

6. Copy of all conformance request (Additional Classification and Rate) responses, approvals, denials, and/or modifications issued by the Department of Labor (DOL) for this project;

7. The name of the bona fide apprenticeship program and evidence of the formal certification by the DOL for a trainee program in which the terms of the trainee program for the crafts reference in item 6.^{1/}

Determination Letter Dated April 5, 2013, at 1. LGPO released a number of documents responsive to the request but withheld portions of those documents under Exemptions 4 and 6 of the FOIA. *Id.* The Appellant filed this Appeal claiming that the wage rate, fringe benefits, and apprenticeship guidelines are stipulated by contract and cannot be considered confidential nor would their release cause a competitive disadvantage to the submitter.^{2/} Therefore that information, argues the Appellant, cannot be withheld under Exemption 4. Appeal Letter dated April 26, 2013 at 2-3. Further, the Appellant argues that the wage information cannot be withheld under Exemption 6 once the worker's privacy is protected by withholding his identifying information. *Id.* at 3.

II. Analysis

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 further 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. Exemptions 4 and 6 are at issue in this Appeal.

A. Exemption 4

Exemption 4 shields 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). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a

^{1/} Requests numbered 1 and 7 are not at issue in this Appeal.

^{2/} Although the Appellant mentions "apprenticeship guidelines" in its Appeal, it makes no argument for the "apprenticeship guidelines" release.

different analysis applies. The agency must determine whether the information in question is “commercial or financial,” “obtained from a person” and “privileged or confidential.”

The first requirement is that the withheld information be “commercial or financial.” Federal courts have held that these terms should be given their ordinary meanings and that records are commercial as long as the submitter has a “commercial interest” in them. *Public Citizen*, 704 F.2d at 1290. The information submitted by the contractors, *i.e.*, payroll reports, statements of compliance, fringe benefits statements and statements of non-performance, clearly satisfy the definition of commercial or financial information. The second requirement is that the information be “obtained from a person.” It is well-established that “person” refers to a wide-range of entities, including corporations and partnerships. *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. TFA-591 (2000).^{3/} The contractors satisfy that definition. Finally, in order to be exempt from disclosure under Exemption 4, the information must be “confidential.” In this case, the contractors were required to submit the documents in question as part of its contract with LGPO. Accordingly, we find that the withheld information was “involuntarily submitted.” In order for the application of Exemption 4 to be proper, the *National Parks* test must be applied. Under *National Parks*, involuntarily submitted withheld information is 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 submitter. *National Parks*, 498 F.2d at 770.

The Appellant is not challenging whether the information withheld is either commercial or financial or obtained from a person. Appeal Letter at 2. The Appellant argues that LGPO misapplied Exemption 4 in redacting the wage rate (hourly and fringe benefits) as its release will not substantially harm the contractor competitively. *Id.* The Appellant argues that disclosure of the hours worked on a project jobsite is readily observable on most projects and should not be protected under Exemption 4.

LGPO determined that release of the commercial and financial information contained in the documents would likely cause the contractors substantial competitive harm. We believe that release of the information would give the contractors’ competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information in particular would give the contractors’ competitors an undue advantage in bidding on future contracts. Therefore, we find that LGPO properly applied Exemption 4 to the withheld information in the released documents and properly withheld the total hours worked and total pay received under Exemption 4.

B. Exemption 6

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

^{3/} OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

individuals from 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 significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat’l Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep’t of Hous. & 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) (*Reporters Committee*). 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 Nat’l Ass’n of Retired Federal Employees*, 879 F.2d at 874.

LGPO applied Exemption 6 to redact the names, addresses, and other personal identifying information of contractor employees and to withhold the hours worked each day and the deduction, contribution, and payments made to each individual. The Appellant has not challenged the withholding of the names, addresses, and other personal identifying information of the contractor employees. However, once the contractor employees’ names and addresses and other identifying information have been removed from the documents, we do not find a privacy interest in the hours worked or deductions, contributions, and payments. Therefore, LGPO improperly relied on Exemption 6 to withhold the deduction, contribution, and payment information which was withheld only under Exemption 6. We will remand the matter to LGPO for a new determination either releasing that information or justifying its withholding under a different provision of the FOIA.

LGPO invoked both Exemptions 4 and 6 to withhold contractor’s information, including names, addresses, and license numbers. The Appellant contends that LGPO improperly withheld the contractor’s information under Exemption 6. We agree. While LGPO properly invoked Exemption 4 to withhold the contractor’s information, it should not have also applied Exemption 6. We will not remand the matter to LGPO because the information was properly withheld under Exemption 4.

LGPO also withheld the hours worked each day under both Exemptions 4 and 6. The Appellant contends that the LGPO improperly withheld the contractor employees’ wages, hours worked and withholdings under Exemption 6, contending, that “after withholding the employee’s identify contained in the block labeled ‘Name, Address, SSN, Driver’s License, Ethnicity, Gender’ no other data can be withheld under Exemption 6.” Appeal at 3. While we agree with the Appellant’s argument regarding Exemption 6, LGPO also withheld the hours worked each day under Exemption 4 as well as Exemption 6. We have previously held that release of the hours worked, daily and weekly, would give the contractors’ competitors an undue advantage in bidding on future contracts. *Torres Consulting & Law Group, LLC*, Case No. FIA-13-0004 (2013). We will not remand the matter to LGPO because the information was properly withheld under Exemption 4.

III. Conclusion

After considering the Appellant's arguments, we are convinced that LGPO properly withheld the redacted information from the documents under Exemption 4. Although LGPO improperly used Exemption 6 to withhold the contractor's names, addresses, and license numbers, it properly withheld that information under Exemption 4, and we will not remand the matter for reconsideration of those withholdings. However, LGPO improperly used Exemption 6 to withhold contractor employees' deduction, contribution, and payment information. We will remand the matter to that office for a new determination either releasing the information or justifying its withholding on another basis. Accordingly, the Appeal will be granted in part and denied in all other respects.

It Is Therefore Ordered That:

- (1) The Appeal filed by Torres Consulting & Law Group, LLC, Case No. FIA-13-0027, is hereby granted as specified in Paragraph (2) below and denied in all other respects.
- (2) The matter is hereby remanded to the Loan Guarantee Program Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above 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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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 10, 2013