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The Honorable Mike Lee
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
United States Senate

The Honorable Richard Blumenthal
United States Senate

The Honorable Cory A. Booker
United States Senate

Agricultural Promotion Programs: Status of Freedom of Information Act Requests

The U.S. Department of Agriculture’s (USDA) Agricultural Marketing Service (AMS) is responsible for the oversight of 22 research and promotion programs, more commonly known as check-off programs.¹ Check-off programs are authorized by the Secretary of Agriculture through an order issued after public notice and comment. The Secretary issues these orders under the authority provided in legislation addressing specific agricultural commodities or under general authority provided in the Commodity Promotion, Research, and Information Act of 1996. Generally, the process of issuing an order begins when industry submits a proposed order to the Secretary to expand the market for a given agricultural commodity through the development and implementation of promotion, research, and information programs. The term check-off refers to the way the research and promotion programs are funded—an assessment is paid by producers, handlers, processors, importers, or others in the marketing chain for each unit of a commodity sold, produced, or imported. The programs are principally funded by this assessment and do not receive any federal appropriations. In addition, AMS is reimbursed from these assessments for its oversight activities.

Each check-off program is operated by a board, such as the American Egg Board or the Cattlemen’s Beef Board, whose members, for the most part, are appointed by the Secretary of Agriculture from nominations submitted by industry. Check-off boards are explicitly prohibited from (1) engaging in any action that could be a conflict of interest, (2) using assessed funds to influence any legislation or governmental action or policy, and (3) promoting any advertising that may be false, misleading, or disparaging to another agricultural commodity. AMS has primary oversight responsibility for ensuring that check-off boards comply with authorizing legislation and agency policy.

¹The 22 commodities for which there are research and promotion programs are: beef, Christmas trees, cotton, dairy, egg, fluid milk, Hass avocados, highbush blueberries, honey, lamb, mangoes, mushrooms, paper and packaging, peanuts, popcorn, pork, potatoes, processed raspberries, softwood lumber, sorghum, soybeans, and watermelons. See enclosure I for more information.

The Freedom of Information Act (FOIA) requires federal agencies to provide the public with access to government information on the basis of the principles of openness and accountability in government.² Each year, federal agencies release information to FOIA requesters that is intended, among other things, to contribute to the understanding of government actions, including the disclosure of waste, fraud, and abuse. AMS is one of the many agencies at USDA that responds to these requests. One recent FOIA request regarding check-off programs revealed the potential for activities that did not comply with the law.³

You asked us to review the status of AMS's FOIA requests related to check-off programs. This report summarizes AMS data on FOIA requests for check-off programs.

To do this work, we collected data on FOIA requests from AMS and analyzed that data to determine the status of requests from fiscal years 2012 through 2016, the most recent years for which complete data were available. To assess the reliability of the data, we interviewed USDA and AMS officials about how the data were compiled, how the data were checked, and any limitations of the data. We found the data to be sufficiently reliable for the purposes of this report.

We conducted this performance audit from September 2016 to October 2017 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

USDA's FOIA processing is decentralized, occurring at the agency level rather than at the departmental level. USDA offers its agencies FOIAXpress, a commercial, off-the-shelf system specifically designed to automate FOIA case processing and facilitate the tracking of FOIA requests. AMS officials use this system but also use their own tracking system while processing FOIA requests in order to customize the information they collect and track.

Once a FOIA request is received by AMS, it is entered into both FOIAXpress and AMS's own tracking system. AMS determines whether the request is simple or complex,⁴ and the agency contacts the requester to acknowledge that the request has been received. In the case of check-off programs, both the boards and AMS initiate a search of records and information that fulfills the request. Both the boards and AMS review documentation to determine whether

²5 U.S.C. § 552.

³In September 2015, AMS began a review of the American Egg Board, which manages the egg check-off program, after a FOIA request brought to light potential misconduct. AMS's review, which culminated in a July 2016 report, found that the American Egg Board engaged in several instances of inappropriate conduct, including internal activities targeting a specific company and failing to adhere to AMS's program guidelines. See U.S. Department of Agriculture, Agricultural Marketing Service, Compliance and Analysis Program. *Review Report: Case Number: L-014-15* (July 7, 2016).

⁴Factors that increase the complexity of a request include the volume of information involved, the number of offices that might have responsive documents, the extent to which the information is technical or difficult to understand, and the need to communicate with third parties, such as other agencies or owners of possible proprietary information. AMS's FOIA officer makes the final determination as to whether a request is considered simple or complex.

portions of any record should be withheld based on statutory exemptions.⁵ In addition, because check-off boards may work with third-party businesses, those businesses may also need to review information that is the subject of a FOIA request.⁶ Nine specific exemptions can be applied to withhold information. For example, in general, classified information, trade secrets, and information that could reasonably be expected to constitute an unwarranted invasion of personal privacy may be withheld. (Enclosure II includes a complete list of the FOIA exemptions.) A request may be denied in full based on one or more of the exemptions, or it may be partially granted, in which case information may be blacked out (redacted). If no exemption applies, and disclosure is not otherwise prohibited by law, the request should be granted in full. AMS program staff work with the FOIA officer to reach consensus on applying exemptions. If there are any questions on the proper application of exemptions, USDA's Office of General Counsel may be consulted.

FOIA allows requesters to challenge an agency's final decision on a request through an administrative appeal or a lawsuit. Specifically, requesters have the right to file an administrative appeal if they disagree with the agency's decision on their request. Requesters should generally exhaust their administrative remedies, such as filing an administrative appeal, before a lawsuit can be filed.⁷ If a request is denied on appeal, requesters then have 6 years to file a lawsuit pertaining to the request.⁸ Further, if requesters substantially prevail in a FOIA lawsuit, the court may assess against the government reasonable attorneys' fees and litigation costs.⁹

In 2007, FOIA was amended to allow both requesters and agencies to contact the Office of Government Information Services, within the National Archives and Records Administration, to help resolve a dispute at any point in the FOIA process, including after filing an administrative appeal. In addition, the Office of Government Information Services offers mediation to help resolve disputes between requesters and agencies as an alternative to litigation.¹⁰

⁵Some FOIA requests are closed before reaching this stage, for reasons such as (1) no responsive documents can be found, (2) all responsive documents originated with another agency and were referred to that agency for processing, or (3) after being notified of fees, the requester is unwilling to pay the estimated fees.

⁶USDA regulations state that each USDA agency is responsible for determining whether to disclose information in agency records that has been submitted by a business. If an agency receives a request for information that has been submitted by a business, the agency shall: (1) provide prompt notification to the business and afford the business reasonable time in which to object to disclosure, (2) notify the requester of the need to inform the business, (3) determine whether the records are exempt from disclosure or must be released, (4) provide the business with notice of the final determination on disclosure, and (5) notify businesses promptly in instances in which FOIA requesters bring suit seeking to compel disclosure.

⁷The Court of Appeals for the District of Columbia Circuit has held that exhaustion of the administrative appeal process is "generally required before filing suit in federal court." *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003) (quoting *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990)). Consequently, the court held that the requester did not exhaust all his administrative remedies, i.e., the requester did not file an appeal with the Office of Information Privacy.

⁸The general statute of limitations for civil suits against the federal government is 6 years. 28 U.S.C. § 2401(a).

⁹To substantially prevail, a plaintiff must have obtained relief through either (1) a judicial order, or an enforceable written agreement or consent decree; or (2) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

¹⁰The OPEN Government Act, enacted in 2007, amended FOIA to, among other things, establish the Office of Government Information Services within the National Archives and Records Administration to oversee and assist agencies in implementing FOIA. Among its responsibilities, the office offers mediation services to resolve disputes between requesters and federal agencies.

AMS may charge fees for searching and copying associated with FOIA requests, but the act provides exceptions. For example, news media pay reduced or no fees. For all requesters, fees may be waived if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. AMS passes along the costs associated with AMS's searching and copying for FOIA requests related to check-off programs to the check-off boards, which reimburse AMS for its oversight of the program out of the program assessments.

Summary of AMS Data on FOIA Requests for Check-off Programs

For fiscal years 2012 through 2016, the number of annual check-off-related requests received by AMS ranged from a low of 12 requests in 2013 to a high of 35 requests in 2016. About 69 percent (72 of 104) of all the check-off requests during this time were for protein-related check-off programs (egg, beef, pork, or lamb). About 18 percent (19 of 104) of all the check-off requests were for either the dairy or fluid milk check-off programs. The remaining 13 percent of requests covered a variety of other check-off programs. For the same period, we found the following information on the 104 FOIA requests:

- **Requests granted in full, granted in part, or denied and exemptions:** Nearly 58 percent (60 of 104) of check-off requests during that period were granted in part; about 19 percent (20 of 104) were granted in full; less than 3 percent (3 of 104) were denied; about 17 percent (18 of 104) either had no records, were withdrawn by the requester, were a duplicate request, did not receive a response from the requester, had no agency records of the requested information, or the records were not reasonably described by the requester; and less than 3 percent (3 of 104) had not yet been fulfilled and therefore had no final disposition. Of those requests that were granted in part or denied in full, the exemption most commonly cited was Exemption 6 (58 requests), for information that, if disclosed, would invade another individual's personal privacy. This was followed by Exemption 4 (41 requests), for trade secrets or commercial or financial information that is confidential or privileged.
- **Length of time to fulfill requests:** The average number of days in each fiscal year to fulfill a check-off-related request ranged from a low of 58 days in fiscal year 2012 to a high of 120 days in fiscal year 2013, with an overall average of 77 days for the 5-year time frame we reviewed. The 2 requests that took the most amount of time were related to the dairy check-off program. The first of these requests was received in fiscal year 2013 and took 562 days to fulfill. According to AMS officials, in addition to the complexity of the documents requested, AMS's search resulted in approximately 14,000 pages of responsive documents. AMS FOIA officials provided the requester with batches of documents as they were reviewed. The second request was received in fiscal year 2014 and remains open. According to AMS, more than 20 releases of information consisting of thousands of pages of documentation have been given to the requester; however, there is ongoing litigation over the request. AMS officials said that for many of the requests that involve large volumes of information, they will work with the requester to provide them with information as it is reviewed rather than wait until all of the information is reviewed and available.

- Request backlog:** The number of backlogged requests as of the end of each fiscal year ranged from 2 in fiscal year 2014 to 8 in fiscal year 2015. According to agency officials, each sub-agency at USDA determines how it will reduce backlogs. Furthermore, officials said that USDA's Office of the Chief Information Officer continuously monitors the sub-agency backlogs through monthly conference calls and includes this information in USDA's annual report to the Department of Justice.¹¹ AMS FOIA officials said AMS hired two FOIA contractors in fall 2016 to help with both backlogged and ongoing FOIA requests. AMS FOIA officials said program staff provide interim releases of information to requesters as the review process progresses. In addition, AMS officials said that in June 2017, the AMS FOIA office was moved organizationally within AMS in order to handle FOIA requests in a more efficient and timely manner. This organizational change brings together all FOIA resources within AMS, including contractors, under one office and is expected to increase communication. Check-off program officials said complex and voluminous requests affect AMS's response time.
- Administrative appeals and lawsuits:** FOIA requesters filed 11 administrative appeals and six lawsuits against AMS. Four of the six lawsuits are currently in process, and two were dismissed. All of the lawsuits were for protein-related check-off programs: beef, dairy, egg (2), and pork (2).
- Office of Government Information Services assistance:** In fiscal year 2013, AMS requested that the Office of Government Information Services provide an informal opinion on whether AMS should have granted a fee waiver for a FOIA request related to the pork check-off program. AMS had originally granted a fee waiver to the requesting organization, but the National Pork Board raised objections about the waiver. The Office of Government Information Services' memorandum addressing the issue referred AMS to a case involving a fee waiver request by a public interest group that filed a request for records related to a quasi-governmental body. In this circumstance, the court disagreed with the agency's decision to deny a fee waiver.¹² Based on the information provided by the Office of Government Information Services, AMS ultimately granted the fee waiver. According to AMS FOIA officials, most, if not all, FOIA requesters of check-off programs have qualified for fee waivers. Officials also noted that complex requests involving large volumes of information can cost tens of thousands of dollars to process. The check-off programs are fee-based, which results in these costs being passed on to the check-off boards.

More detailed information is included in tables 3 through 9 in enclosure III.

¹¹All federal agencies are required by law to annually submit a report to the Attorney General and the Director of Government Information Services covering the previous fiscal year. The required information includes the number of determinations to not comply with a request for records by the agency and the reasons for such a determination. 5 U.S.C. § 552(e). In addition, Department of Justice guidance also calls for a report from the chief FOIA officer of each agency.

¹²Physicians Comm. for Responsible Med. v. HHS, 480 F. Supp. 2d 119, 125 (D.C. Cir. 2007).

Agency Comments

We provided a draft of this report to USDA for review and comment. USDA did not have any comments on the draft.

We are sending copies of this report to the appropriate congressional committees, the Secretary of Agriculture, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-3841 or morriss@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report include Thomas M. Cook (Assistant Director); Rose Almoguera; Kevin Bray; Cindy Gilbert; Bridget Grimes; Khali Hampton; Holly Sasso; and Sheryl Stein.



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Enclosures – 3

Enclosure I

Table 1 provides a list of the 22 check-off programs, the year each was established, and the legislation that authorizes each program.

Table 1: U.S. Department of Agriculture Commodity Check-off Programs

| Check-off program | Year established | Authorizing legislation |
|---------------------|------------------|--|
| Cotton | 1966 | Cotton Research and Promotion Act |
| Potato | 1972 | Potato Research and Promotion Act |
| Egg | 1976 | Egg Research and Consumer Information Act |
| Dairy | 1984 | Dairy Production Stabilization Act |
| Beef | 1986 | Beef Promotion and Research Act of 1985 |
| Pork | 1986 | Pork Promotion, Research, and Consumer Information Act of 1985 |
| Watermelon | 1989 | Watermelon Research and Promotion Act |
| Soybean | 1991 | Soybean Promotion, Research, and Consumer Information Act |
| Fluid Milk | 1993 | Fluid Milk Promotion Act of 1990 |
| Mushroom | 1993 | Mushroom Promotion, Research, and Consumer Information Act of 1990 |
| Popcorn | 1997 | Popcorn Promotion, Research, and Consumer Information Act |
| Peanut | 1999 | Commodity Promotion, Research and Information Act of 1996 |
| Highbush Blueberry | 2000 | Commodity Promotion, Research and Information Act of 1996 |
| Hass Avocado | 2002 | Hass Avocado Promotion, Research, and Information Act of 2000 |
| Lamb | 2002 | Commodity Promotion, Research and Information Act of 1996 |
| Mango | 2004 | Commodity Promotion, Research and Information Act of 1996 |
| Honey | 2008 | Commodity Promotion, Research and Information Act of 1996 |
| Sorghum | 2008 | Commodity Promotion, Research and Information Act of 1996 |
| Softwood Lumber | 2011 | Commodity Promotion, Research and Information Act of 1996 |
| Processed Raspberry | 2012 | Commodity Promotion, Research and Information Act of 1996 |
| Christmas Tree | 2014 | Commodity Promotion, Research and Information Act of 1996 |
| Paper and Packaging | 2014 | Commodity Promotion, Research and Information Act of 1996 |

Source: U.S. Department of Agriculture. | GAO-18-55R

Enclosure II

Table 2 provides categories of information that are exempt from disclosure under the Freedom of Information Act.

Table 2: Freedom of Information Act Exemptions

| Exemption number | Matters that are exempt from the Freedom of Information Act |
|-------------------------|---|
| (1) | (A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to the Executive Order. |
| (2) | Related solely to the internal personnel rules and practices of an agency. |
| (3) | Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld, or if enacted after October 28, 2009 and it specifically cites to 5 U.S.C § 552(b)(3). |
| (4) | Trade secrets and commercial or financial information obtained from a person that are privileged or confidential. |
| (5) | Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency. |
| (6) | Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. |
| (7) | Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information |
| | (A) could reasonably be expected to interfere with enforcement proceedings; |
| | (B) would deprive a person of a right to a fair trial or impartial adjudication; |
| | (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; |
| | (D) 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 confidential source; |
| | (E) 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; or |
| | (F) could reasonably be expected to endanger the life or physical safety of an individual. |
| (8) | Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. |
| (9) | Geological and geophysical information and data, including maps, concerning gas or oil wells. |

Source: 5 U.S.C. § 552(b)(1) through (b)(9). | GAO-18-55R

Enclosure III

Tables 3 through 9 provide information on the status of Freedom of Information Act (FOIA) requests received in fiscal years 2012 through 2016 that were related to the U.S. Department of Agriculture's commodity research and promotion programs, commonly known as check-off programs.

Table 3: Number and Type of U.S. Department of Agriculture Check-off Program Freedom of Information Act (FOIA) Requests Received by Fiscal Year

| Fiscal year | Number of FOIA requests related to check-off programs | Number of simple requests ^a | Number of complex requests ^a | Check-off programs ^b |
|--------------|---|--|---|--|
| 2012 | 21 | 8 | 13 | Egg (1); Beef (6); Christmas Tree (1); Cotton (1); Dairy (4); Honey (1); Pork (5); Potato (1); All programs (1) |
| 2013 | 12 | 4 | 8 | Egg (1); Beef (3); Christmas Tree (1); Fluid Milk (1); Dairy (2); Pork (3); Potato (1) |
| 2014 | 16 | 6 | 10 | Lamb (1); Beef (3); Fluid Milk (4); Dairy (4); Honey (1); Pork (2); Watermelon (1); Paper and Packaging (1); Soybean (2); All programs (1) |
| 2015 | 20 | 13 | 7 | Egg (7); Beef (6); Hass Avocado (1); Dairy (1); Pork (2); Paper and Packaging (2); Potato (1) |
| 2016 | 35 | 13 | 22 | Egg (6); Lamb (4); Beef (11); Christmas Tree (2); Dairy (3); Peanut (1); Pork (11); Soybean (1); Potato (1); All programs (3) |
| Total | 104 | 44 | 60 | Egg (15); Lamb (5); Beef (29); Hass Avocado (1); Christmas Tree (4); Cotton (1); Fluid Milk (5); Dairy (14); Honey (2); Peanut (1); Pork (23); Potato (4); Watermelon (1); Paper and Packaging (3); Soybean (3); All programs (5) |

Source: GAO's analysis of U.S. Department of Agriculture data. | GAO-18-55R

^aAccording to agency officials, factors that increase the complexity of a request include the volume of information involved, the number of offices that might have responsive documents, the extent to which the information is technical or difficult to understand, and the need to communicate with third parties, such as other agencies or owners of possible proprietary information.

^bThe total number of check-off programs may not equal the total number of FOIA requests in any given year because requests may cover multiple programs. Some FOIA requests were related to all 22 check-off programs.

Table 4: Number of U.S. Department of Agriculture Check-off Program Freedom of Information Act Requests, by Fiscal Year, Granted in Full, Granted in Part, and Denied

| Fiscal year | Number of requests granted in full | Number of requests granted in part | Number of requests denied | Other^a | Pending^b | Total |
|--------------------|---|---|----------------------------------|--------------------------|----------------------------|--------------|
| 2012 | 6 | 11 | 1 | 3 | 0 | 21 |
| 2013 | 2 | 8 | 0 | 2 | 0 | 12 |
| 2014 | 5 | 6 | 2 | 2 | 1 | 15 |
| 2015 | 1 | 16 | 0 | 3 | 0 | 20 |
| 2016 | 6 | 19 | 0 | 8 | 2 | 33 |
| Total | 20 | 60 | 3 | 18 | 3 | 104 |

Source: GAO analysis of U.S. Department of Agriculture data. | GAO-18-55R

^aIncludes no records, request withdrawn, duplicate request, no response from requester, no agency record, and records not reasonably described.

^bPending requests have not yet been fulfilled and therefore there is not yet a final disposition of whether the request will be granted in full, granted in part, or denied.

Table 5: Length of Time to Fulfill U.S. Department of Agriculture (USDA) Check-off Program Freedom of Information Act Requests, by Fiscal Year

| Fiscal year | Number of requests | Average number of days | Median number of days | Least number of days | Most number of days |
|-------------------------|---------------------------|-------------------------------|------------------------------|-----------------------------|----------------------------|
| 2012 | 21 | 58 | 32 | 6 | 186 |
| Denied requests | 1 | 30 | 30 | 30 | 30 |
| Simple requests | 8 | 28 | 26 | 6 | 69 |
| Complex requests | 13 | 76 | 46 | 16 | 186 |
| 2013 | 12 | 120 | 50 | 4 | 562 |
| Denied requests | 0 | N/A | N/A | N/A | N/A |
| Simple requests | 4 | 17 | 20 | 4 | 24 |
| Complex requests | 8 | 179 | 64 | 27 | 562 |
| 2014 | 16 | 84 | 34 | 1 | 724 |
| Denied requests | 2 | 24 | 24 | 11 | 37 |
| Simple requests | 6 | 24 | 20 | 1 | 54 |
| Complex requests | 10 | 124 | 37 | 11 | 724 |
| 2015 | 20 | 99 | 39 | 12 | 478 |
| Denied requests | 0 | N/A | N/A | N/A | N/A |
| Simple requests | 13 | 56 | 29 | 12 | 203 |
| Complex requests | 7 | 179 | 131 | 21 | 478 |
| 2016 | 35 | 60 | 34 | 1 | 272 |
| Denied requests | 0 | N/A | N/A | N/A | N/A |
| Simple requests | 13 | 53 | 20 | 1 | 272 |
| Complex requests | 22 | 64 | 45 | 1 | 192 |
| Total, 2012-2016 | 104 | 77 | 34 | 1 | 724 |
| Denied requests | 3 | 26 | 30 | 11 | 37 |
| Simple requests | 44 | 42 | 23 | 1 | 272 |
| Complex requests | 60 | 105 | 50 | 1 | 724 |

Source: GAO analysis of USDA data. | GAO-18-55R

Note: USDA makes a determination on whether a request is simple or complex before it determines whether to grant or deny a request. Therefore, in those years in which there are denied requests, the number of denied, simple, and complex requests may total more than the number of requests in that year.

Table 6: Number of Backlogged U.S. Department of Agriculture Check-off Program Freedom of Information Act Requests, by Fiscal Year

| Fiscal Year | Number of backlogged requests |
|-------------|-------------------------------|
| 2012 | 5 |
| 2013 | 3 |
| 2014 | 2 |
| 2015 | 8 |
| 2016 | 7 |

Source: GAO analysis of U.S. Department of Agriculture data. | GAO-18-55R

Table 7: Exemptions Relied on in Denying U.S. Department of Agriculture (USDA) Check-off Program Freedom of Information Act (FOIA) Requests in Full or in Part, by Fiscal Year

| Fiscal year | Exemption 2 ^a | Exemption 3 ^b | Exemption 4 ^c | Exemption 5 ^d | Exemption 6 ^e | Exemption 7 ^f |
|--------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| 2012 | 1 | 2 ^g | 7 | 2 | 9 | 0 |
| 2013 | 0 | 0 | 5 | 3 | 7 | 1 |
| 2014 | 0 | 2 ^h | 4 | 0 | 7 | 0 |
| 2015 | 0 | 0 | 9 | 6 | 16 | 0 |
| 2016 | 0 | 0 | 16 | 12 | 19 | 0 |
| Total | 1 | 4 | 41 | 23 | 58 | 1 |

Source: GAO analysis of USDA data. | GAO-18-55R

^aExemption 2 is for information that is related solely to the internal personnel rules and practices of an agency.

^bExemption 3 is for information that is specifically exempted from disclosure by federal statute.

^cExemption 4 is for trade secrets or commercial or financial information obtained from a person that is confidential or privileged.

^dExemption 5 is for privileged communications within or between agencies, including those protected by the (1) deliberative process privilege (provided the records were created less than 25 years before the date on which they were requested), (2) attorney-work product privilege, and (3) attorney-client privilege.

^eExemption 6 is for personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

^fExemption 7 is for records or information compiled for law enforcement purposes that (1) could reasonably be expected to interfere with enforcement proceedings, (2) would deprive a person of a right to a fair trial or an impartial adjudication, (3) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (4) could reasonably be expected to disclose the identity of a confidential source, (5) 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, or (6) could reasonably be expected to endanger the life or physical safety of any individual.

^gIn fiscal year 2012, two FOIA requests related to checkoff programs relied on exemption 3, for information that is specifically exempted from disclosure by another federal law. One request was denied based on 7 U.S.C §2619(c), which prohibits public disclosure of records that are required to be kept for fee assessments and demonstration of compliance by handlers and importers as part of potato research and promotion. The other request was denied based on 7 U.S.C. § 2105(c), restricting certain disclosures under the Cotton Act.

^hIn fiscal year 2014, two FOIA requests related to checkoff programs relied on exemption 3, for information that is specifically exempted from disclosure by another federal law. Both requests were denied based on the disclosure prohibition in 7 U.S.C §2276, which prevents information from being disseminated for a purpose other than aggregated data. One request was also denied based on the disclosure prohibition in 7 U.S.C. § 608d(2), which prohibits information furnished or acquired by the Secretary of Agriculture under the authority of 7 U.S.C. § 608d(1). The Secretary is authorized by 7 U.S.C. § 608d(1) to request information from parties to a marketing agreement that the Secretary finds necessary to determine the extent to which the parties are meeting their responsibilities and if there is any abuse of the privilege of exemptions from the antitrust laws.

Table 8: Number of U.S. Department of Agriculture Check-off Program Freedom of Information Act Request Administrative Appeals, by Fiscal Year

| Fiscal year | Number of administrative appeals |
|--------------------|---|
| 2012 | 1 |
| 2013 | 5 |
| 2014 | 1 |
| 2015 | 3 |
| 2016 | 1 |
| Total | 11 |

Source: GAO analysis of U.S. Department of Agriculture data. | GAO-18-55R

Table 9: Lawsuits Filed against the U.S. Department of Agriculture (USDA) by Check-off Program Freedom of Information Act (FOIA) Requesters

| Fiscal Year | Program | Background | Status |
|-------------|---------|---|------------|
| 2012 | Pork | On September 24, 2012, the Humane Society of the United States (HSUS) filed suit in U.S. District Court for the District of Columbia against the Secretary of Agriculture under the Administrative Procedure Act challenging the approval of the National Pork Board’s purchase of four trademarks including “Pork, The Other White Meat”. On February 9, 2017, the National Pork Producers Council, which was allowed to intervene in the case, filed a motion to dismiss, or in the alternative, a brief opposing HSUS’ motion for summary judgment. The suit was based on documents obtained through a FOIA case. | In process |
| 2013 | Dairy | On April 10, 2013, the Physicians Committee for Responsible Medicine (PCRM) filed suit in U.S. District Court for the District of Columbia against USDA, alleging that USDA failed to produce all records in a FOIA request and challenging some of the exemptions applied by USDA. In March 2014, the Court ordered the parties to submit a timeline for processing the remaining 8,963 documents in response to PCRM’s FOIA request. | In process |
| 2014 | Pork | On October 3, 2013, HSUS filed suit in U.S. District Court for the District of Columbia against USDA seeking the release of records related to the Pork Board’s purchase of “Pork, The Other White Meat”. The case was voluntarily dismissed on March 25, 2014. | Dismissed |
| 2015 | Beef | On November 12, 2014, the Organization for Competitive Markets (OCM) filed suit in U.S. District Court for the District of Columbia seeking the release of documents related to an audit of the beef check-off program by the USDA Office of the Inspector General. OCM requested the documents under FOIA. On October 25, 2016, the National Cattlemen’s Beef Association’s (NCBA) motion to intervene in the case was approved. NCBA has objected to releasing documents because they contain private NCBA business information. On February 17, 2017, NCBA, having completed a review provided AMS with FOIA documents and its recommendation as to what records contain confidential business information, along with its proposed Vaughn index. ^a The final set of records was provided to OCM on March 31, 2017. | In process |
| 2016 | Egg | On January 6, 2016, PCRM filed a lawsuit, related to documents retrieved in a FOIA request, in the U.S. District Court for the Northern District of California, against USDA and the Department of Health and Human Services, alleging that the government had allowed the food industry and financial inducements to dictate the Dietary Guidelines Advisory Committee’s new recommendations on cholesterol. | Dismissed |
| 2016 | Egg | On August 8, 2016, the Good Food Institute filed a lawsuit against USDA for allegedly failing to release American Egg Board documents under a FOIA request. The group is asking that the court order USDA to, among other things, release the records and pay its legal and search fees. The parties filed their most recent Joint Status Report on September 7, 2017. ^b USDA reported that it identified 1,728 responsive pages and it disclosed 159 pages in the months of July and August. | In process |

Source: USDA. | GAO-18-55R

^aA Vaughn index is an itemized index, correlating each withheld document (or portion) with a specific FOIA exemption(s) and the relevant part of the agency’s nondisclosure justification. The index may contain such information as: date of document, originator, subject/title of document, total number of pages reviewed, number of pages of reasonably segregable information released, number of pages denied, exemption(s) relied on, and justification for withholding. FOIA requesters are not entitled to a Vaughn index during the administrative process.

^bA status report is a report that summarizes a particular situation as of a stated period of time. Status reports may be filed individually or jointly, with more than one specific person or entity.

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