Case No. 17-1346

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARGUS LEADER MEDIA, D/B/A *ARGUS LEADER*,

Appellee,

v.

FOOD MARKETING INSTITUTE,

Appellant.

NATIONAL GROCERS ASSOCIATION,

Amicus on behalf of Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION
(4:11-cv-04121-KES)

APPELLEE'S BRIEF

Filed on behalf of Argus Leader Media

Jon E. Arneson
South Dakota Bar #45
123 S. Main, Suite 202
Sioux Falls, SD 57104
(605) 335-0083
Attorney for Appellee ARGUS LEADER MEDIA

SUMMARY OF THE CASE

In the opening paragraph of *Argus Leader Media v. U.S. Dep't of Agric.,* 740 F.3d 1172, 1173 (8th Cir. 2014), this Court wrote:

> Amid increasing public scrutiny of this burgeoning program [SNAP]…*Argus Leader* 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 [USDA] under [FOIA]….With little explanation,[USDA] refused disclosure. After an internal administrative appeal proved fruitless, Argus brought a FOIA suit [in August, 2011]….

Following the rejection of its FOIA exemption 3 defense in that decision, USDA moved for summary judgment on exemptions 4 and 6. The District Court denied the motion in September, 2015. In May, 2016, after USDA abandoned exemption 6, a bench trial was held on USDA's exemption 4 defense. The pivotal issue—exemption's "confidential" element—boiled down to "whether disclosure of the SNAP payment data was "likely to cause substantial competitive harm" to SNAP retailers. The District Court correctly determined that USDA had failed to prove that to be the case. USDA did not appeal. Food Marketing Institute (FMI) intervened and did appeal the District Court's decision in February, 2017.

CORPORATE DISCLOSURE

Appellee, Argus Leader Media, d/b/a *Argus Leader*, is a subsidiary of Gannett Company, Inc., a public corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes, Rules and Regulations:

Other References:

STATEMENT OF THE ISSUE

There is one issue[1] properly before the Court:

1) **Was the District Court's finding that disclosure of the annual store-level amounts the federal government pays out to retailers participating in the Supplemental Nutrition Assistance Program (SNAP) was not "likely to cause substantial competitive harm" to SNAP retailers—and not "confidential" information entitled to FOIA exemption 4 protection—clearly erroneous?**

Apposite cases:

- *Central Platte Natural Resources District v. U.S. Dep't of Agriculture*, 643 F.3rd 1142 (8th Cir. 2011)
- *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transportation,* 260 F.3d 858, 863 (8th Cir. 2001)
- *Missouri Coalition for the Environment Foundation v. U.S. Army Corps of Eng'rs,* 542 F.3d 1204, 1208 (8th Cir. 2008)
- *National Parks and Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir.1974).

Apposite statutes:

- 5 U.S.C. §552(b)(4)
- 7 U.S.C. §2011

---

[1] FMI has tried to insinuate, as issues on appeal, alternative exemption 4 "confidentiality" theories, namely, retailer secrecy and program efficacy. USDA raised neither theory and consistently argued "competitive harm" to be the applicable "confidentiality" test. FMI App.147-149; 204 and 209. Consequently, the Court should not consider FMI's second and third issues. *Jenkins by Agyei v. State of Missouri,* 962 F.2d 762, 766 (8th Cir. 1992) ("Insofar as the intervenors assert a [new claim], the issue is raised for the first time on appeal, and we do not consider such issues.") *See also Roth v. Dep't of Justice,* 642 F.3d 1161, 1179-80 (D.C. Cir. 2011) (government precluded from advancing argument on appeal that was not raised in district court in a way that would sufficiently put plaintiff "on notice of the need to rebut it.")

STATEMENT OF THE CASE

A. SNAP purpose and function.

The Supplemental Nutrition Assistance Program (SNAP) is a government subsidization program functioning within the United States Department of Agriculture and administered by USDA's Food and Nutrition Service.[2] FMI App.133. Despite USDA's reluctance to concede the core dynamics of a government assistance program, there was eventual acknowledgement by government witnesses that under SNAP the government pays for food for low-income households. Tr.T.25(25)-26(8); Tr.T.28(2-7); Tr.T.30(12)-31(2); Tr.T.33(20)-34(19). Quite obviously, the government must—and does—keep track of that information.[3] Tr.T.38(19)-39(14).

FMI's and USDA's references to SNAP retailers' "redemptions" and "redemption" data is outdated. *See, Argus Leader Media v. USDA, supra,* 740 F.3rd at 1174. ("[T]he days when retailers had to redeem physical food stamps have long passed….") The term "redemption" obscures Argus's objective, which is to obtain from the government information of government spending.[4]

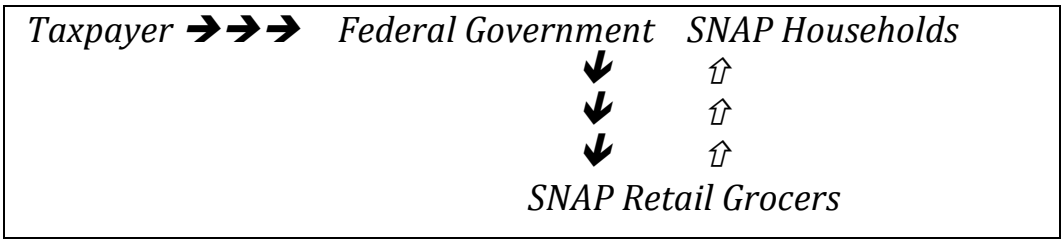
SNAP is accurately depicted in both of the following diagrams:

---

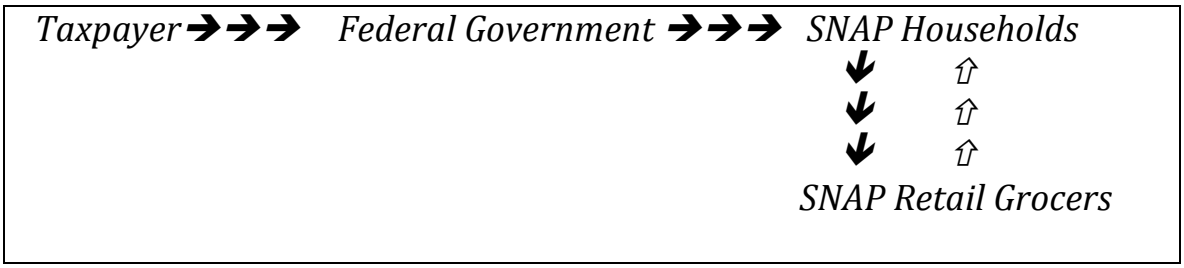
[2] To facilitate identification of parties, Food and Nutrition Service, a USDA sub-agency, will be referred to as "USDA."

[3] USDA maintains the SNAP records in the STARS System. Tr.T.13(19)-14(3).

[4] USDA admitted it uses the term "redemption" to mean the "dollar value of sales for SNAP-eligible foods paid for by SNAP to a retailer." FMI App.34.



⇧ = *Food (Benefits)*
🡻 = *Money (Payment)*



⇧ = *Food (Benefits)*
🡻 = *Money (Payment)*

SNAP's purpose, codified at 7 U.S.C. §2011, is "to promote the general welfare, to safeguard health and well-being of the Nation's population by raising levels of nutrition among low-income households." Tr.T.26(15)-27(23). The program's goal is to "alleviate [the] hunger and malnutrition" caused, in part, by the "limited food purchasing power of low-income households" by enabling "low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power…." *Id*.

A private sector food retailer's participation in SNAP is entirely voluntary. Tr.T.32(18-21); Tr.T.106(16-18). USDA's acceptance of a food retailer wishing to do SNAP business is wholly dependent upon whether "participation will effectuate the purposes of [SNAP]." 7 U.S.C.§2018(a)(1). The welfare of the retailer is not a

government concern. Tr.T.31(22)-32(3). A willing retailer need only be "eligible" for USDA's authorization. FMI App.42. USDA's website establishes that eligibility is simply a matter of either selling a qualifying variety of products in four food staple groups or having sales of staple foods amount to 50+% of total retail sales.[5] Tr.T.105(12)-106(3). A retail store's size, location, sales volume, and income do not affect eligibility; SNAP demographics do not affect eligibility; presence or absence of competition from SNAP or non-SNAP grocery businesses does not affect eligibility. Tr.T.107(25)-108(10).

There is no limit on the number of retailers who can participate in SNAP. Tr.T.106(12-15). Approximately 321,000 retail stores actually do participate in SNAP. Tr.T.99(5-7). SNAP recipients, *i.e.,* the low-income households receiving benefits under the program, can purchase food from participating retail stores using an Electronic Benefit Transfer (EBT) card that functions, effectively, as a debit card for the recipient's account with the government. FMI App.133, 134.

While there is no doubt SNAP is an enormous sixty-nine billion dollar government program,[6] its proportion of total grocery sales is less certain. FMI, relying on 2015 U.S. Census Bureau statistics, claimed SNAP accounts for "well over 10%" of all grocery retail. However, in its own 2015 publication, *Food Retail*

[5] http://www.fns.usda.gov/snap/retail-store-eligibility-usda-supplemtntal-nutrition-assistance-program.

[6] FMI Brief, fn.4.

Industry Speaks report,[7] FMI estimated "about 5 percent of groceries are paid for using SNAP benefits."

B. Argus's FOIA request.

Interested in knowing the annual amounts the federal government paid out to each of the 321,000+ SNAP retail grocery locations[8] from 2005-2010, Argus sent a written FOIA request to USDA's Food and Nutrition Service FOIA officer. FMI App.4. The request was denied. FMI App.5. Argus officially appealed the denial on February 25, 2011. FMI App.6. Although 5 U.S.C. §552(a)(6)(A)(ii) requires agencies to provide an official response within twenty days, Argus spent nearly six months waiting for an official response that never came.[9] Argus filed this FOIA lawsuit on August 26, 2011.

FMI's vague innuendo that Argus might have an affirmative responsibility to furnish "details regarding the nature of the article [it] will publish" or to explain why currently available data "are insufficiently specific for its purposes" completely misses the mark. FMI Brief, fn.7. Argus, as a FOIA requestor, does

---

[7] http://www.fmi.org/our-research/supermarket-myth-busted. The 100% discrepancy should serve as a warning that not all statistics or measurements should be carved in stone.

[8] These include the different types and sizes of retail operations—supermarkets, grocery stores, specialty stores, convenience stores, farmer's markets, etc.—that are voluntarily participating in SNAP.

[9] Glossing over USDA's disregard of its legal duty, FMI simply said Argus's intra-agency administrative appeal had been "unofficially denied." FMI Brief, p.7.

not have an obligation to justify its interest in government records to a federal agency. *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 172 (2004); *Forsham v. Califano,* 587 F.2d 1128, 1134 (D.C. Cir. 1978) (Requestor's "need or interest is irrelevant," under FOIA.)

C. District Court exemption 4 proceedings.

1. USDA's summary judgment motion.

After this Court ruled out USDA's exemption 3 defense,[10] USDA spent most of the next year laying the groundwork for a second summary judgment motion—this one based on FOIA exemptions 4 and 6.[11]

USDA insisted that Executive Order 12600 and 7 C.F.R. §1.12 required that all SNAP retailers be notified of a FOIA request that had potential exemption 4 implications, despite language suggesting otherwise.[12] For a considerable period of time, USDA claimed this "costly and time-intensive administrative process [would involve] mailing notices to each vendor/ retailer" of potential exemption 4 implications at an estimated cost of "$373,286 and 11 work-weeks for FOIA staff." Argus App.1 (USDA continuance motion.) In early August, 2014, without

[10] Argus Leader Media v. U.S. Dep't of Agric., supra.

[11] USDA scrapped exemption 6 prior to trial. FMI App.221.

[12] Executive Order 12600, Sec. 8(a) dispenses with notice if "the agency determines that the information should not be disclosed…." 7 C.F.R. §1.12's notice applies only when a USDA agency "cannot readily determine whether the information…is confidential business information…."

explanation, USDA changed its mind and notified SNAP retailers by automated telephone calls and e-mails, rather than old-fashioned mail. FMI App.34.

USDA contacted over 321,000 SNAP retailers—including "all current SNAP retailers and any former SNAP retailer authorized during the 2005-2010 timeframe"—advising them of the Argus request and directing their attention to a Request for Information (RFI) in the Federal Register. The original script of the robocall/e-mail message read:

> This is an important message from the USDA, Food and Nutrition Service….A request has been made for records that show your store's annual SNAP sales amounts. In response, FNS has published a Request for Information asking whether SNAP sales amounts at stores such as yours should be made available to the public. As a former or current SNAP authorized retailer, this will affect you directly. We encourage you to read the [RFI] carefully and submit your comments of concern or support….[13]

USDA's "*Request for Information: Supplemental Nutrition Assistance Program; Retailer Transaction Data*" was published in the Federal Register on August 4, 2014.[14] The same day USDA issued a press release explaining the RFI:

> [USDA] is seeking public input concerning a proposal to provide more information to the public about the amount of [SNAP] benefits used by participants at individual grocery stores and retailers.

---

[13] USDA subsequently changed the script, slightly, adding that "[t]he submission of comments is entirely voluntary. If you don't have any comments, you do not have to do anything in response to this [RFI]…." FMI App.33.

[14] https://www.federalregister.gov/documents/2014/08/04/2014-18288/request-for-information-supplemental-nutrition-assistance-program-snap-retailer-transaction-data.

> USDA's goal is to provide as much transparency as possible on retailer data within the limits of the law. "Our goal is to provide more transparency so that people can have access to basic information about the amount of SNAP benefits that individual grocery stores and retailers are redeeming," Agriculture Under Secretary Kevin Concannon said….The RFI is part of the…ongoing effort to make government more open and accountable and increase transparency.[15]

The RFI asked five questions, the first of which had relevance to the underlying Argus FOIA request. FMI App.37. It asked:

> Are aggregated annual SNAP redemption data at the individual store level confidential business information? If yes, please explain why the disclosure is likely to cause substantial competitive harm and fully explain all other grounds upon which you oppose disclosure of such information….[16]

By the time the RFI comment period closed on September 8, 2014, there were 539 published comments.[17] By USDA's count, 266 came from confirmed SNAP retailers and another 57 from "likely retailers which [sic] could not be confirmed in the STARS database." FMI App.36. Of those 323 comments, USDA determined about 235 were opposed to disclosure for different reasons. FMI App.37-38.

---

[15] https://www.usda.gov/media/press-releases/2014/08/04/usda-seeks-public-input-increase-transparency-snap-retailer-data.

[16] https://www.federalregister.gov/documents/2014/08/04/2014-18288/request-for-information-supplemental-nutrition-assistance-program-snap-retailer-transaction-data.

[17] http://www.regulations.gov/#!docketBrowser;rpp=25;so=DESC;sb=postedDate;po=);dct=PS;D=FNS-2014-0030;refD=FNS-2014-0030-0001.

Claiming not to have sufficient expertise in the food industry "to determine whether disclosure of annual redemption data is likely to cause substantial harm to the competitive position of retailers," USDA solicited declarations, "from twenty-three of the retailers and trade associations that submitted RFI comments."[18] FMI App.40. Those prospective declarants were allegedly selected "because they provided the greatest amount of detail regarding the food industry market and competitive harm in the comments they submitted in response to the [RFI]." Argus App.21 (Gold Declaration).

Although USDA witness, Andrea Gold, had asserted under oath[19] that disclosure proponents were ignored because their comments "were not as detailed and fact-specific as many of the comments opposing release," the RFI, a public record,[20] reveals that eleven of the fifteen declarants used by USDA on summary judgment did not submit any comment.[21]

[18] After Argus pointed out conspicuous incongruities in USDA's accounting, USDA claimed there had been a typographical error and that "twenty-three" was actually "thirteen." Tr.T.144(24)-145(23).

[19] *See* Argus App.20 (Gold Declaration).

[20] https://www.federalregister.gov/documents/search?conditions%5Bterm%5D=FR+Doc%232014-18288.

[21] A "search" for declarants Bourne, Buche, Barbier, Gresham, Hays, Champagne, LeBlanc, Snyder, St. Germain, Perret and Zahar did not produce results.

USDA's summary judgment motion was predicated on those fifteen declarations, charted below.[22, 23] FMI App.54-157.

FMI App. #	Declarant	Business	Type	State		RFI
54	Barnes	FMI	Trade			
56	Bourne	Ragland	Retail	Ala/Tenn	X	no
59	Buche	Buche Co.	Retail	SD	X	no
62	Barbier	Big B's	Retail	Louisiana	X*	no
66	Gresham	Double Quick	Retail	Mississippi		no
71	Hays	Dyer	Retail	Tenn/Ky	X	no
74	Champagne	Champagne	Retail	Louisiana	X*	no
78	Forman	Cumberland	Retail	Various		
97	LeBlanc	Raintree Mkt.	Retail	Louisiana	X*	no
101	Macks	Kmart	Retail	Various		
109	Larkin	NGA	Trade		X	
113	Snyder	Supervalu	Retail	Various		no
116	St. Germain	Pierre Part	Retail	Louisiana	X*	no
120	Perret	Club Grocery	Retail	Louisiana	X*	no
124	Zahar	GCM	Retail	Texas	X*	no

The consensus of the declarants was that competitors "could use" SNAP data to increase competition where SNAP sales were better than expected or decrease competition where SNAP sales were worse than expected. FMI App.54-157.

[22] FMI acknowledged it had submitted a declaration. FMI Brief, fn.8. It did not mention that its members ignored FMI's pleas "to submit examples of the competitive harm that would be caused [by disclosure]" to help USDA "defend their decision." App.26, 27 (FMI 12/2/14 conference call report); Argus App.30 (FMI 12/16/14 conference call report).

[23] Those marked with an "X" were virtually identical. Those asterisked had even underlined the same word for emphasis. Argus later learned that those ten had been prepared by NGA's general counsel. Argus App.25 (Larkin letter); Tr.T.269(9-11).

The District Court denied USDA's summary judgment motion in a memorandum opinion and order on September 30, 2015. FMI App.167.

2. Trial.

On May 24 and 25, 2016, a bench trial was held on the question of FOIA exemption 4's application, *i.e.,* whether the exemption protected the annual store-level SNAP payment data from public disclosure.[24]

As the FOIA defendant agency, USDA carried the burden of going forward with the proof and the burden of persuasion. Three USDA employees who worked within the Food and Nutrition Service testified. Collectively, the three revisited USDA's explanations on summary judgment of SNAP's purpose and operation, as well as the agency's exemption 4 notification process, and response analysis. The collective agency testimony reiterated:

- USDA's belief that Argus's FOIA request triggered a notice requirement under Executive Order 12600 and 7 C.F.R. §1.12. Tr.T.115(23)-116(2);
- USDA's robocall and e-mail notice[25] informing all SNAP retailers of the FOIA request and alerting them to the RFI,[26] that sought exemption 4 feedback. Tr.T.126(13)-131(18);
- USDA's follow-up with disclosure opponents, exclusively. Tr.T.80(25)-81(25).

[24] USDA abandoned exemption 6 prior to trial. *See also* Tr.T.115(18-20).
[25] Argus App.31 (USDA Trial Exhibit 203).
[26] Argus App.33 (USDA Trial Exhibit 208).

Dan Cline, a program analyst for SNAP's Retailer Policy and Management Division, described the work of USDA's team that analyzed the RFI comments, generally. Tr.T.42(3-6). Cline's later testimony addressed his more specific "reanalysis" of retailers and trade associations "responsive to Question 1 of the RFI."[27] Tr.T.50(11-15). Cline confirmed:

- The RFI produced a total of 539 comments from "members of the general public, trade associations, retailers, advocacy groups." Tr.T.44(6-8);
- All RFI comments "made on regulations.gov are available for public review, and all 539 should be online." Tr.T.77(10-13);
- 235 retailers opposed disclosing the [SNAP] data in response to RFI Question 1. Tr.T.76(24-25);
- "Of those 235, there were 82 that further went on to include language in their comment that our team interpreted as a reference to Exemption 4." Tr.T.92(4-6);
- Cline asked thirteen "entities" to furnish declarations to support its exemption 4 defense.[28] Tr.T.84(13-18).

Andrea Gold, SNAP's Director of Retailer Policy and Management Division, corroborated:

- The thirteen entities comprised nine trade associations, two law firms, and two retailers. Tr.T.148(17-25);

[27] *Id*.

[28] *See also* FMI App.50.

- Seventeen declarations were returned to USDA as a result of the declaration solicitation. Tr.T.145(20-23);
- Fifteen of the seventeen were submitted in support of USDA's summary judgment motion. Tr.T.148(10-13)
- Nine of the fifteen were "very similar" declarations.[29, 30] Tr.T.147(22)-148(2); Tr.T.152(17-22).

Five witnesses representing SNAP retail entities also testified, essentially repeating their summary judgment grievances.[31] Regardless of size, each entity perceived itself as a potential victim of competition[32] should its gross annual SNAP sales become public information. The common refrain was that competitors could exploit the retailers' SNAP payment information, causing economic detriment.

The witnesses expressed concern that the competition would be on the lookout for stores with SNAP sales that were higher or lower than expected—although there was not much explanation how the SNAP sales "norm" for a particular location would be determined. As the speculative scenario unfolded, the

[29] FMI App.56; 59; 62; 71; 74; 97; 116; 120; 124. (These were also Argus trial exhibits 56, 58, 59, 60, 61, 62, 64, 65, 67, 68)

[30] Later testimony indicated the uncommon similarity of the nine declarations—and a tenth from National Grocers Association President Peter Larkin—was the result of NGA's general counsel having written the script. Tr.T.177(1)-178(7); Tr.T.268(15-21); Tr.T.269(8-11). Argus App.25 (Larkin letter).

[31] USDA had submitted declarations from all five entities represented—Dyer Foods, Kmart, Supervalu, Cumberland Farms, and NGA–on summary judgment.

[32] Curiously, Walmart—the store most often named as a potential SNAP predator––was thought by NGA's Peter Larkin to be an FMI member.

competition, armed with this information, would either target or avoid a particular location. The predicted effect was uncertain. There were conflicting suggestions that locations with higher-than-expected SNAP volume might encourage and discourage competition. Similarly, there was ambiguity whether competitors might regard locations with lower-than-expected volume as exploitable or avoidable.

The retail witnesses' other argument was that SNAP sales figures could "stigmatize" the SNAP customer and/or the SNAP-friendly retailer, possibly causing some non-SNAP customers—and even some SNAP customers—to shop elsewhere.

Argus called two expert witnesses, Richard Volpe[33] and Ryan Sougstad,[34] both of whom presented opinions that the disclosure of annual store-level SNAP

[33] Volpe earned a Ph.D. in agricultural and resource economics from the University of California-Davis and spent four years at USDA's Economic Research Service in Washington, D.C., as a research economist specializing "on the economics of the food supply chain." Since 2014, he has been an assistant professor in the agribusiness department at California Polytechnic State University in San Luis Obispo, California, with responsibilities to teach, do research and community service. Tr.T.341(12)-342(24).

[34] Sougstad earned a Ph.D. in business administration—with an emphasis on information and decision sciences—from the Carlson School of Management, University of Minnesota, and, at the time of the trial, was an associate professor at Augustana University in Sioux Falls, South Dakota, teaching "data analytics, business intelligence, project management and operations management, statistics, and finance,"[34] Tr.T.371(3-12).

payment information was not likely to cause substantial competitive harm to existing SNAP retailers.

Dr. Volpe estimated he had authored or co-authored approximately twenty academic journal articles or USDA research papers and done research on "the competitive behavior of supermarkets." Tr.T.343(5-15).

> I teach and research primarily on the nature of the behavior and the competition among food retailers, and that's food retailers of multiple formats…not just conventional supermarkets [but also] supercenters, convenience stores, dollar stores, and so on. So I find this issue interesting. I have published on this issue a number of times, and I teach a couple of classes on food retail management specifically related to these issues.

Tr.T.345(19)-346(6).

Based on his own research experience, Volpe concluded that even those intent on using annual store-level sales data to their competitive advantage would be "highly unlikely" to succeed on that basis. Tr.T.349(6-17). He also questioned how much time and resources SNAP competitors would devote to efforts to exploit their knowledge of SNAP data if that strategy were to likely lead to a negative stigma. Tr.T.350(1-17). Volpe went on to explain that the variety of available methods to observe competition in an open grocery industry makes the added value of the information negligible, in comparison to the observable pricing, promotions, layout, service, products. Tr.T.351(9-25)

Volpe went on to explain the inherent danger of competitors relying heavily on SNAP data in "benchmarking."[35] Because results can be influenced by multiple variables, in Volpe's opinion "assumptions [extrapolated from SNAP data] can very easily be wrong…." Tr.T.352(4)-353(4). Volpe also pointed out that credible research indicated store-switching is "relatively uncommon," further limiting the potential competitive impact of SNAP sales disclosure. Tr.T.361(13-20). Volpe concluded that "for any potential story about how there may be competitive harm, there's a flipside to that story in how it might result in competitive gain." The SNAP retailer might repel competition just as often as it attracts competition. Tr.T.361(2-9)

Dr. Sougstad initially pointed out that he focused his "research teaching primarily around the value of information and using statistical analysis, data mining techniques, and how companies…can extract value from such analysis." Tr.T.372(21-25) Sougstad testified, essentially, that there is "such a breadth of data available [for businesses] to make strategic decisions, that the SNAP data itself is going to be of marginal value in the analysis they use." Tr.T.375(19-22). In his opinion, the potential SNAP retail competitor would concern itself with its "own data set of existing customers and be able to look at the demographic data

[35] "Benchmarking," essentially involves comparing yourself to others. FMI App.154.

that's widely available, and be able to make a very informed location decision with or without the SNAP data.[36]

USDA's final witness was Bruce Kondracki, hired at the last minute as a "rebuttal expert witness."[37] Kondracki's basic contention was that his company's "supply-side" prediction model would be more accurate if SNAP sales information were plugged into it. Kondracki admitted that demand "is fairly predictable ….based on population," but "constantly changes with the performance of the retailers." Tr.T.389-390. While he believed that having SNAP sales information would lessen the business risk being taken by a client, Kondracki also volunteered that the forecast industry's standard deviation was "[p]lus or minus 5, 10 percent." Tr.T.397. Kondracki observed, "In any retail competitive scenario, the first one who gets to the right sites is the winner. It's a huge competitive advantage."[38] Tr.T.398(1-3). He also admitted that there are very, very close margins that would cause retailers to be wary. Tr.T.397. At one point, Kondracki stated:

---

[36] Sougstad's original understanding was that the SNAP information being requested went beyond gross annual SNAP sales to be product-specific. Tr.T.379(9-11). It was a misconception that was cleared up when USDA took his deposition well before trial.

[37] An unintended switch of party designations in a scheduling order allowed USDA to unveil Kondracki on the Friday before the trial's Tuesday start.

[38] USDA's position was that *existing* store locations are the ones who will suffer the substantial competitive harm.

> Right now I understand that SNAP sales are, according to FMI, average about 5.8 percent in the industry.[39] But *we also know* that high SNAP retailers get as much as 50 percent of their sales [from] SNAP. So half their business could be SNAP business.

Tr.T.398(8-12). Kondracki subsequently revealed that current retailers were already categorized as stores that perform well and stores that do not perform well in "high SNAP areas."[40] Tr.T.399 (8-12).

Kondracki concentrated on his belief that more information would improve the accuracy of his firm's predictive model(s). But while he claimed a targeting client would have a better perspective, Kondracki's reflection on the actual consequences was oblique, at best. He did not venture the opinion that disclosure was likely cause substantial competitive harm to existing SNAP retailers.

When the dust had settled,[41] USDA had not persuaded the District Court that disclosure of the annual store-level SNAP payments would be likely to cause the SNAP retailers substantial competitive harm. And that factual finding, in turn, precluded USDA from treating the SNAP information as "confidential" under FOIA exemption 4. Simply put, the District Court determined that secrecy was not justified.

---

[39] The government's estimate is twice that, which should give one pause before relying too heavily on statistics in making extrapolations.

[40] The testimony invites inferences that significant store-related SNAP information is already known or estimated and that projections based on such information are inherently going to involve considerable guesswork.

[41] At USDA's request, post-trial briefs were submitted by both USDA and Argus.

D. FMI's intervention on appeal.[42]

USDA elected not to appeal the District Court's trial decision[43] and notified SNAP retailers on or about January 19, 2017, that it would be releasing the annual SNAP payment data for years from 2005 to the present as a result of the District Court's trial decision.[44] FMI App.259; Argus App.

FMI became aware of USDA's decision not to appeal the District Court's trial decision and moved to intervene for purposes of appealing that decision.[45] The District Court granted the motion, but required FMI to post a bond in the event Argus was awarded attorney fees.

SUMMARY OF THE ARGUMENT

The amounts the government pays out annually to retailers voluntarily participating in SNAP are presumptively open records under FOIA, and USDA bore the substantial burden of overcoming that presumption by proving that information to be secret under a narrowly construed FOIA exception 4. The

[42] Argus's originally requested information from 2005-2010—information that is now 7-12 years old. On February 10, 2015, Argus sent a second FOIA request for the SNAP payment data for the years 2011 to 2014. Argus App.35 (Argus FOIA request #2). Assistant U.S. Attorney Stephanie Bengford, USDA's lead counsel throughout this case, confirmed in a January 27, 2017, e-mail that USDA intended to comply with both of the Argus FOIA requests. Argus App.38 (Bengford e-mail).

[43] Implicitly, USDA also relinquished its right to appeal the District Court's order denying its summary judgment motion.

[44] *See,* Argus App.36 (Shahin memo) and Argus App.37 (USDA website notice).

[45] FMI did not appeal the denial of USDA's summary judgment motion.

pivotal factual question for the District Court was whether USDA had proven that "disclosure of the [requested SNAP payment] information is likely…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).[46] Consequently, the sole issue on appeal is whether the District Court was clearly erroneous in finding that USDA had not proven that to be the case.

The District Court, having twice considered USDA's case, was not persuaded that release of the SNAP payment data was "likely to cause substantial competitive harm" to SNAP retailers. Based on USDA's evidence, alone, the District Court had sufficient basis for not finding this predictive fact had been proven. The SNAP retailers, who uniformly regarded themselves as potential victims of increased competition, were unable to link, logically, the public knowledge of the SNAP data to a reasonably certain[47] pattern of substantial harm from their competitors.

The District Court also relied on the expert opinions of economic expert witnesses whose unbiased opinions provided sufficient basis for the court's

---

[46] This is the applicable prong of the "confidential" standard derived from *National Parks and Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974).)

[47] To be taken into consideration, there should be "reasonable certainty" of future happenings, *i.e.* injury. *See, e.g., Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit*, §15.70 (2017 ed.).

dispositive finding. In the final analysis, the District Court's finding is not erroneous, let alone clearly erroneous. The supposed causal link between SNAP payment disclosure and "high probability" of "significantly great" economic harm was tenuous, at best.

ARGUMENT

A. Standard of review.

In this case, the Court should review the District Court's "factual conclusions that place a document within a stated exemption of FOIA" under a "clearly erroneous" standard.[48] *Schiffer v. FBI,* 78 F.3d 1405, 1408, 1409 (9th Cir. 1996) quoting *Ethyl Corp. v. United States EPA,* 25 F.3d 1241, 1246 (4th Cir. 1994). *See also*, *Johnston v. United States Dep't of Justice,* No. 97-2173, 1998 WL 518529, at *1 (8th Cir. Aug. 10, 1998) ("We review the district court's factual findings for clear error and its legal conclusions de novo.") *Hulstein v. DEA,* 671 F.3d 690 (8th Cir. 2012) *Missouri Coalition for Environment Foundation v. U.S. Army Corps of Engineers*, 542 F.3rd 1204, 1209 (8th Cir. 2008).

[48] It is the trial court's factual determination whether disclosure is likely to cause substantial competitive harm that places the SNAP information within or without exemption 4. *See, Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2nd 673 (D.C. Cir. 1976) ("We cannot set aside [competitive harm] findings…unless, after giving due regard to the trial court's opportunity to judge the credibility of each witness, we are forced to conclude that it was clearly erroneous." (Citing FED. R. APP. P 52(a))).

B. FOIA presumptions and burden of persuasion.

As the district court observed, "'Congress intended FOIA to permit access to official information [of federal government agencies] long shielded unnecessarily from public view.'" *Hulstein v. DEA*, 671 F.3d 690 (8th Cir. 2012) (quoting *Milner v. Department of the Navy*, 562 U.S. 3 (2011)).

The "basic purpose [of FOIA] reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1976). In short, "FOIA generally mandates broad disclosure of government records." *Central Platte Natural Resources District v. U.S. Department of Agriculture*, 643 F.3rd 1142 (8th Cir. 2011) (citations omitted).

The corollary to 5 U.S.C. §552(a)(3)(A)'s emphatic presumption that an agency "shall make records promptly available to any person" is that exceptions to the rule—FOIA exemptions—are subject to strict interpretation. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("[FOIA exemptions are] consistently given a narrow compass.") *Milner v. Dep't of Navy,* 562 U.S. 3, 6 (2011) (quoting *FBI v. Abramson,* 456 U.S. 615, 630 (1982) ("[FOIA exemptions] must be narrowly construed.")

The agency always carries the burden "to justify the withholding of any requested documents." *U.S. Department of State v. Ray*, 502 U.S. 164, 173 (1991).

And all "doubts [are] resolved in favor of disclosure." *Local 3, International Brotherhood of Electrical Workers v. NLRB*, 845 F.2nd 1177, 1180 (2nd Cir. 1988).

C. FOIA exemption 4 "confidential" test.

1. USDA did not prove release of SNAP payment information is "likely to cause substantial competitive harm." (FMI issue #1)

On appeal is the District Court's answer to the factual question whether disclosure of the requested SNAP payment information was likely to cause substantial competitive harm—commonly referred to as the National Parks I test. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) ("disclosure of the information is likely…to cause substantial harm to the competitive position of the person from whom the information was obtained.") *See also CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1999) (It is necessary to prove "actual competition and a likelihood of substantial competitive injury.") This is the factual test that has been used in this Circuit to determine the applicability of exemption 4. *See Brockway v. Dep't of Air Force,* 518 F.2nd 1184 (8th Cir., 1975) and *Contract Freighters, Inc. v. Sec'y of U.S. Dep't of Transp.,* 260 F.3rd 858 (8th Cir. 2001). The specific pivotal consideration is whether the District Court's finding that the "likelihood of substantial competitive harm" had not been proven was "clearly erroneous."

The "likelihood of substantial competitive harm" is a "predictive fact," requiring "the fact finder to predict either actual or hypothetical future reality." *See* Margaret B. Kwoka, *The Freedom of Information Act Trial,* 61 AMERICAN U. L. REV. 217 (2011).

> These types of questions include whether and how much economic injury the plaintiff is likely to suffer in the future or what profits a plaintiff might have made but for the defendant's conduct. Questions of predictive fact are also consistently treated as factual questions by courts.

Id., at 230, citing Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J.APP.PRAC&PROCESS 101, 104 (2005). *See also, Cooper Indus. v. Leatherman Tool Grp., Inc.,* 552 U.S. 424, 437 (2001).

The evidence must establish that something will occur with a requisite degree of certainty, which in this case is "likely," *i.e.,* "having a high probability of occurring or being true: very probable."[49] MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 10th ed. (1996). The occurrence that must be proven likely competitive harm that is "substantial," *i.e.,* "considerable in quantity: significantly great." *Id.* In accordance with the "narrow compass" given FOIA exceptions, the operative words, "likely" and "substantial" must not be given short shrift. The question is not whether disclosure of the information *might* cause substantial competitive harm, nor is it whether disclosure is likely to cause *some* competitive

[49] *See also* BLACK'S LAW DICTIONARY 4th ed. (1968) ("[I]n all probability.")

harm. USDA needed to prove to the District Court that there was a "high probability" the release of annual in-store SNAP payment information would cause SNAP retailers a "significantly great" amount of competitive harm.[50]

Because of the disparate contexts in which federal courts have considered an agency's "confidentiality" defense, it is substantively impractical to fit cases into a rigid mold. Distinctive features effectively necessitate a case-by-case treatment of the competitive harm cases. In other words, one size does not fit all. *See Dep't of Justice Guide to the Freedom of Information Act*: *Exemption 4*, at 309, 310 (2009; updated 2016) ("The courts have tended to resolve issues of competitive harm on a case-by-case basis rather than by establishing general guidelines.")

Although FOIA trials are relatively rare, in the event the likelihood of substantial competitive harm is a disputed fact, courts are apt to turn to experts for help. *See In Defense of Animals, v. USDA,* 501 F.Supp.2nd 1, 8 (D.D.C. 2007) (bench trial on prospect of competitive harm "would be greatly facilitated by expert testimony."); *See also Pub. Citizen Health Research Group v. FDA,* No. 94-0169, slip op. at 1 (D.D.C. Feb. 3, 1997) (*in camera* review of document by court and an expert for each party.)

Citing *Pub. Citizen Health Research Grp. v. Food & Drug Admin.,* 704 F.2d 1280 (D.C. Cir. 1983), FMI contended "a sophisticated economic analysis of the

[50] Although it was not specifically articulated, competitive harm presumably refers to diminished profitability.

likely effects of disclosure" is not a prerequisite to a finding of "substantial competitive harm." However, that is not to say a court should ignore economic expertise, should it be available.

At trial USDA rehashed its summary judgment contentions that the grocery business was competitive and that disclosure of a SNAP retailer's gross annual SNAP sales could lead to competitive targeting to that retailer's detriment. The District Court —this time with the added benefit of credible economic experts who rationally disputed that substantial competitive harm was likely to occur—found the predictive fact had not been proven. Expert opinion and common sense,[51] coupled with basic deficiencies in USDA's proof, provided the District Court with a solid foundation to reasonably infer that disclosure in this case was not likely to result in substantial competitive harm.

Ironically, USDA's decision not to appeal serves to validate the District Court's decision. In giving up after having spent 2 ½ years vigorously litigating its FOIA exemption 4 defense, USDA implicitly conveyed a conviction that the District Court was right. USDA, quite obviously, is not a defendant throwing in the towel for lack of money. It is also notable that one month after the trial, the Food and Nutrition Service's top official, USDA Under Secretary Kevin

[51] The trial court, assuming the jury's role, may believe all, part, or none of a witness's testimony and is required to reach a verdict "based only on the evidence, your common sense, and the law…." *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit*, §1.03 (2017 ed.).

Concannon, told *Wall Street Journal,* "There was fear that somehow [disclosure of the payment amounts] would adversely affect the competitive situation of stores. I don't share that view myself."[52]

As FMI recognized, there is a component of the "competitive harm" test that is not a matter of "predictive fact," namely, the existence of "actual competition." *Pub. Citizen Health, supra,* at 1291. Argus accepted that the grocery business is competitive and NGA's estimate that the net profit margin for food retailers is approximately 1%. But if it should be intuitively obvious that a 1% profit margin establishes a "highly competitive retail environment," it should also be intuitively obvious that the same low margin leaves precious little room for error in making competitive business decisions. Logically, that margin for error will be reflected in the speculative value the alleged SNAP-business predator ascribes to SNAP sales information. The smaller the margin, the less useful the information. And the less useful the information, the less likely it is to be used, let alone used effectively.

Unlike forecasting the outcome of mixing yellow paint with blue paint, the "predictive fact" in this case is not a scientifically verifiable result. Logically, that inherent uncertainty makes a finding on the "predictive fact" less susceptible of being regarded "clearly erroneous."

[52] https://www.wsj.com/articles/stores-accepting-food-stamps-face-stricter-rules-1467106205.

Dividing the "competitive harm" argument into various parts, as FMI did in its brief, is mainly cosmetic. It does not change the essence of the case. The central inquiry remains whether the District Court was legally obligated to find USDA's proof of competitive harm to be persuasive.

FMI maintained that *Madel v. U.S. Dep't of Justice,* 784 F.3rd 448 (8th Cir. 2015), serves as a dispositive 8th Circuit precedent on exemption 4 competitive harm. However, as noted, not every case fits the template. *Madel*, an appeal of a summary judgment, dealt with information that is markedly different from that in issue here.

The information in issue in *Madel* were spreadsheets documenting sales in Georgia of a specific product—oxycodone—by five private businesses and "identifying every buyer, location of sale, and amount of drug" and a report listing "quarterly drug-distribution totals by zip code for every drug and every state …for the period 2006 to 2015." After reviewing the probative requirements on summary judgment,[53] the 8th Circuit concurred that the spreadsheets could be used to determine the same type of market share, inventory and sales information contained in the separate report, which was being withheld on the ground the information was traceable to individual businesses. *Id.*, at 453-454.

[53] See *Missouri Coal. for Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3rd 1204, 1210 (8th Cir. 2008); *Quiñon v. FBI*, 86 F.3rd 1222, 1227 (D.C. Cir. 1996).

The information in the current case, in contrast, is a gross sales number attributable to a relatively small segment of grocery shoppers believed to be somewhere between 5-10% of overall sales. The proportion of SNAP sales to total sales will vary from store to store and remain unknown, as will any particular store's profitability, the customers' identities and purchases. Granted, much of the grocery business—display, service, products, hours, promotions, infrastructure, layout, service, promotions, etc.—has always been and remains independently and freely discoverable by means of simple observation. *E.g.,* Hays' testimony ("I personally do not [go to Walmart], except to go in and to assess my competition." Tr.T.172(16-17).) ("[I] [l]ook at what products [competitors] are carrying. Look at what prices they have on the products. Things like that." Tr.T.183(20-21).)

Knowing gross annual SNAP sales does not add appreciable value to that body of information. And that which is *not* observable—total sales and profitability, for instance—continue to be unknown.[54]

Given the grocery industry's "razor-thin" 1% profit margin**,** it seems unlikely that a grocery business will be particularly anxious to make a major

[54] As evidence of useful sales extrapolation, FMI cited the testimony of Joey Hays of Dyer Foods. ("[I]f you knew what percentage of my sales was paid for in SNAP benefits, you could come to a rough estimate, a better estimate…of what our store's sales are, and determine if you think there's more for you to get from us…." Tr.T.192(11-15)). But annual gross SNAP sales do not reveal a percentage relative to total sales. Hays's use of the word "rough" is notable. Infrastructure decisions based on "rough" estimates of sales might not prove to be prudent decisions.

investment gamble based on the amount another store grosses on an annual basis from SNAP. That the industry also has loyal patronage,[55] makes it an even bigger gamble and one even less likely to be taken.

Furthermore, it was a matter of emphasis for *Madel* Court that "Madel has offered no reason or evidence to disbelieve DEA's claims of harm [and] does not argue…that he can meaningfully contest the exemption's application." *Id.,* at 454. Plainly, Argus's request was for less detailed information, and its refutation of USDA's exemption 4 claims has been consistent and pronounced.[56]

Madel's dénouement proved interesting. Within a year of the 8th Circuit's decision, the DEA, voluntarily, released the "confidential" report in its entirety. On remand on the segregability issue, the Minnesota District Court criticized the agency for relying on the drug companies' disclosure objections "stated in broad terms and without any specific detail." The District Court held that "company-specific information by the buyer's county, business activity, drug type, transaction

---

[55] *See* Volpe testimony. ("[C]onsensus [of peer-reviewed studies and surveys] seems to be that [grocery] store-switching among households is relatively rare." Tr.T.361(13-20).)

[56] The 8th Circuit referred to the requestor's "rebuttal" in *Biles v. Dep't of Health & Human Servs.,* 931 F.Supp.2nd 211, 224 (D.D.C. 2013) as an example of what Madel did *not* do. The same cannot be said of Argus. Beyond the trial, itself, the record is replete with Argus's disputation and refutation of USDA's exemption 4 contentions, including the Argus memorandum of law opposing summary judgment (Document 73). [In deference to FED. R. APP. P 30(a)(2), Argus did not incorporate that memorandum in its appendix.]

date, dosage units, and total grams for the years [requested] is not exempt from disclosure under [exemption 4]." *Madel v. DOJ*, No. 13-2832, 2017 WL 111302 (D. Minn. Jan. 11, 2017). The DEA's action and the District Court's decision, at the very least, indicate that government agencies and/or private entities have a tendency to overstate their case for "confidentiality." Considering the "narrow compass" given FOIA exemptions, it should not be assumed that the sky is falling.

The procedural dissimilarity also has significance. As was the case with *Madel,* most FOIA appellate decisions address summary judgments. FMI, however, has appealed from the District Court's factual finding at trial. Under those circumstances, the trial court is entitled to considerable deference, which the "clearly erroneous" standard embodies.

Concluding its *Madel* comparison, FMI referred to the Kmart witness's testimony that there "would be concern that that sort of detailed store-level data provides unique insights that would facilitate competitors' efforts to steal our clients." "Concern," of course, is not proof that gross annual SNAP sales provide unique insights to competitors that will likely result in Kmart suffering substantial harm from those competitors. The crux of the matter is whether the information is the type that the competition can effectively exploit, causing substantial harm to and leaving no recourse for the SNAP retailer.

The nature of the information in the Argus case would appear to be unique among the exemption 4 cases, making the search for precedent a prickly undertaking. Whatever guidance the case law provides will be best derived from those with factual aspects that most closely resemble the SNAP scenario. *See, e.g., Center for Public Integrity v. Dep't. of Energy,* 191 F.Supp.2nd 187, 194 (D.D.C. 2002) ("[Agencies must be] able to demonstrate that release of the information would be of substantial assistance to competitors in estimating and undercutting a bidder's future bids.")[57] *See also, GC Micro Corp. v. Defense Logistics Agency,* 33 F.2nd 1109, 1111 (Exemption 4 does not protect general information on percentage and dollar amount of work subcontracted…that does not reveal the "breakdown of how the contractor is subcontracting the work…."); *N.C. Network,* No. 90-1443, slip op. at 9 (4th Cir. Feb. 5, 1991) (Exemption 4 does not cover general information regarding sales and pricing that would not reveal submitter's costs, profits, etc.) So although there may not be an "all-fours" precedent, the Argus's factual context that was before the District Court definitely tilts away from a case in which the party allegedly facing future competitive harm is more isolated and/or

[57] Naturally, in bidding cases the competitive harm from disclosure is more apt to be demonstrable—and demonstrably substantial—than in cases in which all competing businesses have an equal and continuing opportunity to share a market. *See, Dep't of Justice Guide to FOIA, supra,* at 328 ("On the other hand, protection under the competitive harm prong has been denied when the prospect of injury is remote—for example, when a government contract is not awarded competitively—or when the requested information is too general in nature.")

is furnishing the government with information that has a life of its own outside the confines of a government program in which there is voluntary participation.

FMI continued with the assertion that USDA had shown the annual SNAP payment information, if disclosed, would increase competition for SNAP retailers, would be used in competitive forecasting, would stigmatize high-performing SNAP stores.

USDA championed the SNAP retailers' generic allegation—typically expressed as a worry—that their competitors would be able use the SNAP information effectively to damage them. Relying on a handful of SNAP retailers, USDA advanced sweeping claims of harm that were ambiguous, vague, and excessively speculative.[58] The District Court had more than sufficient reason to find that USDA's comprehensive proof package did not carry enough weight either on summary judgment or at trial. *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291(D.C. Cir. 1983) ("[C]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents."); *Gilda Industries, Inc. v. U.S. Customs and Border Protection Bureau*, 457 F.Supp.2d 6, 10 (D.D.C. 2006) ([The agency] is not required to provide a detailed economic analysis of the

[58] While it is axiomatic that the "predictive fact entails some degree of speculation, it was incumbent upon USDA to prove it "likely." The trial court has the inherent authority to evaluate the evidence and consider it too speculative to prove a particular occurrence is "likely."

competitive environment, [but] must provide affidavits that contain more than mere conclusory statements of competitive harm."); *Lee v. FDIC*, 923 F.Supp. 451, 455 (S.D.N.Y. 1996) (Court rejected "competitive harm" claim when submitter failed to provide "adequate documentation of the specific, credible, and likely reasons why disclosure of [the information] would actually cause substantial competitive injury.") *Cf. Carmody & Torrance v. Def. Contract Mgmt. Agency,* No. 11-1738, 2014 U.S. Dist. LEXIS 33130 (D. Conn. Mar. 13, 2014) (private business contracting with government proved "actual competition in a bid for another U.S. government contract…[and that] [d]isclosure of [withheld] information would likely give competitors advantages in future bids;" however, court ordered disclosure of information that "would not cause substantial competitive harm.")

Significantly, USDA and the SNAP retailers failed to recognize that there is a difference between a worst-case scenario and a likely-case scenario. Virtually every argument and claim related to the former. There was no mention of the words "likely" or "substantial" in their evidence, let alone any explanation of their situational application. The District Court concentrated on what was "likely" to happen, not on what *might* happen and quite properly invoked its own common sense in the process.

Assuming USDA's worst-case scenario approach, FMI inherited the bifurcated prognoses that high (good) SNAP sales numbers would either attract or repel competition and low (bad) SNAP numbers would attract or repel competition.[59] The trial court, entrusted to make the finding on disclosure's likely competitive effect, certainly was not bound to subscribe to a theory based on such a perplexing incongruity and had sufficient reason to doubt USDA's predictive argument.

Additionally, the District Court was justified in factoring in what USDA did *not* address. USDA was asking the court to find a rationally direct connection between disclosure of annual store-level SNAP payment information at point A and a likelihood of substantial competitive harm to SNAP retailers at point B. To expect—and legally compel—the District Court to make that connection, USDA needed to do more than expose the retailers' antipathy for competition.

The occasional salute to competition notwithstanding,[60] the unvarnished tenor of USDA's case was that its group of SNAP retailers would prefer not to face

---

[59] As noted previously, the threshold problem is developing relatively precise appreciation for "good" and "bad" SNAP volume.

[60] *E.g.,* Johnstone testimony. ("I mean I think competition is good for America." Tr.T.230(16-20)); Larkin testimony. (Q: "[W]e assume competiton is good. Right?" A: "Yes." Tr.T.289(9-11)) Several retailers who used the NGA-produced declaration template included a stock statement that "[a]ll consumers are harmed when competition is lessened, reduced, or eliminated, particularly those who are economically challenged and reliant upon government assistance." FMI App.64, 76, 99, 118, 122.

any competition. Despite paying lip service to their public service, SNAP participation is more a matter of bottom line than charity. It is an understandable priority and not one that the District Court can be expected to ignore in the process of evaluating evidence. No court can be forced to suspend its common sense.

Throughout the case, USDA produced only a dim, sometimes contradictory view of the supposed SNAP aggressor, the competitive mechanisms that would be employed and, ultimately, the effective utility of the SNAP data. Even standing alone, the cherry-picked testimony upon which FMI based its argument would not have precluded the District Court winding up in reasonable disagreement with it.

Furthermore, a court's decision can be informed both by evidence that is produced and that which is not. In trying to build its road between disclosure and likely substantial competitive, SDA left some critical gaps.[61]

For example, USDA's retail group did not explain their helplessness in the face of competition. Yet there were indications that the "prey" might have means to effectively fight back against the hypothetical "predator" to minimize loss of, maintain or even increase customers, volume and profit. Kmart's representative, Andrew Johnstone, testified, "We pay attention to every bit of information about who the members and customers are who shop at a particular store, what they are buying, and we try to market them as effectively as possible." Tr.T.224(22-25).

[61] That is not to imply that USDA could necessarily have closed the gaps. Not every predictive fact has a logical basis.

Johnstone went on to acknowledge that Kmart has methods to stay competitive. Tr.T.225(3-5). Having previously identified "differentiation" as a "key" to a grocery retailer's continuing success,[62] NGA's Peter Larkin agreed that competition can stimulate business improvement, since "the nature of the business" is "to find a way to differentiate [yourself] and make the shopping experience for the consumer better than the competitor."[63] Tr.T.289(22)-290(8).

USDA conspicuously ignored the probative significance of the SNAP retailers' general apathy, as witnessed by the underwhelming response to the Request for Information (RFI). USDA personally contacted 321,988 SNAP retailers with an urgent message that a request had been made "for records that show your store's SNAP sale amounts [and] [m]aking this information public could impact you." The retailers were directed to the RFI that asked if they considered "SNAP redemption data at the individual store level to be confidential business information," and if they did, to "explain why the disclosure is likely to cause substantial competitive harm and fully explain all other grounds upon which you oppose the disclosure of such information." Despite the ominous tone and blatantly leading wording, few of the 321,988 SNAP retailers showed any concern whatsoever. According to USDA, 235 believed the information was confidential

[62] Tr.T.249(16-20).

[63] The Court's attention is directed again to the sealed testimony of Cumberland Farms' Mary Gwen Forman. Sealed Tr.T.26(10-17).

business information; only about 80 even mentioned the word "competition" in their responses; a veritable handful actually tried to explain competitive harm. USDA had turned to the retailers to help make its exemption 4 case because the retailers were in the best position to understand "the ways in which [they] may or may not compete with each other."[64] The staggering number of SNAP retailers who did not care enough to react to this anticipated threat to their livelihoods effectively decimates USDA's exemption 4 case.[65]

Although there is likely to be some pushback that trade organizations speak for their entire membership, that is plainly not the case.[66] Without establishing which members of a trade organization are actually being represented, "group representation" numbers are, essentially, meaningless. NGA's witness, Peter Larkin, provided a membership total for supermarkets with sales ranging from the "low end in terms of annual sales, $2 million to $5 million…up to approximately $5 billion in sales." Tr.T.242(1-10), 244(4-17). He did not know what percentage participated in SNAP. Tr.T.244(20-25). Larkin offered no estimate of the percentage actually espousing USDA's "competitive harm" doctrine or even

[64] FMI App.137.

[65] FMI attempted to encourage its members to provide USDA with declarations for use on summary judgment, but without success. Argus App.27; Argus App.30; Argus App.21, 22.

[66] Subtracting the entire memberships from 321,988 still leaves an overwhelming percentage of SNAP retailers whose silence was a valid answer to USDA's inquiry about competitive harm.

indicating concern. FMI did not participate at the trial, but approximated its membership in a summary judgment declaration. FMI did not include breakdowns based on size or SNAP participation or evidence of its members' interest or disinterest in the SNAP sales disclosure issue. However, it did claim to cover "the spectrum of diverse venues where food is sold, including single owner grocery stores [to] large multi-store supermarket chains…." FMI App.54.

Thinking through the feared hypothetical leads to an unavoidable conundrum. FMI and NGA contend that they represent SNAP retailer victims expected to suffer substantial harm from new competition generated by disclosure. Yet their grocer memberships encompass the small, the medium, and the large. While FMI and NGA claim to account for those on the losers' side of the post-disclosure equation, nobody seems to claim any association with those on the winners' side.[67] That omission puts a serious dent in the argument.

The use of annual SNAP sales volume for extrapolation is clearly fraught with statistical dangers. It is very plainly an inexact science with an abundance of variables. Common business sense suggests that in a business that requires very large outlays for very small marginal returns, the investment decisions will not be overly dependent upon that bit of added information.

[67] Andrew Johnstone, of Kmart, indicated, "[T]o some extent retail is a zero-sum game. A sale at Kmart is a lost sale at one of our competitors." Tr.T.229(25)-230(2).

SNAP sales data reveal just that, SNAP sales data. Significant unknowns remain, largely, unknown. *See, e.g,* Joey Hays' testimony. ("So [to assess the sale potential of a store] we need to know what their sales are and all the things that go along behind it in their profitability and loss statement." Tr.T.170(24)-171(1); and Tr.T.180(18)-119(3)) *See also* Andrew Johnstone (Kmart) ("Any information about the performance of our stores, about the particular customers who shop at our stores, what they are buying at our stores, that provides insights to our competitors that would help them potentially steal customers away from Kmart." Tr.T.211(11-15)

FMI also reproduced USDA's "stigma" argument that is perplexing and untenable. It, too, is presented as a double-barreled concern. Non-SNAP customers, supposedly, will desert stores that become identified—"stigmatized"—as SNAP-friendly due to disclosure of their SNAP sales volume. The SNAP-friendly store's problem is compounded, purportedly, by the anticipated defection of the SNAP customers, who, themselves, are "stigmatized."

The retailers seemed to be generally conflicted on the matter of stigma. Although they complained that disclosure of SNAP data would cause them to be stigmatized as a SNAP store, most of them also paid homage to SNAP and prided themselves for their "service." Declarants replicating the NGA form, included a paragraph that read: "[Store name] has served SNAP recipients in its store(s) for

[period of years] in order to assist low income people in need of food and nutritional assistance." FMI App.56, 60, 63, 71, 75, 98, 117, 121, 125. FMI's sworn declaration referred to its members' participation as "support [of[the program." FMI App.54. Kmart's stated, "We greatly appreciate the opportunity to participate in the SNAP program, and would be honored to continue as a SNAP retailer. We believe ensuring that SNAP recipients have continued access to SNAP retailers is of the utmost importance to the health and economy of this nation…."[68] FMI App.101.

Even retailers explicitly marketing to SNAP customers expressed "stigma" anxiety. Joey Hays, of Dyer Foods, testified his stores "market to [the SNAP demographic]" and he didn't "know anybody that doesn't want [SNAP] business." Tr.T.174(18-22); Tr.T.196(14-16). But he worried that being "known for doing a lot of [SNAP] business" could hurt. Tr.T.176(8-11). Andrew Johnstone, of Kmart, stated, "[W]e do try to market to low-income consumers, consumers who take advantage of the SNAP program." Tr.T.209(4-6). But he later added, "The

[68] Cumberland Farms' self-contradiction was particularly flagrant. In its response to USDA's RFI, in-house counsel for Cumberland wrote, ("[We are] committed to making life easier for member of the communities we serve. Often, that commitment means providing an essential grocery source for low-income customers working hard to make ends meets. To that end, nearly all Cumberland Farms stores accept SNAP benefits, and SNAP beneficiaries rely on those stores every day to meet their basic needs for qualified food and beverage purchases—including a variety of dairy, fruits, and other healthful offerings." FMI App.88. At trial, however, Cumberland's witness spoke a much harsher truth to which Argus directs the Court's attention. Sealed Tr.T.26(5-9).

disclosure [that a particular base of customers at a store are SNAP customers] could have a stigmatic effect or a negative effect." Tr.T.211(19-23).

Overlooked in all this stigma frenzy is the fact that the names and locations of all SNAP retailers are a matter of public record,[69] accessible to anybody. If, indeed, there exists a class of grocery shopper who is intent on avoiding patronizing the SNAP retailer or possibly rubbing shoulders with a SNAP shopper in the grocery store, it is doubtful the decision has not already been made. SNAP sales information would be superfluous. Further, if it is argued that a SNAP stigma will cost a store SNAP business, it is fair to assume that the competitor(s) who took away the business will inherit the stigma. Joey Hays, of Dyer Foods, submitted that it is the SNAP customer who will be stigmatized and will look to shop elsewhere.[70] But, obviously, those SNAP customers are going to have to shop somewhere. If SNAP volume and the SNAP stigma truly go hand in hand, logic dictates that wherever the stigmatized SNAP customer goes, the stigma follows.

Clearly, the contention that good SNAP sales will lead a competitor to steal SNAP customers and the contention that good SNAP sales will stigmatize a store cannot lead to the same result. How does the store that steals the SNAP customers escape the stigma?

---

[69] https://www.fns.usda.gov/snap/retailerlocator.

[70] Tr.T.193(25)-194(1); Tr.T.196(21-25).

FMI suggests if "competitive harm" cannot be proven though traditional channels, "external indicia" are a substitute means "to show that disclosure of certain information would cause competitive harm." The thrust of the argument seems to be that if acquisition of a business's unknown commercial information came at a cost to its competitors and/or the business took steps to maintain its confidentiality, its free public release would translate into "substantial competitive harm." The flaw is there is no evidence of the "commercial value" that would supposedly upset "the existing balance of relative costs." What would the competition pay for a retailer's SNAP sales? And does the fact a SNAP retailer keeps the information secret automatically make it "valuable"? As for the "balance," it is worth remembering that if there is an actual market for SNAP sales data, it is a two-way street between competitors.

Whether information is costly—or even impossible to obtain—is simply not the point. The factual issue is whether disclosure is likely to cause substantial competitive harm. FMI's arguments dance around the fringes of that question, and for good reason. There is really very little to indicate that disclosure of SNAP sales will so alter the competitive landscape for SNAP retailers that they incur substantial economic loss. USDA simply did not present a persuasive prospectus

that "substantial" harm was "likely."[71] And while we do not have a crystal ball, as NGA's Peter Larkin noted, we do have common sense.

Criticizing the District Court's analysis and citing *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2nd 673, 683 (D.C. Cir. 1976), FMI urged the Court to consider "the nature of the material sought and the competitive circumstances in which the [submitters][72] do business, relying at least in part on relevant and credible opinion testimony." The "material sought" in this case is simply government payment information under a government program, and the "competitive circumstances," voluntary participation in that government program. The *Kleppe* material—"detailed financial information" submitted to government—was decidedly different.

According to FMI, "[i]n…a highly-competitive environment, *any* additional insights into a competitor's business could have an outsized effect." FMI Brief, p.35 (Emphasis in the original.) The operative word in that pronouncement is "could," which does not mean "is likely." Furthermore, the quality of the "insight" and context can make an appreciable difference in whether or not an "outsized"

---

[71] When it comes to retailers' descriptions of anticipated competition, the trial transcript is filled with "could's" and "might's." Neither means "likely."

[72] FMI's insertion of the word "submitters" suggests how different the Argus SNAP case really is. Argus wants government's SNAP records. To the extent there is any retailer "submission" involved, it is simply a record of retailer's voluntary participation in a public program.

effect is predictable. It is most certainly not a given, and presenting it as such casually skips over USDA's need to prove the disclosure of information in this case is likely to cause substantial competitive harm.

To bolster its claim that "the importance of the competitive landscape" is a matter of common sense, FMI turned to non-FOIA "contexts where competitive information is acknowledged as protectable." The exercise serves as a reminder that competitive landscapes differ, as does the nature of the information being protected. This case has little in common with FMI's examples. The landscape here is quite level. All 321,000 SNAP retailers would have access to the same information.

Finally, FMI takes direct aim at the District Court's interpretation of some evidence—particularly Bruce Kondracki's rebuttal model testimony. The District Court had suggested that Kondracki's model correlation numbers seemed to confirm the opinions of Argus's experts on the added valule of SNAP sales information. Whether or not Kondracki actually did agree with Argus's experts was not dispositive. Furthermore, even if Kondracki was misunderstood on that point, it did not mean that his targeting model held the answer.[73] Considering that there are a host of other factors that Kondracki would still not know or could not

[73] A boast of being able to make a "huge impact" if there is information that "helps us understand" store performance, for instance, leaves a lot to the imagination. Tr.T. 392(17-20). *Compare* Tr.T.403(3-12).

employ effectively in a model, his rebuttal testimony may have been the last words, literally, but not figuratively. The District Court deals with the totality of the evidence.

FMI's final "competitive harm" argument appears to be borrowed from FOIA exemption 6. FMI advanced a "balancing-of-interests" test that USDA had emphatically rejected.[74] FMI App.205-207. Argus, on the other hand, is quite comfortable with a meaningful balancing of interests, because it essentially would permit disclosure proponents to prevail, regardless of the likelihood of substantial competitive harm. FMI would limit "public interest in disclosure" under FOIA to that which contributes "significantly to public understanding of the operations or activities of government." *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487 (1994) However, in view of FOIA rules of construction, a more liberal interpretation is eminently reasonable. As the District Court noted in the denial of USDA's summary judgment motion, "there is a great public interest in full disclosure of the parameters of the SNAP program." FMI App.177. And "great public interest" should suffice when the subject matter is public spending.

[74] To be sure, USDA wasted no effort following up with any RFI respondents favoring disclosure, no matter how articulate and well-reasoned their views. Argus included samples in its statement of material facts. **App. (Doc. 72)**

2. <u>Retailer secrecy preference is not the "confidential" test and was never raised or argued by USDA in the District Court.</u> (FMI #2)

FMI has asked the Court to add a third option to the exemption 4 confidentiality test—one based on the wishes or customs of the SNAP retailer—despite the fixed requirement that FOIA exemptions be narrowly construed. *Missouri Coal. for the Env't Found. V. U.S. Army Corps of Eng'rs,* 542 F.3d 1204, 1208 (8th Cir. 2008) (Holding that all FOIA exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act.") *See also, Argus Leader Media, supra,* 740 F.3rd 1172. It almost appears that FMI is using exemption 4 as a pretext to revive USDA's moribund exemption 6 defense.

The exemption 4 confidentiality test, with its two alternative prongs, is well-established and —as USDA recognized—is controlling law in the 8th Circuit. The relevant prong is the "likelihood of substantial competitive harm."

USDA did not assert or argue that a SNAP retailer's preference for secrecy of the SNAP sales data was a factor in this case in the District Court. *See* Fn.1, above. Since the issue is being raised for the first time on appeal, it does not merit the Court's consideration. *Jenkins by Agyei, supra,* 962 F.2d 762, 766; *Roth v. Dep't of Justice, supra,* 642 F.3d 1161, 1179-80.

In any event, were a court to consider adding a third prong to National Parks I, it is highly unlikely retailer secrecy would be a viable candidate. Criticizing a proposal to deviate from National Parks I in *9 to 5 Org. for Women Office Workers v. Bd. Of Governors of Fed. Reserve Sys.*, 721 F.2nd 1, 9 (1st Cir. 1983), the Court cited a House Committee report, flatly rejecting a "disclosure policy…contingent on the subjective intent of those who submit information." H.R.Rep. No. 95-1382, 95th Cong., 2nd Sess. 18 (1978). The Court went on to note:

> The emphasis [of exemption 4 protection] should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential.

Id. at 10.[75]

Argus's FOIA request was not directed at SNAP retailers to uncover their internal business secrets. Argus, instead, asked the government to disclose the government's spending records under a government program—a program in which the retailers happen to participate voluntarily. However one chooses to label this SNAP information—as payments, sales or redemptions—it has no independent existence outside the context of SNAP.

USDA's analysis also presupposed an element of ownership missing here. Even in the atypical case in which a person submits "commercial information"

[75] It is also highly doubtful a court would allow a business to prevent government from disclosing information in a "reverse FOIA" case by simply declaring the information to be secret.

about a "third party," USDA recognized that the "commercial interest" must "belong" to the person who allegedly stands to be harmed by disclosure of the information. FMI App.146. Argus wants the *government's* information.

FMI's attempt to introduce this "secrecy" defense effectively underscores just how different this case is, factually and contextually, from other exemption 4 scenarios. In most instances, exemption 4 functions as protection for private business information that "the government requires a private party to submit…as a condition of doing business with the government." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 29 (D.D.C. 2000)[76] However, SNAP payment information is not pre-existing information about a person or entity that is being submitted to qualify to go into business with the government. It is, instead, a record of that business actually being conducted. SNAP is a self-contained transactional process within the federal government's orbit. As a practical matter, the EBT provides a means for SNAP retailers to bill the government—if indirectly—and to be paid.

[76] To the extent legislative history is useful, the explicit congressional exemption 4 concern—as USDA noted—was to "assure confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies…." H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). FMI App.141. That is not a description that readily fits SNAP payment information either by type or derivation.

To conclude, those in the private sector choosing to do business with the government should reasonably expect to sacrifice some privacy in relation to the conduct of that business. *See Racal-Milgo Gov't Sys. v. SBA,* 559 F.Supp. 4, 6 (D.D.C. 1981) ("Disclosure of prices charged the Government is a cost of doing business with the Government."); *EHE,* No. 81-1087, slip op. at 4 (D.D.C. Feb. 24, 1984) ("[O]ne who would do business with the government must expect that more [information] is more likely to become known to others than in the case of a purely private agreement.") Permitting the private business to dictate government secrecy is akin to letting the tail wag the dog.

3. Administrative efficacy is not the "confidential" test and was never raised or argued by USDA in the District Court. (FMI #3)

In a last-ditch argument, FMI has asserted that "government's interest in [SNAP's] efficiency and effectiveness" should be an optional third prong of the "confidentiality" test. It is another issue being raised for the first time on appeal. USDA strictly adhered to the "competitive harm" test of "confidentiality," in keeping with the controlling law. Therefore, it also is not an issue that the Court should consider. *Jenkins by Agyei, supra,* 962 F.2d 762, 766; *Roth v. Dep't of Justice, supra,* 642 F.3d 1161, 1179-80.

The argument lacks merit in any case. That USDA—the agency managing SNAP—made no claim that disclosure of SNAP payment information would harm

administrative efficacy is a telling decision that undermines FMI's argument and proves its apprehension to be misplaced.[77] Were administrative efficacy in issue, it stands to reason that the government administrator would be in a better position than FMI to evaluate the alleged harm. In short, FMI should not be permitted to invent a case for the government—especially when the government does not share that conviction. FMI's contentions are also flawed by bias.

There is no logical basis for assuming, for instance, that increased competition—the basic complaint of the SNAP retail trial witnesses—will be harmful to the SNAP recipients.[78] If anything, free-market competition should help SNAP households stretch their purchasing power, ultimately improving the quality and quantity of what they can buy with their benefits. This is fundamental economics. *See, e.g.,* Paul A. Samuelson, *Economics: An Introductory Analysis,* pp. 57-71 (7th ed. 1967). It also represents SNAP's core purpose, which, as FMI noted, is "to increase the food purchasing power of low-income households through normal economic channels." FMI brief p.52; 7 U.S.C. §2011.

The argument that disclosure could result in a reduction in the number of retailers participating in SNAP is far-fetched. First, it is at odds with the basic

[77] Had USDA been genuinely concerned that disclosure would negatively affect SNAP's administration and function, it undoubtedly would have appealed.

[78] As previously noted, SNAP retailers generally supported the concept of competition.

"competitive harm" premise that new competition will be moving in on existing SNAP retailer turf. Presumably, that would add to the number. Second, it also conflicts with the corollary premise that SNAP sales are important to the SNAP retailers. If that is true, would a SNAP retailer give up those sales just to avoid having them made public? It is highly doubtful a retailer would cut off his nose to spite his face. Presumably, their business sense deserves more credit.[79]

A final thought is the very real possibility that disclosure of SNAP sales information might very well deter fraud in the program. Citing a USDA's own research study, *The Extent of Trafficking in the SNAP: 2009-2011,* this Court pointed out "approximately ten percent of participating retailers engage in trafficking." *Argus Leader Media, supra,* 740 F.3d at 1174. A high-volume SNAP trafficker would undoubtedly find transparency discomfiting. Public awareness could also prove helpful in identifying and combatting fraud. *See Argus Leader Media, supra,* 740 F.3d at 1177. ("Congress has clearly indicated its intent to involve the public in counteracting fraud perpetuated by retailers participating in the program.") Reducing fraud in a government program benefits everybody but the criminal.

[79] The RFI response—to which all 321,988 SNAP locations were urged to respond—did not suggest there would be an exodus, let alone a mass exodus, from SNAP, should SNAP sales be disclosed.

CONCLUSION

The cornerstone of the Freedom of Information Act is the presumption that federal government agencies' records are open record, reflecting the basic tenet that in a democracy, the government belongs to the people. FOIA confers on the public the right to know the annual amounts the government pays out to stores under USDA's Supplemental Nutrition Assistance Program. The Argus's FOIA request in this case could be justifiably denied if and only USDA could overcome the presumption. To defend a denial, USDA needed to substantiate the application of one of FOIA's nine exemptions, a group of exceptions that are not intended to be liberally interpreted. After failing on exemption 3 and scuttling exemption 6, USDA's defense was reduced to the "confidentiality" branch of exemption 4. Specifically, USDA needed to prove that disclosure of the requested information would likely cause substantial competitive harm to SNAP retailers.

As this exemption 4 case wended its way through summary judgment and trial, the District Court had ample opportunity to evaluate the information and the competitive context and USDA's claims. Through its hand-picked SNAP retailers, USDA did prove that those retailers do not like competition. USDA also proved that those same retailers do not want their SNAP sales known. Left shrouded in doubt, however, was the *likely* effect on competition. USDA had the burden of demonstrating that *substantial* competitive harm was the likely result of disclosure.

But when the dust had settled, the necessary link between disclosure and substantial competitive harm remained uncertain and tenuous. The District Court had sufficient basis for finding that the likelihood of substantial competitive harm had not been proven and, consequently, that exemption 4 did not apply.

Since the dispositive fact in the exemption 4 "competitive harm" context is an unknown, those cases boil down to predictions based on circumstances that are likely to vary dramatically from case to case. Again, there is no set formula for the determination of likelihood of substantial competitive harm.

In this case the District Court was not persuaded by USDA's attempt to show the harm with an approach that never got beyond "could" and "might" and never provided any sense of what it considered "substantial." USDA seemed to have come to the same conclusion, as did 321,000 or so SNAP retailers who were portrayed as potential "victims" of disclosure. There was no better evidence in this case than the fact that almost none of the SNAP retailers reacted to the dire warnings USDA sent them. And those SNAP retailers would logically be the first ones to want to protect themselves. They clearly did not buy into the imaginary risk that substantial competitive harm was coming their way.

Unless the goal is to protect SNAP retailers from any possibility of competition, the District Court's finding cannot be considered clearly erroneous. It bears emphasis that the question is not whether the disclosure of the SNAP

payment data might or could cause competitive harm. And on the flipside, it is also not a question of proving a little harm, some harm, or moderate harm. The competitive harm that must be proven to be likely is substantial.

It would be unreasonable to conclude that the District Court, given its long history and understanding of this case, clearly erred on the predictive fact question and reached the wrong decision. In actuality, the District Court's ruling that the information requested by Argus was not protected by FOIA exemption 4 was not only eminently defensible, but also correct.

Dated this 16th day of October, 2017.

/s/ Jon E. Arneson
Jon E. Arneson
South Dakota Bar #45
123 S. Main Ave., Ste. 202
Sioux Falls, SD 57104
(605) 335-0083
Attorney for Appellee, ARGUS LEADER MEDIA

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 12,628 words, excluding parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft®Word for Mac 2011, Version 14.7.6 in 14-point New Times Roman.

3. Jon E. Arneson, attorney for Appellee, hereby certifies pursuant to 8th Cir. R. 28A(h) that this brief has been scanned for viruses and is virus free.

/s/ Jon E. Arneson
Jon E. Arneson

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were served through the CM/ECF on all registered counsel on October 16, 2017.

/s/ Jon E. Arneson
Jon E. Arneson