UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, Plaintiff, v. U.S. DEPARTMENT OF AGRICULTURE, Defendant.	)	Civil Action No. 21-cv-1408 (APM)

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

It is public knowledge that the nation's poultry and meatpacking plants were hotspots for the spread of COVID-19 in Spring 2020, that plants requested federal government intervention when state and local governments attempted to impose infection-control requirements, and that, as workers fell ill and died, many plants temporarily closed or reduced their operations. It is also public knowledge that plants communicated with public health experts and implemented certain protective measures in an attempt to minimize the spread of COVID-19. USDA's assertion that the information at issue concerning these topics is confidential and thus properly withheld under Freedom of Information Act (FOIA) exemption 4 is both unsupported by any admissible evidence and contradicted by the substantial evidence demonstrating that the submitters do not closely guard such information. The information is also not confidential because USDA provided no promise that it would keep the information private; USDA's contrary position rests on a meritless theory of implied privacy assurances. Further, USDA's assertion that information is "commercial" because it relates to a business fails to apply the correct test for "commercial" under exemption 4. Moreover, because USDA fails to identify any interest protected by exemption 4 that would be harmed from disclosure of the withheld information, the FOIA Improvement Act mandates the information's release. The Court should grant plaintiff's motion for summary judgment and order USDA to disclose the withheld information.

ARGUMENT

I. Information about Smithfield's COVID-19 protective measures and reopening of its Sioux Falls plant (*Vaughn* Entry Nos. 1 & 2) is not within the scope of exemption 4.

A. The withheld information is not "confidential" because it was not kept private.

1. Smithfield does not closely guard the information (*Vaughn* Entry Nos. 1 & 2).

Concerning the records designated as *Vaughn* Entry Nos. 1 and 2, which redacted information about certain COVID-19 protective measures and reopening protocols at Smithfield's Sioux Falls plant, USDA has offered no admissible evidence showing that Smithfield customarily and actually kept the information private, as required for information to be confidential under exemption 4. *See Food Marketing Institute v. Argus Leader (FMI)*, 139 S. Ct. 2356, 2366 (2019). USDA cites only its FOIA officer's quotation of an unsworn letter submitted by Smithfield's attorney. *See* Def. Opp. & Reply ("Def. Opp.") 2, ECF No. 21 (citing Def. SOMF ¶ 22, ECF No. 15-2 (citing Graves Decl. ¶ 24, Attachment G, ECF No. 15-3)). As USDA elsewhere concedes, however, the statements in the unsworn letter from Smithfield's counsel are inadmissible hearsay. Def. Opp. 5 ("[i]n response to Plaintiff's hearsay objection," withdrawing USDA's reliance on statements made in the unsworn letter regarding the provision of privacy assurances). And USDA does not dispute that hearsay statements cannot support the agency's withholding. *See* Pl. Mem. 17; *see also Reyes v. EPA*, 991 F. Supp. 2d 20, 24 n.2 (D.D.C. 2014) (stating, in a FOIA case, that "[i]t is well established that if a [party] fails to respond to an argument raised in a motion for summary judgment, it is proper to treat that argument as conceded" (citation omitted)).

Moreover, Smithfield's hearsay statements do not support USDA's withholding in any event. According to USDA's FOIA officer Alexis Graves, Smithfield's attorney asserted that "roughly five people within Smithfield had access to the information contained" in the record. Graves Decl., Attachment G. That purported statement, however, does not demonstrate that

Smithfield "customarily" treated the information as private, as required for information to be confidential under exemption 4. *See FMI*, 139 S. Ct. at 2366 (stating that information must be both "customarily *and* actually treated as private by its owner" for it to be "confidential" (emphasis added)). Lacking "a single affidavit … speaking to the [submitter's] customary treatment of" the information, USDA has failed to meet its burden under FOIA exemption 4. *Lapidus L. Firm, PLLC v. Washington Metro. Area Transit Auth.*, 2021 WL 6845004, at *3 (D.D.C. Feb. 25, 2021).

In addition, USDA's assertion of confidentiality is "called into question by contradictory evidence in the record." *Humane Soc'y of United States v. USDA*, 549 F. Supp. 3d 76, 88 (D.D.C. 2021) (quoting *Gallant v. NLRB*, 26 F.3d 168, 191 (D.C. Cir. 1994)). There is no genuine dispute that Smithfield has freely disseminated both categories of withheld information: (i) information describing Smithfield's COVID-19 protective measures and protocols in reopening the Sioux Falls plant (*Vaughn* Entry Nos. 1 & 2), and (ii) information contained in the Sioux Falls reopening timetable identifying the plant's slaughter capacity, reopening dates, and the number of impacted employees and departments (*Vaughn* Entry No. 2).[1] As to the first category, USDA does not dispute that Smithfield has publicized information about its COVID-19 protective measures and reopening protocols, including for its Sioux Falls plant. *See* Def. Resp. ¶¶ 52–58, ECF No. 21-1. USDA likewise concedes that Smithfield does not treat as confidential several of the COVID-19 protective measures implemented at the Sioux Falls plant. *Compare id.* ¶ 62, *with id.* ¶ 80. Further, as to the information contained in the Sioux Falls reopening timetable, it is undisputed that Smithfield does not treat information about its plant slaughter capacities as confidential, *compare*

[1] USDA does not clarify whether, in withholding the number of impacted employees, it means the number of employees impacted by the reopening schedule or the number of employees that contracted COVID-19. However, neither is "confidential." *See infra* at pp. 3–4; *see also* Pl. Mem. 15, ECF No. 16.

id. ¶ 69, *with id.* ¶ 81, that Smithfield publicly shared information about its reopening schedule, *id.* ¶ 66, and that data about COVID-19 cases at the Sioux Falls facility is publicly available and was shared by Smithfield with government regulators and Smithfield's employees, *id.* ¶¶ 71–72. In addition, the press reported on the number of employees and identities of departments that returned to work at the Sioux Falls plant. *See* Pl. SOMF ¶ 70 (citing news article), ECF No. 16.

Accepting these facts, USDA contends (Def. Opp. 3) that plaintiff has not shown that the specific information that USDA withheld has been publicly disclosed. This argument fails for several reasons. To start, it is USDA's burden to show that the withheld information is "confidential"—not plaintiff's burden to show that it is not. *See Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999). In addition, there is reason to doubt USDA's assertion that the specific information it redacted has not been publicly disclosed. For example, the April 20 and 22, 2020, memoranda from the Centers for Disease Control (CDC) to the South Dakota Department of Health and Smithfield, both of which are publicly available, identify in detail specific screening, distancing, infection control, and masking measures that had been implemented at the Sioux Falls plant and additional measures that the CDC recommended to reduce COVID-19 transmission at that plant. *See* Pl. SOMF ¶¶ 63–64; *see also* Def. Resp. ¶¶ 63–64 (stating "[u]ndisputed" to these facts). To the extent that the withheld information reflects information that is contained in these memoranda (or any other public source), it cannot be "confidential."[2]

[2] Indeed, USDA asserted that the information in the April 20 memorandum was "confidential," *see Vaughn* Entry No. 6, when that memorandum, in fact, had been publicly disclosed. *See* Def. Resp. ¶¶ 47–48. USDA's response is that the record was released publicly after Smithfield informed USDA it was confidential. Def. Opp. 1 n.1. But the record was indisputably made public before USDA filed its motion for summary judgment. It is USDA's burden, not Smithfield's, to satisfy itself that the information is "confidential." USDA's improper withholdings in that record calls into question the assertions that it has made relative to the other records in this case.

Moreover, although information that is in the public domain is obviously not confidential, "public disclosure is a separate matter" from whether the information is "customarily and actually treated as private," as required by *FMI. Animal Legal Def. Fund v. USDA*, 2021 WL 3270666, at *7 n.5 (N.D. Cal. July 30, 2021) (explaining that "[i]nformation can conceivably not be publicly disclosed, but still not be private and confidential"). USDA, however, does not address, and thus fails to satisfy, its burden to demonstrate Smithfield's customary treatment of that information—that is, how it "treats the *type* of … commercial information" that the agency seeks to withhold. *Lapidus Law Firm,* 2021 WL 6845004, at *3 (emphasis added); *see also Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 2022 WL 990744, at *3 (D.D.C. Mar. 31, 2022) (stating that "the relevant inquiry" is how the submitter "treated the *kind* of information it provided" to the agency (emphasis added)). And here, there is no genuine dispute that Smithfield did *not* customarily treat the kind of information withheld as confidential; rather, it publicly disseminated information about its COVID-19 measures and reopening of the Sioux Falls plant, as described above. *See Renewable Fuels Ass'n v. EPA*, 519 F. Supp. 3d 1, 11 (D.D.C. 2021) (stating that "[w]hile a refinery that, for instance, kept its 2015 petition secret while disclosing its 2016 petition '<u>actually</u>' treated its 2015 petition as confidential, it is difficult to say that it '<u>customarily</u>' treated its seeking of relief so"); *Am. Small Bus. League v. DOD*, 2019 WL 4416613, at *3 (N.D. Cal. Sept. 15, 2019) (stating that "Lockheed Martin's selective disclosure of supposed confidential information … undercuts its vague contention that the company 'customarily' treats said information as confidential").

In addition, Smithfield's COVID-19 mitigation measures and protocols would have been apparent—indeed, visible—to the Smithfield workers who returned to work, as well as the workers' representatives. For example, Smithfield publicized that a union representative had received a tour of the protective measures implemented at the plant, Pl. SOMF ¶ 60, and the press

reported information shared by employees about those measures, *see id.* ¶ 61. Where information is widely available to a large group of people who are free to share it, it is not "confidential" under exemption 4. *See, e.g.*, *Farmworker Just. v. USDA,* 2021 WL 827162, at *2 (D.D.C. Mar. 4, 2021); *Animal Legal Def. Fund v. USDA*, 2021 WL 3270666, at *8; *Center for Investigative Reporting v. DOL*, 470 F. Supp. 3d 1096, 1114 (N.D. Cal. 2020).

Finally, USDA offers no response to plaintiff's point that stamping the reopening plan (*Vaughn* Entry No. 2) "not for distribution" does not satisfy USDA's burden to demonstrate that the information is "confidential." Pl. Mem. 16.

2. There is no evidence that South Dakota, the submitter of the record designated as *Vaughn* Entry No. 1, keeps the information private.

USDA's redactions from the South Dakota Department of Health letter are unjustified for an additional reason. That record was submitted to USDA by the then-Chief of Staff for the South Dakota governor, *see* Liu Decl., Ex. 1, but USDA submits zero evidence regarding the confidential treatment of the information by South Dakota. USDA asserts that the lack of evidence is "immaterial," Def. Resp. ¶ 82, but the submitter's treatment of the withheld information is the heart of the confidentiality inquiry under exemption 4. *See FMI*, 139 S. Ct. at 2363. The absence of evidence on that issue is dispositive of USDA's withholding and warrants summary judgment in plaintiff's favor. *See, e.g.*, *Am. Soc'y for Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv.*, 2021 WL 1163627, at *6 (S.D.N.Y. Mar. 25, 2021) (holding that the information was not confidential "[b]ecause the Agencies offer no proof establishing that [the submitter] customarily and actually treats the information as private").

Moreover, the record evidence shows that South Dakota did *not* keep secret the information regarding its assessment, in coordination with the CDC, of Smithfield's COVID-19 mitigation plans at the Sioux Falls plant—that is, the type of information that USDA withheld here. Indeed,

South Dakota officials made public statements to the press identifying the assistance it was providing to mitigate COVID-19 transmission at the Sioux Falls plant. *See* Pl. SOMF ¶ 74 (collecting news articles); *see also* Def. Resp. ¶ 74 (stating "[u]ndisputed ... that Smithfield's collaboration with public health officials [was] generally known to the public"). USDA offers no evidence to the contrary. Because South Dakota was free to share the information that USDA withheld, the information is not "confidential" under exemption 4. *See FMI*, 139 S. Ct. at 2363 (stating that "it is hard to see how information could be deemed confidential if its owner shares it freely").

Ignoring its burden to show that South Dakota keeps the information private, USDA cites (Def. Opp. 2) hearsay statements from a *Smithfield* attorney stating that Smithfield "closely held" the information. But USDA's assertions about Smithfield do not show that the submitter—South Dakota—customarily or actually kept the information private. *See Animal Legal Def. Fund*, 2021 WL 3270666, at *5 (concluding that assertions made by companies that later acquired the submitter companies did not demonstrate that the information was "confidential" where there was no evidence of the specific steps that the submitters took to keep the information confidential).

In any event, not only are Smithfield's statements inadmissible hearsay, *see supra* at pp. 2, but the assertion that Smithfield treats the information as confidential is contradicted by the undisputed evidence showing that Smithfield freely disseminated such information. For example, USDA concedes that Smithfield's collaboration with the state agency "was not a secret," Def. Opp. 3, and that its coordination with public health officials was "generally known to the public," Def. Resp. ¶¶ 74–75.

USDA contends that it was "not the mere fact of Smithfield's collaboration with public health officials, but rather the company's plans for partnering with public health officials and

resuming its operations at a facility that [Smithfield] treated as confidential." Def. Opp. 3. But Smithfield publicized its "plans for partnering with public officials and resuming its operations" at the Sioux Falls facility. *Id.* For example, Smithfield issued a press release stating that "[t]esting, which is being administered by the State of South Dakota, is available to all Smithfield employees prior to returning to work" and that "[m]ore tests will be conducted in the coming weeks as the company slowly ramps us its operations."[3] To the extent that USDA's argument is that the specific withheld information was not publicly disclosed, that does not support USDA's withholding for the reasons explained *supra* (at pp. 4–5).

B. The withheld information is not "confidential" because it was provided without any assurances that USDA would keep the information private.

1. USDA did not provide privacy assurances to South Dakota.

Information is "confidential" only if it was submitted under a government assurance of privacy. Pl. Mem. 19–23. Yet USDA offers no evidence showing that it provided South Dakota, the submitter of the record designated as *Vaughn* Entry No. 1, with any privacy assurances concerning information contained in that record. Accordingly, USDA has failed to satisfy its burden to show that the information contained in that record is confidential under exemption 4. *See Public Justice Fdn. v. Farm Service Agency*, 538 F. Supp. 3d 934, 943 (N.D. Cal. 2021) (concluding that information was not confidential under exemption 4 because "no confidentiality assurance was provided"); *see also* Pl. Mem. 19–23.

[3] Press Release, Smithfield Foods, Smithfield Foods To Reopen Sioux Falls, South Dakota Facility After CDC Conducts Thorough Site Inspection and Affirms Company Meets or Exceeds All Employee Health and Safety Guidance (May 6, 2020), https://www.smithfieldfoods.com/press-room/2020-05-06-Smithfield-Foods-To-Reopen-Sioux-Falls-South-Dakota-Facility-After-CDC-Conducts-Thorough-Site-Inspection-and-Affirms-Company-Meets-or-Exceeds-All-Employee-Health-and-Safety-Guidance.

2. USDA did not provide privacy assurances to Smithfield.

Reversing the position it took in its opening brief, USDA concedes that it provided no express privacy assurances to Smithfield. Def. Opp. 5; *see also* Def. Resp. ¶ 76. USDA asserts that it provided *implied* privacy assurances, but it cites no factual evidence demonstrating that USDA provided implied privacy assurances to Smithfield for the information at issue. Rather, USDA suggests that *all* communications from poultry and meatpacking processors to USDA during the COVID-19 pandemic were made under an implied assurance of confidentiality. According to USDA, because poultry and meatpacking processors are part of the "food and agriculture" sector, and thus part of the nation's "critical infrastructure," and because Executive Order No. 13,917 directed the Secretary of Agriculture to take "all appropriate action" under the Defense Production Act (DPA), the "context in which Smithfield and other meat processors provided" the information imbued it with an implied promise that USDA would keep it confidential. Def. Opp. 5–6.

USDA's argument is meritless. As plaintiff previously explained (Pl. Mem. 24), the executive order and the DPA are irrelevant here. Neither they nor the policy memorandum that designated sixteen sectors of the economy "critical infrastructure"[4] reference confidentiality. Moreover, it is undisputed that USDA did *not* exercise its authority under the DPA to require any meatpacking companies, much less Smithfield, to do anything at all. Def. Resp. ¶ 79. Further, as courts of appeals have explained, and USDA does not contest, the mere designation of an industry as part of the "critical infrastructure" does not create any kind of special relationship between the federal government and private entities within a "critical infrastructure" sector. *See Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 740 (8th Cir. 2021) (rejecting argument that critical infrastructure

[4] *See* Presidential Policy Directive/PPD-21, Critical Infrastructure Security and Resilience (Feb. 12, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.

designation created special relationship between meatpacking companies and the federal government); *see also Mitchell v. Advanced HCS, LLC*, 28 F.4th 580, 590 (5th Cir. 2022) (same, for nursing homes); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 685 (9th Cir. 2022) (same); *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 406 (3d Cir. 2021) (same).

Under USDA's theory of implied assurances, all information that every private entity within any of the 13 sectors of the economy designated as "critical infrastructure" submitted to the government since the onset of the COVID-19 pandemic would have been provided under an "implied assurance" of privacy. Thus, under USDA's theory, private entities in "sectors as broad as 'Commercial Facilities,' 'Financial Services,' and 'Healthcare'" and "categories of workers, including dentists, automotive repair workers, news reporters, and funeral home workers," *Buljic*, 22 F.4th at 740, all were provided with an implied assurance of privacy by the government as to any and all information provided to the government. Such an interpretation has no grounding in the statute that provides a basis for critical infrastructure designations, *see* 42 U.S.C. § 5195c, and is contrary to FOIA's "strong presumption in favor of disclosure." *Pub. Citizen v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (citation omitted).

In contrast, where courts have found implied assurances of confidentiality, they have done so based on the historical confidential treatment of the information or other indicia of government confidentiality. *See Flyers Rts. Educ. Fund, Inc. v. FAA.*, 2021 WL 4206594, at *8 (D.D.C. Sept. 16, 2021) (citing declaration stating that "[f]or decades, [the company] has submitted to the FAA information of the sort sought by Plaintiffs with an understanding and expectation that the FAA would treat it as private"); *see also Am. Small Bus. League v. DOL*, 411 F. Supp. 3d 824, 835 (N.D. Cal. 2019) (noting, among other things, that "[t]he government provided secure portals to transmit documents"). No such evidence exists here. To the contrary, USDA's public release of similar (or

the same, *see infra* at pp. 18) information in other records produced in response to plaintiff's FOIA request suggests that the government does *not* typically treat such information as confidential.

USDA's reliance on *Citizens for Responsibility & Ethics in Washington* v. *Department of Commerce*, 2020 WL 4732095 (D.D.C. Aug. 14, 2020), is misplaced. There, the information concerned communications from a defense contractor to a former White House advisor to help secure the agency's endorsement of the contractor for work for the Romanian government. *Id.* at *1. The court found an implied privacy assurance because the information was provided in the context of "grow[ing] [the contractor's] business in foreign markets," and without such an assurance, the defense contractor "would not seek [the government's] assistance" because the information "could easily fall into the hands of competitors." *Id.* at *4. Here, there is no evidence that absent an assurance of confidentiality, meatpacking plants would not have sought assistance from USDA or other federal agencies during the pandemic. To the extent that USDA's argument is that any information that could fall into the hands of competitors is a context supporting implied privacy assurances, that argument should be rejected as overbroad and contrary to FOIA's strong presumption in favor of public disclosure.

C. The withheld information is not "commercial."

USDA does not explain why information about health and safety requirements to mitigate against COVID-19 transmission, such as the information withheld here, is "commercial" in nature or function, as required to be "commercial" under exemption 4. *See Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002). And USDA does not respond to plaintiff's argument (Pl. Mem. 27) that general descriptions of Smithfield's business operations are not "commercial" under exemption 4. *See 100Reporters LLC v. DOJ*, 316 F. Supp. 3d 124, 140 (D.D.C. 2018). USDA also does not respond to plaintiff's argument (Pl. Mem. 26) that information reflecting "Smithfield's plans for complying with federal guidance" is not necessarily "commercial."

Instead, USDA contends that the information is "commercial" based on vague, generalized (and somewhat inconsistent) assertions that the information relates to Smithfield's business operations.[5] However, as plaintiff has explained (Pl. Mem. 25–27), "[n]ot every bit of information submitted to the government by a commercial entity qualifies for protection under Exemption 4." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *see Public Citizen v. HHS*, 975 F. Supp. 2d 81, 100 (D.D.C. 2013) (stating that it "is plainly incorrect" that "a company has a 'commercial interest' in all records that relate to every aspect of the company's trade or business"); *Chicago Tribune Co. v. FAA*, 1998 WL 242611, at *2 (N.D. Ill. May 7, 1998) ("The mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information[.]").

USDA states that "commercial" information is not "limited only to details about 'Smithfield's marketing and sales programs or contracting processes.'" Def. Opp. 7 (quoting Pl. Mem. 27). But plaintiff never argued that "commercial" was not limited only to such information,[6] and USDA fails to explain why the information here *is* "commercial" within the scope of exemption 4. Further, in responding to plaintiff's argument that the information is not "commercial" because it is stale and does not reveal information about Smithfield's ongoing operations, USDA asserts (Def. Opp. 6) that "it determined" that the withheld information was

[5] *Compare* Def. Mem. 10 (stating that the information "relat[es] to the plant operations and business decisions and practices"), *with* Def. Opp. 6–7 (asserting that the information "reflect[s]" or "describe[s]" "prospective business processes," including potential operational changes, at the Smithfield plant (quoting USDA's *Vaughn* Index Entry Nos. 1 and 2)), *with id.* 7 (asserting that the information is "about a company's operational and business plans").

[6] USDA misquotes plaintiff's argument, which was in the context of distinguishing *Public Citizen v. HHS*, 975 F. Supp. 2d 81 (D.D.C. 2013). *See* Pl. Mem. 27.

commercial. USDA's determination, of course, is not dispositive; the question is whether USDA's determination was correct.

II. The names of the poultry facility and local regulators for which the National Chicken Council requested USDA intervention (*Vaughn* Entry No. 4) are not within the scope of exemption 4.

A. The withheld information is not "confidential."

1. The poultry facility and local regulators were free to share the information, and the National Chicken Council's hearsay statements do not support USDA's withholding.

Although USDA redacted the names of state and local regulatory entities from a record discussing the requirements that the regulators sought to impose on a poultry facility, there is no dispute that those regulatory entities are from Tennessee and Hamilton County. Def. Resp. ¶ 88. USDA also redacted the name of the poultry facility from that same record, but the COVID-19 mitigation requirements that Tennessee and Hamilton County regulators imposed on particular poultry facilities are not "confidential" information.

a. USDA has not submitted *any* evidence regarding whether the poultry facility or the local governments (the Tennessee and Hamilton County officials) treat the information as private. Indeed, as to the poultry facility, USDA admits, Def. Resp. ¶ 92, that "[t]here is no evidence showing that the poultry facility closely guarded the fact that it was discussing with local and State governments the COVID-19 measures or requirements at its facility," Pl. SOMF ¶ 92.

USDA asserts that it is "immaterial" that it submitted no evidence from the local regulators or the poultry facility. Def. Resp. ¶¶ 90–91, 104. USDA is wrong. Here, the withheld information reflects the discussions between the poultry facility and local regulators. Accordingly, USDA's failure to adduce evidence showing that the poultry facility and local regulators keep the information private is fatal to its assertion of exemption 4. *See FMI*, 139 S. Ct. at 2363 (stating that "it is hard to see how information could be deemed confidential if its owner shares it freely").

The fact that the record was submitted by the National Chicken Council (and not the poultry facility or local regulators) does not obviate USDA's burden to show that the poultry facility and local regulators treated the information as confidential. Indeed, courts have concluded that even in circumstances where the submitter asserts that it keeps the information private, the information is not "confidential" if other persons who own or possess the information are able to freely disseminate it. *See New York Times Co. v. FDA*, 529 F. Supp. 3d 260, 282–83 (S.D.N.Y. 2021); *Animal Legal Def. Fund*, 2021 WL 3270666, at *7; *Ctr. for Investigative Reporting*, 470 F. Supp. 3d at 1114; *see also Farmworker Just.,* 2021 WL 827162, at *2

Here, there is no genuine dispute that the local regulators and poultry facility do *not* customarily or actually keep private their interactions regarding the imposition of infection control requirements at a facility. First, USDA acknowledges that news articles have included public statements from Tennessee and Hamilton County officials about their efforts to mitigate COVID-19 at poultry facilities. *See* Def. Resp. ¶¶ 93–94.[7] Second, it is undisputed that poultry companies did not closely guard information discussing their interactions with local and State health departments to reduce COVID-19 transmission at poultry facilities, Def. Resp. ¶ 99, and that news articles and press releases were disseminated where poultry companies made public statements discussing their cooperation with local regulators, *id.* ¶¶ 95–96. Third, USDA concedes that the member poultry plants of the National Chicken Council, as well as the National Chicken Council itself, do not treat as private information requesting USDA intervention against local requirements for COVID-19 protective measures, which was disclosed repeatedly in other records of USDA's

[7] USDA responds "Undisputed" "as to the fact of the news articles" but asserts that the article does not support that the information "was not held confidential by the trade association or its member companies." Def. Resp. ¶ 93. USDA's assertion does not address the relevant point here: that the *local regulators* did not keep the information confidential.

production, but withheld in the record here. *Compare* Def. Resp. ¶ 98 *with* ¶ 114. Fourth, USDA does not dispute, *id.* ¶ 97, that "the coordination between local, State, and federal governments over COVID-19 protective measures at particular poultry facilities was widely reported by the press," Pl. SOMF ¶ 97. Indeed, USDA acknowledges that "state health authorities and the poultry facilities themselves may have the public generally aware that meat and poultry processors were cooperating [with] public health authorities." Def. Opp. 8.

While accepting these facts, USDA nonetheless asserts that the cited public materials do not show that the specific information was publicly disclosed. That argument fails for the same reasons discussed above (*supra* at pp. 4–5): It does not demonstrate that the information was customarily and actually kept private, as is USDA's burden. Because the Tennessee and Hamilton County regulators and the poultry facility were free to share the information contained in the record, that information is not "confidential" under exemption 4.

b. To support its withholding, USDA cites only the assertions in its *Vaughn* index. Those assertions, however, were based on inadmissible hearsay in an unsworn email from the National Chicken Council. *See* Graves Decl., Attachment H (National Chicken Council email to USDA). Again, USDA cannot rely on hearsay statements to satisfy its burden. *See supra* pp. 2.

In any event, the hearsay statements from the National Chicken Council do not show that the information is "confidential." USDA parrots the National Chicken Council's statement that the information was shared with a limited number of National Chicken Council staff. Def. Opp. 8. That assertion, however, does not show that the *local regulators and poultry facility* kept the information private. Indeed, evidence in the record (*see supra* pp. 13–14) demonstrates that they do not. Further, USDA cites the National Chicken Council's statement that the poultry facility provided the information to the National Chicken Council for the purpose of engaging with the

government. As plaintiff has noted (Pl. Mem. 32–33), that statement shows that the company did *not* keep the information closely guarded, because it provided the information with the intent of its further dissemination. USDA offers no response to this point.

2. USDA did not provide privacy assurances as to the withheld information.

USDA submits no evidence showing that USDA provided privacy assurances to the National Chicken Council, local regulators, or the poultry facility as to the withheld information. Instead, USDA concedes that that no express assurances were given here and incorporates by reference the argument for implied privacy assurances that it made for the information contained in the records, designated as *Vaughn* Entry Nos. 1 and 2, about the Smithfield Sioux Falls plant. Def. Opp. at 8 n.5. USDA's argument fails for the reasons discussed above. *See supra* at I.B.2. Because USDA did not provide confidentiality assurances as to the information it withheld from the record here, the information is not "confidential" under exemption 4. *See* Pl. Mem. 19–23.

B. The withheld information is not "commercial."

USDA offers no response to plaintiff's arguments that the withheld information is not "commercial" within the meaning of exemption 4. Instead, it simply asserts (Def. Opp. 8), without argument or citation to evidence, that the information is "commercial in nature because it involved the company's plans for continuing to operate during the pandemic." USDA's generalized assertion is inadequate to show that the information is "commercial" within the meaning of exemption 4. *See Pub. Citizen Health Research Grp.*, 704 F.2d at 1290 (stating that "[n]ot every bit of information" is "commercial"); *see also 100Reporters II*, 316 F. Supp. 3d at 141 (concluding that information in the company's compliance monitor's work plan was not "commercial").

III. The names of poultry and meatpacking facilities in records identifying plant closures, reopening dates, and slaughter capacities (*Vaughn* Entry No. 5) are not "confidential."

A. The poultry and meatpacking companies did not keep the information private.

Plant closures, reopenings, and reduced capacities for individual facilities are matters of public knowledge, as demonstrated by the numerous public sources identifying that information. USDA submits no contrary evidence, and thus it has failed to show its withholding of the names of poultry and meatpacking plants from records identifying closures and capacity reductions is "confidential."

Notably, USDA no longer argues, as it did in its opening memorandum, that the withheld information is "confidential" because USDA marked the records "internal" and "not for public release." Instead, USDA seeks to flip the burden under exemption 4 to plaintiff, contending that *plaintiff* has not shown that the submitters (the poultry and meatpacking companies) customarily or actually keep the information private. *See* Def. Opp. 9–10. But it is USDA's—not plaintiff's—burden to justify its withholdings. *Pub. Citizen Health Research Grp.* 185 F.3d at 904–05. And by failing to submit any evidence regarding whether the poultry and meatpacking companies customarily or actually treat the information as private, USDA has failed to satisfy that burden. Indeed, USDA does not make any assertion in any of the materials it submitted regarding whether the companies treat the information as confidential. Citing its *Vaughn* index entry, USDA states (Def. Opp. 9) that "[t]he business submitters objected that release of the information" would result in competitive harm. Competitive harm, however, is not the applicable standard for whether information is "confidential." *See FMI*, 139 S. Ct. at 2364–65 (overruling the *National Parks* competitive harm test). And, in any event, the *Vaughn* index entry does not state that the business submitters made any such objection. *See Vaughn* Index at 9.

Further, USDA does not appear to dispute that information about plant closures, reopening dates, and normal slaughter capacities is *not* "confidential"; indeed, USDA accepts that such information has been publicly disclosed. For example, the press, poultry and meatpacking companies, and even USDA have publicly disseminated information about plant closures and reopenings. *See* Pl. SOMF ¶¶ 119–24 (collecting public sources). Likewise, poultry and meatpacking companies, trade groups, and USDA have publicly shared information about plant processing capacities. Pl. SOMF ¶¶ 125–28 (collecting public sources). USDA again responds that these public disclosures do not show that the specific information that was withheld is publicly available, but that does not show that the information is "confidential." *See supra* at pp. 4–5.

What's more, contradicting USDA's assertion that the specific information it redacted here is "confidential," some of the information that USDA redacted appears to have been affirmatively disclosed by USDA in other records produced in response to plaintiff's FOIA request:

Closed Pork Plants	***Date closed***	***Date to Open***
1. Smithfield, Sioux Falls, SD (18,500 head)	04/11/2020	TBD
2. Tyson, Columbus Junction, IA (10,000 head)	04/06/2020	04/13/2020
3. Yosemite, Modesto, CA (1,400 head)	04/08/2020	04/09/2020

Closed Pork Plants	***Date closed***	***Date to Open***
1. (b) (4) (18,500 head)	04/11/2020	TBD
2. (b) (4) (10,000 head)	04/06/2020	04/13/2020
3. (b) (4) (1,400 head)	04/08/2020	04/09/2020

Compare Liu Decl., Ex. 9, ECF No. 16-2 (4th Interim Response at 45), *with* Def. Ex. 2, ECF No. 21-2 (*Vaughn* Entry No. 5, Final Response at 217). The submitters, however, do not treat as confidential the information that USDA released to plaintiff. Graves Decl. ¶ 16 (stating that "the submitters are no longer objecting to any of the information that USDA determined to release to Plaintiff"). Accordingly, there is no dispute that Smithfield Foods, Tyson Foods, and Yosemite Foods do *not* treat information about normal slaughter capacities, plant closures, and reopening dates as confidential.

Next, seeming to accept that information about normal slaughter capacities, plant closures, and reopening schedules is *not* "confidential," USDA argues that its assertion of exemption 4 is proper because the withheld information would disclose reduced slaughter capacities for particular plants. *See* Def. Opp. 9 (stating that the withheld information "does not only state which plants were closed," but also that "the chart lists … the reduced slaughter capacities, as compared to the plants' normal slaughter capacities"). USDA's argument fails for several reasons. To start, USDA mischaracterizes the redacted records. The redacted internal USDA memorandum does not identify reduced slaughter capacities. *See* Def. Ex. 2 (Final Response at 696–97). As for the redacted internal USDA charts, no data about reduced slaughter capacities appears at all on many of the pages of those charts. *See id.* (4th Interim Response at 52, 74–75, 84–85; Final Response at 218, 548–549, 725–726, 729, 734–35, 738, 745, 749, 766–67, 770).[8] In addition, on another 3 pages of the charts, for several of the plants identified on those pages, the redacted information would reveal closures only. *See id.* (4th Interim Response at 51, 83 (redacting names of certain plants at reduced slaughter capacities, and also redacting names of *other* plants that are closed); Final Response at 217 (same)). Thus, at a minimum, the Court should order USDA to release the redacted information on the pages of records that would not disclose reduced slaughter capacities.

Nonetheless, information about reduced slaughter capacities is not "confidential." USDA submits no evidence and does not argue that poultry and meatpacking companies customarily or actually keep such information private. To the contrary, USDA concedes that "[p]oultry and meatpacking companies publicly shared information stating that certain plants were operating at reduced capacities," Pl. SOMF ¶ 130, and that "[s]pecific numeric data reflecting the reduced

[8] On some pages of redacted charts, the withheld information would identify plants that have current slaughter capacities of zero, but that is the same as a plant closure, which USDA does not dispute is not "confidential" information.

slaughter capacities of specific meat and poultry plants were publicly reported by the press, disseminated by trade groups, and shared with union representatives," *id.* ¶ 131. *See* Def. Resp. ¶¶ 130–31 (stating "Undisputed" in response to these statements).

USDA asserts (Def. Opp. 10) that the public sources cited in plaintiff's opening memorandum do not "show that the business submitters share this sort of information [reduced slaughter capacities] with their competitors or with the public." But the public sources included materials where the meatpacking companies themselves stated that the plants were operating at reduced capacities, *see* Pl. SOMF ¶ 130—contradicting USDA's assertion that the companies customarily closely guarded information about their reduced capacities. To the extent that USDA is repeating its argument that the public disclosures do not reflect the specific withheld information, that argument fails for the reasons discussed *supra* (at pp. 4–5).

B. USDA did not provide privacy assurances as to the withheld information.

Again, USDA concedes that no express privacy assurances were given and incorporates by footnote its argument regarding implied privacy assurances for the records discussing Smithfield's Sioux Falls plant. For the same reasons discussed above (at I.C & II.B), USDA's argument should be rejected. Because USDA fails to show that it provided the submitters here with privacy assurances for the withheld information, the information is not confidential. *See* Pl. Mem. 19–23.

IV. USDA fails to identify any interest protected by exemption 4 that would be harmed by the information's release.

Because USDA fails to show that disclosure of the withheld information will result in reasonably foreseeable harm to an interest protected by exemption 4, the FOIA Improvement Act mandates the information's release. *See* 5 U.S.C. § 552(a)(8)(A)(i). Responding to plaintiff's point that USDA failed to show that disclosure of the withheld information would dissuade poultry and meatpacking companies from submitting like information in future national emergencies, USDA

asserts that plaintiff's argument is "conclusory" and fails to create a genuine dispute of fact. Def. Opp. 10. It is, however, USDA's burden to "articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld." *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021). USDA's generalized assertions here fall well short of its burden. *See id.*

USDA contends that its withholding is "necessary … to protect" the nation's critical infrastructure and that "necessary cooperation between industry and government" during a national emergency "would be severely thwarted" if the withheld information were not confidential. *Id*. at 11. USDA, however, fails to explain how release of the withheld information would result in harm to such an interest. Moreover, the upshot of USDA's argument is that, for all industry participants in the nation's critical infrastructure, the release of any piece of information would result in reasonably foreseeable harm to the country's critical infrastructure. That argument is unreasonably broad and would severely undercut FOIA's "strong presumption in favor of disclosure." *Pub. Citizen*, 533 F.3d at 813.

CONCLUSION

For the foregoing reasons, and the reasons set forth in plaintiff's memorandum in support of its motion for summary judgment, plaintiff's motion should be granted, and the Court should order that USDA disclose the withheld information.

Dated: April 19, 2022

Respectfully submitted,

/s/ Wendy Liu

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