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

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff Occupational Safety & Health Law Project (OSH Law Project) moves for summary judgment in this Freedom of Information Act case against Defendant U.S. Department of Labor (DOL). In support of this motion, OSH Law Project submits the accompanying Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment; Plaintiff's Response to Defendants' Statement of Facts and Plaintiff's Cross-Statement of Undisputed Material Facts; Declaration of Randy Rabinowitz and accompanying exhibits; and a proposed order.

Dated: January 24, 2022

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act (FOIA) case, plaintiff Occupational Safety & Health Law Project (OSH Law Project) seeks the terms by which the Occupational Safety and Health Administration (OSHA) has defined Century Aluminum Company's obligations under an OSHA health standard that regulates workers' occupational exposure to beryllium in general industry, 29 C.F.R. § 1910.1024. This information was redacted from an agreement between OSHA and Century (the Abatement Plan Agreement) that is part of a settlement agreement resolving Century's petition for review of the beryllium standard. Defendant U.S. Department of Labor (DOL) asserts that the withheld information is "confidential" and "commercial" information "obtained from a person" within the scope of FOIA exemption 4.

DOL's claim that the terms defining Century's compliance obligations under the beryllium standard are exempt from public disclosure is wrong for four independent reasons. First, the information at issue was not "obtained from a person" within the meaning of exemption 4 because it embodies executive action determining a standard governing regulated conduct. Specifically, the information reflects OSHA's determination of the terms that would satisfy Century's obligations under the beryllium standard. Because that information did not exist before OSHA agreed to those terms by entering into the Abatement Plan Agreement and the settlement agreement resolving Century's petition, it was generated from within the government, not "obtained from" Century.

Second, the information from the Abatement Plan Agreement is not "confidential" under exemption 4. DOL has not satisfied its burden to show that the information is customarily and actually treated as private, and DOL has not asserted that it provided any assurance that it would keep the Abatement Plan Agreement private.

Third, the information is not "commercial" within the meaning of exemption 4 because it defines Century's *legal* requirements under the beryllium standard. Such information is neither of a commercial nature nor does it serve a commercial function.

Finally, the information should be released under the FOIA Improvement Act of 2016. Exemption 4 does not protect an interest in concealing the degree to which a company is subject to regulatory requirements different from those applicable to other companies, and disclosure of information contained in an agreement with the government would not impede DOL's access to similar information in the future.

The Court should grant plaintiff's motion for summary judgment, deny defendants' motion for summary judgment, and order DOL to disclose the information redacted from the Abatement Plan Agreement.

FACTUAL BACKGROUND

A. The Beryllium Standard and Century's Petition for Review

1. Beryllium is a metal used in "a variety of industries," including the construction, metalworking, telecommunications, and automotive industries. *See* Occupational Exposure to Beryllium, 82 Fed. Reg. 2470, 2480 (Jan. 9, 2017). "[I]nhalation exposure to beryllium, as well as [] skin exposure to beryllium" can result in a worker's "sensitization" to beryllium, resulting in the development of

chronic beryllium disease and serious lung disease. *Id.* at 2492 (internal citations omitted). In 2017, OSHA determined that, under the permissible exposure limits set forth in its then-existing rule, employees exposed to beryllium "face[d] a significant risk of material impairment to their health," including an "increased risk of developing chronic beryllium disease and lung cancer." *Id.* at 2470. OSHA therefore issued a new final rule on occupational exposure to beryllium. *Id.*

OSHA's beryllium standard sets "new permissible exposure limits" and "include[s] other provisions to protect employees, such as requirements for exposure assessment, methods for controlling exposure, respiratory protection, personal protective clothing and equipment, housekeeping, medical surveillance, hazard communication, and recordkeeping." *Id.* OSHA issued three separate standards—one each for general industry, construction, and shipyards—"in order to tailor requirements to the circumstances found in these sectors." *Id.*

The beryllium standard for general industry established, among other things, requirements that employers use "engineering and work practice controls" and "housekeeping" measures to reduce beryllium exposure to employees, and thus mitigate the risk of sensitization to beryllium and serious disease. Paragraph (f)(2) of the beryllium standard "requires employers to implement engineering and work practice controls to reduce beryllium exposures to employees." *Id.* at 2667. In explaining this requirement, OSHA stated that "requiring primary reliance on engineering and work practice controls is necessary and appropriate" and that "engineering controls … provide consistent levels of protection to a large number of

workers … and can efficiently remove toxic substances from the workplace." *Id.* at 2672.

Addressing the beryllium standard's housekeeping requirements, set forth in paragraph (j) of the standard, OSHA explained that "these provisions are important because they minimize additional sources of exposure to beryllium that engineering controls do not completely eliminate." *Id.* at 2689. OSHA "determined that keeping surfaces as clean as practicable is appropriate because promptly removing beryllium deposits prevents them from becoming airborne, thus reducing employees' inhalation exposure, and helps to minimize the likelihood of skin contact with beryllium." *Id.* at 2689–90. Because skin exposure to beryllium is "a pathway to sensitization," "housekeeping provisions may be especially critical in the final beryllium standards." *Id.* at 2689.

2. Century Aluminum Company is an aluminum manufacturer that operates two aluminum smelting facilities in Kentucky and one in South Carolina. Declaration of Dennis Harbath (Harbath Decl.) ¶ 3, ECF No. 17-3. In March 2017, Century filed a petition for review of the beryllium standard in the U.S. Court of Appeals for the Seventh Circuit. *See* Petition for Review, *Century Aluminum Company v. OSHA*, 7th Cir. No. 17-1460 (filed Mar. 2, 2017). Century's petition was later transferred to the Eighth Circuit and eventually consolidated with a large number of other petitions for review of the beryllium standard. Order, *Century Aluminum Company v. OSHA*, No.

17-1546 (8th Cir. Mar. 14, 2017); *see also* Order, *Century Aluminum Company v. OSHA*, No. 17-1546 (8th Cir. Aug. 14, 2020).[1]

United Steelworkers (USW) intervened in support of OSHA in each of the petitions that were pending in the Eighth Circuit and was represented in the case by Ms. Randy Rabinowitz. Declaration of Randy Rabinowitz (Rabinowitz Decl.) ¶ 5. In April 2018, OSHA, through counsel, provided Ms. Rabinowitz, a copy of the then-current draft of the Abatement Plan Agreement between Century and OSHA that would specify the terms by which Century would satisfy the beryllium standard under a proposed settlement agreement between OSHA and Century. *Id.* ¶ 6. OSHA provided the draft Abatement Plan Agreement to Ms. Rabinowitz without any restrictions that the draft agreement must be kept confidential. *Id.* ¶ 7. Neither OSHA nor Century, at any point, requested that Ms. Rabinowitz keep the draft Abatement Plan Agreement confidential. *Id.* ¶¶ 7–10.

On September 29, 2020, Century and OSHA entered into a settlement agreement resolving Century's challenge to the beryllium standard. Declaration of Stanley E. Keen (Keen Decl.) ¶ 8, ECF No. 17-3. The parties filed a stipulation of voluntary dismissal of the petition but did not file the settlement agreement. *See* Stipulated Motion to Voluntarily Dismiss Petition, *Century Aluminum Co. v. OSHA*,

[1] The consolidated petitions before the Eighth Circuit included other challenges to the 2017 general industry beryllium standard, the first of which was filed by a group of petitioners led by Airborn, Inc. (the Airborn Petitioners), as well as petitions challenging the 2019 and 2020 beryllium standards for the construction and shipyard sectors. *See* Joint Status Report, *Airborn, Inc. v. OSHA*, No. 17-1124 (8th Cir. Apr. 8, 2021).

No. 17-1546 (8th Cir. Sept. 30, 2020).[2] USW requested a copy of the final settlement and Abatement Plan Agreement from Century. Rabinowitz Decl. ¶ 9. Century, however, refused to provide a copy of the final agreement in the absence of a formal confidentiality agreement. *Id.*

B. OSH Law Project's FOIA Request and This Lawsuit

On October 26, 2020, OSH Law Project, through its Executive Director Ms. Rabinowitz, submitted a FOIA request to DOL seeking records regarding Century's compliance with the beryllium standard. *See* Keen Decl., Ex. 1. The FOIA request explained that the requested records concerned a settlement agreement between OSHA and Century that "resolves litigation pending before the U.S. Court of Appeals for the Eighth Circuit" and that "[i]n that agreement, OSHA set forth specific requirements for Century to comply with OSHA's Beryllium standard." *Id.* On December 1, 2020, OSH Law Project agreed to revise its FOIA request to seek only "the final abatement plan for Century Aluminum" that was incorporated into the settlement agreement between Century and OSHA resolving Century's petition in the Eighth Circuit. Keen Decl., Ex. 3.

In response to plaintiff's FOIA request, on January 13, 2021, DOL produced a single record: the "Abatement Plan Agreement" between Century and OSHA. *See* Keen Decl., Ex. 2. In its final response letter, DOL stated that the produced record

[2] By contrast, the settlement agreement that resolved the Airborn Petitioners' petitions for review was filed on the public docket without any redactions. *See* Joint Motion to Suspend Briefing Schedule and Hold Appeal in Abeyance, *Airborn, Inc. v. OSHA*, No. 17-1124 (8th Cir. Apr. 30, 2018) (attaching the settlement agreement between the Airborn Petitioners and OSHA).

was "the final abatement plan contained in the agreement between Century Aluminum and OSHA settling Century Aluminum's 8th Circuit challenge to the beryllium standard." *Id.* DOL, however, heavily redacted the record on the asserted basis of exemption 4. *See id.*

According to the parts of the Abatement Plan Agreement that OSHA released, the Abatement Plan Agreement was "Appendix D" to the settlement agreement between Century and OSHA. *See id.* The first paragraph of the Agreement states that OSHA had reviewed beryllium-exposure data submitted by Century and that Century had made various statements regarding beryllium exposure at its facilities. The Abatement Plan Agreement then provides:

> In light of the foregoing statements by Century, provided that Century also complies with the exposure assessment provisions of paragraph (d) and provides respiratory protection in accordance with paragraph (g) [of the Beryllium Standard], OSHA has determined that compliance with the terms of Abatement Plans 1, 2, and 3 below, would satisfy Century's obligations with respect to paragraphs (f)(2), (j)(1)(i), and (j)(2)(i)-(ii) of the Beryllium Standard for General Industry, 29 C.F.R. § 1910.1024, in Hawesville, Sebree, and Mt. Holly, respectively.

Id. Although the Abatement Plan Agreement sets forth the abatement plans for each of Century's three facilities, DOL redacted the terms of the plans in their entirety, asserting exemption 4. *See id.*

On February 1, 2021, OSH Law Project submitted an administrative appeal of DOL's final response to the request. Keen Decl., Ex. 4. In the appeal, OSH Law Project challenged DOL's withholding of information under exemption 4. *Id.* Plaintiff stated that DOL had "redacted so much of the document" that the produced record

does not disclose "Century's compliance obligations under the beryllium standard." *Id.* DOL acknowledged receipt of the appeal. Rabinowitz Decl. ¶ 16; *id.*, Ex. 1. DOL, however, did not respond to the appeal within the statutory deadline of twenty working days provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(ii). *See* Rabinowitz Decl. ¶ 17.

On July 27, 2021, OSH Law Project filed this lawsuit, seeking to compel DOL to disclose the information that it had redacted from the record that it produced in response to OSH Law Project's FOIA request. ECF No. 1. DOL filed its motion for summary judgment on November 17, 2021 (ECF No. 17), defending its invocation of exemption 4. Century filed a motion to intervene, which the district court granted on December 10, 2021 (ECF No. 20). In its order granting Century's intervention motion, the district court permitted Century to file a "substantive submission … in connection with defendant's motion for summary judgment." *Id.* On December 22, 2021, Century filed a notice that joined the DOL's motion for summary judgment and adopted DOL's argument without offering any additional arguments. *See* ECF No. 21.

STANDARD OF REVIEW

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Reporters Comm. for Freedom of the Press v. FBI*, 369 F. Supp. 3d 212, 218–19 (D.D.C. 2019). Summary judgment is appropriate when "there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must "analyze all underlying facts and inferences in the light most favorable to the FOIA requester." *Neuman v. United States*, 70 F. Supp. 3d 416, 421 (D.D.C. 2014). The court reviews de novo the agency's withholding of information. 5 U.S.C. § 552(a)(4)(B).

In FOIA cases, "the burden [is] on the agency to sustain its action, and the agency therefore bears the burden of proving that it has not improperly withheld the requested records." *Citizens for Resp. & Ethics in Wash. v. DOJ,* 922 F.3d 480, 487 (D.C. Cir. 2019) (internal quotation marks and citations omitted). The government "bears the burden of proving the applicability of any statutory exemption it asserts in denying a FOIA request," *Maydak v. DOJ*, 218 F.3d 760, 764 (D.C. Cir. 2000), and it must furnish "detailed and specific information" to justify its withholding, *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). Summary judgment for the government is appropriate only if the government "establish[es] beyond factual dispute" that its withholding is justified. *Evans v. Fed. Bur. of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020). The government's burden "does not shift even when the requester files a cross-motion for summary judgment." *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 99 (D.D.C. 2019) (citing *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999)). Rather, "the Government ultimately has the onus of proving that the documents are exempt from disclosure," whereas the "burden upon the requester is merely to establish the absence of material factual issues before a summary disposition of the case could permissibly occur." *Pub. Citizen Health Research Grp.*, 185 F.3d at 904–05 (internal marks and citations omitted).

Moreover, pursuant to the FOIA Improvement Act of 2016, even where an exemption applies, an agency may withhold exempt information only if "(I) the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA]

exemption"; or "(II) disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). To satisfy the requirement of foreseeable harm in paragraph (I) of the Act, the agency must "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) (quoting H.R. Rep. No. 114-391, at 9). "[G]eneralized assertions" do not suffice to meet the agency's burden. *Reps. Comm. for Freedom of the Press*, 3 F.4th at 369 (quoting *Machado Amadis v. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020)).

If the government fails to satisfy its burden to show that its withholding was proper, the information at issue should be disclosed. *See Evans*, 951 F.3d at 587 (noting that the D.C. Circuit has "discouraged serial summary judgment motions after the government's first loss"); *see also S. All. for Clean Energy v. Dep't of Energy*, 853 F. Supp. 2d 60, 79 (D.D.C. 2012) (Lamberth, J.) (stating that there may be ample reason to administer "the strong medicine of immediate disclosure" where the government fails to satisfy its burden, instead of "second chances for sophisticated repeat-players in FOIA litigation").

ARGUMENT

Exemption 4 provides an exception to FOIA's disclosure requirement for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). DOL does not contend that the withheld information comprises "trade secrets" or that it is "financial" or "privileged." Thus, for the redacted information to be within the scope of exemption 4, DOL must show that (i) it was "obtained from a person," (ii) it is "commercial" information, and

(iii) it is "confidential." Here, the withheld information satisfies none of those requirements.

In addition, even where information falls within the scope of an exemption, FOIA requires disclosure unless the government shows that it "reasonably foresees that disclosure would harm an interest protected by" FOIA exemption 4. *Id.* § 552(a)(8)(A)(i)(I). DOL fails to make that showing here.

I. The withheld information was not "obtained from a person" within the meaning of exemption 4.

Exemption 4 applies only to information "obtained from a person." *Id.* § 552(b)(4). Century Aluminum is a "person" within the meaning of the statute. *See id.* § 551(2) (defining "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency"). However, because the information in the Abatement Plan Agreement discloses *OSHA*'s information—that is, its agreement to accept particular measures as satisfying the requirements in the beryllium standard—it was not "obtained from a person" within the meaning of exemption 4.

A. It is well-settled that information that was "generated within the Government" fails to satisfy the "obtained from a person" requirement of exemption 4. *Bd. of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403–04 (D.C. Cir. 1980), *abrogated on other grounds by U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982); *see also COMPTEL v. FCC*, 910 F. Supp. 2d 100, 115 (D.D.C. 2012) (Lamberth, J.) (stating that "[i]nformation may be 'obtained from a person' if provided by individuals, corporations, or numerous other entities,

but not if it was generated by the federal government"). Rather, exemption 4 "is available only with respect to information received from sources outside the Government." *Soucie v. David*, 448 F.2d 1067, 1079 n.47 (D.C. Cir. 1971); *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970) (stating that exemption 4 "encompass[es] only information received from persons outside the Government").

Where a record is prepared by an agency but incorporates information submitted by an outside person, the "obtained from a person" requirement is satisfied only if the information at issue is a restatement or summary of the outside person's information. *See S. All. for Clean Energy*, 853 F. Supp. 2d at 68 (explaining that information is "obtained from a person" if it "is either repeated verbatim or slightly modified by the agency"). For example, in *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C. Cir. 1979), information in an audit report reflecting a company's "actual costs for units produced," "actual scrap rates," "break-even point calculations," and "actual cost data" satisfied the "obtained from a person" requirement because "the release of this information would disclose data supplied to the government from a person outside the government." *Id.* at 530.

By contrast, information is not "obtained from a person" if it reflects the agency's analysis or decision, even if that information involves materials that were initially submitted by an outside person. As this Court has explained, "when the redacted information—despite relying upon other information obtained from outside the agency—constitutes that agency's own analysis, such information is the agency's

information, and not 'obtained from a person' under Exemption 4." *S. All. for Clean Energy*, 853 F. Supp. 2d at 68. Such information "is no longer a 'person's' information but the agency's information." *Id.* For example, in *Philadelphia Newspapers, Inc. v. HHS*, charts prepared in connection with an HHS audit were not "obtained from a person," even though the audit "was based on raw data obtained from" the outside organization. 69 F. Supp. 2d 63, 66 (D.D.C. 1999). "An audit is not simply a summary or reformulation of information supplied by a source outside the government. It also involves analysis, and the analysis was prepared by the government." *Id.* at 67. Similarly, in *Fisher v. Renegotiation Board*, 355 F. Supp. 1171 (D.D.C. 1973), the court concluded that information reflecting the amounts of excess profits by federal contractors "is information from the Government" because "[t]he amount of excess profits is a determination made by the Board which applies its own accounting analysis to the information obtained from the contractors." *Id.* at 1174.

Here, the information redacted from the Abatement Plan Agreement was not "obtained from a person" because that information reflects OSHA's decision, based on its own analysis of the adequacy of Century's proposed abatement plans, regarding the terms by which Century would satisfy the beryllium standard. It is undisputed that the terms of the Abatement Plan Agreement are the terms that "OSHA and Century agreed would constitute compliance with certain provisions in the Beryllium standard for General Industry, if implemented, including 29 C.F.R. § 1910.1024(f)(2)." Keel Decl. ¶ 9; *see also id.*, Ex. 2. It is further undisputed that the Abatement Plan Agreement was incorporated into a settlement agreement

between the federal agency and Century Aluminum resolving Century's challenge to the beryllium standard. *Id.* ¶ 8 (stating that "[t]he Settlement Agreement contains, among other parts, an Abatement Plan for three Century Aluminum locations"); *see also id.*, Ex. 2. Thus, the withheld information does not simply restate information supplied by Century; rather, it reflects the "agency's own analysis" of and decision as to the terms by which Century would satisfy the beryllium standard (and under which Century's petition for review would be resolved). *S. All. for Clean Energy*, 853 F. Supp. 2d at 68; *see Philadelphia Newspapers*, 69 F. Supp. 2d at 67 (same).

The decision in *Bloomberg, L.P. v. Board of Governors of the Federal Reserve System*, 601 F.3d 143 (2d Cir. 2010), is instructive on this point. In *Bloomberg*, the Second Circuit held that information about the amounts, terms, and conditions for loans made by the Federal Reserve was not "obtained from a person" under exemption 4. *Id.* at 147. The court rejected the government's argument that the loan information "was 'obtained' from the borrowing banks" because the loans were automatically granted based on the loan application submitted by the private banks. *Id.* at 149. The request "does not seek loan applications; it seeks documents that show what loans the Federal Reserve Banks *actually* made," and "the fact of the loan (and its terms) cannot be said to be 'obtained from' the borrower." *Id.* at 148. Because the loan information was "not merely the information collected and slightly reprocessed by the government," but rather was "disclosure of the agency's own executive actions" and "did not come into existence until the Federal Reserve Bank took executive action by granting the loan," the information "was generated within a Federal Reserve Bank."

Id. at 148–49. "[I]t cannot be said that the government 'obtained' information as to its own acts and doings from external sources or persons," the court explained. *Id.* at 149.

Similarly, in *Detention Watch Network v. ICE*, 215 F. Supp. 3d 256 (S.D.N.Y. 2016), the court held that information regarding "bed-day rates, unit pricing and staffing plans included in final government contracts" between agencies and private detention facilities was not "obtained from a person" within the meaning of exemption 4. *Id.* at 262–63. The court rejected the government's argument that the information was "obtained from" private contractors because it was submitted in the initial bid documents: "Plaintiffs do not seek the initial bid documents," but rather "seek documents that show the ultimate terms of the government contracts, including the contracts themselves." *Id.* at 263. The rate information was "negotiated and agreed on by the Government, as one would expect in an arm-length transaction," and "even if the bed-day rates and unit prices were not negotiated but merely adopted … the contracts and their terms did not come into existence until each party to the contract—the private party and the Government—took 'executive action' to enter into the contract." *Id.* Thus, the court held that "[t]he terms of those contracts are not 'obtained from' the contractors." *Id.*

Like the information at issue in *Bloomberg* and *Detention Watch*, the information here was not "obtained from a person" because it reflects the terms of the agency's agreement in a final contract with the agency. The redacted information in the Abatement Plan Agreement "did not come into existence," *Bloomberg*, 601 F.3d

at 148, until OSHA "took executive action," *id.* at 149, by signing the settlement agreement of which the Abatement Plan Agreement was a part. Because the Abatement Plan Agreement information reflects "disclosure of the agency's own executive actions," *id.* at 148–49, and OSHA's "own acts and doings," *id.* at 149, that information was not obtained from Century and, accordingly, is outside the scope of exemption 4. As *Detention Watch* put it, the "ultimate terms" that the *government* agreed would govern Century's compliance were not "obtained" from Century within the meaning of exemption 4. 215 F. Supp. 3d at 263. The release of such information, which discloses OSHA's executive actions, is essential to fulfilling the "core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Am. Immigr. Lawyers Ass'n v. Exec. Off. for Immigr. Rev.*, 830 F.3d 667, 674 (D.C. Cir. 2016) (quoting *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 495 (1994) (internal quotation marks omitted)).

B. DOL asserts (at 13) that the Abatement Plan Agreement information was "obtained from" Century because it reflects Century's methods for limiting beryllium exposure. That the withheld information, however, might reflect information *about* Century does not mean that the information that was requested and is being withheld was "obtained from" Century. *See Bloomberg*, 601 F.3d at 147 (holding that loan information was not "obtained from a person," even though the information "was in effect determined by the loan request" submitted by the private banks); *see also S. All. for Clean Energy*, 853 F. Supp. 2d at 69 (distinguishing "commercial terms constituting parts of the deal arrived at by [the agency] and the Applicants" from

"commercial or financial information *of* the Applicants" within the scope of exemption 4). As the Second Circuit has explained, "the fact that information *about* an individual can sometimes be inferred from information *generated within an agency* does not mean that such information was *obtained from* that person within the meaning of FOIA." *Bloomberg*, 601 F.3d at 148.

DOL's assertion (at 13) that "Century was the original and ultimate source for the information" is likewise unavailing. That an agency's action may have been based on information initially supplied by an outside person does not satisfy the "obtained from a person" requirement. *See S. All. For Clean Energy*, 853 F. Supp. 2d at 68 (stating that "when the redacted information—*despite relying upon other information obtained from outside the agency*—constitutes that agency's own analysis, such information is the agency's information, and not 'obtained from a person' under Exemption 4" (emphasis added)). Thus, the audit information at issue in *Philadelphia Newspapers* was not "obtained from a person" under exemption 4, even though it was "based on raw data obtained from" the outside organization, *Philadelphia Newspapers*, 69 F. Supp. 2d at 66, and the excess-profit information at issue in *Fisher* did not satisfy the "obtained from a person" requirement even though that "information [was] obtained from the contractors," *Fisher*, 355 F. Supp. at 1174.

DOL cites only one case to support its assertion of the "obtained from a person" requirement: *Public Citizen Health Research Group v. National Institute of Health*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002). There, the information at issue was the final royalty rate paid by licensees to the NIH under agreements entered into between the

agency and the licensees. *Id.* The plaintiff did not dispute in its opening brief that the information was "obtained from a person," but then reversed course in its reply brief. *Id.* at 43. Because the plaintiff argued that the information was not "obtained from a person" for the first time at the reply stage, the court concluded that the plaintiff had waived its argument on that issue. *See id.* at 43–44.

DOL, however, relies on dicta in *Public Citizen Health Research Group* that, even if the court had "permitted Plaintiff to make this argument, it would fail," because "the licensee is the ultimate source of this information." *Id.* at 44. The court's assessment of the "obtained from a person" prong there was wrong. As explained above in Part I.A, information disclosing the terms of an agency's agreement is not "obtained from" an outside person. Indeed, when the same judge later addressed the same issue in a case where the argument had not been waived, she held that the incentive-award amounts reflected in NIH contracts with private contractors were *not* "obtained from a person." *See In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102–03 (D.D.C. 2008) (holding that the incentive award amounts "are the amounts that NIH agreed to pay to the contractor" and thus were not obtained from a person under exemption 4).

Similarly, here, the withheld information is not "obtained from" Century because it reflects the terms that OSHA agreed would satisfy Century's obligations under the beryllium standard.[3]

[3] In *Defense of Animals*, Judge Kollar-Kotelly attempted to reconcile her earlier dicta in *Public Citizen Health Research Group* by stating that unlike the royalty rates at issue in *Public Citizen Health Research Group*, where the licensee was "required to

II. The information at issue is not "confidential" under exemption 4.

Information is "confidential" within the meaning of exemption 4 "[a]t least where" two conditions are met: (1) the information is "customarily and actually treated as private by its owner"; and (2) "provided to the government under an assurance of privacy." *Food Marketing Institute v. Argus Leader* (*FMI*), 139 S. Ct. 2356, 2366 (2019). In *FMI*, the Supreme Court held that the first condition is required, but it left open the question whether the second also must be satisfied. *Id.* at 2363 (stating that there was "no need to resolve" whether privacy assurances were required because that condition was met in that case).

Here, DOL has not satisfied its burden to show that abatement agreements with the government are customarily and actually treated as private. Moreover, DOL does not assert that it provided an assurance that it would keep the Abatement Plan Agreement private. For both these reasons, the withheld information is not "confidential" under exemption 4.

A. The information at issue is not "customarily" or "actually" treated as private.

As the Supreme Court explained in *FMI*, information must be "customarily *and* actually treated as private by its owner" for it to be "confidential" under exemption 4. 139 S. Ct. at 2366 (emphasis added). Information is "customarily" kept

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pay royalties to NIH," the incentive award amounts at issue in *In Defense of Animals* "are the amounts that NIH agrees to pay to the contractor, not the other way around." 543 F. Supp. 2d at 102. Here, the information in the Abatement Plan Agreement is similar to the category of information described in *In Defense of Animals*, because the information discloses the terms that *OSHA* agreed set forth Century's requirements under the beryllium standard.

private if it is kept private "by or according to custom or established practice" and "in accordance with what is customary or usual." *See* "Customarily," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/customarily. By contrast, the information is "actually" kept private if the information was, in fact, kept secret. *Cf. FMI*, 139 S. Ct. at 2363 (stating that "is hard to see how information could be deemed confidential if its owner shares it freely").

DOL and Century have failed to satisfy their burden to show that Century "customarily" keeps its agreements with government agencies private. They have submitted no evidence to show that Century "customarily" keeps such agreements private; neither the Century nor the DOL declarations includes any statements attesting to Century's customary practice with respect to abatement plans or comparable agreements with the government. Further, information defining the measures by which a company satisfies an OSHA standard—including in variance orders, abatement plans and settlement agreements with OSHA—has routinely been released by OSHA and other companies in the past. Rabinowitz Decl. ¶ 20. For example, OSHA's variance orders—which identify the terms and conditions by which OSHA agrees that an employer is permitted to deviate from an OSHA standard—are publicly available in the Federal Register. *Id.* ¶ 21 & Ex. 2; *see also* 29 C.F.R. § 1905.6.

In addition, OSHA has posted publicly on its website its settlement agreements with over thirty employers that include provisions for the abatement of hazards that violate the OSH Act. *See* Rabinowitz Decl. ¶ 23 (citing Corporate-Wide Settlement Agreements, OSHA, https://www.osha.gov/enforcement/cwsa). One of the settlement

agreements, for example, posted on OSHA's website is an agreement between OSHA and Republic Steel that settled an administrative proceeding brought by OSHA against Republic Steel for safety hazards at Republic Steel's facilities. Rabinowitz Decl. ¶ 23 & Ex. 3. That settlement agreement identifies abatement measures and controls that Republic Steel is required to implement, as well as deadlines for Republic Steel to complete its abatement actions. *Id.* OSHA's public disclosures of abatement provisions in settlement agreements shows that such information is not "customarily" kept secret. *See also* 29 U.S.C. § 655(e) (requiring that OSHA publish in the Federal Register a statement of the reasons for its orders, decisions, compromises, or settlement of any penalty).

Moreover, there is evidence that Century does *not* customarily or actually keep private or secret the information contained in the Abatement Plan Agreement. A draft of the Abatement Plan Agreement was provided by OSHA to counsel for USW without any restrictions that USW was required to keep the draft agreement private or secret. Rabinowitz Decl. ¶¶ 5–8. Century expressly stated, through counsel, that it did *not* intend to assert confidentiality over the contents of the draft Abatement Plan Agreement. *Id.* ¶ 10; *see also* Harbath Decl., Attachment B (stating that Century did not "intend to now place restrictions on USW's discussions regarding the contents of the draft settlement agreements to the extent such discussions do not confirm what is or isn't actually in the executed settlement agreement itself"). That Century disclaimed confidentiality over the engineering and work practice controls and housekeeping measures in the draft Abatement Plan Agreement, and insisted on

confidentiality only over the terms of its final agreement with OSHA, supports that Century does not customarily or actually keep such information private.

Furthermore, the terms contained in the draft Abatement Plan Agreement—which are likely substantially similar to the terms contained in the final Abatement Plan Agreement, *see* Rabinowitz Decl. ¶ 12—provide general descriptions of standard engineering and work practice controls that are routinely used in the industry. *Id.* ¶ 11. Such information is not customarily or actually kept secret; indeed, the descriptions of the controls and measures identified in the draft Abatement Plan Agreement are similar to the descriptions of such controls and measures that OSHA usually includes in its assessment of a standard's technological feasibility, which is publicly available in the Federal Register. *Id.* In addition, the draft Abatement Plan Agreement references the requirements of a state permit—such information is not customarily or actually kept private or secret. *Id.*

Finally, information is "confidential" only if it is "closely held" and shared with only a "limited few." *FMI*, 139 S. Ct. at 2363. For example, in *Center for Investigative Reporting v. Department of Labor*, the court held that a DOL form was not "confidential" where the company "is required by law to post the forms for current employees and to provide the forms upon request to *all current and former employees, and their representatives*, with no restrictions on these individual's further disclosure of the forms." 470 F. Supp. 3d 1096, 1114 (N.D. Cal. 2020). The court explained that the information was "widely available" to "a large group of people" because the

company was "legally required" to provide that information to its employees or an employee's representative. *Id.* at 1112.

Here, Century is required by law to disclose to its employees and the employee's representatives a "written exposure control plan" that contains information regarding the engineering and work practice controls and housekeeping measures it will implement to comply with the beryllium standard, *see* 29 C.F.R. § 1910.1024(f)(1)(iii); *see also id.* (citing § 1910.1020(e))—the same topics of information that DOL withheld from the Abatement Plan Agreement. For example, the written exposure control plan "must contain" "[a] list of engineering controls, work practices, and respiratory protection required by paragraph (f)(2) of this standard," 29 C.F.R. § 1910.1024(f)(1)(i)(G), and "[p]rocedures for keeping surfaces as free as practicable of beryllium, § 1910.1024(f)(1)(i)(E). That information is exactly what the Abatement Plan Agreement sets forth. *See also* Keen Decl. ¶ 9 (stating that the abatement plan "contains, for each location, a series of engineering and work practice controls" and "housekeeping measures").

Thus, information regarding Century's plans for compliance with the regulatory requirements concerning engineering and work practice controls and housekeeping measures cannot be "customarily" or "actually" kept secret because that type of information is required by law to be disclosed in a written exposure control plan, which Century must "make … accessible to each employee who is, or can reasonably be expected to be, exposed to airborne beryllium" and the employee's representatives, § 1910.1024(f)(1)(iii); *see also* § 1910.1024(m)(4)(ii)(B) (requiring

employers to "ensure that each employee who is, or can reasonably be expected to be, exposed to airborne beryllium can demonstrate knowledge and understanding" of the plan). Century has more than 600 employees and contractors at its Hawesville facility, more than 720 employees and contractors at its Sebree facility, and more than 350 employees and contractors at its Mt. Holly facility, *see* Harbath Decl. ¶¶ 22–24—significantly more than a "limited few," *FMI*, 139 S. Ct. at 2363. Information that must be shared with that many people cannot be "closely guarded," *id.*, and, therefore, is not "confidential" under exemption 4. *See Ctr. for Investigative Reporting*, 470 F. Supp. 3d at 1114; *see also Farmworker Just. v. USDA*, 2021 WL 827162, at *2 (D.D.C. Mar. 4, 2021) (holding that information shared with the paid members of the Georgia Farm Bureau was not "confidential" under exemption 4).

B. The information is not "confidential" because the government did not provide an assurance that it would be kept in confidence.

1. A government assurance of privacy is required for information to remain "confidential" under exemption 4.

In *FMI*, the Supreme Court posited, without deciding, that even where information is both customarily and actually treated as confidential, the information "*lose[s]* its confidential character" if it is communicated without an assurance that the government will keep it secret. 139 S. Ct. at 2363. Although the question remains open, the best reading of exemption 4 is that information is "confidential" only where the government has provided the submitter with an assurance of confidentiality.

Start with the text. As the Supreme Court explained in *FMI*, "confidential" under exemption 4 means the "ordinary, contemporary, common meaning" of the term. *Id.* at 2362. The ordinary meaning of "confidential" is that the information is

provided "in confidence." *Id.* at 2363 (citing 1 Oxford Universal Dictionary Illustrated 367 (3d ed. 1961), and Webster's New World Dictionary 158 (1960)). Although *FMI* did not need to reach the question of whether exemption 4 required assurances of privacy, the Supreme Court contemplated that such a requirement was supported by the ordinary meaning of the term "confidential." *FMI*, 139 S. Ct. at 2363. It stated that "[c]ontemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential," and explained that the second condition is that "information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." *Id.*

Requiring privacy assurances for "confidential" information also ensures that other portions of the statute are not rendered superfluous. The canon against surplusage is "one of the most basic interpretive canons," *Corley v. United States*, 556 U.S. 303, 314 (2009), and "is strongest when an interpretation would render superfluous another part of the same statutory scheme," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). Exemption 4 protects three categories of information: trade secrets, privileged commercial or financial information, and confidential commercial or financial information. 5 U.S.C. § 552(b)(4). DOL's reading, however, would render both "trade secrets" and "privileged" superfluous. Both types of information by definition are kept private by the *holder* of the information. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right [in the trade secret] is

extinguished."); *see also SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) ("The confidentiality of communications covered by a privilege must be jealously guarded by the holder of the privilege lest it be waived." (internal brackets omitted)). Thus, if DOL were correct that "confidential" in exemption 4 requires *only* that the submitter of the information customarily keep and actually treat the information as private, trade secrets and privileged information would necessarily fall within the category "commercial or financial information obtained from a person and … confidential," and there would be no need to list them separately.

In addition, the legislative history of exemption 4 supports that privacy assurances are required. The House Report states that exemption 4 encompasses information "where the Government has obligated itself in good faith not to disclose documents or information which it receives." H.R. Rep. No. 89-1497 (1966). And it explains that information that "is given to an agency *in confidence*" is "confidential" under exemption 4. *Id*. (emphasis added).

Moreover, this Circuit's precedent before *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which set forth the exemption 4 standard overruled in *FMI*, interpreted "confidential" to require a government promise of confidentiality. For example, *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971), held that exemption 4 covered information that the government's "agreed to treat … as confidential." Similarly, *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 425 F.2d 578, 581 (D.C. Cir. 1970), stated that exemption 4 encompasses "data submitted 'in confidence.'" In *FMI*, the Supreme Court cited *Sterling Drug* and

Grumman Aircraft favorably, quoting language from both, and stating that these decisions "interpreted [exemption 4's] terms in ways consistent with the[] understanding[]" of the meaning of the term "confidential" explained in the Court's decision. *FMI*, 139 S. Ct. at 2363. Thus, this precedent too supports reading exemption 4 to require a government assurance of confidentiality.

Since *FMI*, at least one court has held that assurances of privacy are required for information to remain "confidential" under exemption 4. In *Public Justice Foundation v. Farm Service Agency*, 538 F. Supp. 3d 934 (N.D. Cal. 2021), the court concluded that information was not "confidential" under exemption 4 because the information was submitted without a government assurance of privacy. *Id.* at 943 ("Exemption 4 does not permit FSA to withhold loan application information or payment information related to loans because, *here, no confidentiality assurance was provided*." (emphasis added)). *Public Justice Foundation*'s holding that the information was not "confidential" under exemption 4 was based solely on the absence of assurances of privacy; the court did not reach the question whether *FMI*'s first prong—"that the information is both customarily and actually treated as private by its owner"—was satisfied. *Id.* Similarly, here, this Court should rule that privacy assurances from the government are required for information to be "confidential" under exemption 4.

In contrast, in *Renewable Fuels Ass'n v. EPA*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021), the court declined to hold that information loses its confidential character absent assurances of privacy, on the ground that *Critical Mass Energy Project v.*

Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992) (en banc), directed otherwise. *Critical Mass*, however, does not mandate that conclusion. In *Critical Mass*, the information was submitted to the government "on the condition that the agency will not release the information to other parties without [the submitter's] consent." *Critical Mass*, 975 F.2d at 874. The court of appeals was not confronted there with—and the parties did not argue—the question whether confidentiality assurances were required. *Critical Mass* thus did not issue binding precedent on that question. Its definition of the requisites of "confidential" information in circumstances where an assurance of confidentiality was provided by the government cannot be read as a holding that satisfaction of that definition would be sufficient where such an assurance was absent.

Furthermore, *Critical Mass* does not supply the applicable standard for "confidentiality" following *FMI*. In *Critical Mass*, this Circuit distinguished between voluntarily and compulsorily submitted information and held that "confidential" had different meanings for each. *See* 975 F.2d at 872. The Supreme Court in *FMI* considered *Critical Mass* and rejected its dichotomy. *FMI*, 139 S. Ct. at 2365 (discussing *Critical Mass*). The Court overruled the test that *Critical Mass* applied to compulsorily submitted information, and it adopted a test *different* from the one that *Critical Mass* applied to voluntarily submitted information: Whereas the *Critical Mass* standard asked whether the information is "customarily" disclosed publicly, the

FMI standard asks if the information is "customarily" *and* "actually" treated as private by the owner of that information.[4]

Thus, this Court should reject DOL's contention that privacy assurances are not required under exemption 4. The conclusion in *Renewable Fuels* that confidentiality assurances are not required cannot be squared with the statutory text of exemption 4 or with this Circuit's decisions that were favorably cited by the Supreme Court in *FMI*. Further, *Critical Mass* does not require a contrary result, because the holding in *Critical Mass* does not reach the issue.[5]

2. DOL did not provide assurances that it would keep the Abatement Plan Agreement private.

DOL does not argue that it provided any assurances that it would keep the terms of the Abatement Plan Agreement private. And neither DOL nor Century has submitted evidence showing that any such assurances were, in fact, given.

Rather, DOL asserts only (at 17) that "there was no reason for Century to expect" disclosure because the Abatement Plan Agreement "states plainly that the information contained therein is confidential and exempt under FOIA." DOL, however, misreads the Abatement Plan Agreement: The agreement states that

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[4] *Compare FMI*, 139 S. Ct. at 2366 (information is confidential "[a]t least where [it] is both customarily *and* actually treated as private by its owner and provided to the government under an assurance of privacy" (emphasis added)), *with Critical Mass*, 975 F.2d at 872 (information is confidential where "it is of a kind that the provider would not customarily make available to the public").

[5] If this Court concludes that *Critical Mass* is properly interpreted as foreclosing a requirement of privacy assurances, then plaintiff preserves for appeal the argument that *Critical Mass* should be overruled, in light of the statements in *FMI* that such a requirement follows from the statutory language of exemption 4.

"*Century* designates all the items discussed in this document confidential commercial information, as that term is defined in 29 C.F.R. § 70.26(b). *Century* claims that this document thus is protected from disclosure under the Freedom of Information Act." Keen Decl., Ex. 2 at 1 n.1 (emphases added). Thus, the Abatement Plan Agreement states only that *Century* considered the information exempt under FOIA. It carefully avoids any statement suggesting that the government agreed with Century's statements, let alone provided an assurance of confidentiality.

Indeed, the footnote cited by DOL from the Abatement Plan Agreement expressly leaves open the possibility that DOL would *release* the information at issue in response to a FOIA request. *See id.* (stating that "OSHA will evaluate Century's designation [of confidential commercial information] in accordance with 29 C.F.R. § 70.26 and applicable law should it receive a request for this information under the Freedom of Information Act"). Where an agency has indicated that it would disclose the information at issue, courts have concluded that the information is not "confidential." *See Am. Soc'y for Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv.*, 2021 WL 1163627, at *5 (S.D.N.Y. Mar. 25, 2021) (emphasis added) (concluding that the submitters of information "had no reasonable expectation that the Agencies would treat the information as confidential" where the submitters "were on notice that it was the Agencies' policy to release that information in response to a FOIA request"); *see also WP Co. LLC v. U.S. Small Bus. Admin.*, 502 F. Supp. 3d 1, 16 (D.D.C. 2020) (stating that information was not "confidential" where the record "expressly notified" the submitter "in a form disclaimer" that the information would

be released in response to a FOIA request); *Ctr. for Investigative Reporting*, 470 F. Supp. 3d at 1114 (concluding that "while it is uncertain whether an assurance of privacy is required, where, as here OSHA indicated the opposite—that it would disclose the [information]—Amazon lost any claim of confidentiality it may have had").

Here, although DOL did not go so far as to say it *would* disclose the information, it certainly provided no assurance that it would *not*. In light of DOL's express statement that it would "evaluate" Century's designation of confidentiality in response to a FOIA request, Keen Decl., Ex. 2 at 1 n.1, Century had no reasonable expectation that OSHA would keep the information at issue private.

In a declaration, Century asserts that "Century would not have entered into the Settlement Agreement without assurance from OSHA that OSHA would protect the Abatement Plan as confidential in the event of a third party's request for access." Harbath Decl. ¶ 20. However, the declaration nowhere states that OSHA, in fact, did provide any confidentiality assurances. *See generally* Harbath Declaration.[6] The Agreement makes clear that it did not. *See* Keen Decl., Ex. 2 at 1 n.1. And DOL does not assert that assurances were in fact given. In the absence of an assurance of privacy from DOL, the information is not "confidential" under exemption 4.

[6] Moreover, the Century declarant, Mr. Harbath, is a plant manager at Century's Mt. Holly facility. *Id.* ¶ 1. The declaration does not attest to Mr. Harbath's personal knowledge of Century's settlement negotiations and strategy. Thus, Mr. Harbath's statement regarding the circumstances in which Century would not have agreed to the settlement should be rejected for lack of personal knowledge. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 110 (stating that "all affidavits … must be made on personal knowledge" (internal quotation marks omitted)).

III. Information defining a company's legal obligations is not "commercial" information within the scope of exemption 4.

Information is "commercial" under exemption 4 "if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citation omitted). Exemption 4 thus applies to records that "reveal basic commercial operations or relate to the income-producing aspects of a business," as well as "when the provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). The term "commercial," however, is "not all encompassing," *Elec. Privacy Info. Ctr. v. DHS*, 117 F. Supp. 3d 46, 62 (D.D.C. 2015), and "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).

A. The terms of the Abatement Plan Agreement are not "commercial" information because they define Century's *legal* obligations under an OSHA standard regulating occupational exposure to beryllium in general industry, 29 C.F.R. § 1910.1024. The Agreement explicitly states that "compliance with the terms" redacted from the record "would satisfy Century's obligations with respect to paragraphs (f)(2), (j)(1)(i), and (j)(2)(i)–(ii) of the Beryllium Standard for General Industry, 29 C.F.R. § 1910.1024, in Hawesville, Sebree, and Mt. Holly, respectively." Keen Decl., Ex. 2.

Because the withheld information defines Century's obligations under law, 29 C.F.R. § 1910.1024, the information neither "serves a commercial function" nor "is of

a commercial nature," *Nat'l Ass'n of Home Builders*, 309 F.3d at 38. "[A]lthough the terms commercial and financial are defined broadly, they are not without limits." *COMPTEL v. FCC*, 945 F. Supp. 2d 48, 57 (D.D.C. 2013) (Lamberth, J.) (concluding that the government failed to demonstrate that a draft consent decree and compliance plan were "commercial" under exemption 4). *See also Block & Leviton LLP v. FTC*, 2021 WL 822500, at *2 (D. Mass. Feb. 22, 2021) (stating that "drafts of settlement agreements which 'reveal the parties' negotiations and reflect [the company's] legal and commercial priorities with regard to settlement'" did not reflect "commercial" information under exemption 4).

Information about a company's compliance obligations is not "commercial" information in and of itself. For example, *New York Times Co. v. DOJ*, 2021 WL 371784 (S.D.N.Y. Feb. 3, 2021), applying the D.C. Circuit's test for "commercial" under exemption 4, held that "information about the design, implementation, and remediation of [the company's] compliance program" was not "commercial in and of itself." *Id.* at *12. It "reject[ed] Intervenor's and Defendant's argument that all information about [the company's] compliance program is itself commercial and exempt under Exemption 4." *Id.* at *8. In so concluding, the court reviewed the decisions in *Public Citizen v. HHS* (*Public Citizen II*), 66 F. Supp. 3d 196 (D.D.C. 2014), and *100Reporters LLC v. DOJ* (*100Reporters I*), 248 F. Supp. 3d 115 (D.D.C. 2017)—both of which DOL relies on here (at 10–11).[7] The court explained that those

[7] The court in *New York Times* also discussed other decisions in those cases: *Public Citizen v. HHS* ("*Public Citizen I*"), 975 F. Supp. 2d 81 (D.D.C. 2013), and *100Reporters LLC v. DOJ* ("*100Reporters II*"), 316 F. Supp. 3d 124 (D.D.C. 2018).

cases did not hold that *all* compliance information was "commercial." *New York Times Co.*, at *12. Rather, the specific information discussed in those cases was "commercial" only where it was

> intertwined with other information that can fairly be described as commercial, such as (i) sales statistics, profits and losses, and inventories; (ii) references to finance functions, mergers and acquisitions practices, and sales and marketing, or information about country operations, projects, contracts, and bids; (iii) information about interactions between the companies' salespeople and customers, or how the companies promote their products; and (iv) extensive information about the company's marketing and sales programs and contracting processes.

Id. (internal quotation marks and citations omitted). Put differently, compliance information is not "commercial" in and of itself; compliance information is "commercial" only if it is inextricably intertwined with *other* information that serves a commercial function or is of a commercial nature.

Thus, *100Reporters I* and *Tokar v. DOJ*, 304 F. Supp. 3d 81, 94 n.3 (D.D.C. 2018)—which relied on *Public Citizen II* and *100Reporters I*—fail to support the notion that a submitter has a "business interest" in its compliance information. *See* Def. Mem. 10–11 (citing *100 Reporters I* and *Tokar*). "[N]ot every bit of information" in a company's possession is information that is "commercial" under exemption 4. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290. DOL points to no decision holding that information defining a company's obligations under law is "commercial" in nature or function. And DOL has not contended that the withheld information is inextricably intertwined with any of the categories of information identified in *New*

York Times Co. as information "that can fairly be described as commercial." *New York Times Co.*, 2021 WL 371784, at *12.[8]

DOL's assertion (at 11) that the information at issue is "commercial" because the same "type of information" was held to be "commercial" in *Public Citizen II* and *100Reporters I* is incorrect. The portion of *Public Citizen II* that DOL cites was part of the court's discussion of whether the information is "confidential" within the meaning of exemption 4—not whether it was "commercial" information. *See Public Citizen II*, 66 F. Supp. 3d at 210. Indeed, in *Public Citizen II*, the court concluded that the plaintiff had conceded the issue whether the information was "commercial," and the court's discussion of the "commercial" prong of exemption 4 was dicta. *Id.* at 207. And in *100Reporters I*, on which DOL also relies, the court later determined, following an *in camera* review, that some of the information in the compliance monitor's work plan that the government sought to withhold was *not*, in fact, "commercial." *100Reporters LLC v. DOJ* (*100Reporters II*), 316 F. Supp. 3d 124, 140 (D.D.C. 2018) (stating that the information was not "commercial" under exemption 4 because it "consists mostly of general descriptions of the Monitor's past and future activities with very few details about [the company's] business operations"). To be sure, *100Reporters I* found that certain information in the annual monitor reports and work

[8] DOL's citation of *Tokar* is also unavailing because there, the question whether the information was "commercial" was not presented. Indeed, the plaintiff "ha[d] not challenged DOJ's withholding pursuant to Exemption 4." 304 F. Supp. 3d at 94 n.3. The court stated in dicta, in a footnote, that it found that the information was "commercial," quoting from *Public Citizen II* and citing *100Reporters I*, without further analysis. *Id.*

plans that described specific bids and order data was "commercial." *See* 248 F. Supp. 3d at 136. DOL, however, has not contended here that the information redacted from the Abatement Plan Agreement reflects that sort of specific transactional information.

At bottom, the information in the Abatement Plan Agreement is not "commercial" in and of itself because it is information defining Century's obligations under the beryllium standard, regardless of the impact of those obligations on Century's business. Such information does not serve a commercial function, nor is it of a commercial nature. Indeed, it is far different in kind from other information that has been found to be "commercial," such as "revenue, net worth, income, and EBITDA" or "sales statistics, profits and losses, and inventories," *Pub. Citizen v. HHS*, 975 F. Supp. 2d 81, 99 (D.D.C. 2013) (citations omitted).

DOL's contrary position rests on an untenably broad interpretation of "commercial." According to DOL (at 10), the information is "commercial" because Century "expended significant resources" in developing the Abatement Plan Agreement. That Century spent resources developing compliance methods with the beryllium standard does not mean that the information itself serves a commercial function or is of a commercial nature. Indeed, if "commercial" encompassed everything for which a company expended resources, then it is hard to imagine what information would *not* fall within the scope of that term. The Court should reject such a result. *Cf. Pub. Citizen Health Research Grp.*, 704 F.2d at 1290 (cautioning that "not every bit of information" is "commercial" under exemption 4).

IV. DOL has failed to satisfy its burden under FOIA's segregability requirement.

FOIA requires agencies to produce "[a]ny reasonably segregable portion of a record … after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "The agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information." *Mokhiber v. U.S. Dep't of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004). To satisfy this burden, "the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987). "The court must ensure that [FOIA's] segregability requirement is followed, even if it must do so *sua sponte*." *Stotter v. United States Agency for Int'l Dev.*, 2020 WL 5878033, at *4 (D.D.C. Oct. 3, 2020) (citing *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007)).

Here, DOL has failed to demonstrate that it has disclosed all reasonably segregable portions of the Abatement Plan Agreement. Instead, DOL redacted the entirety of the abatement plans for Century's three facilities. Neither DOL's declarant nor Century's addresses segregability. Moreover, there is evidence that the information withheld from the Abatement Plan Agreement likely includes reasonably segregable information outside the scope of exemption 4 even under DOL's overbroad view of the meaning of "confidential" and "commercial." For example, a draft copy of the Abatement Plan Agreement references requirements set forth in a Clean Air Act permit issued by a state agency. Rabinowitz Decl. ¶ 11. Such information is not

customarily or actually kept secret, and therefore, is not "confidential" under exemption 4. Further, to the extent that the withheld information includes "general descriptions … with very few details about [the company's] business operations," such information is not "commercial" under exemption 4. *100Reporters II*, 316 F. Supp. 3d at 140.

Thus, DOL has failed to satisfy its burden under FOIA's segregability requirement and should be ordered to produce all reasonably segregable information that is not exempt under FOIA exemption 4. *See Gatore v. DHS*, 327 F. Supp. 3d 76, 89 (D.D.C. 2018) (ordering release of segregable nonexempt information).

V. The Abatement Plan Agreement information should be disclosed under the FOIA Improvement Act.

Pursuant to the FOIA Improvement Act of 2016, information must be disclosed, even if it falls within the scope of a FOIA exemption, unless "the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law." *See* 5 U.S.C. § 552(a)(8)(A)(i). "[T]he foreseeable harm requirement 'impose[s] an independent and meaningful burden on agencies.'" *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369 (D.C. Cir. 2021). To satisfy the foreseeable-harm requirement, the agency must "articulate both the nature of the harm [from release] and the link between the specified harm and specific information contained in the material withheld," and "generalized assertions" do not suffice to meet the agency's burden. *Id.* at 369.

No appellate court has addressed the foreseeable-harm requirement in an exemption 4 case, and district courts have disagreed over what interests are protected

by exemption 4. *See, e.g.*, *N.Y. Times Co. v. DOJ*, 2021 WL 371784, at *15 n.15 (S.D.N.Y. Feb. 3, 2021) (collecting cases). DOL cites (at 18) *Center for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90 (D.D.C. 2019), as supplying the applicable standard. There, the court held that the foreseeable-harm requirement was satisfied by showing that "the specific information withheld" would "caus[e] 'genuine harm to [the submitter's] economic or business interests,' … and thereby dissuad[e] others from submitting similar information to the government." 436 F. Supp. 3d at 113 (internal citations omitted).

Under the *Center for Investigative Reporting* standard cited by DOL, disclosure of the information at issue here would not result in foreseeable harm to an interest protected by exemption 4, because releasing the information in the Abatement Plan Agreement would not "dissuad[e] others from submitting similar information to the government." *Id.* at 113. The Abatement Plan Agreement is part of a settlement agreement with the government that resolved Century's petition for review of the beryllium standard. DOL has offered no support for the notion that disclosure of the terms of a final contract and settlement agreement with the government would discourage companies from entering into such agreements.

Moreover, whatever interests are protected by exemption 4, the 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 their industry is not one of them. Here, Century asserts that competitors would receive a "windfall" from the information, Harbath Decl. ¶ 16, and that there would be "an

information imbalance" because "Century's competitors are likely safeguarding as confidential whatever beryllium dust exposure abatement plans they have developed to date to which Century has no access," *id.* ¶ 19. But only Century is subject to the terms set forth in the Abatement Plan Agreement; Century's competitors are required to comply with the regulatory requirements set forth in the beryllium standard. DOL fails to explain how disclosure of the set of regulatory requirements to which only Century is subject would result in any competitive advantage for other companies in the industry.

CONCLUSION

For the foregoing reasons, OSH Law Project's motion for summary judgment should be granted, defendants' motion for summary judgment should be denied, and the Court should order DOL to disclose the information at issue.

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Respectfully submitted,

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