

Animal Identification



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Animal Identification: Confidentiality of Information

Overview

Some livestock producers and livestock industry participants have raised concerns about who will be able to access the information provided to the National Animal Identification System (NAIS). Their concerns include: 1) that establishing a centralized database might allow others in the industry, either the producer's direct competitors or packers, to know information about their operations; 2) government agencies such as the Internal Revenue Service, Bureau of Land Management, or the Environmental Protection Agency may access the data; and 3) people who have designs in harming animal agriculture might access the information. The reasons for these concerns vary. For example, producers may not want other market participants to access the information because the other participants might use the information to manipulate the market. Producers are concerned that if other federal agencies have the information, it may make it more likely that the other agencies will bring various environmental, grazing, tax, or other claims against the producers. Others worry that people might use the information to locate operations or livestock with the purpose of harming the operation or spreading a contagious disease.

Some have discussed voluntary systems run by private entities as a possibility to address these confidentiality concerns with the NAIS. Others, however, have questioned whether a private system would work. For the NAIS to achieve its goal of effectively tracking animals, it must have a very high participation rate, and the government will, at the very least, have to have some involvement in the program so it can access the information in times of emergency.

The NAIS and FOIA

The Freedom of Information Act (FOIA)¹ applies to records maintained by agencies within the executive branch of the federal government, which includes the United States Department of Agriculture (USDA). The purpose of FOIA is

¹ 5 U.S.C. § 552.



to provide public access to government records. FOIA does not apply to entities neither chartered nor controlled by the federal government.

It is possible to voluntarily provide information to the government. In one example of a program that encourages voluntary reporting to the Federal government, a special provision exists for people who voluntarily provide information to the Department of Homeland Security (DHS). The Homeland Security Act provides that information related to a “critical infrastructure” that is voluntarily submitted to DHS for homeland security purposes shall be exempt from FOIA.² The agriculture and food industries have been designated as critical infrastructures.³ This provision also states that the information shall not be used by any federal agency in any civil action.⁴ This exemption may have limited use, given that no one has suggested that the DHS administer animal ID. Yet the rationale used in this provision, that the public interest in the government receiving good information to deal with security concerns outweighs the public’s interest in having access to the information, may also apply to the NAIS. This is especially true given the increased concern with agricultural biosecurity.

If FOIA does apply then data recorded in the NAIS system would be accessible to the general public unless the data under the NAIS was exempt. FOIA itself may exempt the information because it is confidential business

information, or Congress could expressly limit access to the information in new legislation.

FOIA already includes a number of exemptions within the law. The exemption most likely to apply to the NAIS would be the exemption for trade secrets and commercial information.⁵ For this exemption to apply, the government would have to show that release of the information would either hurt the government’s ability to gather this necessary information in the future, or cause a substantial competitive harm to the person who provided the information.⁶ Arguably, either of these reasons would apply to the NAIS because release of the information would discourage livestock producers from providing the information in the future, or people could use the information to affect the prices of calves or cattle.

Beyond exemptions included in FOIA, federal law includes other exemptions relating to a particular regulatory scheme. The Homeland Security exemption was discussed above. Another statutory exemption familiar to the livestock industry is the exemption found in the Livestock Mandatory Price Reporting Act, which states, “no facts or information obtained under [this law] shall be disclosed in accordance with [FOIA].”⁷ The reasoning, much like one of the concerns with the NAIS, is that other market participants could use the mandatory price reporting information to affect the market.

² 6 U.S.C § 133.

³ Directive on Defense of United States Agriculture and Food, 40 Weekly Comp. Pres. Doc. 183 (Feb. 9, 2004).

⁴ 6 U.S.C § 133.

⁵ 5 U.S.C. § 552(b)(4).

⁶ *Utah v. U.S. Dept. of Interior*, 256 F.3d 967, 969 (10th Cir. 2001).

⁷ 7 U.S.C. § 1636(b)(3).

A third example of a statutory exemption can be found in the Bioterrorism Act of 2002. This Act requires members of the food industry (not including farmers, ranchers, or meatpackers) to register with the Food and Drug Administration.⁸ Just as the purpose of the NAIS is to trace the whereabouts of animals, the purpose of the Bioterrorism Act is to trace the whereabouts of food in case it is intentionally or unintentionally contaminated. Information collected under the Bioterrorism Act is exempt from FOIA.⁹

If a federal agency attempts to disclose information that federal law requires not be disclosed, then a private party can seek to enjoin or stop the agency from such action using the Administrative Procedures Act (APA).¹⁰ Under the APA, federal agencies are prohibited from acting contrary to law. Disclosure of information that federal law requires to be confidential would violate the APA.

Members of Congress and Senators have introduced numerous pieces of legislation that would exempt an animal ID system from FOIA or require the information to remain confidential. (For examples, go to <http://thomas.loc.gov/> and type in the following bill numbers: H.R. 3787, H.R. 3961, H.R. 4005, and S. 2070.) Currently none of these bills has moved very far in the legislative process.

Access to Information Held by a Private Entity

Confidentiality concerns may also arise where the government is not involved in the collection or storing of information. Where private entities hold the information, private contracts will dictate who has access to the information. Without express limits on its authority to release the information, a private entity may have the ability to provide information to individuals or firms that a person does not want to have the information. For example, commercial entities, such as magazines, routinely provide information to other merchants about their subscribers. Without an agreement stating otherwise, private entities may legally share this information. As these systems are developed, people will want to pay close attention to limits on access to the information and how those limits are enforced.

Animal ID, Confidentiality, and Civil Lawsuits

FOIA may not be the only method of obtaining access to information provided by the NAIS. Private parties in the course of litigation pursuant to a court's subpoena power could seek certain documents and information. Obtaining information through a subpoena differs from obtaining information through FOIA because it involves parties to litigation, whereas FOIA involves a question

⁸ 21 U.S.C. § 350d.

⁹ 21 U.S.C. § 350d(a)(4).

¹⁰ *John Doe # 1 v. Veneman*, 2004 WL 1737792 (5th Cir., August 4, 2004). In this case, a number of ranchers sought to stop USDA from providing access to information related to a voluntary program to control coyote attacks. The court ruled that because the federal statute implementing the program prohibits USDA from releasing the information gathered for the program, the USDA abused its discretion when it decided to release the information.

of whether the general public can access information. For instance, if a consumer sues a cow/calf operator because the consumer found a needle in some meat, a court would be able to order the holder of the animal ID information to provide the information to the court. This applies even if the information was originally provided voluntarily to a non-governmental organization. Generally, information presented at trial is open to the public, but the court may decide to keep the information sealed from public view; those involved with the trial, however, would be able to use the information in the trial.

References and Sources of Additional Information on Confidentiality and the NAIS

More information on FOIA from the U.S.

Department of Justice: <http://www.usdoj.gov/oip/foi-act.htm>

Food and Drug Administration's web page on the Bioterrorism Act: <http://www.fda.gov/oc/bioterrorism/bioact.html>.

Questions and answers on the Bioterrorism Act, including information about who has access to the registration information (question M). <http://www.cfsan.fda.gov/~dms/ffregui4.html#m>.

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