

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Laborers' International Union of)
North America, Pacific Southwest Region)
)
Filing Date: April 23, 2013)
_____)

Case No.: FIA-13-0024

Issued: May 9, 2013

Decision and Order

On April 23, 2013, the Department of Energy (DOE) Office of Hearings and Appeals received an Appeal of a determination issued to the Laborers' International Union of North America, Pacific Southwest Region (Appellant) by DOE's Loan Guarantee Program Office (LGPO) on March 19, 2013 (Request No. HQ-2013-00308-F). In that determination, LGPO released partially redacted documents responsive to a request that the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO withheld portions of that document under Exemptions 4 and 6 of the FOIA. 5 U.S.C. § 552(b)(4) & (6). This Appeal, if granted, would require LGPO to produce the withheld information, and to release responsive documents dated through March 19, 2013, when LGPO issued its Determination Letter.

I. Background

On December 7, 2012, the Appellant¹ submitted a FOIA Request, seeking copies of certified payroll records from CLP, Inc., a contractor for the Desert Sunlight Solar Generation project in Riverside County, California, "from March 1, 2012 to the most current payroll record at the time this request is being processed." *See* FOIA Request from Izaak C. Velez, Labor Relations Representative, Appellant, to Alexander Morris, FOIA Office, DOE (Dec. 7, 2012).

LGPO responded to the Appellant's FOIA Request on March 19, 2013, stating that it was releasing documents, but withheld portions of the documents pursuant to Exemptions 4 and 6. *See* Determination Letter from David G. Frantz, Acting Executive Director, LGPO, to Izaak

¹ The Appellant explained that one of its objectives is to protect construction workers from violations of applicable labor standards, and that it monitors compliance with laws and regulations governing construction on federally funded or federally-assisted projects. *Id.* The purpose of the instant FOIA Request, therefore, is for the Appellant to verify whether the contractor of the Desert Sunlight Solar Generation project, CLP, Inc., is in compliance with federal wage standards. Appeal at 1-2.

Velez, Appellant (Mar. 19, 2013). LGPO stated that it withheld confidential sensitive commercial information that “includes payroll information such as individual employee’s hours worked, net and gross wages, which could be used to determine total labor costs.” *Id.* at 2. LGPO explained that “release of such information would give the contractor’s competitor’s [sic] an undue advantage when submitting proposals in the future because competing contractors and subcontractors could utilize this information to respond to a bid request thereby degrading the competitive process and resulting in cost increases in similar projects.” *Id.* Moreover, LGPO invoked Exemption 6 for withholding personal information, including employees’ names, social security numbers, payroll deductions and other withholdings. *Id.*

The contested payroll documents fall into two categories.² First, there is a document entitled “Public Works Payroll Reporting Form (Payroll Reporting Form),” which contains ten columns of information pertaining to the employees’ weekly payroll information. In the Payroll Reporting Forms, LGPO redacted the information in columns 1 (name, address, and social security number of employee), 4 (hours worked each day), 5 (total hours worked that week), 6 (rate of pay), 7 (gross amount earned), 8 (deductions, contributions and payments) and 9 (net wages paid for week), pursuant to Exemption 4, Exemption 6 or both. The second document at issue is entitled “Deductions,” which contains the names of employees and their deductions. In the Deductions sheet, LGPO redacted the employees’ names and the amounts of various deductions, including health insurance, life insurance, vision and dental insurance, disability, and child support. These withholdings are made pursuant to Exemption 6.

On April 23, 2013, the Appellant appealed LGPO’s determination, claiming that LGPO improperly redacted the pay rate, hours worked, deductions, gross pay and net pay pursuant to Exemptions 4 and 6. Appeal at 2. The Appellant does not appeal LGPO’s decision to withhold personal identifying information, such as names, addresses and social security numbers, from the payroll documents. *Id.* Finally, the Appellant argues that LGPO should have released payroll records through the date when LGPO responded to its FOIA Request on March 19, 2013, rather than through January 2013. *Id.*

II. Analysis

We will deny the Appeal in part as to LGPO’s failure to provide records dating through March 19, 2013, when it issued the Determination Letter. Courts have applied the “date-of-search” as the cut-off date for locating responsive documents. *See Public Citizen v. Dep’t of State*, 276 F.3d 634, 644 (D.C. Cir. 2002) (“At the very least, we think that with minimal administrative hassle, the Department could apply a date-of-search cut-off to the Central File.”). Here, LGPO’s search began and ended in January 2013, and accordingly, the scope of its search for responsive documents dating through January 2013, was proper. *See* Email from Janelle Jordan, LGPO, to Shiwali Patel, Attorney-Examiner, OHA (Apr. 29, 2013). Moreover, in its FOIA Request, the Appellant requested documents “from March 1, 2012 to the most current payroll record *at the time this request is being processed*,” indicating that the Appellant actually requested documents through the date-of-search, rather than the date that LGPO issued its

² There is also a signature page that follows the Payroll Reporting Forms with redactions made pursuant to Exemption 6. However, as that page contains personal identifying information, the withholding of which is not challenged by the Appellant, those redactions are not before us in the instant Appeal.

determination. *See* FOIA Request from Izaak C. Velez, Labor Relations Representative, Appellant, to Alexander Morris, FOIA Office, DOE (Dec. 7, 2012) (emphasis added). Thus, following is our analysis on LGPO's invocation of Exemptions 4 and 6 to withhold information in the Payroll Reporting Forms and the Deductions sheets.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

The DOE regulations provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The DOE FOIA regulations further provide that a field office that withholds information from a requester must include in its determination a "statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption(s) applies to the record withheld, and a statement of why a discretionary release is not appropriate." 10 C.F.R. § 1004.7(b)(1). As explained below, we find that LGPO's properly invoked FOIA Exemption 4 to the information being withheld in the Payroll Reporting Forms and, while LGPO properly withheld certain information under Exemption 6, it also withheld information beyond that for which it did not provide an adequate explanation.

A. Exemption 4

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). LGPO cites both "trade secrets" and confidential "commercial or financial information" as justifications for withholding information in the released documents.

LGPO contends that it redacted sensitive commercial information from the payroll documents, specifically, the numbers of hours worked and the employees' net and gross wages. Determination Letter at 2. LGPO claims that "release of such information would give the contractor's competitor's [sic] an undue advantage when submitting proposals in the future because competing contractors and subcontractors could utilize this information to respond to a bid request thereby degrading the competitive process and resulting in cost increases in similar projects." *Id.* Furthermore, LGPO provided a letter from CLP's counsel, wherein she stated that the withheld information is confidential because it is not customarily made available to the public and its release would give its competitors an advantage in the marketplace. Letter from Jennifer A. Teaford to Janelle Jordan, LGPO (Mar. 5, 2013).

In order to apply Exemption 4 to protect confidential “commercial or financial information” from disclosure, the withheld information must be “obtained from a person.” It is well-established that “person” refers to a wide-range of entities, including corporations, such as CLP, Inc., the contractor whose records are sought by the Appellant. *See Comstock Int’l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. VFA-0591 (2000).

In this case, the payroll records were submitted to DOE as part of its loan agreement pursuant to the Davis Bacon Act. *See* Email from Janelle Jordan, LGPO, to Shiwali Patel, OHA (May 6, 2013). Hence the information was “involuntarily submitted,” and accordingly, the *National Parks* test must be met to find the information withheld to be confidential. Under *National Parks*, involuntarily submitted information is considered confidential if its release would be likely to either (a) impair the government’s ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitters. 498 F.2d at 770. “Courts generally defer to an agency’s predictions concerning the repercussions of disclosure, acknowledging that predictions about competitive harm are not capable of exact proof.” *SACE v. Dep’t of Energy*, 853 F. Supp. 2d 60, 71 (D.D.C. 2012).

Here, we conclude that the information in the Payroll Reporting Forms, in columns 4, 5, 6 and 7, was properly withheld pursuant to Exemption 4. We have considered a similar issue in *Torres Consulting & Law Group, LLC*, where we found that release of information in payroll records, specifically the total hours worked daily and weekly and wage rates, would provide competitors with an undue advantage, and therefore, that information was confidential and exempt from release. OHA Case No. FIA-12-0056 (2012); *see also Nat’l Parks*, 498 F.2d at 770. Accordingly, as we conclude that Exemption 4 has been properly invoked as to the redactions in columns 4, 5, 6 and 7 for containing confidential commercial or financial information, we need not consider whether release of such information would constitute a violation of the Trade Secrets Act or whether that same information may be withheld pursuant to Exemption 6. *See In the Matter of Newport Partners, LLC*, OHA Case No. FIA-13-0016 (2013).

B. Exemption 6

Moreover, LGPO invoked Exemption 6 for the redactions in columns 8 and 9 of the Payroll Reporting Forms and the withholdings in the Deductions sheet. Exemption 6 shields from disclosure “[p]ersonnel 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); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Dep’t of Hous. and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Reporters Committee for Freedom of the Press v. Dep’t of Justice*, 489

U.S. 769, 773 (1989). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Ripskis*, 746 F.2d at 3.

The Appellant acknowledges, and we agree, that information revealing the names of employees and their social security numbers in the Payroll Reporting Forms and Deductions sheets was properly redacted pursuant to Exemption 6. However, to the extent that there is other information that was withheld from the Appellant under Exemption 6, we are remanding this matter to LGPO to release that information or provide additional justifications for its withholding. Specifically, LGPO has not sufficiently explained how release of the information contained in columns 8 and 9 of the Payroll Reporting Forms – deductions, contributions and payments and net wages for the week – would constitute an unwarranted invasion of personal privacy. As the names and social security numbers of the employees are redacted, the deduction, contribution and payment amounts, in and of themselves, do not reveal *personal* information. For this same reason, LGPO did not sufficiently support its application of Exemption 6 on the Deductions sheets, wherein it redacted personal income, tax deductions and insurance information. Hence, we will remand this matter in part in order for LGPO to either release that information or explain why it should be withheld pursuant to another exemption.

C. Segregability of Other Releasable Information

The Appellant states that there are inconsistencies with the redactions in the released documents. Specifically, the Appellant avers that while all the documents are nearly identical in form, there is information pertaining to the classification of employees that is visible as to some of employees, but not others. Appeal at 2. For example, on many of the Payroll Reporting Forms, LGPO's explanations for redacting information contained in columns 4, 5, and 6 is noted in a text box that blocks part of the information in column 3 (work classification). Consequently, the work classification listed in column 3 is revealed as to some employees, but not others. Accordingly, we will remand this matter to LGPO to release segregable portions of the payroll documents and to issue a new determination letter. *See* 5 U.S.C. § 552(b) (the FOIA requires that "any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.").

III. Conclusion

It Is Therefore Ordered That:

- (1) The Appeal filed by the Laborers' International Union of North America, Pacific Southwest Region, on April 23, 2013, Case No. FIA-13-0024, is hereby denied in part and remanded in part as set forth in Paragraph (2) below.
- (2) This matter is hereby remanded to the Loan Guarantee Program Office, which shall issue a new determination in accordance with the instructions set forth in this Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may

be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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Date: May 9, 2013