Agricultural Law Update

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Equal and exact justice to all men, of whatever state or persuasion, religious or political.

— Thomas Jefferson

Immigration reform act impacts agriculture

The Immigration Reform and Control Act of 1986 was signed by President Reagan on Nov. 6, 1986. Pub. L. No. 99-603, 1986 U.S. CODE CONG. & AD. NEWS (99 Stat.)(to be codified at 8 U.S.C. scattered sections). This landmark legislation will impact the entire society, and contains numerous provisions of special interest to agriculture.

The Act makes it unlawful for any person to recruit, to hire, or to refer for employment an alien "knowing" the alien to be unauthorized. Use of a labor contractor to "knowingly" obtain the services of an illegal alien is also unlawful.

Employers, including farmers, must comply with the new employment verification system. This system requires certain documents be presented by the employee and properly examined. A verification form is then completed, which attests that the documents appear on their face to be genuine and that they demonstrate citizenship or other lawful presence in the U.S. for employment purposes. Civil and criminal penalties will be imposed on violators.

Anti-discrimination provisions are included in the Act, designed to protect persons lawfully in the United States from arbitrary denial of jobs based on foreign appearance, speech patterns, or other immigration-related matters.

Illegal aliens who have continuously been in the United States since prior to Jan. 1, 1982, will be given an opportunity to apply for temporary lawful residence. The application period will probably commence on May 5, 1987. Persons who have enjoyed temporary lawful residence status for 18 months will be permitted to apply to have their status converted to permanent resident status.

The Act contains special concessions to the labor intensive perishable agricultural commodities sector. The program, in its first phase, contemplates qualifying certain illegal aliens who have previously performed seasonal agricultural services in the United States as special agricultural workers.

(continued on next page)

Estoppel and the FmHA: FmHA continues to prevail

In the last several years, unauthorized representations made to farmers, commercial agricultural lenders and others by employees of the Farmers Home Administration (FmHA) have generated numerous lawsuits against the agency.

The proportions of the phenomenon inspired the United States Claims Court in 1985 to "...express its concern over what maybe [sic] a pattern of affirmative misconduct on the part of FmHA employees." *People's Bank & Trust Co. v. United States*, 7 Cl. Ct. 665, 669 (1985) (citing seven cases in the Claims Court from 1982 to 1985 alleging misrepresentation of authority by FmHA personnel).

In most of the cases, the plaintiff sought to recover on an estoppel theory — an effort that has met with little success.

In the recent case of *People's Bank of Lincoln County v. United States*, 635 F.Supp. 642 (E.D. Mo. 1986), a commercial bank learned the hard way that reliance on the apparent authority (as distinguished from the actual authority) of an FmHA employee is at one's peril.

The bank loaned money to a farmer based on the oral representations (later confirmed in writing) of the FmHA county supervisor that the FmHA was making an emergency loan to the farmer, and would reimburse the bank when the FmHA loan was closed. The FmHA subsequently declined to reimburse the bank for its loans to the farmer.

At trial, the bank conceded that the county supervisor did not have the authority to guarantee repayment because there had been no compliance with the regulations governing the guaranteed loan program. 7 C.F.R. Part 1980.

The bank, however, urged that the FmHA should be estopped from denying the unauthorized agreement the county supervisor made with it.

(continued on next page)

If a shortage of special agricultural workers develops, the second phase of the program contemplates the admission of a limited number of replenishment agricultural workers to fill labor needs of producers of perishable agricultural commodities.

One of the requirements for special agricultural worker status is that the worker has performed seasonal agricultural services in the United States for at least 90 days during the 12-month period ending May 1, 1986.

Under certain circumstances, special agricultural workers and replenishment agricultural workers will be able to apply to have their status converted to permanent resident status.

Until May 31, 1987, the Immigration and Naturalization Service is not to conduct proceedings or to issue orders relating to alleged violations of the Act. Instead, a public information and education program is to be mounted. During the subsequent 12-month period, citations may be issued in cases where there is reason to believe that there have been employment or paperwork violations, but no penalty is to be imposed, nor are any proceedings to be pursued or orders issued.

During the 16-month period from June 1, 1987 to Nov. 30, 1988, proceedings are not to be conducted or penalties imposed relating to alleged violations involving agricultural field workers. This deferral of enforcement is to be contrasted with the 12-month citation warning period in effect as to employment of other classes of workers.

The Act also restricts warrantless entry onto outdoor agricultural operations, thus limiting the scope of the existing "open field doctrine."

Finally, the Act streamlines the H-2 Program, which, for years, legally allowed agricultural employers to bring foreign workers into the United States when faced with shortages of domestic workers. This program, now to be known as the H-2A Program, will continue to allow temporary admission to the United States for a wider range of employment than field work or work related to perishable agricultural commodities.

The Act is lengthy, complex, and is subject to interpretation and construction at many points. Many key issues of interest to agricultural employers are sure to be the subject of extensive comment as the proposed regulations are studied.

Availability of an internal working draft of the regulations was announced at 52 Fed. Reg. 2,115 (Jan. 20, 1987). A copy may be obtained by calling the Immigration and Naturalization Service at 202/786-4764. Formal issuance of proposed regulations is expected on or about Feb. 27, 1987.

— Donald B. Pedersen

Editor's Note: An in-depth piece on the agricultural aspects of this Act will be forthcoming.

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ESTOPPEL AND THE FmHA/CONTINUED FROM PAGE 1

In rejecting the estoppel theory, the court ruled that the bank had failed to show the requisite affirmative misconduct that must be present before the government may be estopped. Ill-defined, "affirmative misconduct" is a product of a judicially imposed balance between the government's interest in enforcing its laws free from estoppel and the public's interest in "some minimum standard of decency, honor and reliability in [its] dealings with [its] Government." *Hechler v. Community Health Services of Crawford County Inc.*, 467 U.S. 51, 60-61 (1984).

In *People's Bank of Lincoln County*, that balance again tilted in favor of the government's interest in operating free of estoppel. The government recognized the public's competing interest, however, by admonishing the FmHA to "safeguard against future occurrences of this sort which often destroy the public's trust and confidence." 635 F.Supp. at 644.

— Christopher R. Kelley

Defining milk order areas

Defining the geography of milk marketing areas is one of the most important terms of a federal milk marketing order, because it is, in turn, the tool by which milk is identified for pricing and pooling.

Vetne identifies four factors that the Secretary of Agriculture will employ in defining geography: 1) identification of population centers; 2) uniformity of Grade A milk standards and other state requirements; 3) area of distribution and competition between handlers; and 4) identification of the milkshed or area from which handlers receive milk from dairy farmers.

In 1981, Vetne could state that "... [a]ctions challenging the secretary's designation of a marketing area, brought by handlers and producers who claimed economic disadvantage by such designation, have been singularly unsuccessful." Vetne, *Federal Marketing Order Programs*, 1 Agricultural Law 105 (J. Davidson ed. 1981).

One exception to the pattern of unsuccessful challenges is *Lehigh Valley Farmers v. Block*, 640 F.Supp. 1497 (E.D. Pa. 1986), which granted a permanent injunction prohibiting the Secretary of Agriculture from amending the Middle Atlantic, New York and New Jersey Milk Marketing Orders to include 20 additional and previously federally unregulated counties.

The Court's opinion reviews the evidence at great length, and concludes that the Secretary of Agriculture lacked substantial evidence to support its proposed changes in the order area.

The court's decision also includes a discussion of standing for federations of cooperatives and handlers for challenging marketing order amendments. *See* 3 *Agricultural Law Update* 3 (May 1986) and 3 *Agricultural Law Update* 3 (August 1986).

— John H. Davidson

Antitrust judgment reversed

Previous issues of *Agricultural Law Update* have reported the antitrust litigation involving the beef industry (September 1985, p. 6; February 1986, p. 6).

The Supreme Court has reversed the circuit court, hereby allowing the possibility of a merger of Excel Corp. and Spencer Beef. *Cargill Inc. v. Monfort of Colorado Inc.*, 107 S. Ct. 484 (1986).

The Court found that the threat of loss of profits due to possible price competition following a merger was not sufficient to constitute a threat of antitrust injury.

— Terence J. Centner

Farmer's proof of loss was adequate

Lowe v. E.I. DuPont De Nemours and Co., 802 F.2d 310 (8th Cir. 1986), was an appeal from a jury verdict in the amount of $53,040 for damages to crops resulting from use of the herbicide Lexone.

On appeal, it was contended that the plaintiff failed to produce evidence supportive of the following jury instruction describing the measure of damages:

> [t]he difference in the fair market value between the crop the land would otherwise have produced and the crop that was actually produced, less the difference between what it would have cost to have produced, harvested, and marketed an undamaged crop and what it did cost to produce, harvest, and market the actual crop.

The only evidence offered by plaintiff was his own testimony to the effect of the difference between crops treated with the chemical and crops not so treated, the cost of seed, the cost of herbicide, planting, harvesting and cultivating. The court found this testimony sufficient to support the award of damages.

— *John H. Davidson*

Non-dischargeable debt under 523(a)(2)

The Sixth Circuit in *In re Phillips*, 804 F.2d 930 (1986), decided that the bankruptcy debtor Phillips could not discharge a debt of $17,500 owed to creditor Coman. Coman, who had known Phillips for 25 years, had made the loan and taken a mortgage on 117 acres. Coman, a non-practicing attorney, prepared the mortgage using an old deed Phillips gave him.

The court found that the debtor had concealed from Coman the fact that all but 47 of the 117 acres had been sold. The remaining acres were encumbered by two mortgages totaling $83,099. Phillips admitted that he had (at about the same time as the Coman loan was made) executed a financial statement to a lending agency which reflected ownership of 50 acres.

On these facts, the court reversed both lower courts. The issue was whether Coman was reasonable in his reliance on Phillips' false information so as to be entitled to the protection of section 523(a)(2)(A).

The court reviewed the various lines of authority regarding the question of whether reasonable reliance should be required and, if so, how it should be defined.

Noting that the Sixth Circuit had previously adopted the reasoning of the Seventh Circuit in *In re Garman*, 643 F.2d 1252 (1980), *cert. denied*, 450 U.S. 90 (1981), the court determined that the standard for deciding reasonable reliance is "circumstantial evidence of actual reliance; that is, dischargeability shall not be denied where a creditor's claimed reliance would be so unreasonable as not to be actual reliance at all." *Id.* at 1256.

Cases which involved the negligence of commercial lending institutions or title companies in failing to investigate "red flags" were inapposite to a situation which involved a personal loan between individuals with a 25-year relationship. The facts showed that Coman's reliance was reasonable.

— *Patricia A. Conover*

Federal Register in brief

The following is a selection of notices, final rules and proposed rules that have been published in the *Federal Register* in the last few weeks:

1. Farm Credit Administration; Disclosure to Shareholders, Accounting and Reporting Requirements; Correction to Final Rule. 51 Fed. Reg. 44,783. Correction to final rule published at 51 Fed. Reg. 42,084. Filed: Dec. 11, 1986.

2. Environmental Protection Agency: Notice to Secretary of Agriculture of Proposed Rule on Registration of Active Ingredient-Producing Establishments and Submission of Pesticide Reports. 51 Fed. Reg. 45,132. Filed: Nov. 14, 1986.

3. Certification of Central Filing System — Nebraska. 51 Fed. Reg. 45,493. Filed: Dec. 16, 1986.

4. Certification of Central Filing System — North Dakota. 51 Fed. Reg. 45,493. Filed: Dec. 16, 1986.

5. Brucellosis; Documentation of Animal Identification on Certificates. 51 Fed. Reg. 45,776. Proposed Rule. Comments due by Feb. 20, 1987.

6. APHIS; Standards for Accredited Veterinarians. 51 Fed. Reg. 45,874. Final Rule. Effective date: Dec. 23, 1986.

7. Commodity Credit Corp.; Disaster Payment Program for 1986 Crops; 51 Fed. Reg. 46,593. Final Rule. Effective date: Dec. 19, 1986.

8. Farm Credit Administration; Temporary Regulations; Regulatory Accounting Practices. 51 Fed. Reg. 46,597. Final Rule with requestion for comments due by Feb. 24, 1987.

9. APHIS; Requirements and Standards for Accredited Veterinarians. 51 Fed. Reg. 46,685. Proposed Rule. Regards conflicts of interest between financial interests and official duties. Comments due by Feb. 23, 1987.

10. Certification of Central Filing System — Arkansas. 51 Fed. Reg. 46,887. Filed: Dec. 22, 1986.

11. Commodity Credit Corp.; Referral of Delinquent Debt Information to Credit Reporting Agencies. 51 Fed. Reg. 46,993. Effective date: Dec. 30, 1986.

12. Certification of Central Filing System — Louisiana. 51 Fed. Reg. 47,036. Filed: Dec. 23, 1986.

13. Financing of Commercial Sales of Agricultural Commodities; Pub. Law 480, Title 1 Regulations. 51 Fed. Reg. 47,408. Final Rule. Effective date: Jan. 30, 1987.

14. Election to Expense Certain Depreciable Business Assets. 52 Fed. Reg. 409. Final Regulations. The regulations are generally effective for property placed in service after Dec. 31, 1980, with some exceptions.

15. Allocation and Apportionment of Partnership Expenses. 52 Fed. Reg. 438. Withdrawal of Notice of Proposed Rulemaking. Withdraws proposed amendments regarding apportionment of partnership expenses under sections 861 and 882 of I.R.C., published at 49 Fed. Reg. 22,344 (May 29, 1984).

— *Linda Grim McCormick*

AG LAW CONFERENCE CALENDAR

Farm Debtor and Creditor Options in the Current Farm Crisis.
Feb. 27, 1987, Columbia, MO.

Topics include: Chapter 12 in bankruptcy; income tax aspects of debt liquidation; and state support agencies.

Sponsored by the Missouri Bar Agricultural Law Committee.
For more information, contact Stephen F. Matthews at 314/882-0152.

Representing Arkansas Farmers in Distress.

March 6, 1987, Hilton Hotel, Little Rock, AR.

Topics include: Rights of Farm Credit System borrowers; ASCS program cap cases; Chapter 12 in bankruptcy; income tax implications of farm liquidations; the new central filing system; and agricultural lender liability.

Sponsored by the Arkansas Institute for Continuing Legal Education.
For more information, contact Rae Jean McCall at 501/375-3957.

Seminar on Bankruptcy Law and Rules.

March 26-28, 1987, Marriott *Marquis* Hotel, Atlanta, GA.

Topics include farm bankruptcy.

Sponsored by the Southeastern Bankruptcy Law Institute.

For further information, contact Myra Bickerman at 404/396-6677.

The Freedom of Information Act and the USDA: An overview

By John J. Watkins

On Sept. 4, 1986, the U.S. Department of Agriculture (USDA) promulgated a final rule revising its guidelines for implementing the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982). The new rule, which will be codified at 7 C.F.R. §§ 1.1-1.19, appears at 51 Fed. Reg. 32,189 (Sept. 10, 1986).

This article will briefly examine basic FOIA procedures within the USDA in light of the new rule, and provide an overview of the major statutory exemptions that allow the withholding of public records.

Purpose and Structure of the FOIA

Enacted in 1966, the FOIA established (for the first time) an effective statutory right of access to records held by the federal government. The basic purpose of the act is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

The act, however, also recognizes that certain societal interests, including the national security, personal privacy and law enforcement, can outweigh the public interest in an open government. In seeking to accommodate these competing concerns, the FOIA establishes a general rule that any person has a right of access to federal agency records. The act does exempt from disclosure records that fall into nine categories, however. 5 U.S.C. § 552(a)(3), (b). These provisions will be the focus of this article.

Two other features of the FOIA are also worth mentioning. The act contains various "publication" requirements — the violation of which can lead to invalidation of related agency action. *See Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977).

An agency must publish in the *Federal Register* such information as substantive rules, general policy statements and procedural regulations. Final opinions in administrative adjudication, administrative staff manuals and other material not published in the *Federal Register* must be indexed and made available for public inspection. 5 U.S.C. § 552(a)(1), (2). About half of the reported FOIA cases concerning agriculture have involved these provisions. *E.g., Giles Lowery Stockyards Inc. v. Department of Agriculture*, 565 F.2d 321 (5th Cir. 1977), *cert. denied*, 436 U.S. 957 (1978).

John J. Watkins is an associate professor of law at the University of Arkansas, Fayetteville. Professor Watkins is also of counsel to the law firm of Arens & Alexander, Fayetteville, Ark.

Under section 552(a)(4)(E), which was added to the FOIA in 1974, a federal court may award attorney's fees and litigation costs to a plaintiff who has "substantially prevailed." *See Cox v. Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979); *Harrison Bros. Meat Packing Co. v. Department of Agriculture*, 640 F.Supp. 402 (M.D. Pa. 1986).

Even if this test is met, a court may, in its discretion, decide not to make an award. Factors that play a part in the exercise of this discretion include the public benefit from the case, any commercial benefit to the plaintiff, as well as whether the government's position in withholding the records had a reasonable legal basis. *Fenster v. Brown*, 617 F.2d 740 (D.C. Cir. 1979).

If a fee award is made, most courts use the so-called "lodestar" method in determining an appropriate amount. *See Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

Making a FOIA Request

A request for records under the FOIA can be made by "any person," defined in 5 U.S.C. § 551(2) to include individuals (American citizenship is not required), partnerships, corporations and other associations, as well as state and local governments. No showing of "proper purpose" is necessary, and the requester need not indicate why he or she is seeking particular records.

While the requester's purpose or motive is generally irrelevant to the question of whether records should be disclosed, it may play a role in determining various procedural matters, i.e., a waiver or reduction of fees for copying and search time. Moreover, the requester's purpose may convince an agency to exercise its discretion to release records that fall within an exemption, and may be a factor in the application of particular exemptions.

Despite its name, the FOIA applies to "records" — not to "information." This distinction is important, for a person may not use the act to force an agency to answer specific questions he or she might have, or to compile data or create records. *See* USDA Reg. § 1.16.

Instead, an agency must produce for public inspection non-exempt "records" — a term not defined in the FOIA. The courts, however, have taken a broad view of the word, holding that it includes computer tapes, photos and recordings, as well as more traditional documents such as memoranda and letters.

Moreover, material within an agency's possession or control is subject to the FOIA — regardless of whether it was created or obtained by the agency. *See Forsham v. Harris*, 445 U.S. 169 (1980); *Kissinger v. Reporters Committee*, 445 U.S. 136 (1980).

The FOIA itself contains only two requirements for a request: 1) it must "reasonably describe" the records sought; and 2) it must comply with the agency's published procedural regulations. 5 U.S.C. § 552(a)(3). These regulations must inform the public of where and how to address FOIA requests, of what types of records are maintained by the agency, of its fee schedule for copying and search time, and of its administrative appeal procedures.

The USDA's recently revised regulations should be the starting point for anyone seeking records from the USDA or its component agencies.

As for the specificity requirement, a request passes muster if it enables a professional agency employee (familiar with the subject area) to locate the record with a reasonable amount of effort. *See* USDA Reg. § 1.6(b).

As a practical matter, agency employees are likely to be more helpful in responding to a FOIA request that is somewhat specific than one that requires them to look for the proverbial needle in a haystack. Not surprisingly, the USDA rules advise that wherever possible, a requester should supply specific information — dates, titles, etc. — that may help identify the records. *Id.*

If the USDA or one of its agencies finds the request insufficiently specific, it must notify the requester and give him or her an opportunity to provide clarification or to confer with agency personnel for assistance in identifying the records. *Id.* § 1.6(c).

Generally, the rules provide that the request must be in writing and addressed to the appropriate official. *Id.* § 1.6(a). However, § 1.6(d) expressly states that oral requests are not precluded — although a formal written request is necessary if the requester is dissatisfied with the agency's response to the oral inquiry.

In other words, a written request is a prerequisite for further administrative consideration and for judicial review, since the courts will not hear FOIA cases until all administrative remedies have been exhausted. *Hedley v. United States*, 594 F.2d 1043 (5th Cir. 1979).

Under USDA Reg. § 1.6(a), the request should be sent in an envelope marked "FOIA Request" to "the official designated in regulations promulgated by the agency." For records in the Office of the Secretary or Office of Government and Public Affairs, that person is the Director of Information, Office of Governmental and Public Affairs. *Id.*

Other rules must be consulted to identify the FOIA official at other USDA agencies. *E.g.*, 51 Fed. Reg. 30,836 (Aug. 29, 1986), to

be codified at 7 C.F.R. § 370.5 (Freedom of Information Act Coordinator, Animal and Plant Health Inspection Service); 51 Fed. Reg. 35,204 (Oct. 2, 1986), to be codified at 7 C.F.R. § 412.4 (Deputy Manager, Federal Crop Insurance Corp. (FCIC), or directors of FCIC Field Operations Offices).

If a request is not addressed to a specific agency, pertains to more than one agency, or is sent to the wrong agency, USDA Reg. § 1.6(f)-(g) provide that it will be handled by the USDA's "central processing unit," which will refer it to the appropriate agency or agencies, then notify the requester.

Careful attention to the FOIA procedural requirements of a given agency is extremely important, for absent compliance, the agency is under no obligation to search for records or to release them. Once a proper request is made, the agency must inform the requester of its decision to grant or deny access to the records within 10 working days. 5 U.S.C. § 552(a)(6)(A)(i).

Actual release of the records need not take place within that period, but access must be provided "promptly." *Id.* § 552(a)(6)(C). Under USDA Reg. § 1.7(a), notice of an agency's decision to release records must state the approximate date on which the records will be available.

The 10-day deadline may be extended pursuant to 5 U.S.C. § 552(a)(6)(B), which allows an extension of up to 10 working days if there is a need to search for and collect records from separate offices, examine a voluminous amount of records, or consult with another agency or component. *See also* USDA Reg. § 1.11.

Consultation between an agency of the USDA and the Office of General Counsel, Office of Governmental and Public Affairs, or the Department of Justice as to legal or policy issues raised by the request is not a basis for an extension of time, however. *Id.* Of course, the requester and the agency may agree among themselves to such an extension.

If an agency does not meet the 10-day deadline, the requester may treat this failure as a denial of his or her request, as well as constructive exhaustion of his or her administrative remedies. The requester can then seek immediate judicial review. 5 U.S.C. § 552(a)(6)(C).

The statute expressly provides, however, that the court may allow the agency additional time to respond if it can show that its failure to meet the deadline resulted from "exceptional circumstances," and that it is exercising "due diligence" in processing the request. *Id. See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

Accordingly, the better course is to negotiate with the agency. Under USDA Reg. § 1.12, the agency must, upon realizing that it cannot meet the deadline, notify the requester, state the reasons for the delay, and indicate the date upon which a determination is expected.

If the agency decides to deny the request in whole or in part, it must inform the requester of the reasons for the denial, of his or her right to appeal administratively within the agency, and of the name and title of each person responsible for the decision. 5 U.S.C. § 552(a)(6)(A)(i), (C).

Further, USDA Reg. § 1.7(a) requires that the notice include the title and address of the official to whom an administrative appeal is to be addressed, as well as a statement that the appeal must be made within 45 days of the date of the denial. If the records are in the custody of another agency outside the USDA, the notice must so advise the requester. *Id.* § 1.7(b).

The administrative appeal process works much like the procedure governing the initial request. The appeal must be in writing, addressed to the agency official designated by regulation, and sent in an envelope marked "FOIA Appeal." USDA Reg. § 1.6(e). As noted above, the appeal must be taken within 45 days of the denial of the initial request.

Before an agency within the USDA can deny an appeal, it must receive the approval of the Assistant General Counsel of the Research and Operations Division in the Office of General Counsel. *Id.* § 1.10. Appeals must be decided within 20 working days, 5 U.S.C. § 552(a)(6)(A)(ii); USDA Reg. § 1.7(c), although the same rules for extensions of time for initial requests apply here as well.

Similarly, if the appeal is denied in whole or in part, the agency must inform the requester of the reasons for the denial, the name and title of the persons responsible, and of the right to judicial review. 5 U.S.C. § 552(a)(6)(A)(ii), (C); USDA Reg. § 1.7(c).

Obtaining records under the act is not without cost, as agencies are expressly permitted to charge "reasonable" fees for searching for and copying the requested records. 5 U.S.C. § 552(a)(4)(A).

Accordingly, if a requester anticipates or fears a large bill, the request should require the agency to notify him or her if it appears that the fees will exceed a given amount. Under USDA Reg. Appendix A, the basic fees are 10 cents per letter-sized page for copying, and $8 or $14.60 per hour for manual searches — depending upon whether clerical or professional employees are utilized. Computer search charges vary among the USDA's computer centers.

In any event, no fees may be charged for time spent examining records to determine if they are exempt, or in resolving legal or policy questions concerning the request.

The FOIA allows agencies to waive fees if such a waiver "is in the public interest, because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. § 552(a)(4)(A). In general, the central question is whether the records are of interest to the public, or are primarily for the personal or commercial benefit of the requester. *See* USDA Reg. Appendix A, § 5(a).

FOIA Exemptions

The basic premise of the FOIA is that all records within an agency's possession or control are open to public inspection unless they fall within one of nine exemptions listed in 5 U.S.C. § 552(b).

The following discussion is limited to four exemptions that have been the focus of the reported FOIA cases involving agriculture: Exemption 3 (material exempt from disclosure under other federal statutes); Exemption 4 (trade secrets and commercial information); Exemption 6 (personnel records and similar material which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy); and Exemption 7 (law enforcement records).

Before turning to these exemptions, it should be pointed out that an agency (upon locating a record that includes both exempt and non-exempt material) must delete the exempt information and disclose the remainder. 5 U.S.C. § 552(b); USDA Reg. § 1.7(f).

Moreover, because the nine exemptions are permissive — not mandatory — in nature, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), an agency may, in its discretion, release to the public records covered by an exemption. *See* USDA Reg. § 1.14(b).

Exemption 3, the so-called "catchall" exemption that incorporates other federal statutes mandating non-disclosure of records, is frequently relied upon by agencies in denying FOIA requests.

This exemption allows the withholding of records prohibited from disclosure by another statute that: 1) requires material be withheld and leaves the agency no discretion in the matter; or 2) establishes particular criteria for withholding the records, or refers to particular types of records to be withheld.

In *Hunt v. Commodity Futures Trading Commission*, 484 F.Supp. 47 (D.D.C. 1979), the court held that a portion of the Commodity Exchange Act, 7 U.S.C. § 12 (1982), qualifies under Exemption 3. Another statute that probably meets the test is the Agricultural Adjustment Act, 7 U.S.C. § 1373

(continued on next page)

(1982 & Supp. 1985), which makes confidential the reports and records that farmers submit to the USDA concerning government loans, parity payments, consumer safeguards, and market quotas.

Exemption 4 covers two broad categories of information found in federal records: 1) trade secrets; and 2) information which is commercial or financial, obtained from a person, and privileged or confidential.

This exemption was designed to protect the interest of commercial entities that submit information to the government, as well as the government's interest in receiving continued access to such data.

It has been largely responsible for the so-called "reverse FOIA" lawsuit, in which a submitter of information seeks to enjoin an agency from releasing that information in response to a request from a third party. *See Chrysler Corp. v. Brown, supra; National Organization for Women v. Social Security Administration*, 736 F.2d 727 (D.C. Cir. 1984).

In order to protect the interests of submitters of business information, the USDA has included a "submitter notice" requirement in its new FOIA regulations. *See* USDA Reg. § 1.8. This provision, which undoubtedly is the most significant of the new regulations, requires USDA agencies to promptly notify a business information submitter that a FOIA request has been made. This notification affords him an opportunity to object to the disclosure of any portion of the records.

Moreover, § 1.8(a)(4) requires an agency to provide the submitter "with notice of any determination to disclose such records prior to the disclosure date, in order that the matter may be considered for possible judicial intervention." This provision is obviously designed to give the submitter sufficient time to file a "reverse FOIA" action to enjoin release of the records.

Most Exemption 4 cases are concerned not with "trade secrets," but with commercial information submitted to the government that is privileged or confidential. Virtually any information relating to a business or trade qualifies as "commercial," *e.g.*, profit/loss statements, sales data, customer lists, or overhead and operating costs.

There is generally no difficulty with the requirement that the information be "obtained" by the government from a "person" — a term that includes entities such as corporations and partnerships. The most litigated question is whether the records are privileged or confidential, with most judicial attention having been devoted to the meaning of the term "confidential."

In the leading case of *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court held that records are "confidential" for Exemption 4 purposes if disclosure would likely impair the government's ability to obtain such information in the future, or cause substantial harm to the competitive position of the person submitting the information.

The first test is obviously no problem if the government can compel an entity to furnish the information. Difficulties arise only when the data is provided voluntarily. Not surprisingly, Exemption 4 cases involve the second test, and require a determination of whether disclosure would cause substantial competitive harm. *See, e.g., Sharyland Water Supply Corp. v. Block*, 755 F.2d 397 (5th Cir. 1985) (audit reports filed with Farmers Home Administration to obtain loan not "confidential," since release would not cause competitive harm); *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (profit/loss records and market share information held confidential).

Exemption 6, generally known as the "personal privacy" exemption, can apply to personnel and medical records of federal employees and to "similar" records maintained by the government on any individual. Any records which pertain to a particular individual qualify for Exemption 6 consideration. *Department of State v. Washington Post Co.*, 456 U.S. 595 (1982).

The exemption's use of the term "personal" privacy indicates that it does not protect corporations or other business organizations. *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980).

The initial inquiry is whether the information is of such a personal nature that its disclosure would invade one's privacy. In one of the leading cases, *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974), the court found a substantial privacy interest in a government study reflecting marital status, legitimacy of children, medical condition, welfare payments, alcohol consumption, and family fights.

Other information held to implicate privacy interests includes personal and family history, religious affiliation, employee disciplinary records, social security numbers, criminal "rap sheets," and financial data. In contrast, courts have found comparatively little privacy interest in records revealing names, addresses, telephone numbers, date and place of birth, salaries of government employees, educational background, and work experience.

After evaluating the privacy interest involved, the agency must consider the public interest in obtaining access to the information. Because the FOIA creates an exemption only when disclosure would cause a "clearly unwarranted invasion" of personal privacy, it is obvious that certain "warranted" invasions will be tolerated and disclosure permitted.

Accordingly, in the balancing process required by Exemption 6, the scales are generally tipped in favor of disclosure. In making this determination, the courts have usually assigned the "public interest" factor great weight in situations when the records sought would inform the public about agency behavior or misbehavior.

Conversely, the public interest is less likely to outweigh the privacy interest if the records are of little interest to anyone but the requester. *Compare Columbia Packing Co. v. Department of Agriculture*, 563 F.2d 495 (1st Cir. 1977) (records of federal meat inspectors involved in bribery scheme), *with Minnis v. Department of Agriculture*, 737 F.2d 784 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985) (lodge owner on scenic river sought names and addresses of applicants for permits to travel on river).

Exemption 7 protects "investigatory records compiled for law enforcement purposes" to the extent that disclosure of such records would interfere with enforcement proceedings, deprive a person of his or her right to a fair trial, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose investigative techniques and procedures, or endanger the life or safety of law enforcement personnel.

The inquiry under the revised exemption requires two steps: 1) whether the record is an "investigatory" one compiled for law enforcement purposes; and 2) whether its disclosure would cause one of the specified harms. *See FBI v. Abramson*, 456 U.S. 615 (1982).

In the agricultural area, the central issue has been application of the first part of the test. Although the phrase "law enforcement" encompasses civil as well as criminal statutes, *Rural Housing Alliance v. Department of Agriculture, supra*, documents that reflect routine administration, or oversight of federal programs, do not qualify as "investigatory records." *E.g., Goldschmidt v. Department of Agriculture*, 557 F.Supp. 274 (D.D.C. 1983)(inspector reports listing conditions in meat and poultry plants not within Exemption 7).

Conclusion

This capsule look at the FOIA only scratches the surface of what has become a complex body of law affecting public access to government information. Those seeking more detailed treatment of FOIA questions should consult the following: U.S. Department of Justice, *Short Guide to the Freedom of Information Act, reprinted in* Administrative Conference of the United States, *Federal Administrative Procedure Sourcebook* (1985); J. O'Reilly, *Federal Information Disclosure* (1979); and J. Franklin & R. Bouchard, *Guidebook to the Freedom of Information and Privacy Acts* (1980).

STATE ROUNDUP

ALASKA. *Right-to-Farm Legislation*. Alaska has joined the vast majority of states in enacting so-called "Right-to-Farm" legislation, which gives the farmer certain rights in agricultural nuisance actions.

The Alaska statute, Alaska Stat. Section 09.45.235, is closely patterned after the North Carolina prototype. It provides that an "agricultural operation is not and does not become a private nuisance by a changed condition that exists on neighboring land if the agricultural operation has been in operation for more than three years and if the agricultural operation was not a nuisance at the time the agricultural operation began."

The act became effective Aug. 23, 1986.

— Jan Marie Miller

FLORIDA. *Ag Land Classification Denied*. The court in *Markham v. Rose*, 495 So.2d 865 (1986), upheld the Broward County property appraiser's refusal to grant an agricultural classification to a portion of land subject to a cattle lease.

The lessor and tenant alleged that the property qualified for a lower agricultural assessment under Fla. Stat. section 193.461 (1983), because it contained a water hole and some cattle grazed on it.

The property appraiser maintained, however, that such special treatment was unwarranted because, although the rest of the property was being used for agricultural purposes, this particular part was overgrown and uncultivated.

The court based its reversal of the lower court on three grounds: One, the lower court had failed to note the presumption of correctness due the property appraiser's determination. Two, the evidence did not support a finding that the property was being put to current commercial agricultural use as required by statute. Finally, the lower court had based its ruling on irrelevant issues: 1) perceived need for green space in urban south Florida; and 2) the failure of the appraiser to timely notify the taxpayers to allow them to clear the land to put it to sufficient agricultural use.

— Sid Ansbacher

SOUTH CAROLINA. *Two Shots at the PIK Proceeds.* In *United States v. Carolina Eastern Chemical Co. Inc.*, 638 F.Supp. 521 (D.S.C. 1986), the District Court of South Carolina ruled that entitlements under the federal government's Payment-In-Kind (PIK) Diversion Program (where a farmer never planted any crops) were not "proceeds" of collateral pursuant to a security agreement that gave a security interest in crops.

The Farmers Home Administration (FmHA) made several loans to a farmer which were secured by several security agreements covering crops *and the proceeds thereof* [emphasis added], as well as real estate mortgages.

The funds from the PIK program were placed in a certificate of deposit in the joint name of the plaintiff, United States, and the defendant in this case, who was a judgment creditor of the farmer also claiming right to the funds.

In defeating the government's first claim to the funds, the court adopted a "strict constructionist" approach in interpreting the security instruments. It pointed out that the farmer never planted any crops to which the government's interest in "crop proceeds" could attach. The PIK funds, therefore, were ruled not to be such proceeds.

On this issue, the court was forced to follow one of two sharply conflicting lines of decision taken by the few courts that have considered the matter. The other line would accord the term "proceeds" a flexible and broad content, thus allowing PIK funds to be covered by similar security instruments.

It is noteworthy that a heavily considered factor in this issue is whether or not the parties intended the security interests to cover such subsidies.

The government's second claim was that the PIK funds should be considered "rents, issues and profits" of the land as included in the real estate mortgages. Because the government never instituted any foreclosure proceedings, the court was not required to decide the issue. The court did, however, indicate that the funds would probably fall within such a category.

Upon the government's motion for reconsideration or amendment of judgment in *United States v. Carolina Eastern Chemical Co. Inc.*, 639 F.Supp. 1419 (1986), the district court elaborated on the issue of whether PIK proceeds could be claimed as rents of mortgaged property.

It was reaffirmed that a mortgagee out of possession is not entitled to rents until he seeks to consummate his rights by some positive step toward possession.

— Charles H. Cook

Antitrust action in the dairy industry

The Ninth Circuit Court of Appeals has reversed and remanded a district court's dismissal of an antitrust action by operators of an independent dairy farm. *La Salvia v. United Dairymen of Arizona*, 804 F.2d 1113 (9th Cir. 1986).

The plaintiffs had cited several alleged practices of the dairy farmers' cooperative in support of their claims, including: 1) the cooperative's use of full supply contracts with handlers and discrimination against handlers unwilling to become parties to such contracts; 2) the cooperative's refusal to purchase plaintiffs' excess fluid milk until after the current action was filed; 3) the giving of rebates to handlers; 4) the use of restrictive covenants not to compete within the "base plan" system; 5) the existence of reserve and pooling agreements with out-of-state cooperatives; and 6) the cooperative's acquired control of raw milk transportation in the milk marketing area.

The Ninth Circuit held that under section 4 of the Clayton Act, the private dairy operators were proper parties to challenge the alleged anti-competitive conduct. In excluding evidence of the base plan, the rebates and the integration of milk transportation facilities, the district court "confused the prudential limitations on private antitrust actions with the requirements of damage-in-fact and causation." *Id.* at 1116.

Summary judgment on plaintiffs' unilateral refusal to deal claim was improper given conflicting evidence of a material fact.

— Terence J. Centner

No property right to future FmHA loans

The case of *DeJournett v. Block*, 799 F.2d 430 (8th Cir. 1986) is an appeal from the dismissal of a *Bivens*-type damage action. The plaintiffs were Farmers Home Administration (FmHA) borrowers, and also unsuccessful applicants for subsequent FmHA loans.

Plaintiffs asserted that FmHA officials, in exercising their discretion with respect to the loan applications, failed to comply fully with a number of statutory and regulatory programs. In so doing, plaintiffs claim they were deprived of property without due process of law.

The Eighth Circuit held for the FmHA, and dismissed the action. The fact that the plaintiffs had received loans in the past did not provide them with a constitutionally protected property interest in future loans. Further, filing a loan application does not create a claim of entitlement.

— John H. Davidson

Address Correction Requested

Agricultural Law Update
6201 Howard Street
Niles, IL 60648

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA REQUESTS NOMINATIONS. The American Agricultural Law Association (AALA) Nominating Committee requests your candidate suggestions and selection comments for the 1987-88 office of president-elect and two new members of the board of directors for the three-year term beginning in 1987. Please send your nominations and comments to David A. Myers, Chair, Nominating Committee, Valparaiso University, School of Law, Valparaiso, IN 46383; 219/465-7864.

AALA DISTINGUISHED SERVICE AWARD. The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information in support of the nominee. The nominee must be a current member of the AALA and must have been a member thereof for at least the preceding three years. Nominations for this year must be made by June 30, 1987, and communicated to Drew L. Kershen, Chair, Awards Committee, School of Law, University of Oklahoma, 300 S. Timberdell Road, Norman, OK 73069; 405/325-4702.

FOURTH ANNUAL STUDENT WRITING COMPETITION. The AALA is sponsoring its fourth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amounts of $500 and $250.

The competition is open to all undergraduate, graduate or law students currently enrolled at any of the nation's colleges or law schools. The winning paper must demonstrate original thought on a question of current interest in agricultural law.

Articles will be judged for perceptive analysis of the issues, thorough research, originality, timeliness, and writing clarity and style.

Papers must be submitted by June 30, 1987. For complete competition rules, contact Drew L. Kershen, Chair, Awards Committee, School of Law, University of Oklahoma, 300 S. Timberdell Road, Norman, OK 73069; 405/325-4702.

AALA BOARD OF DIRECTORS. Please note the following address correction: Kenneth J. Fransen, Baker, Manock & Jensen, 5260 N. Palm, Fresno, CA 93704; 209/432-5400.

1986-87 AALA OFFICERS. Here are corrections for the following officers' addresses and telephone numbers: Terence J. Centner, secretary-treasurer, Department of Agricultural Economics, 315 Conner Hall, University of Georgia, Athens, GA 30602; 404/542-0756; David A. Myers, past president, School of Law, Valparaiso University, 2110 LaPorte Ave., Valparaiso, IN 46383; 219/465-7864.