UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARM LABOR ORGANIZING COMMITTEE, Plaintiff, v. U.S. DEPARTMENT OF LABOR, Defendant.	)	Civil Action No. 20-645 (KBJ)

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

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In this FOIA case against the Department of Labor (DOL), Public Citizen challenges DOL's withholding under FOIA exemption 4 of the names of tobacco buyers from DOL's narrative reports for 61 agricultural employers (growers) about grower violations of federal labor law. Commercial information falls within the scope of exemption 4's protection for "confidential commercial information" where it is "customarily and actually treated as private by its owner" and "provided to the government under an assurance of privacy." *Food Mktg. Inst. v. Argus Leader* (*FMI*), 139 S. Ct. 2356, 2366 (2019). DOL fails to satisfy this standard.

It is undisputed that the majority of the growers did not object to the disclosure of the information, that the names of tobacco-company buyers are openly displayed on posters and promotional materials, that tobacco companies and growers have disclosed the information to persons outside their organization (including FLOC), and that the names of tobacco buyers were routinely released in response to prior FOIA requests. Moreover, DOL's narrative reports fail to show that the DOL investigators who collected and recorded the information provided any assurance that DOL would keep the names of tobacco buyers private. Although DOL asserts that the names of tobacco buyers are protected under confidentiality provisions in sales contracts between the growers and tobacco companies, no such contract has been placed in the record, and the purported provisions on which DOL relies do not appear to preclude dissemination of the requested information.

Faced with these undisputed facts, DOL makes generalized assertions of confidentiality based on hearsay statements from its declarant, Patrice Rachel Torres, and those of a few growers and tobacco companies. The materials submitted by DOL do not satisfy its burden under FOIA. *See Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (the government at summary judgment must "provide detailed and specific information demonstrating that material

withheld is logically within the domain of the exemption claimed"). Furthermore, DOL fails to provide any non-speculative explanation for why disclosure of the requested information will result in foreseeable harm to an interest protected by exemption 4.

The Court should grant FLOC's motion, deny DOL's motion, and order DOL to disclose the names of tobacco buyers that it redacted from the narrative reports.

ARGUMENT

I. The requested information is not "confidential" under exemption 4 because it was not customarily and actually kept private by the growers or tobacco companies.

A. DOL must produce the information provided by the growers who did not object to its release.

After being informed by letter from DOL that if the grower "failed to respond to the letter, [DOL] would release the commercial information," all but eight growers declined to respond.[1] Def.'s Resp. to Pl.'s Cross-Statement of Undisputed Material Facts (Def. R. 56.1 Resp.) ¶¶ 43–45. Nevertheless, DOL redacted some tobacco-company names from the narrative reports regarding the 53 growers who did not respond. Where the government has explicitly informed submitters that information would be disclosed in the absence of an objection and none is made, that information is not protected by exemption 4. *See WP Co. v. U.S. Small Bus. Admin.*, No. CV 20-1240 (JEB), 2020 WL 6504534, at *9 (D.D.C. Nov. 5, 2020) (concluding that a loan application that "expressly notified potential borrowers … that their names and loan amounts would be 'automatically released' upon a FOIA request" was not confidential under exemption 4).

Ignoring the undisputed fact that 53 growers did not object to release of the information that they submitted to DOL, DOL relies on "its own independent assessment," *see* Def. Reply &

[1] DOL states that the records that it produced reflect the narrative reports for approximately 77 growers, and also that it sent letters to 76 growers. *See* Def. R. 56.1 Resp. ¶¶ 37, 44; *see also* Def. Mot., Declaration of Patrice Rachel Torres (Torres Decl.) ¶ 16. DOL also agrees that the records at issue concern the narrative reports for only 61 growers. Def. R. 56.1 Resp. ¶ 38. DOL does not explain the mismatch in these numbers.

Opp. (Opp.) 8, to support its withholding. The agency's declaration, however, explains that the "independent assessment" focused only on the eight growers who *responded* to DOL's letter inquiry, not the ones who failed to do so. *See* Torres Decl. ¶ 23 ("After … conducting an independent assessment, WHD determined it was appropriate to withhold references relating to any crop buyers from the investigations of *the eight [growers] who objected to the disclosure* of such information in their responses." (emphasis added)). DOL's purported "independent assessment" does not identify any specific facts showing that the 53 growers who did *not* object to disclosure keep the names of their tobacco buyers private. Instead, DOL cites (Opp. 8) generalized assertions from the Torres declaration stating that the agency did not locate the information in the public domain and was not "aware of any reason to doubt" that the information was confidential, and that tobacco sales contracts "often" include confidentiality provisions. These generalized assertions do not satisfy the agency's burden under FOIA. *E.g.*, *Campbell*, 164 F.3d at 30–31 (stating that an agency declaration is insufficient to satisfy the government's burden at summary judgment in a FOIA case where it "does not contain any specific reference to [the specific person who was the subject of the FOIA request] or any other language suggesting that the [agency] tailored its response a specific set of documents"); *see also Am. Immigr. Council v. DHS*, 950 F. Supp. 2d 221, 236 (D.D.C. 2013) ("generalized, categorical descriptions of the contents and conclusions that do little more than parrot established legal standards" are insufficient to satisfy the government's burden).

Moreover, as explained in FLOC's opening brief (Mem. 6–7), Torres's statements are inadmissible because they are not based on personal knowledge and are hearsay. *See also* Opp. 3 (admitting that Torres "reli[ed] on individuals within her office and the letters submitted by the growers" and on "information conveyed to [her] by other individuals in [her] office" (quoting

Torres Decl. ¶ 2)). DOL contends that hearsay is permissible in FOIA cases and that Torres's statements are admissible because they were made under penalty of perjury. That misses the mark. Indeed, the very case that DOL cites—*Humane Society of United States v. Animal & Plant Health Inspection Services*—concluded that, although hearsay may be permissible in assessing the adequacy of an agency's search (which is not at issue here) or for purposes of inter-agency consultation (also not at issue here), "it is a different matter entirely to rely on out-of-court statements from private third-parties to justify an agency's withholding." 386 F. Supp. 3d 34, 44 (D.D.C. 2019). Accordingly, courts in FOIA cases have routinely rejected as inadmissible statements by agency declarants who lack personal knowledge and rely on hearsay. *See Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, No. 19-1552 (ABJ), 2021 WL 1749763, at *5 (D.D.C. May 3, 2021) (citing *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981), and *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 224 F.R.D. 261, 264-65 (D.D.C. 2004)); *see also New York Times Co. v. OMB*, No. CV 19-3562 (ABJ), 2021 WL 1329025, at *3 (D.D.C. Mar. 29, 2021) (holding that "the statements of declarants who lacked personal knowledge, which were contradicted by other evidence in the record, were not sufficient to meet the government's burden of proof").

DOL also cites (Opp. 8–9) declarations from tobacco companies RJ Reynolds, Universal Leaf, and China Tobacco, as well as a newly submitted declaration from grower Andy Clapp of A&M Clapp Farm, to support its assertion that tobacco contracts "often" include confidentiality clauses.[2] But, as discussed in FLOC's opening memorandum (Mem. 13–15) and *infra* (pp. 11–12,

[2] DOL also submits new declarations from another four growers (Durham Brothers Farms, LLC; J.F. Leaf; Patrick Edwards Farms, LLC; Hartland, Inc.), *see* Opp., Ex. A, but it does not cite these declarations to justify its withholding of information from the 53 growers who did not object to disclosure. These new declarations are nearly identical to the Clapp declaration and do not satisfy DOL's burden for the same reasons that the Clapp declaration fails to satisfy DOL's burden.

14–15), the fact that some tobacco contracts include confidentiality clauses does not demonstrate that the specific contracts applicable here contain confidentiality clauses covering the information at issue. The assertion thus is not sufficient to satisfy DOL's burden to justify its withholding of the information at issue. *See*, *e.g.*, *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999) (rejecting third-party affidavits containing "conclusory and generalized assertions" as insufficient to carry the government's burden at summary judgment); *see also Public Citizen Health Rsch. Grp. v. FDA*, 185 F.3d 898, 906 (D.C. Cir. 1999) (same). Notably, DOL has not submitted a copy of a sales contract with a confidentiality provision, let alone any contract at all. Def. R. 56.1 Resp. ¶¶ 67–68 (admitting that the tobacco-company declarations do not attach copies of contracts); *see generally* Opp., Ex. A (declarations from five growers). The declarations' statements about purported confidentiality provisions are thus inadmissible hearsay, and they do not show that the names of tobacco buyers are confidential, as explained in FLOC's opening brief (Mem. 13–15) and also *infra* (pp. 11–12, 14–15).

Because DOL has not carried its burden to show that the 53 growers who did not object to the disclosure of the requested information consider the names of their tobacco buyers to be a secret, that information is not confidential within the meaning of exemption 4. Accordingly, the Court should grant summary judgment in FLOC's favor as to the narrative reports regarding the 53 growers who failed to respond to DOL's letter and order DOL to release the names of the tobacco buyers that were withheld from those reports.

B. The information at issue is not "confidential" under exemption 4 because it is not customarily and actually treated as private.

i. The growers do not keep the names of tobacco buyers private because that information is displayed on posters and promotional items.

There is no genuine dispute that the growers openly display tobacco buyer names on posters and that the names appear on promotional items (like raincoats) that are given to the

workers. *See* Def. R. 56.1 Resp ¶¶ 50–53 (citing examples). Although DOL asserts "[d]isputed" in response to these facts, DOL cites no record evidence controverting these facts. Instead, DOL responds that FLOC did not produce "admissible evidentiary support … outside of its own assertions" and "failed to meet its burden." *See* Def. R. 56.1 Resp. ¶¶ 50-53. DOL's response is both procedurally improper and substantively deficient.

As a procedural matter, because DOL failed to present evidence to controvert the facts adduced by FLOC, these facts should be deemed admitted. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996); *see also* Dkt. 5, ¶ 5(f) ("If an opposition fails to include … specific references to the parts of the record relied upon to support the … response, the Court may treat as conceded any facts asserted in the movant's statement of facts"). Substantively, DOL's response makes little sense: The statements in the Flores declaration *are* evidence in the record that may be considered by this Court, and it is *DOL's* burden to justify DOL's withholding under FOIA. *Cf. Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, 922 F.3d 480, 487 (D.C. Cir. 2019) (reiterating that, in FOIA cases, "'the burden [is] on the agency to sustain its action,' 5 U.S.C. § 552(a)(4)(B), and the agency therefore bears the burden of proving that it has not 'improperly' withheld the requested records").

Seeming to accept the facts, DOL argues that the names of tobacco buyers on posters and raincoats are "limited disclosure[s]" that are "not made to the general public." Opp. 9. This assertion lacks any basis in the factual record: Although DOL speculates as to how many people wore the raincoats and how many visitors saw the posters, it offers no *evidence* showing that the posters and raincoats were accessible to only a limited group of people. By contrast, FLOC adduced uncontroverted evidence showing that the posters and raincoats were accessible to and shared with the workers, and that Alliance One expressly requested that posters bearing its name

be displayed somewhere "visible to workers." *See* FLOC Mot., Declaration of Justin Flores (Flores Decl.) ¶¶ 6–8, Exs. 1–2. One grower (Hightower Farm) employs over 750 workers, *see id.*, Declaration of Wendy Liu (Liu Decl.), Ex. 3 at Bates No. 272 (FOIA production)—clearly, not a small group of people.

DOL is also wrong on the law. The only cases that DOL cites for its theory of "limited disclosures" predate *FMI* and are inapposite. *See* Opp. 9 (citing *Ctr. for Auto Safety v. NHTSA*, 93 F. Supp. 2d 1, 17–18 (D.D.C. 2000) and *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 163 n.25 (3d Cir. 2000)). The issue in *OSHA Data* was not whether the information was "confidential" within the scope of exemption 4, but rather whether certain costs associated with notifying submitters could be assessed to a FOIA requester. *See* 220 F.3d at 161, 162–63. And *Center for Auto Safety* applied the *Critical Mass* test that distinguished between voluntarily and compulsorily submitted information, which no longer applies after *FMI*. Indeed, another district court concluded that the very statement from *Center for Auto Safety* on which DOL relies is inconsistent with the *post*-FMI law on exemption 4. *See Ctr. for Investigative Reporting v. DOL*, 470 F. Supp. 3d 1096, 1113 (N.D. Cal. 2020) (rejecting DOL's reliance on *Ctr. for Auto Safety*, 93 F. Supp. 2d at 17–18).

Contrary to DOL's suggestion, exemption 4 is not satisfied whenever the information at issue is not "disseminated to the general public." *See* Opp. 9. Rather, information is "confidential" under exemption 4 only if it is "closely held" and shared with only a "limited few." *FMI*, 139 S. Ct. at 2363. Accordingly, district courts following *FMI* have held that information that is accessible to more than a small group of people is not "confidential" within the meaning of exemption 4, even if it has not been shared with the general public. *See*, *e.g.*, *Farmworker Just. v. U.S. Dep't of Agriculture,* No. 19-CV-1946 (DLF), 2021 WL 827162, at *2 (D.D.C. Mar. 4, 2021) (holding that

information that was not disseminated publicly, but was shared with the paid members of the Georgia Farm Bureau, was not "confidential" under exemption 4). In *Center for Investigative Reporting v. U.S. Department of Labor*, for example, the court held that a DOL form was not "confidential" under exemption 4 where the company was required to post the form and provide copies upon request to the company's current and former employees and their representatives. 470 F. Supp. 3d 1096, 1113–14 (N.D. Cal. 2020). In so holding, the court rejected DOL's argument that the information was "confidential" because only a "small subset of all employees" actually saw the form, explaining that DOL had no evidence in the record corroborating that assertion and concluding in any event that the "[t]he information was indisputably … widely available," regardless of how many people actually saw it. *Id.* at 1114; *accord* Report & Recommendation at 21–22, *Public Citizen Found. v. U.S. Dep't of Labor*, No. 18-cv-117 (D.D.C. June 23, 2020), ECF No. 37 (holding that the DOL form was not customarily kept private or closely held). Similarly, here, the names of tobacco buyers were openly displayed on posters and raincoats, and both growers and tobacco companies shared the identities of their grower-supplier relationships outside their organizations. *See* Def. R. 56.1 Resp. ¶¶ 59–64. Thus, the information was indisputably "widely available," *see Ctr. for Investigative Reporting*, 470 F. Supp. 3d at 1114.

DOL retorts "nonsensical," Opp. 9, in response to FLOC's argument that information that is openly displayed is not private or secret, but does not explain why. Instead, DOL rehashes the evidence cited in its opening brief and ignores the significant evidentiary issues with that material. For example, DOL recites (Opp. 7) the agency declarant's assertion that the information is "confidential," relying on the eight grower letters.[3] To begin with, the agency's assertion is

[3] DOL's statement in its brief (Opp. 7) that this assertion was made by the "farms" is misleading. The quotation is from the agency declaration. *See* Torres Decl. ¶ 18.

"substantively deficient" because it "do[es] not attest to specific facts indicating how each objector treats the relevant data," *see Humane Soc'y Int'l v. U.S. Fish & Wildlife Serv.*, No. CV 16-720 (TJK), 2021 WL 1197726, at *4 (D.D.C. Mar. 29, 2021); *see also Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 112 (D.D.C. 2019) (concluding that a statement that is "ambiguous as to whether it in fact refers to the practices of these submitters" fails to satisfy the government's burden in a FOIA case). Moreover, DOL does not respond to—and thereby concedes—Plaintiff's argument (Mem. 7-8) that the letters are inadmissible hearsay. *See Emuwa v. DHS*, No. 1:20-CV-01756 (TNM), 2021 WL 2255305, at *6 (D.D.C. June 3, 2021) (explaining that a party may not "rely on out-of-court statements from private third-parties" at summary judgment and concluding that "[t]his Court, like others, has not allowed government defendants to rely on such evidence because of hearsay concerns"); *see also Reyes v. EPA*, 991 F. Supp. 2d 20, 24 n.2 (D.D.C. 2014) (stating, in a FOIA case, that "[i]t is well established that if a [party] fails to respond to an argument raised in a motion for summary judgment, it is proper to treat that argument as conceded." (citation omitted)); Dkt. 5, ¶ 7(d)(v) ("if counsel fails to respond to arguments in opposition papers, the Court may treat those specific arguments as conceded" (citation omitted)). DOL pivots (Opp. 5) by offering the letters for the fact that the eight growers objected to release of the information, "[b]ut just because a company has objected says nothing about whether it customarily and actually treats the information as private." *Humane Soc'y Int'l,* 2021 WL 1197726, at *4; *see also Leopold v. U.S. Dep't of Justice*, No. 19-3192 (RC), 2021 WL 124489, at *6 (D.D.C. Jan. 13, 2021) ("The government must prove the applicability of its claimed exemptions with facts—performative utterances, which the government acknowledges have no truth value, cannot help the government's case.").

With its reply and opposition, DOL for the first time submits declarations from five growers.[4] For starters, these declarations are relevant as to the five growers only; they are not evidence of whether the other 56 growers treat the information at issue as private or secret. And even as to the five growers, the newly submitted declarations do not satisfy DOL's burden. The statements in these declarations—which are near-identical across all five declarations—are insufficient because they "merely parrot[] the language requested by" the agency and do not provide specific facts showing that the growers keep the information private or at least closely held. *See Humane Soc'y Int'l*, 2021 WL 1197726, at *4; *see also Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, No. 18-CV-02414-DMR, 2020 WL 2995209, at *4 (N.D. Cal. June 4, 2020) (stating that comments that "do not speak to how owners keep and treat the [] information" and instead "focus on the reasons why the owners oppose the release of the information" are "minimally probative"). The declarations assert that the grower is "typically" subject to a contract that has a confidentiality provision, *see, e.g.*, Opp., Ex. A (Clapp Decl.) ¶ 7, but they do not assert that the grower *actually* holds such a contract with any of the buyers at issue, and none of the five declarations identify the scope of a purported confidentiality provision or attach a copy of an applicable contract. *Cf. FMI*, 139 S. Ct. at 2366 (information must be "customarily and *actually* treated as private by its owner" (emphasis added)). And despite the declarants' assertions that they do not disclose the identities of tobacco buyers, that information *is* disclosed for some tobacco buyers in the narrative reports regarding all five of these growers.[5] Therefore, the declarations'

[4] Although these declarations are all dated before DOL's opening brief, DOL did not submit them with its motion for summary judgment. These declarations should be viewed with great skepticism, for the reasons discussed *infra* at pp. 17–18.

[5] *See* Liu Decl., Ex. 3 (FOIA production) at Bates Nos. 11–12 (in the report about Durham Brothers Farms, LLC, identifying "US Smokeless," "Hail and Cotton," "Phillip Morris," "Japanese Tobacco International," and "Gallatin Re-drying"); *id.* at Bates No. 279 (in the report about J.F. Leaf, identifying "Japan Tobacco International"); *id.* at Bates No. 553 (in the report about Hartland, Inc., identifying "Gallatin Re-dry Company" and "U.S. Smokeless Tobacco Company"); *id.* at Bates No. 820 (in the report about Patrick Edwards Farms, LLC, identifying "US Tobacco"); *id.* at Bates No. 853 (in the report about A&M Clapp Farm, identifying "Japan Tobacco International").

sweeping statements that the growers do not disclose the names of tobacco buyers cannot be squared with the record in this case. *See Ctr. for Investigative Reporting*, 2020 WL 2995209, at *4 ("As [*FMI*] makes clear, the court must examine whether the information *actually* is kept and treated as confidential, not whether the submitter considers it to be so." (emphasis added)).

Furthermore, the narrative reports for more than half of the 61 growers at issue (including all five growers who submitted declarations) reveal the names of some tobacco buyers (such as Phillip Morris USA, US Tobacco, US Smokeless Tobacco, or Japanese Tobacco International), even as others were redacted. *See* Def. R. 56.1 Resp. ¶¶ 28–29, 39–40. As FLOC explained (Mem. 9–10), the selective disclosure of names within a single grower report refutes DOL's contention that the grower "customarily" keeps the names of tobacco buyers private. *See Am. Small Bus. League v. U.S. Dep't of Def.*, No. 18-01979 WHA, 2019 WL 4416613, at *3 (N.D. Cal. Sep. 15, 2019) ("Lockheed Martin's selective disclosure of supposed confidential information (*i.e.*, supplier names …) undercuts its vague contention that the company 'customarily' treats said information as confidential."). DOL does not respond to this point.

Finally, DOL overstates the record regarding the evidence of whether the growers keep the identities of their grower-buyer relationships confidential. DOL asserts that the "farmers and tobacco buyers detailed how they ensure this information remains private" (Opp. 7), but none of the factual "detail[s]" that DOL identifies in its brief is reflected in the grower letters that DOL cites. *See generally* Def Mot., Ex. 5. Nor is there factual detail in the newly submitted grower declarations, or elsewhere in the record, showing how the 61 growers keep the information private. On the other hand, there is substantial uncontroverted evidence showing that the growers do *not* customarily keep the names of all tobacco buyers private, display the information at issue, and

share it with more than a "limited few." *See FMI*, 139 S. Ct. at 2363. On this record, DOL has failed to prove that the growers keep the names of tobacco buyers private.

ii. The tobacco companies do not keep the information private because they voluntarily shared it with others outside the company.

DOL concedes that the tobacco companies shared the names of their grower-suppliers with others outside the organization, including FLOC. For example, DOL admits that RJ Reynolds named the tobacco grower J.B. Rose & Sons, Inc., as its most valuable grower and supplier in marketing materials that are publicly available. Def. R. 56.1 Resp. ¶ 56; *see also* Flores Decl. ¶ 16, Ex. 8 (RJ Reynolds brochure at pg. 43). DOL also concedes that Alliance One and Universal Leaf have identified its growers to FLOC, *id.* ¶¶ 57, 59–63, that Universal Leaf has disclosed that it purchases tobacco from two of the growers who are at issue in this case, *id.* ¶ 60, that Alliance One's relationships with certain tobacco growers were disclosed in publicly available court filings, *id.* ¶ 65, and that Alliance One and RJ Reynold's grower relationships were disclosed in response to prior FOIA requests, *id.* ¶ 66. Where, as here, the tobacco companies have shared the identities of their grower relationships, that information is not closely held. *See FMI*, 139 S. Ct. at 2363 (stating that information is not confidential "if its owner shares it freely").

DOL argues that statements in the Flores declaration that Alliance One and Universal Leaf shared the names of their growers with FLOC, and that growers have shared the names of tobacco buyers with FLOC, are conclusory and inadmissible hearsay for lack of personal knowledge. *See* Opp. 11–12. The statements, however, are not conclusory; they attest to facts. And Flores obviously has personal knowledge of whether tobacco companies (or growers) have told *Flores* the identities of their grower-suppliers (or tobacco-company buyers). Unlike the Torres declaration, Flores relies on his own personal knowledge as the basis for the statements in his declaration. Moreover, DOL admits the truth of Flores's statement that Universal Leaf has

disclosed information to FLOC regarding some of its growers. *See* Def. R. 56.1 Resp. ¶¶ 59–61; *id.* ¶ 63 (admitting that "Universal Leaf confirmed the names of a few of its growers"); *see also* Opp., Ex. B (Wigner Decl.) ¶ 5 (conceding that Mr. Wigner shared information with FLOC about certain growers "[a]s reflected in my emails attached to Mr. Flores' Declaration"). And although DOL spills much ink in its briefs over purported confidentiality provisions in tobacco sales contracts, Mr. Wigner attests that the Universal Leaf contracts with its growers do *not* preclude Universal Leaf from sharing information about the growers. *Id.* ¶ 11 (stating that the purported "Non-Disclosure Provision in ULNA's contracts with agricultural producers" "applies only to sellers (ULNA is the buyer) and does not prevent or restrict ULNA from using its own commercially sensitive information in furtherance of its own [Agricultural Labor Practices] program"). Thus, by Universal Leaf's own admission, the purported confidentiality provision on which DOL relies does not support its assertion of exemption 4.

The statements regarding purported confidentiality provisions in the other tobacco-company declarations similarly do not justify DOL's withholding of buyer names. The purported confidentiality provision for RJ Reynolds does not appear to bar disclosure of the fact that a grower sells to the tobacco company, *see* Def. Mot., Ex. 6 (RJ Reynolds Decl.) ¶¶ 26, 31, and the purported confidentiality provision for China Tobacco does not appear to bind the tobacco company at all, *see id.* (China Tobacco Decl.) ¶ 5 ("The confidentiality provision prohibits the *sellers* (*growers*)…" (emphasis added)). DOL ignores all of this. Moreover, the statements regarding purported confidentiality provisions in the tobacco-company declarations are inadmissible hearsay, for the reasons explained in FLOC's opening brief (Mem. 15). And contrary to DOL's contention, the fact that the statements in the tobacco-company declarations were made under penalty of perjury does not resolve the hearsay concern. *E.g.*, *Leopold*, 2021 WL 124489, at *5 n.7

(refusing to "consider the portions of the declarations that merely quote from the letters the Court has determined are inadmissible" in a declaration submitted under penalty of perjury).

Further, DOL's assertion (Opp. 7) that the "tobacco buyers detailed how they ensure this information remains private" overstates the record. DOL's suggestion that RJ Reynolds, Universal Leaf, Alliance One, and China Tobacco all adopt the measures that DOL identifies, *see* Opp. 7–8 (citing the declarations from all four companies), is not supported by the evidence submitted in this case. For example, DOL asserts (Opp. 7) that the tobacco companies "scrupulously guard" the information on "private, password-protected computer systems and networks," but only the Universal Leaf declaration (and not that of any other tobacco company) makes any mention of password-protected computer systems and networks. Similarly, DOL asserts that the tobacco companies train their employees on confidentiality, but only the RJ Reynolds declaration (and not any other tobacco-company declaration) references employee training. Moreover, substantial uncontroverted evidence shows that RJ Reynolds, Universal Leaf, and Alliance One *have* shared the names of their grower-suppliers. *See* Def. R. 56.1 Resp. ¶¶ 56–63.

None of the cases on which DOL relies (Opp. 10) show that its withholding of information on the basis of statements from the third-party tobacco companies is justified. The relevant discussion in *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392 (D.C. Cir. 1980), that DOL quotes concerns the meanings of "commercial" or "financial" under exemption 4—terms that are not at issue here. *Id.* at 405–06. DOL also cites *Miami Herald Publishing Co. v. U.S. Small Business Administration*, but the cited discussion concerns the application of the *National Parks* substantial-competitive harm test, which *FMI* overruled. 670 F.2d 610, 613–14 (5th Cir. 1982). And *Leopold v. Department of Justice*, No. CV 19-3192 (RC), 2021 WL 124489, at *2 (D.D.C. Jan. 13, 2021), is inapposite. There, the third-party objector was a bank that objected

to the release of an independent monitor report describing "the internal controls, policies and procedures" of the bank. *Id.* Here, the information at issue is from narrative reports about the labor practices of the *growers*. Although *Leopold* is consistent with the proposition that the growers may assert confidentiality objections to the information in the reports about the growers (which FLOC does not dispute), it does not illuminate the growers' privacy practices or whether the withholding here was justified under exemption 4.[6]

II. The names of tobacco buyers are not "confidential" under exemption 4 because they were not submitted under an assurance of privacy.

A. Information provided without an assurance of privacy falls outside the scope of exemption 4.

In *FMI*, the Supreme Court explained that information might lose its confidential character if it is provided to the government without an assurance of privacy. 139 S. Ct. at 2363 (stating that "information might be considered confidential only if the party receiving it provides some assurance that it will remain secret"). As explained in FLOC's opening brief (Mem. 16–17), requiring assurances of privacy is consistent with the ordinary meaning of exemption 4, the legislative history of that exemption, and *FMI*.

DOL's response is tepid. Without addressing (or even acknowledging) FLOC's arguments why privacy assurances are required, DOL states that some district courts have not decided the question and that *Renewable Fuels Ass'n v. EPA*, No. 18-2031, 2021 WL 602913 (D.D.C. Feb. 16, 2021), declined to impose a "blanket requirement" of assurances of privacy. *See* Opp. 12–13. That some district courts have declined to resolve the question says nothing about what the answer to

[6] DOL cites two employment-contract cases that reference the public interest in maintaining confidentiality of trade secrets. Opp. 8 (citing *Robert Half Int'l Inc. v. Billingham*, 315 F. Supp. 3d 419 (D.D.C. 2018); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67 (D.D.C. 2001)). DOL does not claim that the withheld information is "trade secrets" under exemption 4. These cases have no applicability here.

that question is. And DOL fails to address FLOC's several arguments (Mem. 17–18, 20–21) why *Renewable Fuels* was wrongly decided.

A recent district court decision bolsters FLOC's position that assurances of privacy *are* required for information to remain "confidential" under exemption 4. In *Public Justice Foundation v. Farm Service Agency*, the court held that information was not "confidential" under exemption 4 because the information was submitted absent a government assurance of privacy. No. C 20-01103 WHA, 2021 WL 1873186, at *6 (N.D. Cal. May 10, 2021) ("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 decided solely on the basis that assurances of privacy were not provided; 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.*

Finally, DOL does not appear to dispute that whether the information was submitted under an assurance of privacy is at least *relevant* to whether the information is "confidential" under exemption 4. *See* Mem. 21–22 (citing *Stotter v. U.S. Agency for Int'l Dev.*, No. 14-CV-2156 (KBJ), 2020 WL 5878033, at *5 (D.D.C. Oct. 3, 2020) ("[I]t is clear beyond cavil that whether the agency provided an 'assurance of privacy' when it received the information is relevant to determining" whether the information is "confidential"); *see also Reyes*, 991 F. Supp. 2d at 24 ("if a [party] fails to respond to an argument raised in a motion for summary judgment, it is proper to treat that argument as conceded" (citation omitted)).

B. DOL has failed to show that DOL provided assurances of privacy to the 61 growers who provided the information at issue.

No mention of government assurances of privacy appears in any of the narrative reports about the 61 growers that identified their tobacco purchasers to the DOL investigators, Def. R. 56.1 Resp. ¶ 70, nor in any of the letters from the eight growers who objected to disclosure, *id.* ¶ 75. And DOL concedes that the "evidence" that it cited in its motion to show that assurances were provided *does not exist* in the record of this case. *Id.* ¶ 71 (admitting that the "Tobacco Decl." and "A&M Decl." are not in the record); *see also id.* ¶ 74. Moreover, DOL admits that the information at issue has been disclosed publicly in the past, including in response to prior FOIA requests and for several of the growers at issue in this case. *Id.* ¶¶ 76–78. DOL further acknowledges that it wrote to the growers saying that it would disclose the information at issue absent a response from the grower, *id.* ¶ 43, which is inconsistent with the notion that DOL had provided an assurance of privacy when it gathered the information. Thus, the undisputed record reflects a complete absence of evidence that the 61 growers received assurances of privacy or could have had any "reasonable expectation," *see Am. Soc'y for Prevention of Cruelty to Animals v. Animal & Plant Health Inspection Serv.*, No. 19 CIV. 3112 (NRB), 2021 WL 1163627, at *5 (S.D.N.Y. Mar. 25, 2021), that the information would be kept private.

DOL contends that DOL investigators "frequently offer verbal assurances of confidentiality," Torres Decl. ¶ 5, but the fact that assurances are sometimes given does not mean that they were *actually* made. DOL also cites (Opp. 13) a statute and regulations that provide that DOL "shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith," *see* 29 U.S.C. § 1862(b); 29 C.F.R. §§ 500.7(b), 501.6(c), but the information at issue does not identify a complainant and the identity of the growers who provided the information has already been disclosed.

DOL also cites (Opp. 13) statements from the five newly submitted grower declarations asserting that the DOL investigator to whom they provided the names of their tobacco buyers promised that the names would be kept private. As noted above, these declarations are relevant as to five growers only; they are not evidence that assurances were provided to any of the other growers that provided the information at issue. Even as to the five growers, the declarations are of limited evidentiary value and should be viewed with great skepticism. *First*, except for the name of the grower, all of the statements in the five grower declarations are *identical*. *See generally* Opp., Ex. A. This suggests that the same person wrote all five declarations, undermining the credibility of the statements therein.

Second, although these declarations are dated in February—before the deadline for DOL's motion for summary judgment—DOL does not satisfactorily explain why it waited until its reply and cross-opposition to file these declarations. Without identifying the specific material to which it is referring, DOL asserts that "affidavits mentioned in Defendant's Motion for Summary Judgment, Dkt. No. 15, were inadvertently not filed with motion." Def. R. 56.1 Resp. ¶¶ 41, 74. To the extent that DOL is referring to the newly submitted grower declarations, DOL's motion did not mention or cite these declarations, nor did the agency declaration. It is passing strange to assert that it was an "inadvertent[]" filing error that resulted in the omission of these declarations, when none of the materials supporting the motion made reference to the declarations.

Third, despite the statements in the declarations that the grower does not disclose the names of tobacco buyers "as a matter of course," *see, e.g.*, Opp., Ex. A (Clapp Decl.) ¶ 8, the names for *some* (but not all) tobacco buyers are, in fact, indisputably disclosed in the narrative reports regarding all five of these growers.[7] Although DOL's reports about one of the five growers

[7] *See* Def. R. 56.1 Resp. ¶ 28; *see also* Liu Decl., Ex. 3 (FOIA production) at Bates Nos. 11–12 (in the report about Durham Brothers Farms, LLC, identifying "US Smokeless," "Hail and Cotton," "Phillip Morris," "Japanese

(Edwards Farms) references that grower's reluctance to reveal information about tobacco buyers, even there, the grower appears to have volunteered the names of "some of the big buyers." Liu Decl., Ex. 3 at Bates No. 820 (FOIA Production, identifying US Tobacco). It is implausible that the DOL investigator would have given an assurance of privacy as to some buyer names but not others, at least without making note of such a very specific assurance in the narrative report. Again, there is no mention of privacy assurances anywhere in the reports. Def. R. 56.1 Resp. ¶ 70.

DOL's citation to *Citizens for Responsibility & Ethics in Washington v. Department of Commerce*, No. 1:18-CV-03022 (CJN), 2020 WL 4732095 (D.D.C. Aug. 14, 2020), where the court found that the requested information was provided under an implied assurance of privacy, is to no avail. There, the record did not reflect (and the plaintiff did not argue) that the withheld information had been disclosed elsewhere. 2020 WL 4732095, at *4. Here, there is significant uncontroverted evidence that the information has been released in the past. *See* Def. R. 56.1 Resp. ¶¶ 76–78. And there, the court made a finding that the information was provided under an implied assurance of privacy because of the specific "context" in which the information was provided. *Citizens for Resp. & Ethics in Wash.*, 2020 WL 4732095, at *4 (explaining that the company provided the information "to grow its business in foreign markets"). Here, the information was provided during an investigation regarding the grower's violations of federal labor law. DOL fails to explain why the context applicable here—the grower's illegal practices—supports confidentiality rather than disclosure.

Tobacco International," and "Gallatin Re-drying"); *id.* at Bates No. 279 (in the report about J.F. Leaf, identifying "Japan Tobacco International"); *id.* at Bates No. 553 (in the report about Hartland, Inc., identifying "Gallatin Re-dry Company" and "U.S. Smokeless Tobacco Company"); *id.* at Bates No. 820 (in the report about Patrick Edwards Farms, LLC, identifying "US Tobacco"); *id.* at Bates No. 853 (in the report about A&M Clapp Farm, identifying "Japan Tobacco International").

Where the information has been released in the past (including in response to prior FOIA requests) or where the agency indicated that it would disclose the information, courts have concluded that the information is not "confidential" under exemption 4 because the government has provided "assurances of *publicity*." *See Am. Soc'y*, 2021 WL 1163627, at *5–6 (emphasis added) (concluding that the submitters of information "had no reasonable expectation that the Agencies would treat the information as confidential"); *see also Ctr. for Investigative Reporting*, 470 F. Supp. 3d at 1114 ("while it is uncertain whether an assurance of privacy is required, where, as here OSHA indicated the opposite—that it would disclose the [form]—Amazon lost any claim of confidentiality it may have had"). Here, the information has been released in the past (including for several of the growers at issue), Def. R. 56.1 Resp. ¶¶ 76–78, and DOL notified the growers that it would disclose the information absent a response from the grower, *id.* ¶ 43. These undisputed facts belie any assertion that DOL provided an assurance of privacy to the growers.

III. The names of tobacco buyers should be disclosed pursuant to the FOIA Improvement Act of 2016.

Even if the information at issue falls within the scope of a FOIA exemption, it must be disclosed unless it is reasonably foreseeable that "disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A)(i); *see also Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106 (FOIA Improvement Act "impose[s] an independent and meaningful burden on agencies" that "was intended to restrict agencies' discretion in withholding documents under FOIA"). Without responding to FLOC's arguments, DOL "reiterates," Opp. 14, that disclosure would harm the interests of the tobacco companies and the growers. DOL fails to show that disclosing the names of tobacco buyers will result in foreseeable harm to an interest protected by exemption 4, as FLOC has explained (Mem. 23–25).

Few courts have had occasion to interpret the foreseeable-harm provision in the context of exemption 4. But courts interpreting the foreseeable-harm provision in the context of other exemptions have required agencies to "provide more than 'nearly identical boilerplate statements' and 'generic and nebulous articulations of harm.'" *Ctr. for Investigative Reporting v. CBP*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019) (exemption 5); *see also Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020) (same) ("agencies, to justify withholding records under FOIA's foreseeable-harm provision, cannot simply rely on 'generalized' assertions that disclosure 'could' chill deliberations"). The provision's legislative history is also consistent with requiring specificity in the agency's explanation for why disclosure would result in reasonably foreseeable harm. *See* H.R. Rep. No. 114-391, at 9 (2016) ("An inquiry into whether an agency has reasonably foreseen a specific, identifiable harm that would be caused by a disclosure would require the ability to articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld.").

Here, DOL fails to explain why disclosure of the specific information would result in harm to an interest protected by exemption 4. The only "interest" identified by DOL is purported harm to the interests of the tobacco companies and the growers, *see* Opp. 14–15, but DOL fails to show that the disclosure of the buyer names will result in any such harm. DOL does not cite any evidence from a grower, but rather asserts that "[it] would be against the growers' business interests to compel what is effectively a violation of the growers' contracts with the buyers." *Id.* 15. But the sales contracts are not in the record, *see* Def. R. 56.1 Resp. ¶¶ 67–68, and DOL has failed to show that the contracts prohibit a grower from providing information in cooperation with a governmental investigation of potential violations of labor law. DOL speculates (Opp. 15) that disclosure of the information "might very well" cause harm, but speculative and generalized assertions are not

sufficient to meet DOL's burden. *See Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 107 (explaining, in examining the agency's withholding under exemption 5, that "the defendants' claims of foreseeable harm consist of 'general explanations' and 'boiler plate language,' that do not satisfy the foreseeable-harm requirement" (internal citation omitted)). As for the tobacco buyers, DOL merely parrots the same arguments it made in its motion. These arguments are wrong for the reasons FLOC has already explained (Mem. 23–25).

Moreover, the uncontroverted record belies DOL's contention that disclosure of the requested information would result in harm to the growers and tobacco companies because buyer names *are* disclosed in the reports regarding more than half of the growers at issue, *see* Def. R. 56.1 Resp. ¶¶ 39–40, yet DOL has offered no evidence that the disclosure has caused harm. Further, 53 of the 61 growers did not object to disclosure of the information; the names of buyers have been disclosed in the past (including for several of the growers here); RJ Reynolds and Universal Leaf have voluntarily disclosed the identities of some of the tobacco growers from whom they purchase, and RJ Reynolds has even publicized its most valuable tobacco grower in a publicly available marketing brochure. *Id.* ¶¶ 39–40, 56–66, 76–78. Again, DOL has offered no evidence that harm has resulted from the prior disclosures.

Because DOL fails to show that disclosure of the names of tobacco buyers will result in reasonably foreseeable harm to an interest protected by exemption 4, the Court should grant FLOC's motion for summary judgment.

CONCLUSION

For the foregoing reasons, and the reasons set forth in FLOC's memorandum in support of its motion for summary judgment, FLOC's motion should be granted, DOL's motion should be denied, and the Court should order that DOL disclose the names of tobacco buyers in DOL's narrative reports regarding the growers.

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Respectfully submitted,

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