UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RENEWABLE FUELS ASSOCIATION AND GROWTH ENERGY, *Plaintiffs,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES DEPARTMENT OF ENERGY, *Defendants.*	)	Civil Action No. 18-2031

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Congress enacted the Freedom of Information Act ("FOIA") to require disclosure when it will "contribut[e] significantly to public understanding of the operations or activities of the government." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Disclosure of the requested information is necessary here for exactly that reason because EPA has created a body of "intentionally shrouded and hidden agency law" to evade review of its misuse of small refinery exemptions under the Renewable Fuel Standard ("RFS"). *Advanced Biofuels Ass'n v. EPA* ("*ABFA*"), 792 F. App'x 1, 5 (D.C. Cir. 2019). By invoking Exemption 4 to avoid disclosure of the names and locations of the companies and refineries that EPA has granted or denied exemptions from compliance with the RFS, EPA is in effect arguing that whether a private entity is subject to a regulatory requirement is itself confidential information provided by the private entity. That is absurd.

EPA loses further credibility in its inconsistent efforts to distinguish the withheld information (the names and locations of companies and refineries) from the context in which EPA produces this data (in issuing its determination on whether a particular refinery is entitled to receive a compliance exemption). EPA argues for viewing the withheld information in isolation for certain elements required to claim Exemption 4, but insists on viewing the information in context for other elements of Exemption 4. EPA cannot have it both ways. Specifically, it cannot credibly argue that the names and locations of companies and refineries should be considered by themselves in evaluating whether the information was "obtained from a person," while simultaneously arguing that it is the context in which the names and locations are provided that supports their view that the information is commercial and confidential. A more consistent analysis shows that neither view of what information would actually be disclosed independently satisfies all the elements of

Exemption 4, which dooms EPA's defense. EPA must be ordered to produce this basic information, which it has provided no legitimate legal basis to withhold.

ARGUMENT

When an "agency withholds records" that have been requested under FOIA, "it bears the burden of showing that at least one of the exemptions applies." *WP Company LLC v. U.S. Small Bus. Admin.*, 2020 WL 6504534, at *5 (D.D.C. Nov. 5, 2020). EPA fails to demonstrate that Exemption 4 (the only exemption at issue) applies here.

A. EPA Has Not Met its Burden of Showing That the Withheld Information Was Commercial or Financial

As explained in Plaintiffs' Memorandum in Support, the withheld information in isolation—names and locations of companies and refineries—is neither commercial nor financial as those terms have been defined in this Circuit. *See* Pls. Memo. at 12-13. EPA does not deny this point. Instead, EPA argues that the context in which the basic information is provided makes it commercial because (in its view) disclosure of the names and locations will identify which refineries have petitioned for or received an exemption, which in turn might imply something about the refinery's financial condition. That argument is meritless.

Although EPA asserts that a "refinery's petition could provide competitors and other market participants with key insights into the refinery's financial and competitive position," *Vaughn* Index at 3, the mere fact that a small refinery submitted a petition actually says very little, for in recent years *most* small refineries have submitted exemption petitions.[1] Nor does the fact that a refinery may have received an exemption provide any commercial or financial information. An exemption reveals only that EPA made the decision to exempt the refinery from RFS

[1] EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Nov. 19, 2020).

compliance for that year. And while EPA's exemption decisions are "based upon an evaluation of commercial and financial information submitted to EPA in the refinery's petition" (Opp. 14), Plaintiffs' Motion does not seek to compel the disclosure of that information.

EPA further confuses the matter by describing in depth the information contained in refineries' *petitions* for small refinery exemptions. Opp. 13, 15; *Vaughn* Index at 3. Plaintiffs do not dispute that these petitions contain some commercial and financial information, but again Plaintiffs' Motion does not seek the petitions or any of the refineries' financial information contained therein; it seeks only the petitioners' names and the locations of the refineries in *EPA's decision documents*. This information in the redacted agency decision documents informs the public whether a refinery received an exemption from complying with the RFS for a given year, which *at most* implies that EPA determined RFS compliance might affect the company disproportionately. This type of broad implication is insufficient to bring EPA's decision within the scope of Exemption 4. *See Besson v. U.S. Dep't of Commerce*, 2020 WL 4500894, at *4 (D.D.C. Aug. 5, 2020). Moreover, Plaintiffs' Motion does not challenge EPA's decision to redact the refineries' financial information from its decision documents or EPA's decision to withhold information that could be used to determine the value of a refinery's exemption. At issue here is only the basic fact of which refineries were granted or denied an exemption from complying with the RFS. Such basic information cannot legitimately be withheld under Exemption 4.

EPA's attempts to distinguish the compelling precedent of the *COMPTEL* decision also fall flat. In *COMPTEL,* this court required the Federal Communications Commission to disclose the names and phone numbers of a company's "staff and contractors" contained in agency records, including in emails between the company and the FCC, finding, *inter alia,* that such basic information is not "commercial in nature." *COMPTEL v. Fed. Commc'ns Comm'n*, 910 F. Supp.

2d 100, 114, 116 (D.D.C. 2012). Although EPA claims that "the petitioners' names and facility locations in this case concern the refineries' 'commercial interests' because the small refinery petitions contain information attempting to establish unfavorable structural and economic conditions at the refinery" (Opp. 15), as just explained, Plaintiffs' Motion seeks only the names of the petitioning companies and locations of the refineries, not the refineries' petitions or the information contained therein. As in *COMPTEL*, EPA's *Vaughn* Index relies on a "conclusory assertion[]"—that the withheld information "could provide competitors and other market participants with key insights into the refinery's financial and competitive position," *Vaughn* Index at 3—which is "insufficient to show that Exemption 4 was appropriately invoked." *COMPTEL*, 910 F. Supp. 2d at 117; *Prop. of the People, Inc. v. Office of Mgmt. & Budget*, 330 F. Supp. 3d 373, 380 (D.D.C. 2018) ("[C]onclusory and generalized allegations of exemptions are unacceptable.") (quotation marks omitted).

At the same time, the other D.C. District Court cases relied on by EPA—*Tokar* and *Public Citizen*—are completely inapposite. For starters, those cases have little significance here because the plaintiffs in those cases did not contest EPA's assertion that the withheld information was "commercial." *See Tokar v. U.S. Dep't of Justice*, 304 F. Supp. 3d 81, 94 n.3 (D.D.C. 2018) (Plaintiff "has not challenged DOJ's withholding pursuant to Exemption 4."); *Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 66 F. Supp. 3d 196, 207 (D.D.C. 2014) ("The plaintiff offers no arguments as to why the [withheld records] should not be considered 'commercial' within the meaning of Exemption 4. … Consequently, the defendant-intervenors' arguments as to the commercial nature of the documents may be accepted as conceded."). In any event, those cases are irrelevant. As EPA explains, *Tokar* found that "information describing how a corporation implemented a regulatory compliance program was 'commercial.'" Opp. 12; *Tokar*, 304 F. Supp.

3d at 94; *see also Pub. Citizen*, 66 F. Supp. 3d at 207 (Exemption 4 covered companies' documents "describ[ing] in detail basic business operations and techniques" and "sales and marketing activities"). By contrast, the information sought by Plaintiffs would reveal *whether* a refinery was subject to RFS compliance obligations at all, not any company-specific information related to *how* it intended to comply with those obligations. In other words, the withheld information concerns how a *federal agency* has implemented a regulatory program and who is subject to those regulatory requirements, not the strategy by which *refineries* "implement *their* compliance programs." *Tokar*, 304 F. Supp. 3d at 94 n.3 (emphasis added). The names and locations of entities exempt from compliance is the exact type of information that Congress intended to make public in enacting FOIA. *See WP Company LLC*, 2020 WL 6504534, at *5 ("Congress enacted FOIA to … open agency action to the light of public scrutiny.") (quotation marks omitted).

B. EPA Has Not Met its Burden of Showing That the Withheld Information Was Obtained from a Person

For this element of proof, EPA asks the Court to look at the withheld information in isolation, asserting that "EPA obtained the petitioners' names and facility locations from the respective SRE petitions." Opp. 18. But elsewhere in its response, EPA impliedly concedes that the names and locations of refineries on their own are neither commercial nor confidential and argues that the Court must consider the requested information "in the context of [the refinery's] status as a petitioner and/or recipient of a small refinery exemption." *Vaughn* Index at 4. EPA cannot flip flop like that, always choosing whichever description of the information it believes is most likely to qualify for the exemption. In any event, the withheld information was not "obtained from a person" under either view.

If the relevant information is the refinery's "status as a … recipient of a small refinery exemption," Opp. 24-25, 29, this is obviously "obtained from" EPA—EPA makes the decision—

and therefore cannot be withheld under Exemption 4 regardless of how this Court decides the other two elements. Like most agency adjudications, EPA's small refinery exemption decisions include the affected entity's basic identifying information—the identity of the requesting entity and the name and location of the refinery at issue. The fact that this identifying information was also included in the refineries' petitions does not render it "obtained from a person" for purposes of Exemption 4. *See* Pls. Memo. 13-14. *EPA* decides whether to grant or deny an exemption. The refineries submit information to EPA in their requests for an exemption, but they do not make the determination—that rests with EPA alone. *See S. Alliance for Clean Energy v. U.S. Dep't of Energy*, 853 F. Supp. 2d 60, 75 (D.D.C. 2012) ("[I]nformation generated by the government is not exempt from disclosure under Exemption 4 simply because it is based upon information supplied by persons outside the agency."). Plaintiffs seek only EPA's decision.

Elsewhere, including in its *Vaughn* Index, EPA attempts to frame Plaintiffs' request in terms of the information—the names and locations of the applicants—in isolation, emphasizing that the information was contained in the applications for exemptions. According to EPA, the information was "obtained from a person" because "EPA obtained the withheld information from the affected refineries and imported that information into the decision documents" and because "the affected refineries meet the definition of the term 'person' as defined in 40 C.F.R. § 2.201(a)." *Vaughn* Index at 3. But EPA's use in decision documents of the names and locations of recipients of its decisions are not obtained from a person; they are obtained from EPA when it makes its decisions. *See COMPTEL*, 910 F. Supp. 2d at 116 ("the name of [a private company's] staffer in an email sent from FCC staff to [the company] staff would not likely constitute information 'obtained from a person'"). Notably, EPA correctly recognized that this basic information contained in small refinery exemption decisions is *not* "obtained from a person," in the course of

two prior proposed rulemakings. *See* Proposed Rule, Renewable Enhancement and Growth Support, 81 Fed. Reg. 80,828 (Nov. 16, 2016) ("Proposed REGS Rule"); Pls. Memo., Ex. B. While Plaintiffs do not argue that the proposed REGS Rule has independent "legal effect" (Opp. 20), these prior EPA proposed determinations—made on two separate occasions three years apart—call into serious question EPA's refusal to disclose the information.

This case is also completely distinguishable from the *Gulf & Western Industries* holding relied upon by EPA. *See* Opp. 17-19. In *Gulf & Western Industries*, the court found that "actual costs for units produced, actual scrap rates, break-even point calculations and actual cost data" supplied by a contractor and included in a government report were "supplied to the government from a person outside the government" and thus could be withheld under Exemption 4. 615 F.2d 527, 529-530 (D.D.C. 1979). The data supplied by the contractors in *Gulf & Western Industries* is analogous to the financial information supplied by oil companies in their small refinery exemption petitions, which, as clarified *supra* at 3, Plaintiffs are not seeking in this case. Simply put, the identities of the petitioners and refineries cannot be disaggregated from EPA's decision and therefore cannot be withheld under Exemption 4.

C. EPA Has Not Met its Burden of Showing That the Withheld Information Was Confidential

EPA's assessment of confidentiality is both legally and factually inaccurate. EPA asserts that "the affected refineries demonstrated that each customarily and actually treat the withheld information—in the context of its status as a petitioner and/or recipient of a small refinery exemption—as private." *Vaughn* Index at 4. But companies routinely disclose publicly whether

they have received an RFS exemption, through court documents[2] and publicly-available financial disclosures.[3] And throughout the course of this FOIA litigation, EPA has released this information in the majority of instances—thirty-eight out of the seventy-two produced decision documents. Consequently, refineries cannot claim that such information is "customarily kept private." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). Nor can refineries have a legitimate interest in keeping confidential a regulatory decision by a government agency rendered in the course of implementing a national program.

Moreover, the limited information requested by Plaintiffs' Motion does not reveal any of the particular details of EPA's analysis or the data on which its analysis is based. As EPA notes, there are a wide variety of factors that DOE and EPA consider in deciding whether a refinery suffers "disproportionate economic hardship." Opp. 13; *see also* Pls. Memo., Ex. A. For instance, in some cases EPA might grant an exemption on the basis that a refinery produces mostly diesel fuel and operates in a non-niche market. In other cases, EPA's decision might be based on the refinery's access to credit and whether the refinery has other lines of business. Given the multitude of considerations that factor into whether a small refinery is entitled to a compliance exemption, the simple fact that a refinery received an exemption does not reveal any particular confidential information about the refinery. While the public is free to speculate on the particular factors on which EPA relied in making its decisions, such "bare speculation" does not render information confidential. *WP Company LLC*, 2020 WL 6504534, at *9.

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[2] *See, e.g.*, *Wynnewood Refining Co. v. EPA*, No. 20-1099 (D.C. Cir. filed Mar. 26, 2020); *Sinclair Wyo. Refining Co. v. EPA*, No. 19-1196 (D.C. Cir. filed Sept. 20, 2019); *Big West Oil, LLC v. EPA*, No. 19-1197 (D.C. Cir. filed Sept. 23, 2019); *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600 (4th Cir. 2018); *Hermes Consol., LLC v. EPA*, 787 F.3d 568 (D.C. Cir. 2015); *Lion Oil Co. v. EPA*, 792 F.3d 978 (8th Cir. 2015).

[3] *See, e.g.*, HollyFrontier Corp., Form 10-Q filing with the U.S. Sec. & Exch. Comm'n (Quarterly Period Ending June 30, 2018).

EPA's attempt to distinguish *WP Company LLC* also falls short. In *WP Company LLC*, this Court found that "even assuming that a business's payroll qualifies as 'confidential' under Exemption 4, the agency may not withhold borrowers' names, addresses, and loan amounts pursuant to such provision, as disclosure would not reveal any commercial information that is 'customarily and actually treated as private.'" *Id.* (quoting *Food Mktg.*, 139 S. Ct. at 2366). Likewise, in this case, disclosure of the fact that a refinery has received an exemption does not reveal the financial benefit received by the refinery or any of the other potentially confidential factors discussed above. EPA has redacted from the decision documents the specific factors that were determinative in deciding to grant each exemption petition. Without knowledge of these factors, the specific justifications for the exemption remain confidential. *See id.* The isolated fact that a small refinery was exempt from its RFS obligations in a given year, however, is not confidential.

To the extent the Court considers the second *Food Marketing* factor—that the "party receiving [the information] provide[d] some assurance that it will remain secret"—that factor reinforces the conclusion that the withheld information is not confidential. *Food Mktg.*, 139 S. Ct. at 2363.[4] EPA admits that it "did not provide express assurances that the withheld information would be considered CBI when it was submitted to the Agency." Opp. 28; Miller Decl. ¶44. The best EPA can come up with is an argument that its CBI regulations themselves suggest "an *implied* assurance that the withheld information would at least temporarily be treated as confidential" (Opp. 28) (emphasis added). But this "temporary" status of information submitted for a CBI

[4] There is no factual or policy reason not to require both factors of *Food Marketing*, and courts in this Circuit have acknowledged that "the absence of evidence in the record of an assurance of confidentiality [i]s one factor to consider in determining whether the information meets the definition of 'confidential' under FOIA." *Gellman v. Dep't of Homeland Sec.*, 2020 WL 1323896, at *11 n.12 (D.D.C. Mar. 20, 2020).

determination does not qualify as an assurance under *Food Marketing*. Regulatory provisions indicating that EPA will *temporarily* refrain from disclosing the information until it makes a confidentiality determination does not constitute an implied assurance the material will remain confidential *permanently* because the information could be disclosed if EPA ultimately determines that it is not confidential. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Commerce*, 2020 WL 4732095, at *4 (D.D.C. Aug. 14, 2020). In such instances, a temporary delay in public disclosure while the government evaluates the submitted information would not ultimately prevent the information from "fall[ing] into the hands of competitors or other entities that sought it," and therefore would not render the information confidential. *Id.*

EPA attempts to invert the express presumption of the second *Food Marketing* factor and argue that the withheld information should be treated as confidential because "EPA did not provide any express or implied indications to the affected refineries that the withheld information *would* be publicly disclosed." Opp. 28 (emphasis added). Not only is this reformulation nowhere in the Supreme Court's decision, but it also contravenes FOIA's "strong presumption in favor of disclosure." *WP Company LLC*, 2020 WL 6504534, at *5 (quotation marks omitted).[5] The fact that EPA did not inform the refineries that their identities could be publicly disclosed is irrelevant to whether this information is confidential for purposes of Exemption 4. In any event, EPA has twice effectively provided indications that it would be inclined to make the information sought here public. *See* 81 Fed. Reg. at 80,909; Pls. Memo., Ex. B.

[5] The DOJ Guidance that EPA cites (Opp. 24) to support this novel interpretation of *Food Marketing* is flawed and self-serving.

D. EPA's Administration of Small Refinery Exemptions Has Created Secret Law and EPA's Claims Otherwise Are Misplaced

EPA's small refinery exemption decisions create law by determining the regulatory obligations of particular parties subject to the RFS. These decisions also modify the total volume of renewable fuel that is legally required to be blended into transportation fuels nationally each year (because EPA has not accounted for exemptions granted after the annual standards were promulgated, which effectively lowers the standards). By withholding the information requested through this Motion, EPA is making and applying secret law. Although EPA shares the aggregate number of exemptions it has decided to grant or deny, its withholding of the basic information regarding individual exemption decisions sought here has made it difficult or impossible for affected third parties, such as Plaintiffs, to challenge its exemption decisions. EPA has relieved scores of refineries of their statutory compliance obligations without any public process, leaving Plaintiffs and other affected entities "without a viable avenue for judicial review." *ABFA*, 792 F. App'x at 5. EPA's present attempt to use Exemption 4 to maintain a body of secret law is contrary to "FOIA's central purpose … to ensure that the Government's activities be opened to the sharp eye of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' Memorandum in Support, Plaintiffs respectfully request that their Motion for Partial Summary Judgment be granted. Plaintiffs request that the Court award the following relief:

i. Declare that, for any small refinery exemption decision made by EPA under the

RFS program, the name of the entity petitioning for the exemption and the name and location of the small refinery cannot be withheld under FOIA Exemption 4, 5 U.S.C. § 552(b)(4);

ii. Order EPA to immediately produce the information to Plaintiffs that was unlawfully withheld for RFS compliance years 2015, 2016, and 2017; and

iii. Prohibit EPA from withholding any of the five data elements identified in the Proposed REGS Rule in responding to Plaintiffs' FOIA requests.[6]

Respectfully submitted this 5th day of January, 2021.

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[6] Plaintiffs' Motion addresses the first two data points from the Proposed REGS Rule (the name of the company requesting the exemption and the name and location of the refinery for which the relief was requested) because EPA conceded that the other three are not covered by Exemption 4 (the nature of relief requested, the time period for which relief was requested, and the extent to which EPA granted or denied the requested relief). *See* Pls. Memo. 11 & n.2. An order by this Court requiring that EPA produce the unlawfully withheld information should therefore make clear that EPA may not withhold *any* of the five of data elements.

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