



United States  
Department of  
Agriculture

Grain Inspection,  
Packers and Stockyards  
Administration

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

February 23, 2011

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

Dear Ms. Mucklow:

This is an interim response to your December 15, 2010, correspondence regarding the 11 pages of documents that the Grain Inspection, Packers and Stockyards Administration (GIPSA or the Agency) withheld from disclosure on December 10, 2010, regarding complaints (received by GIPSA) from market participants relating to packer-to-packer sales.

The documents that are available for release include the complaints that were submitted to GIPSA and memoranda to the files summarizing meetings the Agency had with the complainants. GIPSA's determination of those documents follow:

<b>Number of Pages</b>	<b>FOIA Exemption</b>	<b>Explanation</b>
1	(b)(7)(D)	
6	(b)(4) and (b)(7)(C)	Confidential business information
2	(b)(4) and (b)(7)(D)	Confidential business information; Complainant Confidentiality
2	(b)(4) and (b)(7)(D)	Confidential business information; Complainant Confidentiality

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 responsive records are commercial in nature because they relate to the business or trade of packing market participants. The responsive information 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 corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government. The information GIPSA is withholding, in part, was provided to GIPSA by complainants of packing market participants.

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.’”

The records requested are complaints that market participants submitted voluntarily to GIPSA alleging price manipulation in packer-to-packer transactions. GIPSA also located memoranda to the files summarizing interviews with these complainants. The information the complainants provided to GIPSA investigative personnel during the 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 future 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.

GIPSA also is withholding the company names of those market participants who the complainants alleged were involved in manipulating prices in packer-to-packer transactions.

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.

#### 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 GIPSA's investigation or how GIPSA conducted its investigative functions. Therefore, the privacy interests of all individuals mentioned in the complaints trumps 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.

One complainant requested confidentiality at the onset of its interview with GIPSA investigative personnel. GIPSA assured the complainant that it 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 identifying information under express understanding of confidentiality.

Certain portions of information also are being withheld because their disclosure could tend to lead to the identification of confidential sources.

There are no fees associated with processing 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