Rule 24(a)(2). The court stays its judgment in this case pending review by the Eighth Circuit Court of Appeals because of the potential irreparable harm disclosure of the requested information could cause FMI members, and FMI is required to post a $20,000 bond. The court also grants FMI's motion for a 15-day extension to file an appeal.

DATED this 30th day of January, 2017.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 08/07/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

Appellant's motion to stay the mandate, appellee's response and appellant's reply have been considered by the court and the motion is denied.

August 07, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX L

Supreme Court of the United States

No. 18A146

FOOD MARKETING INSTITUTE,

Applicant

v.

ARGUS LEADER MEDIA, DBA ARGUS LEADER

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 17-1346, is hereby recalled and stayed pending further order of the undersigned or of the Court. It is further ordered that a response to the application be filed on or before Thursday, August 16, 2018, by 4 p.m. The reply, if any, is to be filed by 4 p.m., Tuesday, August 21, 2018.

/s/ Neil M. Gorsuch
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of August 2018.

APPENDIX M

(ORDER LIST: 585 U.S.)

WEDNESDAY, AUGUST 29, 2018

ORDER IN PENDING CASE

18A146 FOOD MARKETING INST. V. ARGUS LEADER MEDIA

The application to recall and stay the mandate, presented to Justice Gorsuch and by him referred to the Court, is granted, and the mandate of the United States Court of Appeals for the Eighth Circuit in case No. 17-1346 is recalled and stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice Ginsburg, Justice Sotomayor, and Justice Kagan would deny the application.

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 08/29/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

Pursuant to an order of the U.S. Supreme Court, dated August 29, 2018, the mandate is hereby recalled and stayed pending the disposition of a petition for writ of certiorari.

August 29, 2018

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

(Filed 07/13/18)

Argus Leader Media, doing business as Argus Leader

Appellee

v.

United States Department of Agriculture

Food Marketing Institute

Appellant

National Grocers Association

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:11-cv-04121-KES)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX P

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Civ. 11-4121

ARGUS LEADER MEDIA, dba ARGUS LEADER,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Excerpts from Transcript of Court Trial held May 24-25, 2016, before the Honorable Karen E. Schreier, U.S. District Court Judge, at the U.S. District Courthouse in Sioux Falls, South Dakota

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APPEARANCES:

MR. JON E. ARNESON, Attorney at Law, 123 S. Main Avenue, Suite 202, Sioux Falls, South Dakota 57104, appearing on behalf of the Plaintiff.

MS. STEPHANIE C. BENGFORD, U.S. Attorney's Office, P.O. Box 2638, Sioux Falls, South Dakota 57101-2638, appearing on behalf of the Defendant.

MR. DAVID K. GASTON and MS. CHU-YUAN HWANG, U.S. Department of Agriculture, 1400

Independence Avenue, S.W., Room 3311, Washington, DC 20250, appearing on behalf of the Defendant.

* * *

[230] MR. ARNESON: So competition is good for America, but not too much competition?

MR. JOHNSTONE: I don't think I'm saying that. I'm saying that information that we consider proprietary and confidential that we submitted to the [231] Government, with the understanding that it would be kept confidential, we're concerned that the release of that will cause us substantial competitive harm. You can say that that's the impact of the free market, if that's your view. All I can say is we are concerned about what we think the likely negative effects are of the release of the information, which is information we keep confidential and we don't disclose to anyone.

MR. ARNESON: Okay. I would agree then that -- let me see if I can state this. You're saying that the Kmart attitude is this information is proprietary, confidential, secret. Yet, is it not the payment under a Government program?

MR. JOHNSTONE: It is.

* * *

[291] MS. BENGFORD: And so then its actual SNAP sales individual store data, you believe that's a key piece?

MR. LARKIN: Absolutely.

MS. BENGFORD: And why is that?

MR. LARKIN: Because anybody that wants to locate a new store or compete with their current competitor now knows, you know, X number of dollars are available that are going to that competitor, and they're going to do

everything they can to capture for that percentage, whatever they can, out of that dollar amount.

[292] In today's world, they have ways of guessing. They have ways of estimating. They have market research they can do. But there is no place where they can get the actual data. And when our members signed up for the program, they always felt that it was confidential, private, and it was never going to be released.