



United States
Department of
Agriculture

Grain Inspection,
Packers and Stockyards
Administration

Stop 3642
1400 Independence Ave., SW
Washington, D.C. 20250-3642

March 2, 2011

Ms. Rosemary Mucklow
Director Emeritus
National Meat Association
1970 Broadway, Suite 825
Oakland, California 94612

Dear Ms. Mucklow:

This is the Grain Inspection, Packers and Stockyards Administration’s (GIPSA or the Agency) final response to your December 15, 2010, correspondence seeking specified records or documents relating to Mr. Butler’s August 10, 2010, letter. GIPSA located the following documents, consisting of 98 pages of documents, which respond to the bulleted items in your letter:

Bullet	Records Sought	Responsive Document(s)
1	Documents supporting Mr. Butler’s statement that packer-to-packer acquisitions have “expanded considerably” since 2006	Percent of packer-to-packer sales in the negotiated market Hog market analyses
2 and 4	Documents supporting Mr. Butler’s statements: <ul style="list-style-type: none"> • that packer-to-packer sales have contributed to significant price distortions • that certain packers may be influencing negotiated hog prices through a separate procurement mechanism” 	Graphs of base prices Case Assessment and Case Description Investigation Report Synopsis of Facts Competition Investigation Work Plan Comparisons of Packer Base Price Ranges; May 23, 2007, Current Volume by Purchase Type, Live and Carcass Basis; and Daily Livestock Report Analysis of Market Participants

Bullet	Records Sought	Responsive Document(s)
3	Any record or document relating to GIPSA's request to AMS that certain packer-to-packer transactions be reclassified from "Negotiated" to "Packer Sold" or "Packer Sold Negotiated" transactions in AMS price reports, including but not limited to, any analyses of daily hog procurement transaction data that resulted in such request and any follow-up documentation demonstrating the effect of these reclassifications	Classification of Hog Transactions
5	Any record or document relating to Mr. Butler's statement that "statistical analysis of daily transaction data spanning two years indicated that the packer-to-packer transactions were affecting the negotiated base price an average of \$1.31 per cwt (approximately 2 percent) over the two year period."	Analyses of variances Estimated Daily U.S. Slaughter Capacity
6	Any other record or document that purportedly supports GIPSA's proposed ban on packer-to-packer sales	All responsive documents have been provided

GIPSA's determination of the above documents follows:

Number of Pages	FOIA Exemption	Determination
13		Release in entirety
46	5 U.S.C. 552(b)(4)	Portions redacted—confidential business information
4	5 U.S.C. 552(b)(4)	Withhold in entirety—confidential business information
8	5 U.S.C. 552(b)(4) & (b)(5)	Portions redacted—confidential business information; pre-decisional and deliberative
1	5 U.S.C. 552(b)(4) & (b)(7)(C)	Portions redacted—confidential business information; protect personal information in law enforcement records
1	5 U.S.C. 552(b)(4) & (b)(7)(C)	Withhold in entirety – confidential business information; protect personal information in law enforcement records
1	5 U.S.C. 552(b)(4); (b)(5); (b)(7)(C), (b)(7)(D)	Portions redacted—confidential business information; protect personal information in law enforcement records; attorney-client privilege; protect records compiled for law enforcement purposes which could reasonably disclose the identity of a confidential source

Number of Pages	FOIA Exemption	Determination
3	5 U.S.C. 552(b)(4), (b)(5), (b)(7)(C)	Portions redacted—confidential business information; pre-decisional and deliberative; protect personal information in law enforcement records
2	5 U.S.C. 552(b)(4); (b)(5); non-responsive	Portions redacted – confidential business information; attorney-client privilege; information non-responsive to request
5	5 U.S.C. 552(b)(5)	Withhold in entirety – pre-decisional and deliberative
5	5 U.S.C. 552(b)(7)(E)	Withhold in entirety—protect investigative techniques
8	5 U.S.C. 552(b)(4) & (b)(7)(E)	Withhold in entirety – confidential business information; protect investigative techniques
1	5 U.S.C. 552(b)(4), (b)(7)(C), nonresponsive	Portions redacted—confidential business information, protect personal information in law enforcement records; information not responsive to request

Confidential Business Information – Exemption 5 U.S.C. 552(b)(4)

Exemption (b)(4) protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” This exemption is intended to protect the interests of both the government and submitters of information. The very existence of Exemption 4 encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable. The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.

Exemption 4 covers two distinct categories of information in federal agency records. GIPSA reviewed the responsive information and finds that it does not contain trade secrets; therefore, the Agency asserts that the information is commercial or financial, obtained from a person, and privileged or confidential.

The first threshold that must be met in asserting Exemption 4 is that the information must be commercial or financial. GIPSA has determined that the information in the responsive documents is commercial in nature because it relates to the business or trade of packing facilities, which sheds light on their internal business operations.

The second criteria that must be met to assert Exemption 4 is that the information “be obtained from a person.” The term “person” refers to individuals as well as a wide range of entities, including corporation, banks, State governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government. The information was provided by the packing facilities themselves or by individuals employed by packing facilities.

The third criteria to assert (b)(4) is that the submitted information is “privileged or confidential.” The FOIA has established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is “confidential” under Exemption 4: (1) when a FOIA request is made for financial or commercial information a person was obliged to furnish the Government, and (2) when information is furnished to the Government voluntarily. When the information is provided voluntarily, it is categorically protected provided it is not “customarily” disclosed to the public by the submitter.

Various interests of both the government and submitters of information are protected by Exemption 4; and different interests are implicated depending upon whether the requested information was submitted voluntarily or under compulsion. As to the government's interests, when submission of the information is "compelled" by the government, the interest protected by nondisclosure is that of ensuring the continued reliability of the information. On the other hand, when information is submitted on a "voluntary" basis, the governmental interest protected by nondisclosure is that of ensuring the continued and full availability of the information. This same dichotomy between compelled and voluntary submissions applies to the submitter's interest as well. When submission of information is compelled, the harm to the submitter's interest is the "commercial disadvantage" that is recognized under the National Parks "competitive injury" prong. When information is volunteered, the exemption recognizes a different interest of the submitter—that of protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained.'"

Voluntary Submission

Information in some of the responsive documents that GIPSA located summarize the complaints that market participants submitted to the Agency alleging price manipulation in packer-to-packer transactions. The information the complainants provided to GIPSA investigative personnel in writing and during their interviews was done so voluntarily. GIPSA finds that if the Agency released the information it obtained from complainants regarding their opinions and observations relating to packer-to-packer transactions and information regarding their internal business operations, these companies, and any other complainants, would be reluctant to provide complete disclosure of information to the government thereby impairing the government's ability to obtain such information in the future. Furthermore, the information at issue does not appear to be the kind that companies, particularly those in the packing industry, customarily disclose about themselves to the public.

In light of the foregoing, GIPSA has determined to withhold portions of information in the responsive records that were voluntarily submitted by complainants because they meet the confidential business information criteria for Exemption 4 protection.

Mandatory Submission

GIPSA conducted investigations pursuant to the Packers and Stockyards Act to determine if market participants were manipulating prices in packer-to-packer transactions. Market participants as well as individuals were served subpoenas to produce records for investigative and enforcement purposes. Portions of these documents reflect the background of the

allegations, GIPSA's findings and conclusions, and summaries of depositions. GIPSA evaluated these records to determine whether their disclosure would cause the packing facilities significant competitive harm. Packing facilities have their own unique ways of conducting business; and they have their own client base, processing procedures, market strategies, and producer contracts. GIPSA believes that competitors' knowledge of other packing facilities' business operations and of information about their processing operations, producer contracts, and marketing transactions and strategies would allow them to develop similar operations that would result in a market share loss for the facilities. Furthermore, the release of market strategies would provide competitors with commercially valuable knowledge, which would be extremely useful to these companies in developing their own marketing and development strategies.

GIPSA, furthermore, has a regulatory and statutory obligation to maintain the confidentiality of all protected information obtained during the course of conducting business and investigations. Therefore, GIPSA policy prohibits the disclosure of confidential business information, which includes the names of registered entities that are being, or that have been, investigated.

GIPSA concludes that releasing confidential business information, which was required to be submitted to USDA by packing market participants and individuals, would result in significant competitive harm to the packing facilities. Therefore, GIPSA determines that this information falls within the coverage of Exemption 4 and should not be disclosed.

Pre-decisional and Deliberative – Exemption 5 U.S.C. 552(b)(5)

Exemption (b)(5) protects “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.” As a threshold matter, the responsive records must be inter-agency or intra-agency documents in order to be protected from disclosure under Exemption 5. The responsive documents are a case description, a case assessment, and an investigation file—all are GIPSA documents. Further, to come within the scope of Exemption 5, the responsive records must fall within the coverage of a privilege recognized in litigation. The deliberative process privilege is one of the litigation privileges that may be invoked under Exemption 5 in order to withhold responsive information.

The deliberative process privilege prevents injury to the quality of agency decisions by encouraging open, frank discussions on matters of policy between subordinates and superiors. This privilege protects against premature disclosure of proposed policies before they are finally adopted and against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's actions. The privilege protects the decision-making processes of government agencies—not merely the documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.

In order for the deliberative process privilege to apply, the responsive materials must be: a) pre-decisional; and b) deliberative. The responsive documents relate to investigative material and reflect the opinions, observations, and findings that lower level employees were offering to higher level GIPSA officials regarding their review of packing facilities' business records. GIPSA has determined that the documents at issue are pre-decisional and deliberative because they offer advice, opinions, and recommendations to GIPSA management, who is responsible for making final decisions regarding the outcome of investigations.

In light of the foregoing, GIPSA is releasing documents with certain portions redacted or is withholding pages of documents in their entirety pursuant to Exemption 5 through the deliberative process privilege.

Attorney-Client Privilege – Exemption 5 U.S.C. 552(b)(5)

Another privilege incorporated into Exemption (b)(5) concerns “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” It fundamentally applies to facts divulged by a client to his attorney, but the privilege also encompasses any opinions given by an attorney to his client based upon those facts. It also applies to facts divulged by a client to his attorney. GIPSA is withholding portions of the case description document that reflect notations written by a GIPSA employee regarding confidential conversations with other Federal agencies.

Personal Information in Law Enforcement Records – Exemption 5 U.S.C. 552(b)(7)(C)

Under FOIA Exemption 7(C), agencies are not required to disclose “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” GIPSA conducted investigations into the complaints it received alleging price manipulation in packer-to-packer transactions. Therefore, for purposes of Exemption 7, the requested records are law enforcement records.

The complaints submitted to GIPSA reference the names, contact information, and identifying information of complainants and interviewees; the names of GIPSA investigative personnel; and the names of individuals associated with market participants.

Both government and private individuals have privacy interests that are more than de-minimis. In the case of records related to investigations by criminal law enforcement agencies, the case law has long recognized, either expressly or implicitly, that “the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.” The individuals mentioned in these investigative materials may not wish to field unsolicited inquiries about the subject of these investigations.

Exemption 7(C) has been regularly applied to withhold references to persons who are not targets of investigations and who were merely mentioned in law enforcement files, as well as to persons of "investigatory interest" to a criminal law enforcement agency. The identities of federal, state,

and local law enforcement personnel referenced in investigatory files are also routinely withheld, usually for reasons similar to those described by the Court of Appeals for the Fourth Circuit: "One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives."

GIPSA has determined to withhold all of these names, contact information, and identifying information. Moreover, GIPSA has concluded that revealing the identities and other personal contact information of these individuals will not educate the public about how GIPSA conducted its investigative functions. Therefore, the privacy interests of all individuals mentioned in the complaints trump the public interest that would be advanced by the disclosure of their names and contact information.

Express Confidentiality – Exemption 5 U.S.C. 552(b)(7)(D)

Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

Courts have uniformly recognized that express promises of confidentiality deserve protection under Exemption 7(D), and they usually require affidavits specifically demonstrating the existence of such an express promise. Express promises can be supported by notations made on the face of documents indicating that the information in them is to be kept confidential pursuant to an express promise; by statements from the agents or sources involved in which they attest to their personal knowledge of an express promise; by specific agency practices or procedures regarding the routine treatment of confidential sources, including those for "symbol-numbered" sources, or by some combination of the above.

A complainant requested confidentiality at the onset of his/her interview with GIPSA investigative personnel. GIPSA assured the complainant that the Agency would make every effort to keep the information confidential but that under certain circumstances, such as litigation, that certain information could be disclosed but that complainant would be made aware of such circumstances. Accordingly, GIPSA is withholding, pursuant to Exemption 7(D), complainants' names, contact information, and information that could identify him/her under express understanding of confidentiality.

Law Enforcement Techniques and Procedures – Exemption 5 U.S.C. 552(b)(7)(E)

Exemption 7(E) authorizes the withholding of all law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” The first clause of this exemption allows for a categorical withholding of certain investigative procedures. The second clause protects guidelines the release of which could cause a circumvention of the law. GIPSA finds the first clause of this exemption applicable to the pages or portions of documents that are exempt from disclosure because their release would reveal the statistical analyses and equations the Agency used to evaluate data. Further explanation of specific guidelines or techniques could cause the harm protected by the exemption.

Non-responsive information

GIPSA’s review of the responsive documents identified several pages of documents and portions of documents that did not respond to your request. Consequently, GIPSA is either withholding the pages in their entirety or is redacting certain portions of the documents because they do not respond to your request.

GIPSA is not assessing you a fee to process your request.

You are advised of your right to appeal my decision within 45 days from the date of this letter by writing to:

J. Dudley Butler, Administrator
Grain Inspection, Packers & Stockyards Administration, USDA
1400 Independence Avenue, S.W., STOP 3601
Washington, D.C. 20250-3601

If you decide to appeal, please state with specificity your basis and clearly mark your letter and the envelope with the words "Freedom of Information Act Appeal".

Sincerely,

Joanne C. Peterson

Joanne C. Peterson
GIPSA Freedom of Information Act Officer
202-720-8087

Enclosures: Responsive documents are provided via electronic mail, as well as hard copy sent overnight express.