

SNAP RETAILER REDEMPTION DATA: IS MORE TRANSPARENCY IN THE FUTURE FOR THE NATION’S LARGEST ANTI-HUNGER PROGRAM?

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I. INTRODUCTION

“When 50 million people in the richest country on the planet are hungry,
that’s a crisis.”-Representative Jim McGovern¹

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1. Ned Resnikoff, *America’s New Hunger Crisis*, MSNBC (May 23, 2014, 3:01 PM), <http://www.msnbc.com/all/americas-new-hunger-crisis>.

Hunger in the United States is a sad irony. The food system in the U.S. produces an ample amount of food to feed the country's entire population, and accessibility to food is rarely a problem.² But today, approximately 50 million people in the U.S. are hungry – for the most part due to their inability to afford the food at their local grocery store.³ What is troublesome is that our nation's history of widespread hunger included some of the same questions people are asking today, including why hunger even exists in a country as rich as the U.S. For example, during the Great Depression in the 1930s, the country saw substantial numbers of hungry and malnourished individuals and even cases of starvation.⁴ Yet, during the Great Depression the U.S. had massive food surpluses and the world's most productive industry.⁵ Today too, people ponder why hunger still exists in a nation as rich and productive as the U.S. Nevertheless, our nation has a history of successfully reducing the number of people who are hungry, which offers hope that one day the U.S. will accomplish this massive feat once again.

One government program that has been credited with significantly reducing hunger and poverty in the U.S. is the Supplemental Nutrition Assistance Program (SNAP), or historically known as the "Food Stamp Program."⁶ Toward the end of the Great Depression, the first Food Stamp Program was created to help those who were unemployed purchase food surpluses at half the normal cost of those food products.⁷ The program ran from 1939-1943 and assisted U.S. citizens through tough times and widespread unemployment during the Great Depression.⁸ Then, in 1964 the Food Stamp Act returned as permanent law as part of

2. See *Who Experiences Hunger*, BREAD FOR THE WORLD, <http://www.bread.org/who-experiences-hunger> (last visited Apr. 24, 2016); see also ALLISON KARPYN & SARAH TREUHAF, THE FOOD TRUST & POLICYLINK, THE GROCERY GAP: WHO HAS ACCESS TO HEALTHY FOOD AND WHY IT MATTERS 9 (2010), http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf (noting that in some areas the main cause of hunger can be the lack of access to grocery stores and other businesses that sell food products).

3. BILL STRAWBRIDGE & MARGARET WALLHAGEN, BREAD FOR THE WORLD, 2014 HUNGER REPORT: ENDING HUNGER IN AMERICA 11 (2014), files.bread.org/institute/hr14/hunger-report-2014.pdf; see *Who Experiences Hunger*, *supra* note 2.

4. *Great Depression and World War II, 1929-1945*, LIBRARY OF CONG., <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/deppwwii/depress/> (last visited Apr. 24, 2016).

5. *Id.*

6. See *Supplemental Nutrition Assistance Program (SNAP): A Short History of SNAP*, FOOD & NUTRITION SERV., USDA, <http://www.fns.usda.gov/snap/short-history-snap> (last updated Nov. 20, 2014) [hereinafter *Short History of SNAP*].

7. *Id.*

8. See *id.*

President Lyndon B. Johnson's War on Poverty.⁹ One year after the Food Stamp Act of 1964, nearly 500,000 citizens were enrolled in the Food Stamp program, and the annual cost of the program was expected to be approximately \$360 million.¹⁰ The enactment of a permanent Food Stamp Act, along with other government anti-poverty programs, resulted in one of the most significant decreases of poverty in our nation's history.¹¹

Today, the Food Stamp program has witnessed a few changes since 1964, including over 46.5 million program participants in 2013 and an annual budget of over \$74 billion.¹² The Food Stamp Program is now part of the Farm Bill, or currently the Agricultural Act of 2014, and is now known as the "Supplemental Nutrition Assistance Program" or "SNAP."¹³ SNAP is used by most participants as temporary assistance to respond to a person's current financial situation and to help pull these individuals out of poverty.¹⁴ The percentage of the U.S. population on SNAP benefits in 2014 was 14.8 percent.¹⁵ In order to be eligible for SNAP, an individual's income must fall below the 130 percent poverty line,¹⁶ which is an annual income of less than \$20,712 for a two person household, and an annual income of less than \$31,535 for a family of four.¹⁷

SNAP also significantly impacts the nation's economy, with approximately \$76 billion in SNAP benefits redeemed in 2013 alone at 252,962 participating

9. *A Goal to End Hunger*, FORBES (Oct. 19, 2013), <http://www.forbes.com/sites/skollworldforum/2013/10/19/a-goal-to-end-hunger/>; *Short History of SNAP*, *supra* note 6.

10. *Short History of SNAP*, *supra* note 6.

11. *See A Goal to End Hunger*, *supra* note 9.

12. *Supplemental Nutrition Assistance Program Participation and Costs*, FOOD & NUTRITION SERV., USDA, www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap (last updated Mar. 4, 2016) [hereinafter *Participation and Costs*].

13. *See Agricultural Act of 2014*, Pub. L. No. 113-79, §§ 4001-4033, 128 Stat. 649, 137-75; *Supplemental Nutrition Assistance Program (SNAP): Legislation*, FOOD & NUTRITION SERV., USDA, <http://www.fns.usda.gov/snap/legislation> (last updated Mar. 26, 2014) [hereinafter *Legislation*].

14. *See STRAWBRIDGE & WALLHAGEN*, *supra* note 3, at 119.

15. Neil Shah, *Food-Stamp Use Starting to Fall*, WALL ST. J. (Sept. 1, 2014, 6:50 PM), <http://www.wsj.com/articles/food-stamps-starting-to-fall-1409606700>.

16. 7 U.S.C.S. § 2014(c) (LexisNexis 2015); *Map the Meal Gap: Food Insecurity in the U.S.*, FEEDING AM., map.feedingamerica.org/county/2013/overall (last visited Apr. 24, 2016).

17. *See Supplemental Nutrition Assistance Program (SNAP): Eligibility*, FOOD & NUTRITION SERV., USDA, <http://www.fns.usda.gov/snap/eligibility> (last updated Feb. 25, 2016) [hereinafter *Eligibility*]. *But see, e.g.*, GENE FALK & RANDY ALISON AUSSENBERG, CONG. RESEARCH SERV., R42054, THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP): CATEGORICAL ELIGIBILITY 5-6 (2014) (recognizing certain states have opted to allow "categorical eligibility" for individuals, which could be up to a household income of 200% of the federal poverty line).

businesses, including stores, farmer's markets, farms, homeless meal providers, treatment centers and homes, etc.¹⁸ Likewise, third party processors have and continue to benefit from SNAP Electronic Benefit Transfer (EBT) transactions because today's SNAP participants all have EBT cards, which work like debit cards.¹⁹ The third party processor charges a transaction fee for processing the charge and transferring the amount from the SNAP participant's EBT card to the retailer's account.²⁰

With a program that costs taxpayers billions of dollars each year, many question the effectiveness of the program and if it is the best method to end hunger in America, or if SNAP dollars are simply another way for corporations to earn billions each year.²¹ Furthermore, the stigma of the SNAP program and the speculation of its participants acting fraudulently have caused the program to lose support from the general public.²² Several legislators recently attempted to make significant budget cuts to the program while debating the 2014 Farm Bill due to this poor public perception and lack of trust in the SNAP program.²³ Some succeeded, with budget cuts to SNAP in the recent Farm Bill equaling approximately \$8.6 billion.²⁴

Therefore, increasing the public's awareness regarding the importance and success of this program is necessary in order to provide a sufficient amount of funds and an effective SNAP policy that will not only provide immediate relief to hungry Americans, but will also offer a sustainable solution to pull our fellow citizens out of poverty *permanently*. Today, fifty years after the first Food Stamp Program was enacted, the government food stamps program has yet to sufficiently end hunger in the U.S., leaving us to ponder what problems must be fixed in

18. FOOD & NUTRITION SERV., USDA, SNAP RETAILER MANAGEMENT 2013 ANNUAL REPORT 2 (2013), <http://www.fns.usda.gov/sites/default/files/snap/2013-annual-report.pdf>.

19. *Eligibility*, *supra* note 17.

20. *See EBT: General Electronic Benefit Transfer (EBT) Information*, FOOD & NUTRITION SERV., USDA, <http://www.fns.usda.gov/ebt/general-electronic-benefit-transfer-ebt-information> (last updated Sept. 24, 2015) [hereinafter *EBT: Information*].

21. *See generally* MICHELE SIMON, EAT DRINK POLITICS, FOOD STAMPS: FOLLOW THE MONEY (2012), <http://www.eatdrinkpolitics.com/wpcontent/uploads/FoodStampsFollowtheMoneySimon.pdf>.

22. *See generally* Darlena Cunha, *This is What Happened When I Drove My Mercedes to Pick Up Food Stamps*, WASH. POST (July 8, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/07/08/this-is-what-happened-when-i-drove-my-mercedes-to-pick-up-food-stamps/> (providing examples of the stigma and criticism people on government food assistance programs have experienced).

23. *See* Resnikoff, *supra* note 1.

24. Margarete Purvis, Letter to the Editor, *Part of the Farm Bill: Cuts to Food Stamps*, N.Y. TIMES (Feb. 7, 2014), <http://www.nytimes.com/2014/02/08/opinion/part-of-the-farm-bill-cuts-to-food-stamps.html>.

order to make SNAP an effective program that will reduce the number of poor and hungry individuals in our country. Increased transparency of our nation's largest anti-hunger program is one of the many ways in which the government can combat hunger. There must be increased transparency in order to foster public support and effectively utilize SNAP to decrease our nation's hunger and poverty rates. The goal should be to let history repeat itself through this government program, which almost eliminated hunger in the U.S. once before.

However, some stakeholders have raised concerns about the significant harms that could result if SNAP data becomes more transparent. Should some information remain confidential? Could increasing this government program's transparency actually harm, instead of benefit, SNAP? This Note will address the possibility of increased transparency for SNAP in the near future and whether the United States Department of Agriculture (USDA) will be mandated to provide access to SNAP data that is currently withheld from the public. Section II will address the SNAP data the USDA has traditionally defined as exempt from disclosure to the public under the Freedom of Information Act (FOIA) in comparison to the Eighth Circuit Court of Appeals decision that held the USDA must disclose SNAP retailer redemption data. Section II will also summarize the USDA's response to the Eighth Circuit Court of Appeals decision. Section III will include a legal analysis of FOIA Exemptions 4 and 6 and the release of SNAP retailer redemption data, and the recent U.S. District Court for the District of South Dakota's decision reaffirming that SNAP retailer redemption data is not exempt from disclosure under FOIA. Section III will also look into the positive and negative repercussions of releasing this data and the impact this could have on SNAP participants, SNAP retailers, and the SNAP program as a whole. Finally, this Note will conclude with the impact the Eighth Circuit Court of Appeals decision could have on the fight against hunger in the U.S.

II. SNAP RETAILER REDEMPTION DATA: EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT?

Demands for increased transparency of a government program where \$76 billion taxpayer dollars are spent each year is a request from both opponents and supporters of SNAP.²⁵ Many have asked the question: "Do SNAP dollars truly assist in the fight against hunger in America?" One option for gaining access to the information the government collects on this anti-hunger program could be

25. See, e.g., Monica Eng, *Politicians, Health Advocates Seek Transparency, Restrictions in Food Stamp Program: Goal is for Better Accounting of Billions Spent, Healthier Choices*, CHI. TRIB. (June 20, 2012), http://articles.chicagotribune.com/2012-06-20/news/ct-nw-food-stamp-spending-20120620_1_food-stamp-junk-food-supplemental-nutrition-assistance-program/2.

through FOIA. “FOIA . . . mandates that an agency disclose records [up]on request, unless they fall within one of nine exemptions.”²⁶ FOIA was intended to provide more transparency and access to government information that had historically been kept confidential and hidden from the public for no valid or necessary reason and to ensure that the public could have the right to judicial review in cases where unwilling government officials might refuse to release information that should be made available to the public.²⁷

Recently, the USDA and Eighth Circuit Court of Appeals disagreed when it came to certain SNAP retailer data’s required disclosure under FOIA.²⁸ Historically, the USDA has not released detailed information related to SNAP retailers. The USDA does not gather or have the authority to force retailers to collect data on product purchases.²⁹ The USDA does collect data on how much each store and retailer is reimbursed from SNAP, but does not make this information public.³⁰ The USDA believed SNAP retailer redemption data fell under one of the nine exemptions under FOIA.³¹ However, after the recent Eighth Circuit Court of Appeals decision in *Argus Leader Media v. USDA*, the USDA may now have a legal obligation to release SNAP retailer redemption data to the public.³²

A. SNAP Retailer Redemption Data and FOIA Exemption 3: The USDA v. Argus Leader Decision

The massive growth of SNAP participants and funding from the pre-2008 Recession to the time period during and after the Recession led to increased skepticism and inquiry from the general public.³³ A South Dakota newspaper, the *Argus Leader*, inquired how much money individual retailers make each year from SNAP, due to the increased public distrust of this program.³⁴ The *Argus Leader* requested the information be disclosed by the USDA under FOIA.³⁵ The

26. *Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011).

27. *EPA v. Mink*, 410 U.S. 73, 80 (1973); *see* 5 U.S.C. § 552 (2012).

28. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. 45175, 45175 (Aug. 4, 2014).

29. *Id.*; SIMON, *supra* note 21, at 15; *see* 7 U.S.C. § 2018(c) (2012).

30. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175; SIMON, *supra* note 21, at 15.

31. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175.

32. *See Argus Leader Media v. USDA*, 740 F.3d 1172, 1173 (8th Cir. 2014); Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175.

33. *See Argus Leader Media*, 740 F.3d at 1173.

34. *Id.*

35. *Id.*; *see* 5 U.S.C. § 552 (2012).

USDA responded by denying the request to disclose this information, and did not provide a detailed explanation as to why the Department refused to disclose this information.³⁶ In response, *Argus Leader* filed a claim in the United States District Court for the District of South Dakota under FOIA.³⁷

Specifically, the *Argus Leader* requested retail information from 2005-2010 including: “store identifier or unique ID number, the store name, the store address, the store type, and the yearly redemption amounts or Electronic Benefit Transfer . . . sales [amounts] for each participating store.”³⁸ The only data that was not provided to *Argus Leader* by the USDA was the stores’ ID numbers and the annual redemption amounts for each store.³⁹ The issue of the stores’ ID numbers was determined to be irrelevant information and the withholding of this information was no longer disputed.⁴⁰ “Redemption data” was the only information still in dispute.⁴¹ “Redemption data is the dollar amount of goods that each retailer sells to SNAP beneficiaries and . . . redeems from the federal government” each year.⁴² The Benefit Redemption Division (BRD), which runs the EBT system, collects the requested information; but the USDA and its agency which administers SNAP, the Food and Nutrition Service (FNS), believes this information falls under FOIA Exemption 3.⁴³

In the argument before the United States District Court for the District of South Dakota, *Argus Leader* contended that Exemption 3 under FOIA does not apply to redemption data because the statute is not a withholding statute, and the redemption data is not the kind of information Congress intended to have withheld.⁴⁴ Under FOIA Exemption 3, information that is prohibited from being released to the public by another statute is exempt from required disclosure under FOIA if the statute: “(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be with-

36. *Argus Leader Media*, 740 F.3d at 1174.

37. *Id.*; see Complaint at 1, *Argus Leader Media v. USDA*, 900 F. Supp. 2d 997 (D.S.D. 2012) (No. Civ. 11-4/21).

38. *Argus Leader Media v. USDA*, 900 F. Supp. 2d 997, 1000 (D.S.D. 2012); Complaint, *supra* note 37, at 2.

39. *Argus Leader Media*, 900 F. Supp. 2d at 1000.

40. *Id.* at 1001.

41. *Id.*

42. *Id.* at 1000.

43. See *id.* at 1000-01; Order Denying Defendant’s Motion for Summary Judgement at 3, *Argus Leader Media v. USDA*, 2015 U.S. Dist. LEXIS 132120 (D.S.D. Sept. 30, 2015); see also 5 U.S.C. §§ 552(b)(3) & (b)(4) (2012).

44. *Argus Leader Media*, 900 F. Supp. 2d at 1002.

held[.]”⁴⁵ Thus, when determining if Exemption 3 applies to the information at issue, courts look at: (1) if it is a withholding statute and (2) whether the information at issue falls within the withholding statute.⁴⁶

First, the statute must be a withholding statute.⁴⁷ The USDA argued the statute, 7 U.S.C. § 2018, is a withholding statute; however, no U.S. District Court prior to this case has ruled on whether this statute is a withholding statute.⁴⁸ Thus, the district court analyzed this issue of first impression by looking at the plain language of the statute.⁴⁹ It was not disputed among the parties that 7 U.S.C. § 2018 was a withholding statute, and the district court concluded this element was satisfied.⁵⁰ Therefore, the element at issue is whether retailer redemption data falls within the statute’s list of documents that the USDA has the authority to limit use or disclosure of to the general public.⁵¹

Next, the district court had to determine whether SNAP retailer redemption data falls within the withholding statute, Section 9(c) of The Food and Nutrition Act of 2008 (Farm Bill). Section 9(c) grants the USDA the authority to issue regulations to restrict the use or disclosure of information received from SNAP retailer applicants and participating SNAP retailers.⁵² “Section 9(c) imposes criminal penalties for disclosure of such information in a manner not authorized by Federal law or regulation.”⁵³ “Throughout the history of the Program, Section 9(c) of the Act has been interpreted as a withholding statute that includes SNAP retailer redemption information.”⁵⁴ In 1978, the Food and Nutrition Services published the final rule to affirm Section 9(c) prohibits the release of “information furnished by firms, including . . . their redemptions of coupons, . . . except for purposes directly connected with the administration and enforcement of [the] Food Stamp Act and these regulations.”⁵⁵ The USDA has always acted in pursuance of this Act and the FNS regulations, and the Secretary has never been grant-

45. 5 U.S.C. § 552(b)(3)(A).

46. *Cent. Platte Nat. Res. Dist. v. USDA*, 643 F.3d 1142, 1146 (8th Cir. 2011); *Ass’n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 332 (D.C. Cir. 1987).

47. *Cent. Platte Nat. Res. Dist.*, 643 F.3d at 1146; *Ass’n of Retired R.R. Workers, Inc.*, 830 F.2d at 332.

48. *Argus Leader Media*, 900 F. Supp. 2d at 1005.

49. *Id.* at 1006; *Zanoni v. USDA*, 605 F. Supp. 2d 230, 236 (D.D.C. 2009).

50. *Argus Leader Media*, 900 F. Supp. 2d at 1006.

51. *Id.* at 1007.

52. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. 45175, 45175 (Aug. 4, 2014); *see* 7 U.S.C. § 2018(c) (2012).

53. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175.

54. *Id.*

55. 7 C.F.R. § 278.1(q) (2016).

ed with the authority to release that data to the public.⁵⁶

The court then analyzed whether SNAP retailer redemption data fell within the sales tax and income information that was specifically exempt within the withholding statute.⁵⁷ The statute clearly requires income and sales tax information the government receives from SNAP retailers to be withheld.⁵⁸ The district court reasoned that because income and sales tax information is clearly within the language of the statute, and redemption data, although not mentioned specifically in the statute, falls within income and sales tax information, it clearly is information that falls within the withholding statute.⁵⁹ The district court concluded the plain language of the statute clearly includes a “narrow criteria for when information . . . [can] be released and redemption data is included under [the statute’s] broad description of what constitutes ‘information.’”⁶⁰ The court held the USDA properly withheld the retailer redemption data.⁶¹ Thus, the court granted the USDA’s motion for summary judgment, stating the information was exempt from disclosure under Exemption 3.⁶²

Argus Leader appealed this decision to the United States Court of Appeals for the Eighth Circuit.⁶³ The Eighth Circuit Court of Appeals began their decision by noting their concern with SNAP trafficking (selling SNAP benefits for cash).⁶⁴ The court here made note of why there are transparency concerns with SNAP and retailers, due to the fact that ten percent of retailers engage in trafficking each year.⁶⁵ The court also stated certain facts are often misunderstood or misinterpreted about SNAP due to a lack of information, including the fact that a large majority of SNAP participants are from households with a child, elderly, or disabled person.⁶⁶

Once again, the USDA admitted that it was able to provide *Argus Leader*

56. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175.

57. 7 U.S.C. 2018(c); *Argus Leader Media v. USDA*, 900 F. Supp. 2d 997, 1007 (D.S.D. 2012).

58. 7 U.S.C. § 2018(c); *Argus Leader Media*, 900 F. Supp. 2d at 1007-08.

59. See *Argus Leader Media*, 900 F. Supp. 2d at 1008.

60. *Id.* at 1009.

61. *Id.* at 1008.

62. See 5 U.S.C. § 552(b)(3) (2012); see *Argus Leader Media v. USDA*, 740 F.3d 1172, 1173 (8th Cir. 2014); (whether or not Exemption 4 applies to the release of this data was not decided in this Eighth Circuit Court of Appeals decision). *Argus Leader Media*, 900 F. Supp. 2d at 1010.

63. *Argus Leader Media*, 740 F.3d at 1175.

64. *Id.* at 1174

65. *Id.*

66. *Id.* (noting that in 2012, 76 percent of SNAP participants were from these households).

with retailer redemption data, but felt this information was required to be withheld under Exemptions 3 & 4 of FOIA.⁶⁷ The USDA once again moved for summary judgment under Exemption 3 of FOIA.⁶⁸ Again, both parties agreed that 7 U.S.C. § 2018 (c) is a withholding statute, or a statute that requires particular information to be withheld from public disclosure.⁶⁹ The only issue disputed was whether the information at issue falls within the withholding statute.⁷⁰

The Eighth Circuit court held that the district court misread and misinterpreted the withholding statute, 7 U.S.C. § 2018(c).⁷¹ The type of information this statute discusses is information the applicant retail food store submits to the USDA for purposes of their application and continued qualification for being a SNAP retailer.⁷² The Eighth Circuit court concluded because retailer redemption information is not this type of information – information the applicant or approved SNAP retailer *submits* to the USDA – the information cannot be exempt from required disclosure.⁷³ Retailer redemption data is gathered by a division of the USDA, through a third party processor, and thus, is not information submitted by the retailers.⁷⁴ No SNAP retailer application forms, or information gathered to determine whether the retailer may continue to be a SNAP retailer, contain redemption data.⁷⁵ The plain language is clear, retailer redemption data is not the type of information required to be withheld by this statute.⁷⁶

The Eighth Circuit added further support to this plain language reading of the statute.⁷⁷ The court argued the subsection heading stating “information submitted by applicants” made it obvious that the information can only be that which the applicants themselves submit.⁷⁸ Thus, if there was any ambiguity in the statute, which the court stated there was not, this tool of statutory construction would make clear that the heading intended for the contents of the subsection to only withhold information submitted by applicants.⁷⁹

The Eighth Circuit court determined that the district court made several errors. The Eighth Circuit court argued the district court misread the term “any in-

67. *Id.*; see 5 U.S.C. §§ 552(b)(3)-(4).

68. *Argus Leader Media*, 740 F.3d at 1174; see 5 U.S.C. § 552(b)(3).

69. *Argus Leader Media*, 740 F.3d at 1175.

70. *Id.*

71. *Id.* at 1176.

72. 7 U.S.C. § 2018(c) (2012); *Argus Leader Media*, 740 F.3d at 1175-76.

73. *Argus Leader Media*, 740 F.3d at 1176.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.*

78. 7 U.S.C. § 2018(c); *Argus Leader Media*, 740 F.3d at 1176.

79. *Argus Leader Media*, 740 F.3d at 1176.

formation obtained under this subsection” to include all information used by the USDA to determine retailer’s qualifications when the statute clearly only applies to information that is submitted to the USDA by the retailer.⁸⁰ The Eighth Circuit court also reasoned that the district court’s interpretation that retailer redemption data fell under the “relevant income and sales tax filing documents,” which are allowed to be withheld, did not comply with the statutory interpretation requirements that require the courts to “presume that [the] legislature says in a statute what it means.”⁸¹ Retailer redemption data is not an income or sales tax filing document, and therefore, the district court cannot just presume that retailer redemption data was meant to be included in the statute, when the legislature did not specifically describe this data in the Act.⁸²

The Eighth Circuit court also analyzed the statutory language of FOIA Exemption 3, which the district court did not address.⁸³ Under Exemption 3, the information must be “*specifically exempt*” from disclosure in the withholding statute, and in addition, the withholding statute must either “*require*” it to be withheld, or the statute must “*establish*” or “*refer*” to specific subjects or types of information that should be withheld.⁸⁴ The language of the withholding statute clearly does not “specifically exempt” retailer redemption data.⁸⁵

Furthermore, the Eighth Circuit court noted that while they must first rely on an interpretation of the statutory text, they also may look at the legislative history of the statute.⁸⁶ The court noted Congress’s intent was to ensure the public was aware of SNAP fraud by retailers and because retailer redemption was originally in a completely different section of the Act, Congress did not intend at the time for the USDA to have the ability to gather redemption data.⁸⁷ The court concluded the legislative history did not show that Congress intended for redemption data to be included as information that should be withheld in this statute and exempt from disclosure under Exemption 3.⁸⁸

Thus, the Eighth Circuit Court of Appeals concluded that the plain text of 7 U.S.C. § 2018(c) clearly does not include retailer redemption data, and therefore,

80. *Id.*

81. *Id.* at 1176-77.

82. *Id.* at 1177.

83. *See id.* at 1175; *see also* *Argus Leader Media v. USDA*, 900 F. Supp. 2d 997, 1005 (D.S.D. 2012).

84. *See* 5 U.S.C. § 552(b)(3) (2012); *Argus Leader Media*, 740 F.3d at 1175.

85. *See* 5 U.S.C. § 552(b)(3); 7 U.S.C. § 2018(c) (2012). *See generally* *Argus Leader Media*, 740 F.3d at 1172.

86. *Argus Leader Media*, 740 F.3d at 1177.

87. *Id.*

88. *Id.*

this information does not fall within the withholding statute.⁸⁹ In conclusion, the court held retailer redemption data was not exempt under Exemption 3 of FOIA, ruling in favor of *Argus Leader*.⁹⁰

B. The USDA's Response

Following the Eighth Circuit Court of Appeals decision, the USDA posted a Request for Information in the *Federal Register* to solicit public comment on a potential change in policy to release retailer transaction data.⁹¹ The USDA specifically focused on gathering feedback from SNAP retailers, and asked for public comment on the following: (1) Is aggregated monthly or annual SNAP redemption data at the individual store level “confidential business information,” and thus, exempt from required disclosure under FOIA exemption 4; (2) Would the release of SNAP redemption data provide greater transparency and public accountability with the administration of SNAP, and specifically what impact the release of this information could have on SNAP participants; (3) Should aggregated monthly or annual SNAP redemption data be released at the individual store level; and (4) If a different impact would result if the aggregated redemption data was released for all the retailer's stores in that state combined, or nationally combined sales, compared to releasing redemption data at the individual store level.⁹² The overall objective of the USDA's request for information is to provide greater transparency of the program, while remaining within their legal obligations.⁹³ Over 530 comments were submitted to the USDA through this Request for Information.⁹⁴

The USDA primarily solicited comments from SNAP retailers, and while a majority of the comments were not in favor of the USDA releasing this redemption data, over a hundred comments were in favor of the USDA's release of this data and increased transparency of SNAP.⁹⁵ In fact, some SNAP retailers had no issue with the release of their redemption data and were in support of increased transparency.⁹⁶ The USDA contacted 321,988 SNAP retailers for feedback but

89. *Id.*

90. *Id.*

91. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. 45175, 45175 (Aug. 4, 2014).

92. *Id.* at 45175-76.

93. *Id.* at 45175.

94. Comment Letters on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, Docket No. FNS-2014-0030.

95. *See id.*; *see also* Order Denying Defendant's Motion for Summary Judgment, *supra* note 43, at *5; Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175.

96. *See, e.g.*, Chris Dilley, People's Food Co-op of Kalamazoo, Comment Letter on Re-

only 323 responded,⁹⁷ which leads future courts to ponder the realistic impact the release of this data could have on SNAP retailers.

Even so, the USDA decided to continue to press the issue in court.⁹⁸ The Eighth Circuit decision did not address whether or not the data is immune from required release under Exemptions 4 or 6 of FOIA.⁹⁹ Therefore, the USDA filed a motion for summary judgment arguing the retailer transaction data was exempt from disclosure under FOIA Exemptions 4 and 6, and stated they would not release the data, claiming it is exempt from required release under these exemptions.¹⁰⁰

The U.S. District Court for the District of South Dakota first analyzed whether or not the USDA is not required to disclose retailer redemption data under FOIA Exemption 4.¹⁰¹ Exemption 4, which is analyzed in more detail below, would exempt the USDA from disclosing any “commercial or financial information obtained from a person and privileged or confidential” information.¹⁰² The district court stated that in order for an agency to claim this exemption, they must “provide affidavits which justify the claimed exclusion of each document,” and show a correlation between the exemption and the part of the document which the agency is claiming should be exempt.¹⁰³ The district court determined that in order to show that the USDA is entitled to summary judgment as a matter of law, and therefore, should not be required to disclose the retailer redemption data, the USDA must show that the release of retailer redemption data will cause substantial competitive harm to the SNAP retailer.¹⁰⁴ The district court reasoned that because the USDA received a small number of responses from SNAP retailers, some retailers were not concerned about competitive harm from the disclosure of this data, and that a reasonable fact finder could determine that the release of the data is not enough information for a competitor to use to influence the marketplace, there is reasonable dispute as to whether or not the release of this

quest for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Aug. 21, 2014).

97. Order Denying Defendant’s Motion for Summary Judgment, *supra* note 43, at *6.

98. *See id.*

99. *See Argus Leader Media v. USDA*, 740 F.3d 1172, 1177 (8th Cir. 2014); Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175.

100. Order Denying Defendant’s Motion for Summary Judgment, *supra* note 43, at *1, 5.

101. *Id.* at *9.

102. 5 U.S.C. § 552(b)(4) (2012).

103. *Miller v. U.S. Dep’t of State*, 779 F.2d 1378, 1387 (8th Cir. 1985); Order Denying Defendant’s Motion for Summary Judgment, *supra* note 43, at *10.

104. Order Denying Defendant’s Motion for Summary Judgment, *supra* note 43, at *6-7.

data will cause SNAP retailers substantial competitive harm.¹⁰⁵ Therefore, the district court denied the USDA's motion for summary judgment for Exemption 4.¹⁰⁶

Then, the district court analyzed whether or not retailer redemption data fell within Exemption 6 of FOIA.¹⁰⁷ Exemption 6 applies to cases where disclosure of personnel and medical files would lead to an "unwarranted invasion of personal privacy."¹⁰⁸ A legal analysis of Exemption 6 is also discussed below. The question the court first looked at was whether or not the release of this data would reveal private information about a retailer's personal finances.¹⁰⁹ The court concluded that the disclosure of individual store redemption data does not provide enough information to determine what percentage of the retailer's finances are earned from SNAP; therefore, the court concluded redemption data does not disclose enough information to be an accurate representation of a retailer's finances.¹¹⁰ Then, the court discussed how the public has a strong interest in the release of the data, and that as discussed in Exemption 4, a reasonable fact-finder could determine there is not a threat of substantial competitive harm.¹¹¹ Thus, the district court denied the USDA's motion for summary judgment as to Exemption 6, resulting in the district court's denial of the USDA's motion for summary judgment under both Exemptions 4 and 6.¹¹²

The USDA is now left to determine what option they will pursue next. While the USDA may not decide to pursue further litigation, this is one potential option. The district court's order did not provide an in-depth analysis of retailer redemption data for Exemptions 4 and 6.¹¹³ Therefore, when determining if the USDA has established enough facts for Exemption 4 or 6 to apply, courts may provide a deeper and more thorough analysis.

An alternative option could include the creation of a new release policy for SNAP retailer redemption data.¹¹⁴ If the USDA determines they will release the data, they will then make a decision as to how the data will be released and in

105. *Id.* at *11.

106. *Id.*

107. 5 U.S.C. § 552(b)(6); Order Denying Defendant's Motion for Summary Judgment, *supra* note 43, at *12.

108. Order Denying Defendant's Motion for Summary Judgment, *supra* note 43, at *12.

109. *Id.*

110. *Id.* at *13.

111. *Id.*

112. *Id.*

113. *See id.* at *9-13.

114. *See* Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. 45175, 45175 (Aug. 4, 2014).

what form the data will be provided to the public.¹¹⁵ In conclusion, the USDA has thoroughly considered multiple policy options to ensure first, they are legally required to release the information, and second, to increase public transparency of SNAP, while balancing the repercussions releasing this data could have on SNAP participants, SNAP retailers, and SNAP as a whole.¹¹⁶

III. SHOULD SNAP RETAILER REDEMPTION DATA BE DISCLOSED TO THE PUBLIC? A LEGAL AND PUBLIC POLICY ANALYSIS

Congress's intent with FOIA was clear: the public must be permitted access to government information that had been unnecessarily kept from the public eye for too long.¹¹⁷ Thus, FOIA usually mandates broad disclosure of government agency documents.¹¹⁸ In addition, FOIA exemptions "are to be narrowly construed to ensure that disclosure, rather than secrecy, remains the primary objective of the Act[.]"¹¹⁹ and the burden is on the agency to prove the exemption applies to the requested information.¹²⁰ When analyzing whether Exemptions 3, 4, or 6 apply to retailer redemption data, the Act's purpose requires a narrow construction when deciding whether the information is exempt from disclosure, and courts will apply a broad disclosure of most agency documents.¹²¹ Exemption 4 will be analyzed below with this in mind. FOIA Exemption 6 will also be briefly discussed. Finally, this section will address the possible repercussions the release of retailer redemption data might have, including the impact on SNAP participants, SNAP retailers, and the SNAP program as a whole.

A. SNAP Retailer Redemption Data and FOIA Exemption 4

The USDA argued that SNAP retailer redemption data cannot be disclosed to the public under Exemption 4 of FOIA.¹²² Exemption 4 excludes "trade secrets and commercial or financial information obtained from a person and privileged

115. *See id.* (noting that it could be released either at the individual store level or from the combined stores the retailer owns at the state or national level, and whether the aggregated redemption data released will be monthly or annual data).

116. *See id.*

117. *See* *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011); *EPA v. Mink*, 410 U.S. 73, 80 (1973).

118. *Mink*, 410 U.S. at 80; *see* 5 U.S.C. § 552 (2012).

119. *Mo. Coal. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1208 (8th Cir. 2008); *see also* *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Miller v. USDA*, 13 F.3d 260, 262 (8th Cir. 1993).

120. *See* 5 U.S.C. § 552(a)(4)(B).

121. *See* 5 U.S.C. § 552; *Rose*, 425 U.S. at 361; *Mink*, 410 U.S. at 80; *Mo. Coal.*, 542 F.3d at 1208.

122. Order Denying Defendant's Motion for Summary Judgment, *supra* note 43, at *9.

or confidential” information from required disclosure.¹²³ Courts have held that for documents to fall within Exemption 4, the information must be “(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential.”¹²⁴ Therefore, several interested parties, including the USDA, have evaluated each element in order to determine whether or not retailer redemption data falls within Exemption 4.¹²⁵ If the USDA continues to claim they are not required to disclose this information under Exemption 4, the burden will be on the USDA to prove that Exemption 4 does apply to retailer redemption data.¹²⁶

1. *Is SNAP Retailer Redemption Data Commercial or Financial Information?*

Courts have interpreted the words “commercial” and “financial” in 5 U.S.C. § 552(b)(4) by their plain and ordinary meanings.¹²⁷ There is no legislative history to define or explain the words “commercial” or “financial.”¹²⁸ In an effort to define these words, Courts include sales statistics, profits, revenue and income-producing related information all as “commercial” information.¹²⁹ Yet, courts have not forgotten the narrow construction required for FOIA exemptions,¹³⁰ and thus, have held not every piece of information provided or submitted to the government by an entity engaged in commercial activity falls under Exemption 4.¹³¹

123. 5 U.S.C. § 552(b)(4).

124. *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Pub. Citizen v. U.S. Dep’t of Health & Human Servs.*, 975 F. Supp. 2d 81, 98 (D.D.C. 2013). Exemption 4 also exempts other information, such as trade secrets. The author has chosen not to address trade secrets because the USDA’s Request for Information only addressed whether the retailer redemption data was “confidential business information,” not a trade secret. *See Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data*, 79 Fed. Reg. 45175, 45175 (Aug. 4, 2014).

125. *See, e.g.*, Nicholas W. Clark, General Counsel, United Food and Commercial Workers International Union, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014); R. Timothy Columbus, Steptoe & Johnson LLP, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014).

126. *See* 5 U.S.C. § 552(a)(4)(B).

127. *E.g.*, *Bd. of Trade v. Commodity Futures Trade Comm’n*, 627 F.2d 392, 403 (D.C. Cir. 1980).

128. *Bd. of Trade*, 627 F.2d at 403.

129. *Pub. Citizen*, 975 F. Supp. 2d at 99; *see Kahn v. Fed. Motor Carrier Safety Admin.*, 648 F. Supp. 2d 31, 36 (D.D.C. 2009).

130. *See Mo. Coal. v. U.S. Army Corps of Eng’rs*, 542 F.3d 1204, 1208 (8th Cir. 2008); *Miller v. USDA*, 13 F.3d 260, 262 (8th Cir. 1993).

131. *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *British Airports Auth. v. U.S. Dep’t of State*, 530 F. Supp. 46, 49 (D.D.C. 1981).

A strong argument could be made that SNAP retailer redemption data falls within the sales statistics that courts have held qualify as commercial or financial information,¹³² because this data includes the amount of sales each retailer made to SNAP participants.¹³³ Thus, the release of monthly or even annual SNAP data would include statistics of each stores' sales amounts within that time period to SNAP participants, and would be the type of sales statistics courts consider to be commercial or financial.¹³⁴ The redemption data would also show each store's profits or revenue from SNAP participants, which courts have similarly held to be commercial information.¹³⁵ Furthermore, this could also be considered "income producing" information courts have held is commercial, because it is no secret SNAP redemptions contribute significantly to multiple retailers' incomes.¹³⁶ Thus, the USDA has a strong argument that SNAP retailer redemption data is commercial information.

However, this information was not *submitted* to the USDA by the commercial entity.¹³⁷ Therefore, an argument can be made that this information does not fall within commercial or financial information's plain meaning because it does not serve a commercial function or is not of a commercial nature, it was information gathered for the USDA by third party processors to analyze SNAP spending patterns.¹³⁸ However, courts have held the ordinary and plain meaning of commercial and financial does not limit this information to documents provided by that specific business; information can still be commercial and financial if it is supplied by a third party.¹³⁹ Yet, one could still attempt to argue that regardless of who provided this information to the USDA, the information is used solely for

132. *See Pub. Citizen*, 975 F. Supp. 2d at 99.

133. *See id.*; Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. 45175, 45175 (Aug. 4, 2014); *see also* Oliver I. Ireland, Morrison & Foerster LLP, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Redemption Data (Sept. 8, 2014).

134. David French, Senior Vice President, Government Relations, National Retail Federation, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014).

135. *See Pub. Citizen*, 975 F. Supp. 2d at 99; *see also* Kahn v. Fed. Motor Carrier Safety Admin., 648 F. Supp. 2d 31, 36 (D.D.C. 2009).

136. *See Pub. Citizen*, 975 F. Supp. 2d at 99.

137. *See, e.g.*, Argus Leader Media v. USDA, 740 F.3d 1172, 1174 (8th Cir. 2014) (stating the third party processors provide the USDA with this transaction data, not the retailers).

138. *See* The Reporters Committee for Freedom of the Press, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Aug. 28, 2014); *see also* Am. Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978).

139. Bd. of Trade v. Commodity Futures Trade Comm'n, 627 F.2d 392, 405 (D.C. Cir. 1980).

USDA analysis and is not commercial.¹⁴⁰

Even so, based on Courts' interpretation of commercial and financial within Exemption 4, it is likely Courts would conclude retailer redemption data is commercial and financial information.¹⁴¹ Even if the information is only used for the purpose of spending analysis by the USDA, the information is inherently commercial in nature because the data shows retailers' revenue and profit from the SNAP program.¹⁴² Retailer redemption data is inherently within the ordinary meaning of commercial and financial because it relates directly to these retailers' financial benefit from the SNAP program.

2. *Is SNAP Retailer Redemption Data Obtained from a Person?*

Next, a court would need to determine whether or not SNAP retailer redemption data was obtained by the USDA from a person. Corporations and businesses are included within the context of "person" for Exemption 4.¹⁴³ Yet, supporters of releasing the data have argued that "person" does not include the USDA, a government agency.¹⁴⁴ Courts have stated the legislative history and plain language of Exemption 4 does not provide protection to intra or inter agency documents.¹⁴⁵ Some courts have more narrowly confined this to hold that "person" in Exemption 4 does not apply to government agency documents transferred from one government body to another.¹⁴⁶ Thus, the debate once again becomes centered on whether or not this information is generated by the USDA because this information is not submitted by retailers to the USDA.¹⁴⁷ If the document is one produced solely by the USDA, then it could be information courts believe Exemption 4's plain language does not protect because it is not obtained by the government from a person, but instead created within the government agency itself.¹⁴⁸ Thus, the information would be considered by the Courts to

140. See generally The Reporters Committee for Freedom of the Press, *supra* note 138.

141. See *Pub. Citizen*, 975 F. Supp. 2d at 99; *Kahn v. Fed. Motor Carrier Safety Admin.*, 648 F. Supp. 2d 31, 36 (D.D.C. 2009); *Ireland*, *supra* note 133.

142. See *Pub. Citizen*, 975 F. Supp. 2d at 99.

143. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979).

144. See *Grunnman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1969); The Reporters Committee for Freedom of the Press, *supra* note 138.

145. *Brockway v. Dep't of Air Force*, 518 F.2d 1184, 1187-88 (8th Cir. 1975); *Grunnman Aircraft Eng'g Corp.*, 425 F.2d at 582; H.R. REP. NO. 1497, at 10 (1966); S. REP. NO. 813, at 9 (1965).

146. *Brockway*, 518 F.2d at 1187-88.

147. See *Argus Leader Media v. USDA*, 740 F.3d 1172, 1176 (8th Cir. 2014); The Reporters Committee for Freedom of the Press, *supra* note 138; see also *Grunnman Aircraft Eng'g Corp.*, 425 F.2d at 582.

148. See *Grunnman Aircraft Eng'g Corp.*, 425 F.2d at 582; see also 5 U.S.C. § 552(b)(4)

be an agency document, not a business or corporate document.¹⁴⁹

Courts have also concluded information obtained from a person about a third party is included within Exemption 4.¹⁵⁰ This information must be obtained by an outside party, not created within the government agency.¹⁵¹ Thus, the debate will continue to be primarily focused on whether or not this information was “created” or “generated” by the USDA, or if it was information obtained from a “person” because it was given to the USDA by a third-party processor.¹⁵² If a court holds the data is given to the USDA by the third-party processor, the information would likely fall under the definition of “obtained by a person” under Exemption 4.¹⁵³

The third-party processors gather and provide this information about the SNAP retailers’ redemptions to the USDA.¹⁵⁴ In fact, the Eighth Circuit Court of Appeals in the *Argus Leader* case even stated “the underlying data is ‘obtained’ from third-party payment processors”¹⁵⁵ The court did note that the USDA takes this data to *generate* the information, which leads to the assumption the USDA is creating some portion of these records.¹⁵⁶ The USDA’s creation of the redemption data statistics, one could argue, is enough to prove the actual documents or records at issue are not actually created by the third-party processors, but the USDA itself, and therefore, should not fall within Exemption 4 because it was not obtained by the agency from an outside party, but created within.¹⁵⁷ However, the fact even a portion of this information was provided to the USDA by the third-party processor (retail stores’ SNAP transaction data) could lead a court to determine some of this information is still provided by an outside party, and thus, falls within the definition of “obtained from a person.”¹⁵⁸ If a court is

(2012); *Argus Leader Media*, 740 F.3d at 1176; *The Reporters Committee for Freedom of the Press*, *supra* note 138.

149. *See Argus Leader Media*, 740 F.3d at 1176; *The Reporters Committee for Freedom of the Press*, *supra* note 138; *see also Grunman Aircraft Eng’g Corp.*, 425 F.2d at 582.

150. *Bd. of Trade v. Commodity Futures Trade Comm’n*, 627 F.2d 392, 405 (D.C. Cir. 1980).

151. *See id.* (holding information obtained through one person that includes confidential business information regarding a third party could still fall within Exemption 4).

152. *Compare* *The Reporters Committee for Freedom of the Press*, *supra* note 138, *with* *Columbus*, *supra* note 125.

153. *See Bd. of Trade*, 627 F.2d at 405; *see also* 5 U.S.C. § 552(b)(4).

154. *See* 7 C.F.R. § 274.4 (2016).

155. *Argus Leader Media v. USDA*, 740 F.3d 1172, 1176 (8th Cir. 2014).

156. *See id.*

157. *See id.*; *see Grunman Aircraft Eng’g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1969) (holding documents passed around by government bodies are not “obtained from any person” within the meaning of Exemption 4).

158. *See Bd. of Trade*, 627 F.2d at 405.

required to determine whether retailer redemption data meets this element of Exemption 4, it will be a more complicated analysis than the first element (“commercial” or “financial”).¹⁵⁹

3. *Is SNAP Retailer Redemption Data Privileged or Confidential Information?*

The most highly debated element is whether or not this information is “confidential” or “privileged” information.¹⁶⁰ The statute did not provide for the definition of “confidential.”¹⁶¹ Looking to the legislative history, the Senate Report stated the exemption should provide protection for the confidentiality of information “which would [normally] not be released to the public by the person from whom [the information] was obtained.”¹⁶² The legislative history regarding the exemption for “confidential” information points to a concern that individuals may no longer provide necessary information to the government if they believe the government will disclose this information to the public.¹⁶³ The need to ensure this Act would protect the government from releasing competitive business information was made clear during the bill’s hearings.¹⁶⁴ Thus, the test for “confidential” under Exemption 4 includes information that has one of the two following impacts: 1) if disclosure “impair[s] the Government’s ability to obtain necessary information in the future;” or 2) if disclosure would “cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁶⁵ Courts have held the test for confidential information is objective.¹⁶⁶

When looking at the disclosure of retailer redemption data within the first part of the “confidential” test, courts will analyze whether the release of this data would impair the USDA’s ability to gather this necessary information from SNAP retailer’s in the future.¹⁶⁷ There is precedent to support the argument this would not impair the government from still obtaining retailer redemption data in

159. *See generally* Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971); *Pub. Citizen v. U.S. Dep’t of Health & Human Servs.*, 975 F. Supp. 2d 81, 98 (D.D.C. 2013).

160. *See, e.g.*, Clark, *supra* note 125; Columbus, *supra* note 125. *See generally* Getman, 450 F.2d at 673; *Pub. Citizen*, 975 F. Supp. 2d at 98.

161. *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974); *see* 5 U.S.C. § 552(b)(4) (2012).

162. S. REP. NO. 813, at 9 (1965); *see Nat’l Parks & Conservation Ass’n*, 498 F.2d at 766.

163. H.R. REP. NO. 1497, at 10 (1966); S. REP. NO. 813, at 9; *see Nat’l Parks & Conservation Ass’n*, 498 F.2d at 767-68.

164. *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 767-68; *see, e.g.*, S. REP. NO. 1219, at 6 (1964).

165. *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 770.

166. *Id.* at 766.

167. *See id.* at 770.

the future from SNAP retailers.¹⁶⁸ The release of this information would not impede on the USDA's efforts to continue gathering this information in the future because SNAP retailers are mandated by the USDA to provide this information.¹⁶⁹ In addition, the information is technically given to the USDA by the third-party processor, and thus, this disclosure would not alter the third-party processor's decisions to continue to hand over this information to the USDA, as disclosure would not impact them directly.¹⁷⁰ Although some SNAP retailers did threaten to stop participating in the program if such data is disclosed, it is highly unlikely a significant number of retailers will actually do so because SNAP dollars contribute substantially to SNAP retailers' revenue.¹⁷¹ For example, the total benefits redeemed at SNAP retailers in 2013 included over \$76 billion,¹⁷² and 82% of those dollars "were redeemed at supermarkets, large grocers and superstores."¹⁷³ Thus, it is unlikely these major grocers will be willing to lose out on millions and even billions of dollars in revenue simply because the USDA discloses the amount of funds they made monthly or annually from SNAP.

In contrast, there is evidence to support the argument that this information may risk the government's ability to still obtain SNAP retailer redemption data.¹⁷⁴ While the repercussions and policy impact this decision could have on the SNAP program will be discussed later on in this Note, it is relevant to mention here that SNAP retailers have been accustomed to the long withstanding practice by the USDA to not disclose this information.¹⁷⁵ In addition, some SNAP retailers commented they joined the program with the underlying assumption that SNAP redemption data would only be used for internal purposes by the USDA

168. See, e.g., *Ctr. to Prevent Handgun Violence v. U.S. Dep't of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997).

169. See 7 C.F.R. § 274.4 (2016); see also *Ctr. to Prevent Handgun Violence*, 981 F. Supp. at 23 (concluding sales reports from gun dealers will not impede on the government's efforts to collect this information in the future because dealers are mandated by law to provide this information).

170. See 7 C.F.R. § 274.4; *Argus Leader Media v. USDA*, 740 F.3d 1172, 1176 (8th Cir. 2014); Clark, *supra* note 125 (noting the third-party processors "actually provide the data to FNS").

171. Clark, *supra* note 125 ("Several retailers claim that release of this data will cause several stores to no longer be SNAP retailers").

172. *Participation and Costs*, *supra* note 12.

173. Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. 45175, 45176 (Aug. 4, 2014).

174. See Clark, *supra* note 125 (stating several retailers claim they will no longer participate in SNAP if the data is released).

175. See Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. at 45175.

and FDA, and would not be disclosed to the public.¹⁷⁶ SNAP retailers who are hesitant to still participate in the program if the USDA releases this information explained their main concern is how their competitors could potentially use this information to harm their businesses.¹⁷⁷ Even so, regardless of if certain SNAP retailers will decline to still participate in SNAP if this information is disclosed, the USDA will still be able to obtain this information from participating SNAP retailers because of the mandate requiring these retailers to provide this information to the USDA.¹⁷⁸

Therefore, the main focus requires an evaluation of the second prong of the “confidential” test – whether disclosure will result in “substantial harm to the competitive position of the [SNAP retailer] from whom the information was obtained.”¹⁷⁹ While an argument will still exist on whether this test and Exemption 4 should even apply to SNAP retailer’s because of the underlying debate that this information is not “obtained” through the SNAP retailers but a third-party processor,¹⁸⁰ this argument will not be furthered analyzed. Substantial competitive harm is, however, an argument that will be significantly relevant in determining the second prong of this test.¹⁸¹

When determining the amount of competitive harm the release of this information could cause the SNAP retailer, courts have stated in analyzing this prong of the test that “the court need not conduct a sophisticated economic analysis of the likely effects of disclosure.”¹⁸² “Conclusory and generalized allegations of substantial competitive harm” will not be considered by the courts to be proper evidence in determining whether or not the information is confidential.¹⁸³ Courts have also concluded there does not need to be proof of actual competitive harm, but simply evidence showing “[a]ctual competition and the likelihood of substantial competitive injury.”¹⁸⁴

176. See, e.g., Susie Macks, Operations Coordinator, Kmart Stores, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014) (stating Kmart stores agreed to participate as SNAP retailers because they believed SNAP redemption data would not be disclosed by the USDA to the public).

177. See, e.g., *id.*

178. See 7 C.F.R. § 274.4 (2016); see also *Ctr. to Prevent Handgun Violence v. U.S. Dep’t of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997).

179. *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

180. See 7 C.F.R. § 274.4; *Argus Leader Media v. USDA*, 740 F.3d 1172, 1176 (8th Cir. 2014); Clark, *supra* note 125.

181. See *Argus Leader Media*, 740 F.3d at 1176; *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 770; 7 C.F.R. § 274.4; Clark, *supra* note 125.

182. *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

183. *Id.*

184. *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979); *Nat’l Parks*

SNAP retailers against the disclosure of retailer redemption data argue there is substantial evidence to show the release of this information would cause significant injury to their businesses.¹⁸⁵ For example, it is argued that this information would give competitors information about the SNAP consumer market, including the market strength of SNAP redemptions.¹⁸⁶ Retailers could analyze this data to determine marketing strategies, gaining the attention of SNAP consumers by gathering more stock of SNAP products to sell and provide to SNAP participants than their competitors.¹⁸⁷ Some retailers also argue this data could be a reflection of the store's overall sales.¹⁸⁸ For example, the convenience store industry could utilize this market trend information to determine if they should open a store within close proximity of the SNAP retailer convenience store.¹⁸⁹

However, supporters of increased transparency argue SNAP retailer competitors cannot gain a trend in overall sales of the retailer solely based on SNAP participants' redemptions to the retailer, because these stores often have a wide consumer base of non-SNAP customers as well.¹⁹⁰ Arguments have also been made there is no proof this will potentially cause "actual substantial harm" but instead, retailers' concerns are based on "conclusory and generalized allegations."¹⁹¹ Many proponents of releasing this data have also argued grocers and superstore retailers already have access to competitive business information through mystery shoppers or by simply looking at competitors advertisements.¹⁹² Furthermore, the USDA already makes public which stores accept SNAP, and thus, this information could not be used by competitors to stigmatize SNAP retailers.¹⁹³

There are strong arguments on both sides that retailer redemption data is or is not confidential information that if released would cause substantial harm to the person from whom it was obtained. The U.S. District Court for South Dakota analyzed this element of Exemption 4, which will be discussed more below.

& Conservation Ass'n v. Kleppe, 547 F.2d 673, 683 (D.C. Cir. 1976).

185. See, e.g., Columbus, *supra* note 125.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. See, e.g., Clark, *supra* note 125.

191. See Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983); Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); Clark, *supra* note 125.

192. See, e.g., The Reporters Committee for Freedom of the Press, *supra* note 138; Fred Trotter, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 10, 2014).

193. See, e.g., Clark, *supra* note 125. *But see* Columbus, *supra* note 125.

4. *Exemption 4: General Protections and Conclusion*

The USDA cannot forget the mandate to narrowly construe the Exemptions of FOIA.¹⁹⁴ However, there is a strong argument the legislative “history firmly supports the inference that [Exemption 4] is intended for the benefit of persons who supply information as well as the agencies which gather it.”¹⁹⁵ In addition, the legislative history shows Congress intended for information such as “business sales statistics” to be protected by Exemption 4.¹⁹⁶ Therefore, even though the legislative history provided no guidance on whether “business sales statistics” applies to “trade secrets” or “confidential” information under Exemption 4, a strong argument can still be made that SNAP retailer redemption data clearly provides statistics about the business’s SNAP sales, which is undoubtedly commercial or financial information.¹⁹⁷ In conclusion, it is very likely courts would consider SNAP retailer redemption data to be commercial in nature.

However, it is difficult to predict how courts will rule on the close call of whether this information meets the second element of “obtained by a person” because it is “generated” by the USDA, yet, “gathered” by a third-party processor.¹⁹⁸ Based on precedent, it is likely a court would conclude this element is satisfied, because the information is obtained by the third party processor.¹⁹⁹ The SNAP retailer redemption data was given to the USDA by the third party processor, and thus, is information falling within FOIA Exemption 4’s purpose to ensure this information remains confidential, so long as the third element is met.²⁰⁰

Finally, a Court will have to carefully analyze whether retailer redemption data is “confidential” information that would cause competitive harm to the person from whom the information was obtained.²⁰¹ The first part of the “confidential” information test is not satisfied because the USDA still will have the legal authority to require SNAP retailers to provide this information to the agency.²⁰²

194. *Mo. Coal. v. U.S. Army Corps of Eng’rs*, 542 F.3d 1204, 1208 (8th Cir. 2008); *Miller v. USDA*, 13 F.3d 260, 262 (8th Cir. 1993).

195. *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see H. REP. NO. 1497*, at 10 (1966); *S. REP. NO. 813*, at 9 (1965).

196. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1286; *H.R. REP. NO. 1497*, at 10.

197. *See Pub. Citizen Health Research Grp.*, 704 F.2d at 1286.

198. *See Argus Leader Media v. USDA*, 740 F.3d 1172, 1176 (8th Cir. 2014).

199. *See, e.g., Bd. of Trade v. Commodity Futures Trade Comm’n*, 627 F.2d 392, 405 (D.C. Cir. 1980) (holding information obtained from one individual that concerns the confidential business affairs of a third party still falls within Exemption 4 of FOIA and may not be disclosed).

200. *See Bd. of Trade*, 627 F.2d at 405.

201. *See Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

202. *See 7 C.F.R. § 274.4* (2016); *see also Ctr. to Prevent Handgun Violence v. U.S.*

The release of this information will not “impair the ability of the Government to obtain this [necessary] information in the future” because the government has the legal authority to obtain this information from SNAP retailers, regardless of whether or not the numbers of SNAP retailers decrease or increase as a result of the USDA’s decision.²⁰³ Thus, the main issue will be whether or not the release of this information will cause substantial competitive harm to SNAP retailers if it is released to the public. In conclusion, the USDA will most likely focus its efforts on whether or not the release of this information could cause competitive harm to SNAP retailers, not only in order to determine whether or not this information is “confidential business information” and thus, exempt from required disclosure to the public under FOIA, but to also determine if the release of this data will result in a public policy choice by the USDA that could cause substantial harm to not only food retailers, but to the SNAP program as a whole.

5. *The U.S. District Court of South Dakota’s Order Denying the USDA’s Motion for Summary Judgment for Exemption 4*

When reasoning that summary judgment must be denied, the district court only focused on element three of the Exemption 4 analysis: whether this data is privileged or confidential information.²⁰⁴ The district court was only reviewing Exemption 4 for purposes of determining whether or not summary judgment for the defendant, the USDA, was appropriate and therefore, the court only needed to show that a reasonable finder of fact could lead to the conclusion that retailer redemption data is not protected under Exemption 4.²⁰⁵ The court did not analyze the other two elements, most likely because they believed that there was no reasonable dispute that retailer redemption data is commercial information²⁰⁶ and obtained by “a person.”²⁰⁷ Therefore, as analyzed above, the main issue if litigation continues will be whether or not the data is confidential business information that could cause competitive harm to SNAP retailers.²⁰⁸

When analyzing the confidential business information test, the district court only looked at if a reasonable fact finder could dispute whether or not releasing

Dep’t of Treasury, 981 F. Supp. 20, 23 (D.D.C. 1997).

203. *Nat’l Parks & Conservation Ass’n*, 498 F.2d at 770.

204. *See id.*

205. *See* Order Denying Defendant’s Motion for Summary Judgment, *supra* note 43, at *8-10.

206. *See* Pub. Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (defining the term commercial).

207. *See* Bd. of Trade v. Commodity Futures Trade Comm’n, 627 F.2d 392, 405 (D.C. Cir. 1980).

208. *See generally Nat’l Parks & Conservation Ass’n*, 498 F.2d at 770.

the data would cause substantial competitive harm.²⁰⁹ The court stated that the USDA only received a small number of responses from SNAP retailers, which infers that many are not concerned about the competitive harm that could result from the release of this data.²¹⁰ Furthermore, the court reasoned that a reasonable fact finder could determine that the marketplace competition will stay the same regardless of whether or not this data is released, and the release of this information is unlikely to influence the marketplace.²¹¹ After this short analysis, the court concluded that a reasonable fact finder could dispute whether the release of this data will cause substantial competitive harm to SNAP retailers.²¹² The district court's analysis of Exemption 4 and denying the motion for summary judgment is very brief.²¹³ If litigation proceeds, a more in depth analysis of each element and primarily the element of "confidential information" will most likely be analyzed in further detail by the courts.

B. FOIA Exemption 6

The USDA also argued that Exemption 6 applies to individual retailers that are sole proprietors or closely held corporations.²¹⁴ Exemption 6 states that "personnel and medical files and similar files [that] the disclosure of . . . would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure under FOIA.²¹⁵ This requires courts to apply a balancing test of the individual's privacy interest versus the public's interest.²¹⁶ Courts have analyzed similar exemptions with different tests and facts,²¹⁷ and here, this exemption would not even be applicable to all SNAP retailers, but only cases where the release of this information could reveal the owner's personal financial information.²¹⁸ Therefore, this Note will not analyze Exemption 6 in detail because it is likely that retailer redemption data will still be released for most retailers even if Exemption 6 does apply.

209. Order Denying Defendant's Motion for Summary Judgment, *supra* note 43, at *8.

210. *Id.* at *11.

211. *Id.*

212. *See id.* at *13.

213. *See id.* at *9-12.

214. *See id.* at *12.

215. 5 U.S.C. § 552(b)(6) (2012).

216. Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1185 (8th Cir. 2000).

217. *Compare Campaign for Family Farms*, 200 F.3d at 1185, with *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229-33 (D.C. Cir. 2008) (holding what necessitates a substantial privacy interest, or greater than de minimus interest, be shown before it can be weighed against public interest in disclosure within the test for Exemption 6).

218. *See* Order Denying Defendant's Motion for Summary Judgment, *supra* note 43, at *12.

However, the district court did briefly address this exemption within the order denying the USDA's motion for summary judgment.²¹⁹ The court held that the public's interest in disclosure of retailer redemption data outweighed the individual's privacy concerns.²²⁰ This information would not disclose the retailer's profit after business expenses and the percentage of business profits that are received from SNAP dollars.²²¹ The court then reasoned that these facts show that the public's interest is greater than the individuals' privacy interest, although the district court did not discuss why it would be in the public's interest to release this data.²²² If this case proceeds, the court should provide more detail regarding why the public benefit outweighs the privacy interest of an individual. The court hints that the public interest is greater because there would not be a privacy concern for any individual if the data is released, but more facts proving this inference could create a stronger precedent for the future.²²³

C. What is the Best Public Policy? The Positive and Negative Repercussions for SNAP Participants and Retailers

There are some vital public policy concerns that must be taken into consideration as the USDA moves forward in order to ensure this government program remains true to its purpose – to alleviate hunger and malnutrition in the U.S.²²⁴ While the USDA may be required by law to disclose SNAP retailer redemption data,²²⁵ the impact the release of this data could have on SNAP is a major concern beyond the legal analysis of FOIA exemptions. The USDA recognized that there could be serious repercussions for SNAP as a whole, and therefore, the USDA requested public input on how the release of this data could affect SNAP retailers and participants in order to seek out the least harmful method of releasing the data.²²⁶ These public comments have voiced trepidations about the negative repercussions the release of this data could have on SNAP retailers and have stated valid concerns regarding the potential loss of numerous retailers' participation in SNAP.²²⁷ Comments have also raised concerns about the impact the re-

219. *See id.* at *12-13.

220. *Id.* at *13.

221. *Id.*

222. *See id.*

223. *See id.*

224. *See* 7 U.S.C. § 2011 (2012).

225. *See generally* 5 U.S.C. § 552 (2012); *Argus Leader Media v. USDA*, 740 F.3d 1172, 1176 (8th Cir. 2014).

226. *See* Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data, 79 Fed. Reg. 45175, 45175 (Aug. 4, 2014).

227. *See, e.g.*, Steve Schwartz, Interfaith Sustainable Food Collaborative, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer

lease of this data could have on SNAP participants. While SNAP participants' roles do not come into play in the legal analysis of whether this data should or should not be released under FOIA, the public policy behind SNAP is primarily focused on the participants. Therefore, the harmful impact the release of this data could have on SNAP participants will also be a significant factor in the USDA's decision.

1. *The Impact on SNAP Participants*

There is a strong demand for increased transparency within SNAP. The lack of data the public receives about SNAP unfairly disadvantages SNAP policy and the hungry.²²⁸ The lack of data prevents educators, public health practitioners, politicians, and the public from utilizing this data to increase efforts to feed the hungry in the U.S.²²⁹ Moreover, misunderstandings and misinformed skeptics provide compelling reasons to increase the public's knowledge and awareness about SNAP.

While advocates are continuously fighting to keep the hungry fed,²³⁰ their biggest struggles arguably could be solved with more transparency and openness with SNAP.²³¹ Public critics of SNAP are increasingly relying on their personal one-time experiences of individuals they believe or personally know are abusing SNAP.²³² Yet, SNAP abuse and fraud rates are among the lowest in comparison to other government programs.²³³ For example, the percentage rate of error and fraud is higher in the government's Crop Insurance Program than with SNAP.²³⁴

Transaction Data (Sept. 8, 2014).

228. Mary Pat Raimondi & Andrew Pepin Tuma, Academy of Nutrition and Dietetics, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014).

229. *Id.*

230. *See generally* Purvis, *supra* note 24 (noting Congress's recent budget cuts to SNAP in 2014).

231. *See generally* Tracie McMillan, *Are Stores Making Bank Off Food Stamps?*, MOTHER JONES (Apr. 22, 2014), <http://www.motherjones.com/environment/2014/04/are-stores-making-bank-food-stamps>.

232. *See, e.g.*, John S. Adams, *Aid for Needy Debated at Capitol*, GREAT FALLS TRIBUNE (Jan. 24, 2015, 10:46 PM), <http://www.greatfallstribune.com/story/news/politics/2015/01/25/aid-needy-debated-capitol/22306501/> (commenting how a state government worker felt individuals on welfare programs, like SNAP, were not truly needy when mothers came to get welfare benefits "driving a Hummer").

233. *See* Press Release, USDA, USDA Releases New Report on Trafficking and Announces Additional Measures to Improve Integrity in the Supplemental Nutrition Assistance Program (Aug. 15, 2013) (noting about one percent of benefits is trafficked annually).

234. Donald Carr, *Where is the Scrutiny of Crop Insurance Fraud?*, ENVTL. WORKING

SNAP participants are also heavily scrutinized for purchasing primarily junk food items, when in fact, studies have shown SNAP participants often chose healthier items over junk food and eat similar diets to members of the public that are not on food stamps.²³⁵ There is a need for reliable information and data to disprove these misconceptions before these rumors continue to spread and create public and political distrust of the nation's largest hunger relief program.

Thus, there is a need to "give the public a complete picture" of SNAP and to ensure that the program is remaining "consistent with the food assistance program's goals."²³⁶ There must be a straight-forward answer from the government to address the continuous questioning from the public about SNAP fraud, unhealthy lifestyles of SNAP participants, and whether this program is truly serving *hungry* individuals.²³⁷ Providing more information about SNAP will not only increase public awareness about the program, but will provide the government with the opportunity to ensure SNAP is effectively feeding the hungry in America.²³⁸

Furthermore, retailer redemption data could be a useful resource for non-profit organizations and programs that combat local hunger.²³⁹ For example, the Johns Hopkins Center for a Livable Future stated they could use this information with the research they conduct regarding food production and public health as additional evidence to the financial barriers low-income citizens face on a daily basis when it comes to purchasing food.²⁴⁰ Also, multiple subsidy and grant funded programs exist for SNAP retailers who provide access to healthy food in low-income areas; the release of this data could determine the success or failure of these programs, some of which are tax-payer funded.²⁴¹

Mapped data points can also be an invaluable tool for those working to increase food access.²⁴² The Pennsylvania Department of Public Health (PDPH)

GRP. (Apr. 22, 2013), <http://www.ewg.org/agmag/2013/04/where-scrutiny-crop-insurance-fraud>; see also David J. Lynch, *Fraud Stealing \$100 Million Shows Flaws in U.S. Crop Insurance*, BLOOMBERG BUS. (Sept. 10, 2013), <http://www.bloomberg.com/news/articles/2013-09-11/fraud-stealing-100-million-shows-flaws-in-u-s-crop-insurance>.

235. See, e.g., Adams, *supra* note 232.

236. The Reporters Committee for Freedom of the Press, *supra* note 138.

237. See *id.*

238. See *id.*

239. See, e.g., Johns Hopkins Center for a Livable Future, Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014).

240. *Id.*

241. See, e.g., *id.* (discussing the Pennsylvania Fresh Food Financing Initiative grants of \$30 million to food retailers); Press Release, USDA, USDA Expands Support for Farmers Markets to Accept Supplemental Nutrition Assistance Program Benefits (Apr. 29, 2013) (announcing \$4 million in grants to improve SNAP access at Farmer's Markets).

242. James W. Buehler, Health Comm'r, Philadelphia Dep't of Public Health, Comment

commented that “[s]tore-level redemption data would allow [them] to recognize geographic trends in SNAP redemption that would otherwise be invisible”²⁴³ This information would allow PDPH to prioritize neighborhoods that have “low rates of SNAP redemption and high rates of poverty” in order to assist individuals in these areas with SNAP enrollment.²⁴⁴ Additionally, researchers could use this information to identify geographical areas where nonprofits can begin to work with stores with high SNAP transaction patterns to ensure SNAP participants have access to healthier food.²⁴⁵ Specifically, per-store data could show geographical regions where SNAP dollars are being redeemed, and this information could be used with a comparison of that region’s diet-related diseases to target healthy food education efforts where needed in that area.²⁴⁶ Then, these nonprofits can work with SNAP retailers to develop community plans that increase SNAP participants’ access to healthy, affordable food in these low-income areas.²⁴⁷

Nonprofits could also use this information to work with local area farmers to increase hungry individuals’ access to local healthy foods.²⁴⁸ Additionally, more local farmers may apply to be SNAP retailers once they have seen the success and dollar amounts of revenue from those farmers that are SNAP retailers.²⁴⁹ In addition, there is a need to target low-income individuals who are accessing fresh produce through local farmers and farmers’ markets during the months these products are in season, in order to create projects and programs to ensure these individuals can access these healthy food products year-round.²⁵⁰ Effective utilization of SNAP retailer redemption data could increase SNAP beneficiaries’ participation at farmers’ markets.

Finally, researchers could use this valuable information to evaluate the SNAP program as a whole.²⁵¹ Researchers could evaluate the success of SNAP in low-income areas and determine if reorganization or a complete change in SNAP

Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014).

243. *Id.*

244. *Id.*

245. Johns Hopkins Center for a Livable Future, *supra* note 239.

246. *See, e.g.*, Marty Mesh, Executive Director, Florida Certified Organic Growers and Consumers, Inc., Comment Letter on Request for Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Transaction Data (Sept. 8, 2014).

247. Johns Hopkins Center for a Livable Future, *supra* note 239.

248. *See* Schwartz, *supra* note 227.

249. *See* Johns Hopkins Center for a Livable Future, *supra* note 239.

250. *See* Schwartz, *supra* note 227.

251. *See* Johns Hopkins Center for a Livable Future, *supra* note 239.

policy is necessary to end hunger in America.²⁵² This data could also be used to indicate possible fraudulent activity to continue the USDA's successful efforts to further reduce SNAP fraud.²⁵³

However, there is a necessity to weigh the potentially negative repercussions the release of redemption data could have on SNAP participants. SNAP retailers have threatened to stop participating in the SNAP program if this information is released by the USDA.²⁵⁴ If smaller scale neighborhood grocery stores or convenience stores that are the only SNAP retailer in the area cease to be SNAP retailers, concerns arise that SNAP participants could lose access to purchasing SNAP food items altogether.²⁵⁵ In addition, many argue this will just further the stigma and poor public perception of the SNAP program, and result in fewer SNAP eligible individuals' utilization of the program.²⁵⁶

Whether or not the release of Retailer Redemption Data will cure public perception of the SNAP program is unclear. What is clear is that the impact of this decision could potentially harm or benefit the SNAP program as a whole. Thus, the USDA must carefully analyze and prioritize the program's purpose over the interests of both SNAP participants and retailers, in order to ensure the decision does not destroy, but instead positively benefits, the SNAP program and the end of hunger in America.

2. *The Impact on SNAP Retailers*

SNAP retailers have voiced multiple concerns that the release of this data will be detrimental to their businesses.²⁵⁷ SNAP retailer redemption data would give competitors access to sales volumes, the current market trends for SNAP participants, and arguably long-term trade data showing the retailer's overall market trends beyond SNAP sales.²⁵⁸ This could be used by competitors to develop market strategies to target a specific area's SNAP participants.²⁵⁹ Retailer redemption data could be used by businesses to develop new advertising plans to target more SNAP participants and could cause them to increase their stock of SNAP approved food products to compete with area retailers.²⁶⁰ Specifically,

252. *See id.*

253. *See* Raimondi & Tuma, *supra* note 228.

254. *See, e.g.,* French, *supra* note 134.

255. *See generally id.*; Columbus, *supra* note 125.

256. *See* Greg Ferrera, Vice President, Public Affairs, National Grocers Association, Comment Letter on Request for Information: Supplemental Nutrition Assistance Programs: Retailer Transaction Data (Sept. 8, 2014).

257. *See, e.g.,* Columbus, *supra* note 125.

258. *Id.*

259. *Id.*

260. *Id.*

competitors could use this data to compare SNAP sales volume with a competing SNAP retailer's approved SNAP products in that store's inventory.²⁶¹ SNAP retailers also worry this could cause new businesses to pop up near their stores because of the success that their store has had in that area from SNAP sales, thus creating competition with their SNAP and non-SNAP consumer markets.²⁶² Thus, competitive harm to SNAP retailers could arise from the public release of this information.²⁶³

Furthermore, retailers have argued access to retailer redemption data will not provide further insight to the government's actions with SNAP, because SNAP participants make the decision of which store they purchase their items from with their SNAP dollars, not the government.²⁶⁴ The corruption or fraud the public is trying to discover would not be shown through retailer redemption data.²⁶⁵ The only data that would be provided to the public is where SNAP beneficiaries are using their SNAP dollars.²⁶⁶ Retailers have also argued local competitors or the media could use this data to spread negative messages regarding the large number of SNAP customers of a specific retailer, increasing the stigma SNAP participants frequently must overcome.²⁶⁷ Several stores expressed concerns that local stores in inner-city neighborhoods, rural small towns, or even affluent neighborhoods might witness a decrease in SNAP participation if these individuals feel they will be stigmatized if they use their SNAP benefits at a store that has gained public attention.²⁶⁸

However, supporters of releasing this data argue that there is no proof or indication that the release of this data will cause harm to SNAP retailers.²⁶⁹ First, SNAP retailers' store names and locations are already available to the public; thus, there is little likelihood the stigma could be increased at the individual store level when the public can already access which stores are SNAP retailers.²⁷⁰ Second, all that would be released in this information is data about the total amount of sales from SNAP dollars, not the stores overall sales or specific SNAP product sales.²⁷¹ Supporters of releasing the data also argued retailers already have the ability to gather competitive business information about their competition; there-

261. Ireland, *supra* note 133.

262. Columbus, *supra* note 125.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. Ferrera, *supra* note 256.

269. Clark, *supra* note 125.

270. *Id.*

271. *Id.*

fore, there is no valid concern the release of this data will create competitive harm.²⁷² Finally, the release of retailer redemption data to the public in the past has not stopped SNAP retailers from continued participation in the program.²⁷³ When a company is making billions off of the SNAP program, it arguably unlikely these businesses will discontinue participation in this program simply because the amount of revenue they acquire from SNAP will be released to the public.²⁷⁴ It is hard to imagine that the potential competitive harm would be in the billions; the SNAP retailer industry will continue to profit substantially from this program regardless of whether or not the USDA releases this information.

SNAP retailers do provide a major service to SNAP participants, and the SNAP program as a whole. Without their participation, these hungry individuals would struggle to find access to food they can afford and food period. While some SNAP retailers plead they should not be punished for their service to this government program and hungry Americans,²⁷⁵ other retailers are supportive of being open and transparent in order “to strengthen access to food in [their] community.”²⁷⁶ Thus, the USDA should discuss the impact the release of this data could have with a larger number of SNAP retailers to ensure these retailers remain involved in this important government program.

IV. CONCLUSION

The Eighth Circuit Court of Appeals decision in *Argus Leader Media* could result in a wave of new policy changes to increase SNAP transparency and retailer accountability.²⁷⁷ Retailers and SNAP participants eagerly await this decision. If more litigation is the path the USDA chooses, how the courts analyze Exemption 4 will likely be the next step in the evaluation of whether or not SNAP retailer redemption data is exempt under FOIA.²⁷⁸

272. See generally Trotter, *supra* note 192.

273. See, e.g., Michael Morisy, *Where Massachusetts Food Stamp Money is Going*, MUCKROCK (Oct. 18, 2010), <https://www.muckrock.com/news/archives/2010/oct/18/where-massachusetts-food-stamp-money-going/> (releasing SNAP retailer redemption data including the amount specific SNAP retailers made annually –this data is still currently available online even after threats were made to imprison or fine the journalist who released the data); see also McMillan, *supra* note 231.

274. See generally McMillan, *supra* note 231.

275. Jamie Pfuhl, President, Minnesota Grocers Association, Comment Letter to Request Information: Supplemental Nutrition Assistance Program (SNAP): Retailer Redemption Data (Sept. 8, 2014).

276. Dilley, *supra* note 96.

277. See generally *Argus Leader Media v. USDA*, 740 F.3d 1172 (8th Cir. 2014).

278. See, e.g., *Brockway v. Dep’t of Air Force*, 518 F.2d 1184, 1188-89 (8th Cir. 1975) (in which the court began to analyze Exemption 4’s language and legislative history stating

Change could be very beneficial to this anti-hunger program. Skepticism exists throughout the country in regards to SNAP. The main question is whether or not increased transparency is the correct type of change for the program. While there are obvious negative side-effects of increased transparency, the increased public accountability of SNAP could provide benefits to SNAP participants and contribute to an overall better public opinion of the program. Yet, the goal in the end should not be increased transparency, but the end of hunger in America. Whatever the repercussions, the primary goal should be to ensure that the program is meeting the correct objectives: “to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households.”²⁷⁹ Congress made no mention that the purpose of the program is to ensure SNAP retailers retain their millions and billions of dollars in revenue from this program – instead their objective was clear: to alleviate hunger and malnutrition in the United States.²⁸⁰

that at least one previous case analyzed the exemption incorrectly).

279. 7 U.S.C. § 2011 (2012).

280. *See* 7 U.S.C. § 2011.