

**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 FOR RECONSIDERATION OF THE JOINT MOTION FOR AN
IMMEDIATE PROTECTIVE ORDER PENDENTE LITE AGAINST DISTRIBUTION
OR PUBLICATION OF INFORMATION**

On May 29, 2018, Defendant Office of Inspector General, United States Department of Agriculture (“USDA”) and Defendant-Intervenor National Cattlemen’s Beef Association (“NCBA,” and with USDA, “Defendants”), by and through their undersigned counsel, requested that this Court: (1) enter an immediate protective order, pendente lite, that prohibits Plaintiff Organization for Competitive Markets (“OCM”) from copying, disseminating, or otherwise making public the Previously-Produced Records (as defined herein) until further order of this Court; and further, (2) enter an order requiring OCM to return the Previously-Produced Records

to USDA for review and processing, as required by Executive Order 12,600 and 7 C.F.R. § 1.12 (“Joint Motion”).

The next day, on May 30, 2018, this Court directed OCM to respond to the Defendants’ Joint Motion by no later than June 7, 2018, but did not issue an order for an immediate protective order, *pendente lite*. NCBA, which is the source of the documents and information placed at immediate risk of disclosure in the absence of a protective order, respectfully requests the Court to reconsider its May 30, 2018 Minute Order, and issue immediately the requested protective order *pendente lite*.

In support thereof, NCBA states as follows:

The Previously-Produced Records Contain Highly Sensitive and Confidential Business and Personal Information

As previously noted, on July 24, 2013, USDA’s Agricultural Marketing Service produced to OCM approximately 7,500 pages of records (“Previously-Produced Records”), including a large number of documents originating with or containing NCBA information. *See* May 29, 2018 Declaration of Douglas L. Evans (“Evans Decl.”), ECF No. 77-1 ¶¶ 7, 8, 9.

NCBA has conducted a preliminary review of 3,009 pages of the Previously-Produced Records which contain NCBA and NCBA-personnel information (the so-called “Additional Documents”). NCBA has confirmed that the Additional Records contain confidential and proprietary business information of NCBA. *See* Evans Decl. ¶¶ 7, 8. Of even greater concern, however, the Additional Records contain names of NCBA employees and other individuals, as well as their sensitive personal information, such as information from which their salaries and benefits could be determined. *Id.*; *see also* Evans Decl., Exh. 2 at 2-5.

Had USDA followed its own regulations and procedures pursuant to Executive Order 12,600 and 7 C.F.R. § 1.12, the Additional Records would have never been released to OCM

without redactions of sensitive personal information under Exemption (b)(6). In addition, before any disclosure to OCM, USDA would have transmitted the documents to NCBA (and other third parties whose information is included among the Previously-Produced Records) for its recommendations as to the application of Exemption (b)(4). The transmittal letter to OCM for the Previously-Produced Records indicates that the documents contain some Exemption (b)(6) redactions but also states that “of the 7,544 pages, 6,923 pages are being released in their entirety, 33 are being released with redactions made pursuant to Exemption 5 of the FOIA, and 588 pages are being released with redactions pursuant to Exemption 6.” Evans Decl., Exh. 1 at 2. Thus, according to the July 24, 2013 Letter, over 90 percent of the Previously-Produced Records was released without any redactions.

USDA cannot now specifically identify which of the Previously-Produced Records were redacted and which were those released in their entirety. Evans Decl. ¶ 6. Additionally, despite USDA’s request, OCM has failed provide to USDA a copy of the Previously-Produced Records so that USDA can determine what Exemption (b)(6) information was redacted. In any case, it is clear that USDA did not redact any information under Exemption (b)(4) from the Previously-Produced Records. All of this information is now vulnerable to improper disclosure pending the Court’s consideration of the Joint Motion.

An Immediate Protective Order Pendente Lite is Required to Ensure OCM Does Not Disseminate Information Contained in the Previously-Produced Records

NCBA is deeply concerned that, in the absence of a protective order, OCM could disclose NCBA’s confidential and proprietary information, and also the sensitive personal information of its employees. This concern is reasonable, based on OCM’s previous publication of information received from USDA as a result of OCM’s April 11, 2013 FOIA Request (“OCM FOIA Request”). For example, on March 31, 2017, OCM published and disseminated documents

received from USDA incident to the OCM FOIA Request. Evans Decl. ¶ 12; *see also* Supplemental Evans Declaration (“Suppl. Evans Decl.”), ECF No. 61-4 ¶ 15. In that instance, after USDA provided OCM with the records, that same day OCM immediately posted the entire set of records on its website and also immediately sent a press release to dozens of major news and media organizations with a link to electronically download the records. *Id.*

This concern is heightened significantly for NCBA in light of the fact that USDA, through counsel, contacted OCM, requesting a copy of the Previously-Produced Records, and that OCM has failed to comply with that request. OCM has not hidden its animosity to NCBA and its mission on behalf of the nation’s cattle producers. OCM has supported legislation that would seek to undermine the beef checkoff program that is the foundation of the work of the Cattlemen’s Beef Board (“CBB”). *See* Exh. B to NCBA’s August 11, 2017 Motion for Summary Judgment, ECF No. 61-6 at 4-7 (OCM Facebook post: “Want to Stop NCBA [] from receiving checkoff tax dollars? Support the federal Opportunities for Fairness in Farming Act and the Voluntary Checkoff Act.”); *see also* Checkoff Reform Program, <https://competitivemarkets.com/checkoffreform/> (last visited May 31, 2018) (“[OCM] ha[s] worked with members of Congress to introduce legislation in both the U.S. House and Senate that would reform the federal checkoff programs.”).

In addition, as NCBA has previously explained, OCM competes with NCBA and has engaged in a calculated and concerted effort to undermine and damage NCBA’s image and business relationships, and to remove NCBA as a resource for receipt of beef checkoff program

funds. *See* Suppl. Evans Decl. ¶¶ 9, 18; *see generally* Exhs. A, B to NCBA’s August 11, 2017 Motion for Summary Judgment, ECF Nos. 61-5, 61-6.¹

While the Previously-Produced Records were provided to OCM by USDA in July 2013, it does not appear that OCM has publicly published on its website the subset of the Additional Records. Evans Decl. ¶ 12. Nor is there any information about the Previously-Produced Records currently on OCM’s website, blogs, or newsletters. *Id.* ¶ 12. If OCM did not realize it already, the Joint Motion clearly informed OCM that it now possesses highly sensitive and confidential personal, business, and proprietary information which it is free to publish or disseminate to third parties for publication or further distribution, absent an immediate protective order.

¹ Among others, the following are representative comments made by OCM concerning NCBA and NCBA’s role in the beef checkoff program:

- “[OCM’s] first order of business” is to “tak[e] the Beef Checkoff contract away from NCBA.” Exh. A at ECF No. 61-5 at 25.
- “[OCM has] now been informed that there are **9,300 pages of raw financial information** regarding [NCBA’s] expenditure of checkoff funds[.] Of course, this caused considerable alarm to NCBA who now claims they just learned of our suit [and] their aim is **obviously to try to obstruct our receiving this information.**” *Id.* (emphasis added).
- “NCBA simply must be defunded and discredited!” *Id.* at 16.
- “[T]he first step in fixing the current market crises needs to be ending this NCBA gravy train that enables them to work against the interests of those who are required to fund the program. **This is OCM’s number one priority.**” *Id.* at 21 (emphasis in original).
- “It is also critically important that we tell the world that NCBA and the other phone farm organizations do not speak for us or our interests.” *Id.* at 25.
- NCBA leaders “are like Judas goats leading their members to the slaughterhouse” and that NCBA is “cutting the American Cowboy’s throat.” *Id.* at 10, 45.

An Immediate Protective Order Pending Resolution of the Joint Motion Requiring OCM to Return the Previously-Produced Records to USDA Will Merely Preserve the Status Quo and Will Not Prejudice or Injure OCM in Any Way.

OCM has no legitimate reason to object to a Protective Order requiring maintenance of the status quo while return of the Previously-Produced Records is adjudicated. Moreover, immediate issuance of the protective order requested in the Joint Motion will ensure protection of sensitive personnel information and confidential and proprietary business information, which should never have been placed in OCM's hands in the first place without appropriate redaction, from being disclosed to the likely injury of NCBA and its employees.

For these reasons, NCBA requests the Court to reconsider its order of May 30, 2018, and to grant the [Proposed] Protective Order Pendente Lite at ECF No. 77-4 of the Joint Motion.

Pursuant to D.D.C. Local Rule 7(m), counsel for NCBA has conferred with counsel for the USDA and for Plaintiff. USDA's counsel states "No objection from Defendant [USDA] OIG. As of this filing, counsel for NCBA did not receive a response from OCM's counsel to its e-mail conferring as to its position to this Motion.

WHEREFORE, for the foregoing reasons, NCBA respectfully requests that this Court reconsider its May 30, 2018 Minute Order and issue a protective order preventing OCM from copying, disseminating, or otherwise making public the Previously-Produced Records until further order of this Court, and any further relief the Court may grant.

Dated: May 31, 2018

Respectfully submitted,

/s/ Bryan J. Harrison

Daniel C. Schwartz (D.C. Bar # 0017749)

Bryan J. Harrison (D.C. Bar # 1016187)

BRYAN CAVE LEIGHTON PAISNER LLP

1155 F Street, NW

Washington, D.C. 20004

Telephone: 202-508-6000

E-mail: dcschwartz@bclplaw.com

E-mail: bryan.harrison@bclplaw.com

*Attorneys for Defendant-Intervenor National
Cattlemen's Beef Association*

**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

[PROPOSED] PROTECTIVE ORDER PENDENTE LITE

Upon review and consideration of Defendant-Intervenor National Cattlemen’s Beef Association’s (“NCBA”) Motion for Reconsideration (“Motion”) of the Joint Motion by NCBA and the United States Department of Agriculture (“USDA”) for an Immediate Protective Order Pendente Lite Against Distribution or Publication of Information (ECF No. 77), any response or opposition thereto, and for good cause having been shown, it is this ____ day of _____ 2018, hereby

ORDERED that NCBA’s Motion is GRANTED; and it is further

ORDERED that Plaintiff Organization for Competitive Markets (“OCM”) shall not copy, disseminate, disclose, or otherwise make public those 7,544 pages of records, any portion

thereof, or any information contained therein, produced to it by USDA on July 24, 2013, unless and until further order of this Court.

Emmet G. Sullivan
United States District Judge

Copies to: All counsel of record via CM/ECF