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INTRODUCTION

The issue in this Freedom of Information Act (FOIA) case is whether defendant Department of Labor (DOL) improperly withheld the names of tobacco buyers under exemption 4, where DOL obtained the names from tobacco growers. As plaintiff Farm Labor Organizing Committee (FLOC) explained in its 2021 summary judgment briefs, DOL’s withholding is unlawful: The information is not within the scope of exemption 4 because it is not “confidential,” and no foreseeable harm to a protected interest would result from its disclosure.

On July 28, 2025, the Court granted in part FLOC’s summary judgment motion and denied in part DOL’s motion. It held that the government was not entitled to summary judgment based on the government’s argument that the growers, who provided the information to DOL, kept the information confidential. The Court, however, ordered the parties to address, through renewed briefing, the question “whether, in conducting an Exemption 4 analysis, the Court can consider how a non-submitter owner (here, a Buyer) treats the withheld information in the absence of information about the submitter (here, a Grower).” Order 1, ECF 38.

The statutory text, legislative history, and relevant case law show that, to justify withholding information under exemption 4, the government must show that the person from whom the government obtained the information (the submitter) keeps it confidential. Here, the Court has already found that DOL failed to establish that the growers treat the names of tobacco buyers as confidential. Therefore, for the reasons explained in FLOC’s summary judgment briefs and in this memorandum, the

Court should grant FLOC's renewed summary judgment motion, deny DOL's motion, and order disclosure of the buyer names at issue.

BACKGROUND

A. Factual Background

DOL's Wage and Hour Division investigates whether tobacco growers comply with federal wage and labor law. *See* Mem. Op. & Order (MSJ Op.) 2, ECF 37. In investigating the grower's practices, a DOL official interviews the grower and obtains from the grower the identities of the buyers of the grower's tobacco. *See id.* At the conclusion of investigations, DOL officials "memorialize their findings and conclusions in narrative reports." *Id.*

In June 2018, FLOC submitted a FOIA request for the findings of DOL investigations conducted in 2015, 2016, or 2017 in which DOL determined that a tobacco grower in North Carolina, Kentucky, Tennessee, or Virginia had violated any federal law or regulation. *Id.*; *see* Torres Decl., Ex. 1 (FOIA Request), ECF 22. After identifying responsive records, DOL sent letters to the 76 Growers identified in the records, providing them an opportunity to object to the disclosure of the information they had provided. DOL sent similar letters to 20 tobacco companies identified in the records, even though the tobacco companies had not submitted the information to DOL. *See* MSJ Op. 3. "The letters stated that, if the recipient failed to respond by a certain date, DOL would release the information." *Id.*

Only eight growers responded to DOL, asserting in letters that the information was confidential. *Id.* None of the other 68 growers responded to DOL; they did not object to release of the information that they had submitted to DOL and "did not

submit any information stating whether they treat this information as confidential.” *Id.* at 7. In addition, four of the twenty buyers identified in the responsive records, who did *not* provide the information at issue to the government, responded to DOL and objected to the agency’s disclosure of the information that DOL obtained from the growers. *Id.* at 2. Those buyers are Alliance One, China Tobacco International North America, R.J. Reynolds Tobacco Company, and Universal Leaf. *Id.*

On the asserted basis of exemption 4, DOL redacted from the responsive investigative reports “references relating to any crop buyers from the investigations of the eight [Growers] who objected to the disclosure of such information, and any references to the four objecting Buyers and their affiliates,” MSJ Op. 3, even though the growers who submitted such information had not objected to its release.

B. Procedural History

In March and April 2021, the parties cross-moved for summary judgment on DOL’s exemption 4 withholdings. FLOC explained that DOL had failed to satisfy its burden because the buyer names at issue were not customarily and actually kept private, were not provided under an assurance of privacy, and that disclosure of the names would not result in foreseeable harm to an interest protected by exemption 4. *See* Pl. SJ Mem., ECF 23; Pl. SJ Reply, ECF 27.

On July 28, 2025, this Court issued a Memorandum Opinion and Order. It granted in part FLOC’s motion and denied in part DOL’s cross-motion and ordered DOL to remove redactions showing that Strickland Farms sold tobacco to Alliance One in 2016, because such information is in the public domain. MSJ Op. 16. In

addition, the Court held that “looking only to how Growers treat the information in question, DOL has not discharged its burden to demonstrate that the withheld information properly falls under Exemption 4.” *Id.* at 8. The government had attempted to justify its withholding based on hearsay statements from a DOL official, letters from eight growers, declarations from five growers submitted at the reply stage, and declarations by the four objecting buyers. The Court rejected DOL’s withholding based on that evidence, explaining that the eight grower letters were inadmissible hearsay; the five grower declarations did not establish foreseeable harm from disclosure; and the agency officer’s declaration did not establish foreseeable harm for any of the growers. *See id.* at 9–15. In addition, the Court found no evidence in the record showing that the “Growers who contract with Alliance One treat this information as confidential or would be harmed by its disclosure.” *Id.* at 15.

The Court, however, denied the parties’ cross-motions without prejudice because DOL had “urge[d] the Court to consider whether the Buyers treat this information as confidential and would be foreseeably harmed by its release,” even though the government did not obtain the information from the buyers. *Id.* The Court acknowledged that FLOC had disputed the government’s assertion of exemption 4 based on the practices of the buyers, but did not rule on the issue. *Id.* Instead, the Court invited the parties to file renewed briefs that “address how the statutory text and structure, legislative history, and relevant caselaw bear on the question of whether, in conducting an Exemption 4 analysis, the Court can consider how a non-

submitter owner (here, a Buyer) treats the withheld information in the absence of information about the submitter (here, a Grower).” Order 1.

LEGAL STANDARD

“Congress enacted the Freedom of Information Act (FOIA) ‘to pierce the veil of administrative secrecy and open agency action to the light of public scrutiny,’ and thereby to ‘achieve greater transparency in support of open government.’” *Insider Inc. v. Gen. Servs. Admin.*, 92 F.4th 1131, 1133 (D.C. Cir. 2024) (citation omitted). FOIA’s “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Citizens for Resp. & Ethics in Wash. v. DOJ*, 58 F.4th 1255, 1261 (D.C. Cir. 2023) (citation omitted). Accordingly, “FOIA exemptions must be narrowly construed, even though they are as much a part of FOIA’s purposes and policies as the statute’s disclosure requirement.” *Id.* (cleaned up).

“The agency bears the burden to justify nondisclosure under any exemption it asserts.” *Id.* at 1262. “[T]he court must analyze all underlying facts and inferences in the light most favorable to the FOIA requester.” *Neuman v. United States*, 70 F. Supp. 3d 416, 421 (D.D.C. 2014). If the government fails to satisfy its burden to show that its withholding of information was proper, then the information at issue must be disclosed. *See Maydak v. DOJ*, 218 F.3d 760, 769 (D.C. Cir. 2000) (ordering disclosure).

ARGUMENT

Exemption 4 exempts from FOIA’s public disclosure requirement “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). “When an agency withholds non-trade-secret

information under Exemption 4, it must demonstrate that the withheld information is ‘(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.’” *Citizens for Resp. & Ethics in Wash.*, 58 F.4th at 1262. In *Food Marketing Institute v. Argus Leader Media*, the Supreme Court explained that the term “confidential” means “‘private’ or ‘secret.’” 588 U.S. 427, 434 (2019) (quoting Webster’s Seventh New Collegiate Dictionary 174 (1963)). The Court “considered two conditions that might be required for information provided to the government to be confidential within the meaning of Exemption 4: (1) that information is ‘customarily kept private, or at least closely held, by the person imparting it,’ and (2) that ‘the party receiving [the information] provides some assurance that it will remain secret.’” *Citizens for Resp. & Ethics in Wash.*, 58 F.4th at 1269 (quoting *Food Mktg. Inst.*, 588 U.S. at 434). The Court held that “at least the first condition must be met,” but left open whether the second must also be met. *Id.*

DOL’s assertion of exemption 4 to withhold the names of tobacco buyers fails to satisfy this standard for several reasons. First, exemption 4 requires the government to show that the person from whom it obtained the information (here, the grower) treats the information as “confidential.” DOL does not meet that burden, as this Court has already found. DOL’s reliance on exemption 4 to withhold information based on assertions of confidentiality by *third parties*, *not* the submitters, is contrary to the exemption’s statutory text, history, purpose, and judicial precedent. Second, exemption 4 does not apply for the additional reason that the information is not “confidential” because the government did not assure the growers that it would

be kept private. Third, DOL's withholding violates FOIA because disclosure would not result in foreseeable harm to an interest protected by exemption 4.

Because DOL has failed to satisfy its burden to justify its withholding, the information must be released.

I. DOL's withholding is unlawful because the submitters do not treat the information as confidential.

To justify withholding information under exemption 4, DOL must show, among other things, that the submitter treats the information as "confidential"—that is, that the information is "customarily kept private, or at least closely held, *by the person imparting it*" to the government. *Food Mktg. Inst.*, 588 U.S. at 434 (emphasis added). The government cannot discharge its burden under FOIA by asserting that third parties keep the information private.

A. The text of exemption 4 shows that the submitter must keep the information private for the information to be within the exemption's scope. Because FOIA does not define the term "confidential," the term is interpreted "according to its 'ordinary, contemporary, common meaning'" at the time of enactment. *Pierre-Noel on behalf of K.N. v. Bridges Pub. Charter Sch.*, 113 F.4th 970, 980 (D.C. Cir. 2024). The Supreme Court has stated that the term's ordinary meaning, and therefore the meaning as used in exemption 4, is "'private' or 'secret.'" *Food Mktg. Inst.*, 588 U.S. at 434 (quoting Webster's Seventh New Collegiate Dictionary). For information to be a secret, the person who has that information must treat that information as secret. If a person shares information without treating it as private or secret, then the information is not actually private or secret and thus is not confidential.

The notion that information is “confidential” where the submitter does *not* keep it secret is contrary to the term’s plain meaning. As the Supreme Court has stated, “contemporary dictionaries suggest ... that ... information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, *by the person imparting it.*” *Id.* at 433–34 (citing Webster’s Third New International Dictionary (1961); Black’s Law Dictionary (1968); emphasis added); *see also* Random House College Dictionary (1972) (defining “confidential” as “imparted in confidence; secret”); Webster’s Third New International Dictionary (1966) (defining “confidential” as “communicated, conveyed, acted on, or practiced in confidence”). Because the person imparting the information is the submitter, the submitter must keep the information private for it to be “confidential.”

Further, the text of exemption 4 protects from disclosure certain types of “information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). The phrase “information obtained from a person” makes plain that the focus is on the submitter—the person from whom the government obtains the information. Congressional reports accompanying FOIA’s enactment make the same point, explaining that exemption 4 covers certain “material if it would not customarily be made public *by the person from whom it was obtained* by the Government.” H.R. Rep. No. 89-1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427 (emphasis added); *see* S. Rep. No. 89-813, at 9 (1965) (stating that the exemption protects information which would customarily not be released to the public *by the person from whom it was obtained*” (emphasis added)).

That exemption 4 looks to the *submitter's* treatment of the information reflects the exemption's twin purposes: "to encourage individuals to provide certain kinds of confidential information to the Government" and to "protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication." *Critical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 877 (D.C. Cir. 1992) (en banc) (citation omitted); *see id.* at 873 (stating that exemption 4 "is intended for the benefit of persons who supply information, as well as the agencies which gather it" (citation omitted)); *see also* H.R. Rep. No. 1497 at 31 (stating that the exemption encompasses "information which is given to an agency in confidence, since a citizen must be able to confide in his Government"). Both purposes look to the interests of the submitter, not any other private person.

Moreover, "disclosure, not secrecy, is the dominant objective of the Act." *Citizens for Resp. & Ethics in Wash.*, 58 F.4th at 1261. DOL's theory that *any* person who claims an "ownership" interest over the information, but who did not provide that information to the government, could invoke exemption 4, *see* MSJ Op. 8, would run contrary to FOIA's "strong presumption of disclosure," and the mandate that FOIA exemptions must be "narrowly construed." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citations omitted).

Administrative materials further support that the exemption examines the confidentiality practices of the submitter, not any other person. For example, Executive Order 12,600 directs agencies to "establish procedures to notify *submitters*

of records containing confidential commercial information” before that information is disclosed under FOIA. 52 Fed. Reg. 23781 (1987) (emphasis added). It does not require agencies to notify people other than the submitters. *See id.* Similarly, DOL’s regulations for disclosing “[c]onfidential commercial information” under exemption 4 require that “a *submitter*”—not anyone else—be given notice and an opportunity to object to disclosure. 29 C.F.R. § 70.26 (emphasis added).

Thus, courts have required that the submitter of the information keep that information confidential to justify the government’s exemption 4 withholding. In *Food Marketing Institute*, the Supreme Court discussed favorably the D.C. Circuit’s decision in *Critical Mass*. The Supreme Court explained that “there, the court ... adhered to a much more traditional understanding of the statutory term ‘confidential,’ holding that information qualifies as confidential ‘if it is of a kind that would customarily not be released to the public *by the person from whom it was obtained.*’” *Food Mktg. Inst.*, 588 U.S. at 438 (quoting *Critical Mass*, 975 F.2d at 879–80; emphasis added). And *Critical Mass* made clear that “the agency invoking Exemption 4 must meet the burden of proving the *provider’s* custom”—not the confidentiality practice or custom of anyone who did not provide the information to the government. 975 F.2d at 879 (emphasis added); *see Ctr. for Auto Safety v. NHTSA*, 244 F.3d 144, 148 (D.C. Cir. 2001) (stating that “in assessing customary disclosure, the court will consider how the particular party customarily treats the information, not how the industry as a whole treats the information”).

District courts have applied *Critical Mass*'s requirement that the confidentiality inquiry under exemption 4 examine the practices of the submitter—not anyone else. See *Occupational Safety & Health L. Project, PLLC v. DOL*, 2022 WL 3444935, at *7 (D.D.C. Aug. 17, 2022) (“After *Food Marketing Institute*, courts in this district have concluded that *Critical Mass* and its progeny provide the governing standard for assessing confidentiality under Exemption 4.”); see also *Gov’t Accountability Project v. DOT*, 2025 WL 721734, at *2 (D.D.C. Mar. 6, 2025) (“The submitting entity must actually treat the information as confidential, meaning it is not shared freely, customarily disclosed, or made publicly available.”); *Occupational Safety & Health L. Project*, 2022 WL 3444935, at *8 (“[T]he test here is not about general custom in the industry, nor by the government. Rather, the issue is how [the company that submitted the information to the government] customarily treats the information, not how its peers do.”); *WP Co. v. SBA*, 2021 WL 2982173, at *6 (D.D.C. July 15, 2021) (stating that “the Government must do something to establish how the particular information-providers customarily and actually treat the relevant material”); *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 110, 112 (D.D.C. 2019) (examining whether the government established “submitter custom for purposes of Exemption 4” and rejecting the government’s assertion of the exemption where the government’s statement was “at best ambiguous as to whether it in fact refers to the practices of the[] submitters”); accord *Am. Soc’y for Prevention of Cruelty to Animals v. APHIS*, 2021 WL 1163627, at *6 (S.D.N.Y. Mar. 25, 2021) (“Discerning whether an agency has satisfied [*Food Marketing Institute*’s] first prong is an

‘objective’ inquiry under which ‘the agency invoking Exemption 4 must meet the burden of proving the submitter’s custom.’” (internal brackets omitted)).

B. In this case, this Court has already held that DOL did not satisfy its burden to show that the submitters treat the information as confidential. *See* MSJ Op. 8 (“[L]ooking only to how Growers treat the information in question, DOL has not discharged its burden to demonstrate that the withheld information properly falls under Exemption 4.”); *id.* at 14 (similar). Because only the submitters’ confidentiality practices are relevant, DOL’s withholding is unlawful. *See WP Co.*, 2021 WL 2982173, at *6 (holding that “in the absence of any evidence regarding the particular practices of even a single [submitter] with respect to [the information at issue], [the court] cannot sustain [the agency’s] decision to withhold that information”).

Nonetheless, DOL argues that exemption 4 may justify its withholding if third-party buyers—but not the submitters—“treat this information as confidential and would be foreseeably harmed by its release.” MSJ Op. 15. The buyers’ practices, however, are not pertinent to the exemption 4 inquiry because the government did not obtain the information from the buyers. In any event, DOL fails to satisfy its burden to justify its withholding even if the Court considers the buyers’ practices, in light of the extensive evidence showing that the buyers did not, in fact, customarily or actually keep the information secret. *See* Pl. SJ Mem. 11–15; Pl. SJ Reply 13–16 (discussing evidence that the buyers shared the identities of their growers with others outside their companies, including in marketing materials and public filings).

II. The information is not within the scope of exemption 4 because it was not submitted under a government assurance of privacy.

DOL's withholding is unlawful for another reason. For the reasons explained in FLOC's earlier summary judgment briefs, information is "confidential" under exemption 4 only where the government obtained the information after assuring the submitter that it would remain confidential. The text of exemption 4, the legislative history of the exemption, and *Food Marketing Institute* all support this point. See Pl. SJ Mem. 15–23; Pl. SJ Reply 16–17.

Here, the record contains no evidence showing that any of the growers provided the buyer names to the DOL investigator with any assurance that the information would remain private. See Pl. SJ Reply 18 (discussing the "complete absence of evidence" in the record). Indeed, DOL concedes that the "evidence" it had cited to show privacy assurances *does not exist* in the record of this case. See Def. R. 56.1 Resp. ¶ 71 (admitting that the "Tobacco Decl." and "A&M Decl." are not in the record), ECF 25. And DOL's assertion that the growers received privacy assurances is belied by the evidence showing that DOL informed the growers that it would disclose the buyer names absent a response from the grower, *id.* ¶ 43, and that DOL has previously disclosed this type of information publicly, *id.* ¶¶ 76–78. Moreover, no privacy assurances were given to the buyers, and DOL does not assert otherwise. See *generally* Def. SJ Mem. 17–19, ECF 22; Def. SJ Opp. & Reply 13–14, ECF 25.

III. Section 552(a)(8)(A) requires disclosure of the withheld information.

In addition, under FOIA's 2016 amendments, 5 U.S.C. § 552(a)(8)(A)(i), to justify its withholding, the government must meet its "independent and meaningful

burden” to show that disclosure of the information would result in foreseeable harm to an interest protected by exemption 4. *Leopold v. DOJ*, 94 F.4th 33, 37 (D.C. Cir. 2024) (citation omitted); *see id.* (stating that the 2016 amendments “further limited withholding pursuant to all exemptions, except Exemption 3”). “[A]pplication of the foreseeable-harm standard to Exemption 4 requires a showing of ‘foreseeable commercial or financial harm to the submitter upon release of the contested information.’” *Shteynlyuger v. Centers for Medicare & Medicaid Servs.*, 698 F. Supp. 3d 82, 124 (D.D.C. 2023); *see Seife v. FDA*, 43 F.4th 231, 240 (2d Cir. 2022) (stating that the exemption’s “protected interests are the submitter’s commercial or financial interests, and the ... foreseeable harm requirement refers to harm to the submitter’s commercial or financial interests”). The government has not met that burden here.

As this Court has already found, “nothing ... in the record establishes foreseeable harm” to the growers. MSJ Op. 7; *see id.* (stating that “there is no competent evidence to establish that those Growers would be foreseeably harmed by disclosure”). DOL argues that disclosure would result in harm to the third-party buyers, but it does not explain why exemption 4 protects their interests when they did not submit the information. Even assuming, however, that buyers’ interests are relevant, there is no foreseeable harm to the buyers. Although DOL has asserted that disclosure would cause competitive harm to the buyers because other buyers would seek to “poach” growers, the information at issue is approximately a *decade* old. Any purported competitive harm from disclosure is significantly diminished in light of the passage of time. *See Gov’t Accountability Project v. FDA*, 206 F. Supp. 3d 420, 442

(D.D.C. 2016) (stating that “federal courts have recognized that the competitive injury that Exemption 4 is designed to prevent can be significantly mitigated if the disclosed information is stale”). Moreover, the notion that disclosure would cause the growers identified here to be poached does not ring true, because the growers are ones who violated federal law, and the tobacco companies purport to want to eliminate such employers from their supply chain. *See, e.g.*, RJ Reynolds Decl. ¶ 32, ECF 22. Further, DOL’s assertion of harm is belied by the evidence showing disclosures of this type of information, in the past and in many of the reports here, including by two of the objecting buyers (RJ Reynolds and Universal Leaf), with no showing of resulting harm. *See* Pl. SJ Mem. 23–25.

CONCLUSION

For the foregoing reasons and the ones set forth in FLOC’s earlier summary judgment briefs, DOL’s withholding of the names of tobacco buyers is unlawful, and the Court should order that DOL promptly disclose that information.

Dated: January 12, 2026

Respectfully submitted,

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