United States Department of Energy
Office of Hearings and Appeals

In the matter of Daniel J. Gage.	)	
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Filing Date: January 7, 2013	)	Case No.: FIA-13-0001
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	)	

Issued: January 23, 2013

Decision and Order

On January 7, 2013, Daniel J. Gage (Appellant) filed an Appeal from a determination issued to him on November 29, 2012, by the Department of Energy's (DOE) Golden Field Office (GFO) (Request No. GO-13-004). In its determination, the GFO responded to a request for documents that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the GFO to release the requested information it withheld pursuant to FOIA Exemption 4.

I. BACKGROUND

On October 30, 2012, the Appellant requested the following: "Any documents related to the settlement proposal for Cooperative Agreement No. DE-FC36-97ID13554 [Cooperative Agreement] with American Iron and Steel Institute [AISI]." Letter from Carol Battershell, Manager, GFO, to the Appellant (Nov. 29. 2012) (Determination Letter); Comment from Derek G. Passarelli, Chief Counsel, and Michele Harrington Altieri, FOIA Officer, GFO, to Shiwali Patel, OHA Attorney-Examiner (Jan. 14, 2013) (Comment), Ex. C. The GFO responded to the Appellant's FOIA Request on November 29, 2012, providing 193 pages of documents, with 22 pages with redactions pursuant to Exemption 4. It stated that the redacted information contains settlement cost information and technological process descriptions, which would cause substantial competitive harm if disclosed. *Id.* at 2.

In its Determination Letter, the GFO stated that the records were involuntarily submitted by AISI and its subcontractor in response to a settlement offer with the DOE, and that "public release of this confidential information could be used by competitors to copy AISI's technological approach without having to incur any costs." *Id.*

In his Appeal, the Appellant states that he seeks the total settlement amount that was redacted, not "detailed proprietary information or trade secrets." Appeal letter (Jan. 4, 2013). On January 10, 2013, in response to our inquiries regarding the scope of his Appeal, the Appellant

clarified that he was only contesting certain redactions found on page 2 of the documents, which is a letter from the DOE to AISI, dated August 22, 2012, accepting the AISI's Confidential Settlement Proposal. Email from the Appellant to Shiwali Patel, Attorney-Examiner, OHA (Jan. 10, 2013). The Appellant stated: "Most specifically, I am simply interested in knowing the total amount of money in US dollars the grant recipient – AISI – has been required to return to DOE under Cooperative Agreement No. DE-FC36-97ID13554. Asked another way, I am interested in knowing exactly how much Cooperative Agreement No. DE-FC36-97ID13554 actually cost the federal treasury once concluded." *Id.* The Appellant argues that the redacted information, which contains program costs and the full refund amount from the AISI to the DOE, should be disclosed because "the main details of this noncompetitive grant were public upon award," and the letter does not contain any trade secrets or AISI's financial or operational information. *Id.*

Accordingly, we deem the Appeal to only challenge the redacted information on page 2 regarding the total amount that AISI refunded to the DOE under Cooperative Agreement No. DE-FC36-97ID13554. Hence, while there are five redactions on page 2, the Appellant only challenges the first and last redactions.[1]

II. ANALYSIS

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are 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. 5 U.S.C. § 552(a)(4)(B). 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).

In order for the application of Exemption 4 to withstand scrutiny, 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

[1] The sections on page 2 with the challenged redacted information are as follows:

> The U.S. Department of Energy (DOE) has reviewed the Confidential Settlement Proposal (Proposal) dated August 15, 2012 from the American Iron and Steel Institute (AISI) regarding the subject cooperative agreement. The Proposal offers reimbursement to DOE of $ [Ex. 4 – *challenged by the Appellant*] in program costs, based upon a reduction of total program costs of $ [Ex. 4] that results when Phase II project equipment in the amount of $ [Ex. 4] is treated as an asset and capitalized by Bailey PVS Oxides, LLC (Bailey). . . .
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> Accordingly, DOE accepts the AISI Proposal, as submitted, provided that the following conditions are satisfied within thirty (30) days of the date of this letter: 1. Return funds in the amount of $ [Ex. 4 – *challenged by the Appellant*] DOE via check. . . .

the competitive position of submitters. 498 F.2d at 770. Courts "need not conduct a sophisticated economic analysis of the likely effects of disclosure." *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) (citation omitted). However, "[c]onclusory and generalized allegations of substantial harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." *Id.* Yet, agencies "need not 'show actual competitive harm'; evidence revealing '[a]ctual competition and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality.'" *Id.* (quoting *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)). Finally, information that would allow competitors to undercut a submitter's bids is the type of information that is not normally released to the public, and is considered to cause substantial competitive harm if released. *Gulf & Western Indus.*, 615 F.2d at 530-31. Thus, if the information would reveal the profit rates, general and administrative rates, and actual costs of a competitor company, it may be exempt from release. *Id.*

Here, the GFO states that that settlement proposal was involuntarily submitted because it was required to submit its proposal in response to the DCAA audit. Comment at 3. We agree, and will therefore apply the *National Parks* test to determine whether or not release of the settlement amount would cause substantial harm to the competitive position of its submitters. 498 F.2d at 770.

In response to our inquiries, the GFO provided us with the unredacted versions of the documents that it provided to the Appellant. *See* Comment. In a footnote to its Comment, the GFO stated that the Appellant previously submitted 12 FOIA requests to its Office on behalf of his client, Hoosier Magnetics, Inc., for records concerning the Defense Contract Audit Agency (DCAA) Report 6381-2009B177900002 and Cooperative Agreement DE-FEC-36-97ID13554. *Id.*, n.1. The DCAA Report details the audit of the AISI and its subcontractor, Bailey-PVS Oxides, LLC (Bailey), for direct equipment costs incurred under the Cooperative Agreement.[2] *Id.*

Under the Cooperative Agreement, AISI hired Bailey to implement technology in an existing plant and to make process modifications and equipment additions to convert it to a finish-grade strontium hexaferrite processing facility. *Id.* at 2. The GFO stated that the DCAA conducted an audit at the DOE's request in order to verify the costs incurred by Bailey, and the DCAA determined that some of Bailey's equipment costs were unallowable. *Id.* Eventually, in 2012, AISI demonstrated to the DOE Contracting Officer that a portion of the direct equipment costs incurred by Bailey was allowable under the Cooperative Agreement, and based on a proposed settlement submitted by AISI, the DOE agreed to accept a sum certain, which settled the dispute regarding Bailey's equipment costs. *Id.* This is the amount that is sought by the Appellant.

Attached to its Comment, the GFO provided a sworn declaration by Richard A. Barcelona, the Chairman of Bailey, who explained that the settlement concerned a "dispute over Bailey's direct equipment costs under the subcontract," and that the payment made by AISI to DOE was "equal to DOE's cost share percentage of the disallowed direct equipment costs." *Id.*, x. F ¶ 3. He also stated that Hoosier Magnetics, Inc., which was represented by the Appellant in previous FOIA

[2] On or about May 27, 2004, Bailey entered into a subcontract agreement with AISI regarding the Cooperative Agreement between AISI and the DOE. *See* Comment, Ex. F, ¶ 3.

requests seeking records concerning the same Cooperative Agreement, is a direct competitor with Bailey in the ferromagnetic material market. *Id.*, ¶ 4.

Mr. Barcelona further explained that Bailey would suffer competitive harm if the settlement amount was released because it "would provide a competitor insight into the cost of Bailey's assets used in its subcontract with AISI that it was required to capitalize and continues to use in the manufacture of ferrite powder." *Id.*, ¶ 6. He also claimed that Bailey's customers could use this information against it in future negotiations. *Id.* Furthermore, Mr. Barcelona asserted that it "does not publish its equipment costs structure and has not shared the information in the Confidential Settlement with its competitors." *Id.*, ¶ 9. Indeed, it takes such precautions to protect that information as only select employees have access to it. *Id.* In regards to the potential for future competitive harm, Mr. Barcelona averred that because of Bailey's technological advances in its services, he anticipates that the Government and private companies will seek its services, and that "[i]n such a competitive environment, companies seek any increment of useful information about their competitors' businesses, particularly technical information and pricing information; because obtaining that information could allow them to chip away at their competitors' businesses." *Id.*, ¶ 11.

Despite Mr. Barcelona's representations, it is not apparent how disclosure of the settlement amount would reveal Bailey's equipment costs and price structure. While the GFO and Mr. Barcelona claim that release of the settlement amount would enable competitors "to determine the value of equipment capitalized by Bailey which is still in use," and "gain improper insight into Bailey's equipment costs structure," we are not convinced that the settlement amount alone would reveal such information. Comment at 3-4. The settlement amount indicates a reduction in the total Program Cost with the DOE; it does not, in and of itself, reveal any specific equipment costs incurred by Bailey. We simply cannot ascertain how Bailey would be subjected to competitive harm based on the disclosure of the settlement amount alone. Thus, we are remanding this matter to the GFO. If the GFO intends to continue to withhold this information, it should explain, in its new determination, how any specific harm to the submitter's competitive interests would result from the release of the settlement amount.

III. CONCLUSION

It Is Therefore Ordered That:

(1) The Appeal filed on January 7, 2013, by Daniel J. Gage, OHA Case No. FIA-13-0001, is hereby remanded to the Golden Field Office, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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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