

USDA's GIS Data Need Not Be Disclosed

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Overview

Under the Freedom of Information Act (FOIA), a governmental agency must disclose all records that are requested by “any person,” unless the information sought is exempt from a FOIA request. The issue has come to the forefront again in a battle between two government agencies over access to USDA data that would also be helpful to the requesting agency.

*Central Platte Natural Resources District v. United States Department of Agriculture, et al.*¹

In 2009, the Central Platte Natural Resources District (CPNRD) sued the USDA and its Farm Service Agency (FSA) on a claim that the USDA has improperly denied the CPNRD access to USDA data that CPNRD wanted to use to help it provide guidance on irrigation practices, mapping of cropland and other agency decisions. The desired data was USDA's geographic information system (GIS) data. The information had been requested since 2005, with USDA wavering on whether it would provide the data on various occasions. CPNRD wanted to use the data to determine fertilizer practices and water usage on private farmland that receive federal farm

program benefits. CPNRD also administers a water quality program and wanted to use the USDA data to better administer the program in a more cost-effective manner. Producers growing certain types of crops must report for water quality purposes, and the GIS data would make it simple for CPNRD to certify one million irrigated acres in the eleven counties in the district. CPNRD had to certify all irrigated acres when the state of Nebraska put a moratorium in 2004 on all new irrigated acres and irrigation wells in districts that were deemed “fully appropriated” or “over appropriated” in their groundwater use.

CPNRD and USDA work in a cooperative arrangement on certain matters. Under an agreement between the agencies, CPNRD had to provide USDA with a specialist to help USDA develop a GIS – the computer system that assembles, stores, manipulates and displays geospatial information. That information is used as an aid in producing flood maps, conducting an agricultural census and helping the USDA respond to natural hazards. After the GIS was created, USDA initially shared the GIS data with CPNRD, but stopped that practice in 2005 because the data identified individual farm owners, operators, borrowers and other agricultural producers. When the parties

couldn't come to an agreement concerning sharing the data, CPNRD proceeded to do the certification by recreating the same data that USDA had via the GIS and, at the same time, sued under the Freedom of Information Act (FOIA)² and the Administrative Procedure Act (APA).³ With access to the GIS data, CPNRD estimated that it could have accomplished the certification with one employee in 45 days. Without the data, the task took two years to accomplish (essentially duplicating the USDA data) at a cost to taxpayers in the district of approximately \$350,000.

Multi AG Media, LLC v. United States Department of Agriculture⁴

While the case was pending with the trial court, the U.S. Circuit Court of Appeals decided a FOIA case involving USDA data.⁵ In that case, the plaintiff was a commercial vendor of agricultural data, and made various FOIA requests for various records of farm data maintained by the USDA involving the ag subsidy and benefit programs. FSA released some of the information, but withheld other information on the ground that it contained private information about individual farmers and, as a result, was exempt from a FOIA request. The trial court sided with the plaintiff in ordering the disclosure of requested information in two of the files, but also granted USDA's motion for summary judgment and allowed the USDA to withhold information in two other files – the Compliance File and the GIS database.

On appeal, the court reversed the trial court as to the withheld files. The court reasoned that while the Compliance File (a database with information on crops and field acreage) might not directly say anything about a particular program, it said everything about whether a particular farm was eligible to

participate and would thus shed light on the agency's performance of its statutory duties. Without the Compliance File data, the public would have great difficulty verifying that FSA was properly conducting its spot checks and properly using that data. The GIS file is a database with farm data on a digitized aerial photograph. About 98 percent of the farms in the files were family owned, in which the financial makeup of the businesses mirrored the financial situation of the family members. The GIS database was used to monitor program compliance. The court reasoned that the GIS database should be made public because it would allow the public to more easily determine if the USDA was catching cheaters and lawfully administering its programs.

The 2008 Farm Bill

At the time of the D.C. Circuit's decision in early 2008, it stirred up a debate concerning whether it set a precedent that would impact the release of other information gathered by USDA agencies and programs. In 2008, the primary concern surrounded the National Animal Identification System (NAIS) and the potential for the disclosure of proprietary business information via FOIA requests. But, that's when the Congress stepped-in and included a provision in the 2008 Farm Bill to address those concerns (at least partially). That provision prohibits the disclosure of "geospatial information."⁶ But, there is an exception to the prohibition on disclosure that allows the USDA or one of its agencies to release or disclose information to those "working in cooperation with the Secretary in any Department program...when providing technical or financial assistance with respect to the agricultural operation, agricultural land, or farming or conservation practices..."⁷ CPNRD argued that it qualified for the exception because it

cooperated with USDA on many tasks. But, USDA disagreed and denied CPNRD's FOIA request in June 2009. USDA took the position that CPNRD did not qualify to the cooperator exception because it had not "met the criteria established for certification as an organization that is working in cooperation with the USDA on a Department program." The USDA did not address CPNRD's Privacy Act request.

CPNRD Appeal

The CPNRD administratively appealed USDA's FOIA decision and then sued USDA on the basis that the USDA's refusal to release the GIS data violated the FOIA. USDA then denied CPNRD's administrative appeal on the basis that CPNRD did not need the GIS data to fulfill its role as a cooperator. USDA also said the CPNRD could not get the GIS data under the Privacy Act because the cited routine uses did not apply. CPNRD amended its complaint to include an allegation that USDA violated the APA in its refusal to release the GIS data under the Privacy Act's routine use exceptions.

The trial court granted the USDA's motion for summary judgment on CPNRD's FOIA claim. The trial court also dismissed CPNRD's APA claim on the basis that it was barred because FOIA was an adequate remedy. CPNRD appealed.

On appeal the court affirmed.⁸ The court referenced one of the exceptions to the general rule of disclosure under FOIA. But, the court determined that the 2008 Farm Bill provision was a "withholding" statute for FOIA purposes and that, therefore, the GIS data need not be disclosed via a FOIA request. The provision specifically contained a "prohibition on the disclosure of geospatial data about agricultural land or

operations."⁹ As for CPNRD's APA claim, the court noted that the APA prevents a court from reviewing an APA claim where the party seeks "a court order" to produce the same documents under both FOIA and the APA.¹⁰ So, the court affirmed the trial court's finding that the FOIA provided an adequate remedy (CPNRD was requesting the same remedy under both the APA and the FOIA) and, as a result, the court could not entertain CPNRD's APA claim.

Conclusion

So, the GIS data was barred from disclosure by the 2008 Farm Bill Farm Bill provision. That has implications specifically for Nebraska's 23 natural resources districts, primarily for water management purposes. On a broader scope, it would seem that the Congress could come up with a procedure where agencies using identical data for different purposes could share the necessary information without compromising proprietary information so that the agencies aren't duplicating the same work, all at taxpayer expense. In recent years, FSA and the IRS have partnered in developing procedures for sharing critical information for the determination of qualification for federal farm program benefits, without comprising confidential tax information. Of course, another alternative is to get the government out of the business of regulating agricultural operations and doling out taxpayer dollars to agricultural producers. But, that isn't likely to happen in the near future.

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¹ No. 10-3205, 2011 U.S. App. LEXIS 13081 (8th Cir. Jun. 27, 2011).

² 5 U.S.C. §552.

³ 5 U.S.C. §701, et seq.

⁴ 515 F.3d 1224 (D.C. Cir. 2008).

⁵ *Multi AG Media, LLC v. United States Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008).

⁶ 7 U.S.C. §8791.

⁷ 7 U.S.C. §8791(3)(A)(i).

⁸ *Central Platte Natural Resources District v. United States Department of Agriculture, et al.*, No. 10-3205, 2011 U.S. App. LEXIS 13081 (8th Cir. Jun. 27, 2011)

⁹ 7 U.S.C. §8791(b)(2)(B).

¹⁰ 5 U.S.C. §552(a)(4)(B).