

AGRICULTURAL ACCOUNTABILITY: THE NATIONAL ANIMAL IDENTIFICATION PLAN, CONFIDENTIALITY AND THE FREEDOM OF INFORMATION ACT

I. INTRODUCTION

Government accountability is, by far, one of the most pressing current issues. While many have lobbied for transparency in government action, there are still obstacles to achieving it, despite the enactment of the Freedom of Information Act and state information accessibility acts. This Comment will look at the need for governmental transparency as it relates to agriculture, specifically under the proposed National Animal Identification Plan. Recent announcements suggesting the possible privatization of the system have raised concerns about the public's future ability to gauge the effectiveness of a program, as well as government accountability in regard to this program, which was designed to protect the public from the impact of livestock disease, particularly mad cow disease. If the United States, (hereinafter "U.S.") was exposed to an outbreak of mad cow disease, under the proposed, initially voluntary, publicly maintained system, the public would face great difficulty in obtaining records surrounding government reaction because they would probably be protected from disclosure. This Comment suggests that the most effective program would be government mandated and controlled, while providing limited disclosure under the Freedom of Information where the government is forced to act by a discovery of disease among livestock.

First, this Comment will offer a succinct introduction to the topic, followed by a discussion of the current situation in regard to the proliferative mad cow disease, the history of the National Animal Identification Plan, and the need for the program in light of concerns over the spread of mad cow disease. Second, this Comment will review the details of the National Animal Identification Plan being proposed, including implementation, the data to be collected and cost, as well as the legal concerns raised by those entities to be included. Third, this Comment will look at the accessibility of information collected by a mandatory program, which

this Comment proposes is necessary to provide for the most efficient and expansive protection for the American food chain. Fourth, this Comment will weigh the industry's right to confidentiality against the consumer's right to information regarding the safety of the American product. Ultimately, it will suggest a compromise regarding confidentiality via changes to the National Animal Identification Plan that, this author maintains, are imperative to ensure protection for consumer food health and safety, while simultaneously asserting the strong need for government transparency as it relates to this issue.

II. PROBLEMATIC STRUCTURE OF THE CURRENT NATIONAL SYSTEM

A. *The Proposed National Animal Identification System*

In an effort to stymie the spread of disease among livestock in the American food chain, the United States Department of Agriculture, ("USDA") designed the National Animal Identification System (hereinafter referred to as "NAIS") program.¹ In the beginning planning stages, the comprehensive program seeks to require farmers' and producers' participation in tracking livestock throughout the United States and abroad.² The information collected would be used to identify the source of infected livestock prior to the introduction of the disease into the consumer chain. Naturally, the agriculture industry is concerned about the types of data collected, the means by which it will be collected and the potential accessibility of the information by competitors, government agencies, and bioterrorists.³ This Comment will explore the means by which the information could be made available under the Freedom of Information Act, with brief mention to the state accessibility, (i.e. The California Public Records Act) and other potential outlets as they relate to eradication of livestock disease.

In 1996, a variant of a human neurological disorder called Creutzfeldt-Jakob disease ("CJD") was discovered in the United Kingdom.⁴ Pathologically different from its classic relative, CJD, whose median age at death is sixty-eight years, variant CJD is recognized by characteristic

¹ John Maas, *UCD Vet News*, California Cattlemen's Magazine (Sept. 2003), available at <http://www.vetmed.ucdavis.edu> (last visited Sept. 10, 2005).

² United States Department of Agriculture (USDA), About NAIS, <http://animalid.aphis.usda.gov/nais/about/index.shtml> (last visited Sept. 10, 2005).

³ Doug O'Brien & Michael Roberts, *Animal Identification: Confidentiality of Information* (Fall 2004), <http://lmic.info/memberspublic/animalid/fs05.pdf>.

⁴ Center for Disease Control, *Variante Creutzfeldt-Jakob Disease* (June 29, 2005), <http://www.cdc.gov/ncidod/dvrd/vcjd/index.htm> (last visited Nov. 14, 2005).

dementia and a median age of twenty-eight at death.⁵ In 1986, two cases of a similar neurological disorder had been recognized and ultimately identified in cattle located in the United Kingdom.⁶ The disorder was termed “Bovine Spongiform Encephalopathy” or “BSE.”⁷ It was attributed to the feeding of sheep remains⁸ exposed to scrapie, a spongiform disease found in sheep, to vegetarian cows which resulted in cattle vulnerability to BSE.⁹ A new theory suggests that the introduction of BSE may be attributed to exposure via cattle meal to human remains infected with classic CJD.¹⁰ The theory suggests that remains from ceremonial burials in the Ganges River on the Indian Subcontinent, may have been accidentally incorporated with animal bones collected for fertilizer and exported to the UK by local peasants responsible for gathering them, an important aspect of local trade.¹¹ Evidence suggests that there is a strong causal link between the outbreaks in cattle and the variant CJD in humans; a single agent is responsible for both human and cattle outbreaks.¹²

In 2005, the second BSE case was identified in the United States by the USDA surveillance program.¹³ As of September 14, 2005, an investigation to identify the origins of the cow had not yielded results.¹⁴ The USDA and the Food and Drug Administration have taken regulatory measures to prevent future contamination through discontinuation of high risk material like that from disabled animals, organs of animals over thirty months, mechanically separated beef, etcetera.¹⁵ The USDA’s ability to protect livestock is contingent on their ability to isolate infected animals prior to the outbreak of disease.¹⁶ Both industry and government

⁵ *Id.*

⁶ Center for Disease Control, *Bovine Spongiform Encephalopathy* (July 7, 2005), <http://www.cdc.gov/ncidod/dvrd/bse/> (last visited Nov. 14, 2005).

⁷ *Id.*

⁸ *Id.*

⁹ Emma Ross, *Theory: Mad Cow May Have Come From Humans* (2005), available at http://www.usatoday.com/tech/science/discoveries/2005-09-01-mad-cow-theory_x.htm.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Michael T. Roberts & Harrison M. Pittman, *Legal Issues in Developing a National Plan for Animal Identification* (Feb. 2004), http://www.nationalaglawcenter.org/assets/articles/roberts_animalid.pdf.

¹⁴ U.S. Food and Drug Administration, *Commonly Asked Questions About BSE in Products Regulated by CFSAN*, <http://www.cfsan.fda.gov/~comm/bsefaq.html> (last updated June 30, 2005).

¹⁵ *Id.*

¹⁶ National Food Animal Identification Task Force, *Summary: National Identification Work Plan* (November 2002), <http://www.animalagriculture.org/id/TaskForce/National%20Identification%20Work%20Plan%20Summary.pdf>.

officials agree that the best method of limiting the spread of diseases like BSE is the establishment of a tracking and identification system.

1. History and Timeline of the National Animal Identification System

Recognizing the importance of a national identification system, in October of 2002, a task force comprised of veterinarians, producers, practitioners and other agriculture associations presented the National Animal Identification Work Plan to an audience of stakeholders at the United States Animal Health Association (“USAHA”) annual meeting.¹⁷ It was subsequently accepted by the USAHA, which passed the USAHA 2002 Resolution, detailing its acceptance and requesting assistance from the USDA and Animal Plant Health Inspection Service (“APHIS”).¹⁸ The USAHA requested that by January of 2003, USDA/APHIS form a team of federal and state governments and industry representatives to foster the development of a National Animal Identification Plan, via use of the USAHA approved work plan.¹⁹ The system’s implementation was designed to “enhance animal disease monitoring, surveillance, control and eradication in the United States.”²⁰ Largely a reaction to “intensified public interest,” the development of the plan follows a number of bovine spongiform encephalopathy (commonly referred to as “mad cow disease”) discoveries throughout the world, and the most recent one in the United States.²¹ After discovery of an infected Holstein in the state of Washington in December 2003, agricultural officials were criticized for the delay in tracing the source of the animal.²² The lack of a cohesive identification system was a relevant factor in the delay, and consequently, led to the prioritization of the National Animal Identification System to combat against future problems.²³ As a direct result, the USDA was expected to expedite the system’s implementation.²⁴

2. The Need for the National Animal Identification Plan

Bob Hawks, Under Secretary of Marketing and Regulatory Programs, testifying before a Senate Agriculture subcommittee, reported that most industrialized nations are in the process of developing an animal identifi-

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Doug O'Brien & Michael Roberts, *supra* note 3.

²² Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

²³ *Id.*

²⁴ *Id.*

cation system, or already have one in place.²⁵ The NAIP is expected to increase consumer demand and marketability, as well as confidence in the American product.²⁶ There is some disagreement over whether the program proposed would be voluntary or mandatory.²⁷ If the program is to function as planned, it is expected to require mandatory participation eventually, given that the tracking effectiveness will depend on the level of participation within the industry.²⁸ Organizations, like the National Livestock Producers Association, will likely favor a mandatory program because of the desire to assimilate to the expectations of the international trade market.²⁹ Currently, there are no plans to penalize animal owners for non-compliance,³⁰ but market pressure is expected to force participation.³¹

The threat of bioterrorism is an ongoing concern in the current political climate.³² Some worry about the deliberate induction of a livestock threatening disease, like BSE into the U.S. food chain.³³ The discovery of an infected livestock can have an enormous economic effect on both the nation and the particular industry.³⁴ Recent discoveries in the United States and Canada were detrimental to the exportation abilities of both countries.³⁵ Kansas State University estimated that as a result of Canada's inability to export, five thousand meat packers lost their jobs as Canadian imports slowed in the United States.³⁶ In 2003, after the Canadian discovery, but prior to the discovery of BSE in the U.S. chain, Japan significantly restricted the import of U.S. Beef.³⁷ While negotiations

²⁵ Embassy of the United States, Japan, *U.S. Animal Identification System Would Initially Be Voluntary* at <http://japan.usembassy.gov/e/tp-20040305-18.html> (last visited Nov. 14, 2005).

²⁶ United States Animal Identification Development Team, *FAQs on the United States Animal Identification Plan*, <http://www.usaip.info/faq.htm> (last visited Nov. 14, 2005).

²⁷ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

²⁸ Doug O'Brien & Michael Roberts, *supra* note 3.

²⁹ Alina Tugenc, *Beyond Branding*, Government Executive Magazine (July 15, 2004) available at <http://www.govexec.com/features/0704-15/0704-15newsanalysis3.htm>.

³⁰ United States Animal Identification Development Team, *supra* note 26.

³¹ Alina Tugenc, *supra* note 29.

³² United States Animal Health Association Res. 19, Committee on Livestock Identification (Oct. 14, 2003).

³³ United States Animal Identification Development Team, *supra* note 26.

³⁴ United States Animal Health Association Res. 19, *supra* note 32.

³⁵ *Economic Impact of BSE still playing out*, AgriNews.com (June 23, 2005), <http://www.agrinewspubs.com/Main.asp?SectionID=1&SubSectionID=207&ArticleID=8713>.

³⁶ *Id.*

³⁷ CRS Report for Congress, *Animal Identification and Meat Traceability* (June 28, 2005) (on record with the Library of Congress; RL32012) available at www.ncseonline.org/nle/crsreports/05jun/RL32012.pdf.

have attempted to regain the number one foreign market for beef, the lack of verifiable information regarding animal identification may serve as a complication.³⁸ The ability to trace an animal within forty-eight hours is expected to reduce the social and economic risks of widespread livestock disease.³⁹ The harm to the Canadian beef industry occurred despite their recent implementation of a national cattle identification program.⁴⁰ In 2003, the program was incapable of identifying the source of an infected adult, possibly due to the program's focus on calf identification.⁴¹ Despite this, the U.S. expects the NAIP infrastructure to reduce the United States' vulnerability to bioterrorism, as well as non-terrorist related outbreaks, both foreign and domestic.⁴² The plan is expected to impose universal identification requirements on native and non-native livestock.⁴³

B. Current Methods of Animal Identification

While many of the animals addressed under the NAIP have been subject to rudimentary identification, nationwide consistency has been a problem.⁴⁴ Consequently, delays and efficiency issues typically confront a party who wishes to "trace back" a diseased animal.⁴⁵ The USDA's ability to protect livestock is contingent on their ability to isolate infected animals prior to the outbreak of a disease.⁴⁶

The size and complexity of the U.S. animal industry will limit the reach of the animal identification program initially,⁴⁷ despite the expressed need for the program's immediate implementation.⁴⁸ With over ninety-five million cattle present in the United States, the possibility of an immediate system is unlikely.⁴⁹ The system's uniformity would largely depend on the dispersal of responsibility among governments, both state and federal, as well as producers and processors of meat.⁵⁰ The responsibility of identifying animals would eventually fall on owners,

³⁸ *Id.*

³⁹ United States Animal Identification Development Team, *supra* note 26 at 4.

⁴⁰ United States Animal Health Association Res. 19, *supra* note 32.

⁴¹ Maas, *supra* note 1.

⁴² United States Animal Identification Development Team, *supra* note 26 at 7.

⁴³ *Id.* at 35.

⁴⁴ United States Department of Agriculture, *supra* note 2.

⁴⁵ *Id.*

⁴⁶ United States Animal Health Association Res. 19, *supra* note 32.

⁴⁷ Embassy of the United States, Japan, *supra* note 25.

⁴⁸ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

⁴⁹ Embassy of the United States, Japan, *supra* note 25.

⁵⁰ Doug O'Brien & Michael Roberts, *supra* note 3.

with plans to make the technology required available to those who lack it.⁵¹ At the time of the NAIP work plan's drafting, the priority of the program was health of livestock in the United States, with the long term objective of developing a program capable of identifying all locales having contact with an infectious animal within forty-eight hours.⁵²

In 2004, the USDA presented further details about the exact structure of the system.⁵³ The tracking system, subject to national standards, will be used consistently throughout the nation.⁵⁴ The plan, while expected to have the capability of *registering* premises by 2005, has yet to be implemented.⁵⁵ APHIS and the USDA have begun to train officials on the use of the future system, evaluation of alternative systems, and public education.⁵⁶

The primary objective of the program is the identification of animals and premises that may have been exposed to an infected animal, within forty-eight hours of initial discovery.⁵⁷ The plan does nothing to "rid disease from animals."⁵⁸ The plan encompasses cattle, equine, sheep, and goats, swine and poultry as well as other game birds, camelids, aquaculture and ratites.⁵⁹ There are three phases to the system's establishment.⁶⁰ The implementation of the first phase would focus on identifying any physical operations that house animals.⁶¹ These would include "locations where livestock and poultry are managed, marketed and exhibited."⁶² The second phase would focus on assigning individual animals and groups within a production chain with unique numbers (also called "Animal Identification Numbers" and "Group Ids").⁶³

The third phase will deal with retrofitting participants with the technology required to advance the efficiency of the system.⁶⁴ Once the animals and premises are identified, information regarding movement will

⁵¹ United States Animal Identification Development Team, *supra* note 26.

⁵² National Food Animal Identification Task Force, *supra* note 16.

⁵³ United States Department of Agriculture, *supra* note 2.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

⁵⁸ Bill Sardi, Health, Brought To You By Your Federal Government (June 10, 2005), <http://www.lewrcokwell.com/sardi/sardi38.html>.

⁵⁹ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

⁶⁰ *See generally* National Food Animal Identification Task Force, *supra* note 16.

⁶¹ *Id.*

⁶² United States Department of Agriculture, *supra* note 2.

⁶³ National Food Animal Identification Task Force, *supra* note 16.

⁶⁴ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

be collected by the USDA.⁶⁵ According to APHIS, the information will be made available only to health authorities at the federal and state (as well as tribal) level.⁶⁶ This information is deemed necessary to ensure the USDA's ability to safeguard animals from the outbreak of disease.⁶⁷ APHIS has said that the information collected via the system will pertain only to that information necessary for tracking, allowing proprietary data from producers to remain with private entities.⁶⁸

The USDA has yet to determine definitively how the information will be collected and reported other than the requirement that the information be standardized.⁶⁹ There are plans to evaluate various technologies prior to the determination of the best method by which the information should be collected.⁷⁰ The United States Animal Identification Plan suggested that with appropriate industry input, the system should be governed by federal and state entities.⁷¹ It is expected that, at minimum, the government will need access to the information during emergencies;⁷² if disease were to infiltrate U.S. livestock, rapid action would be necessary to limit the impact.⁷³ Without a method to determine how extensively an infectious cow commingled with the population at large, the impact of such a discovery could completely destroy the nation's export of beef, which after the 2003 mad cow discovery, resulted in a ninety percent loss of exportation.⁷⁴ An effective identification system would be able to identify and isolate infected animals; countries awaiting exportation would have more assurances of limited exposure.

Ultimately, the system will be capable of identifying and mapping the exact movements of an infected animal, which would be necessary to identify other animals that may be affected because of commingling or contact.⁷⁵ Accurate and efficient in regards to both time and finances, investigation will require knowledge of where animals are being kept and moved.⁷⁶ The most practical identification methods will be determined in conjunction with the specific industry, assuming it meets federal re-

⁶⁵ United States Department of Agriculture, *supra* note 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ United States Animal Identification Development Team, *supra* note 26.

⁷⁰ United States Department of Agriculture, *supra* note 2.

⁷¹ National Food Animal Identification Task Force, *supra* note 16.

⁷² Doug O'Brien & Michael Roberts, *supra* note 3.

⁷³ United States Department of Agriculture, *supra* note 2.

⁷⁴ *U.S. Loses 90 Percent of Exports after Mad Cow Discovery*, Wate.com (Dec. 27, 2003), <http://www.wate.com/global/story.asp?s=t578761&ClientType=Printable>.

⁷⁵ *Id.*

⁷⁶ *Id.*

quirements (none of which plan to contradict current practice).⁷⁷ The movement of cattle over their life span will likely be done by ear tags.⁷⁸

1. Additional Information about the USAIP

The information to be collected has not been identified definitively,⁷⁹ although the USAIP has expressed that it will be limited to “essential information.”⁸⁰ The “essential information” expected to be included is: an animal identification number, premises ID, date, and the type of movement or event. Administration and maintenance of the collected information is expected to occur at the state level, within the respective department of agriculture⁸¹ with key information being transmitted into a national database.⁸² Other information deemed relevant to a future tracing may be collected, (e.g. species, breed, sex, age, etcetera) in the future.⁸³

The program’s cost is expected to be distributed among the federal government and industry stakeholders.⁸⁴ While the costs have yet to be determined definitively, the program was allotted \$18.8 million dollars in 2004 for initial funding⁸⁵ and \$14.3 million in governmental grants.⁸⁶ It is expected to cost the industry more than \$500 million.⁸⁷ Industry contributions are expected to match or exceed governmental spending; the cattle industry alone expects to pay \$500 million towards the initiation of the program.⁸⁸ If the program was capable of limiting the loss of exports and preserving domestic prices via assurances of limited exposure to international partners and the public, it could save the United States up to \$6 billion.⁸⁹

⁷⁷ United States Animal Identification Development Team, *supra* note 26.

⁷⁸ Bill Sardi, Health, Brought To You By Your Federal Government (June 10, 2005), <http://www.lewrcokwell.com/sardi/sardi38.html>.

⁷⁹ United States Animal Identification Development Team, *supra* note 26.

⁸⁰ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

⁸¹ United States Animal Identification Development Team, *supra* note 26.

⁸² *Id.*

⁸³ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

⁸⁴ United States Animal Identification Development Team, *supra* note 26.

⁸⁵ *Id.*

⁸⁶ Press Release, USDA to Award up to \$14.3 Million to States and Tribes for National Animal ID Systems Premises Registration (June 21, 2005) at http://animalid.aphis.usda.gov/nais/newsroom/news_2005-6-21.shtml.

⁸⁷ Alina Tugenc, *supra* note 29.

⁸⁸ *Id.*

⁸⁹ *U.S. Loses 90 Percent of Exports after Mad Cow Discovery*, Wate.com (Dec. 27, 2003), <http://www.wate.com/global/story.asp?s=1578761&ClientType=Printable>.

2. Confidentiality Concerns

Concerns regarding the confidentiality of information collected under the plan were expressed by industry producers early on.⁹⁰ Producer objections regarding accessibility of the information under the Freedom of Information Act included: competitor access to information, access to sensitive material by bioterrorists, and the availability of information to government agencies.⁹¹ The specific objections may be based on worries about market manipulation, intentional contamination of livestock and the possibility of government imposed environmental and tax claims on the basis of the information gathered under the plan.⁹² The NAIP work plan did address the confidentiality concern, ultimately deciding that the information would not be made available under the Freedom of Information Act per exemption or by private maintenance of the database.⁹³ APHIS has said that access to the information would be limited to state and federal officials.⁹⁴ Beyond the FOIA, other potential sources for public accessibility exist.⁹⁵

In 2005, the USDA announced that the National Animal Identification Plan would diverge significantly from the original concept, opting instead for privatization instead of public management.⁹⁶ The private sector is expected to take responsibility for a system of identification, estimated to have a cattle tag on every calf born by the year 2009.⁹⁷ Despite confidentiality concerns, the USDA maintains that the information needs to remain readily accessible and expects that it will be possible without government management.⁹⁸ Dave Fredrickson, president of the National Farmers Union disagrees.⁹⁹

I am greatly disappointed that the U.S. Department of Agriculture has announced its plans to allow private entities to collect and maintain producer in-

⁹⁰ National Food Animal Identification Task Force, *supra* note 16.

⁹¹ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

⁹² Doug O'Brien & Michael Roberts, *supra* note 3.

⁹³ National Food Animal Identification Task Force, *supra* note 16.

⁹⁴ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

⁹⁵ Doug O'Brien & Michael Roberts, *supra* note 3.

⁹⁶ Bob Meyer, *Johann Says Private Database will be Used for Animal ID* (August 30, 2005), <http://www.brownfieldnetwork.com/gestalt/go.cfm?objectid=092BA8E4-B2C0-28D5-6691CF923EEAA9E7>.

⁹⁷ Art Hovey, *Johanns Assigns Animal Identification System to Private Sector*, Lincoln Journal Star, Aug. 30, 2005, available at <http://www.journalstar.com/articles/2005/08/31/business/doc4314e0f4caa77217101368.txt>.

⁹⁸ Bob Meyer, *Johann Says Private Database will be Used for Animal ID* (August 30, 2005), <http://www.brownfieldnetwork.com/gestalt/go.cfm?objectid=092BA8E4-B2C0-28D5-6691CF923EEAA9E7>.

⁹⁹ *Id.*

formation in a National Animal Identification System (NAIS). Our membership has repeatedly stated its call for the database to be maintained within the public agency domain. Private control of producer information creates an inherent risk to producers that private and/or proprietary information could be divulged in a manner that could be detrimental to producers, farms, and the marketplace.¹⁰⁰

National Farmers had earlier expressed a preference towards a database that although federally controlled and maintained, was sheltered from public disclosure.¹⁰¹

III. PROPOSED SOLUTION

A. *A Simple Compromise: Farmer Confidentiality and Disclosure*

The information required to analyze the effectiveness of a national animal identification program will be more difficult to obtain under private control.¹⁰² The need for a well functioning system is clear¹⁰³ and the ability and effectiveness of such a system will be reliant on the trace-back function.¹⁰⁴ Third party and private interference does not contribute to the efficiency of the system, and may lead itself to the same issues expressed in regards to accessibility under the FOIA.¹⁰⁵ The program should be government mandated, government controlled and consequently, the consumer should be able to expect that information about lapses in function be made public so that it can more easily be rectified. The USDA Coordinator for National Animal Identification Systems, Neil Hammerschmidt conceded in 2004 that the effectiveness of a program's success will also depend on an established level of participation.¹⁰⁶ Ultimately, accountability for performance should fall on the government, not private entities.¹⁰⁷

Consumer watch groups have used the Freedom of Information Act to access information about deviance from safety standards within the meat-packing industry, designed to limit meat disease issues.¹⁰⁸ Public Citizen's recent exposure of Nebraska's nation-leading consumer food violations followed an eight month waiting period for inspection records

¹⁰⁰ Statement, National Farmworkers Union.

¹⁰¹ *Johanns Announces Key Component of Animal ID System* (September 1, 2005) at http://www.newfarm.org/news/2005/0805/083105/animal_id.shtml.

¹⁰² Art Hovey, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Alina Tugenc, *supra* note 29.

¹⁰⁷ Art Hovey, *supra* note 97.

¹⁰⁸ *Id.*

from the Department of Agriculture, available via the Freedom of Information Act.¹⁰⁹ Despite federal assurances that promotion of consumer safety is a priority, there are still problems with accessing information about food products that may serve to endanger the consumer.¹¹⁰ Recent reports suggested that three percent of milk cartons in the United States are contaminated with paratuberculosis, a human pathogen associated with Crohn's disease. Despite the Food and Drug Administration's ability to mandate bacteriological tests to prevent the spread of disease from animals to humans,¹¹¹ it appears that the system needs greater enforcement.¹¹²

The FDA has been harshly criticized for favoring lobbyist industries at the risk of public safety.¹¹³ When the discovery of a BSE-infected cow occurred in June 2004, the USDA was criticized for announcing tests were inconclusive while experimental tests had come back positive.¹¹⁴ It is clear that under a privately managed, non-government run system, information would be difficult if not impossible to access. For that reason, this Comment will argue that a public system, with limited access under the Freedom of Information Act is required to meet the original expectations of the livestock industry and consumers, both foreign and domestic. Furthermore, given the importance of the program and the problematic nature of livestock disease, participation should be mandated as soon as possible.

Before outlining the changes recommended to protect the rights of those involved, it is necessary to look at the collected information's possible vulnerability under the Freedom of Information Act if the system were public (with some government involvement). In order to be effective,¹¹⁵ the program necessitates government involvement to maintain, create or implement the identification plan.¹¹⁶

¹⁰⁹ *Id.*

¹¹⁰ Bill Sardi, Health, Brought To You By Your Federal Government (June 10, 2005), <http://www.lewrcokwell.com/sardi/sardi38.html>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *BSE Discovered in U.S.-Born Cow for First Time, Leading to More USDA Criticism* (pt. 1) (June 30, 2005: Number 25, Volume 5) available at <http://www.farmedanimal.net/faw/faw5-25.htm>.

¹¹⁵ Art Hovey, *supra* note 97.

¹¹⁶ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

1. The Freedom of Information Act

The Freedom of Information Act's 1966 enactment,¹¹⁷ by President Lyndon B. Johnson, was preceded by his account that "[a] democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."¹¹⁸ The act gave the public the right to access federal agency records and was later amended to ensure a high standard of agency compliance.¹¹⁹ The standard by which information can be withheld changed under the Bush administration.¹²⁰ Instead of the foreseeable harm inquiry that dictated what information could be withheld by the government since 1993, a 2001 memorandum by John Ashcroft implemented a "sound legal basis" test.¹²¹

2. Would the FOIA Apply?

The Freedom of Information Act generally applies to case opinions, policy statements and their interpretations and records.¹²² Agency records under the care of government agencies within the executive branch fall under the Freedom of Information Act,¹²³ which would potentially allow the public access to the information collected under a National Animal Identification Plan.¹²⁴ The United States Department of Agriculture is considered an agency within the executive branch, and thus, it is subject to the FOIA.¹²⁵ Government agencies include "government corporations, government controlled organizations, and independent regulatory agencies."¹²⁶ The Freedom of Information Act is not applicable to "private companies; persons who receive Federal contracts or grants; private organizations; or State or local governments;"¹²⁷ nor does it apply

¹¹⁷ *History of the Freedom of Information Act* (2002), <http://www.pbs.org/now/politics/foia.html>.

¹¹⁸ George Kennedy, *How Americans Got Their Right to Know* (1996), <http://www.johnemossfoundation.org/foi/kennedy.htm>.

¹¹⁹ *History of the Freedom of Information Act*, *supra* note 117.

¹²⁰ *Id.*

¹²¹ United States Department of Justice, Office of Information and Privacy, Press Release (Oct. 15, 2001), <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

¹²² 5 U.S.C.S. § 552 (2005).

¹²³ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

¹²⁴ *Id.* at 6.

¹²⁵ Doug O'Brien & Michael Roberts, *supra* note 3.

¹²⁶ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

¹²⁷ H.R. Report No. 105-37 (1997) available at <http://www.tncrimlaw.com/foia/VI.html>.

to entities not chartered or controlled by the federal government.¹²⁸ In *United States Dept. of Justice v. Tax Analysts*, the court required that for something to qualify as an “agency record” it must have been obtained or created by the specific agency.¹²⁹ In addition, it must also be physically located at the agency simultaneous to the information request, (e.g. “under agency control”).¹³⁰

Based on the above-mentioned, one could assume that a mandatory program, controlled by the United States Department of Agriculture would fall under the Freedom of Information Act. Further, this Comment opines that the information collected would be deemed to be “obtained” by the entity for purposes of the Freedom of Information Act.

3. Would the Information Be Exempt or Excluded?

There are three exclusions and nine exemptions listed under the Freedom of Information Act that have the potential to limit public accessibility.¹³¹ The most relevant exemptions relate to commercial or financial information, items classified as trade secrets and material that by its confidential nature, could cause harm to the individual holder. Trade secrets and commercial information excluded under the FOIA¹³² must be “obtained from a person and privileged or confidential.”¹³³ In *National Parks and Conservation Association v. Morton*, information is deemed confidential if it impairs the ability of the government to “obtain necessary information in the future, or causes substantial harm to the informer’s ability to compete.”¹³⁴ Consequently, if the information collected under the NAIP can be shown to harm the government’s future ability to gather the information or substantially harms the provider’s ability to compete, it may be deemed exempt.¹³⁵ Further limitations on information affecting the interests of national defense and foreign policy are also encompassed by the FOIA.¹³⁶

¹²⁸ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

¹²⁹ *United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

¹³⁰ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

¹³¹ *Id.*

¹³² Doug O'Brien & Michael Roberts, *supra* note 3.

¹³³ 5 U.S.C.S. § 552 (2005).

¹³⁴ *National Parks & Conservation Assn. v. Morton*, 498 F. 2d 765, 769 (D.C. Cir. 1974).

¹³⁵ Doug O'Brien & Michael Roberts, *supra* note 3.

¹³⁶ 5, U.S.C.S. § 552 (2005).

The burden of proving that the circumstances justify nondisclosure falls upon the party seeking to avoid disclosure.¹³⁷ That party has the burden of showing actual competition and a likelihood of substantial injury; allegations that are conclusory and generalized will not meet the burden required under the Freedom of Information Act.¹³⁸ Where the information is available to the public through other sources, there can be no competitive harm.¹³⁹

The applicability of the trade secret exemption to data collected under a mandatory, National Animal Identification Plan would have to hinge on the provider's hindrance of competition because the ability of the government to collect information under a mandatory program is absolute. In *Apodaca v. Montes*, when a news reporter requested information from the county regarding the financial statements of county bail bond companies, the disclosure was held to be impervious to the county's ability to collect information because the program was not voluntary, and participation was mandated.¹⁴⁰

There has been no information suggesting that the information to be collected is expected to relate to financial information. It is this author's opinion that the information collected under a mandatory program would need to be statutorily exempted in order to preempt disclosure unless the information was deemed to affect the interest of domestic security. Given the concerns about bioterrorism in the current political climate,¹⁴¹ the interest of domestic security could be deemed to outweigh the public right to disclosure.

4. Exclusion Under Preexisting Statutes

The Freedom of Information Act also allows for information to be specifically excluded by enactment of a statute, as long as the statute does allow discretionary denial and provides specificity regarding the withheld information (by either explicitly denying them or establishing criteria to deny).¹⁴² The Livestock Mandatory Price Reporting Act required farmers to report a pricing summary of all cattle and beef purchases.¹⁴³ The act specifically excluded the information collected under

¹³⁷ *National Parks & Conservation Assn. v. Kleppe*, 547 F.2d 673, 679 n.20 (D.C. Cir. 1976).

¹³⁸ *Id.*

¹³⁹ *CNA Fin. Corp. v. Donovan*, 485 U.S. 977 (1988), *cert. denied*.

¹⁴⁰ *Apodaca v. Montes*, 606 S.W.2d 734, 735, 736 (Tex.Civ.App. 1980).

¹⁴¹ United States Animal Health Association Res. 19, *supra* note 32.

¹⁴² 5 U.S.C.S. § 552.

¹⁴³ Janet Perry et al., *Did the Mandatory Requirement Aid the Market?* (September 2005), <http://www.ers.usda.gov/Publications/LDP/Sep05/ldpm13501>.

the act from access via the FOIA¹⁴⁴ in an effort to prevent competitors from manipulating the market.¹⁴⁵ Similarly, information collected under the Bioterrorism Act regarding the location of food supplies to prevent intentional or unintentional contamination is exempt from the FOIA.¹⁴⁶ Neil Hammerschmidt, USDA Coordinator for National Animal Identification Systems, said that a *voluntary program* could expect protection from disclosure under the Homeland Security Act as a “critical infrastructure,” while a mandatory program would require legislature-enacted exemption¹⁴⁷ but made no mention of whether a legislative exemption was pending. Thus, even if the information collected under the NAIS did not fall under one of the exclusions or exemptions discussed, the information could be explicitly exempted by proposed legislation.

It is not clear why the information collected under the National Animal Identification Plan could not rely on the existing legislation to avoid disclosure. The Center for Disease Control and Prevention, (“CDC”) reported that they processed 997 requests for information during the 2005 fiscal year.¹⁴⁸ Four hundred and fifteen were granted in full and 183 were granted in part.¹⁴⁹ The CDC relied on five of the nine Freedom of Information exemptions, as well as two statutes, Guarantee of Confidentiality¹⁵⁰ and the Public Health Security and Bioterrorism Preparedness and Response act of 2002.¹⁵¹ Of the 386 remaining requests, most of them were denied on the basis of there not being records, with the majority of the rest denied due to duplicate requests, not being agency records and withdrawn requests.¹⁵² Based on this, one could argue that sufficient existing legislation is already in place to avoid exposing confidential information unnecessarily.

B. Proposed Legislation

In 2004, H.R. 3787, the “National Farm Animal Identification and Records Act,” was introduced. H.R. 3787 would prevent disclosure of information collected through the NAIS under the privileged commercial

¹⁴⁴ Doug O'Brien & Michael Roberts, *supra* note 3.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Alina Tugenc, *supra* note 29.

¹⁴⁸ Center for Disease Control and Prevention, Freedom of Information Act: Annual Report (2005) available at <http://www.cdc.gov/od/foia/annu05.pdf>.

¹⁴⁹ *Id.*

¹⁵⁰ See 42 U.S.C. § 242, (2005).

¹⁵¹ *Id.*

¹⁵² *Id.*

information exemption of the FOIA.¹⁵³ Some limited disclosure would be allowed for public health and safety purposes, but only as deemed necessary by the Secretary of Agriculture.¹⁵⁴ H.R. 3787 also proposes an amendment to the Animal Health Protection Act that would allow for an international panel to objectively review the response of the Department of Agriculture to future disease outbreaks.¹⁵⁵ In early 2004, the bills were referred to the House Committee on Agriculture.¹⁵⁶ H.R. 3961 purports to add an amendment to the Animal Health Protection Act¹⁵⁷ which would specifically exclude information collected from the Freedom of Information Act and the Privacy Act.¹⁵⁸ Oversight under this act falls on the Secretary of Health and Human Services via the Commissioner of Food and Drugs.¹⁵⁹ The Commissioner would be responsible for evaluating the pervasiveness of animal protein disbursement in feed, prohibited under the act.¹⁶⁰ The bill was referred to the House Committee on Energy and Commerce in March of 2004.¹⁶¹ Introduced a month prior, Senate Bill 2070 mirrors the language of H.R. 3961.¹⁶² It was referred to the Senate Committee on Agriculture, Nutrition and Forestry in early February of 2004.¹⁶³

Another bill, H.R. 4005, referred to the House Committee on Agriculture in 2004 from the House of Representatives, addresses the exemption of information collected under the program.¹⁶⁴ The most expansive of the proposed litigation, it provides for the limited release of information at the Secretary of Agriculture's authorization where that information involves livestock threatened by disease and the requesting party seeks the information for "reasons consistent with the public health and public safety purposes of the livestock identification system..."¹⁶⁵ Under the proposed bill, mandatory disclosure would be required to owners and controllers of livestock, when they request it, the Attorney General for law enforcement purposes, the Secretary of Homeland Security in regard to national security, a "court of competent jurisdiction," and a foreign

¹⁵³ H.R. 3787, 108th Cong. (2004).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ H.R. 3961, 108th Cong. (2004).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² S. 2070, 108th Cong. (2004).

¹⁶³ *Id.*

¹⁶⁴ H.R. 4005, 108th Cong. (2004).

¹⁶⁵ *Id.*

country's government when necessary to track disease-threatened livestock.¹⁶⁶

Certainly, the proposed legislation nears adequacy in the representation of the producers' and processors' rights to privacy. While confidentiality under all of the proposed acts seems imminent for the affected parties, accessibility to information collected under the program, even where limited, is not granted to the average consumer. The proposal for limited access by specifically listed parties based only on health and safety reasons are insufficient to ensure proper oversight and transparency. Oversight is addressed by H.R. 3787 by way of an independent advisory board, but should not serve as an alternative for public consumer review and disclosure.

1. State Accessibility and Additional Opportunities for Disclosure

Depending on the state, state enacted information accessibility acts may provide more information than available under FOIA.¹⁶⁷ For example, in California, section 6250 of the Government Code provides a comparable right to disclosure.¹⁶⁸ With a significantly larger exemption window, the California Public Records Act explicitly exempts anything contained in or related to "geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports obtained in confidence from any person."¹⁶⁹ Collected information can also be deemed inapplicable for release by the California Evidence Code, which states that where the need for confidentiality outweighs the necessity of disclosure in light of the public interest and interest in justice, it may be refused.¹⁷⁰ While the CPRA has been interpreted to lack absoluteness,¹⁷¹ the ultimate decision is often left to a court to determine.

If the plan were voluntary, and the information submitted at will, it may be subject to exemption from the FOIA, much like it is under the Homeland Security Act.¹⁷² Under that act, if the information is submitted voluntarily and it relates to a critical infrastructure, it is exempt from the FOIA.¹⁷³ Both the agricultural and food industries are accepted as critical

¹⁶⁶ *Id.*

¹⁶⁷ Doug O'Brien, *Animal Identification Issues in the News*, <http://www.nationalaglawcenter.org/assets/news/animalid.pdf> (Sept. 24, 2004).

¹⁶⁸ Cal. Gov. Code § 6250 (2005).

¹⁶⁹ *Id.*

¹⁷⁰ Cal Evid. Code § 1040 (2005).

¹⁷¹ *Uribe v. Howie*, 19 Cal. App. 3d 194, 206 (Cal.Ct.App. 1971).

¹⁷² Doug O'Brien & Michael Roberts, *supra* note 3.

¹⁷³ *Id.*

infrastructures.¹⁷⁴ Some have expressed concern about the court subpoena power posing an additional source of accessibility.¹⁷⁵ If a party to litigation was capable of showing that the government's need for confidentiality is outweighed by their need for the information, the information may be subject to subpoena.¹⁷⁶ If the same rationale that exempts information from being made accessible to the HSA was applied to the FOIA's applicability to the NAIP, there may be limits on a federal agency's ability to use any collected information in a civil action. The FOIA would probably not apply to voluntary programs, which would be governed by contractual agreement instead.¹⁷⁷ For example, a program requesting voluntary submission could, to encourage farmer participation, expressly agree that information collected would not be made available to third parties, much like business and consumer agreements.

C. Solutions and Compromises

I. Partial Legislative Exemption

The proposed National Animal Identification System is simply that: a proposal. Conjecture concerning the availability of information collected under the program is inherently speculative given the solely foundational and sometimes inconsistent information provided. Still, after a careful analysis, it appears that whether the data collected under the program will be publicly accessible or not, at least a minimal amount of information should be. The threat of mad cow disease to the average consumer, the financial welfare of the country and the potential impact on the exportation of animal products, which coincidentally constitute twenty percent of U.S. trade,¹⁷⁸ are dependent on the proper oversight of the program. A large amount of government funds will be devoted to the development of this program;¹⁷⁹ spending allocations and related subsidies, grants, and expenditures should be subject to public scrutiny. The need for such transparency is evidenced by reports like those of the Washington-based Environmental Working Group's website, which list recipients of federal farm subsidies, based on information gathered under the Free-

¹⁷⁴ *Id.*

¹⁷⁵ Michael T. Roberts & Harrison M. Pittman, *supra* note 13.

¹⁷⁶ *Id.*

¹⁷⁷ Doug O'Brien, *Animal Identification Issues in the News*, <http://www.nationalaglawcenter.org/assets/news/animalid.pdf> (Sept. 24, 2004).

¹⁷⁸ Geoffrey Bensen & Mary Merchant, *U.S. Agricultural Export Markets available at* <http://www.ces.ncsu.edu/depts/agecon/trade/ten.html> (last visited Dec. 20, 2005).

¹⁷⁹ Alina Tugenc, *supra* note 29.

dom of Information Act.¹⁸⁰ Instead of supporting small family farmers, a large amount of the farm subsidies listed went to enhance the profits of agricultural conglomerates.¹⁸¹ Roughly ninety percent of the farmers in California receive absolutely no agricultural subsidies despite leading the nation in farm state sales.¹⁸² Nationally, the top ten percent of farming subsidy recipients receive seventy percent of taxpayer support every year.¹⁸³ Similarly frightening, documents obtained from the USDA in 1991 showed that a ban on feeding cow and sheep remains to livestock was considered, but it was deemed too costly for the livestock industry.¹⁸⁴ Where large amounts of government funding is involved, public scrutiny is needed to ensure fairness and accountability. Likewise, transparency is needed to ensure that the government is not protecting business interests at too great of a consumer risk.

As discussed earlier, the investigation surrounding the 2005 discovery of a BSE-infected cow in the United States has yet to yield results.¹⁸⁵ Certainly, the public deserves to know the steps taken by the federal government towards resolution and future plans for prevention, particularly given the potential health, fiscal and societal impact it poses. To achieve this end, the system of animal identification must be a capable, effective program allowing for public oversight and governmental transparency.

Thus, the expectation of a farmer or manufacturer to keep information confidential under a nationally mandated identification program is reasonable, but so is the citizen's right to access information surrounding the discovery of disease among products they consume. Any effective compromise would require a balancing of the two interests and provide for two goals: protection for farmers and manufacturers from unreasonable inquiries that they feel would invade their privacy, while allowing for access to information regarding government reaction to the potentially dangerous and increasingly rampant spread of livestock disease.

¹⁸⁰ <http://www.ewg.org/farm/redraw/index.php>.

¹⁸¹ Ruth Rosen, *The Day Ashcroft Foiled FOIA*, S.F. Chronicle at <http://www.unitedstatesgovernment.net/thedayashcroftfoiledfoia.htm>.

¹⁸² Environmental Working Group, *After Hong Kong, Redraw America's Farm Subsidy Ma* (December 13, 2005), available at <http://www.ewg.org/farm/redraw/index/php> (last visited Dec. 20, 2005).

¹⁸³ *Id.*

¹⁸⁴ Michael Greger, *The Health Implications of Mad-Cow Disease*, International Vegetarian Unit (July 27, 1996) available at <http://www.ivu.org/congress/wvc96/.html>.

¹⁸⁵ U.S. Food and Drug Administration, *supra* note 14.

2. H.R. 4005 as a Foundation

With a few minor alterations, House of Representatives Bill 4005 may serve as a starting point for a fair, equitable compromise. It provides for *per se* access to foreign governments, courts, the Attorney General, the Secretary of Homeland Security, and the owner or controller of the livestock.¹⁸⁶ It provides for discretionary access to a person obtaining the information in regard to public health safety.¹⁸⁷ This Comment suggests that despite the limited access granted under the proposed bill, access would be insufficient to gauge government performance in the event of a BSE discovery.

The Freedom of Information Act does attempt to guarantee access to records which although they contain some amount of exemptible information, can be manipulated to omit the exempt portion.¹⁸⁸ Much of the information collected under the program will be pertinent in determining the strengths or weaknesses of a government reaction. For that reason, the information could remain confidential without impacting the public's right to evaluate it, were the information to be made available in the event of a BSE or other dangerous disease's discovery. At that point, the public should be able to access any records pertaining to the resolution and investigation of the discovery. Disclosure of information that would cause significant and inarguable harm to the provider could be omitted by manipulation of the document, as long as it did not affect the coherence of the document. This Comment argues that these changes should be imposed in an effort to simultaneously support the right of the private property owner to privacy, while maintaining transparency in government in regard to the consumption of consumer products.

Were the information collected disclosed only upon the discovery of an infected animal, many of the concerns expressed by farmers and producers in regard to bioterrorism and competitor access would be resolved because explicit, confidential data could be omitted. This Comment does not consider the possibility of collected information leading to government interference, given that the concerns expressed thus far in regards to this issue suggest that the desire to avoid disclosure may be for devious purposes.¹⁸⁹

¹⁸⁶ H.R. 4005, 108th Cong. (2004).

¹⁸⁷ *Id.*

¹⁸⁸ Freedom of Information Act, 5 U.S.C.S. § 552 (2005).

¹⁸⁹ John Maday, *Don't Ask, Don't Tell? Drovers* (August 31, 2004), <http://www.iqbeef.org/tophand/1004/Dont%20Ask%20Don't%20Tell.htm>.

IV. CONCLUSION

This Comment began by discussing the increasing presence of livestock disease. Using that foundation, there was a discussion of the introduction of a National Animal Identification System, detailing the history and time line of the program, the necessity of the program and the current methods used to identify and track livestock. Accepting farmer and producer concerns surrounding possible disclosure of confidential information under the Freedom of Information Act, we sought a possible compromise by analyzing potential availability of information under a federally maintained and mandated identification program. Based on the above, it is suggested that in order to ensure an effective and sufficient response, the program should be mandatory. Second, the program should be governed by governmental agencies to ensure proper oversight. Lastly, it is encouraged that the information collected be made available to the public upon discovery of an outbreak to ensure that the government is taking an appropriate response via the enactment of legislation according to the guidelines discussed above. Recent announcements regarding the planned privatization of the National Animal Identification System run contrary to the effectiveness goals and initiatives expressed by the USDA and APHIS. A new discovery of livestock illness would unnecessarily create potential roadblocks to accessing information under the program's current work plan, a voluntary, privately run identification system.

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