

**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of California Arizona Nevada )  
District Organization )  
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Filing Date: October 2, 2012 ) Case No.: FIA-12-0059  
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Issued: October 31, 2012

**Decision and Order**

On October 2, 2012, the California Arizona Nevada District Organization (Appellant) filed an Appeal from a determination issued to it on September 10, 2012, by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2011-01751-F). In that determination, LGPO released documents responsive to a request 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, however, withheld portions of the released documents under FOIA Exemptions 4 and 6. This Appeal, if granted, would release the withheld information.

**I. Background**

On December 9, 2011, the Appellant filed its updated request with DOE for a copy of all certified payroll reports, statements or compliance, fringe benefit statements, and statements of non-performance as submitted by two contractors: Millennium Reinforcing (MR) and Largo Concrete (Largo). Appeal at 1. On September 10, 2012, LGPO responded releasing 161 pages of responsive documents. However, LGPO redacted portions of those documents pursuant to Exemptions 4 and 6 of the FOIA. LGPO withheld the names, social security numbers and other personally identifying information under Exemption 6. LGPO withheld the number of hours worked by each employee during each pay period and each employee's net and gross pay for each pay period under both Exemption 4 and Exemption 6. Determination Letter dated September 10, 2012, from David G. Frantz, Acting Executive Director, LGPO, to Appellant. The Appellant challenges the withholding of the total hours worked and total pay received in those documents.<sup>1</sup> Appeal at 1.

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<sup>1</sup> The Appeal also claims that LGPO withheld: "fringe benefit payment statements." However, the 161 pages of responsive documents released to the Appellant appears to include a number of fringe benefit payment statements. *See e.g.*, Responsive Documents at 1, 3, 18, and 21.

## 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. Only Exemptions 4 and 6 are at issue in this Appeal.

### A. Exemption 4

Exemption 4 exempts from mandatory public 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). 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." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines 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. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*).

If the material does not constitute a "trade secret," a 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 payroll reports, statements of compliance, fringe benefits statements and statements of non-performance, at issue in the present case, 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).<sup>2</sup> The information at issue in the present case was obtained from Largo Concrete, an outside contractor, and therefore satisfies this definition. Finally, since the information at issue does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."<sup>3</sup>

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<sup>2</sup> OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

<sup>3</sup> In the present case, LGPO does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). In the present case, LGPO did not indicate whether the information it withheld was voluntarily submitted. However, Largo was required by contract to submit the documents in question, therefore the information was involuntarily submitted. Since the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. The LGPO appears to have misapplied the National Park's test, stating:

Release of this type of information would cause substantial financial and competitive harm to this Project as competing sub-contractors would utilize this information to respond to the bid request which would result in a less competitive process now and in the future. Such financial information, if released, would cause harm to the Project by resulting in a substantial increase of the Project cost.

Determination Letter at 2. The standard set forth in *National Parks* is whether release of the information would be likely to impair the government's ability to obtain such information in the future or cause substantial competitive harm to the submitter. *National Parks*, 498 F.2d at 770. LGPO was attempting to protect its own financial interests and "the competitive process" rather than protecting the government's ability to obtain information in the future or to prevent the government's contactors from incurring substantial competitive harm.

However, our *de novo* review of the redacted information has convinced us that its release would likely result in substantial competitive harm to the submitter of the information. We believe that release of the information would give Largo's competitors an undue advantage when submitting proposals in the future. Armed with information about the submitter's labor costs and requirements, Largo's competitors could undercut it when bidding on future contracts. Therefore, we find that Exemption 4 could be properly applied to the withheld information in the released documents and the total hours worked and total pay received could be properly withheld 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 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 information 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 invoked FOIA Exemption 6 to redact the information from the documents released to the Appellant. The Appellant contends that the LGPO improperly withheld the total hours worked and total pay received under Exemption 6, contending, that “[w]here all personal identifiers have been redacted from documents and it is not possible to identify the individual in question, there is no privacy interest in the number of hours worked, and the total pay received.” Appeal at 8. We agree.

It is well settled that the release of an individual’s name to the public implicates a privacy interest under the FOIA. *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008). The privacy interests protected by the exemptions to FOIA are broadly construed. *See Reporters Comm.*, 489 U.S. at 763. Therefore, LGPO correctly concluded that the contractor employees whose names appear in the documents have a legitimate expectation of privacy under the FOIA. 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 pay received. Therefore, LGPO improperly relied on Exemption 6 to withhold this information.

### **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 total hours worked and total pay received information, we will not remand the matter to that office for a new determination because the information was properly withheld under Exemption 4. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by California Arizona Nevada District Organization, Case No. FIA-12-0059, is hereby denied.
- (2) 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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