UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, et al., Defendants.	)	No. 18-cv-00117-EGS-GMH

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff Public Citizen Foundation moves for summary judgment on its claim under the Freedom of Information Act against defendants United States Department of Labor and Occupational Safety and Health Administration. Attached with this motion are a memorandum in support of the motion and in opposition to defendants' motion for summary judgment, counter-statement of material facts, proposed order, and the declarations of Michael A. Carome, Eric Frumin, David Michaels, and Margaret Seminario.

Dated: December 9, 2019

Respectfully submitted

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn (D.C. Bar No. 1033296)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, et al., Defendants.	)	No. 18-cv-00117-EGS-GMH

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES, REGULATIONS, & RULES

OTHER

INTRODUCTION

Plaintiff Public Citizen brought this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to compel defendants United States Department of Labor and the Occupational Safety and Health Administration (collectively, OSHA) to produce summary injury and illness records submitted to OSHA from August 1, 2017, to January 31, 2018, pursuant to the final rule entitled "Improve Tracking of Workplace Injuries and Illnesses," 81 Fed. Reg. 29,624 (May 12, 2016) (the Electronic Reporting Rule). OSHA has about 237,000 responsive records in a single database, but it has withheld the records in full, asserting that they contain confidential commercial information exempt from disclosure under FOIA Exemption 4.

OSHA's position on whether the requested records are exempt from disclosure has shifted repeatedly. Since at least 2004, OSHA's consistent position was that the requested information "is not of a kind that would include confidential commercial information" within the meaning of Exemption 4. 81 Fed. Reg. at 29,658. Accordingly, until the FOIA requests at issue here, OSHA routinely released such records upon request. When it issued the Electronic Reporting Rule in 2016, OSHA stated that it would make the submitted information immediately available to the public in a searchable online database. OSHA did not suggest that the requested records fell within the scope of Exemption 4 until it filed its first motion for summary judgment in this case, in June 2018. In that motion, OSHA argued that although release of the records would not harm the submitters, Exemption 4 allowed OSHA to delay for four years the release of the records to avoid potential harm to the effectiveness of OSHA's enforcement targeting program. Now, OSHA has abandoned that theory and asserts that the records can be withheld in their entirety based on *Food Marketing Institute v. Argus Leader* (*FMI*), 139 S. Ct. 2356 (2019).

In *FMI*, the Supreme Court held that "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2366. OSHA's reliance on *FMI* is unavailing for several reasons.

First, the records at issue are annual summaries of work-related injuries and illnesses. They do not contain "commercial or financial information," and *FMI* did not change the standard for determining whether information is "commercial or financial."

Second, the records are not "customarily and actually treated as private" by the submitters. To the contrary, OSHA requires the same information to be posted in a conspicuous area in the workplace and made available to employees, former employees, and their representatives, and there are no restrictions on further dissemination of the data by employees or their representatives. Further, the type of records requested here have not customarily been kept private by OSHA when it collected such records in the past; instead, it routinely released them to third parties in response to FOIA requests. In addition, other agencies require the submission of similar illness and injury data and post the data on the agencies' websites. OSHA relies heavily on industry comments expressing a desire to keep such records private, but the records are not in fact treated as private.

Third, when OSHA collected the records at issue, it provided no assurance of privacy. Rather, OSHA announced that the records would be posted on OSHA's website and made available to the public. OSHA did not announce a change in its position on public disclosure of the type of records at issue here until August 23, 2019, two years *after* employers submitted the requested records with the clear understanding that they would be released to the public. Whatever the effect of OSHA's August 2019 announcement, it cannot change the fact that no such assurance was made with regard to records submitted before that date.

Fourth, the FOIA Improvement Act of 2016 directs agencies not to assert an exemption unless the agency determines that disclosure would cause reasonably foreseeable harm to an interest protected by the exemption. Here, OSHA has not attempted to make such a showing.

Finally, even if some portions of the requested records were exempt from disclosure, OSHA could easily redact exempt fields from the database and produce the remaining fields. OSHA's conclusory assertion that the requested information is not segregable should be rejected.

For these reasons, the Court should grant plaintiff's motion for summary judgment and deny OSHA's motion.

BACKGROUND

The Occupational Safety and Health Act was enacted in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 29 U.S.C. § 651(b), by, among other means, "providing for appropriate reporting procedures … [that] will help achieve the objectives of this [Act] and accurately describe the nature of the occupational safety and health problem," *id.* § 651(b)(12). To accomplish this goal, the Act authorizes the Secretary of Labor to promulgate regulations requiring employers to "make, keep and preserve, and make available to the Secretary," occupational health records. *Id.* § 657(c)(1); *see id.* § 673(e). The Act further directs the Secretary to "prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses." *Id.* § 657(c)(2); *see id.* § 673(e). The Act also provides that, "to further the purposes of this chapter, the Secretary ... shall develop and maintain an effective program of collection, compilation, and

analysis of occupational safety and health statistics." *Id.* § 673(a). The Secretary has delegated these statutory responsibilities and authorities to OSHA.

Since 1971, OSHA has promulgated regulations "to require employers to record and report work-related fatalities, injuries, and illnesses." 29 C.F.R. § 1904.0; *see* 81 Fed. Reg. at 29,625 (citing Recording and Reporting Occupational Injuries and Illnesses, 36 Fed. Reg. 12,612 (July 2, 1971)). OSHA requires employers with more than 10 employees in most industries to maintain records of occupational injuries and illnesses. *See* 29 C.F.R. § 1904; 81 Fed. Reg. at 29,624. Covered establishments must record each employee injury and illness on a "Log" (the OSHA Form 300) and must prepare a supplementary "Incident Report" that provides additional details about each case recorded (the OSHA Form 301). At the end of each year, establishments are required to prepare an "Annual Summary Form" (the OSHA Form 300A) based on the information in the Log. *See* 29 C.F.R. § 1904.32(b). Only the Form 300A data from calendar year 2016 and part of calendar year 2017 is at issue in this case. *See* Kapust Decl. ¶ 12, ECF No. 29-6.

On the Form 300A, establishments provide an annual summary of the number of deaths, lost-workday cases, cases with job transfer or restriction, and other recordable cases; as well as the total number of lost or restricted workdays; and the type of cases (injury, skin disorder, respiratory condition, poisoning, hearing loss, or other illness). *See* Edens Decl. ¶ 20 and Ex. M (sample Form 300A), ECF No. 29-5. Form 300A also requires each establishment to provide its name, address, industry description, industrial classification (if known), average number of employees, and total hours worked in the prior year. *See id.*

Employers are required to post the Form 300A in a conspicuous place at the worksite for a period of three months of the year following the year covered by the records. *See* 29 C.F.R. § 1904.32(a)(4), (b)(5)–(6). Establishments must preserve the Form 300A for five years and make

copies available at no charge to employees, former employees, and their representatives. *See* 29 C.F.R. §§ 1904.33, 1904.35. OSHA imposes no restrictions on further dissemination of the Form 300A by employees or their representatives. *See* 81 Fed. Reg. at 29,684 (explaining that employees or their representatives can obtain Form 300A data and make it public "at any time, if they wish"); *see* Seminario Decl. ¶ 16 (explaining that the disclosure regulations do not restrict employees or employee representatives from "sharing or utilizing this data").

Before it issued the Electronic Reporting Rule, OSHA received Form 300A data through onsite inspections and, from 1997 to 2012, through the OSHA Data Initiative (ODI), an annual survey through which OSHA requested Form 300A data from approximately 80,000 large establishments in high-hazard industries. *See* 81 Fed. Reg. at 29,627; Kapust Decl. ¶ 5. Where the Form 300A data was collected during onsite inspections, OSHA routinely disclosed it in response to FOIA requests. Meilinger Decl. ¶ 6, ECF No. 29-4. With respect to the data received through the ODI, OSHA initially took the position that certain information was within the scope of Exemption 4, but OSHA's argument was rejected in *New York Times v. DOL*, 340 F. Supp. 2d 394, 401 (S.D.N.Y. 2004). From the time of the *New York Times* decision until its response to the FOIA requests at issue here, OSHA's "consistent policy" was to release Form 300A data in response to FOIA requests. 81 Fed. Reg. at 29,658; *see* Seminario Decl. ¶¶ 19–24 (explaining that AFL-CIO regularly requested and received Form 300A data); Frumin Decl. ¶ 30 ("OSHA has been collecting and publicly releasing the Annual Summary (Form 200A or 300A) for over 20 years, and making it easily available to the public for most of that time.").

On May 12, 2016, OSHA issued the Electronic Reporting Rule. *See* 81 Fed. Reg. at 29,624. The Rule, effective January 1, 2017, requires covered establishments to submit Form 300A data

to OSHA.[1] The Electronic Reporting Rule included phased-in submission deadlines. Covered establishments were required to submit Form 300A data for calendar year 2016 by July 1, 2017. *Id.* That deadline was extended to December 15, 2017. *See* Improve Tracking of Workplace Injuries and Illnesses: Delay of Compliance Date, 82 Fed. Reg. 55,761 (Nov. 24, 2017). Employers were required to submit their 2017 Form 300A data by July 1, 2018. 81 Fed. Reg. at 29,624. Beginning in 2019, the Rule requires submission of Form 300A data for the preceding calendar year by March 2. *Id.*

In the notice of proposed rulemaking, OSHA noted with respect to FOIA that it had determined that "[t]he information required to be submitted under the proposed rule is not of a kind that would include confidential commercial information" because "[t]he information is limited to the number and nature of injuries or illnesses experienced by employees at particular establishments, and the data necessary to calculate injury/illness rates, i.e., the number of employees and the hours worked at an establishment." 78 Fed. Reg. at 67,263. OSHA explained that "[d]etails about a company's products or production processes are not included on the OSHA recordkeeping forms, nor do the forms request financial information." *Id.* The agency also noted that the Mine Safety and Health Administration, the Federal Railroad Administration, and the Federal Aviation Administration all post similar injury and illness data on their websites. *See id.* at 67,260.

OSHA invited "[m]embers of the public … to express their views on this issue during the comment period." *Id.* at 67,263. In response, some commenters raised concerns with respect to publication of the collected data, arguing that some of the information might be exempt from

[1] The Electronic Reporting Rule also required the submission of information from Forms 300 and 301, but those requirements were rescinded by a subsequent rule entitled "Tracking of Workplace Injuries and Illnesses," 84 Fed. Reg. 380 (Jan. 25, 2019) (the Rollback Rule).

disclosure under Exemption 4. 81 Fed. Reg. at 29,633, 29,657–58. Others disagreed. *See id.* at 29,660. OSHA considered the comments and concluded that "the information required to be submitted by employers under this final rule is not of a kind that would include confidential commercial information." *Id.* at 29,658; *see id.* at 29,653 ("[T]he final rule will not result in … the release of records containing … confidential commercial and/or proprietary information."); *id.* at 29,659 ("Again, OSHA wishes to emphasize that it will post injury and illness recordkeeping information collected by this final rule consistent with FOIA."). The agency explained that the Secretary had "carefully considered the issues … and concluded that the information on the OSHA recordkeeping forms, including the number of employees and hours worked at an establishment, is not confidential commercial information." *Id.* at 29,658 (citing the notice of proposed rulemaking). "OSHA's recordkeeping regulation does not require employers to record information about, or provide detailed descriptions of, specific brands or processes that could be considered confidential commercial information." *Id.* at 29,659. OSHA noted that many employers routinely disclose information about the number of employees at an establishment, and that part 1904 already requires employers to publicly post Form 300A in the workplace for three months and to disclose the form to current employees, former employees, and their representatives. *Id.* at 29,658; *see also id.* at 29,660 ("[I]nformation on the 300A annual summary, such as the establishment's name, business address, and NAICS code, are already publicly available."). OSHA emphasized that "[t]he purpose for the publication of recordkeeping data under this final rule is to disseminate information about occupational injuries and illnesses," and "OSHA agree[d] with commenters who stated that recordkeeping data generally do not include proprietary or commercial business information." *Id.* at 29,660; *see* Michaels Decl. ¶¶ 12, 23, 27 (explaining that OSHA planned to

release the Form 300A data as quickly as possible, and considered and rejected industry comments opposing such disclosure); Seminario Decl. ¶¶ 41–42 (same); Frumin Decl. ¶ 32–36 (same).

Public Citizen submitted the four FOIA requests at issue to collect the information from OSHA Form 300A for calendar year 2016. Plaintiff sought records submitted from August 1, 2017, through January 31, 2018. *See* Edens Decl., Exs. A, C, G, and I. OSHA identified about 237,000 responsive records, which it initially withheld in full under Exemption 7(E), asserting that that release of the records would "disclose OSHA's techniques and procedures for law enforcement investigations." *Id.*, Exs. E and K. OSHA did not claim that the records contained confidential commercial or financial information subject to withholding under Exemption 4. Public Citizen filed administrative appeals explaining that Exemption 7(E) does not apply to the requested records because they were not compiled for law enforcement purposes, the release of the records would not disclose techniques and procedures for law enforcement investigations or prosecutions, and disclosure of the records could not reasonably be expected to risk circumvention of the law. *Id.*, Exs. F and L. OSHA did not respond to the appeals.

Public Citizen then brought this lawsuit. On June 1, 2018, OSHA moved for summary judgment and abandoned its position that the records are exempt under FOIA Exemption 7(E). Defs. Mem., ECF No. 14-1, at 2 n.1. Instead, OSHA asserted for the first time that it was withholding the records under Exemption 4. *See id.* at 2. Faced with the inconvenient fact that its litigation position was contrary to its longstanding policy and practice, the decision in *New York Times*, and its determination in the Electronic Reporting Rule that the records at issue do not contain "confidential commercial information," OSHA asserted a novel theory: that Exemption 4 could be asserted to protect a governmental interest in "administrative effectiveness." OSHA

argued that Exemption 4 allowed it to delay release of the records for a period of four years to avoid hindering the effectiveness of OSHA's enforcement targeting program.

The parties completed briefing on cross-motions for summary judgment on September 5, 2018. While the motions were pending decision, the Supreme Court decided *FMI*. In light of *FMI*, OSHA has abandoned its "program effectiveness" theory and now claims that the records can be withheld under Exemption 4 based on industry comments that OSHA considered and rejected when it issued the Electronic Reporting Rule, rates of compliance with submission requirements, and an announcement posted on OSHA's website two years after the records were submitted and requested.

LEGAL STANDARD

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). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "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). The Court reviews the agency's claimed exemptions *de novo*. 5 U.S.C. § 552(a)(4)(B); *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

Where the agency withholds responsive records, the agency has the burden of proving that the withheld information comes within one of FOIA's nine statutory exemptions. 5 U.S.C. § 552(a)(4)(B); *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). Summary judgment for the agency is appropriate only if the agency's "affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information

withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). The burden on the agency to justify its withholdings "does not shift even when the requester files a cross-motion for summary judgment because 'the Government ultimately has the onus of proving that the documents are exempt from disclosure,' while 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.'" *Ctr. for Biological Diversity v. EPA*, 279 F. Supp. 3d 121, 137 (D.D.C. 2017) (internal quotation marks and brackets omitted) (quoting *Pub. Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999)).

Moreover, following the FOIA Improvement Act of 2016, an agency may only withhold exempt information if "(I) the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption; or (II) disclosure is prohibited by law." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 98 (D.D.C. 2019) (alternation in original) (quoting 5 U.S.C. § 552(a)(8)(A)). To satisfy this standard, the agency's supporting affidavits must "articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld." *Id.* at 100 (quoting H.R. Rep. No. 114-391, at 9 (2016)).

ARGUMENT

Under Exemption 4, the government may withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Here, DOL does not contend the requested records are either trade secrets, financial, or privileged, Defs. Mem. 12 n.3, 16 n.5, and Public Citizen does not dispute that the withheld data was "obtained from a person." Thus, for the requested records to be exempt, DOL must show that they are

(1) confidential and (2) commercial information. The requested records do not satisfy either requirement.

In addition, the government also has failed to explain what reasonably foreseeable harm it determined would occur from disclosure of the requested information, as required by FOIA under 5 U.S.C. § 552(a)(8)(A), to justify withholding even if information falls within an exemption. Finally, at least some of the fields can be segregated and produced without revealing any fields found exempt.

I. The requested records do not contain commercial information.

Information is "commercial" under Exemption 4 "if, in and of itself, it serves a commercial function or is of a commercial nature."[2] *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (internal quotation marks omitted). Commercial information includes information that, although not itself "relate[d] to the income-producing aspects of a business," is information in which the submitter has a "commercial interest." *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). While "commercial" information is not limited to records revealing "basic commercial operations," the D.C. Circuit has been clear that "not every bit of information submitted to the government by a commercial entity qualifies" as such. *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *see also Elec. Privacy Info. Ctr. v. DHS*, 117 F. Supp. 3d 46, 62 (D.D.C. 2015) ("While commercial information is broadly interpreted to include any information in which the submitter has a 'commercial interest,' such as business sales statistics, research data, overhead and operating costs, and financial conditions, it is not all encompassing." (internal quotation marks omitted)).

[2] Although OSHA repeatedly uses the phrase "commercial or financial," Defs. Mem. 12–15, OSHA does not argue that the withheld data is financial.

Here, the requested information is "limited to the number and nature of injuries or illnesses experienced by employees at particular establishments, and the data necessary to calculate injury/illness rates." 78 Fed. Reg. at 67,263; *see* Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 5933 (Jan. 19, 2001) ("OSHA recordkeeping forms only show[] three things: (1) that an injury or illness has occurred; (2) that the employer has determined that the case is work-related (using OSHA's definition of that term); and (3) that the case is non-minor, i.e., that it meets one or more of the OSHA injury and illness recording criteria."). This information neither serves a commercial function nor is of a commercial nature. This information sheds no light on the product or service offered by the submitter, how the product or service offered is generated, or the costs or revenues of the product or service. Covered establishments track and record the information because OSHA requires them to do so, not for any commercial purpose. Indeed, the data itself is calculated and determined based on OSHA's definitions and standards, *see* 66 Fed. Reg. at 5933, not industry-based definitions or standards.

Similarly, in *Chicago Tribune Co. v. FAA*, No. 97 C 2363, 1998 WL 242611 (N.D. Ill. May 7, 1998), the requester sought records regarding "the nature and frequency of in-flight medical emergencies" on commercial airlines. *Id.* at *3. In holding that such information was not "commercial," the court explained that the medical emergencies "do not naturally flow from commercial flight operations, but rather are chance events which happened to occur while the airplanes are in flight." *Id.* at *2. Because the information lacked a sufficiently "direct relationship with the operations of a commercial venture," the information was not "commercial" for purposes of Exemption 4. *Id.* at *3; *see id.* at *2 ("The mere fact that an event occurs in connection with a commercial operation does not automatically transform documents regarding that event into commercial information."); *see also Pub. Citizen v. HHS*, 975 F. Supp. 2d 81, 100 (D.D.C. 2013)

(citing *Chicago Tribune* for proposition that "commercial" in FOIA has limits); *COMPTEL v. FCC*, 945 F. Supp. 2d 48, 57 (D.D.C. 2013) (same). Like the in-flight medical emergency data at issue in *Chicago Tribune*, the illness and injury data sought here likewise lack a direct relationship with the operations of a commercial venture. Workers may become ill or injured at commercial and non-commercial enterprises alike, and the fact that the illness and injury data sought occurred at a commercial enterprise does not render it commercial.

The cases cited by OSHA do not require a different outcome. As the agency itself acknowledges, the case law on which it relies concerns "settlement negotiation documents, information regarding leasing and prices, and information reflecting business decisions and practices," as well as "employment and wages of workers, and detailed information on goods and customers." Defs. Mem. 13. But worker illness and injury data are none of those things, and OSHA does not claim otherwise.

Instead, OSHA asserts the requested data are commercial because they are "an essential component of the worker productivity and cost calculus, within the rubric of 'labor economics.'" Defs. Mem. 14 (quoting *Flightsafety Servs. Corp. v. DOL*, 326 F.3d 607, 611 (5th Cir. 2003) (per curiam)). *Flightsafety Services*, however, does not support OSHA's argument. There, the Fifth Circuit considered whether data contained in "cross-industry surveys of occupational wages and benefits conducted by the Bureau of Labor Statistics" were exempt under Exemption 4. 326 F.3d at 609. After summarily concluding that the district court had "properly held that the documents at issue (in unredacted form) include 'confidential' and 'commercial' information," the court quoted from the portion of the district court's opinion explaining why the information was *confidential* under the *National Parks* test. *Id.* at 611–12. Indeed, the district court itself had dedicated only half of a sentence to whether the information was *commercial*, stating

"unquestionably, information relating to the employment and wages of workers constitutes commercial or financial information within the meaning of the exemption." *Flightsafety Servs. Corp. v. DOL*, No. Civ.A. 300CV1285P, 2002 WL 368522, at *5 (N.D. Tex. Mar. 5, 2002). The discussion concerning "labor economics" was background concerning the role of the Bureau of Labor Statistics, not a conclusion regarding the scope of "commercial" information. *See id.* at *6, *cited in Flightsafety Servs. Corp.*, 326 F.3d at 611–12.

OSHA also quotes *Watkins v. U.S. Customs & Border Protection*, 643 F.3d 1189, 1195 (9th Cir. 2011), for the point that the requested data are "both 'intimate aspects of [the providers'] business' and critical to each entities' [sic] operational mission and commercial success." Defs. Mem. 14. But in *Watkins*, the "intimate aspects" of the providers' business that would be disclosed were "supply chains and fluctuations in demand for merchandise." 643 F.3d at 1195. Both wage data and supply chain information plainly have a direct relationship to the operations of a commercial venture. Neither is similar to worker illness and injury data.

Finally, OSHA asserts that "[d]ata regarding injury and illnesses, including lost time, permits employers to evaluate and predict payments associated with worker's compensation and short- and long-term disability and assists employers in measuring economic effectiveness and maximizing efficiency. This information is collected and maintained by the entities independent of the reporting requirement, for commercial purposes, because it constitutes vital labor cost data that is fundamental to the providers' bottom line." Defs. Mem. 14–15. OSHA cites no support for these statements and offers no declarations from submitting businesses or labor experts. OSHA's speculation as to how this data is collected and used by employers is insufficient to carry its burden of establishing that Exemption 4 applies. *See Military Audit Project*, 656 F.2d at 738 (explaining the government must submit affidavits that "describe the documents and the justifications for

nondisclosure with reasonably specific detail" and "demonstrate that the information withheld logically falls within the claimed exemption" to carry its burden).

Because the requested information is not "commercial" information, OSHA cannot withhold it under Exemption 4.

II. The requested records are not confidential.

More than four decades ago, the D.C. Circuit held that information was "confidential" for purposes of Exemption 4 if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Recently, in *FMI*, the Supreme Court rejected the *National Parks* test and announced a new test for determining whether information is "confidential" for purposes of Exemption 4: "At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *FMI*, 139 S. Ct. at 2366. The Supreme Court left open the question whether the second prong—government assurance of privacy—is required. *Id.* at 2363.

The information at issue is not "confidential" under the *FMI* test. First, it is not customarily kept and actually treated as private by submitting companies. Second, this Court should hold that confidentiality under Exemption 4 requires a government assurance of nondisclosure, and no such assurance was given with regard to the requested records. Because the information fails both prongs of the *FMI* test, it does not fall within the scope of Exemption 4.

A. The submitting companies have neither "customarily kept" the information private nor "actually treated" it as private.

As the Supreme Court explained in *FMI*, the first prong of confidentiality under Exemption 4 asks two questions: (1) whether the information "is customarily kept private, or at least closely held, by the person imparting it," and (2) whether the information is "actually treated as private." 139 S. Ct. at 2363, 2366. To determine whether the information is customarily kept private, the Court should consider whether the submitter has an established practice of preventing disclosure of the information at issue. *See* Merriam-Webster Online Dictionary (last visited Nov. 3, 2019), https://www.merriam-webster.com/dictionary/customarily (defining customarily as "by or according to custom or established practice" and "in accordance with what is customary or usual"). To determine whether the submitter "actually treated" the specific information at issue "as private," the Court should consider whether the submitter in fact acted in conformity with its usual practice of preventing disclosure of the information.

Here, the submitting companies have neither customarily kept nor actually treated the information as private because the law forbids them from doing so. Since 1971, OSHA has required establishments to post annual summary injury and illness data in a conspicuous place in the workplace, and it currently mandates that they do so for three months of the year following the year covered by the records. *See* 29 C.F.R. § 1904.32(a)(4), (b)(5)–(6); *N.Y. Times*, 340 F. Supp. 2d at 396; Seminario Decl. ¶ 9. Establishments must also preserve their completed Form 300A for five years, during which time the forms are required to be produced upon request and at no charge to employees, former employees, and their representatives. *See* 29 C.F.R. §§ 1904.33, 1904.35. Once the data is produced, further dissemination of the Form 300A data by employees or their representatives is unrestricted. *See* 81 Fed. Reg. at 29,684 (explaining that employees or their representatives can obtain Form 300A data and make it public "at any time, if they wish");

Seminario Decl. ¶ 16. Further, even before the Electronic Reporting Rule, employers were required to produce their Form 300A data to OSHA upon request, and OSHA routinely released Form 300A data under FOIA. *See* 81 Fed. Reg. at 29,684 (explaining that Form 300A data is "already available to OSHA and the public in a variety of ways"); Seminario Decl. ¶¶ 16, 19–24; Frumin Decl. ¶ 30. Finally, employers in industries regulated by the Mine Safety and Health Administration, the Federal Railroad Administration, and the Federal Aviation Administration do not customarily keep injury and illness data private: Those agencies require the submission of such information and post it on their websites. *See supra* p. 6. These facts stand in stark contrast to those in *FMI*, where the "closely guard[ed]" information at issue was neither disclosed nor made publicly available "in any way," and "[e]ven within a company … only small groups of employees usually have access to it." 139 S. Ct. at 2361, 2363.

OSHA resists this straightforward application of *FMI* primarily by pointing to industry comments during the underlying rulemaking process that they "consider the submitted data to be confidential commercial information." Defs. Mem. 17. But *FMI* makes clear that the focus of the inquiry is how the information is "kept" and "treated"—not how it is "considered." In other words, the determination must rest on the sufficiency of the active steps taken by the information-holder to prevent disclosure, not a subjective view of the nature of the information. *See FMI*, 139 S. Ct. at 2361, 2363 (noting that witnesses testified the information was "closely guard[ed]" and discussing retailers limiting of access to information "[e]ven within a company"); *cf. id.* at 2368 (Breyer, J., dissenting) (disagreeing with the majority's holding that confidentiality is assessed by "how [the information] is kept by those who possess it"). The rulemaking comments shed little light on any objective actions taken to prevent disclosure and is contradicted by the forms public posting and longstanding treatment by OSHA under FOIA. Indeed, beyond repeating that some

employers "consider" the information to be confidential, OSHA's memorandum on this point provides no evidence of how the submitting companies *treat* the information.[3] *See* Defs. Mem. 17–22.

Next, OSHA asserts that what it considers a lower-than-expected response rate by covered establishments in 2016, 2017, and 2018 reflects "submitters' concerns about public release of data they consider to be private and confidential." *Id.* at 22–23. As an initial matter, OSHA's speculation about the reason for the response rate is unsupported by any evidence, and OSHA's long history of releasing and publicly posting Form 300A data indicates that such posting does not lower compliance. Michaels Decl. ¶¶ 19–22; Seminario Decl. ¶¶ 19–24, 34–36. Moreover, OSHA has elsewhere attributed low response rates to the lack of clear notice to employers. *See* Tracking of Workplace Injuries and Illnesses, 83 Fed. Reg. 36,494, 36,498 n.3 (July 30, 2018). Further, that some covered establishments violated the law by failing to submit the data as required cannot reasonably render the data that was submitted "confidential."

OSHA also argues that the three months of required public posting in a conspicuous place in the establishment and required disclosure without restrictions to employees, former employees, and their representatives does not affect the confidentiality of the requested records.[4] Defs. Mem.

[3] Moreover, in the rulemaking, OSHA considered these comments and disagreed with them. *See, e.g.*, 81 Fed. Reg. at 29,648–49 ("[OSHA] does not agree that the publishing of recordkeeping data under this final rule will be misleading or that the public will misinterpret data."); *id.* at 29,683 ("OSHA is not aware of damage to the reputations of establishments or firms from other, similar data collection efforts."); *see* Michaels Decl. ¶ 27 (explaining that OSHA considered and rejected industry comments opposing disclosure of the 300A data); Seminario Decl. ¶¶ 41–42 (same); Frumin Decl. ¶ 32–36 (same).

[4] OSHA asserts that the Form 300A data is released to employees, former employees, and their representatives in "a limited and strictly regulated manner," Defs. Mem. at 24, but elsewhere OSHA has made clear that there are no limits or regulations whatsoever with respect to further dissemination of Form 300A data by those to whom it is reported. *See* 81 Fed. Reg. at 29,684

23–25. But OSHA relies entirely on cases that considered whether information had been publicly disclosed. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 17–18 (D.D.C. 2000); *OSHA Data/CIH, Inc. v. DOL*, 220 F.3d 153, 163 n.25 (3d Cir. 2000); *Abrams v. Office of the Comptroller of the Currency*, No. 05-cv-2433, 2006 WL 1450525, at *5 (N.D. Tex. May 25, 2006). Prior public disclosure is not the standard under *FMI*; instead, the question is whether the information is "customarily and actually *treated* as private by its owner." *FMI*, 139 S. Ct. at 2366 (emphasis added). Thus, for example, although a business is not likely to publicly disclose the paint color of its conference room, it also would not customarily keep private the paint color and actually treat the paint color as private. In other words, lack of public disclosure is necessary to keep information private, but it is not sufficient to show that the information is confidential as required by *FMI*.

Moreover, the lack of public disclosure cannot be the only consideration under the first prong of *FMI*'s confidentiality standard because information that has been publicly disclosed cannot be withheld under *any* exemption. As the D.C. Circuit has explained, "'the logic of FOIA' mandates that where information requested is 'truly public, then enforcement of an exemption cannot fulfill its purposes.'" *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (quoting *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999)). And in that context the Third Circuit in *OSHA Data* and the Northern District of Texas in *Abrams* evaluated the information at issue in the cases cited by OSHA. *See OSHA Data*, 220 F.3d at 163 n.25 ("OSHA Data has not met its burden of producing evidence that the information it seeks in its FOIA requests has already been made public by the agency."); *Abrams*, 2006 WL 1450525, at *5–

(explaining that Form 300A data must be posted where employees can see it, and employees or their representatives can also obtain the information and make it public "at any time, if they wish").

6 (discussing whether disclosure of requested information constituted "waiver" of FOIA exemption, including by placing information in "public domain").

OSHA is also incorrect to suggest that the Supreme Court adopted the definition of "confidential" previously used by the D.C. Circuit when evaluating voluntarily submitted information—that is, whether the submitters "customarily disclose such information to the public." *Ctr. for Auto Safety*, 93 F. Supp. 2d at 17 (citing *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc)). The Supreme Court was aware of the *Critical Mass* definition of "confidential," contrasting it with the *National Parks* definition as a "much more traditional understanding" of the term, *FMI*, 139 S. Ct. at 2365, yet the Court neither adopted nor applied that test. Instead, in explaining why the information at issue in *FMI* had been customarily kept and actually treated as confidential, the Court explained that the "closely guarded" information at issue had *both* not been customarily disclosed or made public "in any way" *and* "[e]ven within a company … only small groups of employees usually have access to it." *Id.* at 2363. If lack of customary public disclosure was sufficient, the latter point would be irrelevant.

Lastly, OSHA asserts that although it routinely released Form 300A data under FOIA for more than fifteen years, it has never released the specific records at issue here. *See* Defs. Mem. 25–28. But OSHA's refusal to produce the specific records at issue in this litigation has little bearing on whether such information has been customarily kept and actually treated as confidential by the submitters, and the records at issue here differ from those previously released under FOIA in volume only. The same Form 300A data was collected during the ODI—the previous annual survey through which OSHA requested Form 300A data—and during OSHA workplace inspections and was released under FOIA. Seminario Decl. ¶¶ 19–24; Frumin Decl. ¶ 30. In any

event, that OSHA has historically released the Form 300A data at issue here supports an inference that the submitters would not themselves customarily keep such information private because OSHA would disclose it anyway.

B. Exemption 4 should apply only where the government assures confidentiality, and OSHA gave no such assurance with respect to the records at issue.

The Supreme Court in *FMI* left open the question whether, in addition to the requirement that the information be customarily kept and actually treated as private by the submitter, the government must provide an assurance of confidentiality for information to be deemed "confidential" under Exemption 4. *FMI*, 139 S. Ct. at 2363. Because Exemption 4 is best interpreted to require an assurance of confidentiality, this Court should hold that such an assurance is necessary. Because no such assurance was provided here, the records requested are not exempt under the second prong of the *FMI* test.

1. A government assurance of confidentiality is required.

As the Supreme Court noted, prior to adoption of the *National Parks* test, some courts of appeals—including in this Circuit—had indicated that Exemption 4 applied only where information had been disclosed to the government "'under the express or implied promise' of confidentiality." *Id.* (quoting *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969)); *see also Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971) (relying on the government's "agree[ment] to treat … as confidential" the information submitted), *cited in FMI*, 139 S. Ct. at 2363. Although *FMI* leaves open the question of whether a promise of confidentiality is a necessary second prong for information to be "confidential" within the meaning of Exemption 4, this Court should return to its pre-*National Parks* understanding that Exemption 4 requires a government promise of confidentiality, in light of the consistency of that position with *FMI*.

Further, requiring an assurance of confidentiality for "confidential" information is the best interpretation of Exemption 4 because it 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). OSHA's reading, however, would render both "trade secrets" and "privileged" superfluous, because 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 interest in the trade secret "is extinguished."); *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)); *see also Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (en banc) ("An express waiver occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public." (citing Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence: Practice Under the Rules* § 5.28, at 530–33 (2d ed. 1999), and *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450, 1630 & n.2 (1985)). Thus, if OSHA were correct that "confidential" in Exemption 4 typically requires *only* that the submitter of the information customarily keep and actually treat the information as confidential, *see* Defs. Mem. 29 n.10, trade secrets and privileged information would be superfluous, because they would fall

within the category "commercial or financial information obtained from a person and … confidential." No principle of statutory construction requires this result.

OSHA relies on *DOJ v. Landano*, 508 U.S. 165 (1993), to argue that whether a government assurance of confidentiality is required "depends on an objective inquiry into the circumstances surrounding" the submission of the information to the government. Defs. Mem. 28. *Landano*, however, reaffirms the necessity of a promise of confidentiality. In *Landano*, the Supreme Court considered the meaning of "confidential" in the context of Exemption 7(D), which covers information compiled for law enforcement purposes if disclosure "could reasonably be expected to disclose" the identity of, or information provided by, a "confidential source." 508 U.S. at 167 (quoting 5 U.S.C. § 552(b)(7)(D)). In rejecting the government's request that *all* FBI sources presumptively be considered confidential sources, the Court explained the government must provide "more narrowly defined circumstances" to establish "an implied assurance of confidentiality." *Id.* at 178–79. Thus, the "objective inquiry into the circumstances surrounding" submission of the information that the government proposes based on *Landano* is not for the purposes of determining whether an assurance of confidentiality is necessary but, instead, whether objective facts show an assurance of confidentiality in the absence of an express statement. Thus, even under the government's formulation, some assurance of confidentiality is required.

OSHA also contends that it would be "illogical" to require the agency to show that it gave an assurance of confidentiality because the agency's previous policy of requiring disclosure of this information "was based on the old Exemption 4 precedent that the new Exemption 4 rule expressly rejects." Defs. Mem. 30. OSHA is wrong for two reasons. First, it is plainly not "illogical" to require a government assurance of confidentiality for information submitted prior to *FMI* because the Supreme Court in *FMI* relied on such an assurance in that very case. As the Supreme Court

explained, "the government has long promised [the submitters] that it will keep their information private." 139 S. Ct. at 2363 (citing Food Stamp Program, 43 Fed. Reg. 43,272, 43,275 (Sept. 22, 1978) (codified at 7 C.F.R. § 278.1(*l*) (1978)) (providing that the information obtained under the relevant program could not "be used or disclosed by anyone except for purposes directly connected with the administration and enforcement of" the relevant statute and implementing regulations)). Second, as the D.C. Circuit has explained, the "basic policy" of FOIA is that "disclosure, not secrecy, is [its] dominant objective," subject only to nine "limited exemptions" that are exclusive and narrowly construed. *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011) (quoting *Nat'l Ass'n of Home Builders*, 309 F.3d at 32 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976))). That policy would be frustrated by allowing an agency to expand the coverage of Exemption 4 by providing retrospective assurances of confidentiality years after receiving a FOIA request and where the information was submitted with a clear understanding that the agency intended to release it immediately to the public.

2. OSHA gave no assurance of confidentiality with respect to the records at issue in this case.

OSHA concedes that it did not give an assurance of confidentiality to the submitters of the records at issue in this case. *See* Defs. Mem. 28–31. Indeed, OSHA did the opposite: In the rulemaking establishing the requirement that covered establishments submit the requested records, OSHA affirmatively stated it would publicly disclose this information. 81 Fed. Reg. at 29,625; *see also* OMB Information Collection Request Documents, Supporting Statement A, at 22 (July 26, 2016), *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201604-1218-002; *id.* at 8, 13 (stating "there is no assurance of confidentiality covering information recorded on these forms and documents"); Michaels Decl. ¶ 23 ("[T]imely posting of the data provided by employers was always an integral part of the [Electronic Reporting] rule."). OSHA's

concession that it "stated that it intended to disclose the subject data," *id.* at 30, should end this inquiry.

OSHA's arguments to the contrary lack merit. First, OSHA complains that "it would be both circular and inequitable to penalize establishments required to submit the subject data simply because at the time of the information collection, legal precedent may have prevented OSHA from protecting the data or providing an assurance of privacy." *Id.* at 30–31. This argument ignores that, at the time of submission, the agency itself promised that the information would be publicly disclosed. All parties—the submitters and the requesters—*expected* the government would comply with its promise of public disclosure and its longstanding practice of releasing Form 300A data under FOIA. The only inequitable result would be allowing the government to construct a retroactive assurance of privacy when, at the time of the submissions and the FOIA requests, none had been given.

Second, OSHA argues that a promise by an agency official to disclose information does not waive the applicability of FOIA exemptions. *Id.* at 31. That argument is not the question here, where the issue is whether the requested information is exempt. If, as plaintiff contends, an assurance of confidentiality is required under Exemption 4, the failure to provide such an assurance means the information is not exempt. That the information does not fall within Exemption 4 is not an issue of waiver.

Lastly, OSHA contends that its actions since November 2017 show that it "has taken the position that the Form 300A data should be kept private." *Id.* at 31; *see id.* at 2. As an initial matter, OSHA is wrong with respect to the timing of its policy change. Although OSHA denied plaintiff's first two FOIA requests in November 2017, it invoked Exemption 7(E) and did not mention any change to its longstanding position that Form 300A data is not protected by Exemption 4. OSHA

did not invoke Exemption 4 in response to the FOIA requests, other data requests, in other litigation, or in any public announcement prior to June 2018, when it filed its first motion for summary judgment, and it did not announce a change with regard to its intention to release Form 300A to the public until August 2019.[5] *See* Defs. Mem. at 31–33 (describing four methods by which OSHA has shown its intention to withhold the records under Exemption 4, all of which are post June 2018). In any event, OSHA's change in policy cannot determine whether the requested records are "confidential" commercial or financial information. Rather, as the Supreme Court explained, the Court must determine whether the information is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." *FMI*, 139 S. Ct. at 2366. Of course, if the government publicly discloses information, such disclosure would waive the applicability of any FOIA exemption to that information. *See Cottone*, 193 F.3d at 554. Plaintiff does not contend that OSHA has previously publicly disclosed the requested records in this case. Instead, plaintiff seeks disclosure of the requested records because they are not exempt.

***

OSHA's arguments and submissions establish only one point: Some submitters of the requested information would prefer to keep it private. But OSHA's own regulations require that the submitters publicly post Form 300A in the workplace and provide copies upon request to any

[5] Similarly, OSHA is wrong when it asserts that "OSHA has taken the position since January 2017 that the Form 300A data collected through the ITA should be kept private." Defs. Mem. at 27. OSHA first asserted that the Form 300A data collected through the ITA was exempt from disclosure when it responded to plaintiff's first FOIA request in November 2017, and it did not invoke Exemption 4 for the first time until June 2018. OSHA's mistake apparently stems from its statement that its policy on immediate release of Form 300A data changed "[a]fter Dr. Michaels left OSHA in January 2017." *Id.* at 26. Although it is true that the policy change came subsequent to Dr. Michaels' departure, it did not change soon thereafter and OSHA did not invoke Exemption 4 for the first time for another eighteen months.

employee, former employee, or their representatives, without limitation on how those who obtain the data may use it or share it. Moreover, OSHA did not provide any assurance of confidentiality and, instead, promised that the Form 300A data would be publicly disclosed as soon as it was received, consistent with OSHA's decades-long practice of releasing Form 300A data in response to FOIA requests. Such information is not "confidential" under *FMI* or any commonsense understanding of that word.

III. OSHA has not satisfied the heightened standard for withholding under § 552(a)(8)(A).

In 2016, Congress enacted the FOIA Improvement Act of 2016, which, among other things, amended FOIA by adding the following provision: "An agency shall … withhold information under this section only if … the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or … disclosure is prohibited by law[.]" Pub. L. No. 114-185, § 2, 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)(A)). This requirement applies to all FOIA requests submitted after June 30, 2016 (the enactment date of the FOIA Improvement Act), *id.* § 6, 130 Stat. at 544–45, and therefore applies to all four FOIA requests at issue in this case.

As this Court has explained, this amendment marked a substantive change to FOIA, requiring agencies to meet a "heightened standard" for withholding exempt information. *Judicial Watch*, 375 F. Supp. 3d at 100. "In other words, even if an exemption applies, an agency must release the document unless doing so would reasonably harm an exemption-protected interest." *Id.* To satisfy this heightened standard, the agency must "articulate both the nature of the harm and the link between the specified harm and specific information contained in the material withheld." *Id.* (quoting H.R. Rep. No. 114-391, at 9).

OSHA has neither argued that disclosure is prohibited by law nor satisfied this heightened standard for withholding. Review of the agency's supporting declarations make this clear: Under the "Rationale for Withholding Documents" section of her declaration, Amanda Edens states only that "[t]he data withheld under Exemption 4, information from OSHA Form 300A, 'Summary of Work-Related Injuries and Illnesses' completed forms, were obtained from a person and are confidential commercial or financial information within the meaning of Exemption 4." Edens Decl. ¶ 26. She says nothing about whether OSHA, after determining such information was exempt, reasonably foresaw harm to an interest protected by Exemption 4, much less identify that harm or explain the link between the harm and the specific documents at issue. Similarly, Patrick Kapust states in his declaration facts considered by OSHA in determining that the withheld records were exempt under Exemption 4, purporting to group the facts based on the factors outlined in *FMI*. Kapust Decl. ¶¶ 14–39. Yet after stating that "[t]he data withheld under Exemption 4, information from OSHA Form 300A, 'Summary of Work-Related Injuries and Illnesses' completed forms, were obtained from a person and are confidential commercial or financial information within the meaning of Exemption 4," *id.* ¶ 21, and purporting to explain why the data are "customarily and actually treated as private" by the submitters, *see id.* ¶¶ 25–36, and how "OSHA has publicly demonstrated" that it treats the data as private, *see id.* ¶¶ 37–39, he does not state that OSHA, after determining such information was exempt, reasonably foresaw harm to an interest protected by Exemption 4, much less identify that harm or explain the link between the harm and the specific documents at issue.

Because OSHA's declarants have averred only that OSHA determined the requested data to be exempt but not that OSHA reasonably foresaw that disclosure would harm an interest

protected by Exemption 4, OSHA has failed to meet the heightened standard for withholding under § 552(a)(8)(A).

IV. Portions of the requested records are reasonably segregable.

FOIA requires agencies to produce "[a]ny reasonably segregable portion of a record … after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Moreover, "an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Gray v. U.S. Army Criminal Investigation Command*, 742 F. Supp. 2d 68, 75 (D.D.C. 2010) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). "The agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information." *Mokhiber v. U.S. Dep't of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004). To satisfy its burden, the agency must provide a "detailed justification," and not just make "conclusory statements" to support its segregability determination. *Gray*, 742 F. Supp. 2d at 75 (quoting *Mead Data Cent.*, 566 F.2d at 261).

OSHA relies on the Edens declaration to support its conclusion that no information in the requested records is reasonably segregable. Defs. Mem. 10–12; Edens Decl. ¶¶ 21–23. Edens, however, primarily states only that "[s]egregability is not applicable" because "any attempt at segregating the information in those documents would provide little or no information value, because the material is inextricably intertwined." Edens Decl. ¶ 21. She then lists the data fields in the requested records, *id.* ¶ 22, and repeats that "[m]any of the data fields in the [requested] records, if released individually, would provide little or no informational value," *id.* ¶ 23. She concedes that some data fields or combination of data fields could "provide informational value," but states that releasing those fields "*might* also allow the public to determine the confidential commercial information" being withheld. *Id.* ¶ 23 (emphasis added). Because "OSHA is unable to predict

definitively which data fields, released individually or in combination with other data fields, would allow for such a determination …. the data is inextricably intertwined." *Id.*

OSHA is incorrect. First, OSHA concedes that producing individual data fields independently of each, or redacting individual fields, is possible. *See id.* ¶¶ 21–23. Second, OSHA's declarant vaguely states that some fields "would provide little or no informational value" while others would, but fails to provide any explanation of which data fields OSHA believes fall into each category. *See id.* Without doing so, OSHA fails to provide a sufficient basis for Public Citizen to challenge—and for the Court to evaluate—whether OSHA's determination is correct. Third, OSHA is unable to even articulate how combining information in certain data fields could reveal exempt information, stating only that it "might" be possible. *Id.* ¶ 23. For example, if OSHA were to redact the fields identifying particular businesses—establishment names, company names, street addresses, etc.—how would a member of the public be able to connect the remaining fields of data containing the raw data on illnesses and injuries—total deaths, total injuries, total other illnesses, etc.—to a particular submitter? OSHA has no explanation. In any event, disclosure of individual fields concerning the injury and illness data would be useful to researchers because it would allow for the analysis of broad trends within and across industries. Carome Decl. ¶ 7. Or if the agency were to do the reverse and provide only the names of submitting establishments, such disclosure would enable Public Citizen to identify which covered establishments in fact complied with the legal obligation to submit these records. This information could be used to advocate for increased compliance with OSHA reporting regulations. *Id.* ¶ 8. And the disclosure of demographic information fields in combination with either would allow for a more refined analysis of such information *Id.* ¶ 9.

OSHA has accordingly failed to satisfy its segregability burden and should be ordered to produce the nonexempt portions of the requested records.

CONCLUSION

For the above-stated reasons, the Court should grant Public Citizen's cross-motion for summary judgment and deny OSHA's motion for summary judgment.

Dated: December 9, 2019

Respectfully submitted

/s/ Patrick D. Llewellyn
Patrick D. Llewellyn (D.C. Bar No. 1033296)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION, Plaintiff, v. UNITED STATES DEPARTMENT OF LABOR, et al., Defendants.	)	Civ. A. No. 18-0117 (EGS)

PLAINTIFF'S COUNTER-STATEMENT OF MATERIAL FACTS

I. Background of OSHA's Injury and Illness Data Collections

1. The Occupational Safety and Health Administration ("OSHA") is a subdivision of the United States Department of Labor ("DOL"). Congress created OSHA to ensure the safety and health of workers by, among other things, promulgating and enforcing occupational safety and health standards ("OSHA standards"), as well as recordkeeping regulations "requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses." 29 U.S.C. §§ 655,	1. Admitted.

657. OSHA standards set forth requirements to protect workers from injuries and illnesses in various workplace categories, including: General Industry, Maritime, Construction, and Agriculture. *See* 29 C.F.R. Parts 1910, 1915, 1917, 1918, 1926, and 1928. Ex. 2, Declaration of Patrick J. Kapust ("Kapust Decl."), ¶ 4.	
2. To assist in its mission, from 1997 to 2012, OSHA conducted injury and illness surveys of employers, and collected establishment-specific injury and illness data, through the OSHA Data Initiative ("ODI"). Typically, there were over 180,000 unique establishments subject to participation in the ODI. The ODI was designed so that each eligible establishment received the ODI survey at least once every three-year cycle. In a given year, OSHA would send the ODI survey to approximately 80,000 larger establishments (20 or more employees) in selected industries. These establishments	2. Admitted.

were required to participate in the survey and faced potential citation and fines if they failed to comply. Kapust Decl., ¶ 5.	
3. In 2016, OSHA promulgated a new recordkeeping regulation intended to collect establishment-specific injury and illness data, the rule to Improve Tracking of Workplace Injuries and Illnesses (the "Regulation"). The Regulation requires certain categories of employers to electronically submit to OSHA, on an annual basis, information from certain recordkeeping forms that OSHA requires be kept by the employers, including OSHA Form 300A Summary of Work-Related Injuries and Illnesses.[1] 29 C.F.R. § 1904.41. Each submission contains information from the Form 300A for a specific establishment.[2] Kapust Decl., ¶ 6.	3. Admitted.

[1] Specifically, the Regulation requires annual electronic submission of information from recordkeeping forms by the following establishments: establishments with 250 or more employees; establishments with 20 or more employees but fewer than 250 employees in designated industries; and upon notification by OSHA. 29 C.F.R. § 1904.41(a).

[2] The Regulation requires employers to submit information from recordkeeping forms for each of their establishments that are subject to the rule. 29 C.F.R. § 1904.41. For example, under the Regulation, a corporation that has four establishments subject to the rule must submit four separate submissions.

4. The first set of data OSHA collected under the newly promulgated Regulation was Calendar Year ("CY") 2016 OSHA Form 300A data, which employers were required to submit by December 15, 2017 (although OSHA continued to accept CY 2016 data through December 31, 2017). The second set of data OSHA collected under the Regulation was CY 2017 OSHA Form 300A data, which employers were required to submit by July 1, 2018. The third set of data OSHA collected under the Regulation was the CY 2018 OSHA Form 300A data, which employers were required to submit by March 2, 2019. OSHA will begin collecting CY 2019 OSHA Form 300A data on January 2, 2020; the deadline for electronically reporting this data is March 2, 2020. *See* OSHA webpage: Injury Tracking Application ("ITA"), https://www.osha.gov/injuryreporting/. Kapust Decl., ¶ 7.	4. Admitted, but only Calendar Year 2016 and 2017 Form 300A data is at issue in this case.

5. There are an estimated 463,000 establishments covered by the Regulation. Within the combined calendar years of CY 2016, CY 2017, and CY 2018, hundreds of thousands of employers submitted Form 300A data electronically. Kapust Decl., ¶ 31.	5. Admitted.
6. The first set of data OSHA collected under the newly promulgated Regulation was the CY 2016 data, which employers were required to submit by December 15, 2017 (although OSHA continued to accept CY 2016 data through December 31, 2017). From an estimated 350,000 covered establishments, OSHA received only about 163,000 responsive records (a response rate of 47%).[3] Kapust Decl., ¶ 33.	6. Admitted.
7. The second set of data OSHA collected under the Regulation was the CY 2017 data, which employers were required to submit by July 1, 2018. From an	7. Admitted.

[3] There were 350,000 covered establishments in CY 2016. This differs from the 463,000 currently estimated to be covered because some states, including California, did not require the submission for CY 2016.

estimated 463,000 covered establishments, OSHA received only about 198,000 responsive records (a response rate of 43%). Kapust Decl., ¶ 34.	
8. The third set of data OSHA collected under the Regulation was the CY 2018 data, which employers were required to submit by March 2, 2019. From an estimated 463,000 covered establishments, OSHA received only about 220,000 responsive records (a response rate of 48%). Kapust Decl., ¶ 35.	8. Admitted.
9. OSHA uses data collected under the Regulation (i.e., the OSHA Form 300A data) for enforcement targeting purposes. Specifically, OSHA uses the data as a basis for enforcement programs that target establishments with the highest reported injury and illness rates. The overriding principle of targeting these employers is to have an OSHA presence at establishments with the highest injury and illness rates	9. Admitted that OSHA uses the Form 300A data for enforcement targeting purposes, but denied that enforcement targeting is the primary objective of the Electronic Reporting Rule's requirement that covered establishments submit Form 300A data. The primary objective of the Electronic Reporting Rule was to encourage employers to make efforts to reduce injuries and illnesses, without OSHA increasing inspections, by publicly disclosing the Form 300A data. 81 Fed. Reg. at 29630–32; Michaels Decl. ¶¶ 11–18.

when compared to their industry peers. Kapust Decl., ¶ 8.	
10. OSHA's most recent enforcement targeting program, the Site Specific Targeting Program 2016 ("SST-16"), became effective on October 16, 2018. The program implements OSHA's site-specific targeting inspection program using the CY 2016 Form 300A data submitted by employers under the Regulation. *See* OSHA Directive Number 18-01 (CPL 02), available at https://www.osha.gov/sites/default/files/enforcement/directives/18-01_CPL-02_0.pdf. Kapust Decl., ¶ 9.	10. Admitted.

II. Plaintiff's FOIA Requests

11. On October 13, 2017, Plaintiff submitted a FOIA request dated October 13, 2017 to DOL's "FOIARequests" email inbox for:	11. Admitted.

"All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from August 1, 2017 to September 30, 2017, through OSHA's internet-based injury tracking application pursuant to the Final Rule 'Improve Tracking of Workplace Injuries and Illnesses,' 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically submitted information from OSHA Forms 300, 300A, and 301." Ex. 1, Declaration of Amanda L. Edens ("Edens Decl."), ¶ 4.	
12. On October 18, 2017, in an email to Plaintiff, Defendant's component agency, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the October 13, 2017 FOIA request and assigned it tracking number 843089. Edens Decl., ¶ 5.	12. Admitted.
13. On November 2, 2017, Plaintiff submitted a FOIA request dated November	13. Admitted.

1, 2017 to DOL's "FOIARequests" email inbox for: "All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from October 1, 2017 to October 31, 2017, through OSHA's internet-based injury tracking application pursuant to the Final Rule 'Improve Tracking of Workplace Injuries and Illnesses,' 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically submitted information from OSHA Forms 300, 300A, and 301." Edens Decl., ¶ 6.	
14. On November 6, 2017, in an email to Plaintiff, Defendant's component agency, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the November 1, 2017 FOIA request and assigning it tracking number 844610. Edens Decl., ¶ 7.	14. Admitted.
15. On November 17, 2017, by letter to Plaintiff, DOL responded to FOIA requests	15. Admitted.

843089 and 844610. The letter noted that "OSHA has identified 23,416 records of OSHA Form 300A data submitted to the Agency during the period of August 1, 2017 through October 31, 2017. OSHA does not have any records pertaining to OSHA Forms 300 or 301. The Agency is not collecting that information at this time." The November 17, 2017 letter withheld the Form 300A data as exempt from disclosure under FOIA, stating, "As stated in the preamble to the Improve Tracking of Workplace Injuries and Illnesses final rule (see 81 FR 29624), OSHA plans to use the establishment-specific data for enforcement targeting purposes. Disclosure of the data before and while it is being used to select establishments for inspection would in turn disclose OSHA's techniques and procedures for law enforcement investigations. Thus, OSHA has determined that the data submitted under the electronic reporting	

requirements are exempt from disclosure while they are being used for enforcement targeting purposes, and the Agency must deny your request in full." Edens Decl., ¶ 8.	
16. By letter dated December 12, 2017, Plaintiff appealed the agency's decision to withhold the OSHA Form 300A records. Edens Decl., ¶ 9.	16. Admitted.
17. On December 18, 2017, Plaintiff submitted a FOIA request dated December 18, 2017 to DOL's "FOIARequests" email inbox for: "All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from October 31, 2017 to December 18, 2017, through OSHA's internet-based injury tracking application pursuant to the Final Rule 'Improve Tracking of Workplace Injuries and Illnesses,' 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited to, electronically	17. Admitted.

submitted information from OSHA Forms 300, 300A, and 301." Edens Decl., ¶ 10.	
18. On December 21, 2017, in an email to Plaintiff, Defendant's component agency, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the December 18, 2017 FOIA request and assigning it tracking number 847640. Edens Decl., ¶ 11.	18. Admitted.
19. On February 1, 2018, Public Citizen Litigation Group ("Plaintiff") submitted a FOIA request dated February 1, 2018 to DOL's "FOIARequests" email inbox for: "All records submitted to the Occupational Health and Safety Commission [sic] (OSHA) from December 19, 2017 to January 31, 2018, through OSHA's internet-based injury tracking application pursuant to the Final Rule 'Improve Tracking of Workplace Injuries and Illnesses,' 81 Fed. Reg. 29,624 (May 12, 2016), as revised at 81 Fed. Reg. 31,854 (May 20, 2016). The records should include, but are not limited	19. Admitted.

to, electronically submitted information from OSHA Forms 300, 300A, and 301." Edens Decl., ¶ 12.	
20. On February 2, 2018 in an email to Plaintiff, Defendant's component agency, OSHA, to which the request had been forwarded for processing, acknowledged receipt of the February 1, 2018 FOIA request and assigning it tracking number 850399. Edens Decl., ¶ 13.	20. Admitted.
21. On February 20, 2018, by letter to Plaintiff, DOL responded to FOIA requests 847640 and 850399. The letter noted that "OSHA has identified approximately 237,000 records[4] of OSHA Form 300A data submitted to the Agency during the period of October 31, 2017 through January 31, 2018. OSHA does not have any records pertaining to OSHA Forms 300 or 301. The Agency is not collecting that information at	21. Admitted.

[4] This number includes the 23,416 records of OSHA Form 300A data that were submitted to the Agency during the period of August 1, 2017 through October 31, 2017 and were responsive to FOIA Requests 843089 and 844610. Therefore, the number of responsive records spanning from August 1, 2017 through January 31, 2018 and encompassing all four FOIA Requests totals approximately 237,000 records.

this time." The February 20, 2018 letter withheld the Form 300A data as exempt from disclosure under FOIA, stating, "As stated in the preamble to the Improve Tracking of Workplace Injuries and Illnesses final rule (see 81 FR 29624), OSHA plans to use the establishment-specific data for enforcement targeting purposes. Disclosure of the data before and while it is being used to select establishments for inspection would in turn disclose OSHA's techniques and procedures for law enforcement investigations. Thus, OSHA has determined that the data submitted under the electronic reporting requirements are exempt from disclosure while they are being used for enforcement targeting purposes." Edens Decl., ¶ 14.	
22. By letter dated February 27, 2018, Plaintiff appealed the agency's decision to withhold the OSHA Form 300A records. Edens Decl., ¶ 15.	22. Admitted.

III. DOL's Search for Responsive Records

23. All data responsive to the FOIA Requests are submitted through and captured in OSHA's Injury Tracking Application ("ITA"). The data stored in the ITA are transmitted to the Office of Statistical Analysis ("OSA"), Directorate of Technical Support and Emergency Management on a monthly basis. OSA uploads those records into a Microsoft Access database. OSA searched the database to identify the number of records that were responsive to the FOIA Requests. Edens Decl., ¶ 17.	23. Admitted.
24. The search for responsive documents produced: In response to FOIA Requests 843089 and 844610, 23,416 records of OSHA Form 300A data submitted to the Agency during the period of August 1, 2017 through October 31, 2017. In response to FOIA Requests 847640, and 850399, approximately 237,000 records of OSHA	24. Admitted.

Form 300A data submitted to the Agency during the period of August 1, 2017 through January 31, 2018.[5] Edens Decl., ¶ 18.	
25. No records pertaining to OSHA Forms 300 or 301 were found in response to any of the four FOIA Requests, because the Agency is not collecting that information at this time. Edens Decl., ¶ 18.	25. Admitted.

III. Withholdings

26. In response to Plaintiff's FOIA Requests, on November 17, 2017, DOL withheld in full 23,416 records pursuant to FOIA. On February 20, 2018, DOL withheld in full approximately 237,000 records[6] pursuant to FOIA. The information is being withheld pursuant to Exemption 4, 5 U.S.C. § 552(b)(4). Edens Decl., ¶ 19.	26. Admitted that OSHA withheld in full about 237,000 responsive records in a single database that are responsive to plaintiff's FOIA requests, and admitted that since it filed its first motion for summary judgment in June 2018, OSHA has asserted that the information is exempt from disclosure under FOIA Exemption 4. Denied that OSHA invoked Exemption 4 when it initially withheld the records.

[5] Although FOIA Requests 847640 and 850399 spanned the period of October 31, 2017 through January 31, 2018, in responding OSHA also included in its count the 23,416 records responsive to the previous two FOIA Requests, FOIA Requests 843089 and 844610.
[6] *See* FN 2.

27. The records consist of information from OSHA Form 300A, "Summary of Work-Related Injuries and Illnesses" completed forms. These forms contain data from establishments on the total numbers of deaths, lost-workday cases, cases resulting in work restriction or transfer, and other recordable cases; as well as the total number of lost or restricted workdays; the classification of cases (injury, skin disorder, respiratory, poisoning, hearing loss, or other illnesses); the number of employees; and the total hours worked. Edens Decl., ¶ 20.	27. Admitted.

IV. Segregability

28. Segregability is not applicable to the approximately 237,000 records that were withheld, because any attempt at segregating the information in those documents would provide little or no informational value, because the material is inextricably intertwined. Edens Decl., ¶ 21.	28. Denied. OSHA concedes that producing individual data fields independently of each, or redacting individual fields, is possible. *See* Edens Decl. ¶¶ 21–23. Disclosure of individual fields concerning the injury and illness data would be useful to researchers because it would allow for the analysis of broad trends within and across industries.

	Carome Decl. ¶ 7. Or if the agency were to do the reverse and provide only the names of submitting establishments, such disclosure would enable Public Citizen to identify which covered establishments in fact complied with the legal obligation to submit these records. This information could be used to advocate for increased compliance with OSHA reporting regulations. *Id.* ¶ 8. And the disclosure of demographic information fields in combination with either would allow for a more refined analysis of such information *Id.* ¶ 9.
29. The 300A records contain the following data fields: establishment_name; company_name; street_address; city; state; zip; naics_code; industry_description; size; establishment_type; year_filing_for; annual_average_employees; total_hours_worked; no_injuries_illnesses; total_deaths; total_dafw_cases; total_djtr_cases; total_other_cases; total_dafw_days; total_djtr_days;	29. Admitted.

total_injuries; total_skin_disorders; total_respiratory_conditions; total_poisonings; total_hearing_loss; total_other_illnesses; and change_reason. Edens Decl., ¶ 22.	

V. Litigation

30. On January 19, 2018, Plaintiff filed this FOIA litigation addressing FOIA Requests 843089 and 844610. ECF No. 1, Pl.'s Compl.	30. Admitted.
31. On April 16, 2018, Plaintiff filed a "First Amended Complaint" in this FOIA litigation, adding FOIA Requests 847640 and 850399 to the complaint. ECF No. 12, Pl.'s Am. Compl.	31. Admitted.

***

	32. OSHA requires employers with more than 10 employees in most industries to maintain records of occupational injuries and illnesses. 29 C.F.R. § 1904.0; *see* 81 Fed. Reg. at 29,625 (citing Recording and Reporting

	Occupational Injuries and Illnesses, 36 Fed. Reg. 12,612 (July 2, 1971)).
	33. Covered establishments must record each employee injury and illness on a "Log" (the OSHA Form 300). At the end of each year, establishments are required to prepare an "Annual Summary Form" (the OSHA Form 300A) based on the information in the Log. *See* 29 C.F.R. § 1904.32(b).
	34. Employers are required to post the Form 300A in a conspicuous place at the worksite for a period of three months of the year following the year covered by the records. *See* 29 C.F.R. § 1932(a)(4), (b)(5)–(6).
	35. Establishments must preserve the Form 300A for five years, and make copies available at no charge to employees, former employees, and their representatives. *See* 29 C.F.R. §§ 1904.33, 1904.35.
	36. OSHA imposes no restrictions on further dissemination of the Form 300A by employees or their representatives. *See* 81

	Fed. Reg. at 29,684; *see* Seminario Decl. ¶ 16 (explaining that the disclosure regulations do not restrict employees or employee representatives from "sharing or utilizing this data").
	37. At least until September 12, 2019, where OSHA collected Form 300A data during onsite inspections, OSHA routinely disclosed such data in response to FOIA requests. Meilinger Decl. ¶ 6; *see* Seminario Decl. ¶¶ 19–24 (explaining that AFL-CIO regularly requested and received Form 300A data); Frumin Decl. ¶ 30 ("OSHA has been collecting and publicly releasing the Annual Summary (Form 200A or 300A) for over 20 years, and making it easily available to the public for most of that time.").
	38. Where OSHA collected Form 300A data through the OSHA Data Initiative, from the time of the decision in *New York Times v. U.S. Dep't of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004), through the agency's response to the FOIA requests at issue in this

	case, OSHA's "consistent policy" was to release such Form 300A data in response to FOIA requests. 81 Fed. Reg. at 29,658; *see* Seminario Decl. ¶¶ 19–24 (explaining that AFL-CIO regularly requested and received Form 300A data); Frumin Decl. ¶ 30 ("OSHA has been collecting and publicly releasing the Annual Summary (Form 200A or 300A) for over 20 years, and making it easily available to the public for most of that time.").
	39. In OSHA's notice of proposed rulemaking for the Electronic Reporting Rule, OSHA stated that it "plan[ned] to post the injury and illness data online," which included the Form 300A data. 78 Fed. Reg. at 67,258.
	40. During the rulemaking process for the Electronic Reporting Rule, some commenters raised concerns with respect to publication of the collected data, arguing that some of the information might be exempt from disclosure under Exemption 4. 81 Fed. Reg. 29,633, 29,657–58.

	41. During the rulemaking process for the Electronic Reporting Rule, some commenters disagreed that the collected data would be exempt from disclosure under Exemption 4. *See* 81 Fed. Reg. 29,660.
	42. OSHA considered the comments and concluded that "the information required to be submitted by employers under [the Electronic Reporting Rule] is not of a kind that would include confidential commercial information." 81 Fed. Reg. 29,658; *see id.* at 29,660 ("OSHA agrees with commenters who stated that recordkeeping data generally do not include proprietary or commercial business information."); *see* Michaels Decl. ¶¶ 12, 23, 27 (explaining that OSHA planned to release the Form 300A data as quickly as possible, and considered and rejected industry comments opposing such disclosure); Seminario Decl. ¶¶ 41–42 (same); Frumin Decl. ¶ 32–36 (same).
	43. OSHA reiterated in the final Electronic Reporting Rule that it "intend[ed] to post the

	establishment-specific injury and illness data it collects under this final rule on its public Web site at www.osha.gov." 81 Fed. Reg. at 29,625.
	44. OSHA further stated in the final Electronic Reporting Rule that "[a]ll collected data fields [from the Form 300A data] will be made available" online. 81 Fed. Reg. at 29,632.
	45. At the time the Form 300A data at issue in this case was submitted, OSHA did not provide an assurance of confidentiality to the submitters of that information. 81 Fed. Reg. at 29,625, 29,632; OMB Information Collection Request Documents, Supporting Statement A, at 8, 13 (July 26, 2016), *available at* https://www.reginfo.go/public/do/PRAViewDocument?ref_nbr=201604-1218-002; Michaels Decl. ¶ 23 ("[T]imely posting of the data provided by employers was always an integral part of the [Electronic Reporting] rule.").

	46. There is no evidence that the compliance rate by covered establishments in 2016, 2017, and 2018 reflects submitters' concerns about public release of data they consider to be private and confidential. OSHA's long history of releasing and publicly posting Form 300A data indicates that it does not lower compliance. Michaels Decl. ¶¶19–22; Seminario Decl. ¶¶ 19–24, 34–36. OSHA has attributed low response rates to the lack of clear notice to employers. *See* Tracking of Workplace Injuries and Illnesses, 83 Fed. Reg. 36494, 36498 n.3 (July 30, 2018).
	47. When OSHA denied plaintiff's FOIA requests it invoked Exemption 7(E) and did not mention any change to its longstanding position that Form 300A data is not protected by Exemption 4. Edens Decl., Exs. E and K.
	48. On June 1, 2018, OSHA moved for summary judgment and abandoned its position that the records at issue are exempt under FOIA Exemption 7(E). Defs. Mem.,

	ECF No. 14-1, at 2 n.1. OSHA asserted for the first time that it was withholding the records under Exemption 4. *See id.* at 2. OSHA did not invoke Exemption 4 to withhold Form 300A data in response to FOIA requests, other data requests, in other litigation, or in any public announcement, prior to June 2018, when it filed its first motion for summary judgment, and it did not announce a change with regard to its intention to release Form 300A to the public until August 2019. Kapust Decl. ¶¶ 37–39, Exs. G and H.
	49. Individual data fields within the Form 300A data can be disclosed independent of each other. Edens Decl. ¶ 23.

Although Plaintiff denies some of Defendants' factual statements as explained above, Plaintiff does not contend that there are any material facts as to which there is a genuine issue of fact for trial.

Dated: December 9, 2019

Respectfully submitted

/s/ Patrick D. Llewellyn

Patrick D. Llewellyn (D.C. Bar No. 1033296)
Michael T. Kirkpatrick (D.C. Bar No. 486293)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009

(202) 588-1000

Counsel for Plaintiff