

To: Brad Smith  
From: Wendy John  
Date: May 12, 2000  
Re: What to tell Forest Service cooperators about their obligations under the FSA.

### Issue

What should the Forest Service tell its cooperators about their obligations regarding confidentiality of information under the Food Security Act of 1985 (FSA)? Specifically, are obligations the same for all categories of cooperators? If information is either improperly or inadvertently released, would cooperators be subject to penalties if they make subsequent releases of the same information? Finally, does the FSA supersede the Forest Service's current policy regarding the release of data gathered under the FRRRRA?

### Discussion

Section 3(e) of the Forest and Rangeland Renewable Resources Research Act of 1978, (FRRRRA) 16 U.S.C. §1642(e), requires the Secretary of Agriculture "to establish a program to inventory and analyze ... public and private forests and their resources in the United States." The law also requires the Secretary to obtain permission from property owners before collecting data from private property. It is in the Forest Service's best interest to keep information about specific private property confidential. Otherwise, landowners would have little incentive to grant access to their property and/or information. For example, if data from individual plots were made public, it could be used in litigation against the landowners.

Under the Freedom of Information Act (FOIA), 5 U.S.C. §552, any person has a right to federal agency records to the extent that those records are not protected by an exemption or exclusion. Previously, the Forest Service sometimes met its goal of keeping information about specific private property confidential by invoking section (b)(4) of FOIA which can exempt commercial or financial information. This approach was especially useful in the case of timber companies, which accepted it out of self interest. While the companies were eager to obtain information about their competitors' plots, they were not keen to let information about their own be made public. .

Another FOIA provision, section (b)(3), exempts information prohibited from disclosure by another statute. In order for this exemption to apply one of two requirements must be met. Either the statute must prohibit disclosure "in such a manner as to leave no discretion on the issue" or it must specify types of information not to be disclosed. 5 U.S.C. §552(b)(3).

The FSA explicitly prohibits the use or disclosure of information in anything other than statistical or aggregate form. Recently, the FSA was amended to include among its confidentiality requirements the FRRRRA (7 U.S.C. 2276(d)(10)). Therefore, the raw data collected for the Forest Service under the FRRRRA is exempt from release under the FOIA. The FSA provides for specific penalties if those data are improperly disclosed.

What are the obligations of Forest Service Cooperators under the FSA?

Under the FSA, “neither the Secretary of Agriculture, any other officer or employee of the Department of Agriculture or any agency thereof, *nor any other person* ” may use or disclose information collected under several laws, including the FRRRA, in anything other than statistical or aggregate form. 7 U.S.C. §2276(d)(a), (emphasis added). More specifically, the information may not be used “for a purpose other than the development or reporting of aggregate data in a manner such that the identity of the person who supplied such information is not discernable and is not material to the intended use of such information.” 7 U.S.C. §2276(d)(a)(1). Nor may the information be publicly disclosed “unless such information has been transformed into a statistical or aggregate form that does not allow the identification of the person who supplied particular information.” 7 U.S.C. §2276(d)(a)(2). Violators “shall be fined not more than \$10,000 or imprisoned for not more than 1 year, or both.” 7 U.S.C. §2276(d)(c).

Cooperators fall into four categories: other Forest Service, other federal, state and county, and private. The language of the FSA covers all four categories, prohibiting those cooperators from improperly disclosing information. Other Forest Service workers are included in “any other officer or employee of the Department of Agriculture.” 7 U.S.C. §2276(d)(a). Other federal and state and county cooperators should be considered similar to contractors of the Department of Agriculture since they are paid by the Department to collect data. “Any other person” certainly includes private individuals.<sup>1</sup> The FSA does not indicate in any way that the law applies

---

<sup>1</sup> Other federal workers and state and county workers may also fall under the category of “any other person,” but we should not assume that they do. In *Chesapeake Bay Found. v. United States Dep’t of Agric.*, the D.C. district court held that the FSA rule prohibiting disclosure of information unless it is in a form that does not allow the identification of the person who supplied it did not apply to information supplied by public agencies because “[t]he common usage of ‘person’ does not encompass public agencies.” 917 F. Supp. 64, 66 (D.D.C. 1996). If “person” does not apply to public agencies supplying information, it may not apply to public agencies collecting information. The Court of Appeals reversed, but declined to decide whether the term

differently to different types of violators. All cooperators are subject to the same obligations and penalties.

The question remains who would be liable if a cooperator were improperly to release data: the cooperator, the Department of Agriculture, or both? Cooperators could argue that the Department of Agriculture is solely or jointly responsible under the doctrine of *respondiat superior* (responsibility of a principal for his agent's acts). However, the language of the FSA emphasizes individual responsibility. The statute lists specific individuals prohibited from improperly using or disclosing information: the Secretary of Agriculture, any other officer or employee, any other person. See 7 U.S.C. §2276(d)(a). The penalty section further underscores individual responsibility by stating that “*any person* who shall publish, cause to be published, or otherwise publicly release information ... in any manner or for any purpose prohibited in section (a), shall be fined not more than \$10,000 or imprisoned for not more than 1 year, or both.” 7 U.S.C. §2276(d)(c)(emphasis added). Apparently, whoever is responsible for releasing the information is subject to the penalties.

If information is either improperly or inadvertently released what penalties, if any, apply to subsequent releases of the same information?

It is unclear whether, once information has been improperly or inadvertently released, cooperators may freely make subsequent releases of that same information. While it might be argued that the degree of any disclosure should be considered, the statute specifically prohibits not only improper disclosure of information, but also use for any purpose other than developing or reporting adequate data.

The most legally defensible position is that cooperators should not feel free to make subsequent releases of such information. Rather, they should comply with the spirit of the FSA and attempt to minimize violations.

Does the FSA supersede the Forest Service's current policy?

---

“person” applies to state agencies. See *Chesapeake Bay Found. v. United States Dep't of Agric.*, 108 F. 3d 375, 377 (D.C. Cir. 1997). However, it did note that “1 U.S.C. § 1 defines ‘person’ for all acts of Congress (unless the context indicates otherwise) to include ‘corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals’--but not state agencies.” *Id.*

The Forest Service's current policy states that, "[a]ccess to original data is available to the public ... after the State statistical report has been transmitted for publication." Notice: Uniform Data and Coding Proposal, 54 Fed. Reg. 43,189 - 90 (1989). The data is released with an accuracy of approximately one mile. In the Forest Service, this is referred to as "fuzzing" the data. The advantage of fuzzing is that it allows a certain amount of disclosure to taxpayers without jeopardizing the privacy of landowners.

The policy is invalid under the FSA if it allows disclosure of information that has not "been transformed into a statistical or aggregate form that does not allow the identification of the person who supplied particular information." 7 U.S.C. §2276(d)(a)(2). It would be very hard to argue that the fuzzed data is presented in a statistical form since it is made available after the statistical report has been submitted. In order for its policy to remain valid, the Forest Service would have to argue that the original information is presented in an aggregate form that does not identify the landowner. There are two problems with this. First, the policy characterizes the information as "original." That word strongly suggests that the Forest Service is willing to provide raw data.. The possibility of fuzzing the data does not provide the landowner with adequate security. The Forest Service promises to provide data with an accuracy of plus or minus one mile. But the policy does not prevent it from making more accurate data available. Even if the Forest Service were to consistently fuzz the data, this would not protect very large landowners in the West. The policy is also flawed because it does not provide the information in aggregate form. It is not enough to code ownership categories, particularly if the FSA does not apply to information gathered from public agencies. See footnote 1 above.

The current policy is invalid. In order to comply with the FSA it would have to omit any promise to provide "original data" and make provisions for publicizing data in a more arguably aggregate form that does not rely on distinctions between federal, state, and private land.

### Summary

New legislation amending the Food Security Act's confidentiality provisions applies to Forest Service cooperators of all categories. Forest Service policy concerning release of statistical data should be amended to conform to the new restrictions.