

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ORGANIZATION FOR COMPETITIVE
MARKETS,

Plaintiff,

vs.

OFFICE OF INSPECTOR GENERAL,
UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendant

and

NATIONAL CATTLEMEN'S BEEF
ASSOCIATION,

Defendant-Intervenor

Civil Action No. 1:14-cv-1902-EGS

**DEFENDANT-INTERVENOR NATIONAL CATTLEMEN'S BEEF ASSOCIATION'S
MOTION TO STAY SUMMARY JUDGMENT BRIEFING SCHEDULE AND TO
ORDER DEFENDANT TO COMPLY WITH 7 C.F.R. § 1.12 AND MOTION TO
EXPEDITE RESPONSES TO MOTION AND FOR EXPEDITED HEARING**

Defendant-Intervenor National Cattlemen's Beef Association ("NCBA"), by and through its undersigned counsel, respectfully requests that this Court stay the summary judgment briefing schedule. NCBA further requests this Court to order that the United States Department of Agriculture ("USDA") through Defendant USDA Office of Inspector General ("Defendant" or "OIG"), provide NCBA and other contractors the opportunity to review all additional, potentially responsive records to determine whether Freedom of Information Act ("FOIA") Exemption (b)(4) is applicable, to make recommendations to USDA, as required by applicable FOIA regulations at 7 C.F.R. § 1.12. Finally, NCBA requests that, given the eleventh-hour developments stemming from USDA's actions, as described below, that are outside of NCBA's

control, and the approaching February 21, 2018 summary judgment deadline, that this Court require any responses to NCBA's Motion to be expedited and, if necessary, that this Court schedule an expedited hearing on this Motion prior to the February 21, 2018 summary judgment deadline.

In support of its Motion, NCBA states as follows:

The Partial, Previous History of Production in this Matter

As the Court is well aware, the disclosure of information by USDA and AMS in this case has a long and tortured history. NCBA originally sought to intervene in this litigation when AMS first provided it with certain documents for Exemption (b)(4) review and NCBA learned of the existence of this litigation in September 2016. Before that time, there were substantial dealings in this matter in which NCBA did not participate. In October 2016, this Court permitted NCBA to intervene in order to protect against the release of NCBA's confidential business information under FOIA Exemption (b)(4) and to require Defendant and its related entities (including the Agricultural Marketing Service ("AMS")) to provide NCBA with the opportunity to review and object to the disclosure of responsive records pertaining to NCBA. See ECF No. 40 at 2, 12-13, 18.

After intervening, NCBA received on December 2, 2016 a CD from AMS with 12,341 pages of records in several .pdf files and a single Excel file. NCBA's Chief Financial Officer Douglas Evans, with the assistance of counsel, thoroughly reviewed all 12,341 pages of NCBA Records for applicable exemptions and provided its recommended withholdings to AMS on February 17, 2017. ECF No. 55 at 1-2. AMS agreed with NCBA's proposed withholdings and, accordingly, released the non-exempt and partially redacted documents to Plaintiff Organization for Competitive Markets ("OCM"). ECF No. 62-5 ¶¶ 13, 41.

Following a March 22, 2017 status conference, this Court ordered OIG and AMS to complete processing of the remaining records under review and provide OCM with “those records [OIG and AMS] have determined to disclose, and provide an appropriate *Vaughn* index to OCM for the information being withheld as confidential and proprietary business information.” *See* March 25, 2017 Minute Order entry. USDA then provided OCM with the non-exempt records and a *Vaughn* index. ECF No. 57 at 1. By a May 15, 2017 Minute Order, this Court provided a summary judgment briefing schedule. In August 2017, NCBA and USDA filed motions for summary judgment. ECF Nos. 61, 62.

After those motions for summary judgment were filed (but before OCM filed any response or cross-motion for summary judgment), and with no advance notice to NCBA, AMS produced to OCM several additional responsive records. Because of the newly-produced documents, OCM filed a Motion to Amend the Briefing Schedule, requesting an extension of the briefing schedule. This Court vacated the pending summary judgment motions, stayed the summary judgment briefing schedule, ordered USDA to review its *Vaughn* Indexes and provide cross-referenced Bates numbered lists to OCM, and ordered USDA to produce all improperly processed information to OCM by November 30, 2017.

As this was occurring, on three separate occasions – September 14, 2017, October 10, 2017, and October 24, 2017 – AMS provided to NCBA additional records and requested that NCBA provide it with any proposed FOIA exemption redaction and withholding justifications. NCBA reviewed the 105 pages included in the September 14, 2017 correspondence and provided a response to AMS on September 25, 2017. As to the October 10 and October 24, 2017 requests concerning two native Microsoft Excel spreadsheet files, NCBA responded to AMS within two

and three days, respectively. AMS agreed with NCBA's proposed redactions and withholdings in all three of these requests.

USDA filed a November 30, 2017 Notice containing the cross-referenced list and revised *Vaughn* Indexes, and also noted that there are no further records to produce, but that it required additional time to revise certain redaction justifications. *See* ECF No. 68 at 4; *see generally* ECF No. 68-1. USDA provided OCM a revised *Vaughn* Index on December 20, 2017. After the parties submitted proposed briefing schedules (ECF Nos. 69, 70), this Court set the current briefing schedule, with USDA and NCBA's motions for summary judgment due on February 21, 2018.

The Most Recent Developments Leading to NCBA's Motions

Recently, however, the potential release of a new wave of documents makes NCBA's Motions necessary. On February 9, 2018, AMS sent to NCBA's counsel a letter dated February 8, 2018 proposing to release eight .pdf files and requesting that NCBA provide AMS with any proposed FOIA exemption redaction and withholding justifications for these records. NCBA provided AMS with its proposed withholding justifications as to these records on February 15, 2018.

Earlier this week, on February 13, 2018, USDA's counsel informed NCBA's counsel for the first time that USDA also planned to disclose a significant number of potentially responsive records that contained confidential business information of private businesses, including but not limited to NCBA. USDA provided NCBA's counsel with a "representative sampling" of information contained in the responsive records, which appear to include NCBA confidential and proprietary business information. As far as NCBA's counsel can determine, these documents, which USDA now proposes to release, were included in the most recent *Vaughn* Index provided

by USDA, indicating that the documents originated from the Cattlemen's Beef Board and were being withheld under Exemption (b)(4).

Pursuant to Executive Order 12,600 and USDA regulations, "the policy of the USDA is to obtain and consider the views of the submitter of the information and to provide the submitter an opportunity to object to any decision to disclose the information." 7 C.F.R. § 1.12. As this Court previously found, "AMS is obligated to obtain and consider NCBA's views" whenever "AMS cannot readily determine that information NCBA provided to it is privileged or confidential business information." ECF No. 40 at 12-13 (citing 7 C.F.R. § 1.12(a) ("Each USDA agency [. . .] shall [provide] the business information submitter with prompt notification of a request for that information [and] afford [the] business information submitter reasonable time in which to object to the disclosure of any specified portion of the information."))).

Contrary to the applicable Executive Order and USDA's own regulations, AMS has not provided NCBA (or other private entities) the opportunity to review the records and make FOIA exemption recommendations, nor has it afforded NCBA (or other private entities) the opportunity to object to proposed agency disclosure of this information. In allowing NCBA to intervene, the Court required AMS "to provide NCBA a reasonable amount of time to object to any decision to disclose" NCBA's confidential business information. ECF No. 40 at 13. USDA counsel has informed NCBA's counsel that it is USDA's intent to disclose *thousands* of pages of such records, potentially including confidential and proprietary information from NCBA and other private entities, none of which either NCBA or the other private entities have had any opportunity to review, evaluate under the (b)(4) Exemption, proceed through the normal USDA FOIA appeal process, or litigate before this Court, as necessary.

NCBA's Motion to Stay Summary Judgment Briefing Schedule and to Order Defendant to Comply with 7 C.F.R. § 1.12

In light of the recent developments and USDA's apparent intent to release thousands of pages of confidential business information, NCBA respectfully requests this Court order USDA to comply with its own regulations by: (1) providing appropriate copies of the documents USDA intends to release which include potentially confidential or proprietary business information to NCBA, and other potentially involved private parties; (2) granting NCBA and those other entities a reasonable amount of time to determine if the documents contain information exemption from disclosure under the (b)(4) Exemption; (3) permitting NCBA and those other entities an opportunity to seek administrative review of any initial determinations to disclose confidential or proprietary information; and (4) permitting NCBA (and other entities if they desire to do so) to seek from this Court orders prohibiting the disclosure of any information exempt from disclosure under the (b)(4) Exemption should USDA continue to seek to disclose. In the meantime, NCBA requests that the Court suspend the summary judgment briefing schedule until this process has been completed.

Since its intervention in this case, NCBA has promptly and diligently responded to all of AMS' many requests. NCBA does not intend to unnecessarily delay these proceedings. However, unless this Court stays the summary judgment briefing schedule, orders USDA to comply with its regulations, and provides an opportunity for NCBA and other contractors to review the records at issue, it is all but certain that confidential business information, protected from disclosure under the (b)(4) Exemption, including that of NCBA, will be released. Such a result renders NCBA's entire purpose for intervention in this case meaningless.

NCBA's Motion to Expedite Responses to Motion and Request for Expedited Hearing

Based on the foregoing reasons, and given these eleventh-hour developments outside of NCBA's control, and the approaching February 21, 2018 summary judgment deadline, NCBA respectfully requests that this Court expedite the time for any response or opposition to NCBA's Motion and, if necessary, requests that this Court schedule an expedited hearing on this Motion prior to NCBA and USDA's February 21, 2018 summary judgment deadline.

Pursuant to D.D.C. Local Rule 7(m), counsel for NCBA has conferred with counsel for Plaintiff and USDA. USDA's counsel has stated that USDA "will not consent, but will not object" to NCBA's Motion. OCM's counsel has stated that OCM "has not received notice of a new or pending records release. Based on Defendant's November 2017 Notice to the Court that there are no further records to produce, [OCM] opposes the request to further stay this case."

WHEREFORE, for the foregoing reasons, NCBA respectfully requests that this Court stay the current briefing schedule pending further order of this Court, order that USDA comply with its regulations, and require USDA to provide NCBA and other private entities, as appropriate, the opportunity to review the potentially responsive records for FOIA exemption recommendations, pursuant to the attached proposed order. NCBA further requests that this Court require any responses to NCBA's Motion to be expedited and, if necessary, that this Court schedule an expedited hearing on this Motion prior to the February 21, 2018 summary judgment deadline.

Dated: February 16, 2018

Respectfully submitted,

/s/ Daniel C. Schwartz

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