

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

WP COMPANY LLC d/b/a THE  
WASHINGTON POST, BLOOMBERG  
L.P., DOW JONES & COMPANY, INC.,  
PRO PUBLICA, INC., THE NEW YORK  
TIMES COMPANY, AMERICAN  
BROADCASTING COMPANIES, INC.  
d/b/a ABC NEWS, AMERICAN CITY  
BUSINESS JOURNALS, CABLE NEWS  
NETWORK, INC., NBCUNIVERSAL  
MEDIA, LLC d/b/a NBC NEWS, THE  
ASSOCIATED PRESS, THE CENTER FOR  
INVESTIGATIVE REPORTING  
d/b/a REVEAL,

*Plaintiffs,*

v.

U.S. SMALL BUSINESS  
ADMINISTRATION,

*Defendant.*

Case No. 1:20-cv-01240  
(JEB)

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Defendant United States Small Business Administration hereby respectfully moves for summary judgment in this Freedom of Information Act case because Defendant has produced all responsive records that can be located through reasonable searches and withheld only non-segregable information properly subject to a Freedom of Information Act Exemption. The reasons for this motion are further set forth in the Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, Defendant's Statement of Material Facts as to Which There is No Genuine Issue, and the Declaration of William Manger (as well as the exhibits thereto).

A proposed order is filed herewith.

Dated: August 18, 2020

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Respectfully submitted,

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## INTRODUCTION

In July, the Small Business Administration released detailed information on each of the millions of loans disbursed through the Paycheck Protection Program (“PPP”) and the Economic Injury Disaster Loan program (“EIDL”). For all of the PPP loans, SBA published the location of the borrower, its type of business, and any demographic information reported to the agency. For the EIDL loans, SBA similarly published almost all of the data that it possessed. Plaintiffs now seek to compel disclosure of the few elements of loan data that SBA withheld. But SBA only withheld confidential commercial information, and information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Accordingly, SBA is entitled to summary judgment pursuant to Exemptions 4 and 6 of the Freedom of Information Act.

The payroll data of a private business is confidential commercial information protected from disclosure by Exemption 4. Because a business can only borrow a fixed multiple of its average monthly payroll through the PPP, disclosure of a borrower’s identity and the precise amount of its PPP loan would allow an interested party to deduce the borrower’s total payroll with reasonable confidence. Because the dollar value of a borrower’s payroll is itself exempt from disclosure, information from which that payroll can be deduced and attributed to a particular borrower is likewise exempt. SBA, therefore, could not release the borrower identity together with the precise loan amount for any PPP loan. Exemption 4 requires the withholding of one or the other.

SBA divided the PPP loans into two categories. In the first category, for loans of \$150,000 or more, SBA released the name and address of each borrower, but withheld the precise loan amount, instead specifying a range of value for each loan. In the second category, for loans of less than \$150,000—which were made to the smallest of small businesses, a significant portion of

which are closely tied to the finances of particular individuals—SBA withheld the borrower names and addresses to protect the personal privacy of individuals under Exemption 6. (SBA withheld the names and addresses of independent contractors and sole proprietorships receiving EIDL loans for the same reason.) The SBA released the precise value of these smaller PPP loans, because release of the loan amount does not implicate Exemption 4’s protection for confidential commercial information where the identity of the borrower is withheld.

SBA’s limited withholdings are consistent with the settled understanding of FOIA Exemptions 4 and 6, warranting summary judgment in the agency’s favor.

## **BACKGROUND**

### **A. The Small Business Administration**

The government’s mission under the Small Business Act, 15 U.S.C. § 631 *et seq.*, is to “aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns,” and thereby to preserve the free enterprise system “essential” to national economic well-being and security. 15 U.S.C. § 631(a). To promote that important national objective, Congress created the Small Business Administration (“SBA”), under the management of a single Administrator, *id.* § 633(a), (b)(1), who is given “extraordinarily broad powers” under section 7(a) of the Act, 15 U.S.C. § 636(a), to provide a wide variety of technical, managerial, and financial assistance to small-business concerns. *See SBA v. McClellan*, 364 U.S. 446, 447 (1960); *see generally* 15 U.S.C. § 636(a) (describing numerous varieties of general small-business loans the Administrator is “authorized” and “empowered” to make); 13 C.F.R. § 120.1. In performing those functions, the Administrator is further empowered to “make such rules and regulations as [she] deems necessary to carry out the authority vested in [her],” and in addition to “take any and all

actions ... [that] [she] determines ... are necessary or desirable in making ... loans.” 15 U.S.C. § 634(b)(6), (7).

SBA financial assistance to a small business under section 7(a) may take the form of a direct loan, an immediate participation (joint) loan with a lender, or a deferred participation (guaranteed) loan initiated by a lender but a portion of which the SBA will purchase from the lender in the event of a borrower default. 13 C.F.R. § 120.2(a); *see Valley Nat’l Bank v. Abdnor*, 918 F.2d 128, 129 (10th Cir. 1990); *Cal. Pac. Bank v. SBA*, 557 F.2d 218, 219 (9th Cir. 1977). In practice, however, the SBA ordinarily guarantees loans made by private lenders rather than disbursing funds directly to borrowers. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 (1979). Doing so pares “risk for lenders ... mak[ing] it easier for them to access capital,” and “easier for small business to get loans.” *See* <https://www.sba.gov/funding-programs/loans>. (Economic Injury Disaster Loans, which are made directly by SBA and discussed below, are an exception to this general practice.)

Ordinarily, to qualify for an SBA general business loan an applicant must be an operating business organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)-(c); meet the size standards for a “small” business set forth under the statute and SBA rules (usually stated in terms of number of employees, or average annual receipts), *see* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101. In addition, an applicant must meet SBA standards of creditworthiness, *see* 13 C.F.R. 121.150, and comply with all other Loan Program Requirements.

**B. The Paycheck Protection Program and Economic Injury Disaster Loans**

On March 27, 2020, President Trump signed into law the CARES Act, passed by Congress to provide emergency economic assistance and other support to help individuals, families, businesses, and health care providers cope with the enormous economic and public health crises triggered by the current pandemic. Pub. L. No. 116-136, 134 Stat. 281. SBA received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.

Section 1102 of the CARES Act temporarily permits SBA to fully guarantee loans under made a new program, the “Paycheck Protection Program.” *See* 15 U.S.C. § 636(a)(36). Loans guaranteed under the PPP differ in significant ways from regular loans made under SBA’s 7(a) program. Manger Decl. ¶ 9. Among these differences, the PPP authorizes the SBA to make covered loans to various non-profit organizations, independent contractors, and self-employed individuals, as well as the sole proprietorships and other small business concerns that can access the ordinary 7(a) loans. 15 U.S.C. § 636(a)(36)(D); Manger Decl. ¶ 9. The maximum amount of a PPP loan is calculated from the borrowing business’s average monthly payroll. The maximum loan amount is generally 2.5 times the average monthly payroll for the 12 months preceding the date of the loan, up to \$10 million. Manger Decl. ¶ 96. The methodology to calculate the maximum amount an applicant can borrow through the PPP is established by the CARES Act, 15 U.S.C. § 636(a)(36)(E), and explained in Interim Final Rule, Business Loan Program Temporary Changes, Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,812–13 (Apr. 15, 2020). Compensation paid to an employee in excess of an annual salary of \$100,000, 15 U.S.C. § 636(a)(36)(A)(viii)(II)(aa), or any amounts paid to an independent contractor or sole proprietor

in excess of \$100,000 per year, *id.* § 636(a)(36)(A)(viii)(I)(bb), are not counted in the calculation of average monthly payroll. Manger Decl. ¶ 97.

SBA also administers the EIDL Program. *See* 15 U.S.C. § 636(b)(2). SBA's EIDL program offers long-term, low-interest financial assistance for eligible entities, including small business concerns, businesses with 500 or fewer employees (including sole proprietorships, independent contractors and self-employed persons), private non-profit organizations, agricultural enterprises and tribal small business concerns with less than 500 employees, affected by a covered disaster. Manger Decl. ¶ 11. EIDL loans may be used for working capital, notes payable, and accounts payable, in addition to expenses that result from the disaster's impact. Manger Decl. ¶ 12. An EIDL borrower can also have a PPP loan, but must use the loan proceeds from each for different purposes. Manger Decl. ¶ 12.

### **C. Data Releases and Freedom of Information Act Requests**

Plaintiffs in Case No. 20-cv-1240 submitted Freedom of Information Act requests that, taken together, sought the release of all available information on PPP and EIDL loans. (The details of each separate request are discussed at Manger Decl. ¶¶ 18-81.) The Center for Public Integrity, which is plaintiff in Case No. 20-cv-1614, did the same. Manger Decl. ¶ 82.

On July 6, 2020, SBA released detailed information on each of the 4.9 million PPP loans made to that point. Manger Decl. ¶ 88. The loan-level data included the following fields: city, state, ZIP code, NAICS code;<sup>1</sup> business type; race/ethnicity; gender; veteran status; nonprofit status; jobs reported as retained; date approved; lender; and congressional district. *Id.* For loans

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<sup>1</sup> The North American Industry Classification System (NAICS) code is a self-assigned code that best fits a business's primary industry. For example, barber shops are assigned NAICS code 812111, while beauty salons are assigned NAICS code 812112, and nail salons are assigned NAICS code 812113. Manger Decl. ¶ 88 n.1.

of \$150,000 or more, it also included business names and street addresses, and loan amounts expressed in ranges (not precise values) as follows: \$150,000 to \$350,000; \$350,000 to \$1 million; \$1 million to \$2 million; \$2 million to \$5 million; \$5 million to \$10 million. *Id.* For loans of less than \$150,000, the loan-level data included the precise amount of the PPP loan, but not the business name or street address. *Id.*

Shortly thereafter, SBA made a determination on the release of PPP individual borrower information, and issued letters directing Plaintiffs to SBA's website at [www.sba.gov/ppp](http://www.sba.gov/ppp). *Id.* SBA explained in the letters that portions of the PPP borrower data were being withheld pursuant to FOIA Exemptions 4 and 6. 5 U.S.C. § 552(b)(4), (6). SBA withheld the names and addresses of all borrowers of PPP loans of less than \$150,000. Manger Decl. ¶ 90. SBA also withheld the precise amounts of all PPP loans of \$150,000 or more. *Id.*

SBA also made a final determination on the release of EIDL borrower information and again issued letters directing Plaintiffs to SBA's website at [www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loans#section-header-5](http://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loans#section-header-5). SBA informed Plaintiffs that it was releasing the loan data for all EIDL loans, except that the names and addresses of sole proprietorships and independent contractors were being withheld pursuant to FOIA Exemption 6. 5 U.S.C. § 552(b)(6). Manger Decl. ¶ 91.

Plaintiffs challenge the propriety of the SBA's withholdings.

### **LEGAL STANDARDS**

“FOIA cases typically and appropriately are decided on motions for summary judgment.” *Leopold v. CIA*, 106 F. Supp. 3d 51, 55 (D.D.C. 2015); *see also* Fed. R. Civ. P. 56(a). A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B). “The defendant in a FOIA case must show that its search for responsive records was adequate, that any exemptions

claimed actually apply, and that any reasonably segregable non-exempt parts of records have been disclosed after redaction of exempt information.” *Light v. Dep’t of Justice*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013). “In a FOIA case, a court may award summary judgment solely on the basis of information provided by the department or agency in affidavits or declarations when the affidavits or declarations 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.’” *Id.* at 22 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)); *see Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (“Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail . . . and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” (citation omitted)). “Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf*, 473 F.3d at 374-75.

## ARGUMENT

### **I. SBA Properly Withheld Under Exemption 4 the Precise Amounts of Certain Loans to Avoid Disclosure of Confidential Payroll Information**

FOIA “expressly recognizes that important interests are served by its exemptions, and those exemptions are as much a part of FOIA’s purposes and policies as the statute’s disclosure requirement.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2365, 2366 (2019) (“*Argus Leader*”) (internal citations and brackets omitted). One of those exemptions is set forth in 5 U.S.C. § 552(b)(4) (Exemption 4). In particular, Exemption 4 “shields from mandatory disclosure ‘commercial or financial information obtained from a person and privileged or confidential.’” *Id.* at 2362 (quoting 5 U.S.C. § 552(b)(4)). For information to be covered by Exemption 4, it must be

“(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.” *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). FOIA defines a person to include an “individual, partnership, corporation, association, or public or private organization other than an agency.” 5 U.S.C. § 551(2). The “obtained from a person” requirement is thus beyond dispute in this action, and the “commercial or financial” and “confidential” requirements are satisfied, as explained below.

In particular, SBA properly withheld information under Exemption 4, as recently interpreted in *Argus Leader*, because the portions of the PPP records that SBA did not disclose would reveal commercial information that is customarily and actually kept confidential: the average payroll (and in some cases the wages) of specific PPP borrowers. As explained below, average payroll can be deduced with reasonable confidence from the precise value of a PPP loan, and it could be attributed to any borrower whose identity was associated with the precise value of its loan. To release both pieces of information—borrower identity and precise loan value—for any loan would therefore reveal the borrower’s average payroll, which is confidential commercial information. For loans of \$150,000 or more, SBA released the identity of the borrowers (*i.e.*, their names and street addresses) but withheld the precise amounts of their loans. For loans of less than \$150,000, SBA withheld the identities of the borrowers (protected by Exemption 6, as explained below) but released the precise amounts of their loans. Any further disclosure—of the precise values of larger loans or the identities of smaller borrowers—would cause the release of information protected by Exemption 4.

**1.** The information withheld easily fits within Exemption 4’s “commercial or financial” requirement: The information SBA withheld is “commercial” because it concerns the operations of the businesses whose PPP loans are described in SBA’s records. Similarly, the information



withheld is “financial” because it concerns how those businesses are financed. For example, courts understand information to be “commercial” if it relates to business or trade and the submitter has a commercial interest in the data. *See Pub. Citizen Health Research Grp.*, 704 F.2d at 1290. The exact amount borrowed by a particular business is an element of the data that therefore readily meets the “commercial” requirement. *See, e.g., Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312, 319-20 (D.C. Cir. 2006) (documents containing, among other things, “assessment of the commercial strengths and weaknesses” of domestic industry “plainly contain commercial information within the meaning of Exemption 4”).

It is the requirement that the commercial information be “confidential” that calls for application of the Supreme Court’s guidance in *Argus Leader*.

2. When Congress enacted FOIA in 1966, “[t]he term ‘confidential’ meant then, as it does now, ‘private’ or ‘secret.’” *Argus Leader*, 139 S. Ct. at 2363 (quoting *Webster’s Seventh New Collegiate Dictionary* 174 (1963)). The *Argus Leader* Court explained that the term “confidential” has two meanings. “In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it.” *Id.* “In another sense, information might be considered confidential only if” the party receiving it provides some assurance that it will remain secret. *Id.*

The central issue in *Argus Leader* was whether the “so-called ‘competitive harm’ test” adopted by the D.C. Circuit and several other courts of appeals was consistent with the text of Exemption 4. *Id.* at 2361. The Court held it was not. *Id.* at 2364.

In rejecting the “competitive harm” requirement, *Argus Leader* held that Exemption 4 clearly requires that the information in question be kept confidential by the entity submitting it. The Court found that there was “no need to resolve” whether Exemption 4 also requires the

government to have given an assurance that the information would be maintained in confidence—*i.e.*, whether “privately held information lose[s] its confidential character for purposes of Exemption 4 if it’s communicated to the government without assurances that the government will keep it private”—because the assurance in the case before the Court was not disputed by the parties. *Id.* at 2363 (emphasis in original). Accordingly, the Court held that “[a]t 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.” *Id.* at 2366.

Although the Supreme Court reserved the question of whether Exemption 4 requires the government to give an assurance that it will maintain the information in confidence, if this Court reaches the question, it should hold that no such assurance is required. Information may be “confidential” based on circumstances independent of the context in which the government receives it. Such information is “confidential” if it is generally held in confidence or kept secret by those who convey it to the government. The submission of such “confidential” information to the government does not automatically strip it of its confidential status because, “[i]n common usage, confidentiality is not limited to complete anonymity or secrecy.” *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 173 (1993). So long as the context in which the information is provided does not indicate that the government would itself publicly disseminate it, the information remains confidential under Exemption 4.

That ordinary understanding of the term is reflected in the committee reports on FOIA as enacted in 1966. The reports emphasize that Exemption 4 protects “the confidentiality of information obtained by the Government” when it “would not customarily be made public by the person from whom it was obtained.” H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (House

Report); accord S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (Senate Report). The Supreme Court has accordingly observed, citing those reports, that Exemption 4 “was designed to protect confidential information” where it “would customarily not be released to the public by the person from whom it was obtained.” *Forsham v. Harris*, 445 U.S. 169, 184-185 (1980) (citations omitted). Such information, for instance, would typically “include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments.” House Report 10; see Senate Report 9 (similar list including “business sales statistics”). Determining such information’s confidentiality based on objective factors reflecting how the information is customarily treated outside of the government provides a straightforward and workable basis on which to apply Exemption 4’s protections.

And even if Exemption 4 requires an assurance of confidentiality, neither *Argus Leader* nor the authority it cites requires an express (as opposed to implied) promise of confidentiality by the government. Where the *Argus Leader* Court discussed the “assurance” question, it quoted approvingly the Ninth Circuit’s “conclu[sion] that Exemption 4 would ‘protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise’ of confidentiality.” *Argus Leader*, 139 S. Ct. at 2363 (citing *GSA v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969)) (emphasis added).

Although *Argus Leader* did not elaborate on what circumstances would indicate an “‘implied promise’ of confidentiality” when applying Exemption 4 (see 139 S. Ct. at 2363), precedent interpreting Exemption 7(D) provides a useful analytical framework. In *Department of Justice v. Landano*, the Supreme Court embraced an objective test to assess whether “an implied assurance of confidentiality fairly can be inferred,” based on “generic circumstances” surrounding the communication between the informant and the government that would “characteristically

support an inference of confidentiality.” 508 U.S. at 177, 179. Likewise, when analyzing Exemption 4, looking to objective factors reflecting how the information is customarily treated outside of the government should guide the analysis of the company’s expectations of continued confidentiality once that information is shared with the government (assuming such separate analysis is necessary). Just as “the nature of the crime and the source’s relationship to it” provides an objective indication of whether an informant would assume confidentiality when relaying information to the government touching on those subjects (*see Landano*, 508 U.S. at 179), the fact that a company typically holds information in confidence or secret is likewise an objective factor supporting the conclusion that the company would assume confidentiality when sharing that information with the government. The submission of such confidential information to the government does not by itself alter its confidential status because, “[i]n common usage, confidentiality is not limited to complete anonymity or secrecy.” *Landano*, 508 U.S. at 173.

3. Against that legal backdrop, the average payroll information that can be deduced from the precise PPP loan amounts and attributed to individual borrowers constitutes “confidential” commercial information protected by Exemption 4. SBA properly safeguarded that information by withholding the precise PPP loan amounts for loans of \$150,000 or more, and the identities of the borrowers for loans of less than \$150,000. *See Manger Decl.* ¶¶ 90-113. As explained below, privacy interests covered by Exemption 6 motivated the withholding of the borrower identities (rather than the precise loan amounts) for PPP loans of less than \$150,000. But Exemption 4 requires the withholding of one or the other, because to release a borrower’s identity *together with* the precise loan amount of its PPP loan effectively would disclose its payroll information.

The protection of a private entity’s payroll information under Exemption 4 has been clear since at least the Fifth Circuit’s decision in *Flightsafety Services Corp. v. Department of Labor*,

326 F.3d 607 (5th Cir. 2003) (“*Flightsafety*”). There, the FOIA request sought “all raw data” underlying summary occupational wage and benefit determinations and other employment statistics computed based on private business surveys by the Bureau of Labor Statistics (“BLS”) of the Department of Labor (“DOL”) for specified geographic regions (Wichita Falls, Texas, Oklahoma City, Oklahoma, and Lawton, Oklahoma), as well as for the whole nation. *Id.* at 609. In upholding BLS’s denial of the FOIA request, the Fifth Circuit readily concluded that Exemption 4 protected the requested “information regarding salaries and wages” (*id.* at 609), given that compelled disclosure of the information underlying the BLS determinations “presents a serious risk that sensitive business information *could be attributed to a particular* submitting business” (*id.* at 612) (emphasis added). Such an “attribution,” the Fifth Circuit further reasoned, “would indisputably impair BLS’s future ability to obtain similar information from businesses who provide it.” *Id.* at 612.

Implicit in the Fifth Circuit’s decision was the understanding that private employers customarily treat salary and wage information as confidential. For their part, federal courts have routinely decided cases in which private employers protected their wage or salary information as confidential. *See, e.g., Johnson v. Joo*, No. 01-cv-0004, 2006 WL 627154, at \*33 (D.D.C. March 12, 2006) (private employer concern that “Plaintiff had provided confidential salary information to a new hire” was one of several events culminating in termination of employment); *Capstone Logistics Holdings, Inc. v. Navarrete*, No. 17-cv-4819, 2018 WL 6786338, at \*3-4 (S.D.N.Y. Oct. 25, 2018) (private employer’s “confidential information includes, but is not limited to . . . compensation information relating to each . . . employee”); *Day v. Finishing Brands Holdings, Inc.*, No. 13-cv-1089, 2015 WL 2345279, at \*31 (W.D. Tenn. May 14, 2015) (under private employer’s employee handbook, confidential information included “wages and salaries”).

Adhering to *Flightsafety*'s recognition that government-collected private wage and benefit data is protected under Exemption 4—particularly when that payroll information is capable of “attribution” to “a particular submitting business”—SBA has consistently treated borrower payroll information as confidential. *See* Manger Decl. ¶¶ 95, 105. For example, in its Standard Operating Procedure effective in August 2004 regarding “Disclosure of Information,” SBA reminded its personnel that “[i]nformation ‘voluntarily’ submitted is considered confidential if the submitter would not ordinarily release it to the general public.” SBA, SOP 40-03-3, ch. 4, ¶ 2.d.3.c, at p. 27 (2004) (Manger Decl. Ex. R). And SBA further instructed that “Information Generally Exempt From Disclosure” included “Financial statements, credit reports, business plans . . . pricing information, *payroll information*, private sector experience and contracts . . . purchase information, banking information, corporate structure, research plans and client list of applicant/recipient.” SBA, SOP 40-03-3 App. 3 at p. 63 (emphasis added). SBA’s more recent iteration of the “Disclosure of Information” Standard Operating Procedure reflects the same understanding that borrower payroll information is confidential information the submitter would not ordinarily release to the general public. *See* Manger Decl. ¶ 95 (citing SBA SOP 40-03-4, App. C (effective May 12, 2018)); Manger Decl. Ex. Q. In other words, the SBA’s guidance assumes that borrower payroll information is exempt from disclosure under Exemption 4 because it is “customarily and actually treated as private by its owner,” and the SBA’s guidance further provided submitters with a general “assurance” that payroll information will be kept confidential, as the Court put it in *Argus Leader*, 139 S. Ct. at 2366.

SBA properly followed its guidance and the rationale underlying *Flightsafety* in this case, by withholding either the precise loan amount or the identity of the borrower for each PPP loan. Just as the Fifth Circuit recognized in *Flightsafety* the need to protect against the “serious risk that

sensitive business information could be attributed to a particular submitting business” (326 F.3d at 612), SBA sought to avoid enabling observers to “attribut[e]” payroll information to particular borrowers.

As Chief of Staff Manger explains in his Declaration, SBA partitioned the loan data into two categories based on loan value (loans of \$150,000 or more in one category—loans of less than \$150,000 in the other), and disclosed different details about those categories, with the aim of preventing “attribution” of confidential payroll information to “a particular submitting business.” Withholding names and addresses for loans of less than \$150,000 (for which SBA disclosed the precise loan amount), while withholding precise loan amounts for loans of \$150,000 or more (for which SBA disclosed the names and addresses of borrowers, and their loan values in ranges) properly prevented “attribution” of confidential payroll information. The difference in treatment is explained by privacy interests covered by Exemption 6 (and discussed below). SBA released borrower identities where it concluded that the disclosure would not violate any protected privacy interest, and withheld the precise value of their loans to protect the average payroll information. Where SBA withheld borrower identities on privacy grounds, the precise value of the PPP loans could be released without disclosing confidential commercial information.

SBA’s partitioning approach is founded on the recognition that, because the CARES Act and its implementing regulations establish a clear mathematical relationship between the loan amount and a borrowing business’s average monthly payroll, an observer who knows the loan amount could generally determine the average monthly payroll, at least for those businesses that have no employees with annual salaries over \$100,000 or that have not borrowed less than they were eligible to borrow. *See* Manger Decl. ¶¶ 96-98. Similarly, an observer could use the PPP

loan amount for self-employed individuals and independent contractors to calculate the borrower's average monthly income. *See* Manger Decl. ¶ 99.

As SBA has explained, therefore, its approach to the PPP loan data properly safeguarded confidential payroll information under Exemption 4, while providing the public with substantial visibility into the agency's administration of the PPP lending program.

4. *Argus Leader* did not require an inquiry into whether commercial or financial information was "provided to the government under an assurance of privacy" (139 S. Ct. at 2366), as explained above, *supra*, pp. 10-12—but even if the Court were to engage in such an inquiry, the facts demonstrate that SBA gave at least an "implied promise" of confidentiality" to borrowers (*see* 139 S. Ct. at 2363). "An implied assurance of confidentiality fairly can be inferred" from the "generic circumstances" surrounding the communication between the borrower and the government (*Landano*, 508 U.S. at 177, 179).

To begin with, SBA's publicly available Standard Operating Procedure plainly stated that "payroll information" is "Generally Exempt From Disclosure," providing borrowers with a reasonable expectation that such information would not be released for PPP loans. *See* Manger Decl. ¶ 95 & Ex. Q.

Moreover, the circumstances underlying the PPP support the finding of an implied promise. One of the purposes of the CARES Act is for SBA to provide relief to America's small businesses *expeditiously*, and so underlying every facet of PPP loan administration was the need to move swiftly to mitigate the current economic conditions arising from the COVID-19 emergency. *See* Manger Decl. ¶ 15. In light of the need to proceed expeditiously, it would have taken too long for SBA to require borrowers to substantiate their need for confidential treatment of individual data elements in their PPP loan applications, and for SBA itself to make borrower-specific



determinations regarding treatment of payroll information as “confidential” or otherwise proprietary. *See* Manger Decl. ¶¶ 13-15, 95, 105.

In that context, the PPP borrower application itself—which must be construed in light of the background understanding of protection for payroll information set forth in the Standard Operating Procedure—reinforces the conclusion that SBA promised confidentiality. (That form, SBA Form 2483, is at <https://www.sba.gov/sites/default/files/2020-04/PPP-Borrower-Application-Form-Fillable.pdf>). Although that form advised borrowers that certain “[i]nformation about approved loans will be automatically released,” which included items “such as the names of the borrowers (and their officers, directors, stockholders or partners),” and “the amount of the loan,” the form was also explicit that “[p]roprietary data on a borrower *would not* routinely be made available to third parties.” SBA Form 2483 at 4 (emphasis added). That statement, viewed in light of the explicit guidance in the Standard Operating Procedure, constituted a commitment that confidential data, such as payroll data, would not be publicly released.

Furthermore, given that borrowers are already suffering from the dramatic decrease in economic activity the pandemic inflicted, the risk of competitors inferring payroll information from loan amounts and attributing that information to particular businesses presented a salient threat SBA sought to mitigate. It would be contrary to the purpose of the CARES Act to increase a risk of disclosure that could deter borrowers from applying for PPP loans. *See* Manger Decl. ¶ 105.

SBA’s declaration thus supports the conclusion that borrowers submitted their payroll information under an assurance (at least implied) of confidentiality. That, combined with SBA’s showing that payroll information is customarily maintained as confidential, demonstrates that SBA

is properly withholding the information under Exemption 4 by withholding the loan amounts from which that payroll information could be derived.

## **II. SBA Properly Withheld the Names and Addresses of Certain PPP and EIDL Borrowers Under Exemption 6**

Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Under this exemption, the SBA withheld the names and addresses of PPP borrowers that received loans of less than \$150,000. The SBA also withheld the names and addresses of sole proprietorships and independent contractors that received EIDL loans. *See* Manger Decl. ¶¶ 106-113.

The requirement that the withheld information be contained in “personnel and medical files and similar files” is easily satisfied. The Supreme Court has read this language “broadly, concluding [that] the propriety of an agency’s decision to withhold information does not ‘turn upon the label of the file which contains the damaging information.’” *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 152 (D.C. Cir. 2006) (quoting *U.S. Dep’t of State v. Wash. Post*, 456 U.S. 595, 601 (1982)); *see New York Times Co. v. NASA*, 920 F.2d 1002, 1007 (D.C. Cir. 1990) (en banc). The D.C. Circuit has “read the statute to exempt not just files, but also bits of personal information, such as names and addresses, the release of which would ‘create[] a palpable threat to privacy.’” *Judicial Watch*, 449 F.3d at 152 (quoting *Carter v. U.S. Dep’t of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987)). If Exemption 6 would otherwise protect the names and addresses of certain borrowers, their withholding from loan records rather than “personnel and medical files” is of no moment. What matters for the Exemption 6 analysis is “whether ‘disclosure would compromise a substantial . . . privacy interest.’” *Jurewicz v. U.S. Dep’t of Agriculture*, 741 F.3d

1326, 1332 (D.C. Cir. 2014) (quoting *Consumers' Checkbook Ctr. v. Dep't of Health & Human Servs.*, 554 F.3d 1046, 1050 (D.C. Cir. 2009)).

Some PPP and EIDL borrowers are individuals, and others are businesses. The D.C. Circuit “has often held that individuals have a privacy interest in the nondisclosure of their names and addresses in connection with financial information,” such as the loans at issue here. *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999); accord *Consumers' Checkbook*, 554 F.3d at 1050 (“We have consistently held that an individual has a substantial privacy interest under FOIA in his financial information . . . .”); *Judicial Watch*, 449 F.3d at 153 (quoting *Lepelletier*, 164 F.3d at 47). Thus, the D.C. Circuit “found that the disclosure of information on ‘irrigation practices, farm acreage, and the number and width of rows of tobacco and cotton’ implicated substantial privacy interests because it would ‘in some cases allow for an inference to be drawn about the financial situation of an individual farmer’ receiving federal subsidies.” *Consumers' Checkbook*, 554 F.3d at 1050 (quoting *Multi AG Media v. Dep't of Agriculture*, 515 F.3d 1224, 1226, 1230 (D.C. Cir. 2008)). The Court of Appeals has also “found that contractors on federal construction projects had a substantial privacy interest in their names, addresses, hourly pay, hours worked, and wages.” *Id.* (describing *Painting & Drywall Work Preservation Fund, Inc. v. HUD*, 936 F.2d 1300, 1301–02 (D.C. Cir. 1991)). The D.C. Circuit has recognized a substantial privacy interest in “the names and addresses of those people receiving annuity payments from the Office of Personnel Management.” *Lepelletier*, 164 F.3d at 47 (describing *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 878–79 (D.C. Cir. 1989) (“NARFE”)). And the Court of Appeals has recognized “that physicians have a substantial privacy interest in the total payments they receive from Medicare for covered services.” *Consumers' Checkbook*, 554 F.3d at 1051.

The D.C. Circuit has been “particularly concerned” when names and addresses “may be used for solicitation purposes” or other financial inquiries. *Lepelletier*, 164 F.3d at 47; *see Painting & Drywall*, 936 F.2d at 1303; *NARFE*, 879 F.2d at 876. That concern is not diminished just because the requesters who brought suit lack a financial motive: “[A] court cannot limit the disclosure of records to particular parties or for particular uses,” so it must consider “the impact on personal privacy of the more general disclosure that will likely ensue” from a release to any particular party. *NARFE*, 879 F.2d at 875; *see Reed v. NLRB*, 927 F.2d 1249, 1252 (D.C. Cir. 1991) (“the identity and purpose of the requesting party are *irrelevant* under FOIA” (emphasis in original)). “[I]nformation available to anyone is information available to everyone.” *NARFE*, 879 F.2d at 875. Accordingly, if SBA were to provide the names and addresses of PPP and EIDL borrowers to the *Washington Post* or the Center for Public Integrity, then “that same information would also have to be provided, for example, to creditors.” *Painting & Drywall*, 936 F.2d at 1303.

To determine whether a substantial privacy interest is at stake in the names and addresses of individuals who received loans through PPP and EIDL, the agency must consider what would be learned from the release of that information. *See NARFE*, 879 F.2d at 876 (“Every list of names and addresses sought under FOIA is delimited by one or more defining characteristics, as reflected in the FOIA request itself . . . . The extent of any invasion of privacy that release of the list might occasion thus depends upon the nature of the defining characteristics” associated with the names and addresses.). Most obviously—and most centrally—everyone would know that these individuals have (or at least recently had) money in the bank. Any landlord, for example, whose tenant received a PPP or EIDL loan would know that the tenant either had the money to pay the rent or else had paid some other creditor instead of the landlord. (Indeed, the SBA has already received FOIA requests from landlords seeking to know whether their tenants received PPP funds.

Manger Decl. ¶ 109.) “When it becomes a matter of public knowledge that someone [has borrowed] a substantial sum of money, that individual may become a target for those who would like to secure a share of that sum by means scrupulous or otherwise.” *NARFE*, 879 F.2d at 876 (quoting *Aronson v. HUD*, 822 F.2d 182, 186 (1st Cir. 1987)). The simple fact of the PPP or EIDL loan is enough to bring the names and addresses of these individuals within the rule that “an individual has a substantial privacy interest under FOIA in his financial information.” *Consumers’ Checkbook*, 554 F.3d at 1050.

Nor is the simple fact of these loans—as significant an invasion of privacy as the disclosure of that fact would be—all that the public would learn from the borrowers’ identities. To obtain a PPP loan, a borrower must certify to the bank making the loan “that the uncertainty of current economic conditions makes necessary the loan request to support . . . ongoing operations.” 15 U.S.C. § 636(a)(36)(G)(i)(I); *see* Manger Decl. ¶ 107. If borrower identities were disclosed, the public would therefore learn not only that individuals had received particular loans, but also that those individuals felt the loans were “necessary . . . to support . . . ongoing operations” given “the uncertainty of current economic conditions.” From the certification, the public would therefore learn that the individual borrowers’ financial conditions were precarious enough to make such a certification truthfully, subject to criminal penalties. Moreover, because (as discussed in the Exemption 4 analysis above) the maximum amount of each PPP loan is determined by the average monthly payroll of the business, independent contractors and self-employed individuals who took PPP loans necessarily used their own monthly incomes to perform that calculation. Manger Decl. ¶ 108. Accordingly, the calculation can be run “backwards” (so to speak), allowing an observer to deduce the incomes of independent contractors and self-employed individuals, with reasonable confidence, from the amount of their PPP loans. *Id.* Individuals have more than a *de minimis*

privacy interest in their average monthly incomes. *See Consumers' Checkbook*, 554 F.3d at 1051 (“physicians have a substantial privacy interest in the total payments they receive from Medicare”); *Painting & Drywall*, 936 F.2d at 1301–02 (finding a substantial privacy interest in hourly pay and total wages). Individuals who received PPP or EIDL loans thus have a substantial privacy interest in the fact that they received such loans.

So, too, do *individual owners* whose *businesses* received such loans. “It is clear that businesses themselves do not have protected privacy interests under Exemption 6, but where their records reveal financial information easily traceable to an *individual*, disclosing those records jeopardizes a personal privacy interest that Exemption 6 protects.” *Multi AG Media*, 515 F.3d at 1228 (emphasis in original). For that reason, “Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and ‘the records would necessarily reveal at least a portion of the owner’s personal finances.’” *Id.* at 1228–29 (quoting *Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 685 (D.C. Cir. 1976)); *see Consumers’ Checkbook*, 554 F.3d at 1051 (“We have . . . recognized substantial privacy interests in business-related financial information for individually owned or closely held businesses because the ‘financial makeup of the businesses mirrors the financial situation of the individual family members.’” (quoting *Multi AG Media*, 515 F.3d at 1229)).

Individual owners of businesses as small as sole proprietorships or as large as closely held corporations therefore have substantial privacy interests in the fact that their businesses received EIDL or PPP loans. The simple fact of those loans is “financial information easily traceable to an *individual*”—the owner of the business. *Multi AG Media*, 515 F.3d at 1228. Compounding the intrusion, disclosure of the businesses’ certifications “that the uncertainty of current economic conditions makes necessary the loan request to support . . . ongoing operations,” 15 U.S.C.

§ 636(a)(36)(G)(i)(I), “would necessarily reveal at least a portion of the owner’s personal finances,” *Multi AG Media*, 515 F.3d at 1228–29 (quoting *Kleppe*, 547 F.2d at 685). See Manger Decl. ¶ 108. Given that “[i]nformation about the crops on . . . farms” comes within this rule, see *Multi AG Media*, 515 F.3d at 1229, it is surely logical to conclude that information about the debt structure of an individual’s business does too, because information about debt is at least as closely linked to financial privacy as is information about crops.

The names and addresses of individually owned businesses (including sole proprietorships) and closely held businesses that received EIDL or PPP loans therefore come within the scope of Exemption 6. The SBA’s loan records do not, however, precisely define which businesses are individually owned or closely held. Although the SBA’s electronic files contain a field for “business type,” which includes “sole proprietorship” and several forms of corporate ownership, that field does not identify which of the companies are individually owned or closely held, and which are not. Manger Decl. ¶ 111.

In analogous circumstances, the D.C. Circuit found that Exemption 6 applied to USDA data files on farms, in their entirety. The Court of Appeals explained that the requester had “not shown that all farms are owned in such a manner that disclosing their assets will in no instances allow the public to trace the information to individual farmers.” *Multi AG Media*, 515 F.3d at 1229. The court concluded that even where the government’s “affidavits do not establish the number of farms for which the information would be easily traceable to individuals,” if they “confirm that this is the case for at least a significant portion of them,” then that “showing is sufficient for us to conclude that the files are covered by Exemption 6.” *Id.* The principle is prophylactic: The government can withhold information on some businesses that are more

complexly owned, if it would otherwise be forced to disclose protected information about a significant quantity of businesses that are individually owned or closely held.

That principle applies equally here, authorizing the SBA to protect the privacy of individuals who borrowed in their own name, or in the name of their business, by selecting a threshold below which it would withhold the identities of all PPP borrowers. So long as “a significant portion” of borrowers below that threshold were individuals, or closely associated with individuals, applying a threshold loan value is a reasonable methodology designed to protect the privacy of individual business owners. The SBA chose a loan value of \$150,000, which implies an average annual payroll of \$720,000. (Because PPP loans are capped at 2.5 times average monthly payroll, a business with a monthly payroll of \$60,000—and therefore an annual payroll of  $\$60,000 \times 12 = \$720,000$ —could borrow no more than  $\$60,000 \times 2.5 = \$150,000$ .) These are very small businesses, small enough that the SBA has determined based on its experience in administering small business loans that a significant portion of the businesses are individually owned or closely held. Manger Decl. ¶ 111.

The determination borne from experience that a significant portion of the businesses with PPP loans of less than \$150,000 are individually owned or closely held is enough for Exemption 6 to protect the names and addresses of them all. *See Multi AG Media*, 515 F.3d at 1229 (applying Exemption 6 where the government’s “affidavits do not establish the number of farms for which the information would be easily traceable to individuals,” but “confirm that this is the case for at least a significant portion of them”). A significant portion of the PPP borrowers receiving loans of less than \$150,000 are individually owned or closely held; that “showing is sufficient” for the Court to find the names and addresses of all such borrowers to be “covered by Exemption 6.” *Id.*



Having established that the withheld names and addresses of EIDL and PPP borrowers are covered by Exemption 6, SBA must go on to balance that privacy interest against the public interest in disclosure. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). The “only relevant public interest in disclosure to be weighed in this balance,” however, “is the extent to which disclosure would serve the core purpose of the FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government.” *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original; internal citation and quotation marks omitted). Plaintiffs bear the burden of demonstrating that the release would serve this public interest. *See Carter*, 830 F.2d at 391-92 nn. 8 & 13. But they cannot do so here.

In assessing the public interest, the question is not whether the public has some right to information about the PPP and EIDL programs generally, but what public interest would be served by the release of the names and street addresses of PPP borrowers with loans of less than \$150,000, and EIDL borrowers who are independent contractors or sole proprietors. Any such interest must be assessed in light of the information that has already been released to the public. The SBA has published detailed information about each of the loans for which it has withheld the borrower's name and address, including the city, state, ZIP code, NAICS code, business type, race/ethnicity, gender, and veteran status of the borrowers. Manger Decl. ¶ 88. And for PPP loans of \$150,000 or more, and EIDL loans to any business other than an independent contractor or sole proprietorship, the SBA has released the name and street address of the borrower as well. *Id.* That is more than enough information to meaningfully inform the public what its government is up to in administering these loan programs. The value of any further disclosure is outweighed by the substantial privacy interests described above.

### III. SBA Disclosed All Responsive, Non-Exempt, Reasonably Segregable Information

To meet its burden on segregability, the government must “show with ‘reasonable specificity’ why . . . document[s] cannot be further segregated.” *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002). In assessing whether the government has met this burden, the government is “entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material.” *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007)). Here, SBA met its burden to show that there were no reasonably segregable, non-exempt information in the responsive records. As set forth in the Manger Declaration, as to each PPP loan, SBA disclosed significant information, which it described in the July 6, 2020 Press Release. *See* Manger Decl. ¶ 86-91; Ex. P.

In particular, in addition to releasing overall statistics to describe the loans, as to all PPP loans, SBA disclosed NAICS codes, zip codes, business type, demographic data, non-profit information, name of lender, and jobs supported; in addition, for loans of \$150,000 or more, SBA disclosed the loan amount (in five ranges), business name, and address—and for loans of less than \$150,000, the precise loan amount (without name and address). *See* Manger Decl. ¶¶ 88-89, 103. Moreover, SBA released the loan data for all EIDL loans except names and addresses of sole proprietorships and independent contractors pursuant to FOIA Exemption 6. *See* Manger Decl. ¶ 91. Release of further segregated information would not be meaningful.

SBA therefore did not fail to disclose any reasonably segregable material from the records requested.

**IV. SBA’s Complete Responses to Plaintiffs’ Requests Disposed of Their Claims for Expedited Processing and their Administrative Appeals**

Summary judgment is also warranted in SBA’s favor on Counts II, III, and IV of the Amended Complaint. “By the terms of the FOIA statute, this Court is divested of jurisdiction over a claim regarding ‘an agency denial of expedited processing’ once ‘the agency has provided a complete response to the request.’” *Riccardi v. U.S. Dep’t of Justice*, 32 F. Supp. 3d 59, 66 (D.D.C. 2014) (quoting 5 U.S.C. § 552(a)(6)(E)(iv), and citing, among other cases, *Al-Fayed v. CIA*, 254 F.3d 300, 303 n.1 (D.C. Cir. 2001)). Counts III and IV of the Amended Complaint, alleging “constructive denial” of certain expedited processing requests, are therefore properly dismissed for lack of subject-matter jurisdiction. Similarly, Count II of the Amended Complaint in the lead case, alleging “constructive denial” of two Plaintiffs’ administrative appeals, should be dismissed, because no practical relief can be afforded on that Count in light of SBA’s release of all the non-exempt records sought in Plaintiffs’ requests.

**CONCLUSION**

For the foregoing reasons, SBA respectfully requests that the Court grant it summary judgment on all of the claims in the Amended Complaint.

Dated: August 18, 2020

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

WP COMPANY LLC d/b/a THE  
WASHINGTON POST, BLOOMBERG  
L.P., DOW JONES & COMPANY, INC.,  
PRO PUBLICA, INC., THE NEW YORK  
TIMES COMPANY, AMERICAN  
BROADCASTING COMPANIES, INC.  
d/b/a ABC NEWS, AMERICAN CITY  
BUSINESS JOURNALS, CABLE NEWS  
NETWORK, INC., NBCUNIVERSAL  
MEDIA, LLC d/b/a NBC NEWS, THE  
ASSOCIATED PRESS, THE CENTER FOR  
INVESTIGATIVE REPORTING  
d/b/a REVEAL,

*Plaintiffs,*

v.

U.S. SMALL BUSINESS  
ADMINISTRATION,

*Defendant.*

Case No. 1:20-cv-01240  
(JEB)

**DEFENDANT'S STATEMENT OF MATERIAL FACTS  
AS TO WHICH THERE IS NO GENUINE ISSUE**

Dated: August 18, 2020

ETHAN P. DAVIS  
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO  
Deputy Branch Director

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*Counsel for Defendant*

Defendant United States Small Business Administration (“SBA”) respectfully submits the following statement of material facts as to which there is no genuine issue under Local Rule 7(h)(1):

(1) Plaintiffs in Case No. 20-cv-1240 submitted Freedom of Information Act requests that, taken together, sought the release of all available information on the Paycheck Protection Program (“PPP”) and the Economic Injury Disaster Loan program (“EIDL”) as authorized by Public Law No. 116-136, 134 Stat. 281. The details of each separate request are discussed at the Declaration of William Manger (“Manger Decl.”), ¶¶ 15-85, and Exhibits A through K and M through N thereto.

(2) On July 6, 2020, SBA released detailed information on each of the 4.9 million PPP loans made to that point. Manger Decl. ¶ 88. The loan-level data included the following fields: city, state, ZIP code; North American Industry Classification System (NAICS) code; business type; race/ethnicity; gender; veteran status; nonprofit status; jobs reported as retained; date approved; lender; and congressional district. Manger Decl. ¶ 88 & n.1. For loans of \$150,000 or more, it also included business names and street addresses, and loan amounts expressed in ranges (not precise values) as follows: \$150,000 to \$350,000; \$350,000 to \$1 million; \$1 million to \$2 million; \$2 million to \$5 million; \$5 million to \$10 million. Manger Decl. ¶ 88. For loans of less than \$150,000, the loan-level data included the precise amount of the PPP loan, but not the business name or street address. Manger Decl. ¶ 88.

(3) Shortly thereafter, SBA made a determination on the release of PPP individual borrower information, and issued letters directing Plaintiffs to SBA’s website at [www.sba.gov/ppp](http://www.sba.gov/ppp). *Id.* SBA explained in the letters that portions of the PPP borrower data were being withheld pursuant to Exemptions 4 and 6 of the Freedom of Information Act (“FOIA”). 5 U.S.C. § 552(b)(4), (6). SBA

withheld the names and addresses of all borrowers of PPP loans of less than \$150,000. Manger Decl. ¶ 90. SBA also withheld the precise amounts of all PPP loans of \$150,000 or more. *Id.*

(4) SBA also made a final determination on the release of EIDL borrower information and again issued letters directing Plaintiffs to SBA's website at [www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loans#section-header-5](http://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loans#section-header-5).

SBA informed Plaintiffs that it was releasing the loan data for all EIDL loans, except that the names and addresses of sole proprietorships and independent contractors were being withheld pursuant to FOIA Exemption 6. 5 U.S.C. §552(b)(6). Manger Decl. ¶ 91.

(5) Plaintiffs challenge the propriety of the SBA's withholdings under FOIA.

Dated: August 18, 2020

ETHAN P. DAVIS  
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO  
Deputy Branch Director

Respectfully submitted,

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Trial Attorney

JAMES BICKFORD  
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U.S. SMALL BUSINESS  
ADMINISTRATION,

*Defendant.*

Case No. 1:20-cv-01240  
(*JEB*)

**DECLARATION OF WILLIAM MANGER**



I, William Manger, hereby declare and state the following, pursuant to the provisions of 28 U.S.C. § 1746:

1. At all times relevant to this lawsuit, I have served as the Chief of Staff in the Office of the Administrator and as the Associate Administrator for the Office of Capital Access at the U.S. Small Business Administration (“SBA”), located at 409 Third Street SW, Washington D.C. 20416. The statements contained in this declaration are based upon my personal knowledge, information provided to me in my official capacity, and conclusions and determinations reached and made in accordance therewith.

2. As the Chief of Staff, I am responsible for overseeing the daily operations of the Agency. That responsibility includes, but is not limited to, overseeing the Payroll Protection Program (PPP) loan program, a new temporary loan program created by the CARES Act, and the Economic Injury Disaster Loan (EIDL) Program.

3. As the Associate Administrator for the Office of Capital Access, I manage SBA’s portfolio of direct and guaranteed non-disaster loans, nine operation centers, and 560 employees. Because of the nature of my official duties, I am familiar with the procedures followed by the SBA in responding to all requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for information from its files regarding loans under the PPP and EIDL, including the SBA’s handling of Plaintiffs’ FOIA requests in these actions. In accordance with *Vaughn v. Rosen*, 454 F. 2d 820 (D.C. Cir. 1973), this declaration supports the SBA’s motions for summary judgement. Furthermore, this declaration provides the Court and Plaintiffs with the administrative history of the FOIA requests; describes the procedures used to search for, review, and process the responsive records; and provides the SBA’s justification for withholding records in part under FOIA Exemptions 4 and 6. 5 U.S.C. §§ 552(b)(4), (b)(6).

**The CARES Act and SBA's PPP and EIDL Loan Administration**

4. The SBA's authority to issue non-disaster loans flows from section 7(a) of the Small Business Act, which is titled "Loans to small business concerns; allowable purposes; qualified business; restrictions and limitations." Pub. L. 85-563, § 7, 72 Stat. 384 (1958) (codified at 15 U.S.C. § 636). Under section 7(a), the SBA is "empowered," subject to certain qualifications, "to make loans to any qualified small business concern," which "may be made either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis." 15 U.S.C. § 636(a).

5. SBA has authority to make direct disaster loans under Section 7(b) of the Small Business Act. 15 U.S.C. § 636(b). SBA is authorized to make economic injury disaster loans if it "determines that the [small business] concern, the organization, or the cooperative has suffered substantial economic injury" as a result of a disaster. 15 U.S.C. § 636(b)(2). SBA has authority to declare an economic injury disaster based on a certification from a state governor that "small businesses, private nonprofit organizations, or small agricultural cooperatives (1) have suffered economic injury as a result of such disaster, and (2) are in need of financial assistance which is not available on reasonable terms in the disaster stricken area." 15 U.S.C. § 636(b)(2)(D). The Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, provided that "for purposes of Section 7(b)(2)(D) of the Small Business Act, coronavirus shall be deemed to be a disaster." Pub. L. 116-123, Title II (March 6, 2020). By March 21, 2020, SBA had received economic injury disaster declaration requests from the governors of every state and territory and issued declarations in all states and territories. See 85 FR 20015 (April 9, 2020).

6. On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration

for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public’s exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses. On March 27, 2020, President Trump signed into law the CARES Act, passed by Congress to provide emergency economic assistance and other support to help individuals, families, businesses, and health care providers cope with the enormous economic and public health crises triggered by the pandemic. Pub. L. No. 116-136, 134 Stat. 281.

7. SBA received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” To further respond to the emergency, SBA also drew on its authorities under the pre-existing Economic Injury Disaster Loan (EIDL) Program.

8. The CARES Act initially appropriated \$349 billion to the section 7(a) program to fund the PPP. Participating lenders began accepting PPP loan applications on or about April 3, 2020.

9. Loans guaranteed under the PPP differ in significant ways from regular loans made under SBA’s 7(a) program. Among these differences, the PPP authorizes the SBA to make covered loans to various non-profit organizations, independent contractors, and self-employed

individuals, in addition to sole proprietorships and other small business concerns. In addition, PPP loan amounts are based specifically on the total compensation paid to the borrower's employees, so the PPP loan amounts reflect a small business's payroll and reflect a sole proprietor's or independent contractor's income.

10. SBA also administers the EIDL and EIDL Advance Programs. Pub. L. No. 116-136, 134 Stat. 281; *see also* 13 C.F.R. §123.300 *et seq.*

11. SBA's EIDL program offers long-term, low-interest financial assistance for eligible entities, including small business concerns, businesses with 500 or fewer employees (including sole proprietorships, independent contractors and self-employed persons), private non-profit organizations, agricultural enterprises and tribal small business concerns with less than 500 employees, affected by COVID-19.

12. EIDL loans may be used for working capital, notes payable, and accounts payable, in addition to expenses that result from the disaster's impact. An EIDL borrower can also have a PPP loan, but must use the loan proceeds from each for different purposes. In addition, small businesses, non-profits and other eligible entities may request, as part of their loan application, an EIDL Advance, amounting to \$1,000 for each employee up to \$10,000. The EIDL Advance does not have to be repaid even if the applicant is subsequently denied a loan and is designed to provide emergency economic relief to businesses that are experiencing a temporary loss of revenue.

13. By April 15, 2020, SBA had processed more than 14 years' worth of PPP loans in less than 14 days, and by August 8, 2020, it had processed 5,046,654 loans totaling \$520,438,822,408 in approved dollars. That unprecedented expansion of SBA's funding required the full attention of the agency's employees.

14. In addition to processing an unprecedented number of PPP loans, SBA was also tasked with drafting and implementing an entirely new set of regulations to provide guidance to borrowers and lenders of the PPP as well as issuing procedural notices and new lender forms. *See* Paycheck Protection Program Interim Final Rules at <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#section-header-9>.

15. Congress intended in the CARES Act for SBA to provide relief to America's small businesses expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. In light of the economic crisis facing the nation at the time of the enactment of the CARES Act, including an unprecedented increase in unemployment nationwide and the shuttering of small businesses across the country, there was an urgent need to enable banks and other lenders to begin making PPP loans rapidly. With millions of borrowers receiving hundreds of billions of dollars of support in a matter of weeks, it was not possible to adopt borrower-specific measures to protect confidential financial information. SBA would not have had the operational capacity to review even a small fraction of the company-specific reasons borrowers might provide for why information about their PPP loans constituted sensitive, confidential information.

#### **Administrative History of Plaintiffs' FOIA Requests**

16. Plaintiffs in Civil Action No. 20-cv-1240 are WP Company d/b/a The Washington Post, Bloomberg, LP, Dow Jones Company, Inc., ProPublica, Inc., The New York Times Company, American Broadcasting Companies, Inc. d/b/a ABC News, American City Business Journals, Cable News Network, Inc., NBC Universal Media, LLC d/b/a NBC News, The Associated Press, The Center for Investigative Reporting d/b/a Reveal. Plaintiff in Civil Action No. 20-cv-1614 is the Center for Public Integrity.

17. Plaintiffs made several requests in April and May 2020 under FOIA for information on the loan recipients under PPP and EIDL. Plaintiffs submitted their FOIA requests separately

and at various times. Each request sought the same information for loan-level data regarding businesses that received loans under the PPP and EIDL, including, among other things, borrower name and address, amount of approved loan, race, ethnicity, gender of borrowers, and (for PPP only) lender name. In particular:

### **The Washington Post Requests**

18. On April 24, 2020, the Washington Post submitted a FOIA request for:

Data from the Paycheck Protection Program loan program, including names of applicants, dates of applications, and loan amounts approved from April 3, 2020 until the completion of this loan program. The SBA's website defines the following as information generally disclosed under FOIA and we request this data for all recipients of Paycheck Protection Act loans: (1) Names and commercial street and email addresses of recipients of approved loans; (2) Date of loan approval and date of disbursement (if available); (3) Names of officers, directors, stockholders or partners of recipient firms; (4) Kinds and amounts of loans, loan terms, interest rates, maturity dates, general purpose; (5) Identity and location of participating banks.

Data from the Economic Injury Disaster loan program (EIDL), including names of applicants, dates of applications, and loan amounts approved from March 12, 2020 until the completion of this loan program. We request that the data include: (1) Names and commercial street and email addresses of recipients of approved loans; (2) Date of loan approval and date of disbursement (if available); (3) Names of officers, directors, stockholders or partners of recipient firms; (4) Kinds and amounts of loans, loan terms, interest rates, maturity dates, general purpose; (5) Identity and location of participating banks

19. SBA assigned tracking number SBA-2020-000946 to the PPP portion of the request and assigned tracking number SBA-2020-000947 to the EIDL portion of the request. The Washington Post requested expedited processing for the requests.

20. SBA responded on June 12, 2020 directing the Washington Post to the statistical information found at: <https://www.sba.gov/about-sba/open-government/foia#section-header-32> and provided requester with appeal rights within 90 days.

21. SBA responded again on June 15, 2020, directing the Washington Post to the same statistical information and providing requester with appeal rights.

22. SBA did not respond to the request for expedited processing.

### **Bloomberg Requests**

23. On April 8, 2020, Bloomberg News submitted a FOIA request for:

24. SBA assigned tracking number SBA-2020-000555 to the PPP portion of the request and assigned tracking number SBA-2020-000557 to the EIDL portion of the request. Bloomberg requested expedited processing for the requests.

25. SBA responded to 000555 on April 20, 2020 and to 000557 on April 21, 2020, directing Bloomberg to the statistical information posted on its website and providing requester with appeal rights. SBA did not respond to the request for expedited processing.

26. On April 15, 2020, Bloomberg submitted another request for the same information, except that the dates covered loans made between 4/9/2020 and 4/15/2020. SBA assigned FOIA tracking numbers SBA-2020-000620 and SBA2020-000622. Expedited processing was requested.

27. SBA responded to SBA-2020-000620 on April 23, 2020 directing Bloomberg to the statistical information posted on its website and providing requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

28. SBA responded to SBA-2020-000622 on April 21, 2020 directing Bloomberg to the statistical information posted on its website and providing requester with appeal rights. It also granted the request for expedited processing.

29. On April 23, 2020, Bloomberg submitted another request for the same information except that the dates covered loans made between 4/16/2020 and 4/22/2020. SBA assigned FOIA tracking numbers SBA-2020-000910 and SBA-2020-000911. Expedited processing was requested.

30. SBA responded to SBA-2020-000910 on May 4, 2020 directing Bloomberg to the statistical information posted on its website and providing requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

31. SBA responded to SBA-20202-000911 on May 14, 2020 directing Bloomberg to the statistical information posted on its website and providing requester with appeal rights. It granted the request for expedited processing.

32. On April 29, 2020, Bloomberg submitted another request for the same information except that the dates covered loans made between 4/23/2020 and 4/29/2020. SBA assigned FOIA tracking numbers SBA-2020-001018 and SBA2020-001019. Expedited processing was requested.

33. SBA responded to SBA-2020-001018 on May 6, 2020 directing Bloomberg to the statistical information posted on its website and providing requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

34. SBA responded to SBA-2020-001019 on June 18, directing Bloomberg to the statistical information posted on its website and providing requester with appeal rights. It granted the request for expedited processing.

#### **Dow Jones Requests**

35. On April 3, 2020, Down Jones submitted a FOIA request for:

A summary database of information for all approved loans under the Paycheck Protection Program of the 2020 CARES Act from the time the program began accepting applications through the end of business on April 13, 2020. Please include all data fields the Small Business Administration tracks for each loan that it determines is information generally disclosed under FOIA, including but not limited to: 1) names, commercial street addresses, and e-mail addresses of recipients of approved loans, 2) names of officers, directors, stockholders or partners of recipient firms, 3) kinds and amounts of loans, loan terms, interest rates, maturity dates, general purpose, etc., 4) business type 5) bank name and bank



commercial street address, 6) approval date, 7) disbursement date, 8) NAICS description, 9) franchise name and franchise code, if applicable

36. SBA assigned this FOIA request tracking number SBA-2020-000580. Expedited processing was requested.

37. SBA responded on April 20, 2020 directing Dow Jones to the statistical information posted on its website and providing requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

38. On May 1, 2020, Dow Jones submitted the same FOIA request, which was assigned tracking number 2020-001060. Expedited processing was requested.

39. SBA responded on May 11, 2020 directing Dow Jones to the statistical information posted on its website and providing requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

40. On May 4, 2020, Down Jones submitted the same FOIA request, which was assigned tracking number 2020-001088. Expedited processing was requested.

41. SBA responded on June 17, 2020 directing Dow Jones to the statistical information posted on its website and providing requester with appeal rights. It denied the request for expedited processing.

### **Propublica Requests**

42. On April 23, 2020, Propublica submitted a FOIA request for:

Loan level information about all loans made under the Paycheck Protection Program (PPP). I also request the same information for Emergency EIDL Grants. Specifically, for both these programs, I request the same 34 fields the SBA provides through its “SBA 7(a) & 504 loan data reports” on its FOIA website. See: <https://www.sba.gov/about-sba/open-government/foia#section-header-32> and [http://imedia.sba.gov/vd/general/foia/7a\\_504\\_FOIA%20Data%20Dictionary.xlsx](http://imedia.sba.gov/vd/general/foia/7a_504_FOIA%20Data%20Dictionary.xlsx).

However, in addition to those fields already provided, I also request information on the amount of forgiveness allowed for each loan. This is a special feature of the PPP loans under Section 1106 of the CARES Act.

43. SBA assigned this FOIA request tracking number SBA-2020-000914. Expedited processing was requested.

44. SBA responded on May 4, 2020 directing Propublica to the statistical information posted on its website and providing requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

45. On April 30, 2020, Propublica submitted another FOIA request for “loan level information about companies that received subsidies for SBA 7(a) loans under Section 1112 of the CARES Act, ‘Subsidy for Certain Loan Payments.’ The section enables the SBA to pay the principal, interest, and fees that are owed on specified loans for six months” and “the beginning date of the 6-month period that the SBA paid the loan payments, the end date, and the amount paid by the SBA under Section 1112.”

46. SBA assigned this FOIA request tracking number SBA-2020-001043. Expedited processing was requested.

47. SBA denied the request for expedited processing on July 16 as moot.

### **The New York Times Request**

48. On April 27, 2020, the New York Times submitted a FOIA request for:

A summary database of information for all approved loans under the Paycheck Protection Program of the 2020 CARES Act from the time the program began accepting applications through the end of business on April 13, 2020. Please include all data fields the Small Business Administration tracks for each loan that it determines is information generally disclosed under FOIA, including but not limited to: 1) names, commercial stress addresses, and e-mail address of recipients of approved loans, 2) names of officers, directors, stockholders or partners of

recipient firms, 3) kinds and amounts of loans, loan terms, interest rates, maturity dates, general purpose, etc., 4) business type, 5) bank name and bank commercial street address, 6) approval date, 7) disbursement date, 8) NAICS description, 9) franchise name and franchise code, if applicable.

49. SBA assigned this request FOIA tracking number SBA-2020-000982. The New York Times requested expedited processing for this FOIA request.

50. SBA responded on June 8, 2020 directing the New York Times to the statistical information posted on its website and providing requester with appeal rights. SBA denied the request for expedited processing.

### **The ACBJ Requests**

51. On April 16, the Portland Business Journal submitted a FOIA request for:

1. Paycheck Protection Program – All public data on every loan made through the program, including, but not limited to, the name and location of the borrower and her/his company, the bank that approved the loan, the amount of the loan, and any other public data, including race/ethnicity/gender of the borrower, if that information is gathered.

2. Coronavirus/COVID-19 Economic Injury Disaster Loans - All public data on every loan made through the program, including, but not limited to, the name and location of the borrower and her/his company, the bank that approved the loan, the amount of the loan, and any other public data, including race/ethnicity/gender of the borrower, if that information is gathered.

52. SBA assigned this FOIA request tracking numbers SBA-2020-000628 and SBA-2020-000630.

53. SBA responded on April 22, 2020 directing Portland Business Journal to the statistical information found at: <https://www.sba.gov/about-sba/open-government/foia#section-header-32> and provided requester with appeal rights within 90 days.

54. On April 27, 2020, Portland Business Journal filed an appeal of SBA's response to SBA-2020-000630 to SBA's Office of Hearings and Appeals. OHA has not issued a decision pending resolution of the current litigation.

55. SBA responded to the other part of the request on May 12, 2020, directing the Portland Business Journal to the same statistical information and providing requester with appeal rights.

#### **ABC News Request**

56. On April 13, 2020, ABC News submitted a FOIA request for:

Access to Small Business Administration figures describing how much of the Paycheck Protection Program (PPP) funds that have been approved for small business owners have actually been disbursed to those business owners. Specifically, I would like a breakdown of how much money was disbursed to business owners each day, beginning with the program's inception on April 3rd (the date on which business owners could first apply for the PPP funds). SBA provides reporters with a figure almost daily for how much PPP money has been "approved" for small business owners but has yet to answer any questions on how much business owners have actually received.

57. SBA assigned this FOIA request tracking number SBA-2020-000586. ABC News requested expedited processing.

58. SBA responded on May 2, 2020 directing the ABC News to the statistical information posted on its website and providing requester with appeal rights. It denied the request for expedited processing.

#### **CNN Request**

59. On April 16, 2020, CNN submitted a FOIA request for:

Disaggregated data for all Covid-19-related Economic Injury Disaster Loans applications authorized by the Coronavirus Aid, Relief, and Economic Security Act ("CARE Act") and received by the Small Business Administration. This data should include all fields that contain non-exempt information, including but not limited to the following types of information: Unique identifiers/primary keys; Application number; Application date; Borrower name; Borrower's city; Borrower's county; Borrower's ZIP code; Borrower's state; Borrower's EIN; Loan amount; Nonprofit status; Application status; Status date; Collateral pledged; and Purpose of loan.

60. SBA assigned this FOIA request tracking number SBA-2020-000626. CNN requested expedited processing.

61. On April 22, 2020, SBA responded to the CNN request directing them to the statistical information posted on SBA's website and providing requester with appeal rights. It also granted the request for expedited processing.

62. On April 28, 2020, CNN appealed the FOIA response to SBA's Office of Hearings and Appeals. No decision has been made on the appeal pending resolution of the current litigation.

### **Associated Press Requests**

63. On April 13, 2020, the Associated Press submitted a FOIA request for:

The database that SBA maintains for all loans approved and declined under the Paycheck Protection Program from the start of the program to the date of this request's filing. SBA publicly releases data under two programs (7a and 504) also administered by the same agency office. For the purposes of this request for Paycheck Protection Program data, I request the same fields of information that SBA releases for 7a and 504.

64. SBA assigned this FOIA request tracking number SBA-2020-000594. The AP requested expedited processing.

65. On April 20, 2020, SBA responded to the AP request directing them to the statistical information posted on SBA's website and providing requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

66. On April 22, 2020, the AP submitted another FOIA request seeking:

The name of each entity approved for a Paycheck Protection Program loan (aka borrower); the entity's city; the entity's state; the entity's NAICS subsector description or code for the entity (borrower); the approved dollars for the entity's loan; the name of the lending institution (lender) on the loan; and the date of the loan's approval.

67. SBA assigned this FOIA request tracking number SBA-2020-000882. The AP requested expedited processing.

68. On June 5, 2020, SBA responded to the AP request directing them to the statistical information posted on SBA's website and providing requester with appeal rights. It also denied the request for expedited processing.

#### **NBC News Requests**

69. On April 17, 2020, NBC News submitted a FOIA request for:

Paycheck Protection Program (PPP) Loan Data Reports/Files, including a "loan level" list of all loans approved as part of the PPP from the start of the PPP program and through the exhaustion of the first phase of funding (\$349,000,000,000) on 4/16/20. I am requesting PPP Loan Data Reports/Files which include "loan-specific" data, including the names and addresses of all business entity or individual loan borrowers/recipients and other related and available "loan-specific" data.

70. SBA assigned this FOIA request tracking number SBA-2020-000658. NBC requested expedited processing.

71. On May 2, 2020, SBA responded to NBC directing them to the statistical information posted on SBA's website and providing requester with appeal rights. It denied the request for expedited processing.

72. On April 17, 2020, NBC News submitted another FOIA request for:

Economic Injury Disaster Loan Program (EIDL) Loan Data Reports/Files, including a "loan level" list of all loans approved as part of the EIDL program from January 1, 2020 and through the exhaustion of the first phase of coronavirus/COVID-19-related funding on or around 04/16/20. I am requesting EIDL Loan Data Reports/Files which include "loan-specific" data, including the names and addresses of all business entity or individual loan borrowers/recipients and other related and available "loan-specific" data. If a subset of EIDL Loan Data Reports/Files relating to loans provided in response to coronavirus/COVID-19-related economic injury exists or is distinguishable with identifying data within the broader EIDL data, please provide the subset or the identifying data.

73. SBA assigned this FOIA request tracking number SBA-2020-000660. NBC requested expedited processing.

74. On April 22, 2020, SBA responded to NBC directing them to the statistical information posted on SBA's website and providing requester with appeal rights. It granted the request for expedited processing.

75. On April 29, 2020, NBC submitted another FOIA request seeking: "bank level" data for the Paycheck Protection Program (PPP) including total amounts and number of PPP loans received by small businesses in each Congressional district for all loans approved as part of the PPP from the start of the PPP and through the most recent date for which this data set is available."

76. SBA assigned this FOIA request tracking number SBA-2020-001029. NBC requested expedited processing.

77. On May 6, 2020, SBA responded to NBC directing them to the statistical information posted on SBA's website and providing the requester with appeal rights. It also denied as moot the request for expedited processing because the response was sent within the expedited processing time frame of ten days.

#### **Center for Investigative Reporting (d/b/a Reveal) Requests**

78. On April 21, 2020, the Center for Investigative Reporting submitted a FOIA request for:

Spreadsheets (.csv, excel, etc.) listing each individual loan granted through each Small Business Administration's lending programs responding to the COVID-19 pandemic.

- A spreadsheet showing each individual loan granted under the Paycheck Protection Program (PPP), from the creation of the program to the date of fulfillment. I am requesting all information publicly releasable under to law, including but not limited to the fields typically disclosed for every loan for the SBA's 7a loan program, including:
  - Names and commercial street address, including state and zip code, and email addresses of recipients of approved loans
  - The race of the borrower
  - The gender of the borrower
  - The name of the participating bank

- Names of officers, directors, stockholders or partners of recipient firms.
  - The NAICS code of the business
  - Amounts of loans, loan terms, interest rates, maturity dates.
- A spreadsheet showing each individual loan granted under the Economic Injury Disaster Loan program from March 1, 2020 to the date of fulfillment, to the level of detail described above for the PPP program.
  - A spreadsheet showing each individual loan granted under the SBA Bridge Loan program from March 1, 2020 to the date of fulfillment, to the level of detail described above for the PPP program.
  - A spreadsheet showing each individual action under the SBA Debt Relief program from March 1, 2020 to the date of fulfillment, to the level of detail described above for the PPP program.

79. SBA assigned the FOIA request two tracking numbers: SBA-2020-000828 and SBA-2020-000830. The Center for Investigative Reporting requested expedited processing of these requests.

80. SBA responded on April 27, 2020 directing the requester to the statistical information found at: <https://www.sba.gov/about-sba/open-government/foia#section-header-32> and providing requester with appeal rights within 90 days. It also granted the request for expedited processing.

81. SBA responded again on June 10, 2020, directing the requester to the same statistical information and providing requester with appeal rights. It denied the request for expedited processing.

### **Center for Public Integrity Request**

82. On April 22, 2020, the Center for Public Integrity submitted a FOIA request for:

- (1) All records regarding recipients of the Paycheck Protection Program, including the name and address of the borrower, amount of approved loan, name of the third-party lender, date of approved loan.
- (2) All records regarding recipients of the Economic Injury Disaster Loan (EIDL)-COVID-19 related assistance program (including EIDL Advances), including name and address of the borrower, amount of approved loan, name of the third-party lender, date of approved loan.



- (3) All records reflecting any communication between Administrator Jovita Carranza and her staff concerning the Paycheck Protection Program and the EIDL assistance program, including but not limited to letters, emails, memoranda, reports, appointment calendars, and telephone call logs, and dated between March 1, 2020 and the date you process this request;
- (4) All records reflecting any communication between Administrator Jovita Carranza, her staff, and members of Congress and their respective staff concerning the Paycheck Protection Program and the EIDL assistance program, including but not limited to letters, emails, memoranda, reports, appointment calendars, and telephone call logs, and dated between March 1, 2020 and the date you process this request;
- (5) All records reflecting any communication between Administrator Jovita Carranza, her staff, and third-party lenders concerning the Paycheck Protection Program and the EIDL assistance program, including but not limited to letters, emails, memoranda, reports, appointment calendars, and telephone call logs, and dated between March 1, 2020 and the date you process this request;
- (6) All records reflecting any communication between Administrator Jovita Carranza, her staff, and borrowers under the CARES Act's paycheck protection program and the EIDL program concerning the Paycheck Protection Program and the EIDL assistance program, including but not limited to letters, emails, memoranda, reports, appointment calendars, and telephone call logs, and dated between March 1, 2020 and the date you process this request;
- (7) A database or other similar electronic copy of requested records.

83. SBA assigned FOIA tracking numbers SBA-2020-000848 to item 1; SBA-2020-000849 to item number 2; and SBA-2020-000850 to the remainder of the request. The Center for Public Integrity requested expedited processing.

84. SBA responded on May 14, 2020, directing the requester to the statistical information posted on SBA's website at <https://www.sba.gov/about-sba/open-government/foia#section-header-32> and providing requester with appeal rights within 90 days. It also denied the request for expedited processing.

85. SBA responded again on June 15, 2020 directing the requester to the same statistical information. It also granted the request for expedited processing.

**SBA's Release Of Information About PPP And EIDL Loans**

86. SBA issued letters in response to each of the requests, stating that it was providing statistical information on the PPP and EIDL “in an effort to keep the public informed of the assistance and actions” it was taking at that time. The letters directed the requesters to a link that was posted on the SBA website, which provided statistics on the number and total amount of loans issued on a weekly basis under the PPP and EIDL.

87. That website, found at <https://www.sba.gov/about-sba/open-government/foia#section-header-32>, stated: “SBA is providing statistical information on the Paycheck Protection Program (PPP) loans and Economic Injury Disaster Loans (EIDL) in an effort to keep the public informed of the assistance and actions both it and the thousands of lenders across the country are taking at this difficult time. At this time, the agency is focusing its efforts on assisting small businesses during this unprecedented disruption to the economy due to the coronavirus (COVID-19) outbreak. The agency recognizes the need to balance the interests of transparency with the privacy and confidentiality issues release of loan information raises. In the near future, we will be able to turn our efforts to providing loan-specific data to the public, but hope that all understand the need for the Agency to focus its efforts on fulfilling the urgent needs of small businesses.”

88. On July 6, 2020, SBA released detailed information on each of the 4.9 million PPP loans that had been made up to that point. *See* Exhibit P (“Press Release”). The loan-level data included the following fields: city, state, ZIP code, NAICS code;<sup>1</sup> business type; race/ethnicity; gender; veteran status; nonprofit status; jobs reported as retained; date approved; lender; and

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<sup>1</sup> The North American Industry Classification System (NAICS) code is a self-assigned code that best fits a business's primary industry. For example, barber shops are assigned NAICS code 812111, while beauty salons are assigned NAICS code 812112, and nail salons are assigned NAICS code 812113.

congressional district. For loans of \$150,000 or more, it also included business names and street addresses, and loan amounts expressed in ranges (not precise values) as follows: \$150,000 to \$350,000; \$350,000 to \$1 million; \$1 million to \$2 million; \$2 million to \$5 million; \$5 million to \$10 million. For loans of less than \$150,000, the loan-level data also included the precise value of the PPP loan, but not the business name or street address.

89. The Press Release explained:

Today's release includes loan-level data, including business names, addresses, NAICS codes, zip codes, business type, demographic data, non-profit information, name of lender, jobs supported, and loan amount ranges as follows:

- \$150,000-350,000
- \$350,000-1 million
- \$1-2 million
- \$2-5 million
- \$5-10 million

These categories account for nearly 75 percent of the loan dollars approved. For all loans below \$150,000, SBA is releasing all of the above information except for business names and addresses.

The data release also includes overall statistics regarding dollars lent per state, loan amounts, top lenders, and distribution by industry. The loans have reached diverse communities proportionally, across all income levels and demographics.

In addition, the data provides information regarding the sizes of participating lenders and participation by community development financial institutions, minority depository institutions, Farm Credit System institutions, fintechs and other nonbanks, and other types of lenders. It further contains data showing the reach of the program in underserved communities, rural communities, historically underutilized business zones (HUBZones), and participation by religious, grantmaking, civil, professional, and other similar organizations.

90. On July 13, 2020, SBA made a determination on the release of PPP individual borrower information, and issued letters to each Plaintiff (except the Center for Public Integrity, which received its letter some weeks later). The letters directed Plaintiffs to SBA's website at [www.sba.gov/ppp](http://www.sba.gov/ppp). SBA explained in the letters that portions of the PPP borrower data were being withheld pursuant to FOIA Exemptions 4 and 6. 5 U.S.C. §§ 552(b)(4) and 552(b)(6).

Specifically, SBA withheld the names and addresses of all borrowers of PPP loans made below \$150,000. SBA also withheld the precise values of all PPP loans worth \$150,000 or more.

91. On July 20, 2020, SBA made a final determination of the release of EIDL borrower information and again issued letters to all Plaintiffs (again, except the Center for Public Integrity, which received its letter some weeks later). The letters directed Plaintiffs to SBA's website at <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loans#section-header-5>, and informed Plaintiffs that SBA was releasing the loan data for all EIDL loans, except that the names and street addresses of sole proprietorships and independent contractors were being withheld pursuant to FOIA Exemption 6. 5 U.S.C. §552(b)(6).

92. SBA has no responsive records with regard to PPP loans that were approved but quickly repaid and then cancelled. SBA is notified of a loan cancellation in one of two ways. Either the lender cancels the loan via E-TRAN, or the lender reports the loan cancellation on Form 1502. In either case, lenders are not asked for the reason for, or circumstances of, the cancellation, and neither E-TRAN nor Form 1502 provides a mechanism for reporting the reason for, or circumstances of, the cancellation. Moreover, because PPP loans are made by lenders on a delegated basis and SBA does not interact with borrowers, SBA does not receive information concerning loan cancellations from borrowers. Thus, if a loan was made, entered into E-TRAN, disbursed, quickly repaid, and then cancelled due to the repayment, while the lender would notify SBA of the cancellation, SBA would have no information—from the lender or the borrower—indicating that the repayment prompted the cancellation.

93. Similarly, SBA has no responsive records with regard to PPP loans that were approved but not borrowed. If a loan has been reported to SBA through E-TRAN and subsequently is cancelled, the lender will accomplish the cancellation through E-TRAN, which provides no

mechanism for reporting the reason for, or circumstances of, the cancellation. If, on the other hand, a lender cancels a loan before the loan has been reported to SBA through E-TRAN, SBA will not receive any information about the loan or its cancellation, much less the reason for, or circumstances of, the cancellation. And because PPP loans are made by lenders on a delegated basis and SBA does not interact with prospective borrowers, SBA does not receive information concerning loan cancellations from prospective borrowers. Thus, if a loan was approved but not borrowed and thus cancelled, while the lender under some circumstances would notify SBA of the cancellation, SBA would have no information—from the lender or the prospective borrower—indicating that a prospective borrower’s decision not to borrow prompted the cancellation.

#### **Withholdings Under FOIA Exemption 4**

94. FOIA Exemption 4 protects against the disclosure of “trade secrets and commercial or financial information [that are] obtained from a person and [are] privileged or confidential.” 5 U.S.C. § 552(b)(4).

95. SBA considers payroll information submitted by businesses that apply for public assistance to be confidential commercial or financial information and has not customarily disclosed this data to the public in any way. SBA’s Standard Operating Procedure (“SOP”) regarding Disclosure describes information generally exempt from disclosure and specifically includes payroll information of businesses. *See* SBA SOP 40 04 3; Appendix C (May 12, 2018), attached as Exhibit Q. Previous versions of this SOP contain similar descriptions. *See* SOP 40 03 3; Appendix 3 (August 4, 2004), attached as Exhibit R.

96. The maximum amount of a PPP loan is calculated from the borrowing business’s average monthly payroll. The maximum loan amount is generally 2.5 times the average monthly payroll for the 12 months preceding the date the loan is made, up to \$10 million.

97. The methodology to calculate the maximum amount an applicant can borrow through the PPP is established by the CARES Act and explained in Interim Final Rule, Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 15, 2020). Compensation paid to an employee in excess of an annual salary of \$100,000, or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year, are not counted in the calculation of average monthly payroll.

98. Because the CARES Act establishes a clear mathematical relationship between a business's maximum PPP loan amount and its average monthly payroll, knowing a business's PPP loan amount would allow any interested party to calculate the business's average monthly payroll, other than the amount of any salaries over \$100,000—for any business that borrowed the full amount for which it was eligible. Nationwide, many businesses are unlikely to pay any salaries in excess of \$100,000.

99. For self-employed individuals and independent contractors, any interested party could similarly use the PPP loan amount to calculate the individual's average monthly income.

100. Because Exemption 4 protects a business's payroll information, which can be deduced from the business's PPP loan amount with reasonable confidence, Exemption 4 also protects (a) the identity of the borrower of any PPP loan, where the precise amount of the loan is disclosed, and (b) the precise amount of any PPP loan, where the borrower's identity is disclosed.

101. For PPP loans of \$150,000 or more, SBA disclosed the names and street addresses of the borrowers but withheld the precise amount of their loans—instead providing the loan amounts in five ranges, as follows: \$150,000 to \$350,000; \$350,000 to \$1 million; \$1 million to \$2 million; \$2 million to \$5 million; \$5 million to \$10 million. SBA determined that this provided

the maximum transparency possible while still preserving the borrower's confidential commercial and financial information.

102. For PPP loans of less than \$150,000, SBA disclosed the precise amount of the loans and other information about the loans, but withheld the names and street addresses of the borrowers. In each case, the withheld information was protected by Exemption 4. SBA determined that this separate procedure was appropriate for the smallest PPP loans because a significant percentage of these borrowers are sole proprietors, independent contractors, or other individually owned or closely held entities for whom the disclosure of the PPP loan would reveal private financial information protected by Exemption 6.

103. For PPP loans below \$150,000, Exemption 4 authorizes the withholding of the identities of borrowers even where those borrower identities could be released separately from the detailed loan data that has already been published. The detailed geographic information already released for each loan (city, state, and ZIP code), plus the information about the type of business (NAICS code) would make it possible in many cases to match a list of PPP borrowers with the loan information already released, thereby reconstructing the complete loan information for those PPP loans and allowing an interested party to calculate those businesses' average monthly payrolls with reasonable confidence.

104. For PPP loans of \$150,000 or more, Exemption 4 warrants the withholding of the precise loan amounts even if the borrowers' identities were not explicitly linked to that figure. If the precise loan amounts were released along with other detailed information about the loans, it would be possible in many cases for an interested party to match that data with the detailed loan information linked to borrower identities in the current releases, thereby reconstructing the

complete loan information for PPP loans and allowing the interested party to calculate those businesses' average monthly payrolls with reasonable confidence.

105. SBA's Exemption 4 withholding of payroll information and loan amount information from which payroll information can be discerned properly protects the interests of the more than 5 million PPP loan borrowers who are not parties to this litigation and who accordingly cannot defend their own interests. A business's payroll information, including its aggregate average monthly payroll, is generally considered to be confidential and sensitive information. This information could be used by a business's competitors to gain strategic insights into the size of the business and how much it pays its employees. Competitors could also use this information regarding a business's employee compensation to more effectively lure away those employees by offering higher compensation. The information could be used by suppliers or other counterparties to assess the company's profitability, which could affect commercial negotiations. These harms could result in borrowers being less likely to take loans from the SBA in the future, which would be contrary to the purposes of the CARES Act and SBA's mission of providing financial assistance to small businesses. Disclosure of commercial information traditionally kept confidential by PPP borrowers, including payroll information, would further undermine the statutory purposes of the CARES Act by threatening further economic injury to small businesses when they are already being harmed as a result of the pandemic, as explained above.



**Withholdings Under FOIA Exemption 6**

106. FOIA Exemption 6 provides that an agency may withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption 6 applies to financial information in business records when the business is individually owned or closely held, and the records would necessarily reveal at least a portion of the owner’s personal finances.

107. To obtain a PPP loan, the borrower must certify “that the uncertainty of current economic conditions makes necessary the loan request to support . . . ongoing operations,” and must “acknowledg[e] that [PPP loan] funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments.” 15 U.S.C. § 636(a)(36)(G)(i).

108. The certifications required by the CARES Act—that the PPP loan requested is “necessary . . . to support . . . ongoing operations” given “the uncertainty of current economic conditions” and that the funds loaned will be used for payroll, mortgage payments, lease payments, and utility payments—reveal a portion of the owner’s financial situation for businesses that are individually owned or closely held (including independent contractors, self-employed individuals, and sole proprietorships). For independent contractors and the self-employed, the amount of the PPP loan also reveals the individual borrower’s salary with reasonable confidence. For such businesses, therefore, Exemption 6 applies to the identity of the borrowers. Revealing the existence of a PPP loan for businesses that are individually owned or closely held would reveal that the owner’s financial situation was sufficiently uncertain as to make the PPP loan necessary, and would effectively reveal salary information for independent contractors and the self-employed. It would also reveal to creditors and the general public that the owner had received PPP funds.

109. The SBA has received FOIA requests from landlords seeking to know whether their tenants received PPP funds.

110. For PPP loans below \$150,000, Exemption 6 exempts from disclosure the names and street addresses of borrowers that are individually owned or closely held businesses.

111. The SBA has determined from its experience with the small business community that a significant proportion of the small businesses with PPP loans below \$150,000—which generally have annual payrolls below \$720,000—are individually owned or closely held businesses. But SBA records do not allow it to determine precisely which borrowers these are. Although the SBA’s electronic files contain a field for “business type,” which includes “sole proprietorship” and several forms of corporate ownership, that field does not identify which of the companies are individually owned or closely held, and which are not. The SBA has therefore withheld the names and addresses of all PPP borrowers with loans below \$150,000.

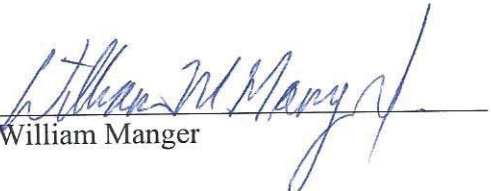
112. The SBA has also withheld the names and addresses of independent contractors and sole proprietorships receiving EIDL loans, because the disclosure of this financial information would infringe on the privacy of the individual business owners.

113. Where SBA withheld information under Exemption 6 in response to Plaintiffs’ FOIA requests, SBA determined the individuals’ privacy interests outweighed any public interest in disclosure. Although the public has a general interest in knowing who has received public funds through the PPP loan program, that interest does not outweigh the privacy interest in the personal finances of individuals, including the owners of individually owned or closely held businesses.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18 day of August 2020.

  
\_\_\_\_\_  
William Manger

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

WP COMPANY LLC d/b/a THE  
WASHINGTON POST, BLOOMBERG  
L.P., DOW JONES & COMPANY, INC.,  
PRO PUBLICA, INC., THE NEW YORK  
TIMES COMPANY, AMERICAN  
BROADCASTING COMPANIES, INC.  
d/b/a ABC NEWS, AMERICAN CITY  
BUSINESS JOURNALS, CABLE NEWS  
NETWORK, INC., NBCUNIVERSAL  
MEDIA, LLC d/b/a NBC NEWS, THE  
ASSOCIATED PRESS, THE CENTER FOR  
INVESTIGATIVE REPORTING  
d/b/a REVEAL,

*Plaintiffs,*

v.

U.S. SMALL BUSINESS  
ADMINISTRATION,

*Defendant.*

Case No. 1:20-cv-01240  
(JEB)

**[PROPOSED]  
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Upon consideration of Defendant United States Small Business Administration's Motion for Summary Judgment, the Memorandum of Points and Authorities in support thereof, and the entire record herein, it is hereby

ORDERED that Defendant's motion is GRANTED; and it is

ORDERED that judgment be entered in favor of Defendant.

It is SO ORDERED.

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The Honorable James E. Boasberg  
United States District Judge