UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OCCUPATIONAL SAFETY & HEALTH LAW PROJECT, PLLC, Plaintiff, v. U.S. DEPARTMENT OF LABOR, Defendant, and CENTURY ALUMINUM COMPANY, Intervenor-Defendant.	)	Civil Action No. 21-cv-02028

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

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INTRODUCTION

On the asserted basis of FOIA exemption 4, the Department of Labor (DOL) withheld the terms of an Abatement Plan Agreement embodying a determination by the Occupational Safety and Health Administration (OSHA) establishing Century Aluminum Company's compliance obligations under OSHA's beryllium exposure standard. Because the Abatement Plan Agreement reflects *OSHA*'s decision about the extent of Century's legal compliance obligations, it is not information "obtained from a person" and, therefore, falls outside the scope of exemption 4. In addition, information defining a company's obligations under law, like the information withheld here, is not "commercial" under exemption 4. Further, because DOL fails to show that Century closely guarded the information or provided it under an assurance of privacy, it is not "confidential." Finally, the FOIA Improvement Act mandates the release of the information because disclosure would not result in reasonably foreseeable harm to an interest protected by exemption 4.

ARGUMENT

I. The terms of the Abatement Plan Agreement were not "obtained from" a person because the Agreement sets out OSHA's determination of Century's compliance obligations under the beryllium standard.

Information that "constitutes th[e] agency's own analysis" or decision is not itself information "obtained from a person" under exemption 4. *S. All. for Clean Energy v. Dep't of Energy*, 853 F. Supp. 2d 60, 68 (D.D.C. 2012). DOL does not appear to contest this legal principle. *See* Def. Opp./Reply ("Def. Opp.") 7–8 (ECF No. 27). Here, it is undisputed that the redacted passages of the Abatement Plan Agreement are "the terms setting forth the requirements that OSHA determined Century would have to follow to comply with the beryllium standard," Def. Resp. to Pl. SOMF ("Def. Resp.") ¶ 49 (ECF No. 27); that "OSHA agreed to the terms set forth in the Abatement Plan Agreement," *id.* ¶ 58; and that OSHA's agreement reflected that "OSHA has

determined that compliance with th[ose] terms … would satisfy Century's obligations" under specified provisions of the beryllium standard, Keen Decl., Ex. 2 (Abatement Plan Agreement) ECF No. 17-3); *see also* Pl. SOMF ¶ 59 (ECF No. 22).[1] Because the withheld information reflects *OSHA*'s determinations concerning Century's compliance obligations, it was not "obtained from a person" under exemption 4.

DOL cites no authority holding that an agreement in which an agency defines a regulated entity's compliance obligations—or anything even resembling such an agreement—is information "obtained from a person." Nonetheless, DOL contends that the withheld information does not reflect the agency's own analysis because "OSHA's hand in developing this [Abatement] Plan was minimal at most," Def. Opp. 8, whereas Century expended "significant resources" in developing the plan, *id.* 7. DOL states that OSHA "only '*reviewed*' detailed submissions provided by Century" and "statements by Century" before "OSHA … determined that compliance with the terms of the Abatement Plan[] … would satisfy Century's obligations" under the beryllium standard. *Id.* 8 (citing Keen Decl., Ex. 2 and Def. Resp. ¶ 59).

DOL misses the point. The key question is not the extent of OSHA's involvement in developing drafts of the Abatement Plan Agreement, but whether "the redacted information—despite relying upon other information obtained from outside the agency—constitutes that agency's own analysis." *S. All. for Clean Energy*, 853 F. Supp. 2d at 68. In such circumstances, the information "is the agency's information, and not 'obtained from a person' under Exemption

[1] DOL purports to "[d]ispute[]" that the redacted information reflects OSHA's decision based on its analysis of the adequacy of Century's proposed abatement plans. *See* Def. Resp. ¶ 59. DOL's response, however, acknowledges that the Abatement Plan Agreement, which DOL says "speaks for itself," expressly states that, "in light of" information submitted by Century, "OSHA has determined that compliance" with the redacted terms would satisfy Century's obligations under the beryllium standard. *Id.* Because the evidence that DOL cites confirms plaintiff's statement in paragraph 59, the statement is undisputed. *See* LCvR 7(h)(1).

4." *Id.* Here, according to the face of the Abatement Plan Agreement, OSHA reviewed information submitted by Century and "determined" that Century's compliance with the terms of the Abatement Plan Agreement would satisfy Century's requirements under the beryllium standard. Keen Decl., Ex. 2 (Abatement Plan Agreement). The information OSHA is withholding—its determination of what measures it deems comply with its beryllium standard—is not a "slight[] modifi[cation]," Def. Opp. 7 (quoting *S. All. For Clean Energy*, 853 F. Supp. 2d at 69), or "summar[y] or reformulation[]" of Century's information, *id.* 8 (quoting *Pub. Citizen Health Research Group v. Nat'l Insts. of Health*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002), and *Judicial Watch, Inc. v. Export-Import Bank,* 108 F. Supp. 2d 19, 28 (D.D.C. 2000)). Rather, OSHA's determination of what measures would satisfy Century's obligations could not have been "obtained" from Century because it did not exist until OSHA reached it. Release of the withheld information would constitute "disclosure of the agency's own executive actions" that "did not come into existence" until OSHA acted. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148–49 (2d Cir. 2010).

DOL tries to contest this point, asserting that "it is common practice" for aluminum producers like Century to develop and maintain beryllium control measures and denying that the agreement was "the catalyst" for creation of those measures. Def. Opp. 9. But the information withheld here is not about what Century would do of its own accord; it is about what OSHA agreed would constitute compliance with the beryllium standard. OSHA's determination that the specified measures comply with the standard is what takes the information here outside the scope of exemption 4's "obtained from a person" requirement.

There is no meaningful distinction between the information here and the information at issue in *Bloomberg* and *Detention Watch Network v. ICE*, 215 F. Supp. 3d 256 (S.D.N.Y. 2016).

Both cases concerned information that the government agency had withheld from final government contracts, and in both, the courts rejected the government's argument that the terms of the contract were "obtained from a person" because the information did not differ substantially (or, in *Bloomberg*, at all) from the terms that were included in the initial submissions by private entities. *Bloomberg*, 601 F.3d at 149; *Detention Watch Network*, 215 F. Supp. 3d at 263. The courts reasoned that the information was not "obtained from a person" because the terms of the final government contracts did not exist until the government agency "took executive action" by granting a loan (*Bloomberg*) or executing a contract with the private detention facility (*Detention Watch Network*). *Bloomberg*, 601 F.3d at 149; *Detention Watch Network*, 215 F. Supp. 3d at 263 (internal quotation marks omitted). Just as the information in those two cases was not "obtained from a person" because it comprised the terms of final contracts between the government agency and a private entity, so too the redacted information here was not "obtained from a person" because it comprises the terms OSHA agreed would constitute compliance by Century.

DOL observes that neither case is "controlling," Def. Opp. 9, but the courts' analyses are persuasive, and DOL points to no contrary D.C. Circuit precedent. DOL tries to distinguish *Bloomberg* on the theory that, "while the Federal Reserve Banks may be in the business of issuing loans, OSHA is not in the business of manufacturing aluminum." Def. Opp. 9. But OSHA is in the business of "ensur[ing] safe and healthful working conditions for workers" by enforcing regulatory standards under the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*, including the beryllium standard. *See* OSHA, About OSHA, https://www.osha.gov/aboutosha. Determining what measures constitute compliance with OSHA standards is central to that core executive function.

DOL does not attempt to distinguish *Detention Watch Network*. Instead, citing *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000), DOL asserts that *Detention Watch Network* "smacks against governing law in this district" holding that information that is "negotiated" or incorporated in an "agency-generated document" retains exemption 4 protection. Def. Opp. 10. *Judicial Watch*, however, said nothing about "negotiated" information and did not involve the withholding of an agency's own *determination* or other action. There, this Court held that information "concern[ing] [an] insurance applicant's financial status and/or export plans" was "obtained … from the insurance applicants themselves, commercial lenders for the applicant, or a purchaser of the goods at issue." 108 F. Supp. 2d at 28. Although several of the records "*relate[d] to* insurance policies that the Bank approved and issued," *id.* at 31 (emphasis added), the terms of the insurance policies themselves were not at issue. Thus, *Judicial Watch* is not contrary to *Detention Watch*'s holding that the terms of final government agreements are not "obtained from a person."

Citing *Judicial Watch* and *Public Citizen Health Research Group v. NIH*, 209 F. Supp. 2d 37, 44 (D.D.C 2002), DOL contends that courts in this District have "squarely rejected" the argument that the terms of a settlement agreement with the government are not information "obtained from a person." Def. Opp. 8. Neither case so held; indeed, neither even involved a settlement agreement. *See Judicial Watch*, 108 F. Supp. 2d at 28, 31–33; *Health Research Group*, 209 F. Supp. 2d at 41. DOL characterizes *Health Research Group* as holding that some information "generated in negotiations" falls within exemption 4, Def. Opp. 8, but what is at issue here is not information Century "generated" in negotiations, but rather *OSHA*'s final determination of what

measures comply with the beryllium standard.[2] Neither *Judicial Watch* nor *Health Research Group* held that such information is "obtained from a person" under exemption 4.

Finally, DOL suggests that plaintiff's citation of *Philadelphia Newspapers, Inc. v. HHS*, 69 F. Supp. 2d 63 (D.D.C. 1999), and *Fisher v. Renegotiation Board*, 355 F. Supp. 1171 (D.D.C. 1973), is misplaced because *Philadelphia Newspapers* involved a government agency audit, *see* 69 F. Supp. 2d at 66, and *Fisher* concerned excess-profit calculations by the agency, 355 F. Supp. at 1174, neither of which was requested by plaintiff here. Those factual distinctions make no difference. As plaintiff explained (Pl. S.J. Mem. 13), the courts in both cases concluded that the information at issue was not "obtained from a person," even though it involved materials initially submitted by an outside person, because it constituted the government's analysis, which took the form of an audit (*Philadelphia Newspapers*) or excess-profit calculations (*Fisher*). Similarly, here, the information redacted from the Abatement Plan Agreement comprises OSHA's analysis—indeed, "determination," Keen Decl., Ex. 2—of the terms that would satisfy Century's compliance under the beryllium standard.

II. Information defining Century's legal and compliance requirements under the beryllium standard is not "commercial."

DOL does not contest that the withheld information constitutes Century's legal and compliance obligations under the beryllium standard. *See* Def. Resp. ¶¶ 49–51, 55–56, 58–59. Nonetheless, citing *100Reporters LLC v. DOJ* (*100Reporters I*), 248 F. Supp. 3d 115, 137 (D.D.C. 2017), and *Public Citizen v. HHS* (*Public Citizen I*), 975 F. Supp. 2d 81, 109 (D.D.C. 2013), DOL asserts that "information that relates to a company's legal or compliance obligations may still be

[2] Plaintiff's opening memorandum explains other reasons why *Health Research Group*'s discussion of "negotiated" rates does not support DOL. *See* Pl. S.J. Mem. 17–19 & n.5 (ECF No. 22). DOL does not respond to those points.

deemed 'commercial or financial' information as long as it *relates* to business or trade." Def. Opp. 11. DOL's argument is unavailing because the information at issue does not merely relate to Century's compliance obligations. Rather, the information *defines* Century's compliance obligations under the beryllium standard. Def. Resp. ¶¶ 49–51, 55–56, 58–59.

DOL points to no case that holds that information defining a company's obligations under law is "commercial" under exemption 4. By contrast, in *100Reporters LLC v. DOJ* (*100Reporters II*), 316 F. Supp. 3d 124, 141 (D.D.C. 2018), the court held that descriptions of "the obligations of [the company] and the [corporate monitor] under the plea agreement" were not "commercial" under exemption 4. Nothing in the text of exemption 4 or the ordinary meaning of "commercial" supports the notion that exemption 4 applies to a company's obligations under law.

Further, neither *100Reporters I* nor *Public Citizen I* held that compliance information is "commercial" if it merely "relates to" business or trade, as DOL asserts. Indeed, *Public Citizen I* rejected that very argument. *See* 975 F. Supp. 2d at 100 (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"). Similarly, in *100Reporters I*, the court nowhere held that all compliance information related to the business's operations was "commercial." *See* 248 F. Supp. 3d at 134–37. Indeed, the court in that case later held that certain compliance information was *not* "commercial," rejecting after an *in camera* review the defendants' assertion that the information "contain[ed] reams of information relating to [the company's] operations." *100Reporters II*, 316 F. Supp. 3d at 140. As the Circuit has instructed, "not 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).

Information about a company's compliance obligations is not "commercial" because compliance information is not, in and of itself, commercial in nature or purpose, as required for information to be "commercial" under *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002). *See* Pl. S.J. Mem. 33–36. For example, the court in *New York Times Co. v. DOJ*, applying the D.C. Circuit's test for "commercial" and analyzing *Public Citizen I* and *100Reporters I*, as well as subsequent decisions in those cases (*Public Citizen v. HHS* (*Public Citizen II*), 66 F. Supp. 3d 196, 208 (D.D.C. 2013), and *100Reporters II*), held that information about a company's implementation of a compliance program under its plea agreement was *not* "commercial." 2021 WL 371784, at *10 (S.D.N.Y. Feb. 3, 2021). As *New York Times Co.* explained, the *Public Citizen* and *100Reporters* courts determined that "information about or related to a compliance program" is "commercial" "only when it is intertwined with other information that can fairly be described as commercial." 2021 WL 371784, at *10. DOL responds that *New York Times Co.* "has no precedential value," Def. Opp. 13, but that court's analysis is instructive because it expressly applied D.C. Circuit law and interpreted decisions from this District, including the cases DOL cites.

Further, DOL misconstrues plaintiff's argument as being that compliance information is "commercial" only if it is "'inextricably intertwined' with other information that reveal[s] basic commercial operations … or is 'transactional' in nature." Def. Opp. 13 (citing *New York Times Co.*). *New York Times Co.* did not hold, nor does plaintiff contend, that compliance-related information can be "commercial" *only* if it falls into those two categories. Rather, information defining a company's compliance obligations is not *itself* "commercial"; compliance-related information is "commercial" only if it is intertwined with other information that is "commercial"—

that is, information that, in itself, is "commercial" in nature or purpose. *See* Pl. S.J. Mem. 33–34, 36.

Here, DOL fails to show that the compliance requirements withheld from the Abatement Plan Agreement are similar to information courts have found to be "commercial." DOL does not dispute that the information does not fall within any of the categories of information that the courts in *Public Citizen* and *100Reporters* determined was "commercial," as summarized by the court in *New York Times Co*.[3] The compliance terms at issue here are unlike the promotional or transactional information that *Public Citizen I* and *100Reporters I* concluded was "commercial." *See Pub. Citizen I*, 975 F. Supp. 2d at 109; *100Reporters I*, 248 F. Supp. 3d at 136–37. Further, the compliance and training documents that *100Reporters I* determined were "commercial" are unlike the information here, which does not merely "pertain[] to" or "discuss" the company's compliance program, 248 F. Supp. 3d at 137, but rather *establishes* the company's compliance obligations under the beryllium standard.

DOL contends that the withheld information is "commercial" because Century has a "business interest," Def. Opp. 11, and "commercial stake," *id.* 14, in the information, which "serves as a 'highly valuable playbook,'" *id.* 12, for maintaining profitable operations "while

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[3] The court in *New York Times Co.* summarized *Public Citizen I* and *II* and *100Reporters I* and *II* as determining that the following was "commercial":

> (i) "sales statistics, profits and losses, and inventories," *100Reporters II*, 316 F. Supp. 3d at 142; (ii) "references to finance functions, mergers and acquisitions practices, and sales and marketing," or information about "country operations, projects, contracts, and bids," *100Reporters I*, 248 F. Supp. 3d at 136; (iii) "information about interactions between the companies' salespeople and customers," or "how the companies promote their products," *Pub. Citizen II*, 66 F. Supp. 3d at 208; and (iv) "extensive information about the [company's] marketing and sales programs and contracting processes," *Pub. Citizen I*, 975 F. Supp. 2d at 109.

New York Times Co., 2021 WL 371784, at *12.

maintaining compliance with beryllium exposure regulations," Harbath Decl. ¶ 16 (ECF No. 17-4). Although information is "commercial" if the submitter "has a commercial interest" in it, *Baker & Hostetler, LLP* v. *Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006), "not every bit of information" pertaining to a business is "commercial" within the meaning of exemption 4, *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290. DOL cites only one case—*Public Citizen II*—to support its assertion that information about a "highly valuable playbook" is "commercial." But the portion of that case that DOL cites is the court's analysis of whether the information was "confidential" under exemption 4, not whether it was "commercial." *See Pub. Citizen II*, 66 F. Supp. 3d at 210. And DOL does not respond to plaintiff's demonstration (Pl. S.J. Mem. 36) that Century's expenditure of resources to develop the Abatement Plan Agreement does not make the information "commercial."

Further, DOL contends that the information is "commercial" because it includes information about engineering and work practice controls and housekeeping measures, which "directly affect Century's day-to-day business operations" and profitability. Def. Opp. 11. DOL, however, offers no support for the notion that where, as here, the information does not merely "concern" Century's implementation of abatement measures, but rather sets forth Century's legal requirements under the beryllium standard, such information is "commercial" under exemption 4. None of the cases that DOL cites involves information establishing a company's requirements under a regulatory standard.[4]

[4] *See Majuc v. DOJ*, 2022 WL 266700, at *5 (D.D.C. Jan. 28, 2022) (information describing "banking protocols and analyses of [company] transactions," financial embargoes and sanctions, and legal advice concerning the company's compliance with embargoes and sanctions); *Leopold v. DOJ*, 2021 WL 124489, at *3, 6 (D.D.C. Jan. 13, 2021) (involving "sensitive banking information" and the independent monitor's "findings and assessment" of a bank's internal anti-money laundering and sanctions compliance program); *Cornucopia Inst. v. USDA*, 2018 WL 4637004, at *11 (D.D.C. Sept. 27, 2018) (information about organic dairies' "production output").

III. The withheld information is not "confidential."

A. DOL misconstrues the summary judgment standard.

DOL's objection (Def. Opp. 2–6) to plaintiff's responses to paragraphs 19, 23, and 26–31 of DOL's statements of fact, which DOL submitted in asserting that the information is confidential, misconstrues DOL's burden at summary judgment, Federal Rule of Civil Procedure 56(c), and Local Civil Rule 7(h).

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), explains that summary judgment is warranted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Where a party with the burden of proof fails to identify evidence that could support a finding in its favor on an issue, its opponent is not required to come forward with evidence to contest an unsupported factual assertion. *See id*. at 323–24. Moreover, if a party presents "evidence … on a dispositive issue [that] is subject to conflicting interpretations, or reasonable persons might differ as to its significance, summary judgment is improper." *Greenberg v. FDA*, 803 F.2d 1213, 1216 (D.C. Cir. 1986) (FOIA case). Thus, in responding to an assertion of fact made by a party bearing the burden of proof, the opposing party need not produce evidence to dispute the purported fact, but rather can point to the absence of proper support for the assertion of purported fact. *See* Fed. R. Civ. P. 56(c)(1)(A)–(B) (a party can respond by citing to record evidence *or* by "showing that the materials cited do not establish the absence or presence of a genuine dispute"); Fed. R. Civ. P. 56, advisory committee's note to 2010 amendment (stating that "[s]ubdivision (c)(1)(B) recognizes that a party need not always point to specific record materials"). Local Civil Rule 7 does not and cannot change the requirements of Rule 56. *Alexander v. FBI*, 691 F. Supp. 2d 182, 193 (D.D.C. 2010) (stating that "the Court must interpret the local rule to be consistent with the requirements of the Rules of Civil Procedure"), *aff'd*, 456 F. App'x 1 (D.C. Cir. 2011).

Here, the agency bears the burden to establish that the requirements of exemption 4 are met. *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999). In responding to DOL's assertions of fact, plaintiff properly disputed DOL's assertions because they were controverted by other record evidence, or the evidence that DOL cited failed to support DOL's assertions of fact that DOL claimed were undisputed. *See* Pl. Resp. ¶¶ 19, 23, 26–27, 29–30 (citing to record evidence controverting DOL's assertion); *see also id.* ¶¶ 27, 28, 30–31 (explaining that the evidence cited by DOL did not support the absence of a genuine issue of material fact). Because plaintiff's responses satisfy Rule 56(c) and Local Civil Rule 7(h), the Court should reject DOL's request to deem admitted under Rule 56(e) its assertions of purported fact.

Further, DOL objects to several of plaintiff's responses that cite to a declaration by Randy Rabinowitz, counsel for United Steelworkers (USW), based on its assertion that Ms. Rabinowitz's testimony "bumps against what appears to be improper lay opinion testimony." Def. Opp. 6. Ms. Rabinowitz's testimony, however, is based on her over forty years of personal experience in the occupational safety and health regulatory field, *see* Rabinowitz Decl. ¶ 2, and is thus admissible lay opinion testimony. *See Atlanta Channel, Inc. v. Solomon*, 2021 WL 4243383, at *3 (D.D.C. Sept. 17, 2021) (concluding that witness testimony that "relied on personal observations from more than thirty years in the television industry to come up with baselines about what certain station features were worth" was admissible lay opinion testimony). DOL cites Federal Rule of Evidence 701(b), but Ms. Rabinowitz's testimony satisfies that rule because it is "rationally based on [her] perception" based on the facts and experience she describes and "helpful to …the determination of a fact in issue"—that is, whether the information was private or closely guarded. *See* Fed. R. Evid. 701(b).

B. DOL fails to satisfy its burden to show that Century customarily and actually keeps such information secret.

1. DOL adduces no evidence regarding Century's customary treatment of information disclosing its legal and compliance obligations.

DOL submits no evidence attesting to Century's customary treatment of agreements with government agencies establishing Century's compliance obligations, as required for DOL to show that information is "confidential" under exemption 4. *See Food Mktg. Inst. v. Argus Leader Media* (*FMI*), 139 S. Ct. 2356, 2366 (2019). The absence of evidence on that issue is dispositive of DOL's withholding and warrants summary judgment in plaintiff's favor. *See Lapidus Law Firm, PLLC v. Wash. Metro. Area Transit Auth.*, 2021 WL 6845004, at *3 (D.D.C. Feb. 25, 2021) (stating that to satisfy its burden under exemption 4, the government must submit evidence showing "how the provider treats *the type* of financial or commercial information an agency seeks to withhold" (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)).

More broadly, DOL adduces no evidence regarding Century's customary treatment of information disclosing requirements under a regulatory standard. By contrast, as DOL does not dispute, variance orders, abatement plans, and settlement agreements between a company and OSHA—which identify the terms by which a company satisfies an OSHA standard—have been publicly released by OSHA and other companies. *See* Def. Resp. ¶¶ 62, 65, 71.[5] DOL asserts that "[p]laintiff has failed to show that *Century*'s Abatement Plan [Agreement] has been published

[5] DOL purports to "[d]ispute" plaintiff's statement that variance orders are required by regulation to be made publicly available, asserting that "[t]he OSH Act and the cited regulation speak for themselves." Def. Resp. ¶ 65. Because the cited regulation, 29 C.F.R. § 1905.6, confirms plaintiff's statement, the statement is undisputed. *See* LCvR 7(h)(1).

anywhere," Def. Opp. 20, but it is DOL's burden to show that Century customarily and actually keeps the information secret, not plaintiff's burden to show that Century publicly discloses it. *See Pub. Citizen Health Research Grp.*, 185 F.3d at 904–05. In addition, DOL contends that the Abatement Plan Agreement is not a variance order or the kind of settlement agreement or abatement plan that DOL would customarily post on its website. *See* Def. Opp. 20–21. But DOL does not contest that the Abatement Plan Agreement shares the defining characteristic of such records: It sets forth OSHA's agreement concerning the measures needed to comply with an applicable regulatory standard.[6] That such information is routinely made public refutes any assertion that it is sensitive or proprietary information that Century customarily or actually keeps private.[7]

2. The information contained in the Abatement Plan Agreement is not "confidential" because Century provided Ms. Rabinowitz with a draft of the Abatement Plan Agreement without any confidentiality restriction.

There is no genuine dispute that Century, in an email to Ms. Rabinowitz, admitted that the information contained in the draft Abatement Plan Agreement was not confidential and sought to assert confidentiality over only the final agreement. *See* Harbath Decl., Attachment B. Put differently, Century did not object to disclosure of any facts concerning the nature of its operations contained in the draft; it sought to assert confidentiality only over *OSHA's* ultimate determination

[6] *Cf. Agric. Retailers Ass'n v. DOL*, 837 F.3d 60, 65 (D.C. Cir. 2016) (concluding that a memorandum issued by OSHA "amounts to a standard within the meaning of the OSH Act" because the court "consider[s] the [m]emorandum's '*practical effect*,' not 'its formal characteristics'" (emphasis added)).

[7] DOL asserts that Ms. Rabinowitz's statement that the Abatement Plan Agreement is, as a practical matter, the equivalent of a permanent variance is "unsupported opinion testimony and legal argument." Def. Resp. ¶ 66. Ms. Rabinowitz, however, is competent to testify whether, based on her personal knowledge and experience, terms redacted from the Abatement Plan Agreement are the functional equivalent of a permanent variance from a regulatory standard. *See supra* p. 12.

of Century's compliance obligations. DOL contends that this fact is "irrelevant" because Century's admission was made in negotiations over a confidentiality agreement that was never executed. Def. Resp. ¶¶ 40–41. The context in which Century made the admission, however, does nothing to affect the key point: Century's disclaimer of confidentiality over the draft agreement shows that it does not customarily or actually keep secret the information about the engineering and work practice controls and housekeeping measures contained in the draft.

DOL asserts that "Ms. Rabinowitz understood that" the draft agreement that she received from OSHA was provided "on the condition of confidentiality and for settlement purposes only." Def. Opp. 17. That assertion not only contradicts Century's own admission, *see* Harbath Decl., Attachment B, but also lacks support in the record evidence DOL cites. As DOL does not dispute, counsel for OSHA provided Ms. Rabinowitz with a copy of the draft agreement without informing Ms. Rabinowitz of any confidentiality restriction. Def. Resp. ¶ 34; *see also* Rabinowitz Decl., ¶ 7 (ECF No. 22-1). DOL's assertion that Mike Wright of USW represented to Century that USW would keep a February 2018 draft of the agreement confidential, *see* Def. Resp. ¶ 38, does not show that any such representation from Mr. Wright extended to the draft agreement that Ms. Rabinowitz received in April 2018.[8] Ms. Rabinowitz also received the draft from *OSHA*, not Mr. Wright, and without any knowledge of any discussions of confidentiality between Mr. Wright and Century. *See* Rabinowitz Decl. ¶ 8. DOL's assertion that OSHA "confirmed with Century" before

[8] Indeed, DOL has not submitted evidence showing that the draft that Century sent to Mr. Wright in February 2018 is the same document as the draft that OSHA sent to Ms. Rabinowitz in April 2018. Further, according to the email that DOL cites, Mr. Wright's purported agreement covered the "couple of documents" that Century sent to Mr. Wright in February 2018. *See* Harbath Decl., Attachment A. The email does not include any purported statements from Mr. Wright agreeing to keep confidential any documents received *after* February 2018. *See id.*

releasing the draft agreement and that it would release only those parts relevant to USW, *see* Def. Opp. 17, does nothing to suggest that the information provided was confidential.

DOL also notes that the draft Abatement Plan Agreement was labeled "CONFIDENTIAL TREATMENT REQUESTED DRAFT RULE 408 COMMUNICATION," *see* Def. Opp. 17 (citing Baird Decl. ¶ 9 (ECF No. 27-1)), but Federal Rule of Evidence 408 is a limited evidentiary privilege, not a confidentiality requirement. Such a marking is not dispositive of whether the record is "confidential," as DOL recognized when it released parts of the final Abatement Plan Agreement, which contains a near-identical marking. *See* Keen Decl., Ex. 2 at 1 (labeled "CONFIDENTIAL TREATMENT REQUESTED RULE 408 COMMUNICATION").

Finally, there is no genuine dispute that the draft agreement contains general descriptions of standard engineering and work practice controls that are routinely used in the industry to comply with OSHA standards, and that those descriptions are similar to the ones that OSHA usually includes in its assessment of a standard's technological feasibility, which is publicly available in the Federal Register. *See* Pl. SOMF ¶¶ 42, 44 (citing Rabinowitz Decl. ¶ 11). Although DOL asserts that these statements are "[d]isputed," it does not cite record evidence controverting them. *See* Def. Resp. ¶ 42 (citing Harbath Decl. ¶¶ 14–15, which are not contrary to plaintiff's statement); *see also id.* ¶ 44 (citing no record evidence). Instead, DOL seems to dispute plaintiff's statements on the ground that the final Abatement Plan Agreement sets forth requirements specifically applicable to Century, *see id*. ¶¶ 42, 44, but that observation is not contrary to the statement's description of the *nature* of those requirements.

3. Century does not closely guard the information because such information is disclosed in the written exposure control plan.

DOL asserts that Century "customarily keeps private" the information in the Abatement Plan Agreement as confidential because Century "guards" its engineering and work practice

controls and housekeeping measures "in the same way any aluminum manufacturer tightly guards their process efficiencies." Def. Opp. 15. The evidence that DOL cites, which primarily describes aluminum manufacturing, *see* Def. SOMF ¶¶ 24–26, does not support the conclusion that Century customarily guards such information, let alone customarily guards it closely. *See also* Pl. Resp. ¶ 26 (disputing DOL's statement (citing Rabinowitz Decl. ¶ 11)).

Moreover, "the court must examine whether the information actually is kept and treated as confidential, not whether the submitter considers it to be so." *Animal Legal Def. Fund v. USDA*, 2021 WL 3270666, at *8 (N.D. Cal. July 30, 2021) (quoting *Ctr. for Investigative Reporting v. DOL*, 2020 WL 2995209, at *4 (N.D. Cal. June 4, 2020)). Century is required by law to disclose to employees and their representatives a "written exposure control plan," which DOL does not dispute contains information that "overlaps," Def. Opp. 21, with the information contained in the Abatement Plan Agreement. *See* 29 C.F.R. § 1910.1024(f)(1)(iii); *id.* (citing § 1910.1020(e)); *see also* Rabinowitz Decl. ¶¶ 25–27. DOL's assertion that Century's employees are required under a company policy to preserve the confidentiality of the plan, *see* Def. Opp. 22 (citing Supp. Harbath Decl. ¶¶ 3–4 (ECF No. 27-3)),[9] does not demonstrate that the workers are actually prevented from disclosing the information in the written exposure plan. *See Animal Legal Defense Fund*, 2021 WL 3270666, at *6 (rejecting the agency's assertion that information was "confidential" because the company's "employees are required to 'sign an agreement to maintain the confidentiality of all information'" where that agreement "was not a contract" and there was no evidence of a nondisclosure agreement). DOL offers no evidence showing that Century's employees were contractually prevented from disclosing the information in the written exposure control plan.

[9] DOL has not submitted a copy of Century's policy into the record, so it is unclear whether the policy would cover all of the information contained in the written exposure plan or what steps Century's employees must take in order to keep covered information confidential under the policy.

C. The information was not provided under a government assurance of privacy.

1. A government assurance of privacy is required for information to be "confidential."

DOL does not meaningfully engage with plaintiff's legal arguments (Pl. S.J. Mem. 24–29) that a government assurance of privacy is required for information to be "confidential" under exemption 4. Indeed, DOL makes no effort to ground its argument in the text or history of exemption 4 or the Supreme Court's discussion of "confidential" in *FMI*.

DOL wrongly asserts that the parties "agree[]" that "the status of governing law in this district" is that no court has held that privacy assurances are required for information to be "confidential" under exemption 4. Def. Opp. 23. True, the D.C. Circuit has not ruled on the question following *FMI*, and the court in *Renewable Fuels Ass'n v. EPA*, 519 F. Supp. 3d 1 (D.D.C. 2021), held that assurances are not required, while other district courts have treated the question as an open one and have assumed without deciding that assurances are required.[10] However, the D.C. Circuit's pre-*National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) precedents, which the Supreme Court cited favorably in *FMI*, interpreted "confidential" to require a government promise of confidentiality. *See FMI*, 139 S. Ct. at 2363 (citing *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971), and *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970)). Thus, the "status of governing law" in this Circuit, Def. Opp. 23, remains that "confidential" requires a government assurance that it will keep the information private. *See also Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971) (concluding that "[o]bviously, a bare list of names and addresses of employees which employers are required by

[10] *See, e.g.*, *Pub. Citizen Found. v. DOL*, 2020 WL 9439355, at *10 (D.D.C. June 23, 2020); *Citizens for Resp. & Ethics in Wash. v. Dep't of Com.*, 2020 WL 4732095, at *3 (D.D.C. Aug. 14, 2020); *Flyers Rts. Educ. Fund, Inc. v. FAA*, 2021 WL 4206594, at *8 (D.D.C. Sept. 16, 2021).

law to give the Board, *without any express promise of confidentiality*, and which cannot be fairly characterized as 'trade secrets' or 'financial' or 'commercial' information is not exempted from disclosure by Subsection (b)(4)" (emphasis added)).

Moreover, as plaintiff explained (Pl. S.J. Mem. 27), at least one recent district court decision outside this District has held that privacy assurances are required for information to remain "confidential" under exemption 4. *See Public Justice Found. v. Farm Service Agency*, 538 F. Supp. 3d 934, 942–43 (N.D. Cal. 2021). DOL does not address *Public Justice*'s holding or reasoning, instead wrongly insisting that "no court has yet held" that government assurances of privacy are required and citing cases predating *Public Justice*. Def. Opp. 23.

DOL relies principally on *Renewable Fuels Ass'n v. EPA*, 519 F. Supp. 3d 1, where the court declined to hold that privacy assurances are required on the ground that *Critical Mass* foreclosed such a ruling. As plaintiffs explained, however, *Renewable Fuels* was wrongly decided, and nothing in *Critical Mass* mandates the conclusion that *Renewable Fuels* reached. *See* Pl. S.J. Mem. 27–29. DOL responds to none of plaintiff's arguments.

DOL further asserts that "whether the agency provided an assurance of privacy is [*at most* considered] relevant to determining whether commercial information … is confidential." Def. Opp. 23 (citing *Shapiro v. DOJ*, 2020 WL 3615511, at *26 (D.D.C. 2020)) (emphasis added). DOL, however, misquotes *Shapiro* by substituting the phrase "at most considered" for *Shapiro*'s actual statement that assurances are "undoubtedly" relevant to whether information is "confidential." *Shapiro*, 2020 WL 3615511, at *26. Indeed, in *Shapiro*, the court held that the government's withholding was "in error" not only because the information was not actually treated as private by its owner, but also because "nothing indicates that the pages in question were 'provided to the government under an assurance of privacy.'" *Id.* (quoting *FMI*, 139 S. Ct. at 2366).

2. DOL fails to show that the government provided Century with any promises that it would keep the information confidential.

Although a government assurance of confidentiality may be either express or implied, *see Citizens for Resp. & Ethics in Wash.*, 2020 WL 4732095, at *3, neither was provided here. None of DOL's arguments demonstrates that DOL provided express privacy assurances. DOL contends that express assurances were provided based on a footnote in the Abatement Plan Agreement stating that "OSHA will evaluate Century's designation" of the information as confidential "in accordance with 29 C.F.R. § 70.26 and applicable law," Keen Decl., Ex. 2 at 1 n.1, and a statement in a Century declaration that Century would not have entered into the settlement agreement absent privacy assurances. *See* Def. Opp. 24. Neither demonstrates that DOL provided an express promise of confidentiality, for the reasons that plaintiff has already explained. Pl. S.J. Mem. 30–31. DOL further asserts that it "expressly agreed to process" the information in accordance with 29 C.F.R. § 70.26, Def. Opp. 25, but nothing in that regulatory provision, which sets forth DOL's procedures in responding to FOIA requests that might include "confidential commercial information," provides an express promise of confidentiality. *See* 29 C.F.R. § 70.26. Interpreting the regulation, or DOL's processing of information under that regulation, as an express promise would mean that DOL has promised confidentiality for *everything* submitted to it.

DOL has submitted no evidence in the record that proves the existence of a government promise of confidentiality. A declaration from an OSHA attorney, Edmund Baird, quotes from and attaches an October 2020 email from Joseph Gilliland, a DOL attorney, that states that "we agreed to keep the agreement confidential to the extent possible," Baird Decl., Ex. 4 (ECF No. 27-2), but Mr. Baird's citation of Mr. Gilliland's statement does not prove the existence of any purported confidentiality agreement. Neither Mr. Baird's declaration nor Mr. Gilliland's email identifies how or when such an agreement was made or illuminates the scope of the purported agreement, let

alone provides the words of the claimed agreement. And although there is no doubt that Mr. Gilliland made the out-of-court statement, the government cites no basis for the admissibility of such a statement to prove the truth of the matter asserted: that such an agreement in fact existed. Although courts have permitted hearsay statements in FOIA cases "when assessing the adequacy of an agency's search" and have permitted FOIA declarants to "rely on information obtained through inter-agency consultation," *Humane Soc'y of United States v. Animal & Plant Health Inspection Serv.*, 386 F. Supp. 3d 34, 44 (D.D.C. 2019), DOL points to no case permitting hearsay in considering whether privacy assurances were made. Moreover, Mr. Gilliland's statement, even if considered, does not support the existence of an express assurance of confidentiality. To the contrary, the phrase "to the extent possible" leaves open the possibility that DOL might have to disclose the information, for example, in response to a FOIA request. Indeed, the Abatement Plan Agreement expressly acknowledged that DOL might receive a FOIA request for the information. *See* Keen Decl., Ex. 2 at 1 n.1. The government does not provide an assurance of confidentiality in circumstances where the submitter is on notice that the information "may be disclosed." *Pub. Just. Found.*, 538 F. Supp. 3d at 942; *see also Humane Soc'y of United States v. USDA*, 549 F. Supp. 3d 76, 90–91 (D.D.C. 2021).

DOL also notes that it "denied the United Steelworkers a copy of the final settlement agreement on account that it had assured Century that it would keep the agreement confidential," Def. Opp. 25, but the fact that DOL withheld the information on that asserted ground is not evidence of an express promise.

Citing *Citizens for Resp. & Ethics in Wash.* (*CREW*) v. *Dep't of Commerce*, 2020 WL 4732095, at *3, DOL contends that only "some assurance of confidential treatment" is sufficient to satisfy exemption 4. Def. Opp. 25. DOL reads *CREW* incorrectly. Read in context, the court's

use of the word "some" plainly refers to the kind of assurance—i.e., one that is either express or implied—rather than the amount of evidence needed to prove the existence of an assurance. *See* 2020 WL 4732095, at *3.

Finally, DOL fails to show that the government provided an implied assurance of privacy. DOL's argument for an implied assurance boils down to the position that if the evidence it cites to establish an *express* assurance fails to do that much, it must at least suffice to show an implied assurance. But DOL cites none of the kinds of circumstances that give rise to implied assurances. For example, courts have found implied assurances of privacy based on the historical treatment of the information or other objective indicia that the government would keep it confidential. *See Flyers Rts. Educ. Fund*, 2021 WL 4206594, at *8 (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"). Even in *CREW*, cited by DOL, the court found implied assurances based on "[t]he context in which [the company] provided [the government] information—to grow its business in foreign markets." 2020 WL 4732095, at *4. DOL offers no support for the notion that a settlement agreement with the government establishing compliance terms carries with it an implied promise of confidentiality.

IV. DOL has failed to satisfy its burden to release all non-exempt, segregable information.

In response to plaintiff's objection that DOL failed to submit any evidence demonstrating that it satisfied its segregability burden under FOIA, DOL now submits a declaration from Lee Grabel, an agency officer who processed plaintiff's FOIA request. *See* Grabel Decl. (ECF No. 27-4). That declaration makes generalized and conclusory assertions that DOL released all reasonably

segregable information. *Id.* ¶¶ 4–6. Such statements do not satisfy the government's burden under FOIA. *See Ctr. for Biological Diversity v. EPA*, 279 F. Supp. 3d 121, 152 (D.D.C. 2017).

Moreover, there is evidence that the withheld information likely includes reasonably segregable information outside the scope of exemption 4. *See* Pl. S.J. Mem. 37–38.[11] DOL should be ordered to produce all reasonably segregable information that is not within the scope of exemption 4.

V. No foreseeable harm to the interests protected by exemption 4 would result from disclosure of the withheld information.

Because disclosure of the information in the Abatement Plan Agreement would not 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).

DOL does not dispute that exemption 4 does not protect an interest in obtaining a commercial advantage from concealing the degree to which a company is subject to regulatory requirements different from those applicable to others in the industry. *See* Def. Opp. 28. Instead, DOL contends that the information "does not reflect the manner" of Century's non-compliance with the beryllium standard, but rather "lays out the measures by which Century must take to come *into* compliance" with the standard. *Id.* The information, however, sets forth the requirements that OSHA determined *Century* would have to follow under the beryllium standard—i.e., *Century*'s requirements under law. *See* Keen Decl., Ex. 2; *see also* Def. Resp. ¶¶ 49–51. Disclosure of that information would not harm an interest protected by exemption 4.

[11] For example, DOL acknowledges that "drafts of the Abatement Plan [Agreement] reference state Clean Air Act regulations." Supp. Harbath Decl. ¶ 5.

DOL is inconsistent about what foreseeable-harm standard it asks the Court to apply. In its motion, DOL quoted (Def. S.J. Mem. 18, ECF No. 17-1) from the standard set forth in *Center for Investigative Reporting v. CBP*, which provides:

> To meet [the foreseeable-harm] requirement, the defendants must explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would harm an interest protected by this exemption, such as by causing genuine harm to the submitter's economic or business interests and thereby dissuading others from submitting similar information to the government.

436 F. Supp. 3d 90, 113 (D.D.C. 2019) (internal citations and marks omitted). Now, DOL asserts that it did *not* argue that the *Center for Investigative Reporting* standard was the correct standard, and that the *National Parks* "substantial competitive harm" test is "more instructive." Def. Opp. 26. DOL does not succeed under either test.

DOL fails to show that, under the *National Parks* test, disclosure of the Abatement Plan Agreement would result in reasonably foreseeable harm to an interest protected by exemption 4. DOL mistakenly states that plaintiff does not dispute that disclosure of the information will cause Century substantial competitive harm. *See* Def. Opp. 27. To the contrary, as plaintiff explained, DOL fails to show that disclosure of the regulatory requirements to which only Century is subject will result in competitive advantage for other companies where Century's competitors must comply with the beryllium standard itself, not the requirements in the Abatement Plan Agreement. *See* Pl. S.J. Mem. 39–40. Thus, although DOL asserts repeatedly that disclosure of the withheld information would result in substantial competitive harm, *see* Def. Opp. 27–28, none of the evidence that DOL cites demonstrates that such harm would result here, where OSHA permits only Century to satisfy the beryllium standard through the controls set forth in the Abatement Plan Agreement.

DOL also does not succeed under the *Center for Investigative Reporting* standard for foreseeable harm. DOL suggests that the *Center for Investigative Reporting* standard is met by

satisfying only "prong one" of the standard, Def. Opp. 26—i.e., "harm to the submitter's economic or business interest." But there are *two* required prongs to the test. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 113 ("such as by causing genuine harm to the submitter's economic or business interests *and* thereby dissuading others from submitting similar information to the government" (emphasis added)). Here, DOL fails to show that the second prong is met. It points to no evidence showing that submitters would be dissuaded from submitting like information in the future. Instead, DOL asserts that "there is [] an obvious chilling effect" should the information be released because "a business, like Century, may no longer want to submit a petition for review" to challenge an OSHA standard. Def. Opp. 26–27; *id.* 28–29. Even on the unlikely assumption that encouraging petitions for review is an exemption 4 interest, such a speculative assertion fails to satisfy the agency's burden. *See Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021). DOL offers no support for the notion that disclosure of the terms by which a company must comply with a regulatory standard would "chill" other companies from seeking to challenge other regulatory standards in order to reach similar settlements. In addition, DOL does not satisfy the first prong of the *Center for Investigative Reporting* test—genuine harm to Century's economic or business interests—for the same reasons DOL has not demonstrated that disclosure of the information will result in substantial competitive harm.

CONCLUSION

For the foregoing reasons, and the ones 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 DOL to disclose the information redacted from the Abatement Plan Agreement.

Dated: April 25, 2022

Respectfully submitted,

/s/ Wendy Liu

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