

INTRODUCTION

As plaintiff Farm Labor Organizing Committee (FLOC) explained in its opening memorandum, the assertion of Freedom of Information Act (FOIA) exemption 4 by defendant U.S. Department of Labor (DOL) to withhold tobacco buyer names from its investigative reports violates FOIA for three independent reasons. First, the information is not “confidential” because the persons from whom the government obtained the information—the submitters (here, the tobacco growers)—do not keep it private. Second, the information is not “confidential” because the growers did not provide the information to DOL under an assurance of privacy. Third, disclosure would not result in foreseeable harm to an interest protected by exemption 4.

In its renewed motion, DOL does not argue that it has met its burden either to show that it provided privacy assurances or to show foreseeable harm. Instead, DOL contends that the information is “confidential” even if the submitters do not keep it private because third parties—tobacco buyers—purport to do so. DOL’s position misreads the exemption, which applies only where the submitter of the information treats it confidentially. This Court has already ruled that DOL failed to make that showing here. *See* MSJ Op. 8, ECF 37.

For the reasons explained in FLOC’s opening memorandum and below, as well as those set forth in FLOC’s 2021 summary judgment briefing, the Court should grant FLOC’s renewed motion, deny DOL’s renewed motion, and order disclosure of the information.

ARGUMENT

For information to be “confidential” under exemption 4, the submitter must treat it as such. Under *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), and its progeny, “[t]he submitting entity must actually treat the information as confidential” for that information to be “confidential” under exemption 4. *Gov’t Accountability Project v. DOT*, 2025 WL 721734, at *2 (D.D.C. Mar. 6, 2025); see FLOC Renewed Mem. 10–12 (collecting cases). DOL agrees that the *Critical Mass* standard is the correct one for assessing confidentiality under exemption 4. See DOL Renewed Mot. 6–7.

DOL wrongly asserts, however, that the court in *Critical Mass* considered how “non-submitter utility companies (among others) treated the reports.” DOL Renewed Mot. 8. The opinion on which DOL relies is a *vacated* panel decision. See *id.* at 6, 8. Even putting that aside, the panel opinion does not support DOL, because it required the agency to “demonstrate that the information it [sought] to shield ‘would customarily not be released to the public *by the person from whom it was obtained.*’” *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281 (D.C. Cir. 1987) (emphasis added), *vacated*, 975 F.2d 871 (D.C. Cir. 1992); see *id.* at 283 (examining the practices of the Institute for Nuclear Power Operations, which submitted the information to the agency). Similarly, the en banc *Critical Mass* decision is clear that “the agency invoking Exemption 4 must meet the burden of proving the *provider’s* custom.” 975 F.2d at 879 (emphasis added); see *id.* at 880 (explaining that the submitter Institute

for Nuclear Power Operations “does not customarily release such information to the public”).

Quoting *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 148 (D.C. Cir. 2001), for the point that the confidentiality “analysis turns on ‘how the particular party customarily treats the information,’” DOL suggests that the “particular party” can be a third party who did not provide the information to the government. DOL Renewed Mot. 7. That assertion ignores the full quotation in *Center for Auto Safety* and misreads the case. Citing the en banc *Critical Mass* decision, *Center for Auto Safety* explains that the court must “consider how the particular party customarily treats the information, *not how the industry as a whole treats the information.*” *Id.* at 148 (emphasis added). There, for instance, the court examined customary disclosure based on the practices of the *submitters*, who were airbag manufacturers and importers that had submitted information to the agency. *See id.* at 146.

DOL cites *Board of Trade of the City of Chicago v. CFTC*, 627 F.2d 392 (D.C. Cir. 1980), as its “leading case” for the notion that information is “confidential” based on the practices of a third party who did not submit the information to the government. DOL Renewed Mot. 5. *Board of Trade*, however, does not support that view. There, the court stated that “information is confidential if it ‘would customarily not be released to the public *by the person from whom it was obtained.*’” 627 F.2d at 404 (emphasis added). In addition, the passage that DOL cites examined the meaning of the words “commercial or financial” in exemption 4. *See id.* at 405–06. It should go without saying that “commercial” and “confidential” are different terms in the statute

with different plain meanings. *Cf.* 5 U.S.C. § 552(b)(4) (exempting “trade secrets and commercial or financial information obtained from a person and privileged or confidential”). “Commercial” considers whether the information itself “is of a commercial nature” or function—i.e., “pertains to the exchange of goods or services or the making of a profit.” *Citizens for Resp. & Ethics in Wash. v. DOJ*, 58 F.4th 1255, 1263 (D.C. Cir. 2023). By contrast, the plain meaning of “confidential” requires the person who imparts or communicates the information to keep it private. *See Food Marketing Inst. v. Argus Leader Media*, 588 U.S. 427, 438 (2019); FLOC Renewed Mem. 7–8. Thus, whereas information is “commercial” based on its nature, information is “confidential” based on its treatment.

Food Marketing Institute does not support DOL’s position that information is confidential based on the practices of a third party, who did not submit the information, if that third party is an “owner” of the information. *See* DOL Renewed Mot. 11–12. In *Food Marketing Institute*, the Supreme Court held that information was “confidential” because the submitters, who were grocery retail stores participating in the Supplemental Nutrition Assistant Program, customarily kept the information private and provided it to the government under an assurance of privacy. *See* 588 U.S. at 434–35. Thus, the Court used “owner” of the information, *see* 588 U.S. at 440, to refer to the submitter of the information to the government. The term did not refer to a third party with a purported “ownership” interest in the information. Other passages in the opinion confirm the point. For example, the Court stated that the plain meaning of the term requires “the person imparting [the information]” to

customarily keep the information private, or at least closely held. *Id.* at 434 (citing contemporary dictionaries). And discussing *Critical Mass* with approval, the Court stated 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.*’” 588 U.S. at 438 (quoting *Critical Mass*, 975 F.2d at 879–80; emphasis added).

The other cases that DOL cites likewise confirm that the *submitter* must keep the information confidential for it to qualify under exemption 4. *See Miami Herald Pub. Co. v. SBA*, 670 F.2d 610, 614 (5th Cir. 1982) (examining whether information was “confidential” because disclosure of the records would “cause substantial harm to the actual competitive position of *the person from whom [the records] were obtained*” (emphasis added)); *Rural Hous. All. v. USDA*, 498 F.2d 73, 79 (D.C. Cir. 1974) (stating that “the information is ‘implicitly and unquestionably not the kind of information which would customarily be released to the public *by the persons from whom it was obtained*’” (emphasis added)); *Benson v. GSA*, 289 F. Supp. 590, 592 (W.D. Wash. 1968) (concluding that a credit report was confidential because it was “furnished by Dun and Bradstreet to [the agency] in ‘strict confidence’”).

Moreover, DOL’s position that information is “confidential” even if the submitter does not keep it secret is contrary to the exemption’s plain meaning, purpose, legislative history, and regulatory and administrative materials. *See* FLOC Renewed Mem. 7–12. As to the statutory text, DOL makes no argument based on the plain meaning of the term “confidential.”

Instead, DOL asserts that interpreting “confidential” to require the submitter to keep the information confidential “collapses” the terms “confidential” and “obtained from a person” and renders the “obtained from a person” term superfluous. DOL Renewed Mot. 8. The terms “obtained from a person” and “confidential,” however, address different requirements under the exemption. The “obtained from a person” requirement limits the universe of records covered by the exemption to those submitted to the government. The “confidential” requirement describes how the information must have been treated for it to be within the exemption’s scope. Thus, reading “confidential” to concern only the person whom the agency “obtained [the information] from” gives effect to each of those parts of exemption 4.

The exemption’s legislative history confirms the point. As FLOC has explained, the congressional reports accompanying the enactment of FOIA explained that exemption 4 covered material that “would not customarily be released to the public by the person from whom it was obtained.” FLOC Renewed Mem. 8 (quoting S. Rep. No. 89-813 at 9 (1965), and citing H.R. Rep. No. 89-1497). That the other pieces of legislative history that DOL cites *also* required submitter confidentiality, *see* DOL Renewed Mot. 9, underscores Congress’s consistent understanding that the exemption can apply only where the information is not customarily disclosed by the person from whom the government obtains it: the submitter.

Moreover, DOL’s regulations and administrative materials support that the exemption requires the submitter to keep the information private, as FLOC explained. *See* FLOC Renewed Mem. 9–10. For example, DOL’s regulations on

exemption 4 require “a submitter” be given notice and an opportunity to object to disclosure and provide no procedure for third parties to do so. 29 C.F.R. § 70.26. In addition, administrative materials direct agencies to establish procedures to notify “submitters of records” of disclosure under FOIA. 52 Fed. Reg. 23781 (1987).

DOL asserts that for Congress to limit the exemption to information that the submitter keeps confidential would be “irrational.” DOL Renewed Mot. 8. Not so. If the submitter does not keep the information private, then it is not “confidential” within the meaning of the statute, regardless of how third parties treat the same information. Indeed, the focus on the submitter reflects the exemption’s twin purposes: (1) to encourage individuals to provide information to the government; and (2) to protect the people submitting that information from competitive harm. *See* FLOC Renewed Mem. 9.

Finally, “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 third party could claim confidentiality over submitted information, even if the submitter does not treat it as confidential, would vastly expand the scope of the exemption, turning on its head FOIA’s “mandate[] [of] a ‘strong presumption of disclosure’ and that the statutory exemptions, which are exclusive, are to be ‘narrowly construed.’” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citations omitted).

CONCLUSION

For the foregoing reasons and the ones set forth in FLOC’s Memorandum in Support of its Renewed Motion for Summary Judgment and FLOC’s 2021 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.

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Respectfully submitted,

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