



Farm Data FAQs

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Last year, the American Farm Bureau Federation conducted a survey of farmers with respect to Farm Data. The results of the survey revealed that many farmers are still uncertain about how their Farm Data is used and whether their data is protected. Fifty-five percent of farmers surveyed did not know whether the agreements they signed with agricultural technology providers (“ATPs”) addressed who owns collected data. Similarly, 59 percent of farmers did not know whether ATPs could use collected data to market products or services back to them.

This article aims to provide an introduction to Farm Data and answer many of the common questions farmers have about Farm Data.

QUESTION 1: WHAT IS FARM DATA?

Farm Data is the collection of information from a variety of sources that allows farmers (or service providers) to see trends and make strategic decisions. Farm Data can be collected from a variety of resources. For example, field sensors and drones can be used to monitor soil conditions and overall crop health. Similarly, many modern farm equipment manufacturers integrate data collection tools into their equipment that can provide useful information like fuel economy and recommended maintenance. Farm data also includes weather data (temperature, precipitation, etc.). The term “Farm Data” means collecting and analyzing all of this information to make farmers more productive and profitable.

QUESTION 2: WHAT DOES “AGGREGATED DATA” MEAN?

“Aggregated Data” is a combination of your data with data from other farmers. The advantage of aggregated data is the availability of more information to detect trends. For example, if a farmer finds a certain seed variety to be unproductive, an aggregated data set can tell a farmer whether the lack of productivity is due to the farmer’s practices, or if similarly situated farmers using the same variety are having problems as well. The disadvantage of aggregated data relates to

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ownership. Typically, an ATP will create the aggregated data set. Does the ATP own the aggregated data? Relatedly, does the ATP take steps to ensure your data is anonymous before it is combined to form an aggregated data set? The answers to these questions should be described in the contract you sign with the ATP.

QUESTION 3: WHO OWNS FARM DATA?

Unless the contract you sign with the ATP clearly addresses ownership, it is not possible to determine who owns Farm Data. If the farmer owns the equipment that collects and generates data from his or her own fields, then there is a strong argument that the farmer owns the created data. However, if the collected data is transmitted to an ATP that formats the data into a useful report, who owns the report? Even if an ATP concedes that the farmer owns his or her data, what impact does ownership have on the ability of others to use that data? Can the ATP aggregate your data with others? Can an ATP use your data to market products to you? For example, if you purchase a field sensor from an ATP, can the ATP use the data produced by that sensor to market fertilizers to you? Some farmers may find data aggregation and targeted marketing beneficial, while others may not. As we will see in the upcoming questions, it is important to address these issues in your agreement with the ATP.

QUESTION 4: IS FARM DATA CONSIDERED "INTELLECTUAL PROPERTY"?

Given the wide variety of information types and sources that combine to create Farm Data, it is difficult to assign Farm Data to any single type of property. Most legal scholars agree that Farm Data most closely resembles intellectual property—specifically trade secrets. A trade secret is information that has economic value from not being readily known to the public and that is subject to efforts to maintain its secrecy. Most farmers assert that their particular farming methods are proprietary, and therefore, the data produced from those methods should be proprietary as well. The counter-argument to this position is that Farm Data is valuable only to the particular farmer, not the general public, and therefore, not a trade secret. For example, Farm Data may tell a farmer that harvesting a field using a particular route will be more fuel efficient. This information is valuable only to the farmer because it is specific to his or her field.

If you want to characterize your Farm Data as a "trade secret," you must take reasonable steps to protect the secrecy of that data. This does not necessarily mean prohibiting disclosure to any party (your ATP cannot do their job if they do not have any data to analyze). Rather, it means you should have some agreement in place that restricts or prohibits the ability of your ATP to re-distribute your data. It is unclear whether Farm Data qualifies as a trade secret. If a court someday determines that it does, having good agreements in place will evidence reasonable steps to keep that data secret, which is a prerequisite to receiving trade secret protection.

QUESTION 5: IS YOUR FARM DATA CONSIDERED "PERSONALLY IDENTIFIABLE INFORMATION"?

Michigan's Identity Theft Protection Act creates protection for personally identifiable information ("PII"), which is defined as "a name, number or other information that is used for the purpose of identifying a specific person or providing access to a person's financial accounts." MCL 445.63(q). Businesses that own or maintain a



database of PII have a duty to notify a person if there has been a breach of their PII. Clearly, some farm data is not likely to be considered PII. For example, the amount of rain on your farm is unlikely to allow a third party to determine your identity. However, data such as serial numbers on farm equipment may be considered PII. A good agreement with an ATP should describe the type of data collected and whether any of that data is subject to protection under the Identity Theft Protection Act.

QUESTION 6: HOW CAN FARMERS PROTECT THEIR FARM DATA?

Until the courts or the legislature provide clarity on how Farm Data is to be treated and protected, the only way to ensure your data is protected is to address it in the agreements you have with ATPs. The American Farm Bureau collaborated with several companies and ATPs to produce Farm Data security principles. These principles provide that farmers own their data and should be notified when data is collected. Farmers should also be made aware of how data is used, and whether farmers have any ability to opt-in or opt-out of data collection or use.

These principles provide farmers some peace of mind that the standard agreements used by many ATPs will be farmer-friendly. However, these principles are by no means a legal requirement. The only way for farmers to be sure of their rights with respect to Farm Data is to address those rights in a written agreement signed by the ATP. Your agreements with ATPs should address what data is collected and how the ATP may use that information. The agreement should answer the questions raised above with respect to aggregation and use of data in marketing. You should identify what types of information should be kept confidential, whether the ATP has a duty to destroy the information after a certain period of time, and whether the ATP is prohibited from using the data for particular purposes. If a particular ATP agreement does not provide you enough protection, you can always ask the ATP to enter into a separate “non-disclosure agreement” that addresses these issues.

For more information on how to protect your Farm Data, contact Mike Zahrt at 616.726.2223 or mzahrt@fosterswift.com.