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.

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

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 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

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

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]

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

[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 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.

clearly erroneous, and we review the applicability of the FOIA exemption de novo." Peltier v. F.B.I., 563 F.3d 754, 762 (8th Cir. 2009).

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

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

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Instead, it argues that the words of the statute—"privileged or confidential," 5 U.S.C. § 552(b)(4)—can be given their dictionary definitions. FMI asserts that "confidential" means "secret," so a record falls within Exemption 4 if it has previously been kept secret. We reject this argument as precluded by "the Supreme Court's admonition that FOIA exemptions 'must be narrowly construed.'" Argus Leader, 740 F.3d at 1176 (quoting Milner v. Dep't of Navy, 562 U.S. 562, 565 (2011)). Under FMI's reading, Exemption 4 would swallow FOIA nearly whole.

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

In an effort to avoid this conclusion, FMI cites to our opinion in Madel. In that case, we affirmed Exemption 4's application to Drug Enforcement Administration (DEA) records pertaining to oxycodone transactions by private companies. See Madel, 784 F.3d at 451-53 (noting that one of the requested documents "contain[ed] information traceable to individual manufacturers and distributors, such as market shares in specific geographic areas, estimates of inventories, and sales" for the entire nation-wide market for oxycodone). We cited DEA declarations that the requested records "could be used to determine the companies' market shares, inventory levels,

and sales trends in particular areas" which might allow competitors "to target specific markets, forecast potential business of new locations, or to gain market share in existing locations, thereby gaining competitive advantage." Id. at 453 (cleaned up). While these concerns appear to mirror those raised by the USDA in this case, Madel is distinguishable. In Madel, the data in question were sufficiently specific (records of individual companies' sales of a particular drug) that their release was likely to provide a tangible competitive advantage. The contested data in this case, by contrast, are more general, and add little to the information already available to retailers. Because the Madel data are not analogous to the data in this case, the result is different.[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

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 COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

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 D

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

ARGUS LEADER MEDIA, d/b/a Argus Leader Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	4:11-CV-04121-KES 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.

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

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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.")

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

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 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 E

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

ARGUS LEADER MEDIA, d/b/a Argus Leader Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	4:11-CV-04121-KES 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 F

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ARGUS LEADER MEDIA, d/b/a Argus Leader, Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant, FOOD MARKETING INSTITUTE, Intervenor.	4:11-CV-04121-KES 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 G
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

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 H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1346

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)

MANDATE

In accordance with the opinion and judgment of 05/08/2018, and the Court's order of 06/04/2018, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

August 07, 2018

Clerk, U.S. Court of Appeals, Eighth Circuit