

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S CROSS-MOTION  
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Wendy Liu (D.C. Bar No. 1600942)  
Adam R. Pulver (D.C. Bar No. 1020475)  
PUBLIC CITIZEN LITIGATION GROUP  
1600 20th Street NW  
Washington, DC 20009  
(202) 588-1000

*Counsel for Plaintiff*

February 18, 2022

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

BACKGROUND ..... 2

    A. The COVID-19 Pandemic and Its Impact on Workers in the Poultry and Meatpacking Industry..... 2

    B. Plaintiff’s FOIA Request..... 3

    C. This Lawsuit ..... 4

STANDARD OF REVIEW ..... 6

ARGUMENT ..... 8

I. Information concerning Smithfield’s protective measures in connection with its reopening of the Sioux Falls plant (*Vaughn* Entry Nos. 1 & 2) is not within the scope of exemption 4..... 8

    A. The withheld information is not “confidential.” ..... 9

        1. The withheld information is not customarily or actually treated as private. .... 9

            a. The information redacted from the Sioux Falls reopening plan was not customarily or actually kept private. .... 10

            b. The information redacted from the April 30 South Dakota government letter was not private or secret..... 17

        2. The information was not provided under an assurance of privacy. .... 19

            a. A government assurance of privacy is required for information to remain “confidential” under exemption 4. .... 19

            b. USDA did not provide assurances that it would keep the information private. .... 23

    B. The withheld information is not “commercial.” ..... 25

II. The names of the poultry facility and local regulators for which a trade association requested USDA intervention (*Vaughn* Entry No. 4) are not within the scope of exemption 4. .... 28

    A. The withheld information is not “confidential.” ..... 28

1.	The withheld information is not customarily or actually kept private. ....	28
2.	The withheld information was not provided under an assurance of privacy. ....	33
B.	The withheld information is not “commercial.” .....	34
III.	The names of poultry meatpacking facilities in records identifying plant closures and slaughter capacities ( <i>Vaughn</i> Entry No. 5) are not within the scope of exemption 4. ....	35
A.	The withheld information is not private or secret. ....	35
B.	The withheld information was not provided under an assurance of privacy. ....	39
IV.	The withheld information should be disclosed under the FOIA Improvement Act of 2016. ....	40
	CONCLUSION. ....	42

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>100Reporters LLC v. DOJ (100Reporters I)</i> , 248 F. Supp. 3d 115 (D.D.C. 2017) .....	26
<i>100Reporters LLC v. DOJ (100Reporters II)</i> , 316 F. Supp. 3d 124 (D.D.C. 2018) .....	27
<i>American Small Business League v. DOD</i> , 2019 WL 4416613 (N.D. Cal. Sept. 15, 2019) .....	16
<i>Baker &amp; Hostetler LLP v. Department of Commerce</i> , 473 F.3d 312 (D.C. Cir. 2006) .....	25
<i>Buljic v. Tyson Foods, Inc.</i> , 22 F.4th 730 (8th Cir. 2021) .....	24
<i>Campbell v. DOJ</i> , 64 F.3d 20 (D.C. Cir. 1998) .....	6
<i>Center for Investigative Reporting v. CBP</i> , 436 F. Supp. 3d 90 (D.D.C. 2019) .....	7, 40
<i>*Center for Investigative Reporting v. DOL</i> , 470 F. Supp. 3d 1096 (N.D. Cal. 2020) .....	10, 16, 33, 39
<i>Chicago Tribune Co. v. FAA</i> , 1998 WL 242611 (N.D. Ill. May 7, 1998) .....	27
<i>Citizens for Responsibility &amp; Ethics in Washington v. DOJ</i> , 922 F.3d 480 (D.C. Cir. 2019) .....	6
<i>Corley v. United States</i> , 556 U.S. 303 (2009) .....	20
<i>Critical Mass Energy Project v. Nuclear Regulatory Commission</i> , 975 F.2d 871 (D.C. Cir. 1992) .....	22, 23
<i>Evans v. Federal Bureau of Prisons</i> , 951 F.3d 578 (D.C. Cir. 2020) .....	7, 18, 33
<i>*Farmworker Justice v. USDA</i> , 2021 WL 827162 (D.D.C. Mar. 4, 2021) .....	10, 33, 39

*Food Marketing Institute v. Argus Leader (FMI)*,  
139 S. Ct. 2356 (2019)..... *passim*

\**Friends of Animals v. Bernhardt*,  
15 F.4th 1254 (10th Cir. 2021) .....17, 18, 23, 33

*Grumman Aircraft Engineering Corp. v. Renegotiation Board*,  
425 F.2d 578 (D.C. Cir. 1970).....21

\**Humane Society International v. United States Fish & Wildlife Service*,  
2021 WL 1197726 (D.D.C. Mar. 29, 2021).....17, 18, 23, 33

*Machado Amadis v. Department of State*,  
971 F.3d 364 (D.C. Cir. 2020).....7

*Marx v. General Revenue Corp.*,  
568 U.S. 371 (2013).....20

*Maydak v. DOJ*,  
218 F.3d 760 (D.C. Cir. 2000).....6, 32

*National Association of Home Builders v. Norton*,  
309 F.3d 26 (D.C. Cir. 2002).....25

*National Business Aviation Association v. FAA*,  
686 F. Supp. 2d 80 (D.D.C. 2010).....26

*National Parks & Conservation Association v. Morton*,  
498 F.2d 765 (D.C. Cir. 1974).....21

*Neuman v. United States*,  
70 F. Supp. 3d 416 (D.D.C. 2014).....6

*New York Times Co. v. FDA*,  
529 F. Supp. 3d 260 (S.D.N.Y. 2021).....10, 33, 39

*New York Times Co. v. DOJ*,  
2021 WL 371784 (S.D.N.Y. Feb. 3, 2021).....26, 40

*Public Citizen v. HHS*,  
975 F. Supp. 2d 81 (D.D.C. 2013).....26, 34

*Public Justice Foundation v. Farm Service Agency*,  
538 F. Supp. 3d 934 (N.D. Cal. 2021).....21, 22

*Public Citizen Health Research Group. v. FDA*,  
185 F.3d 898 (D.C. Cir. 1999).....7

*Public Citizen Health Research Group. v. FDA*,  
704 F.2d 1280 (D.C. Cir. 1983).....25, 35

*Public Citizen, Inc. v. Rubber Manufacturers Association*,  
533 F.3d 810 (D.C. Cir. 2008).....24

*Renewable Fuels Association v. EPA*,  
519 F. Supp. 3d 1 (D.D.C. 2021).....16, 22

*Reporters Committee for Freedom of the Press v. FBI*,  
369 F. Supp. 3d 212 (D.D.C. 2019).....6

*Reporters Committee for Freedom of the Press v. FBI*,  
3 F.4th 350 (D.C. Cir. 2021).....7, 40

*Ruckelshaus v. Monsanto Co.*,  
467 U.S. 986 (1984).....20

*SEC v. Lavin*,  
111 F.3d 921 (D.C. Cir. 1997).....20

*Sterling Drug, Inc. v. FTC*,  
450 F.2d 698 (D.C. Cir. 1971).....21

*Tokar v. DOJ*,  
304 F. Supp. 3d 81 (D.D.C. 2018).....26

*United Technologies Corp. v. DOD*,  
601 F.3d 557 (D.C. Cir. 2010).....41

**Statutes, Rules, & Regulations**

5 U.S.C. § 552(a)(4).....6

5 U.S.C. § 552(a)(8).....7, 8, 40

5 U.S.C. § 552(b)(4) .....8, 20

Defense Production Act of 1950,  
50 U.S.C. § 4501 *et seq.*.....24

Federal Rule of Civil Procedure 56 .....6

**Other Authorities**

“Customarily,” Merriam-Webster Online Dictionary,  
<https://www.merriam-webster.com/dictionary/customarily> .....10

Executive Order 13917, Delegating Authority Under the Defense Production Act  
With Respect to Food Supply Chain Resources During the National Emergency  
Caused by the Outbreak of COVID-19,  
85 Fed. Reg. 26,313 (Apr. 28, 2020) .....24

H.R. Rep. No. 89-1497 (1966).....21

H.R. Rep. No. 114-391 (2016).....7

Oxford Universal Dictionary Illustrated (3d ed. 1961).....19

Webster’s New World Dictionary (1960).....19

## INTRODUCTION

Early in the pandemic, many poultry and meatpacking facilities experienced wide-scale outbreaks of COVID-19. In May 2020, plaintiff Public Citizen submitted a Freedom of Information Act (FOIA) request to defendant U.S. Department of Agriculture (USDA), seeking communications between USDA and the poultry and meatpacking industry about COVID-19. USDA eventually produced responsive records. Invoking FOIA exemption 4, however, USDA withheld information that it said would reveal: (i) health and safety measures that a single plant implemented to reopen after shutting down due to a COVID-19 outbreak; (ii) the names of the local governmental entities and a poultry plant identified by a trade association when requesting USDA intervention against local COVID-19 testing requirements; (iii) the names of the poultry and meatpacking plants that experienced closures or reduced operations due to COVID-19 outbreaks; and (iv) Centers for Disease Control and Prevention's (CDC) preliminary recommendations for reducing COVID-19 spread at a Smithfield Foods meatpacking plant in Sioux Falls, South Dakota.

After USDA filed its summary judgment motion, plaintiff found online the record with CDC's preliminary recommendations for the Sioux Falls plant, unredacted and fully available to the public. That document shows that USDA's redactions to it were not justified by exemption 4 and calls into question USDA's assertion of exemption 4 as to the remaining records. Moreover, as to each of the remaining records, the redacted information is not "confidential" information within the scope of exemption 4 because the information is not customarily or actually kept private or secret and was not provided under an assurance of privacy. In addition, as to the first two categories of information—the plant's health and safety measures and the facility and local governments identified by the trade association—the information is not "commercial" within the



meaning of exemption 4. Finally, disclosure would not result in reasonably foreseeable harm to an interest protected by exemption 4, as required to justify withholding by the FOIA Improvement Act of 2016.

The Court should grant plaintiff's motion for summary judgment, deny USDA's motion for summary judgment, and order USDA to disclose the withheld information.

## BACKGROUND

### A. The COVID-19 Pandemic and Its Impact on Workers in the Poultry and Meatpacking Industry

With the onset of the COVID-19 pandemic, meat and poultry processing facilities became “hotspots for outbreaks that sickened and killed” workers at those facilities.<sup>1</sup> For example, across five of the largest meatpacking companies in the country—JBS USA Food Company (JBS), Tyson Foods, Inc. (Tyson), Smithfield Foods (Smithfield), Cargill Meat Solutions Corporation (Cargill), and National Beef Packing Company, LLC (National Beef)—“at least 59,000 meatpacking workers were infected with the coronavirus during the first year of the pandemic” and “[a]t least 269 meatpacking workers lost their lives to the coronavirus” that year. House Report at 2. During that time, USDA reportedly “bowed to industry pressure, intervening when local health departments threatened to shut meatpacking plants down.”<sup>2</sup> Poultry and meatpacking companies

---

<sup>1</sup> Memorandum from the Majority Staff to Members of the H. Select Subcomm. on the Coronavirus Crisis, House Committee Report at 1 (Oct. 27, 2021), [https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.10.27%20Meatpacking%20Report.Final\\_.pdf](https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.10.27%20Meatpacking%20Report.Final_.pdf) [hereafter, “House Report”].

<sup>2</sup> Sky Chadde, *OSHA and USDA waited months into pandemic to coordinate effort into COVID-19 crisis in meatpacking plants, emails show*, Investigate Midwest (Feb. 5, 2021), <https://investigatemitwest.org/2021/02/05/osha-and-usda-waited-months-into-pandemic-to-coordinate-effort-into-covid-19-crisis-in-meatpacking-plants-emails-show/> (citing records produced in response to plaintiff's FOIA request); *see also* Sky Chadde, *A week before Trump's order protecting meat plants, industry sent draft language to feds*, Investigate Midwest (Sept. 14, 2020), <https://investigatemitwest.org/2020/09/14/a-week-before-trumps-order-protecting-meat-plants-industry-sent-draft-language-to-feds/> (stating that “the companies and their trade

were left “with largely unchecked discretion to determine how to respond to the coronavirus pandemic to the detriment of meatpacking workers.” House Report at 3–4. “Instead of addressing the clear indications that workers were contracting the coronavirus at alarming rates due to conditions in meatpacking facilities, meatpacking companies prioritized profits and production over worker safety, continuing to employ practices that led to crowded facilities in which the virus spread easily.” *Id.* at 2.

**B. Plaintiff’s FOIA Request**

On May 1, 2020, plaintiff Public Citizen submitted a FOIA request to defendant USDA, seeking records regarding the government response to COVID-19 in meat and poultry processing facilities. Specifically, Public Citizen sought:

(1) “Any communications related to COVID-19, the coronavirus, and/or plant closures, slowdowns, or openings related to the pandemic between USDA officials or staff and representatives of Smithfield Foods, Tysons Food, Cargill, Pilgrim’s Pride, JBS, the National Pork Producers Council, the National Chicken Council, and the National Meat Association” (Part One);

(2) “Any communications between USDA officials or USDA staff and Department of Labor officials or staff, including, but not limited to officials or staff at the Occupational Safety and Health Administration, relating to poultry, beef, and pork slaughter and/or processing facilities, and COVID-19 or the coronavirus” (Part Two); and

(3) “All records concerning worker safety or occupational health at poultry, beef, and pork slaughter and/or processing facilities, in connection with COVID-19 or the coronavirus” (Part Three).

Graves Decl., Attachment A (ECF No. 15-3). The date range was March 13, 2020, through the date of the search. *Id.* Public Citizen also requested expedited processing of the request, *id.*, which USDA granted on May 12, 2020, *id.*, Attachment B.

---

organizations tried to thwart local health departments’ orders to close plants by asking the USDA to intervene,” citing records produced in response to plaintiff’s request).

On May 26, 2020, Public Citizen agreed to limit Parts One and Two of its request to email records between certain custodians within certain date ranges, and it agreed to limit Part Three to certain custodians and search terms. Graves Decl., Attachment B. As to Part Three of the request, USDA revealed nine months after receiving the request that it had forgotten about that part of the request, and Public Citizen then agreed to accept a production that USDA had made in response to a different requester as a substitute for Part Three. Pulver Decl., Ex. 1.

Despite granting Public Citizen's request for expedited processing in May 2020, USDA did not begin producing documents until August 28, 2020. Graves Decl., Attachment C. USDA also made additional productions, on a rolling basis, on September 8, 2020, and February 10, 2021. *Id.* On May 10, 2021, after numerous inquiries from Public Citizen on the status of the completion of USDA's response to the request, USDA made a fourth interim production of records. *See id.* At that time, USDA stated that it hoped to complete its response to the request by May 21, 2021. Pulver Decl., Ex. 2. USDA, however, did not complete its response by that date. Pulver Decl. ¶ 3. In addition, asserting FOIA exemptions 4, 5, and 6, USDA heavily redacted many of the responsive records that it produced. *Id.* ¶ 4.

### **C. This Lawsuit**

Public Citizen filed this lawsuit on May 24, 2021—more than a year after USDA granted the request for expedition of the FOIA request—seeking to compel USDA to complete its production and disclose information that it had improperly withheld from the records that it had produced. *See* Complaint (ECF No. 1). On June 25, 2021, USDA made its final production of records responsive to plaintiff's request. *See* Graves Decl., Attachment C. USDA, however, continued to withhold information from responsive records, asserting FOIA exemptions 4, 5, 6, and 7(A). *See* Joint Status Report ¶ 4 (ECF No. 10).

Between August 2, 2021, and January 19, 2022, USDA made seven supplemental productions of records, in which USDA released some information that had been redacted in USDA's earlier productions and continued to withhold other information. *See* Graves Decl., Attachments D & E. For one record—the CDC's preliminary recommendations for Smithfield's Sioux Falls plant—USDA withdrew its assertion of FOIA exemption 5 and instead asserted FOIA exemption 4. *See* Joint Status Report ¶ 4 (ECF No. 11); *see also* Graves Decl., Attachment D (Aug. 2, 2021, USDA supplemental response); *compare* Liu Decl., Ex. 14 (USDA's withholdings under exemption 5), *with* Liu Decl., Ex. 5 (USDA's withholdings under exemption 4). USDA's counsel also provided to plaintiff's counsel additional pages of records that disclosed some information that had previously been redacted. *See* Graves Decl. ¶ 10.

On January 19, 2022, USDA filed a motion for summary judgment and *Vaughn* Index, defending its invocation of FOIA exemption 4 for redactions on six sets of records. ECF No. 15. Plaintiff, however, is not seeking further disclosure with respect to the record designated by USDA as *Vaughn* Entry No. 3. In addition, as to the record designated *Vaughn* Entry No. 6, plaintiff has found an unredacted copy publicly available online. *See* Liu Decl. ¶ 7 & Ex. 6 (“April 20 Memorandum”).<sup>3</sup> The unredacted record reveals that much of the information that USDA sought to withhold is not even arguably within the scope of FOIA exemption 4. For instance, one of the redacted sentences states: “A team from the Centers for Disease Control and Prevention (CDC) traveled to Sioux Falls, South Dakota for an Epi Aid on April 14, 2020.” *Compare* April 20

---

<sup>3</sup> The unredacted record was posted online at [https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/HSSCV-Smith%2000000806-820\\_Redacted.pdf](https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/HSSCV-Smith%2000000806-820_Redacted.pdf). It also was cited in a report by the House of Representatives' Select Subcommittee on the Coronavirus Crisis (the House Report). *See* House Report at 15 n.12 (providing a publicly available URL link to the document). Counsel for USDA confirmed that the unredacted record was the same as the redacted record corresponding to *Vaughn* Entry No. 6. Liu Decl. ¶ 7.

Memorandum at 1, *with* Liu Decl., Ex. 5 (redacted record). No credible interpretation of exemption 4 justifies USDA's withholding of that information.

Thus, at issue in this motion is USDA's withholding of information that would identify: (i) measures taken by Smithfield to reduce the transmission of COVID-19 upon reopening its Sioux Falls, South Dakota plant, *see Vaughn* Entry Nos. 1–2; (ii) the names of the poultry facility and local regulators for which the trade association requested USDA intervention, *see id.*, Entry No. 4; and (iii) the names of poultry and meatpacking facilities that experienced plant closures or reduced operational capacities due to COVID-19, *see id.*, Entry No. 5.

#### 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.” *Center 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 [g]overnment 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”).

## 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). None of the information withheld by USDA is “confidential” within the meaning of exemption 4, and USDA has failed to satisfy its burden to show that the information it withheld in *Vaughn* Entry Nos. 1, 2, and 4 is “commercial.” In addition, for all of the information, USDA has failed to establish that it “reasonably foresees that disclosure would harm an interest protected by” exemption 4, as required to be exempt from FOIA’s disclosure requirement. *Id.* § 552(a)(8)(A)(i)(I). Therefore, the Court should grant summary judgment in favor of plaintiff and order release of the withheld information.

**I. Information concerning Smithfield’s protective measures in connection with its reopening of the Sioux Falls plant (*Vaughn* Entry Nos. 1 & 2) is not within the scope of exemption 4.**

On April 12, 2020, the meatpacking company Smithfield closed its Sioux Falls, South Dakota, plant “indefinitely” due to a COVID-19 outbreak at the plant.<sup>4</sup> Three weeks later, Smithfield reopened the Sioux Falls plant, announcing that it was implementing protective measures and that the company had “receiv[ed] positive confirmation from the Centers for Disease Control and Prevention (CDC) and [USDA] that the company is in full compliance with all CDC and Occupational Safety and Health Administration (OSHA) guidance.”<sup>5</sup>

---

<sup>4</sup> Press Release, Smithfield Foods, *Smithfield Foods to Close Sioux Falls, SD Plant Indefinitely Amid COVID-19* (Apr. 12, 2020), <https://www.smithfieldfoods.com/press-room/2020-04-12-Smithfield-Foods-To-Close-Sioux-Falls-SD-Plant-Indefinitely-Amid-COVID-19>.

<sup>5</sup> Press Release, Smithfield Foods, *Smithfield Foods To Reopen Sioux Falls, South Dakota Facility After CDC Conducts Thorough Site Inspection and Affirms Company Meets or Exceeds All Employee Health and Safety Guidance* (May 6, 2020), <https://www.smithfieldfoods.com/press-room/2020-05-06-Smithfield-Foods-To-Reopen-Sioux-Falls-South-Dakota-Facility-After-CDC->

Asserting FOIA exemption 4, USDA withheld information from two records about the reopening of the Sioux Falls plant: (i) an April 30, 2020, letter from Smithfield to the South Dakota Department of Health that was submitted to USDA by a South Dakota government official, *Vaughn* Entry No. 1; and (ii) a May 6, 2020, reopening plan for the Sioux Falls plant that was submitted to USDA by Smithfield, *Vaughn* Entry No. 2. The withheld information is neither “confidential” nor “commercial.”

**A. The withheld information is not “confidential.”**

Information is “confidential” within the meaning of exemption 4 “[a]t least where” the information is (1) “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. Here, USDA has not satisfied its burden to show that the withheld information is customarily and actually treated as private. In addition, USDA fails to show that the information was provided to USDA under an assurance of privacy. For both these reasons, the withheld information is not “confidential” under exemption 4.

**1. The withheld information is not customarily or actually treated as private.**

Under exemption 4, “confidential” means “private” or “secret,” *id.*, and “known only to a limited few,” *id.* (citation omitted). The information at issue must be “customarily kept private, or at least closely held,” *id.*, and “actually treated as private,” *id.* at 2366. Information is “customarily” kept private if it is kept private “by or according to custom or established practice”

---

Conducts-Thorough-Site-Inspection-and-Affirms-Company-Meets-or-Exceeds-All-Employee-Health-and-Safety-Guidance.



and “in accordance with what is customary or usual.” See “Customarily,” Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/customarily>. Information is “actually” kept private if the information is, in fact, kept secret. See *FMI*, 139 S. Ct. at 2363 (stating that “is hard to see how information could be deemed confidential if its owner shares it freely”).

Information must be closely guarded, “known only to a limited few,” and “not publicly disseminated” for it to be “confidential” within the meaning of exemption 4. *Id.* Accordingly, where information has been shared with a large group of people, courts have consistently held that the information is not “confidential.” See *Farmworker Just. v. USDA*, 2021 WL 827162, at \*2 (D.D.C. Mar. 4, 2021) (information shared with the paid members of the Georgia Farm Bureau was not “confidential” under exemption 4); *Center for Investigative Reporting v. DOL*, 470 F. Supp. 3d 1096, 1114 (N.D. Cal. 2020) (information shared with current and former employees, and their representatives, without restriction on the information’s further dissemination, was not “confidential” under exemption 4); see also *N.Y. Times Co. v. FDA*, 529 F. Supp. 3d 260, 283 (S.D.N.Y. 2021) (concluding that customer and non-customer complaints about a product were not “confidential” because, among other things, there was no “reason to believe that the complainants did not thereafter publicize their complaints or share their contents more broadly”).

**a. The information redacted from the Sioux Falls reopening plan was not customarily or actually kept private.**

The disclosed portion of Smithfield’s reopening plan for the Sioux Falls plant identifies several of the protective measures that Smithfield implemented to reduce the spread of COVID-19. See Liu Decl., Ex. 2. USDA redacted other information, however, that it asserts would disclose “Smithfield’s internal processes, protective measures, and protocols for addressing health and safety guidance and regulatory requirements during the COVID-19 pandemic” and the “reopening timetable” for the Sioux Falls plant. *Vaughn* Entry No. 2. Smithfield’s COVID-19 measures and

reopening protocols fall outside the scope of exemption 4 because they have not customarily or actually been kept private or secret. Rather, Smithfield has publicized information about its infection control measures and reopening protocols on its website and in marketing materials, and it has shared that information with the press.

For example, Smithfield disclosed on its website that it implemented the following measures in response to the COVID-19 pandemic: “[m]andates for face masks when entering work sites”; “[t]hermal scans and health screenings for all individuals entering facilities”; “[m]arked-out passageways to ensure proper physical distancing”; “[f]ree, on-site COVID-19 testing”; “[h]and-sanitizing stations throughout facilities”; “[p]ersonal protective equipment (PPE) distribution to all employees and mandates at workstations”; “[p]lexiglass installation at workstations”; “[n]ew structural enhancements for physical distancing”; and “[e]nhanced cleaning protocols.”<sup>6</sup> Information about Smithfield’s COVID-19 measures and protocols was also detailed in five pages of Smithfield’s publicly available 2020 Sustainability Report.<sup>7</sup> In addition, Smithfield issued a press release identifying its “mandatory and nonnegotiable” “COVID-19 processes, protocols and protective measures” and provided photographs depicting “the company’s protective measures.”<sup>8</sup> And Smithfield stated on its website that it “communicated details” about its COVID-

---

<sup>6</sup> “Facility Enhancements for Workforce Health and Safety,” *Worker Health and Safety*, Smithfield Foods, <https://www.smithfieldfoods.com/Worker-Health-and-Safety>.

<sup>7</sup> “Our Workforce on the Front Lines,” *2020 Sustainability Impact Report*, Smithfield Foods, at 64, <https://www.smithfieldfoods.com/getmedia/1fc9b578-4dff-4104-9706-ba0fbbc44f47/2020-Sustainability-Impact-Report.pdf>.

<sup>8</sup> Press Release, Smithfield Foods, *Smithfield Foods Details Ongoing COVID-19 Testing at Its Facilities* (June 12, 2020), <https://www.smithfieldfoods.com/press-room/2020-06-12-Smithfield-Foods-Details-Ongoing-COVID-19-Testing-at-Its-Facilities>; Press Release, Smithfield Foods, *Smithfield Foods Says That the Company and Its Team Members Want the Same Thing: To Protect Employee Health and Safety While Also Safeguarding America’s Food Supply* (May 1, 2020), <https://www.smithfieldfoods.com/press-room/2020-05-01-Smithfield-Foods-Says-That-the-Company-and-Its-Team-Members-Want-the-Same-Thing-To-Protect-Employee->

19 measures and protocols to all of its employees through emails and text messages, on Smithfield’s “dedicated COVID-19 intranet page,” and through “abundant signage throughout [Smithfield] facilities.”<sup>9</sup> Smithfield “reiterated” its communications about Smithfield’s COVID-19 measures and protocols to employers “throughout the year,” “in multiple languages [its] employees could understand.”<sup>10</sup>

Further, information about COVID-19 measures and reopening protocols for the specific Smithfield Sioux Falls facility discussed in the records is publicly available. For example, Smithfield released information about its Sioux Falls reopening plan in a May 6, 2020, press statement:

At the core of the reopening plan is the company’s ongoing focus on employee health and safety and continued adherence with – at a minimum – CDC and OSHA guidance. Across all its facilities, the company is providing its team members with personal protective equipment (PPE), including masks and face shields, has implemented mass thermal scanning and installed physical barriers on its production floors and in break areas. These measures remain mandatory and nonnegotiable conditions for the company to operate.<sup>11</sup>

Smithfield also disseminated photographs that depicted “the company’s protective measures” at the Sioux Falls facility.<sup>12</sup> In addition, the news media widely reported on Smithfield’s reopening

---

Health-and-Safety-While-Also-Safeguarding-Americas-Food-Supply (including link to photographs).

<sup>9</sup> “Our COVID-19 Response,” *Worker Health and Safety*, *supra* n.6; *see also* 2020 *Sustainability Impact Report* at 61, *supra* n.7.

<sup>10</sup> “Our COVID-19 Response,” *Worker Health and Safety*, *supra* n.6; *see also* 2020 *Sustainability Impact Report* at 61, *supra* n.7.

<sup>11</sup> Press Release, *supra* n.5.

<sup>12</sup> *Id.*

protocols at the Sioux Falls facility.<sup>13</sup> The information was known to union representatives that received a “tour” of the protective measures implemented at the plant,<sup>14</sup> as well as all 3,700 workers at the Sioux Falls plant.<sup>15</sup>

Further, the unredacted portions of the record disclose several measures implemented at the Sioux Falls plant. *See* Liu Decl., Ex. 2 (stating that the company was “providing its team members with personal protective equipment (PPE), including masks and face shields,” that “[t]he company has implemented mass thermal scanning,” and that “[t]he company has installed physical barriers on its production floors and in break areas”). According to USDA, Smithfield does not object to the release of this information. *See* Graves Decl. ¶ 16.

Smithfield’s COVID-19 “controls” and “strategies” are also detailed in an April 22, 2020, memorandum from the CDC to the South Dakota Department of Health and Smithfield and an April 20, 2020, draft of that memorandum—both of which are publicly available online. For example, both memoranda identify specific screening, distancing, infection control, and masking measures implemented at the Sioux Falls plant.<sup>16</sup> The April 22 CDC memorandum provided a list

---

<sup>13</sup> *See* Jodi Schwan, *Smithfield resumes operations in Sioux Falls, details plans for scaling up*, SiouxFalls.Business (May 7, 2020), <https://www.siouxfalls.business/smithfield-resumes-operations-in-sioux-falls-details-plans-for-scaling-up/> (describing measures and posting photographs of those measures).

<sup>14</sup> *Id.*; *see also* Press Release, *supra* n.5 (quoting a union representative as stating that he “toured the plant with our Joint Union Management Safety Committee and was impressed with the measures put in place to protect employees”).

<sup>15</sup> *See* James Doubek, *Workers’ Advocate Says South Dakota Pork Plant Delayed Action on Coronavirus*, NPR (Apr. 17, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/17/837530494/workers-advocate-says-south-dakota-pork-plant-delayed-action-on-coronavirus> (interview with an immigrant advocacy group representative “about what workers at the [Sioux Falls] plant are saying about the working conditions”); *see also* Liu Decl., Ex. 7 (noting that there are 3,700 workers at the Sioux Falls plant).

<sup>16</sup> Memorandum from Michael Grant, CDC National Institute for Occupational Safety and Health et al. to Joshua Clayton, South Dakota Department of Health (Apr. 22, 2020),

of recommendations “intended for this specific [Sioux Falls] plant” “to reduce the spread of COVID-19 between employees while they are at work” and cited the CDC’s interim guidance for employers in their COVID-19 response.<sup>17</sup> Because such details of Smithfield’s compliance with CDC and OSHA guidance are publicly available, the withheld information in the May 6, 2020 reopening plan—which, according to the document itself, reflects Smithfield’s “full compliance with all CDC and [OSHA] guidance,” Liu Decl., Ex. 2—cannot be confidential.

Next, USDA redacted information disclosing Smithfield’s “reopening timetable” for the plant, which identified “reopening dates, departments, harvesting capacity, and the number of affected employees in each department.” *Vaughn* Entry No. 2. That information, however, has been publicly disclosed and shared with a large group of people. For example, Smithfield issued a press release stating that the “harvest floor” at the Sioux Falls facility would “reopen May 11” and that “the company anticipates that the facility will be fully operational by late May.”<sup>18</sup> Information about Smithfield’s reopening schedule also was reported by the press and would have been known to all Smithfield employees at the plant, as well as the employees’ union representatives.<sup>19</sup> Further, Smithfield’s “harvesting capacity” at its plants is not information “customarily” or “actually” kept private because that information is publicly available online,<sup>20</sup> as well as disclosed elsewhere in

---

[https://covid.sd.gov/docs/smithfield\\_recs.pdf](https://covid.sd.gov/docs/smithfield_recs.pdf) [hereafter, “April 22 Memorandum”]; *see also* April 20 Memorandum at 4, 9, 13 (handwritten notations from Smithfield stating it already had “done” or “do[es]” certain measures).

<sup>17</sup> April 22 Memorandum, *supra* n.16, at 5–6.

<sup>18</sup> Press Release, *supra* n.5.

<sup>19</sup> Jodi Schwan, *supra* n.13; *see also* Ryan McCarthy, *Smithfield Foods partially reopens South Dakota Plant*, Meat+Poultry (May 5, 2020), <https://www.meatpoultry.com/articles/23067-smithfield-foods-partially-reopens-south-dakota-plant>.

<sup>20</sup> Steve Meyer, *Pork packing: Just what is capacity?*, at 20, NationalHogFarmer.com (Oct. 2020), [https://cet.gcp.informamarkets.com/sites/cet.com/files/nhf-porkpackerreport\\_0.pdf](https://cet.gcp.informamarkets.com/sites/cet.com/files/nhf-porkpackerreport_0.pdf); *see*

USDA’s production. Liu Decl., Ex. 7 (stating that the Sioux Falls plant “processes 20,000 hogs a day”).

Further, in seeking to hide the “number of affected employees,” *Vaughn* Entry No. 2, USDA is not clear as to whether it is referring to the number of employees impacted by the reopening schedule or the number of employees that contracted COVID-19. Neither, however, is “confidential” information. As to the former, the number of employees and identities of the departments that returned to work upon the reopening of the Sioux Falls facility was known to local unions, all employees who were asked to return to work, and it was reported by the press.<sup>21</sup> And data disclosing the number of reported COVID-19 cases at the Sioux Falls facility (and all other Smithfield facilities) are publicly available online, in detailed charts reporting COVID-19 cases at Smithfield’s various facilities from March 1, 2020, through January 31, 2021.<sup>22</sup> Smithfield itself publicized that such information is shared widely with local, state, and federal regulators and that “COVID-19 data — including active case count — is also available” to all its employees.<sup>23</sup>

Where, as here, Smithfield publicly disseminated the withheld information on its website, to the press, and to all of its employees, such information is not “confidential” within the meaning of exemption 4. *Cf. FMI*, 139 S. Ct. at 2363 (stating that information is not “confidential” if the

---

also Taylor Meek, *Smithfield Foods: How Many Pigs Does Smithfield Slaughter Per Day?*, Sentient Media (July 27, 2019), <https://sentientmedia.org/smithfield-foods/>.

<sup>21</sup> McCarthy, *supra* n.19 (reporting that “[a]ccording to the United Food and Commercial Workers local union and the *Argus Leader*, the pork processing facility asked about 250 employees to report in two staff departments – ground seasoned pork and night clean up”).

<sup>22</sup> *Smithfield Foods Sioux Falls, South Dakota Facility*, <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/10.27.21%20Hearing%20-%20Smithfield.pdf>.

<sup>23</sup> *Employee Health and Safety Amid COVID-19*, Smithfield Foods, <https://www.smithfieldfoods.com/Employee-Health-and-Safety-Amid-COVID-19>.

“owner shares it freely” or if the information is “publicly disseminated” (citation omitted)). That Smithfield made public disclosures about its COVID-19 measures and reopening protocols, including at its Sioux Falls facility, belies the notion that it “customarily” keeps the information at issue private or secret. *See Am. Small Bus. League v. DOD*, 2019 WL 4416613, at \*3 (N.D. Cal. Sept. 15, 2019) (“Lockheed Martin’s selective disclosure of supposed confidential information ... undercuts its vague contention that the company ‘customarily’ treats said information as confidential.”); *see also Renewable Fuels Ass’n v. EPA*, 519 F. Supp. 3d 1, 11 (D.D.C. 2021) (stating that “it is difficult to say that [a refinery] ‘customarily’ treated” its name and location as confidential where that information was kept secret in one document but disclosed in another.”).

Nonetheless, USDA points out that the reopening plan was “marked ‘not for distribution.’” *Vaughn* Entry No. 2. The mere labeling of a record as confidential does not satisfy exemption 4, however, where the evidence shows that the information was not in fact treated as confidential. Thus, here, although USDA asserts that “[o]nly a handful” of Smithfield’s employees “were privy” to the withheld information, *Vaughn* Entry Nos. 1–2; *see also* Graves Decl. ¶ 24, that assertion is contradicted by the substantial evidence, cited above, showing that the information is publicly available online and known to all of Smithfield’s employees. Those facts show that the information was not “actually” kept private or secret. *See FMI*, 139 S. Ct. at 2363 (information is confidential only where it is “known only to a limited few” (citation omitted)); *see also Center for Investigative Reporting*, 470 F. Supp. 3d at 1114 (information shared with current and former employees, and their representatives, without restriction on the information’s further dissemination, was not “confidential” under exemption 4).

In addition, USDA relies on hearsay statements in an unsworn letter from Smithfield, but those statements do not support USDA's withholdings. *See Humane Soc'y Int'l v. United States Fish & Wildlife Serv.*, 2021 WL 1197726, at \*3 (D.D.C. Mar. 29, 2021) (stating that "statements that are impermissible hearsay ... are precluded from consideration by the Court" (citation omitted)); *Friends of Animals v. Bernhardt*, 15 F.4th 1254, 1274 (10th Cir. 2021) (concluding that it was reversible error for a district court to consider hearsay in evaluating withholdings under exemption 4).

**b. The information redacted from the April 30 South Dakota government letter was not private or secret.**

Asserting exemption 4, USDA redacted information from an April 30 letter that was attached to an email sent by a South Dakota government official to the former U.S. Deputy Secretary of Agriculture. According to the parts of the letter that were disclosed, the South Dakota government was in "coordination" with the CDC "to assess actions taken by Smithfield to minimize ... risks of contracting COVID-19 in the workplace, specifically [Smithfield's] Sioux Falls facility." Liu Decl., Ex. 1. USDA, however, redacted the information that it claims "would reveal Smithfield's plans for resuming operations [at the Sioux Falls plant], for partnering with local, state, and federal healthcare authorities, its plans for protecting its employees, and its processes, protocols, and protective measures across its operations." *Vaughn* Entry No. 1.

To carry its burden of showing that exemption 4 applies, USDA must establish that the "the person imparting" the information keeps the information "private, or at least closely held." *FMI*, 139 S. Ct. at 2363. USDA has not done so. The submitter of the April 30 record to the USDA was the South Dakota Department of Health. Liu Decl., Ex. 1. USDA, however, does not argue and offers no evidence showing that the South Dakota Department of Health customarily or actually kept the information private or secret. Instead, USDA asserts that "*Smithfield* advised that



the letter to the South Dakota Department of Health was confidential.” *Vaughn* Entry No. 1 (emphasis added). That assertion should be rejected because it is both conclusory and based on inadmissible hearsay. *See Evans*, 951 F.3d at 584 (concluding that “merely conclusory statements” that lack “reasonable specificity of detail” do not support an award of summary judgment); *see also Humane Soc’y*, 2021 WL 1197726, at \*3; *Friends of Animals v. Bernhardt*, 15 F.4th at 1274. Moreover, the withheld information—which concerns Smithfield’s COVID-19 “protective measures” in reopening its Sioux Falls facility, *see Vaughn* Entry No. 1—is not customarily or actually kept private. *See supra* at I.A.1.a.

In addition, USDA’s assertion that “Smithfield’s plans ... for partnering with local, state, and federal healthcare authorities” is “confidential” information, *see Vaughn* Entry No. 1, is not supported by the record. USDA submits no evidence that such information is customarily or actually treated as private. And that a private company is collaborating with public health officials in a pandemic is not a secret. For example, the coordinated efforts between Smithfield and local and federal governments were disclosed publicly by Smithfield, shared by the local and state governments, and reported by the press.<sup>24</sup> Information disclosing Smithfield’s coordination with

---

<sup>24</sup> Press Release, *supra* n.5 (stating that the South Dakota government was providing testing to its employees in connection with the reopening of the Sioux Falls plant); Alexandra Sternlicht, *South Dakota Gov. Kristi Noem Wants To Reopen Smithfield Foods Plant ‘In A Matter of Days,’* *Forbes* (Apr. 27, 2020), <https://www.forbes.com/sites/alexandrasternlicht/2020/04/27/south-dakota-gov-kristi-noem-wants-to-reopen-smithfield-foods-plant-in-a-matter-of-days/?sh=25747d554384> (quoting the Governor of South Dakota as stating that that “she has been working with the CDC, Vice President Mike Pence and Secretary of Agriculture Sonny Perdue to help reopen the factory as soon as possible with ‘mitigation measures’”); *see also Smithfield closes South Dakota pork plant due to coronavirus*, *AP News* (Apr. 12, 2020), <https://apnews.com/article/virus-outbreak-south-dakota-us-news-kristi-noem-sd-state-wire-0cd7680d2d221944ed05f86691bb3537> (stating that “South Dakota Gov. Kristi Noem and Sioux Falls Mayor Paul TenHaken wrote to Smithfield and urged the company to suspend operations for 14 days so that its workers could self-isolate and the plant could be disinfected”); Stephen Groves, *Noem Says More Testing Supplies Needed to Identify Hot Spots*, *U.S. News* (Apr. 22, 2020), <https://www.usnews.com/news/best-states/south-dakota/articles/2020-04-20/noem-cdc-advice->

the federal government was also disclosed by Smithfield and is publicly available.<sup>25</sup> Thus, the information withheld from the April 30 letter was not customarily or actually kept private.

**2. The information was not provided under an assurance of privacy.**

**a. A government assurance of privacy is required for information to remain “confidential” under exemption 4.**

USDA’s argument (at 15–17) that exemption 4 does not require assurances of privacy should be rejected. In *FMI*, the Supreme Court posited that, even where information is both customarily and actually treated as confidential, the information would “lose 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

---

for-smithfield-wont-be-hard-to-implement?context=amp (stating that the South Dakota Governor was procuring personal protective equipment for the Sioux Falls facility and was requesting testing supplies from the federal government); Jeremy Fugleberg, *Pop-up COVID-19 testing for Smithfield workers, family surges South Dakota cases past 3,500*, Inforum (May 10, 2020), <https://www.inforum.com/newsmd/pop-up-covid-19-testing-for-smithfield-workers-family-surges-south-dakota-cases-past-3-500> (reporting that the South Dakota Department of Health was providing testing for Smithfield workers).

<sup>25</sup> Press Release, *supra* n.5; *see also* April 20 Memorandum; April 22 Memorandum, *supra* n.16.

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). USDA’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 USDA 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 of “commercial

or financial information obtained from a person and ... confidential,” and there would be no need to list them separately.

The legislative history of exemption 4 supports this reading. 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. Because an assurance of nondisclosure had been given, 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 such a 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. *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”).

Thus, this Court should reject USDA’s contention that privacy assurances are not required under exemption 4.

**b. USDA did not provide assurances that it would keep the information private.**

There is no admissible evidence that USDA provided any explicit assurances that it would keep private or secret the information contained in the South Dakota Department of Health letter, *Vaughn* Entry No. 1, or the Sioux Falls reopening plan, *Vaughn* Entry No. 2. USDA asserts that former USDA Undersecretary for Food Safety Mindy Brashears “provided Smithfield an explicit assurance of confidentiality during an April 21, 2020, teleconference.” Graves Decl. ¶ 31. USDA’s assertion, however, relies on a hearsay statement made in a letter submitted by Smithfield’s counsel, *see* Graves Decl., Attachment G, that should be disregarded by the Court. *See Humane Soc’y*, 2021 WL 1197726, at \*3; *Friends of Animals*, 15 F.4th at 1274. Furthermore, USDA’s bare

assertion that confidentiality assurances were provided to Smithfield does not show that such assurances covered the *particular* information redacted by USDA here.

Citing Executive Order 13917 and section 101(b) of the Defense Production Act (DPA), USDA asserts (at 18) that it provided an “*implied* assurance of privacy” because “cooperation from meat and poultry plants and trade associations were [sic] vital to the resolution of supply chain issues and continued efficacy,” Graves Decl. ¶ 29. But nothing in either Executive Order 13917 or the DPA provides confidentiality assurances. Executive Order 13917 instructed the Secretary of Agriculture to initiate the DPA’s contract prioritization and allocation scheme if the Secretary deemed it appropriate to do so. *See Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 736–37 (8th Cir. 2021) (explaining limited nature of Executive Order 13917). And USDA has confirmed in other litigation that it “has not exercised its DPA authority to enter any contracts or issue any orders requiring action by [the poultry and meatpacking] industry.” *See Liu Decl.*, Ex. 12 (Brief for United States as Amicus Curiae in Support of Appellees at 4, *Buljic v. Tyson Foods, Inc.*, Nos. 21-1010 & 21-1012 (8th Cir. Apr. 13, 2021)). In short, the executive order and DPA are irrelevant to the records at issue.

USDA’s conclusory assertion that collaboration with the meatpacking industry was “vital” to the economy does not address the question whether any privacy assurance—implied or otherwise—was provided. Further, under USDA’s theory, all information that meat and poultry plants and trade associations provided to USDA since the onset of COVID-19 would have been provided under an “implied assurance of privacy.” That suggestion both contravenes FOIA’s intent “to provide for open disclosure of public information” and its “strong presumption in favor of disclosure,” *Pub. Citizen, Inc. v. Rubber Manufacturers Ass’n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (citations omitted), and lacks any support in the factual record.

Further, as to the South Dakota Department of Health letter, USDA has not submitted any evidence showing that the South Dakota Department of Health provided an assurance of privacy to Smithfield, or that USDA provided any confidentiality assurances to the state agency. Privacy assurances need to be provided at both steps for information not to “lose” its confidential character. *Cf. FMI*, 139 S. Ct. at 2363 (positing that “privately held information” can “lose its confidential character” under exemption 4).

Because USDA has failed to show that it provided confidentiality assurances (either explicit or implicit) with respect to the specific information at issue here, the information is not “confidential” within the meaning of exemption 4.

**B. The withheld information is not “commercial.”**

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). “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).

With respect to *Vaughn* Entry Nos. 1 and 2, USDA has failed to satisfy its burden to show that the withheld information is “commercial.” For example, USDA redacted from the Sioux Falls reopening plan (*see Vaughn* Entry No. 2) information that is historic and stale, such as the reopening dates, departments, and number of impacted employees. That information is not “commercial” because it does not reveal information about Smithfield’s ongoing business



operations. *See Pub. Citizen v. HHS*, 975 F. Supp. 2d 81, 105–06 (D.D.C. 2013) (concluding that a list of the names, titles, and responsibilities of persons identified in a company’s compliance report is “static and does not appear to have anything to do with the ongoing creation or selling of products, nor does this information appear to be ‘instrumental’ to conducting commerce”); *see also Nat’l Bus. Aviation Ass’n v. FAA*, 686 F. Supp. 2d 80, 86 (D.D.C. 2010) (concluding that aircraft registration numbers were not “commercial” information because the release of the list of numbers “would not provide the requester with any real-time or near real-time data regarding aircraft locations”).

USDA’s assertion (at 10) that the withheld information is “commercial” because it reflects Smithfield’s plans for complying with federal guidance is wrong. The case cited by USDA, *Tokar v. DOJ*, 304 F. Supp. 3d 81, 94 n.3 (D.D.C. 2018), did not present the question whether the information was “commercial” because the plaintiff there did not challenge the government’s withholdings under exemption 4. *Id.* at 94. The dicta in a footnote as to the commercial nature of the information at issue there do not suggest that all compliance information is “commercial.” Indeed, in *New York Times Co. v. DOJ*, 2021 WL 371784, at \*12 (S.D.N.Y. Feb. 3, 2021), the court squarely held the opposite. *Id.* (concluding that *not* all information about a company’s compliance program is “commercial” under exemption 4).

Citing *100Reporters LLC v. DOJ (100Reporters I)*, 248 F. Supp. 3d 115 (D.D.C. 2017), and *Public Citizen v. HHS*, 975 F. Supp. 2d 81 (D.D.C. 2013), USDA asserts (at 10) that the poultry and meatpacking plants “plainly have a commercial interest relating to the plant operations and business decisions and practices.” Neither *100Reporters I* nor *Public Citizen*, however, supports the notion that all information “relating to” a company’s work practices or operations is “commercial.” Indeed, *Public Citizen* expressly *rejected* that argument. *See* 975 F. Supp. 2d at 100

(concluding 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”). Rather, the court concluded that the specific information at issue was “commercial” because it included “extensive” detail about the company’s “marketing and sales programs and contracting processes,” *id.* at 109, and described modifications to the company’s internal processes for fulfilling its requirements under a Corporate Integrity Agreement with the government, *id.* at 105. And the court in *100Reporters* later concluded, following an *in camera* review, that some of the information in the work plan was *not* “commercial” because it “consist[ed] mostly of general descriptions of the Monitor’s past and future activities with very few details about [the company’s] business operations.” *100Reporters LLC v. DOJ (100Reporters II)*, 316 F. Supp. 3d 124, 141 (D.D.C. 2018).

Here, USDA has failed to show that the withheld information is, in and of itself, “commercial” in nature or function. To the extent that the withheld information contains general descriptions, it is not “commercial.” *100Reporters II*, 316 F. Supp. 3d at 140. And unlike the information at issue in *Public Citizen*, the information here neither reflects detail about Smithfield’s marketing and sales programs or contracting processes, nor changes to Smithfield’s processes for satisfying the provisions of a government agreement. USDA’s general assertion that the withheld information relates to Smithfield’s operations or business is inadequate to carry its burden of establishing that the information is “commercial” under exemption 4. *See also Chicago Tribune Co. v. FAA*, 1998 WL 242611, at \*2 (N.D. Ill. May 7, 1998) (stating that “[t]he mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information”).

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

USDA redacted a May 15, 2020, email to the former Undersecretary of Agriculture for Food Safety from a trade group (National Chicken Council) representative asking that USDA intervene in a local government's attempts to impose infection control measures to minimize the spread of COVID-19 at a certain poultry plant. *See* Liu Decl., Ex. 3. According to the unredacted parts of the record, a county health department was “demanding 100% testing of all employees” at the poultry facility and “threaten[ed] ... complete facility closure” because of a COVID-19 outbreak at the facility. *Id.* Asserting exemption 4, USDA withheld the names of the local governmental entities and the poultry plant for which the trade group requested USDA intervention. *See* Vaughn Entry No. 4. Because this information is neither “confidential” nor “commercial,” USDA’s assertion of exemption 4 was improper.

**A. The withheld information is not “confidential.”**

The redacted information is not “confidential” under exemption 4 because it is not customarily or actually kept private or secret, and the information was not submitted under an assurance of privacy. *Cf. FMI*, 139 S. Ct. at 2366.

**1. The withheld information is not customarily or actually kept private.**

USDA asserts that the names of the poultry facility and local governmental entities mentioned in the trade group’s email are “confidential” because disclosure would reveal “the facility’s discussions with local regulators about its ability to operate during the pandemic and the health and safety requirements that the facility was implementing.” *Vaughn* Entry No. 4. This information is not “confidential” because it was not customarily or actually kept private or secret.

To start, the face of the document identifies the names of two Tennessee state officials and the name of a Hamilton County Health Department official. *See* Liu Decl. ¶ 8 & Ex. 8 (Second

Interim Response at 180).<sup>26</sup> Accordingly, the fact that the email communication concerned a poultry facility and State and local regulators in Tennessee and Hamilton County is not a secret.

Next, USDA makes no argument and offers no evidence showing that the local governments identified in the record closely guarded the fact that they were discussing with particular poultry plants the health and safety requirements implemented at the facility. To the contrary, there is evidence that local governments did *not* customarily or actually keep private their discussions with poultry facilities. For example, the Mayor of Hamilton County, Tennessee, told the press that the county health department was communicating with Koch Foods and Pilgrim's Pride over their COVID-19 protective measures at their poultry facilities.<sup>27</sup> The Metro Public Health Department in Nashville and Davidson County also released a press statement about a Tyson Foods plant in Goodlettsville, Tennessee, disclosing that "[t]he U.S. Department of Agriculture, Tennessee Department of Health and MPH are working directly with Tyson officials on the steps to mitigate the threat of the disease as part of plant operations."<sup>28</sup>

---

<sup>26</sup> Although these names were redacted in the copy of this record that USDA's counsel provided to plaintiff's counsel in connection with the *Vaughn* Index, see Liu Decl., Ex. 3, USDA disclosed this information in its prior release of that same document, see Liu Decl. ¶ 9 & Ex. 8.

<sup>27</sup> *Update: Koch Foods responds after COVID-19 cases confirmed at Chattanooga chicken plant*, ABC News Channel 9 (May 14, 2020), <https://newschannel9.com/news/local/county-mayor-11-confirmed-covid-19-cases-at-chattanooga-chicken-plant> (quoting the Hamilton County Mayor Jim Copping as stating during a news conference that "[w]e have been in contact with [Koch Foods] for several days and more discussion today" and that "Mayor Copping says that they are also working with Pilgrim's Pride"); *Health Department: There have been 17 COVID cases at Pilgrim's Pride plant in Chattanooga*, ABC News Channel 9 (May 11, 2020), <https://newschannel9.com/news/local/health-department-confirms-positive-covid-19-case-at-pilgrims-pride-plant-in-chattanooga> (reporting that a Hamilton County Health Department executive stated that "Pilgrim's Pride has cooperated with the Health Department").

<sup>28</sup> Kelly Taylor Hayes, *90 workers test positive for COVID-19 at Tyson Foods plant in Tennessee*, Fox 4 News (Apr. 20, 2020), <https://www.fox4news.com/news/90-workers-test-positive-for-covid-19-at-tyson-foods-plant-in-tennessee>.

In addition, the poultry facilities themselves did not keep secret their cooperation with local governmental entities. For example, Koch Foods and Pilgrim’s Pride confirmed their cooperation with local health departments in Tennessee,<sup>29</sup> and JBS stated that it was “[i]n partnership with the Colorado Department of Public Health and Environment and the Weld County Department of Public Health and Environment” in its effort to “combat the spread of coronavirus.”<sup>30</sup> Further, the coordination between local, State, and federal governments over COVID-19 protective measures at particular facilities was widely reported by the press.<sup>31</sup>

Moreover, information disclosing that companies and trade groups requested USDA intervention against local requirements for certain COVID-19 protective measures is not “confidential.” Such information was disclosed repeatedly throughout USDA’s production of records in response to plaintiff’s request, including for National Chicken Council member poultry plants.<sup>32</sup> The numerous disclosures in produced documents showing that the National Chicken

---

<sup>29</sup> See *Update: Koch Foods, supra* n.27 (quoting Koch Foods statement that “Koch is continuing to cooperate with Hamilton County officials”); see also *Health Department, supra* n.27 (stating that Pilgrim’s Pride is “working with the local health department” (quoting Pilgrim’s Pride statement provided to the press about its Chattanooga facility)).

<sup>30</sup> Press Release, JBS Foods, *JBS USA Announces Temporary Closure of Greeley Beef Facility* (Apr. 13, 2020), <https://jbsfoodsgroup.com/articles/jbs-usa-announces-temporary-closure-of-greeley-beef-facility>.

<sup>31</sup> Mariah Timms, *Metro Health: ‘Impressed’ with conditions at Tyson plant where 120 coronavirus cases found*, *The Tennessean* (Apr. 23, 2020), <https://www.tennessean.com/story/news/health/2020/04/23/tennessee-tyson-plant-coronavirus-outbreak-open/3011593001/> (reporting that the Metro Public Health Department was “in consultation with [Tennessee] state health officials and the Centers for Disease Control” over the COVID-19 outbreak at Tyson Foods’ Goodlettsville, Tennessee facility, and listing the “safety measures” that the company stated that it had implemented at the facility); see also *supra* nn.27–28.

<sup>32</sup> See, e.g., Liu Decl., Ex. 10 (Second Interim Response at 23) (discussing testing requirements imposed by the Governor of Delaware that would impact Delmarva Poultry); *id.* (Second Interim Response at 40–42) (identifying Maryland State and county testing protocols impacting Amick Farms, Perdue, and Delmarva poultry plants); *id.* (Second Interim Production at

Council and poultry companies requested USDA intervention against the COVID-19 requirements that local governments sought to impose at specific poultry plants belies USDA's assertion that such information is customarily kept confidential. Furthermore, such information was publicly disclosed by poultry companies and reported by the press.<sup>33</sup>

In addition, the health and safety requirements implemented at a particular facility is not a secret. As explained above (at 9–19), poultry and meatpacking companies have publicized that information on their websites and with the press.<sup>34</sup> Information identifying the COVID-19 measures implemented at specific plants has also been publicly disseminated by the poultry

---

90–91) (Perdue executive requesting assistance from USDA in connection with the State of Virginia's testing requirements and potential closure of Perdue poultry facility); *id.* (Second Interim Response at 214) (email submitted by the National Chicken Council disclosing the names of member poultry plants facing potential closures due to “the proposed Delaware Health Department testing protocol”).

<sup>33</sup> Steve Sternberg, *Chicken Plants – and the Food Supply – Takes Center Stage in Delaware's COVID-19 Fight*, U.S. News (May 5, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-05-05/chicken-plants-take-center-stage-in-delaware-coronavirus-fight> (reporting that “state health officials and three hospital systems ... will be testing about 5,000 workers at major poultry facilities tied to companies including Perdue Farms and Allen Harim”); *see also* Maddy Lauria, *Coronavirus cases among employees lead to temporary closure of Delaware chicken plant*, Delaware Online (Mar. 30, 2020), <https://www.delawareonline.com/story/news/local/2020/03/30/coronavirus-cases-close-southern-delaware-perdue-chicken-plant/5086110002/> (reporting the measures and protocols implemented at a Perdue plant in Milford, Delaware and stating that a Perdue spokesperson said that “the company is notifying and coordinating responses with local state and federal officials, including the U.S. Department of Agriculture and the Delaware Department of Health and Social Services”).

<sup>34</sup> For example, Tyson Foods released a video on Twitter on April 15, 2020, discussing and identifying the specific COVID-19 protective measures it was implementing at its facilities. <https://twitter.com/TysonFoods/status/1250575720272859138>. *See also, e.g., Beating COVID-19, together*, Tyson Foods, <https://www.tysonfoods.com/fighting-covid-19-together>; *Responding to COVID-19*, JBS Foods, <https://jbsfoodsgroup.com/our-purpose/responding-to-covid-19>.

companies themselves.<sup>35</sup> And information about the required COVID-19 measures at a specific facility is known to all workers at that facility—a large group of people.<sup>36</sup>

Although FOIA places the burden on USDA, *see Maydak*, 218 F.3d at 764, USDA offers *no* evidence showing that the specific facilities or local governments identified in the record customarily or actually kept the information private. USDA does not assert that the local governments kept their attempts to impose infection control measures private. And as to the poultry facilities, although USDA states (at 15) that the information “was closely held within the member client’s company,” it cites no evidence. Moreover, USDA’s assertion is contradicted by the record evidence, *see supra* at 9–19, showing that such information was *not* customarily or actually kept private. USDA also states (at 15) that the information is confidential because it “was only shared with a few [National Chicken Council] officials,” but that assertion does not demonstrate that the specific facilities or local governments identified in the record—the owners of the information at issue—customarily and actually keep the information private or secret.

Further, USDA’s statement that the poultry company shared the information “for the purpose of assisting [the facility] with government engagement,” *Vaughn* Entry No. 4, shows that

---

<sup>35</sup> *Update: Koch Foods responds after COVID-19 cases confirmed at Chattanooga chicken plant, supra* n.27 (Koch Foods released a statement identifying its “COVID-19 actions at [its] facility” in Chattanooga, Hamilton County); *Health Department: There have been 17 COVID cases at Pilgrim’s Pride plant in Chattanooga, supra* n.27 <https://newschannel9.com/news/local/health-department-confirms-positive-covid-19-case-at-pilgrims-pride-plant-in-chattanooga>(Pilgrim’s Pride listed in a press statement “the numerous preventive measures [implemented] at [its] Chattanooga facility).

<sup>36</sup> *See* James Doubek, *supra* n.15 (disclosing the measures reported by workers at the meatpacking plant); *see also, e.g.,* Bernarda Lopez - Worker Testimony, *How The Meatpacking Industry Failed The Workers Who Feed America Before the H. Select Subcomm. on the Coronavirus Crisis* (Oct. 27, 2020), <https://docs.house.gov/meetings/VC/VC00/20211027/114179/HHRG-117-VC00-20211027-SD006.pdf> (testimony from a worker describing the COVID-19 measures implemented at a Tyson Foods plant in Green Forest, Arkansas).

the company did *not* keep the information closely guarded; rather, the company shared information with the trade association so that it could be disseminated to other parties.

Finally, the trade group asserts in an email to USDA that “[t]hese materials are held closely by ... the relevant member companies.” Graves Decl., Attachment G. That assertion is not entitled to any consideration. *See Evans*, 951 F.3d at 584 (concluding that “merely conclusory statements” that lack “reasonable specificity of detail” do not support an award of summary judgment); *see also Humane Soc’y*, 2021 WL 1197726, at \*4 (concluding that statements that “do not attest to specific facts indicating how each [submitter] treats the relevant data” are “conclusory” and are insufficient to support an exemption 4 withholding). Moreover, if offered as evidence of confidential treatment, the trade group’s statement is inadmissible hearsay. *See Humane Soc’y*, 2021 WL 1197726, at \*3; *Friends of Animals*, 15 F.4th at 1274.

In sum, because the information at issue was publicly disseminated by poultry companies and local governments, shared with the press, and known to all employees at the poultry company, the information is not private or secret and, therefore, is not “confidential” within the meaning of exemption 4. *See FMI*, 139 S. Ct. at 2363; *see also Center for Investigative Reporting*, 470 F. Supp. 3d at 1114; *Farmworker Just.*, 2021 WL 827162, at \*2; *N.Y. Times Co.*, 529 F. Supp. 3d at 283.

## **2. The withheld information was not provided under an assurance of privacy.**

As explained above (at 19–23), privacy assurances are required for information to be “confidential” within the meaning of exemption 4. Here, USDA does not argue or provide any evidence showing that explicit assurances of privacy were given. It does not state that USDA provided confidentiality assurances to the trade group that submitted the record, or that the trade group provided any assurances to the specific facilities or local governments referenced in the record, or that USDA provided any assurances to the specific facilities or local governments.



Instead, USDA again asserts that privacy assurances were implied because “cooperation ... was vital to the resolution of supply chain issues, continued efficacy, and compliance with Executive Order 13,917.” *Vaughn* Entry No. 4. USDA’s assertion fails for the reasons explained above. *See supra* at 24. Moreover, the record shows that no privacy assurances were actually provided. USDA asserts that the facility shared the information with the National Chicken Council “for the purpose of assisting [the facility] with government engagement.” *Vaughn* Index Entry No. 4. That statement reveals that the facility provided information to the trade association with the expectation that it would be disseminated to other actors to receive governmental assistance.

**B. The withheld information is not “commercial.”**

USDA does not argue that the names of local regulators or poultry facilities are “commercial” information. Rather, USDA states that “[t]his withheld information when read in tandem with portions already released by USDA, reveals one company’s sensitive commercial information, specifically, operational issues with COVID-19 testing, internal controls, and governmental relations.” *Vaughn* Entry No. 4. USDA’s argument is unavailing.

The fact that local government entities were imposing requirements on the poultry plant is not “commercial” information. As the court held in *Public Citizen v. HHS*, “the identity of an outside agency conducting an investigation” into the submitter is not “commercial” under exemption 4 because such information “would not, standing alone, reveal any information about the business operations or other commercial activities” of the submitter. 975 F. Supp. 2d at 106–07. Here, the names of the local governmental entities that sought to reduce COVID-19 risks at a specific poultry plant do not reveal information about the plant’s business.

In addition, USDA has failed to satisfy its burden to show that the withheld information is “commercial” for the same reasons that it failed to satisfy its burden to show that the information

withheld from the records about Smithfield’s COVID-19 response is “commercial.” *See supra* at 25–27. “Not every bit of information” is “commercial,” *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290, and USDA has failed to demonstrate that the withheld information here is of a commercial nature or purpose.

**III. The names of poultry meatpacking facilities in records identifying plant closures and slaughter capacities (*Vaughn* Entry No. 5) are not within the scope of exemption 4.**

Asserting exemption 4, USDA redacted the names of poultry and meat processing facilities from USDA charts and memorandum identifying plant closures and the slaughter capacities for the impacted plants. *See* Liu Decl., Ex. 4 (redacted record); *see also Vaughn* Entry No. 5. Although the withheld information is “commercial,” the withholding is improper because the information is not “confidential” within the meaning of exemption 4: The information is not customarily or actually kept secret, and USDA did not provide any assurances that the information would be kept private. *Cf. FMI*, 139 S. Ct. at 2366.

**A. The withheld information is not private or secret.**

USDA has failed to satisfy its burden to show that the redacted information is “confidential” within the meaning of exemption 4. Indeed, USDA does not argue that the withheld information is “confidential.” *See* Def. Mem. 14–15. And it has submitted no evidence regarding whether the submitter poultry and meatpacking facilities customarily or actually keep the information private or secret.

Instead, USDA asserts that the records “were intended to be closely held” because *USDA* marked them “‘internal’ and ‘not for public release.’” *Vaughn* Entry No. 5; *see also* Graves Decl. ¶ 26 (stating that “USDA appropriately marked its internal charts, briefs compiling this information ‘privileged,’ ‘confidential,’ ‘for internal use,’ and ‘not for public dissemination’”). USDA is wrong that all the records designated as *Vaughn* Entry No. 5 bear such markings. *See*

Liu Decl., Ex. 4. And, in any event, USDA's markings are irrelevant to the question whether the *submitter* treats the information as confidential.

Moreover, information disclosing the identities of poultry and meatpacking plants that closed during the pandemic cannot be "confidential" because it is not secret. Plant closures and reopening schedules were widely reported by the press. Maps and spreadsheets identifying plant closures for various poultry and meatpacking plants throughout the country are available online,<sup>37</sup> and the news media published numerous articles reporting closures at various poultry and meatpacking plants.<sup>38</sup> There is even a Wikipedia article, citing to numerous news articles, that lists plant closures for various poultry and meatpacking companies due to the impact of COVID-19.<sup>39</sup> And poultry and meatpacking facilities have publicly disclosed that they were closing certain

---

<sup>37</sup> Ryan McCarthy and Sam Danley, *Map: COVID-19 meat plant closures*, Meat+Poultry (June 23, 2020), <https://www.meatpoultry.com/articles/22993-covid-19-meat-plant-map>; *see also* Sky Chadde, *Tracking Covid-19's impact on meatpacking workers and industry*, Investigate Midwest (Apr. 17, 2020), <https://investigatamidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/> (collecting news articles and providing a spreadsheet identifying plant closures for 54 poultry and meatpacking plants).

<sup>38</sup> *See, e.g.*, Kyle Bagenstose and Sky Chadde, *Trump executive order didn't stop meat plant closures. Seven more shut in the past week.*, USA Today (May 5, 2020), <https://www.usatoday.com/story/news/investigations/2020/05/05/coronavirus-closes-meatpacking-plants-despite-trump-executive-order/5172526002/>; Chacour Koop, *As meat packing plants close for coronavirus, will prices spike and shelves go empty?*, The Kansas City Star (Apr. 17, 2020), <https://www.kansascity.com/news/coronavirus/article242055776.html>; Laura Reiley, *Meat processing plants are closing due to covid-19 outbreaks. Beef shortfalls may follow.*, The Washington Post (Apr. 16, 2020), <https://www.washingtonpost.com/business/2020/04/16/meat-processing-plants-are-closing-due-covid-19-outbreaks-beef-shortfalls-may-follow/>; Greg Henderson, *COVID-19: JBS Shutters Greeley Beef Plant, National closes Tama, AG Web* (Apr. 13, 2020), <https://www.agweb.com/news/livestock/beef/covid-19-jbs-shutters-greeley-beef-plant-national-closes-tama>.

<sup>39</sup> *Impact of the COVID-19 pandemic on the meat industry in the United States*, Wikipedia, [https://en.wikipedia.org/wiki/Impact\\_of\\_the\\_COVID-19\\_pandemic\\_on\\_the\\_meat\\_industry\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Impact_of_the_COVID-19_pandemic_on_the_meat_industry_in_the_United_States).

facilities due to COVID-19.<sup>40</sup> Further, USDA has publicly shared information regarding plant closures in a publicly available working paper,<sup>41</sup> and in other records produced in response to plaintiff's request.<sup>42</sup>

Information disclosing that poultry and meatpacking plants were operating at certain slaughter capacities is also not secret. Indeed, meatpacking companies publicly disclose information about their processing capacities. For example, JBS states on its website that it “ha[s] the capacity to process more than 200,000 cattle, 500,000 hogs, 45 million chickens and 80,000 small stock (lambs, sheep, goats and veal calves) per week.”<sup>43</sup> Tyson Foods does the same, reporting that information on its website and in its SEC filings.<sup>44</sup> Information on daily slaughter

---

<sup>40</sup> See, e.g., Press Release, Smithfield Foods, *Smithfield Foods to Close Two Additional Meat Processing Facilities* (Apr. 15, 2020), <https://www.smithfieldfoods.com/press-room/2020-04-15-Smithfield-Foods-to-Close-Two-Additional-Meat-Processing-Facilities>; Press Release, Tyson Foods, *Tyson Foods to Indefinitely Suspend Waterloo Operations* (Apr. 22, 2020), <https://www.tysonfoods.com/news/news-releases/2020/4/tyson-foods-indefinitely-suspend-waterloo-operations>.

<sup>41</sup> Samantha L. Padilla et al., *COVID-19 Working Paper: Changes in Regional Hog Slaughter During COVID-19* (USDA Economic Research Service, COVID-19 Working Paper #AP-095, December 2021), at 19–20, <https://www.ers.usda.gov/webdocs/publications/102784/ap-095.pdf?v=106.9> (stating that “[s]ome of the major pork packing plants in the region temporarily shut down (e.g., JBS USA in Worthington, MN; Smithfield Foods in Monmouth, IL; and Tyson Foods in Logansport, IN), which largely explains the declines in slaughter during April and May 2020” (footnote omitted)).

<sup>42</sup> Liu Decl., Ex. 11 (Cargill letter stating that “Cargill’s Milwaukee, Wisconsin facility was ... closed per a directive from the City of Milwaukee Health Department” and that its Schuyler, Nebraska facility “has been temporarily idled”); *id.*, Ex. 9 (Fourth Interim Response at 45) (identifying plant closures, re-opening dates, and slaughter capacity for Smithfield, Tyson, and Yosemite plants).

<sup>43</sup> *About Our Company*, JBS USA, <https://sustainability.jbssa.com/chapters/who-we-are/about-our-company/>.

<sup>44</sup> *Tyson Foods Facts*, Tyson Foods, <https://ir.tyson.com/about-tyson/facts/default.aspx> (stating on its website that in fiscal year 2021, Tyson Foods had a 155,000 head per week capacity for beef, 469,000 head per week capacity for pork, and 47 million head per week capacity for

capacities is also posted online by trade publications and associations. For example, the National Hog Farmer disseminates a yearly report, which is publicly available online, identifying the estimated daily slaughter capacity for meatpacking plants.<sup>45</sup> Trade groups also have published online information on daily slaughter capacities for various plants.<sup>46</sup> And USDA has disclosed, in records produced in response to plaintiff's FOIA request, slaughter capacities for certain meatpacking plants that were closed due to COVID-19. Liu Decl., Ex. 9 (Fourth Interim Response at 45, identifying plant closures, re-opening dates, and slaughter capacity for Smithfield, Tyson, and Yosemite plants).

In addition, information revealing reduced slaughter capacities at poultry and meatpacking plants due to COVID-19 is publicly available. The poultry and meatpacking companies publicly shared information stating that certain plants were operating at reduced capacities.<sup>47</sup> And specific numeric data reflecting the reduced slaughter capacities of specific meat and poultry plants were

---

chicken); Tyson Foods, Annual Report (Form 10-K) (Nov. 16, 2020), at 19, [https://s22.q4cdn.com/104708849/files/doc\\_financials/2020/ar/Tyson-2020-10K.pdf](https://s22.q4cdn.com/104708849/files/doc_financials/2020/ar/Tyson-2020-10K.pdf).

<sup>45</sup> Steve Meyer, *supra* n.20 (disclosing daily slaughter capacities for 48 meatpacking companies in Fall 2019 and Fall 2020).

<sup>46</sup> *COVID-19 Impacts on Illinois Hog Producers and Pork Processing Industry*, Illinois Pork Producers, [https://ilpork.com/file/448/COVID19%20Impacts\\_IL%20Hogs\\_0520\\_vF-1.pdf](https://ilpork.com/file/448/COVID19%20Impacts_IL%20Hogs_0520_vF-1.pdf) (reporting daily slaughter capacities at various plants in Illinois).

<sup>47</sup> Press Release, Tyson Foods, *Tyson Fresh Meats to Resume Waterloo, Iowa Operations*, <https://www.tysonfoods.com/news/news-releases/2020/5/tyson-fresh-meats-resume-waterloo-iowa-operations> (stating that the Waterloo facility had “limited” operations); *COVID-19 Timeline*, JBS Foods, <https://jbsfoodsgroup.com/businesses/jbs-foods-usa/covid-19-timeline#may-2020> (stating that JBS had “reopen[ed] a portion of its Worthington, Minnesota facility with reduced staff.”); *see also* Tom Polansek, *Coronavirus forces Tyson Foods to shutter two major U.S. pork plants*, Reuters (Apr. 22, 2020), <https://www.reuters.com/article/us-health-coronavirus-tyson-foods/coronavirus-forces-tyson-foods-to-shutter-two-major-u-s-pork-plants-idUSKCN2241ZV>.

publicly reported by the press, disseminated by trade groups, and shared with union representatives.<sup>48</sup>

Where, as here, the withheld information was shared freely by poultry and meatpacking companies, reported by the press, publicly disseminated online, and known to large groups of people, the information is not customarily or actually kept secret, and thus is not “confidential” under exemption 4. *See FMI*, 139 S. Ct. at 2363; *see also Farmworker Just.*, 2021 WL 827162, at \*2; *Center for Investigative Reporting*, 470 F. Supp. 3d at 1114; *N.Y. Times Co.*, 529 F. Supp. 3d at 283.

**B. The withheld information was not provided under an assurance of privacy.**

The information is also not “confidential” within the meaning of exemption 4 because no assurances were provided by USDA to the meatpacking facilities that USDA would keep the information private. *See supra* at 19–23. Here, USDA does not argue or submit any evidence showing that explicit privacy assurances were provided in connection with the information. Instead, USDA repeats that there was an “implicit assurance of confidentiality” because cooperation was “vital to the resolution of supply chain issues, continued efficacy, and compliance

---

<sup>48</sup> Laura Reiley, *Tyson says nation’s pork production is down 50%, despite Trump’s order to keep meat plants open*, The Washington Post (May 4, 2020), <https://www.washingtonpost.com/business/2020/05/04/tyson-says-nations-pork-production-is-down-50-despite-trumps-order-keep-meat-plants-open/> (reporting that an economist stated that Tyson Foods “was down by 57,780 hogs processed per day from a capacity of 78,500 processed per day. That’s 74 percent short.”); *COVID-19 Impacts on Illinois Hog Producers and Pork Processing Industry*, *supra* n.46 (stating that the JBS plant at Beardstown, Illinois, the Smithfield plant at Monmouth, Illinois, and the Rantoul Foods plant at Rantoul, Illinois, were all operating at approximately “80% of normal daily capacity”); Jessica Lussenhop, *Coronavirus at Smithfield pork plant: The untold story of America’s biggest outbreak*, BBC News (Apr. 17, 2020), <https://www.bbc.com/news/world-us-canada-52311877> (reporting that a union representative stated that a Smithfield plant “was running at about 60–65% capacity”).

with Executive Order 13,917.” *Vaughn* Entry No. 5. USDA’s assertion fails for the reasons explained above. *See supra* at 24.

**IV. The withheld information should be disclosed under the FOIA Improvement Act of 2016.**

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*, 3 F.4th at 369. 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.*, 2021 WL 371784, at \*15 n.15 (collecting cases). USDA cites (at 19) *Center for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90 (D.D.C. 2019), in which 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.” *Id.* at 113 (internal citations omitted). Under that standard, disclosure of the withheld information would not result in foreseeable harm to an interest protected by exemption 4, because releasing the withheld information would not “dissuad[e] others from submitting similar information to the government.” *Id.* The information at issue was submitted because employers were seeking government assistance and intervention during the COVID-19 pandemic. USDA has

offered no support for the notion that disclosure of the redacted information would dissuade companies from submitting information in similar circumstances.

Moreover, whatever interests are protected by exemption 4, the interest in hiding the health and safety measures that a company took (or did not take) in response to the COVID-19 pandemic is not one of them. USDA asserts that disclosure would “undermine the[] companies’ competitive position.” Def. Mem. 19 (quoting Graves Decl. ¶ 32). But USDA offers no support for the notion that FOIA exemption 4 protects a company’s interest in obtaining a competitive advantage by concealing the degree to which a company exposed its workers to health and safety risks. Indeed, to the extent that the withheld information would disclose that a company failed to implement certain protections for its employees, the resulting reputational harm that the company would face is not an interest that exemption 4 protects. *See United Techs. Corp. v. DOD*, 601 F.3d 557, 564 (D.C. Cir. 2010) (in discussing whether disclosure of the information would result in competitive harm, stating that “[e]xemption 4 does not guard against mere embarrassment in the marketplace or reputational injury”).

In addition, disclosure of the withheld information would not result in foreseeable harm to an interest protected by exemption 4 because the information is stale. Information about the measures that a company adopted in 2020, a company’s prior communications with local regulators, and information disclosing 2020 plant closures and slaughter capacities is historic information, the disclosure of which would not impact a company’s ongoing business. Because the disclosure of such information would not harm an interest that is protected by exemption 4, the Court should order the information’s release under the FOIA Improvement Act of 2016.



**CONCLUSION**

For the foregoing reasons, Public Citizen's motion for summary judgment should be granted, USDA's motion for summary judgment should be denied, and the Court should order USDA to disclose the information at issue.

Dated: February 18, 2022

Respectfully submitted,

/s/ Wendy Liu

Wendy Liu (D.C. Bar No. 1600942)

Adam R. Pulver (D.C. Bar No. 1020475)

PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street NW

Washington, DC 20009

(202) 588-1000

*Counsel for Plaintiff*