PRELIMINARY LEGAL ANALYSIS OF THE CONFIDENTIALITY PROVISIONS OF THE 2002 FARM BILL AND PROPOSED IMPLEMENTING RULE

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INTRODUCTION

NRCS has proposed a rule to implement the confidentiality provisions in the 2002 Farm Security and Rural Investment Act ("2002 Farm Bill"), 16 U.S.C. §3844. Our understanding is that the rule would bar disclosure of information provided to the agency by farmers seeking financial or technical assistance as well as information provided by NRCS to farmers, such as conservation plans. Our analysis of Section 3844 indicates, however, that such a rule would significantly exceed the agency's legal authority.

On its face, the 2002 Farm Bill does not expand the categories of information exempt from disclosure under FOIA. To the contrary, the Act's definition of exempt information explicitly references FOIA. The legal effect of the Farm Bill confidentiality provision is to make mandatory what was previously only authorized. Thus, while FOIA authorizes the agency to keep proprietary information confidential, the 2002 Farm Bill requires that this information be kept confidential. Under established case law, the 2002 Farm Bill also does not give rulemaking authority to NRCS to redefine the meaning of proprietary information. Accordingly, NRCS may only limit disclosure of "commercial and financial" information that is "privileged and confidential."

NRCS must develop a rule that balances the occasional need for the agency to keep conservation program information confidential to assure its reliability with the important public interests served by broad disclosure. Public disclosure allows states, sportsmen's groups and other organizations to develop programs and offer assistance that dovetails with federal programs. It also allows the public to evaluate the effectiveness of USDA conservation programs. To conduct such evaluations, the public needs specific information about farm participation and the enrollment process.

A limited subset of highly sensitive information provided to USDA for participation in conservation programs is likely confidential and therefore protected by FOIA and the 2002 Farm Bill. According to established case law, this confidential information does not include: (1) agency work products, such as wetland delineation, conservation plans, and conservation compliance determinations, which are not provided by a person to USDA; (2) natural resource information, which is not generally considered commercial and financial; nor (3) information that is available through other means, such as easements, which are publicly recorded. For other conservation information provided to the agency, NRCS should propose a rule to help evaluate whether that information is so sensitive that it must be kept confidential (1) to assure its reliability or (2) prevent significant competitive disadvantage. The rule should also establish an administrative appeal process to assure that confidentiality determinations are made by qualified agency staff.

Preliminary Legal Analysis of the Confidentiality Provisions of the 2002 Farm Bill and Proposed Implementing Rule

I. NRCS Must Follow General FOIA Case Law

Section 1244(b) of the Farm Security and Rural Investment Act of 2002, 16 U.S.C. 3844, provides that information submitted to NRCS or FSA "for the purposes of providing technical or financial assistance . . . with respect to any natural resource conservation program," shall not be public information or shared with another agency if it "is proprietary (within the meaning of section 552(b)(4) of title 5 [United States Code] ["FOIA"]) to the agricultural operation or land that is a part of an agricultural operation." The confidentiality provision is therefore tied to the meaning of Exemption 4 to the Freedom of Information Act (FOIA). In turn FOIA Exemption 4 provides that "trade secrets and commercial or financial information obtained from a person and privileged or confidential [information]" need not be disclosed to the public. 5 U.S.C. §552(b)(4). Thus, the 2002 Farm Bill does not change the definition of exempt proprietary information, but instead gives NRCS the mandatory duty to keep such information confidential.

The plain language of Exemption 4 exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. 5 U.S.C. §552(b)(4). "The exemption ... does not apply to information which does not satisfy the three requirements stated in the statute." *Brockway v. Department of Air Force,* 518 F.2d 1184, 1188 (8th Cir. 1975) (citation omitted). Because the 2002 Farm Bill is directly tied to FOIA, it only exempts information that satisfies these three requirements.

Case law makes clear that NRCS does not have any legal authority to reinterpret the scope of the exemption under FOIA, nor would a court give deference to NRCS' interpretation of that exemption. An agency's statutory interpretation is only entitled to "*Chevron* deference" when it is exercising delegated legislative authority. *Mead v. United States*, 533 U.S. 218, 226-27 (2001). By contrast, agencies are not entitled to deference when they interpret generic statutes that apply to a broad range of agencies. To hold otherwise "would produce an intolerable situation in which different agencies could adopt inconsistent interpretations of FOIA." *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (holding that CIA could not offer its own definition of "compelling need" under FOIA). "For generic statutes like ... FOIA ... the broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretative questions de novo." *Collins v. NTSB,* 351 F.3d 1246, 1252-53 (D.C. Cir. 2003).

II. Information Is Only Exempt from Disclosure if It Satisfies the Three Requirements of FOIA Exemption 4.

As an initial matter, FOIA supports a broad policy of public disclosure. As such, any exemptions must be "narrowly construed." *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"; The purpose of FOIA is "to pierce the veil of administrative secrecy and open agency action to the light of public

scrutiny"); *United States Dep't of State v. Ray,* 502 U.S. 164, 173 (1991) (FOIA mandates "a strong presumption in favor of disclosure"). FOIA is intended to "set[] forth a policy of broad disclosure of Government documents in order 'to ensure an informed citizenry, vital to the functioning of a democratic society.'" *FBI v. Abramson,* 456 U.S. 615, 621 (1982).

1. FOIA Only Exempts Disclosure of Commercial or Financial Information.

The plain language of FOIA Exemption 4 only exempts information that is "commercial or financial." The D.C. Circuit has recognized, "[t]he terms in Exemption 4 are to be given their 'ordinary meanings,' and information is 'commercial' under this exemption if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'" *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2003) (citations omitted). Much of the information NRCS obtains from landowners is not commercial and is therefore not subject to the exemption.

In enacting Exemption 4, Congress contemplated that commercial and financial information would include "business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations." H.Rep.No.1497, 89th Cong., 2d Sess. 10, Reprinted in (1966) U.S. Code Cong. & Admin. News, pp. 2418, 2427 (footnote omitted) (cited in *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 869 n.13 (2d Cir. 1978)). Reflecting this legislative history, case law has limited the exemption to business information, generated by the company in question, the disclosure of which could have competitive implications. *See, e.g., McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1185 (D.C. Cir. 2004) (finding that Exemption 4 applies to disclosure of a corporation's option-year prices and vendor pricing information); *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 906 (D.C. Cir. 1999) (barring disclosure under Exemption 4 of information regarding plaintiff's investigational new drug applications); *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 307 (D.C. Cir. 1999) (barring disclosure of contract terms such as line-item pricing information under Exemption 4); *American Airlines, Inc.,* 588 F.2d at 864-65 (barring disclosure under Exemption 4 of the number of cards that a union seeking to organize an air carrier's employees had submitted to the National Mediation Board); *Gulf & Western Indus., Inc. v. United States,* 615 F.2d 527, 534 (D.C. Cir. 1979) (finding firm's profit rates, cost information, projected scrap rates, and learning-curve data commercial information protected under Exemption 4 where disclosure would allow competitors to estimate and undercut the firm's bid).

By contrast, FOIA Exemption 4 does not apply simply because there is an arguable interest in confidentiality, but only if the information is truly commercial or financial in nature. *See Brockway,* 518 F.2d at 1188 (witness's statements about airplane crash, even though given in confidence to safety investigators, were not exempt because not commercial or financial); *Washington Research Project, Inc. v. Department of Health,* 504 F.2d 238, 244 (D.C. Cir. 1974) (research design submitted in grant application is not

exempt from disclosure because it is not commercial or financial information regardless of whether confidentiality served the scientist's interest in professional recognition and reward).

In particular, information regarding a property's natural resource characteristics is not commercial or financial information subject to the exemption. In *National Association of Home Builders v. Norton,* 309 F.3d 26 (D.C. Cir. 2002), the court held that Exemption 4 did not prevent the Fish and Wildlife Service (FWS) from disclosing information concerning the site-specific locations of the endangered pygmy owl. The court reasoned that Exemption 4 did not apply because "[n]o 'business information' is involved." *Id.* at 29. In general, therefore, the natural resource conditions of a farm, including the presence and scope of wetlands, the conditions of streams and soil, vegetation and wildlife habitat are in the normal circumstance not exempt.

Information also does not become commercial simply because it is generated by a business or because it could be traded. Thus, in *Home Builders*, the court found that plaintiffs did not have a "commercial" interest in information about endangered species simply because there was a commercial cooperative agreement between FWS and the Arizona Game and Fish Department ("State agency") whereby the State agency would accept money from the federal government for access to its database of species locations. *Id.* at 28. The court explained, the information was not commercial "in its function [because] there is no evidence that the parties who supplied the owl sighting information have a commercial interest at stake in its disclosure," i.e., that they could otherwise make money by selling the information. *Id.* at 29-30. Similarly, information about in-flight medical emergencies was not commercial simply because the emergencies occurred in conjunction with an airplane business. *Chi. Tribune Co. v. FAA*, No. 97 C 2363, 1998 WL 242611, at *2-*3 (N.D. Ill. May 7, 1998). The court explained that "[t]he mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information." *Id.*

In general, therefore, the natural resource characteristics of a farm, absent unusual circumstances, do not constitute commercial information. This information would include the presence or absence of wetlands, wildlife habitats, and stream buffers.

2. Information Produced by NRCS Is Not Exempt

FOIA Exemption 4 only bars disclosure of information that was "obtained from a person." Accordingly, information generated by the government, "may not be withheld under Exemption 4," and it "is unnecessary to decide the question of whether [it is] confidential.'" *See Philadelphia Newspapers, Inc. v. Department of Health & Human Services,* 69 F. Supp. 2d 63, 66 (D.D.C. 1999). For example, in *National Association of Homebuilders,* the D.C. Circuit held that the Exemption did not prohibit access to a government-maintained database of endangered species locations because the database was "created by the government rather than in connection with a commercial enterprise." *Homebuilders,* 309 F.3d at 29.

The same principle applies even where the government decision relies heavily on information that is provided by a private party and is indisputably commercial or financial in nature. In *Philadelphia Newspapers, Inc. v. Department of Health & Human Services,* 69 F. Supp. 2d 63 (D.D.C. 1999), the court held that a government audit of financial information by a hospital was not subject to Exemption 4 because the disputed information was "not simply a summary or reformulation of information" supplied to the government by an outside source, but rather "involved analysis prepared" by the government. *Id.* at 66. The fact that the analysis was "based on raw data" provided by the hospital did not bar disclosure of the subsequent government analysis. *Id. See also Fisher v. Renegotiation Bd.,* 355 F. Supp. 1171, 1174 (D.D.C. 1973) ("The amount of excess profits is a determination made by the Board which applies its own accounting analysis to the information obtained from the contractors" and is therefore, not exempt.")

Wetland delineations by NRCS, any conservation compliance determination, and conservation plans by NRCS are among the kinds of technical documents that are generated by the government and that are not information "obtained from a person," even if based in significant measure on such data. The same is also true of much of the information underlying these determinations. Most information used for wetland delineations on agricultural land is derived from aerial photographs and hydric soil maps, which are generated by NRCS or its contractors, rather than the landowner. In short, documents generated by NRCS are not exempt.

3. FOIA Only Bars Disclosure of Information that Is Privileged or Confidential.

Even if information is commercial or financial and produced by a person, it is still only exempt from disclosure under FOIA if it is "privileged or confidential." By definition, information is not confidential if it is readily available elsewhere. Such information must be disclosed. Whether or not other information is privileged or confidential depends on whether the information was provided voluntarily or involuntarily to the government.

a. Information Readily Available Elsewhere Is Not Exempt.

As an initial matter, FOIA does not exempt from disclosure information that is readily available from other sources. *See Frazee v. United States Forest Serv.,* 97 F.3d at 371 (9th Cir. 1996) ("'If the information is freely or cheaply available from other sources ... it can hardly be called confidential' and government agency disclosure is unlikely to competitively harm the submitter."); *CAN Fin. Corp. v. Donovan,* 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality – a *sine qua non* of Exemption 4."). The Justice Department has summarized: "Many courts have held that if the information sought to be protected is itself publicly available through other sources, disclosure under the FOIA will not cause competitive harm and Exemption 4 is not applicable." This rule applies regardless of whether the information is voluntary or involuntary. Department of Justice, May 2004, "Freedom of Information Act Guide," n.

311 and accompanying text (available online at www.usdoj.gov/oip/exemption4.htm#N_448) (hereinafter "DOJ FOIA Guide").

Easements and any accompanying information (e.g., easement location, conditions, and purchase prices), which must be recorded in land registries, are publicly available and are therefore subject to disclosure. Nutrient management plans, which must be disclosed as part of state or NPDES permitting under the Clean Water Act, are likewise publicly available and not protected by FOIA Exemption 4.

b. Information Provided Voluntarily To the Government Is Generally Exempt.

Commercial or financial information that is provided voluntarily to the government is generally exempt so long as it "would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1991). The D.C. Circuit has explained that disclosure would discourage individuals from providing such information to the government. *Id.* (explaining that "the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation" in cases involving voluntary disclosure). Thus, information submitted by farmers seeking technical assistance from NRCS is likely exempt from disclosure under FOIA Exemption 4.

c. Information Submitted To Gain a Government Benefit Is Involuntary.

Information submitted for the purpose of gaining a government benefit is considered "involuntary." *See Frazee v. United States Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996) (information required to be submitted as part of a bid to operate a recreational facility in a national forest is considered "involuntary"); *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (holding that "when the government requires a private party to submit information as a condition of doing business with the government" the submission is deemed "required"). Department of Justice, May 2004, "Freedom of Information Act Guide," n. 91-93 and accompanying text (available online at www.usdoj.gov/oip/exemption4.htm#N_448_). The fact that an individual "chooses" to participate in the government program is irrelevant. As the Department of Justice has explained:

> It should be remembered that for purposes of this analysis, it does not matter that the underlying activity engaged in by the submitter (e.g., seeking a government contract or a loan) is one in which participation is purely voluntary. The key question under *Critical Mass* is whether those who choose to participate in the activity have information-submission requirements placed upon them as a lawful condition of their participation in that activity or an agency's related administrative process. If so, then any information submitted pursuant to such a requirement should be deemed "required."

Department of Justice, 1993, FOIA Update, Vol. XIV, No. 2, at 6-7 (("Exemption 4 Under Critical Mass: Step-By-Step Decisionmaking")(available online at http://www.usdoj.gov/oip/foi-upd.htm); *see also id.* at 3-5 ("OIP Guidance: The Critical Mass Distinction Under Exemption 4") ("The 'voluntariness' of one's overall participation in this process – or in any like administrative process in which one participates voluntarily – cannot alter the fact that information submissions are 'required.'")(citing *Washington Post Co. v. HHS*, 865 F.2d 320, 323 (D.C. Cir. 1989) (distinguishing between submitters' initial decisions to participate in voluntary activity and subsequent requirements imposed on those who choose to participate)).

Accordingly, information submitted to gain financial assistance from USDA conservation programs is involuntary. Such information is only "'confidential' for purposes of the exemption if disclosure is likely either: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n v. Kleppe* ("*National Parks I*"), 498 F.2d 765, 770 (D.C. Cir. 1974)(footnote omitted).

i. Involuntary Information Is Privileged if Disclosure Will Impair the Government's Ability To Obtain Such Information in the Future.

The Justice Department explains that the focus of the first element of the privileged and confidential test is on those "limited situations in which information is required to be provided, but where disclosure of that information under the FOIA will result in a diminution of the 'reliability' or 'quality' of what is submitted." DOJ FOIA Guide n. 234 and accompanying text (quoting *Critical Mass*, 975 F.2d at 878). The propriety of this disclosure is based on a case-by-case approach, which examines the sensitivity of the information and its vulnerability to manipulation. *See Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 29-32 (D.D.C. 2000) (barring disclosure of "financial and technical details," such as detailed financial information, customer lists, and political risk worksheets, of a proposed export transaction where competitors could use the information to "create a competing bid for the same contract that both are seeking in a foreign country"; "public disclosure of such information might encourage exporters to be less forthcoming in their submissions"); *Niagara Mohawk Power Corp. v. United States Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999) (mandating disclosure of performance data, such as details about fuel consumption, and rejecting, as "inherently weak," a claim of qualitative impairment when the agency "secured the information under compulsion" and the data itself "appear[] to take the form of hard, cold numbers on energy use and production, the fudging of which may strain all but the deliberately mendacious"); *see also* DOJ FOIA Guide n. 236 (citing additional cases). The threatened impairment must be "significant" and not "minor," and must overcome the public interest in disclosure in a "rough balancing" test. *Washington Post Co. v. HHS,* 690 F.2d 252, 269 (D.C. Cir. 1982) (remanding to determine whether disputed information was confidential under Exemption 4); *Washington Post Co. v. U.S. Department of Human Services*, 865 F.2d 320 (D.C. Cir. 1989); *Public Citizen Health Research Group v. FDA,* 185 F.3d 898, 904 (D.C. Cir.

1999) (recognizing need for a rough balancing between the private and public interests when considering a withholding under exemption 4).

This case-by-case approach simply does not lend itself to broad rules mandating disclosure. Instead, the propriety of disclosure depends on the sensitivity of the particular information and the threat that disclosure will make such information unreliable in the future. Disclosure of information submitted to USDA for participation in conservation programs is generally unlikely to diminish the "reliability" or "quality" of future submissions for several reasons. As an initial matter, because of the commodity nature of agriculture individual farmers are rarely in competition with one another. Moreover, there has long been a surplus of applicants submitting information for participation in USDA conservation programs, notwithstanding the lack of confidentiality. Finally, most of the information submitted for participation in such programs is not sensitive commercial or financial information. For the most part, this information will not disclose a farmer's confidential business plans. For these reasons, this information need not be exempt from disclosure under FOIA or the Farm Bill.[1]

On the other hand, strong public interests support disclosure of conservation program information. These interests include:

- The public interest in allowing states to offer additional financial assistance programs to USDA program participants. To do so, the states often need to know who is participating in such programs and the details of that participation. For example, Minnesota government officials have complained that a recent misapplication of the confidentiality provision has prevented them from identifying farmers who participate in a Conservation Reserve Program (CRP) that are going to be dropped from the CRP, but might be interested in a federal/state Conservation Reserve Enhancement Program (CREP).

- The public interest in having sportsmen's groups and conservation organizations notify program participants about additional conservation opportunities.

- The public interest in allowing individuals and organizations to evaluate the effectiveness of USDA programs and make constructive suggestions for improvement. The details of conservation plans and measures are needed to inform such evaluations. .

[1] For the same reasons, disclosure is unlikely to implicate the purported "Third Prong" under *National Parks. See Pub. Citizen Health Research Group v. NIH,* 209 F. Supp. 2d 37, 52 (D.D.C. 2002) (alternative holding) (holding "impairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under FOIA Exemption 4"). Disclosure will not diminish "program effectiveness" as it is unlikely to deter applicants from participating; participation has been strong, despite disclosure in the past.

- The public interest in using information available from USDA conservation program participants to assess a region's environmental conditions.

In light of these benefits, any rule (1) should be based on a presumption that information provided for participation in conservation programs is not confidential; (2) should provide guidance for the factors that will be used to determine if information is highly sensitive (and thus exempt from disclosure); and (3) provide for an internal appeal process to assure that those making such determinations are experienced in making these judgments and are responsive to all interests.

ii. Involuntary Information Is Privileged if Disclosure Will Cause Competitive Harm.

Information is also considered confidential if its disclosure would cause competitive harm to the program participant. The test for competitive harm is somewhat demanding. The affected party may not simply make "conclusory and generalized" allegations of competitive harm, but must demonstrate a substantial likelihood of actual competitive harm. *Public Citizen Health Res. Group v. FDA,* 704 F.2d 1280, 1291 (D.C. Cir. 1983). For example, in *Niagara Mohawk Power Corp v. Department of Energy,* 169 F.3d 16, 18-19 (D.C. Cir. 1999), the D.C. Circuit remanded a competitive injury claim to determine whether the power plants in question were actually competitors.

In another case, the D.C. Circuit upheld an agency's decision to disclose three broad categories of information incorporated into a government contract – specifically, "(1) cost and fee information, including material, labor and overhead costs, as well as target costs, target profits and fixed fees; (2) component and configuration prices, including unit pricing and contract line item numbers ("CLINS"); and (3) technical and management information, including subcontracting plans, asset allocation charts, and statements of the work necessary to accomplish certain system conversions" – based upon the submitter's failure to specifically demonstrate that it would suffer competitive harm from their release. *Martin Marietta Corp v. Dalton*, 974 F. Supp. 37, 38, 40 (D.D.C. 1997). The Court upheld the government's conclusion that "neither the revelation of cost and pricing data nor proprietary management strategies were likely to result in such egregious injury to [the submitter] as to disable it as an effective competitor for [the agency's] business in the future." *Id.* at 41.

By contrast, courts have upheld an agency's decision not to disclose business details and strategies that could create a competitive disadvantage. *See* DOJ FOIA Guide notes 339-347 and accompanying text (listing cases). Disclosure is barred where it might allow a competitor to learn about valuable shortcuts "without incurring the time, labor, risk, and expense involved in developing them independently." *Webb v. HHS,* 696 F.2d 101, 103 (D.C. Cir. 1982).

Because most farmers participate in broad commodity markets, information about an individual's operations are unlikely to have competitive significance. The rare exception is where a farmer is employing a novel farming method, such as a proprietary manure-

management technology. There is little reason to develop a specific rule to govern such unusual circumstances.

SUMMARY

In summary, there are several categories of information that cannot be considered confidential. These include: (1) technical work products and judgments by NRCS and its employees, including wetland determinations, conservation compliance judgments, and conservation plans developed by NRCS; (2) details about natural resources and other information that is not commercial or financial; and (3) easements and other information that is publicly available through other means. There should be a presumption that commercial or financial information submitted to NRCS to obtain financial assistance is not confidential. NRCS should adopt a rule that provides guidance for making such determinations and that establishes an administrative appeal process for addressing particular disclosure requests.