

CASE NO. 17-1346

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendant,

and

FOOD MARKETING INSTITUTE,

Intervenor Defendant-Appellant.

On Appeal From the United States District Court
for the District of South Dakota — Sioux Falls
(4:11-cv-04121-KES)

**BRIEF *AMICUS CURIAE* OF NATIONAL GROCERS ASSOCIATION IN
SUPPORT OF INTERVENOR/APPELLANT AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1A, National Grocers Association (“NGA”) makes the following disclosures:

NGA is a voluntary trade association, with headquarters in Arlington, Virginia, that represents more than 1,325 retail and wholesale members operating more than 7,125 retail food stores in all fifty states. NGA has no parent corporation and no publicly held corporations have an ownership interest in NGA.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENTS OF IDENTITY, INTEREST, AND AUTHORSHIP.....1

STATEMENT OF THE CASE.....2

SUMMARY OF THE ARGUMENT3

ARGUMENT5

 I. USDA Proved That SNAP Retailers Would Suffer Substantial
 Competitive Harm6

 II. SNAP-Authorized Retailers Will Sustain Substantial Competitive Harm
 If Store-Level SNAP Redemption Is Disclosed.....9

 III. Disclosure of Store-Level SNAP Redemption Data Will Shed No Light
 on Governmental Activities and Will Harm the Food Stamp Program and
 SNAP Beneficiaries.....13

CONCLUSION.....16

CERTIFICATE OF COMPLIANCE.....17

CERTIFICATE OF SERVICE18

TABLE OF AUTHORITIES

Cases

Contract Freighters, Inc. v Sec’y of U.S. Dep’t of Transp.,
[260 F.3d 858](#) (8th Cir. 2001)7

Dep’t of Air Force v. Rose, [425 U.S. 352](#) (1976)13

Gulf & Western Indus. v. United States, [615 F.2d 527](#) (D.C. Cir. 1979)7, 8

John Doe Agency v. John Doe Corp., [493 U.S. 146](#) (1989).....13

Madel v. U.S. Dep’t of Justice, [784 F.3d 448](#) (8th Cir. 2015)6

Nat’l Parks & Conservation Ass’n v. Morton,
[498 F. 2d 765](#), (D.C. Cir. 1974)..... 7, 13

Pub. Citizen Health Research Grp. v. Food & Drug Admin.,
[704 F.2d 1280](#) (D.C. Cir. 1983).....8

Statutes

[5 U.S.C. §552](#)3

[5 U.S.C. §552\(b\)\(4\)](#)..... 3, 13

[7 U.S.C. §2011](#)16

Other Authorities

Data Warehouse Institute, *Extending the Value of your Data Warehousing Investment* (2007)10

Warudkar, H., *Top-5 Uses of Predictive Analytics for Supermarkets and Retail Stores*10

STATEMENTS OF IDENTITY, INTEREST, AND AUTHORSHIP

NGA submits this brief pursuant to [Fed. R. App. P. 29\(b\)](#). NGA is a District of Columbia non-profit corporation with the principal place of business in Arlington, Virginia. NGA and its more than 1,300 retailer members have a strong interest in ensuring that the manner in which the Freedom of Information Act (FOIA) is interpreted strikes a proper balance between public access to governmental records and protection of private confidential information from disclosure. NGA's Chief Executive Officer testified at the trial before the district court, and NGA members and officials submitted declarations in support of FMI's post-judgment Motion to Intervene.

No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than NGA contributed money intended to fund preparing or submitting this brief.

Counsel for Appellant Food Marketing Institute (FMI) advised that it does not oppose this motion. Counsel for Appellee Argus Leader Media (*Argus Leader*) advised that it reserved its right to oppose this motion.

Websites cited in this brief were last visited on August 17, 2017.

STATEMENT OF THE CASE

During 2011, a reporter for the *Argus Leader*, a Sioux Falls, South Dakota newspaper, submitted a FOIA request to the United States Department of Agriculture's (USDA) Food and Nutrition Service (FNS) seeking, *inter alia*, store-level Supplemental Nutrition Assistance Program (SNAP) redemption data at each of the more than 320,000 SNAP-authorized retail food stores during a five year period. FNS denied that portion of the *Argus Leader*'s FOIA request, asserting that store-level SNAP redemption data was exempt from disclosure pursuant to Exemptions 3, 4 and 6.

In August 2011, the *Argus Leader* sued USDA, alleging that FNS improperly failed to produce store-level SNAP redemption data. The District Court initially entered summary judgment in favor of USDA with respect to its assertion of Exemption 3. After its judgment was reversed by this Court, the District Court held a bench trial on the applicability of Exemption 4 to the requested store-level SNAP redemption data. In a November 30, 2016, Memorandum Opinion and Order, the District Court held that Exemption 4 was inapplicable because the agency failed to prove that the disclosure of store-level SNAP redemption data would cause retailers substantial competitive harm.

SUMMARY OF THE ARGUMENT

More than 260,000 retail food stores are currently authorized by FNS to accept SNAP benefits as payment for eligible food items from more than forty million low-income Americans. Although FNS publishes considerable information regarding SNAP redemptions, including national, state and local SNAP redemption data, it does not disclose individual store-level data in response to requests submitted pursuant to FOIA, [5 U.S.C. §552](#).

FOIA Exemption 4 is intended to safeguard confidential commercial or financial information from competitive disadvantages that could result from disclosure, regardless of how the information has come into the hands of the Federal Government. [5 U.S.C. §552\(b\)\(4\)](#). It is also intended to assure companies that submit information to the Federal Government that their confidential commercial or financial information will not be revealed to third parties. When disclosure of confidential commercial or financial information is likely to cause substantive competitive harm flowing from the use of proprietary information by competitors, Exemption 4 of the FOIA protects against the release of such confidential commercial or financial information.

This case presents an important question regarding the quantum of proof necessary to support a federal agency's decision to decline to disclose confidential commercial or financial information pursuant to FOIA Exemption 4. NGA

respectfully urges this Court to reverse the decision of the District Court because the testimony at trial established that retailers will sustain substantial competitive harm in the event that individual store-level SNAP redemption data are released. Federal agencies are not required to prove that substantial harm is virtually certain to result from disclosure, only that such harm is likely. The release of store-level SNAP redemption data is also likely to harm the effectiveness of the program because many retailers are likely to withdraw from participation, thereby making it more difficult for beneficiaries to redeem their benefits.

NGA recognizes and agrees that Congress enacted FOIA to provide a means for citizens to know about the activities of their government. But the *Argus Leader* -- and anyone with an internet connection -- can already ascertain the dollar value of SNAP redemptions at the national, state, and even zip code level. To the contrary, the dollar value of SNAP redemptions at each of the quarter-million plus SNAP-authorized retailers across the country does not shed light on what the federal government is up to; instead, disclosure of store-level SNAP redemption data will enable retailers use such information to their advantage and cause substantial harm to other retailers. This is precisely why Congress enacted Exemption 4 and why this Court should reverse the District Court.

ARGUMENT

This appeal raises an important question regarding the protection of private confidential information from disclosure under FOIA. In enacting FOIA, Congress did not intend that it be used as a tool to compel federal agencies to release of private confidential information likely to cause substantial competitive harm to private entities. This is especially true in the context of a FOIA request for store-level SNAP redemption data in an already extremely competitive retail food industry.

NGA strongly concurs with the arguments set forth by FMI regarding the appropriate treatment of store-level SNAP redemption data. NGA agrees that store-level SNAP redemption data are exempt from disclosure pursuant to FOIA Exemption 4. We respectfully submit that the District Court, in concluding that USDA failed to prove that substantial competitive harm would result if such data were disclosed, set the evidentiary bar too high. Finally, NGA believes that the District Court's unduly narrow interpretation of Exemption 4 undermines a key aspect of this important governmental program – a well-functioning marketplace for SNAP beneficiaries to redeem their benefits.

I. USDA Proved That SNAP Retailers Would Suffer Substantial Competitive Harm

The District Court erroneously concluded that USDA did not prove that retailers are likely to sustain competitive harm from the release of store-level SNAP redemption data, notwithstanding its finding that “competition in the grocery business is fierce.” AR 229. Instead, it deemed the evidence presented at trial regarding potential competitive harm “speculative at best.” AR 231. The District Court’s decision should be reversed because it cannot be reconciled with the portion of this Court’s decision in *Madel v. U.S. Dep’t of Justice*, [784 F.3d 448](#) (8th Cir. 2015) and other applicable authorities pertaining to Exemption 4.

In *Madel*, this Court affirmed the district court’s holding that the Drug Enforcement Agency (DEA) properly asserted Exemption 4 in declining to release confidential sales data submitted to the agency by four private companies. There, the record contained a declaration from the DEA’s FOIA Chief that summarized the concerns of the private entities regarding the competitive harm that would occur if the information was released:

The Declaration notes that competitors could use this information . . . “to target specific markets, forecast potential business of new locations, or to gain market share in existing locations,” thereby gaining competitive advantage.

Id. at 453. Based thereon, this Court concluded that the agency’s declaration demonstrated that “substantial harm is likely.” *Id.*

This District Court correctly noted that this Court’s decision in *Contract Freighters, Inc. v Sec’y of U.S. Dep’t of Transp.*, [260 F.3d 858](#) (8th Cir. 2001) governs FOIA cases arising under Exemption 4. In *Contract Freighters*, this Court adopted the test first established in *Nat’l Parks & Conservation Ass’n v. Morton*, [498 F. 2d 765](#), (D.C. Cir. 1974). The District Court, however, went beyond the scope of this Court’s decision in *Madel* and imposed an unduly high burden of proof on USDA.

The party invoking Exemption 4 does not need “to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would ‘likely’ to so.” *Gulf & Western Indus. v. United States*, [615 F.2d 527, 530](#) (D.C. Cir. 1979)(citing *Nat’l Parks & Conservation Ass’n v. Kleppe*, [547 F.2d 673](#) (D.C. Cir. 1976). “No actual adverse effect on competition need be shown, nor could it be, for the requested documents have not been released.” *Id.* at 683.

To determine whether information is confidential, district courts are required to evaluate whether disclosure of the withheld information is likely either to: (1) impair the government’s ability to obtain the necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Nat’l Parks*, [498 F.2d at 770](#). The District Court’s decision was premised on the second prong -- whether disclosure of store-level SNAP redemption data would cause substantial competitive harm to retailers.

Review of the District Court’s opinion leads to the conclusion that virtually nothing short of an economic treatise would have been sufficient. Nothing in *Madel* or any other Exemption 4 decision imposes such a high evidentiary hurdle to support an agency’s decision to withhold confidential financial or commercial information.

District courts need not conduct a “sophisticated economic analysis of the likely effects of disclosure” to determine if substantial competitive harm is likely to result. *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, [704 F.2d 1280, 1291](#) (D.C. Cir. 1983). Similarly, an agency asserting Exemption 4 need not “show actual competitive harm.” *Id.* Rather, “‘evidence revealing [a]ctual competition and the likelihood of substantial competitive injury’ is sufficient to bring commercial information within the realm of confidentiality.” *Id.* (citing *Gulf & Western Indus.*, [615 F.2d at 530](#)). Competitive injury, however, “[is] limited to harm flowing from the affirmative use of proprietary information *by competitors* . . . [and] should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from . . . embarrassing publicity.” *Pub. Citizen*, [704 F.2d at 1291 n.30](#).

Although the District Court correctly determined that “the grocery industry has actual competition,” thereby satisfying that requirement, it declined to recognize that disclosure of store-level SNAP redemption data would reveal

retailers' confidential financial or commercial information. Without question, sales data, including SNAP redemption data, cuts to the core of the retail food industry and there is little doubt that some retailers will rely on this information to the financial detriment of other retailers. If store-level SNAP redemption data are disclosed, retailers will use that information (in combination with existing data and tools, including FNS's SNAP Retailer Locator¹) to reverse engineer total sales at competitors' stores. And gaining access to a competitor's store-level sales data is the holy grail of the retail food industry. There is no reasonable dispute that release of store-level SNAP redemption data would be a windfall to retailers by providing them with confidential information that has never been made publicly available, thereby bestowing a clear competitive advantage.

II. SNAP-Authorized Retailers Will Sustain Substantial Competitive Harm If Store-Level SNAP Redemption Is Disclosed

Competition in the traditional retail food marketplace has been fierce for decades and continues to increase with pressure from superstores, drug stores, warehouse clubs, small format/limited assortment grocery store, and a wide variety of alternative channels. With incredibly tight profit margins, retailers use all available tools in order to maintain and expand their customer base and revenues.

¹ The FNS website contains a searchable SNAP Retailer Locator. <https://www.fns.usda.gov/snap/retailerlocator>. Although this tool exists to assist SNAP beneficiaries in locating authorized retailers, it will also be used by retailers for competitive purposes if SNAP redemption data are disclosed.

Predictive analytics has been described as “the science of forecasting future trends based on the study of present-day and past data.” Warudkar, H., *Top-5 Uses of Predictive Analytics for Supermarkets and Retail Stores*, available at expressanalytics.com/analytics/data-analytics/top-5-uses-of-predictive-analytics-for-supermarkets-and-retail-grocers. Predictive analytics uses a variety of statistics and modeling techniques, and utilizes data mining, business intelligence tools, and machine information, to make predictions. See Data Warehouse Institute, *Extending the Value of your Data Warehousing Investment* (2007), available at tdwi.org/articles/2007/05/10/predictive-analytics.aspx?sc_lang=en. Although most uses of predictive analytics in the retail food industry are currently internally focused, retailers also use data for retail site selection. Geographic site selection in the retail food industry is a critically important factor in the long-term profitability and viability of a supermarket or other retail food store. II.RR. 381. But determining where to place a retail food store is far from a precise scientific exercise. To the contrary, while many sources of information are available to retailers and firms specializing in analytics may include market potential analysis, demographic, census, and market data analysis, trade area development and mapping, and customer profiling, they do not extend to a retailer’s sales data, including SNAP redemption data.

During the bench trial before the District Court, Peter Larkin, NGA's Chief Executive Officer, testified that a store's sales data, including SNAP redemption data, is not publicly available and is confidential, closely guarded information. I.R.R. 251. Mr. Larkin stated neither total sales nor SNAP redemptions is public information and is not typically known "beyond just a couple of people." II. RR. 277-78. Mr. Larkin viewed the release of SNAP redemption data as a "game-changer in terms of adding that piece of information into the mix." II. RR. 277. He described the disclosure of SNAP redemption data as "very, very dangerous fuel" to an industry where the level of competition is fierce and increasing and where average net (pre-tax) profits are under one percent. I.R.R. 244-46, 254-55.

The adverse competitive impact on retailers related to disclosure of store-level SNAP redemption data was further illustrated by the testimony of Bruce Kondracki, whose firm conducts consumer behavior modeling for supermarkets and other in the retail grocery industry. Mr. Kondracki testified that the release of store-level SNAP redemption data would have a dramatic impact on the ability of data analytics firms to accurately model sales at competitors' stores. Access to store-level SNAP redemption data "will create a windfall for us and for our competitors to target and benchmark these store sales." II.R.R. 393. Currently, the accuracy of models created by market analytics firms is constrained by the available data, which excludes competitors' sales data. Kondracki noted that the

starting point for designing predictive models is sales data from his clients' stores in a particular area. II.RR. 394. Additional variables, including income and other demographical information, are utilized in an algorithm that is repeatedly adjusted. But predictive models are based on "assumptions," not hard data regarding SNAP redemptions at other stores. II.RR. 393-94.

In the event that store-level SNAP redemption data are released, the accuracy of predictive models will "become more and more accurate." II.RR. 397. Improved models will result in greatly diminished risk for retailers that take the plunge and invest in new stores. The "windfall" from disclosure of SNAP redemption data will result in retailers incurring dramatically reduced risk when opening new stores in proximity to competitors' high-performing stores. These retailers shall gain an increased ability to poach customers and revenues, thereby resulting in substantial competitive harm for retailers.

The tight causal connection between better predictive modeling in an ever-increasingly competitive retail food landscape and substantial competitive harm cannot be understated. When a competitor opens a new store in an already-saturated area, substantive competitive harm will, without question, result. This is precisely the type of confidential information that Congress intended to safeguard when it enacted Exemption 4.

III. Disclosure of Store-Level SNAP Redemption Data Will Shed No Light on Governmental Activities and Will Harm the Food Stamp Program and SNAP Beneficiaries

Congress enacted FOIA to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The goal of broad governmental transparency, however, is not unlimited; Congress realized that legitimate public and private interests could be harmed by the release of certain types of information. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Based thereon, Congress created Exemption 4 and eight other exemptions. Exemption 4 is intended to protect the interests of both the government and submitters of information.

The D.C. Circuit, in *National Parks*, noted that concerns about “widespread disruption of the channels of commerce” were discussed at length during hearings before the Senate Judiciary Committee:

Not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.

498 F. 2d at 769. In light thereof, Congress exempted confidential financial and commercial information from disclosure under FOIA. 5 U.S.C. §552(b)(4).

Failing to provide protection of store-level SNAP redemption data from disclosure under FOIA will upset the careful balance that Congress crafted between the citizenry’s right to know what their government is up to and

countervailing interests justifying withholding of information. FOIA is intended to insure the accountability of federal agencies to the public, not provide a vehicle for discovery of closely held, private confidential information. Disclosing more than ten years² of annual store-level SNAP redemption data will provide yearly snapshots, as well as illustrate long-term trends in SNAP redemptions. As stated *supra*, such information will be used to reverse engineer a store's total sales data.

It is important to note that FNS's role with respect to SNAP retailers is primarily focused on eligibility and fraud prevention. Release of store-level SNAP transaction data will therefore not enlighten those interested in ascertaining how FNS is operating SNAP. The public has long had access to national, state, and zip code level SNAP redemption data. I.R.R. 103. That information, when coupled with other information not exempt from disclosure under FOIA, sheds ample light on FNS's activities with respect to SNAP retailers. Disclosure of store-level SNAP redemption data serves no public purpose and would provide no insight into the workings of the government; instead, it will make confidential financial or commercial information public for the first time and will serve to cause substantial competitive harm in an industry that is already hyper-competitive. And once that

² FNS has received other FOIA requests since 2011 seeking disclosure of annual store-level SNAP redemption data.

information is released, there is no way to undo the substantial competitive harm that is highly likely to occur.

It is important note that SNAP beneficiaries are free to use any or all of their monthly benefits at any authorized retailer. Disclosure of store-level SNAP redemption data would merely show where SNAP beneficiaries redeem their benefits, not shed light on any governmental activity.

Substantial competitive harm to retailers that will result from disclosure is also likely to have substantial adverse impacts on SNAP beneficiaries. This Court should not permit the FOIA to be manipulated in a way that will provide a data windfall for some retailers and cause substantial competitive harm to others. Disclosure of store-level SNAP redemption data will cause some retailers to cease participating in SNAP because of the competitive impacts that will ensue and will likely trigger a domino-like cascade of store closures, especially in impoverished areas with heavy SNAP redemptions.

Store closures in less affluent areas will exacerbate the existing food desert problem that exists in many inner-cities and across wide swaths of rural America, including many parts of South Dakota. If SNAP retailers close or drop out of the program, beneficiaries in those areas will be required to travel ever-greater distances to redeem their benefits. There can be no doubt that a lack of access to retail food stores is inconsistent with the overriding Congressional policy for

SNAP: increasing the food purchasing power of eligible low-income households. 7 U.S.C. §2011. This Court should not permit FOIA to be used in a manner to compel the disclosure of private confidential information that sheds no light on federal governmental activity or how the SNAP is operated, especially given that disclosure is highly likely to cause substantial harm to retailers and beneficiaries, and will further adversely impact the program.

CONCLUSION

For the foregoing these reasons, the District Court's judgment should be reversed.

DATED: August 18, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this motion complies with Fed. R. App. P. 29(a)(5) because it contains 3,392 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by a word processing system and, therefore, is within the 6,500 word limit. This motion also complies with typeface and type-style requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief have been submitted to the Clerk via the Court's CM/ECF system and the files have been scanned for viruses and are virus free.

Dated: August 18, 2017

/s/ Stewart D. Fried
Stewart D. Fried

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were served, this 18th day of August, 2017, through CM/ECF on all registered counsel.

/s/ Stewart D. Fried
Stewart D. Fried