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FSIS Docket Room
U.S. Department of Agriculture
Food Safety & Inspection Service
Room 112, Cotton Annex
300 12th Street, S.W.
Washington, D.C. 20250-3700

01-040N-4
01-040N
Karen Egbert

Re: Announcement of and Request for Comments on FSIS's Tentative Determinations on the Availability of *Salmonella* Test Results, Docket No. 01-040N

The Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture has published a notice announcing its intention to make publicly available the results of its testing for *Salmonella* on livestock and poultry carcasses and in raw ground meat and poultry products.¹ On behalf of the Center for Science in the Public Interest (CSPI), we are writing to comment on FSIS's proposed action. CSPI is a non-profit consumer advocacy and education organization that focuses primarily on food safety and nutrition issues and is supported principally by 800,000 subscribers to its *Nutrition Action Healthletter*.

In October 2001, CSPI submitted a petition to FSIS requesting the agency to post on its website all plant-specific test results for *Salmonella* in carcasses and raw ground meat and poultry products, noting the benefits to consumers and the general public alike.² Since CSPI filed its petition, the National Advisory Committee on Microbiological Criteria for Foods (NACMCF)

¹ 68 Fed. Reg. 18,593 (Apr. 16, 2003).

² CSPI, Citizen Petition, submitted Oct. 1, 2001.

issued a final report recommending that data from the *Salmonella* performance standard program be made public since they reflect a plant's process control.³

While we support FSIS's intent to provide individual establishments with the *Salmonella* test results on a sample-by-sample basis, we believe that, as a matter of law and public policy, FSIS should also make test data available to the public by posting on the FSIS website the sample set results for each individual establishment as they become available.

1. Failure to Post Establishment Sample Set Results on the FSIS Website is Inconsistent With the Electronic FOIA and Ignores USDA Regulations Implementing the Act

FSIS has announced its tentative determination to release to each individual meat and poultry establishment its real-time *Salmonella* test results as those results become available. As FSIS notes, receiving this information should help individual establishments to more readily identify process control deficiencies and assess the relative efficacy of their process controls.⁴ We agree that providing real-time government *Salmonella* test data to individual plants, rather than waiting for completion of sample sets, will help establishments to identify process control failures earlier and to take corrective action sooner.

FSIS also has determined that there is no "value" to posting the sample-by-sample results for individual establishments on its website. While FSIS has indicated that once a sample set is concluded it will post the results on its website, it will do so on an aggregate basis so that results are identifiable only by the establishments' state and district locations.⁵ Failure to post sample set results for individual establishments on the FSIS website is inconsistent with the Electronic

³ NACMCF Final Response to the Questions Posed by FSIS regarding Performance Standard with Particular Reference to Ground Beef Products (Wash., D.C.), Oct. 8, 2002, at p. 8

⁴ 68 Fed. Reg. at 18,596.

⁵ 68 Fed. Reg. at 18,596.

Freedom of Information Act (E-FOIA) as well as USDA's own regulations implementing that Act.

The Freedom of Information Act (FOIA) originally was enacted to broaden the public's access to government information and, consistent with that purpose, establishes a presumptive right for the public to obtain identifiable, existing records of federal departments and agencies.⁶ Subsection (a)(2) of the FOIA provides what is commonly referred to as "reading room" access. It provides that certain basic agency records must routinely be made "available for public inspection and copying" in agency reading rooms.⁷

In 1996, Congress enacted the E-FOIA.⁸ The Amendments modified the requirements of subsection (a)(2) by creating a new category of "reading room" records and requiring the availability of reading room records by electronic means.⁹ Among other things, the agency must include any records disclosed in response to a FOIA request that the agency "determines have become or are likely to become the subject of subsequent requests for substantially the same records."¹⁰ If the agency determines that such records have been or are likely to be the subject of multiple requests in the future, then those records become "reading room" records, which must *automatically* be made available to potential FOIA requesters.

USDA regulations implementing the E-FOIA require departmental agencies to make all

⁶ See United States Dep't of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994) (finding that public access, not secrecy, is the main purpose of the FOIA).

⁷ 5 U.S.C. § 552(a)(2) (2000).

⁸ Pub. L. No. 104-231, 110 Stat. 3048, amending 5 U.S.C. § 552.

⁹ 5 U.S.C. § 552(a)(2).

¹⁰ 5 U.S.C. § 552(a)(2)(D).

records created on or after November 1, 1996 available electronically on a World Wide Web site. Specifically, USDA requires its agencies to make available on-line for public inspection and reproduction, *without request*, copies of any records that, because of the nature of their subject matter, are likely to elicit additional requests for release under the FOIA.¹¹

In the recent Federal Register notice, FSIS has admitted that ‘*Salmonella* testing results have been, and continue to be, requested in significant numbers.’¹² Despite the fact that the *Salmonella* test results meet the criteria for posting on the FSIS web site, FSIS has stated that it “is not convinced of the value of posting this information.”¹³ The standard for determining whether to make the sample set results for individual establishments available for public inspection on-line is *not* whether FSIS is convinced of the “value” of posting this information. Indeed, that approach substitutes FSIS’s subjective criteria for the legal criteria specified in the Act and in USDA’s own regulations.

Under this approach, consumers and others who seek the data would have to make repeated requests, presumably each time a sample set is completed, in order to obtain the results. Because FSIS has acknowledged that the *Salmonella* test results have been and will continue to be the subject of multiple requests, it is inconsistent with both the E-FOIA and USDA regulations for FSIS to refuse to post the sample set results for each establishment on its website as they become available.

¹¹ 65 Fed. Reg. 46,335, 46,337 (July 28, 2000).

¹² 68 Fed. Reg. at 18,595.

¹³ 68 Fed. Reg. at 18,596.

2. FSIS's Statements on How It Intends to Respond to a Request for Salmonella Test Data Are Confusing and Do Not Square with Applicable Law

Recognizing that individuals will continue to seek access to individual establishment test results in the absence of availability of this information on the FSIS website, FSIS has stated how it intends to treat a request for such information. According to FSIS if an individual requests *Salmonella* testing data for a particular establishment, the agency will respond to the request “in turn, generally providing the specific existent information requested.”¹⁴ This statement is confusing and raises issues concerning both the precise test data FSIS is willing to release to individuals and how individuals must request the data.

First, nothing in the FOIA authorizes FSIS to withhold the sample set results for individual plants or refuse to post them on the website. According to FSIS, the agency has “considered the *Salmonella* test results as information for use by the Agency in its deliberative process on how best to proceed with respect to the establishment involved.”¹⁵ Because pre-decisional information can be exempted from disclosure under subsection (b)(5) of the FOIA, “FSIS has not disclosed plant-specific testing results until the set was complete.”¹⁶

The deliberative process privilege is not applicable to this type of data. Exemption 5 exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”¹⁷ Its purpose is to foster the free exchange of ideas within an agency before a policy is adopted or decision

¹⁴ 68 Fed. Reg. at 18,596.

¹⁵ 68 Fed. Reg. at 18,595.

¹⁶ 68 Fed. Reg. at 18,595.

¹⁷ 5 U.S.C. § 552(b)(5).

made.¹⁸ However, the privilege applies only to “deliberative” documents and is ordinarily inapplicable to purely factual matters or to factual protections of otherwise deliberative memoranda.¹⁹

Individual establishments’ test results – whether individual sample results or sample set results – represent raw data, documented in laboratory reports. They are purely factual information - not FSIS’s interpretation or evaluation of that data. Even if the raw data were contained in the opinion or recommendation portion of an agency memorandum or other document, the exemption would not apply to the factual information in the document.²⁰

Moreover, because the fact that the government takes samples at individual establishments to test for the presence of *Salmonella* is well known, the sample set results themselves do not reveal anything about the deliberative process. For instance, if facilities did not know that they were subject to government testing, release of the test results could reveal an investigatory or other deliberative process. Here, however, the fact of testing is public and well-known.

Finally, even if the raw test data could be termed “deliberative” or “pre-decisional,” FSIS

¹⁸ See, e.g., National Wildlife Fed’n v. United States Forest Service, 86 F.2d 1114, 1119 (9th Cir. 1988) (“[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process.”)

¹⁹ See Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980); Not only would such factual material “generally be available for discovery,” see EF A v. Mink, 410 U.S. 73, 87-88 (1973), but its release usually would not threaten consultative agency functions, see Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974). See also Horsehead Indus. V. EPA, No. 94-1296, slip op. at 16 (D.D.C. Oct. 1, 1996) (“EPA has not demonstrated how the disclosure of either the testing process . . . or the data from that testing involves [sic] its deliberative process.”).

²⁰ Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d at 867; ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1236 (D.C. Cir. 1983). However, if the facts are “inextricably intertwined” with exempt portions, they may be withheld. We do not believe that FSIS could meet that standard since presumably the test results are reported in laboratory reports, not agency memoranda. Even then, it seems that the test results would be segregable.

would waive that privilege by disclosing it to the individual establishments. The Agency cannot release information that it considers “deliberative” to one group and not another.

Second, it is unclear *how* FSIS expects individuals to request *Salmonella* test data for individual establishments – whether through a formal FOIA request or through a more informal mechanism, such as a phone call. If FSIS intends to require individuals seeking *Salmonella* test results to file a FOIA request as a predicate for obtaining the data, then the agency is imposing an unfair burden on one group as opposed to another. FSIS cannot arbitrarily decide that it will automatically release the *Salmonella* results to individual establishments, while requiring others, such as consumers, to file a FOIA request. Nothing in the Act or USDA regulations authorizes this unequal treatment. If FSIS releases the information for one group, it must release the information for everyone.²¹

3. *Although “Value” to the General Public is Not the Standard for Determining to Post Sample Set Results on the FSIS Website, There Is Undoubtedly a Public Benefit to Public Release of the Data*

Even if “value” to the general public were the appropriate standard for determining whether to post individual establishments’ *Salmonella* results on the FSIS website, there undoubtedly is a value to the public from posting such results.

FSIS has reported that the prevalence of *Salmonella* in raw meat and poultry continues to decline overall.²² However, the *Salmonella* prevalence in ground chicken from all sizes of

²¹ The potential burden on individuals seeking sample set results also is amplified since it appears that if a person submits a request for the sample set results at an individual establishment at the wrong time, that is, before the sample set data “exists,” then he or she would be unable to obtain that data without filing again at a time when the sample set is complete.

²² USDA, FSIS, *USDA Data Show Incidence of Salmonella Reduced in Raw Meat and Poultry*, News Release No. 0127.03 [hereafter FSIS, *Salmonella* News Release], available at <<http://www.fsis.usda.gov/news/releases/2003/04/0217.htm>>; FSIS, *Progress Report on Salmonella Testing of Raw Meat and Poultry Products, 1998-2002* [hereafter FSIS, *Progress Report on Salmonella Testing*], available at

establishments combined increased from 19.5% in Calendar Year 2001 to 29.1% in CY2002.²³ Moreover, *Salmonella* was detected in 11.5% of broilers, 17.9% of turkeys, and 2.6% of the ground beef being tested.²⁴

Even though *Salmonella* prevalence may be declining, it is still causing a significant number of foodborne illnesses. Foodborne illness data compiled by the Centers for Disease Control and Prevention (CDC) show that in 2002, *Salmonella* was one of the bacterial pathogens with the highest incidence of illness, and since 2000, *Salmonella* infections have increased.²⁵ CSPI's own outbreak data show that between 1990 and 2002, 251 outbreaks with 9,195 cases were linked to beef, with *Salmonella* (along with *E. coli* O157:H7 and *Clostridium perfringens*), being one of the most significant hazards.²⁶ Poultry, too, is a significant cause of illness outbreaks. Between 1990 and 2002, CSPI identified 235 outbreaks with 9,612 cases linked to poultry. Again *Salmonella* (along with *Clostridium perfringens* and *Staphylococcus aureus*) presented one of the most significant hazards.

Publication of sample set data for individual establishments on the FSIS website would help consumers make choices in their purchasing and eating decisions. Consumers – particularly the vulnerable, such as children, older adults and the immuno-compromised, or those who care for the vulnerable – clearly have an interest in avoiding foodborne illness. The NACMCF has

<<http://www.fsis.usda.gov/ophs/haccp/salm5year.pdf>>.

²³ FSIS, *Progress Report on Salmonella Testing*.

²⁴ FSIS, *Salmonella* News Release.

²⁵ CDC, *Preliminary FoodNet Data on the Incidence of Foodborne Illnesses – Selected Sites, United States, 2002*, 52 MORBIDITY AND MORTALITY WEEKLY REPORT 340-343 (Apr. 18, 2003).

²⁶ Center for Science in the Public Interest, *Outbreak Alert!* (Updated and revised Sept. 2002), at p. 11.

concluded that performance standards are valuable tools for verifying process control at slaughter and processing establishments.²⁷ Sample set results at individual establishments reveal how well a particular plant is doing in controlling this pathogen. The data provides an objective basis for judging the effectiveness of an establishment's HACCP plan and Sanitary Standard Operating Procedures and whether it is achieving an acceptable level of performance with regard to controlling and reducing harmful bacteria on raw meat and poultry products.

Since FSIS regulations require that every package of meat or poultry must identify, in a prominent and legible manner, the plant number where that product was produced, consumers could match the plant identification with particular sample set results in order to make their purchasing decisions. USDA's Economic Research Services (ERS) agrees that the consumer's right to know plays an important role in food safety. "A way to enhance food safety still further is to strengthen market forces by making information about a plant's food safety performance as readily available to consumers as the amount of fat and other commonly reported product attributes."²⁸

Recently, at the request of several trade associations, FSIS decided to post on its website the names and addresses of the sellers of livestock and poultry who the Food and Drug Administration has determined are responsible for the repeated sale of livestock or poultry that contain violative levels of chemical residues.²⁹ In making that decision, FSIS stated its belief that

²⁷ National Advisory Committee on Microbiological Criteria for Foods, Final, *Response to the Questions Posed by FSIS Regarding Performance Standards with Particular Reference to Ground Beef Products*, Submitted with Technical Corrections and Edits (Oct. 8, 2002), Wash., D.C. [hereafter NACMCF, *Response to Questions Posed by FSIS Regarding Performance Standards*].

²⁸ Michael Ollinger and Nicole Ballenger, USDA, Economic Research Service, *Weighing Incentives for Food Safety in Meat and Poultry*, Amber Waves (April 2003), Vol. 1, Issue 2, at p. 41.

²⁹ 68 Fed. Reg. 540 (Jan. 6, 2003).

“there is just cause to make information about the violation available to help better ensure that meat and poultry products distributed in commerce are not adulterated with violative chemical residues.”³⁰ Just as slaughterhouses have access to the residue repeat violators list in making their purchasing decisions, so too should consumers have access to information that may affect their purchasing decisions concerning which processors are producing the safest meat and poultry.

There are additional benefits from posting *Salmonella* sample data for individual establishments on the FSIS website. It would allow individual establishments to evaluate their performance against each other based on seasonal and/or regional factors. As the NACMCF has noted, antimicrobial interventions have been approved and others are being evaluated by industry to reduce contamination. “The data from the *Salmonella* performance standard program . . . should be made public, so as to provide guidance to industry in order that commercial operations may assess their process control relative to the industry.”³¹ Providing individual establishment sample set results on the website would allow establishments to compare their performance to others within their same geographic location and could allow establishments to more readily identify process controls and interventions that may work better to control the pathogen. At the same time, posting the *Salmonella* sample set results could act as a market incentive for poorer performing establishments to invest in food safety improvements.

Posting sample set results for individual establishments on the FSIS website also could benefit federal, state and local health officials in their efforts to track the causes and source of

³⁰ 68 Fed. Reg. at 541.

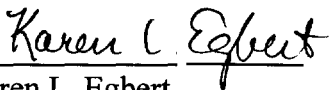
³¹ NACMCF, *Response to Questions Posed by FSIS Regarding Performance Standards*, at p. 8.

food poisoning outbreaks and identify contamination trends based on product type, plant geographical location, seasonality, and other factors.

Conclusion

FSIS has no statutory, regulatory or policy justification for refusing to post individual establishments' *Salmonella* sample set results on its website as they become available. Just as there is a benefit to providing real-time test results to individual establishments, there is a clear public benefit in releasing the sample set results. FSIS has now defined its role as a public health agency. In undertaking this role, FSIS should act more as an advocate for individual consumers and their efforts to avoid foodborne illnesses. An important step in this process would be to support the release of individual establishment sample set data on the FSIS website.

Respectfully submitted,



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