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August 28, 2014

VIA FEDERAL eRULEMAKING PORTAL

Food and Nutrition Services
Department of Agriculture
3101 Park Center Drive
Alexandria, VA 22302

*Re: Request for Public Comments on the Potential Release of
SNAP Retailer Transaction Data*

Dear Sirs/Madams:

The Reporters Committee for Freedom of the Press, along with the 12 undersigned news media organizations and journalism associations, submit the following in response to the Department of Agriculture's (USDA) and component Food and Nutrition Service's (FNS) request for public comments on the potential release of Supplemental Nutrition Assistance Program (SNAP) retailer transaction data. The undersigned have a vested and continuing interest in ensuring robust access to government information to better enable their watchdog role. Further, the undersigned are particularly concerned about access to the incredibly newsworthy information that is the subject of this comment. We address each of FNS's questions in turn.

Question 1: Whether aggregated annual SNAP redemption data at the individual store level are confidential business information.

The aggregated SNAP redemption information at issue here and in the 10th Circuit's decision in *Argus Leader v. U.S. Dept. of Agriculture*, which addressed the newspaper's request for redemption data, does not qualify as confidential business information because it meets neither the definition of "business information" generally, nor the requirements necessary to be considered "confidential." It also cannot be exempt under Exemption 4 of FOIA because, as the Eighth Circuit recognized, it is not "obtained from a person." We will address each of these issues separately.

Aggregated SNAP redemption data are not "business information."

Business information under Exemption 4 is "information [that] relates to commerce or [] has been compiled in pursuit of profit."¹ Under this definition, aggregated SNAP redemption data are not "compiled in pursuit of profit." On the contrary, they are compiled by the government to analyze spending patterns under

¹ *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

food assistance programs. While the information at issue does tangentially “relate[] to commerce,” “[n]ot every type of information provided to the government by an entity engaged in commerce falls within (b)(4).”²

Aggregated SNAP redemption data are not “confidential business information.”

Even assuming aggregated SNAP redemption data at an individual store level are business information, it does not qualify as the type of information that may be considered confidential under Exemption 4. “Confidential business information” is information, the disclosure of which “is likely to have either of the following effects: (1) to impair the government’s ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”³

Taking the “substantial harm” prong first, the release of aggregated SNAP redemption data will not cause any harm, let alone substantial harm, to the competitive position of any store owner affected. The only plausible competitive information this data contemplate is (1) the fact that a given store participates in the food assistance program, or (2) the prices a given store charges for particular items. The first provides no competitive advantage and, in fact, is public information already. The second, while perhaps providing some competitive advantage, is *also* already public, as any competitor could send someone into any other store to note publicly posted prices.

As for the impairment prong of the confidentiality test, there is no evidence to suggest that revealing aggregated redemption data at the store level will impair the government’s ability to obtain this information in the future. The burden of proving such likely impairment is on the government, and it is a high standard.⁴ Because there is no chance of competitive harm to a store if this type of information is released, there can be no reason to believe that the government would face more difficulty in collecting the information if it is subject to FOIA. Additionally, these data sets are produced by the government, so there can be little argument that the government would have more difficulty getting the information if it is made public.

Aggregated SNAP redemption data are generated by the government, and therefore cannot be withheld under Exemption 4.

In addition to covering only confidential business information, Exemption 4 is also limited to that information “obtained from a person.” “Person” in this context

² *British Airports Auth. v. U.S. Dep’t of State*, 530 F.Supp. 46, 49 (D.D.C. 1981).

³ *Nat’l Parks & Conservation Ass’n v. Morton (I)*, 498 F.2d 765, 770 (D.C. Cir. 1974).

⁴ *See Washington Post Co. v. U.S. Dept. of Health & Human Servs.*, 865 F.2d 320, 322 (D.C. Cir. 1989).

clearly does refer to corporations and other business entities.⁵ But it does not refer to the U.S. government.⁶ As the Eighth Circuit has recognized, in the case of this aggregated redemption data, “[t]he department, not any retailer, generates the information.”⁷ In fact, “the retailer spending information is not ‘submit[ted]’ by ‘an applicant retail food store or wholesale food concern.’”⁸ It would, therefore, be improper to withhold aggregated SNAP redemption data on Exemption 4 grounds because that information is not “obtained from a person” as the statute requires.

Question 2: Whether aggregated monthly SNAP redemption data at the individual store level are confidential business information?

The undersigned media groups view monthly aggregated data in the same way as we view annual aggregated data. Therefore, our answer to and analysis of this question are the same as our answer to Question 1.

Question 3: Whether aggregated annual SNAP redemption data at the individual store level should be released for transparency purposes.

The issue of government spending on welfare programs has been controversial since the establishment of such programs in the 1960s. Questions about misuse of these systems, including the Supplemental Nutritional Assistance Program (SNAP), arise frequently and receive extensive media coverage. The unfortunate economic downturn that led to the expansion of the program in 2009 prompted renewed public interest in food stamp data.⁹

The Obama administration has responded to a general demand for more government transparency with a multi-prong initiative to make government data more accessible and easier to analyze, including allowing the public to track exactly how and where federal dollars are spent. The combination of these efforts with the heightened public interest in ensuring accountability for SNAP spending has appropriately led to this

⁵ See *Comstock Int’l v. Exp.-Imp. Bank*, 464 F. Supp. 804 (D.D.C. 1979).

⁶ See, e.g., *Consumers Union v. Veterans Admin.*, 301 F. Supp. 796, 803 (D.N.Y. 1969); *Grumman Aircraft Eng’g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *Judicial Watch v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000).

⁷ *Argus Leader Media v. U.S. Dept. of Agriculture*, 740 F.3d 1172, 1176 (8th Cir. 2014).

⁸ *Id.*

⁹ See Mantovani, Richard, Eric Sean Williams, and Jacqueline Pflieger. *The Extent of Trafficking in the Supplemental Nutrition Assistance Program: 2009–2011*, prepared by ICF International for the U.S. Department of Agriculture, Food and Nutrition Service (2013), www.fns.usda.gov/research-and-analysis.

review of the FNS's policy of keeping store-level redemption data private. FNS should move toward greater transparency and find that redemption information at the individual store level is not confidential business information and does not fall under Exemption 4 of the Freedom of Information Act (FOIA).¹⁰

More Americans than ever are participating in SNAP, which means the public has a heightened interest in tracking spending in the program.

The recession that began in 2008 led to more and more people participating in food assistance programs, with the result being that “a federal program that began as a last resort for a few million hungry people has grown into an economic lifeline.”¹¹ As of April 2014, the most recent data available, more than 46.2 million people were participating in SNAP.¹² Spending on nutrition assistance is the largest percentage of Department of Agriculture expenditures, and amounts to \$70 billion each year.¹³ That amounts to more than President Obama proposed spending in 2013 on homeland security (\$45.1 billion) or civil defense (\$57.4 billion), and more than 10 times what the president proposed spending on the entire United States judiciary (\$7.5 billion).¹⁴

The purpose of FOIA was to allow the public to stay informed about government activities, particularly government spending. A program that alone spends more than an entire branch of government should not be able to hide from public scrutiny. Releasing individual store-level SNAP redemption data is necessary to give the public a complete picture of where government money is going and whether it is being spent in a manner consistent with the food assistance program's goals.

Given the already-documented instances of SNAP fraud, and questions about whether SNAP is contributing to unhealthy lifestyles, the public and members of the media need to be able to access aggregate data to truly examine the program's success.

¹⁰ 5 U.S.C. § 552(b)(4).

¹¹ Eli Saslow, *Food Stamps Put Rhode Island Town on Monthly Boom-and-Bust Cycle*, THE WASHINGTON POST (March 16, 2013), available at <http://wapo.st/1kysoTb>.

¹² *April 2014 SNAP Caseloads Down Over the Year: SNAP Still Matters for Millions of People Across U.S.*, Food Research and Action Center, <http://frac.org/reports-and-resources/snapfood-stamp-monthly-participation-data/#aapr>.

¹³ *Hearing to Review Updates on USDA Inspector General Audits, Including SNAP Fraud Detection Efforts and I.T. Compliance: Hearing before the H. Subcomm. On Dep't Operations, Oversight and Credit of the Comm. On Agriculture*, 112th Cong. (2011) (opening statement of Rep. Jeff Fortenberry), available at <http://1.usa.gov/1rqq2Ve>.

¹⁴ *Four Ways to Slice Obama's 2013 Budget Proposal*, N.Y. TIMES (Feb. 12, 2012), <http://nyti.ms/1daefFP>.

A study done for FNS in 2013 revealed that between 2009 and 2011, trafficking of SNAP benefits diverted about \$858 million from the program each year, and more than 10 percent of authorized SNAP stores engaged in trafficking.¹⁵ Although FNS does investigate irregularities in SNAP payments, opening more details to the public will serve not just the public interest in understanding government spending, but also the government's interest in ensuring proper use of the food assistance program. Allowing members of the news media and the public to perform their own investigations and analysis of aggregated SNAP redemption data can only serve to help the government identify cases of SNAP misuse and correct them, a valuable tool for an agency already stretched thin.

In addition to ferreting out fraud in the SNAP system, revealing redemption data could help the public and government officials focus on where SNAP is succeeding and where it might be failing. Policy experts and journalists have raised questions about whether food assistance programs are contributing to epidemics of obesity and other long-term health problems because they encourage the purchase of low-quality or low-nutrition food.¹⁶ As one reporter has said:

There are important public policy questions at play here . . . How much money is spent at gas stations, which aren't known for their healthy offerings? Are gas stations in urban food deserts raking in the money? And what about big corporations? How much are they pocketing from taxpayers, and what is their influence on the debate over food policy?¹⁷

With such a strong public interest in understanding the intricacies of SNAP data, the government should not be withholding this information from FOIA requesters. In the interest of transparency, FNS should release aggregated SNAP redemption data as a matter of course.

¹⁵ Mantovani *supra* at ii.

¹⁶ Jonathan Ellis and Megan Luther, *Vendors Multiply for Food Stamps*, THE ARGUS LEADER (Aug. 27, 2011), available at <http://archive.argusleader.com/article/20110828/NEWS/108280313/Vendors-multiply-food-stamps>.

¹⁷ Jonathan Ellis, *Transparency Watch: The Argus Leader's Legal Battle with USDA Over Food Stamp Data*, Investigative Reporters and Editors (April 20, 2013), <http://ire.org/blog/transparency-watch/2013/04/20/transparency-watch-usda-food-stamp-data-foia-lawsu/>.

Question 4: Whether aggregated monthly SNAP redemption data at the individual store level should be released for transparency purposes.

The undersigned media groups view monthly aggregated data in the same way as we view annual aggregated data. Therefore, our answer to and analysis of this question is the same as our answer to Question 3.

Question 5: How would the answers to the above questions differ if monthly or annual aggregated data were for a retailer's aggregated sales at all stores within a state or nationally, as opposed to per-store data? Should any other aggregations be considered?

Our answers as to the confidential business nature of the information at issue would not differ if the aggregated data were for all area stores as opposed to per-store.

The public interest in transparency, though, necessitates the release of the most granular data possible. It is critically important that the government release per-store data in an effort to present the most complete and accurate information, and to allow for the most productive analysis of the information. Neither potential fraud, nor potential impact on widespread health concerns is as readily determinable through nation-level data. The availability of individual store-level information is necessary to effectively understand the SNAP system.

Sincerely,

The Reporters Committee for Freedom of the Press

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The Associated Press

Association of Alternative Newsmedia

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