

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

ORGANIZATION FOR)
COMPETITIVE MARKETS,)
)
Plaintiff,)
)
v.)
)
OFFICE OF INSPECTOR)
GENERAL, USDA,)
)
Defendant,)
and)
NATIONAL CATTLEMEN’S BEEF)
ASSOCIATION,)
)
Defendant-Intervenor.)
_____)

Civil Action No. 14-1902 (EGS)

PLAINTIFF’S NOTICE OF SUPPLEMENTAL AUTHORITY

After a years-long pattern of delays and disruptions caused by Defendant, the third and final summary judgment briefing schedule in this case closed in March 2019.¹ The records at issue relate to an Inspector General audit of the federal pork “checkoff” marketing program, and include records relating to the audit itself and also underlying records accounting for the receipt and disbursement of program funds. Briefing over withheld records focused primarily on claims of deliberative process and whether confidentiality attaches to statutorily mandated records of

¹ In April 2019, OIG attempted to extend briefing yet again by moving for a surreply, ECF No. 103, which Plaintiff opposed as unwarranted, ECF No. 104.

program spending. The supplemental authority noticed herein relates only to a subset of records at issue in the case, and specifically the issue of confidentiality.²

This notice is to inform the Court of recent agency action taken to compel the collection of information relating to its federal checkoff program, information that contractors and other participants are statutorily required to keep and provide to the government as a condition of participation in the program. On March 3, 2020, USDA initiated a notice and comment period announcing the extension and revision of the collection of checkoff information necessary to ensure, among other things, that program funds are lawfully expended. 85 FR 12494-01. The notice did not include an assurance of nondisclosure for checkoff expenditures. *Id.* The comment period closed on May 4, 2020, without a single checkoff contractor submitting a comment requesting the agency include a nondisclosure assurance (similar to the one contained in the *FMI* statute). Agricultural Marketing Service, Docket ID AMS-LP-20-0003, www.regulations.gov/docket?D=AMS-LP-20-0003.

The compelled nature of the program's expenditure information without an accompanying assurance of confidentiality further distinguishes this case from the Supreme Court's decision in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) ("*FMI*"). *FMI* dealt with information collected under a statute that expressly restricted its "use or disclosure." 7 U.S.C. 2018(c). The court's confidentiality test in the case was expressly limited to records "both customarily and actually treated as private by its owner *and provided to the government under an assurance of privacy.*" *Id.* at 2366 (emphasis added). The court did not resolve whether records

² Records relating to deliberative process claims are not impacted by this notice. Nor are records of disbursements, expenditures, and other transactions generated by the federal checkoff boards, which are instrumentalities of government and thus not covered by Exemption 4. *See, e.g.*, ECF No. 74, p. 2.

without such assurance can be confidential under Exemption 4, nor did it address the distinctions in expectations of confidentiality between mandatory and voluntary information submissions. *Id.* at 2363. Plaintiff's briefing consistently maintained that there is no expectation of confidentiality in checkoff funding receipt and disbursement information that is statutorily required to be kept and shared with the agency. *See* Pl. Op. Brief, 21-27, 33-34, ECF No. 90; Pl. Reply Br., 16-19, 21, ECF No. 102. Thus, the additional authority provided here further supports Plaintiff's position that information accounting for expenditures of federal beef checkoff program funds, such as contracts and invoices, are subject to FOIA's strong presumption in favor of disclosure.

This case has suffered through a very long and tortuous path resulting from repeat records processing and litigation delays, but Plaintiff believes all issues (including those relating to the subset of records to which this notice applies) are fully briefed and ripe for the Court's decision on the merits.

Dated: June 26, 2020

Respectfully submitted,

/s/ Matthew E. Penzer

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