

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

AMERICAN FARM BUREAU FEDERATION,
NATIONAL PORK PRODUCERS COUNCIL,

PLAINTIFFS,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, GINA MCCARTHY,
*ADMINISTRATOR OF THE U.S.
ENVIRONMENTAL PROTECTION AGENCY,*

DEFENDANTS,

AND

FOOD & WATER WATCH, ENVIRONMENTAL
INTEGRITY PROJECT, AND IOWA CITIZENS
FOR COMMUNITY IMPROVEMENT,

INTERVENORS.

CIVIL No. 13-CV-01751 (ADM/TNL)

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Pursuant to the Federal Rules of Civil Procedure, the Local Rules of this Court, and the Court's Scheduling Order [D.E. 77], Plaintiffs American Farm Bureau Federation ("AFBF") and National Pork Producers Council ("NPPC") respectfully file this memorandum of law in support of their motion for summary judgment.

INTRODUCTION

Freedom of Information Act Exemption 6 protects against federal agency disclosure of personal information that would constitute a “clearly unwarranted invasion of privacy.” In this case, the Environmental Protection Agency has disclosed, and plans to continue disclosing, numerous spreadsheets that contain names, addresses, telephone numbers and other personal information belonging to tens of thousands of American farmers and ranchers. The Internet, EPA says, has destroyed those farmers’ expectation of privacy. But under U.S. Supreme Court precedent, the fact that personal information can be gathered from disparate public sources does not justify EPA’s creation of a federal clearinghouse where that information is collected, stored, and released to the public on request. Rather, EPA should be giving special consideration to the personal information it keeps in its files, even if that information could be found through a diligent Internet search.

STATEMENT OF UNDISPUTED FACTS

A. EPA’s Settlement Agreement and Proposed CAFO Reporting Rule

In 2008, EPA revised the National Pollutant Discharge Elimination System (“NPDES”) regulations governing farms classified as concentrated animal feeding operations (“CAFOs”). *See* Revised NPDES Permit Regulation and Effluent Limitation Guidelines for CAFOs, EPA-HQ-OW-2005-0037, 73 Fed. Reg. 70418 (Nov. 20, 2008). Under this rule, farms that were not discharging pollutants into waters of the United States would have been required to apply for an NPDES permit.

Numerous groups sought judicial review of the Agency's revised CAFO regulations. Agricultural groups argued that the new rule overstepped EPA's statutory authority under the Clean Water Act, while environmental groups argued that the new rule did not go far enough in regulating CAFOs. During the litigation, EPA entered into a settlement agreement with certain environmental plaintiffs, including the Natural Resources Defense Council ("NRDC"), Sierra Club, and Waterkeeper Alliance (the "Settlement Agreement"). *See* Declaration of Deborah Nagle [D.E. 69] ("Nagle Decl.") Ex. 1 (Settlement Agreement among EPA and NRDC, Sierra Club, & Waterkeeper Alliance (December 10, 2008)). The Fifth Circuit, meanwhile, ruled in favor of the agricultural plaintiffs, holding that "the scope of EPA's authority under the [Clean Water Act] is strictly limited to the discharge of pollutants into navigable waters." *National Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 750 (5th Cir. 2011).

As part of the Settlement Agreement, EPA agreed to propose a rule that would require CAFO operators to report certain information to the Agency, and to release that information to the public. *See* Nagle Decl. ¶¶ 2-3. That "CAFO Reporting Rule" would have required all large- and medium-sized CAFO farmers to provide the Agency with location and contact information, as well as details about the type and number of animals and the size of the property. *See* NPDES CAFO Reporting Rule, EPA-HQ-OW-2011-0188, 76 Fed. Reg. 65431 (Oct. 21, 2011); *see also* Nagle Decl. ¶ 18. In proposing this rule, EPA acknowledged that publicly released CAFO information "could be misused to target the CAFO for inappropriate or illegal purposes," which "might raise security or

privacy concerns for CAFO owner/operators, many of whom are family farmers.” 76 Fed. Reg. at 65438.

On July 20, 2012, EPA withdrew its proposed CAFO Reporting Rule. *See* NPDES CAFO Reporting Rule, EPA–HQ–OW–2011–0188, 77 Fed. Reg. 42679 (July 20, 2012). At the same time, EPA committed “to work with its federal, state, and local partners to obtain existing [CAFO] information” *Id.* at 42682. To that end, EPA entered into a Memorandum of Understanding (“MOU”) with the Association of Clean Water Administrators (“ACWA”)—a professional organization whose membership includes state and interstate water pollution control administrators. *Id.* at 42681; Nagle Decl. Ex. 7 (Memorandum of Understanding between EPA and Association of Clean Water Administrators (July 12, 2012)). With ACWA’s cooperation, EPA now has obtained information concerning tens of thousands of livestock and poultry farms and other farming operations from at least 37 states. *See* Nagle Decl. ¶¶ 29-30.

B. EPA’s Original FOIA Releases

In a letter dated September 11, 2012, one of the parties to the Settlement Agreement, Earthjustice, submitted a FOIA request to EPA that sought a host of information about farms, including “records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves” *See* Nagle Decl. Ex. 10 (FOIA Request Letter from Eve C. Gartner, on behalf of Earthjustice, to EPA (Sept. 11, 2012), at 2). The following month, NRDC, another party to the Settlement Agreement, and the Pew Charitable Trusts jointly filed a similar FOIA request, seeking detailed farm information, including “[t]he legal name of the owner of the CAFO . . .

their mailing address, email address, and primary telephone number” and “[t]he location of the CAFO’s production area, identified by latitude and longitude and street address.”

See Nagle Decl. Ex. 11 (FOIA Request Letter from Claire Althouse, on behalf of National Resources Defense Council and PEW Charitable Trusts, to EPA (Oct. 24, 2012), at 2).

On January 31 and February 4, 2013, EPA responded to these requests by releasing all of the data concerning CAFOs and other farms that it had received from twenty states. *See* Nagle Decl. ¶¶ 34-35. EPA also released data it had collected on its own from state websites, EPA data systems, and EPA regional offices. *See id.* The released data primarily consisted of Excel spreadsheets containing the compiled names, addresses, telephone numbers, and email addresses—among other information—belonging to tens of thousands of farmers and ranchers, organized on a state-by-state basis. *See* Nagle Decl. Exs. 15, 16 (filed under seal).

C. EPA’s Response to Objections

When, after business hours on a Friday, EPA informed AFBF and NPPC that it had released this collection of farmers’ personal information, they objected. *See* Nagle Decl. Ex. 18 (Letter from American Farm Bureau Federation, *et al.* to EPA (Feb. 25, 2013)). They subsequently pointed out, among other things, that EPA had failed to consider FOIA Exemption 6, which prohibits the Agency from releasing personal information that “would constitute a clearly unwarranted invasion of privacy.” 5 U.S.C. § 552(b)(6). Although EPA claimed that all of the information it released was “publicly

available,” it agreed to reexamine the release. *See* Nagle Decl. Ex. 19 (Feb. 28, 2013 Stoner letter, at 1-2).

In a letter dated April 4, 2013, EPA articulated its policy regarding the disclosure of farmers’ personal information under FOIA. *See* Nagle Decl. Ex. 23 (Letter from Nancy K. Stoner to Don Parrish, American Farm Bureau Federation (April 4, 2013) (“April 4 Letter”)). The Agency primarily argued that “Exemption 6 does not extend privacy protection to information that is well known or widely available within the public domain.” *Id.* at 2. On that basis, EPA refused to redact from its FOIA releases personal information that was either (1) “identical” or “almost identical” in “content and format” to information available on state or federal websites, or (2) “available through mandatory disclosure requirements of NPDES regulations or similar state permit disclosure laws.” *Id.* at 1-3. In addition, EPA stated that it would disclose information about corporations and businesses, even if they were closely held by an individual or family. *Id.* at 2-3, n.13.

D. EPA’s Amended FOIA Releases

Even under its narrow interpretation of Exemption 6, EPA’s April 4 letter conceded that some of the farm data it had released contained personal information that should have been protected. *See id.* at 2-4. After admitting its error, the Agency asked the FOIA requesters to return their copies of the prior releases, and provided them with a new, partially redacted batch of data. This amended release withheld some personal

information belonging to certain farmers in 10 states. *See* Nagle Decl. ¶ 76.¹ The information from the other 19 states remained completely unredacted. *See* Nagle Decl. ¶¶ 19, 56-59.

In correspondence dated April 30, 2013, EPA again amended its response to the FOIA requests, admitting that it should have redacted additional information protected by Exemption 6. *See* Nagle Decl. ¶ 49, Ex. 26 (Letter from Allison P. Wiedeman, Chief, Rural Branch, EPA Office of Wastewater Management (April 30, 2013)). That letter enclosed a disk with another redacted release and requested the return of previously released disks containing prior releases. *See id.* EPA did not, however, revise or reconsider its policies governing the release farmers' personal information.

E. Pending FOIA Releases

Since releasing the redacted farm information in April 2013, EPA has collected additional information pertaining to farmers in Minnesota, California, Idaho, Nevada, Oklahoma, and Washington. *See* Nagle Decl. ¶ 50, Ex. 27 (spreadsheets of unreleased information [filed under seal]). Several pending FOIA requests seek the release of this information. *See* Nagle Decl. ¶ 51(d).² The potential release of personal information belonging to farmers in these six states—as well as updated information concerning farmers in Pennsylvania—threatens a new and significant harm to the privacy interests of

¹ The states where some farmers' personal information was redacted included Arizona, Colorado, Georgia, Illinois, Indiana, Michigan, Montana, Nebraska, Ohio and Utah. Nagle Decl. ¶ 59.

² During the pendency of this litigation, EPA has agreed to defer release of this information and Plaintiffs agreed to withdraw, without prejudice, their motion for a temporary restraining order/preliminary injunction. *See id.* at ¶¶ 52-53, Ex. 29 (July 10, 2013 Letter from G. Koch).

those farmers and their families. The continued availability of information belonging to the farmers living in the 29 states that were the subject of the first release likewise represents a significant harm to the affected farmers.

F. Intervenor’s Use and Distribution of Personal Information

Two of the Intervenor—Food & Water Watch (“FWW”) and Environmental Integrity Project (“EIP”)—have admitted to receiving all records released by EPA from one of the initial requestors, Earthjustice. *See* Mem. in Support of Mot. to Intervene [D.E. 34] at 6 (citing Porreti Decl. D.E. 34 Ex. A ¶ 7 & Porreti Decl, D.E. 34 Ex. B ¶ 6); Protective Order [D.E. 66] ¶ 3. All three Intervenor have stated that they “engage in litigation and other activities aimed at protecting waterways . . . , and all have identified CAFOs as a particularly substantial threat to those waterways and devote substantial effort to monitoring their impact.” Mem. in Support of Mot. to Intervene at 12. Intervenor FWW further acknowledged that it has made the records it received from Earthjustice “available to the general public upon request.” *See* Protective Order ¶ 3.

ARGUMENT

In this action, AFBF and NPPC challenge, under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, EPA’s release of farmers’ personal information in violation of FOIA. They accordingly must demonstrate that EPA acted arbitrarily and capriciously, or contrary to law, in releasing personal information of farmers that should have been protected from disclosure under FOIA Exemption 6, which safeguards “personal, medical, or similar file[s], the release of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Because APA cases are decided on

facts presented in an administrative record, summary judgment is appropriate under Rule 56 if the moving party can demonstrate that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

I. Farmers’ privacy interest in their personal information far outweighs the public interest in disclosing spreadsheets that reveal nothing about EPA’s activities.

Although FOIA “reflects a general philosophy of full agency disclosure,” the statute also contains several exemptions. *United States Dep’t of Def. v. Federal Labor Rel. Auth.*, 510 U.S. 487, 494 (1994) (“*FLRA*”). The exemption at issue in this case, Exemption 6, “bars disclosure when it would amount to an invasion of privacy that is to some degree ‘unwarranted.’” *Id.* at 495. To determine whether an invasion of privacy is unwarranted, “a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect.” *Id.* (quoting *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989) (brackets omitted)).

A. Farmers have a strong privacy interest in the nondisclosure of their personal information, even if that information is already available to the public in some form.

1. Exemption 6 protects individuals’ ability to control dissemination of their personal information.

The U.S. Supreme Court’s seminal decision in *Department of Justice v. Reporters Committee for Freedom of the Press* creates the framework for assessing an individual’s privacy interest under FOIA. There, FOIA requesters sought disclosure of information gathered as part of the federal government’s program to “collect and preserve fingerprints

and other criminal identification records,” commonly known as “rap sheets.” *Reporters Comm.*, 489 U.S. at 751. This led the Supreme Court to consider whether the subjects of the rap sheets had a protectable privacy interest in preventing the disclosure of their information. Answering in the affirmative, the Court explained that privacy encompasses “the individual’s control of information concerning his or her person.” *Id.* at 763. And because privacy turns first on “control” of personal information, rather than on some measure of how “secret” that information might be, privacy interests do not vanish when information is publicly accessible. *Id.* at 764, 767.

The Supreme Court reiterated this expansive notion of privacy when faced with the potential disclosure of individuals’ home addresses in *United States Department of Defense v. Federal Labor Relations Authority*. The Court acknowledged that “home addresses are often publicly available through sources such as telephone directories and voter registration lists,” but still held that “[a]n individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.” *Id.* at 500.

The Eighth Circuit succinctly summarized this line of authority in *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000).³ In refusing to allow disclosure of farmers’ names in response to a FOIA request, the Court of Appeals observed that people frequently “divulge information to the government for limited purposes with the expectation that the information will not become available to the general public.” *Id.* at 1188. Exemption 6 protects those individuals’ abiding privacy

³ NPPC was an intervenor in the *Campaign for Family Farms* litigation.

interest in deciding where and how their personal information becomes publicly available. *See id.*

2. Farmers have a strong privacy interest in preventing disclosure of their personal information, including their home address, contact information, and financial information.

A substantial amount of the information at issue in this case merits the “special consideration” that is owed to the “privacy of the home.” *FLRA*, 510 U.S. at 501. EPA has released spreadsheets containing (1) the names of individual farmers, (2) their home or mailing addresses, (3) their home telephone numbers, (4) their personal email addresses, (5) the address, GPS data, or latitude and longitude of a farm that doubles as a private residence, and (6) miscellaneous notes and comments revealing personal information.⁴ *See, e.g.*, Nagle Decl. Exs. 16A, 16D, 27 (filed under seal). In addition, EPA has released tens of thousands of farm names, many of which incorporate the name of the individuals or families that operate the farm. *See id.* These releases plainly “disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.” *FLRA*, 510 U.S. at 501. The farmers whose information is being disclosed thus have a particularly strong privacy interest in protecting that information under Exemption 6.

⁴ The information EPA released was not strictly limited to farm owners. For example, the name and contact information of an Indiana farmers’ wife was also part of the released data. *See* Nagle Decl. Ex. 16D (filed under seal). In Nebraska, the names and contact information of farm employees was part of EPA’s disclosure. *See id.* (filed under seal). And before its second round of redactions, EPA released field notes from Montana that mention such personal issues as farmer deaths. *See id.* & Ex. 32 (filed under seal).

EPA also has released information that reveals farmers' personal finances, including (1) the name of the farm, (2) the farm's address, GPS coordinates, or latitude and longitude, (3) the number of animals on the farm, and (4) the number of acres being farmed. *See, e.g.*, Nagle Decl. Exs. 16A, 16D, 27 (filed under seal). Anyone who obtains this information could use it to estimate a farmer's income, debts, and other personal financial information. Under a string of appellate decisions, "an individual has a substantial privacy interest under FOIA in his financial information, including income." *Consumers' Checkbook, Center for the Study of Servs. v. U.S. Dept. of Health & Human Servs.*, 554 F.3d 1046, 1050 (D.C. Cir. 2009). With respect to farming operations, in particular, courts have held that financial information includes things like irrigation practices and farm acreage that would "in some cases allow for an inference to be drawn about the financial situation of an individual farmer." *Id.* (quoting *Multi AG Media v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008)). Here, for example, a farmer's competitors could use EPA-released information concerning the farm's animal population to estimate his annual income or infrastructure debts. Such financial information accordingly implicates a substantial privacy interest protected by Exemption 6.

3. By acting as a federal a clearinghouse for farmers' personal information, EPA has ignored the inherent privacy interest in the nondisclosure of compiled computerized information.

EPA's effort to build a database of farm information parallels the FBI's creation of a rap-sheet database in *Reporters Committee*. Both here and in *Reporters Committee*, the federal agency ostensibly set out to better fulfill its statutory responsibilities by collecting

and cataloguing information about individuals. Both efforts also involved collecting information from states that was often already “a matter of public record.” *Reporters Comm.*, 489 U.S. at 753. The Supreme Court’s opinion in *Reporters Committee* thus holds particular significance here.

Unlike EPA in this case, the Supreme Court in *Reporters Committee* drew a sharp distinction between “public records that might be found after a diligent search” of local sources and “a computerized summary located in a single clearinghouse of information.” *Id.* at 764. Citing several sources, the Court held that “a strong privacy interest inheres in the nondisclosure of compiled computerized information.” *Id.* at 766. A “federal compilation” of data is worrisome by nature, the Court explained, because of the “threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.” *Id.* at 767, 770 (citation omitted). Indeed, the duty to guard against the public release of such federally aggregated information “arguably has its roots in the Constitution.” *Id.* at 770 (citation omitted).

In addition to the Constitutional protections for personal privacy, the Court in *Reporters Committee* found support for the privacy interests it identified in “the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information.” *Id.* at 764-65. Farmers’ personal information is similarly shielded from public release. Data collected by the U.S. Department of Agriculture (“USDA”) may not be used in a manner that reveals “the identity of the person who supplied it,” and is statutorily “immune from mandatory disclosure of any type, including legal process.” 7 U.S.C. § 2276(a), (b)(2)(A). Disclosure of farming practices and geospatial information

about agricultural land is likewise subject to detailed restrictions. *Id.* § 8791. The more broadly applicable Privacy Act of 1974 similarly “directs agencies to establish safeguards to protect individuals against the disclosure of confidential records” that would result in an invasion of privacy. *Federal Aviation Admin. v. Cooper*, -- U.S. --, 132 S. Ct. 1441, 1450 (2012). There is no evidence that EPA properly considered any of these restrictions, or the policies behind them, when it released the personal information at issue here.

EPA’s public release of compiled farm data cannot be reconciled with the Supreme Court’s opinion in *Reporters Committee*. Searchable, state-by-state spreadsheets containing tens of thousands of farmers’ personal information are precisely the sort of “compiled computerized information” that the Court described as inherently involving “a strong privacy interest.” *Reporters Comm.*, 489 U.S. at 766. EPA is essentially creating a nationwide directory and map of all livestock and poultry farmers, complete with the names, addresses, sizes, telephone numbers, GPS coordinates and, in some cases, emails and other family information. When EPA released those spreadsheets, it became the same kind of federal “clearinghouse” for personal information that the Supreme Court condemned in *Reporters Committee*.

B. The public availability of personal information does not destroy an individual’s privacy interest in preventing its further dissemination.

Despite the Supreme Court’s rulings in *Reporters Committee* and *FLRA*, EPA determined that any personal farmer information that was either (1) “publicly available on EPA’s or states’ websites,” or (2) “subject to mandatory disclosure under state or federal law” was categorically “not subject to the privacy protections of FOIA Exemption

6.” Nagle Decl. ¶ 79. According to EPA, information falling into these categories “is well known or widely available within the public domain.” *Id.* Thus, EPA claims, the affected farmers “have no expectation of privacy.” *Id.*

1. Internet accessibility does not defeat an individual’s reasonable expectation of privacy in personal information.

The U.S. Supreme Court rejected EPA’s “cramped notion of personal privacy” in *Reporters Committee*. 489 U.S. at 763. Because “[t]he privacy interest protected by Exemption 6 encompass[es] the individual’s control of information concerning his or her person,” it “does not dissolve simply because that information may be available to the public in some form.” *FLRA*, 510 U.S. at 500 (internal quotation marks omitted). “Even information that is available to the general public in one form may pose a substantial threat to privacy if disclosed to the general public in an alternative form potentially subject to abuse.” *Campaign for Family Farms*, 200 F.3d at 1188. Thus, while living “[i]n an organized society” sometimes requires individuals to disclose sensitive personal information in certain contexts, those individuals continue to retain an “interest in controlling the dissemination” of that personal information. *FLRA*, 510 U.S. at 500 (quoting *Reporters Comm.*, 489 U.S. at 763).

Reporters Committee and *FLRA*, of course, predate the public availability of information on the Internet. EPA’s primary position, as reflected in the Nagle Declaration, seems to be that when information is accessible on the Internet, it is “freely available” by definition, and thus no longer “private.” That argument fails on two fronts.

First, as a legal matter, the availability of information is not the determining factor in the existence of a privacy interest. Rather, the fundamental purpose of FOIA Exemption 6 is to protect “the individual’s *control* of information concerning his or her person.” *FLRA*, 510 U.S. at 500 (emphasis added). The federal government’s “compilation” of otherwise scattered information for release under FOIA “alters the privacy interest implicated by disclosure” because it substantially lessens individuals’ control over their personal information. *Reporters Comm.*, 489 U.S. at 764. Exemption 6 accordingly restricts the federal government’s ability to collate and distribute personal information, regardless of whether that information may be available through other sources. *See id.*; *FLRA*, 510 U.S. at 500. By ignoring this privacy interest, EPA’s prior and planned FOIA releases wrest control of personal information away from farmers, and place their information in the hands of persons who could use it to harass them or their families.

Second, as a factual matter, personal information accessible on the Internet is not necessarily “freely available.” Consistent with the Supreme Court’s observation in *Reporters Committee*, “[t]he very fact that federal funds have been spent” to collect farm information from the states strongly suggests that the information is not otherwise “freely available.” *Reporters Comm.*, 489 U.S. at 764. If it were, the public could collect the same information in the same format using state websites, and “there would be no reason to invoke the FOIA” in the first place. *Id.* True, these Internet searches could be performed from the comfort of a desk chair, without the physical efforts that would have been necessary to gather rap-sheet information. But the point of *Reporters Committee* is

not the amount of labor involved in collecting scattered information. The point is that relying on a federal agency to perform such collection work indicates that the information is not so “freely available” that it eliminates any privacy interests.

Private citizens have not, as the D.C. Circuit recently put it, “surrender[ed]” their “reasonable expectation of privacy to the Internet.” *Am. Civil Liberties Union v. U.S. Dep’t of Justice*, 750 F.3d 927, 933 (D.C. Cir. 2014). The U.S. Supreme Court’s recent rejection of warrantless cell phone searches in *Riley v California*, -- U.S. --, 134 S. Ct. 2473 (2014), illustrates how advances in technology do not eviscerate an individual’s reasonable expectation that personal information will remain private. An important difference remains between “the mere *ability* to access information and the likelihood of actual public *focus* on that information.” *Am. Civil Liberties Union*, 750 F.3d at 933. (emphasis in original). EPA’s position that it can compile and distribute any personal information that can be found on the Internet runs counter to Supreme Court precedent, and would destroy the privacy protections offered by Exemption 6.

2. The fact that public disclosure of personal information is required in one context does not eliminate an individual’s privacy interest in preventing disclosure in a different context.

In addition to information accessible on federal or state websites, EPA determined that no privacy interest exists for information “subject to mandatory disclosure under state or federal law.” Nagle Decl. ¶ 79. As EPA describes it, this category includes information from (1) any farm holding an NPDES permit, (2) any farm holding a state permit subject to public notice requirements, and (3) any farm holding a state permit that must be provided to “interested individuals” under state law. Nagle Decl. ¶ 58. Because

“members of the public can access the same information the EPA obtained from the states” through these “mandatory disclosure requirements,” the Agency concluded that the information was “not obscure,” and thus not protected by Exemption 6. Nagle Decl. ¶ 79.

The fact that some of a farmer’s personal information would be available to the public during a permit application process, or could be individually obtained from agency files on request, does not defeat the permit holder’s privacy interest in the information. The personal information contained in permits that were once the subject of public comment, but have now become part of state or federal databases, are analogous to the “scattered bits of criminal history” at issue in *Reporters Committee*.⁵ 489 U.S. at 767. The past public availability of piecemeal information does not eliminate the “potential invasion of privacy” that results from the present disclosure of information. *Id.* at 769.

NPDES permits and applications are available to the public, usually through requests to state implementing agencies. 33 U.S.C. § 1342(b)(3). “[M]uch of the information” in these state databases—at least from the most recent three years—is also available to the public in EPA’s Enforcement and Compliance History Online website. Nagle Decl. ¶ 26. And, according to EPA, several states have similar public notice and availability procedures for their own state regulatory programs. Nagle Decl. ¶¶ 58(a), (b); 59(c). Locating this information often requires a public records request. Even then, a state information request may turn up far less—and less organized—information than what

⁵ If anything, a farmer’s personal information—disclosed in the course of his or her efforts to earn a living—should be entitled to even greater protection than information disclosed in the course of encounters with the criminal justice system.

EPA has acquired using its regulatory oversight powers. That level of availability cannot destroy an individual's privacy interest in "control of information concerning his or her person." *FLRA*, 510 U.S. at 500.

C. Because most farms are closely held businesses, the disclosure of farm business information often implicates privacy interests.

In addition to rejecting any privacy interest in personal information that was available on the Internet or subject to mandatory disclosure, EPA determined that the "privacy interest" protected by Exemption 6 "only pertains to individuals and does not apply to corporations or businesses." Nagle Decl. ¶ 62. The Agency accordingly declined to apply the balancing test to any "business" information, including, for example, farm names that did not reveal the identity of individual farmers. *See id.* Again, EPA's overbroad assertion conflicts with binding precedent.

The Eighth Circuit Court of Appeals already has addressed Exemption 6's application to corporations in a very similar context. *Campaign for Family Farms v. Glickman*, discussed above, involved a group of hog farmers who sought to prevent the FOIA release of names and addresses that appeared on a petition filed with USDA. The Department argued, among other things, that the privacy interests protected by Exemption 6 were "diminished" because "many individuals may have signed [the petition] in their business or entrepreneurial capacities." *Id.* at 1188. The Eighth Circuit emphatically rejected USDA's argument, holding instead that operating a business as "an individual, sole proprietor, or majority shareholder in a closed corporation" did not alter the business owner's privacy interest. *Id.* "An overly technical distinction between

individuals acting in a purely private capacity and those acting in an entrepreneurial capacity,” the court explained, “fails to serve the exemption’s purpose of protecting the privacy of individuals.” *Id.* at 1189.

Like the Eighth Circuit, the D.C. Circuit has recognized that “individually owned or closely held businesses” retain “substantial privacy interests in business-related financial information.” *Consumers’ Checkbook*, 554 F. 3d at 1051. This is especially true for “farmers, ranchers, and other family-owned businesses.” *Rice v. U.S.*, 245 F.R.D. 3, 5 (D.D.C. 2007); *see Campaign for Family Farms*, 200 F.3d at 1188-89. This reasoning is directly applicable in this case, where many of the farmers whose personal information is at stake operate their farms as sole proprietorships, family partnerships, or closely held corporations. *See, e.g.*, Declaration of Patrick Lunemann (“Lunemann Decl.”) ¶ 3 (attached as Exhibit 1). Indeed, nearly 98% of all farms in this country are owned by individuals, families, partnerships, or family-held corporations. U.S. Dep’t of Agric., Census of Agriculture, Table 67.⁶ Those farmers and their families often live on their farms. *See, e.g.*, Lunemann Decl. ¶ 6. EPA’s flat rejection of privacy protection for farmers who employ the corporate form ignores the Eighth Circuit’s decision in *Campaign for Family Farms* and leaves the farming community with reduced privacy protections.

⁶ Available at http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/st99_1_067_067.pdf.

D. An Excel spreadsheet containing farmers' personal information reveals nothing whatsoever about EPA's operations or activities.

Establishing the existence of a privacy interest is just the first step in analyzing EPA's application of Exemption 6. An invasion of privacy is not "unwarranted" under Exemption 6 unless that privacy interest outweighs "the public interest in disclosure." *FLRA*, 510 U.S. at 495. The public interest in disclosure is narrow, however, and exists only when the information at issue "contribut[es] significantly to public understanding of the operations or activities of the government." *Id.* (citations, brackets and emphasis omitted). If a FOIA release does not serve that narrow purpose, then even "a very slight privacy interest would suffice to outweigh the relevant public interest" *Id.* at 500.⁷

1. The public has no cognizable interest under FOIA in personal information that does not shed light on EPA's activities.

Under FOIA, the public interest in spreadsheets filled with farm names, home addresses, and contact information is nil. The U.S. Supreme Court faced a similar situation in *FLRA*, where FOIA requesters sought the release of non-union employees' names and addresses. 510 U.S. at 490. Because the disclosure of that personal information revealed "little or nothing" about the "agencies or their activities," the Court held that the public interest in the disclosure was "negligible, at best." *Id.* at 497. That holding followed ineluctably from the Court's decision in *Reporters Committee*, which

⁷ Because EPA concluded that "publicly available" information was "not subject to the privacy protections of FOIA Exemption 6," it did not seriously weigh the public interest in its disclosure. Nagle Decl. ¶ 79. EPA's casual assertion that "even if a privacy interest may exist, the weight of public interest in releasing this information . . . far exceeded any privacy interest" is contradicted by its decision to redact personal information not available on the Internet. *Cf. id.* ¶¶ 76 & 80.

found that releasing an individual's criminal history did not advance the relevant public interest. "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Reporters Committee*, 489 U.S. at 774 (emphasis in original).

The raw, data-filled spreadsheets at issue here, consisting primarily of personal information belonging to tens of thousands of farmers, provide no insight into EPA's operations or activities. There is nothing in these farmers' names, location or contact information, or in the size of their farms, that says anything about EPA's enforcement of the Clean Water Act, or whether the farmers are violating the Clean Water Act. As in *Reporters Committee* and *FLRA*, disclosing this type of "information about private citizens . . . that reveals little or nothing about an agency's own conduct" does not serve a relevant public interest under FOIA. *Consumers' Checkbook*, 554 F.3d at 1051 (quoting *Reporters Comm.*, 489 U.S. at 771); see *FLRA*, 510 U.S. at 496. The fact that those private citizens' information came to be in the government's possession as a result of their contact with the government—whether through the criminal justice system, as in *Reporters Committee*, or agricultural permitting by state regulatory authorities, as in this case—is wholly irrelevant. *See id.*

2. The ways requesters might use personal information released under FOIA is irrelevant to the Exemption 6 balancing test.

Perhaps recognizing that the disclosure of Excel spreadsheets—most of which were either provided by states or pulled from state websites—offers virtually no insight

into EPA's operations, the Agency's declaration in this case contains a litany of alleged "public interests" in disclosure.

First, many of EPA's public interest claims revolve around the idea that disclosing farm information will facilitate "public participation" in various federal processes. *See, e.g.,* Nagle Decl. ¶¶ 63, 64, 69, 70, 71. But the public's anticipated use of information released under FOIA does not factor into the Exemption 6 balancing test.⁸ "[W]hether disclosure of a private document is warranted . . . must turn on *the nature of the requested document,*" not "the particular purpose for which the document is being requested." *Reporters Committee*, 489 U.S. at 772 (emphasis added). Even more so, EPA's speculation about how information might trigger other inquiries should carry no weight in the relevant analysis. If the "nature" of the information does not offer insight into EPA's activities, its release does not further FOIA's goal of contributing to public understanding of the government.

Second, EPA's declaration asserts that the release of spreadsheet data, including farmers' personal information, will allow members of the public to "monitor" EPA's administration of certain programs. Nagle Decl. ¶¶ 66, 67, 68, 72, 73. FOIA is not intended to disclose private information about citizens so that other citizens can "monitor" them. The name and personal address of a person—including one who owns and runs a farm—does not inform anyone about whether EPA has failed in its duties under the Clean Water Act, or any other law. Even assuming that the release of farmers'

⁸ Public participation is already a part of the NPDES permitting process. *See* EPA, Public Participation in the NPDES Permit Issuance Process (Sept. 2013), available at: <http://water.epa.gov/polwaste/npdes/basics/upload/publicparticipation.pdf>.

personal information could potentially facilitate oversight of EPA's activities, the open-ended oversight described in EPA's declaration would involve monitoring the activities of law-abiding private citizens who own and operate livestock and poultry farms, not the activities of EPA. Exemption 6 is supposed to prevent such invasions of privacy, not facilitate them. Any interest the public may have in monitoring the activities of farmers thus "falls outside the ambit of the public interest that FOIA was enacted to serve."

Reporters Comm., 489 U.S. at 775.

Just like the requesters in *FLRA*, the Intervenors in this case might be able to use the information they seek—but only in combination with additional actions. Merely identifying farmers and locating their homes and barns may provide a starting point, but it is not nearly enough information to even speculate about whether EPA has failed to enforce the Clean Water Act. To glean any insight into *EPA's* activities, Intervenors would need to collect and analyze information well beyond a farm's location, acreage and number of animals. Again, the personal information being disclosed by EPA says nothing about whether the Agency is properly administering the Clean Water Act, or whether the farms listed in the disclosed spreadsheets are complying with the law.⁹ The spreadsheets, in other words, do "not appreciably further the citizens' right to be informed about what their government is up to." *FLRA*, 510 U.S. at 497 (internal quotation marks omitted).

FOIA requesters should not be able to retrieve a database of personal information about

⁹ As EPA acknowledges, some of the information it gathered from the states includes information concerning farms that do not qualify as CAFOs. Nagle Decl. ¶¶ 20, 29 & n.1. EPA does not have any conceivable Clean Water Act jurisdiction over those farms. In any case, the "policy considerations" underlying the Clean Water Act cannot be "import[ed]" into FOIA's balancing test. *FLRA*, 510 U.S. at 498.

an entire segment of the population under the guise of EPA's alleged failure to act under the Clean Water Act.

Finally, EPA's declaration claims in two paragraphs that releasing the spreadsheets here at issue shows that EPA is carrying out its plan to "collect[] CAFO information nationwide" and "develop a national inventory of permitted CAFOs." Nagle Decl. ¶¶ 65, 74. Unredacted personal information itself, however, sheds no light on EPA's CAFO inventory plans. Nor do the entire spreadsheets. Rather, the spreadsheets and the data they contain are merely the information states provided to EPA, without any EPA manipulation or analysis. Nagle Decl. Exs. 16, 27, 32. If and when EPA turns this information into a "national inventory," that inventory would be subject to the applicable Privacy Act protections. *See* 5 U.S.C. § 552a(b). EPA cannot circumvent those protections by releasing under FOIA the raw data that it is using to build its inventory.

* * *

Both the U.S. Supreme Court and the U.S. Courts of Appeals—including the Eighth Circuit—have consistently emphasized the importance of the privacy interests protected by Exemption 6, and the narrowness of the public interest against which those privacy interests must be weighed. Because the privacy interests at stake in this case "substantially outweigh[] the negligible FOIA-related public interest in disclosure" (*FLRA*, 510 U.S. at 502), the release of farmers' personal information constitutes an "unwarranted invasion of personal privacy" under FOIA Exemption 6. EPA's contrary conclusion was arbitrary, capricious, and contrary to law.

II. Only a permanent injunction against EPA can prevent ongoing, irreparable harm to the farmers and ranchers whose personal information is being distributed.

Once a violation of the APA has been identified, courts must consider whether a permanent injunctive remedy is appropriate. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). To make that determination, a court must “balance three factors: (1) the threat of irreparable harm to the moving party; (2) the balance of harm between this harm and the harm suffered by the nonmoving party if the injunction is granted; and (3) the public interest.” *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 967 (8th Cir. 2005).

A. Thousands of farmers will suffer irreparable injury without a permanent injunction.

Releasing personal information to the public—as EPA has done, and intends to continue doing—qualifies as irreparable harm in and of itself. “When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages.” *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978). As the court explained in *Hirschfeld v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000), the “disclosure of confidential information” is “the quintessential type of irreparable harm that cannot be compensated or undone by money damages.” Similarly, threatening an “invasion of privacy”—especially on the scale contemplated by EPA’s FOIA releases—is plainly irreparable harm. *Oil, Chem. & Atomic Workers Int’l Union v. Amoco Oil Co.*, 885 F.2d 697, 707 (10th Cir. 1989). In addition, the damage to farmers’ interests from releasing the personal data at issue in this case is irreparable because, “once shared, that

private information cannot be ‘un-shared.’” *UBS Fin. Serv., Inc. v. Christenson*, Civ. No. 13-1081, 2013 WL 2145703, at *6 (D. Minn. May 15, 2013)).

On top of the inherent harm that results when personal information becomes public, farmers and their families could suffer specific harms from the disclosure of their names, locations, and contact information. As EPA acknowledged when it proposed the CAFO Reporting Rule, this personal information “could be misused to target [farmers] for inappropriate or illegal purposes.” 76 Fed. Reg. at 65438. Comments submitted on that rule elaborated on this potential harm, noting that the public release of farm locations raises substantial biosecurity concerns. *See* Nagle Decl. Ex. 4 at 2-3 (Comments of the S.D. Dep’t of Agric. & S.D. Dep’t of Env’t & Nat. Res.).

All of these harms come not only from the initial release, but the continued availability of farmers’ personal information. Without a permanent injunction, more farmers would be harmed every time EPA discloses new or updated information, or discloses existing information to new requesters.

B. The public has no protectable interest in knowing the names and locations of the nation’s farmers and ranchers.

The farmers whose personal information is included in the EPA’s spreadsheets will suffer exponentially greater harm than EPA or the Intervenors face if the information is withheld. As already established, the spreadsheets reveal nothing about EPA’s performance of its statutory duties—the only public interest in disclosure for purposes of FOIA. *See supra* at 21-25. By contrast, the farmers whose information is disclosed will further lose control of their ability to control the disclosure and use of their name (and the

names of family members and employees), their telephone numbers, emails, and the exact location of their residence. In addition, the release puts them at risk of harassment, trespass, sabotage, or other damaging activities by activist or terrorist groups and individuals—risks EPA itself has acknowledged. *See* 76 Fed. Reg. at 65438.

C. The public interest favors issuance of injunctive relief.

Finally, the public interest also weighs in favor of a permanent injunction. The public has a strong interest in ensuring that the privacy interests of America’s farmers and their families are protected. As the Eighth Circuit observed in the context of the Fourth Amendment, the public interest favors protecting “personal privacy and dignity against unwarranted intrusion by the State.” *Arnzen v. Palmer*, 713 F.3d 369, 375 (8th Cir. 2013). The U.S. Supreme Court likewise has acknowledged that protecting the “privacy of the home” is a fundamental value that “arguably has its roots in the Constitution.” *FLRA*, 510 U.S. at 501. This public interest, especially as it relates to farmers, is echoed in various statutory privacy protections enacted by Congress. *See supra* at 13-14. A permanent injunction against EPA releasing farmers’ personal information advances this privacy interest.

CONCLUSION

The U.S. Supreme Court has expansively interpreted individuals’ power to limit the disclosure of their personal information under FOIA Exemption 6—especially information pertaining to their name, home or finances. Here, EPA is doing the opposite. If EPA finds that personal information is or was publicly accessible in any form, EPA gives no weight whatsoever to the privacy interests of farmers and their families. On the

other hand, EPA goes to great lengths to explain why the disclosure of this personal information might be in the public interest, while the only public interest that matters under FOIA—insight into *EPA*'s activities—is glaringly absent. EPA's actions in releasing farmers' and ranchers' personal information are arbitrary, capricious, and contrary to the well-established law governing the protection of personal information under Exemption 6.

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Dated: August 15, 2014

Respectfully submitted,

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