United States Department of Energy
Office of Hearings and Appeals

In the matter of Carter & Burgess, Inc.	)	
	)	
Filing Date: February 23, 2012	)	Case No.: FIA-12-0008
	)	
	)	

Issued: April 12, 2012

Decision and Order

On February 23, 2012, Carter & Burgess, Inc., (Appellant) filed an Appeal from a determination issued to it on January 27, 2012, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE). In that determination, NNSA released 73 documents responsive to requests 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. NNSA redacted portions of the released documents. This Appeal, if granted, would release the documents in full.

I. Background

On February 21, 2011, the Appellant filed 15 requests with NNSA. As all the requests referenced the same matter, NNSA consolidated its response. Determination Letter dated January 27, 2012, from NNSA to Andrew D. Keetch, Cantey Hanger, LLP, Appellant's Attorney. The documents at issue are copies of a Mutual Release and Settlement Agreement between Austin Commercial Contractors, L.P. (ACCLP) and Los Alamos National Security LLC (LANS), as well as a number of e-mails between LANS and DOE employees including the Settlement Agreement. NNSA withheld portions of the 73 responsive documents under Exemptions 4, 5, and 6 of the FOIA. *Id.* The Appellant challenges the withholding in those documents. Appeal dated February 22, 2012, from Andrew Keetch, to Office of Hearings and Appeals (OHA), DOE.

Initially, the Appellant argues that the documents were between two private entities, ACCLP and LANS, and therefore, cannot fall within Exemptions 4, 5, or 6. *Id.* Secondly, the Appellant argues that because the two private entities arbitrated a construction contract before the Civilian Board of Contract Appeals, all FOIA exemptions have been waived. *Id.* at 2. Thirdly, the Appellant argues that Exemption 4 does not apply because "[d]isclosure of this information will not impair the government's ability to obtain information in the future." *Id.* at 4. Fourthly, the Appellant claims that because LANS is not an agency of the United States, all documents that involve LANS cannot qualify for protection under Exemption 5. *Id.* at 3. Finally, the Appellant

contends that Exemption 6 is not applicable to any of the documents because it did not seek any information which would cause "injury and embarrassment that can result from the unnecessary disclosure of personal information." *Id.* at 3.

II. Analysis

A. Agency Records

The Supreme Court has articulated a two-part test for determining what constitutes an "agency record" under the FOIA. An "agency record" is a record that is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). As evidenced by NNSA's response, it had possession and control of the documents at the time of the request. Intuitively, if the documents are subject to the FOIA, then they must also be subject to the FOIA Exemptions. Accordingly, we will address NNSA's application of Exemptions 4, 5, and 6 to the withheld information in the pertinent sections below.

B. Waiver of FOIA Exemptions

Courts have routinely held that an agency has waived its protection under a FOIA exemption where there has been an official disclosure or direct acknowledgment by authorized government officials. Thus, waiver of the privilege to withhold information under the FOIA depends upon prior official release of the information or disclosure under circumstances in which an authorized government official allowed the information to be made public. *See Wolf v. CIA*, 473 F. 3d 370, 379-80 (D.C. Cir. 2007) (holding that an agency waived its ability to refuse to confirm or deny the existence of responsive records pertaining to an individual because a top agency official had discussed that individual during congressional testimony); *see also Simmons v. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) (unauthorized disclosure does not constitute waiver).

In the instant case, the Appellant argues that because ACCLP and LANS arbitrated a construction contract dispute before the Civilian Board of Contract Appeals, all FOIA exemptions have been waived. Appeal Letter at 2. In other words, the Appellant claims that when a document has been produced or available through litigation, pertinent FOIA exemptions are waived. Appeal at 2, *citing Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184 (D.D.C. 2009) and *N.D. ex rel. Olson v. Andrus*, 581 F.2d 177 (8th Cir. 1978). A clear reading of both cited cases shows that the documents in question were released by the governmental agency--not by a private entity. Here, at no time did an authorized government official allow the information to be made public. Therefore, we cannot accept the Appellant's argument that because ACCLP and LANS arbitrated the matter that is the heart of its requests, all FOIA exemptions have been waived.

C. Exemptions 4, 5, and 6

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, 5, and 6 are at issue in this Appeal.

1. 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 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 1290. The information submitted by LANS, *i.e.*, financial information, business strategies, legal strategies, etc., clearly satisfies 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). LANS satisfies that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." In this case, LANS was required to submit the documents in question as part of its contract with NNSA. 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 argues that NNSA applied Exemption 4 too broadly because disclosure will not impair the government's ability to obtain the information in the future nor will it cause substantial harm to the competitive position of LANS. Appeal at 3. We agree that because the contract between NNSA and LANS required the information be submitted, it is not likely that release of the information would impair DOE's ability to obtain similar information in the future.

We must address, however, whether release of the information would likely result in substantial competitive harm to the submitters of the information.

NNSA determined that release of the commercial and financial information contained in the documents would likely cause LANS substantial competitive harm. We believe that release of the information would give LANS' competitors an undue advantage when negotiating settlements in the future. In addition, release of the financial information would give LANS' competitors an undue advantage in bidding on future contracts against LANS. Therefore, we find that NNSA properly applied Exemption 4 to the withheld information in the released documents.

2. Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges, among others, that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

A communication between an agency and a private party is also an intra-agency communication when the "common interest" doctrine applies. *Hunton & Williams v. Dep't of Justice*, 590 F.3d 272, 277 (4th Cir. 2010); *Hanson v. Agency for Int'l Dev.*, 372 F.3d 286 (4th Cir. 2004); *accord Klamath*, 532 U.S. at 10. The common interest doctrine applies when an agency and a private party share an interest and the two decide to cooperate in pursuit of the public interest. *Hunton & Williams*, 590 F.3d at 277-83. "[I]n a limited sense," the private party "becomes a part of the enterprise that the agency is carrying out." *Id*. at 280. Therefore, the communications "can be understood as 'intra-agency' for the purposes of Exemption 5." *Id*.

In *Hunton & Williams*, a technology company sued a manufacturer for patent infringement. *Id*. at 274. A trial court enjoined the manufacturer from making the infringing product. During the appeal, the agency and the manufacturer exchanged litigation-related information. The technology company filed a FOIA request for the communications between the agency and the manufacturer. *Id*. at 275. Under Exemption 5, the agency invoked a privilege to withhold the communications. On appeal, the technology company argued that the agency improperly withheld the communications because they were not inter-agency or intra-agency communications. *Id*. at 276-77.

The court held that under the common interest doctrine, the communications between the agency and the manufacturer were considered intra-agency communications. *See id*. at 282. The agency and the manufacturer shared an interest in the government's continued use of the manufacturer's products and decided to exchange information to further that goal. Therefore, the agency and the

manufacturer "could rely on one another's advice, secure in the knowledge that privileged communications would remain just that." *Id*. at 282-83.

Here, NNSA is a federal agency that shares a common interest with a private party, LANS. As in *Hunton & Williams*, NNSA and LANS share a mutual interest since a decision adverse to LANS could result in increased costs borne by NNSA. For this reason, we find that the litigation-related information satisfies *Klamath*'s first condition. Information satisfies *Klamath*'s second condition if it falls within "civil discovery privileges," such as the attorney-client privilege, the attorney work product privilege, or the deliberative process privilege. *Klamath*, 532 U.S. at 8 (citations omitted). NNSA invoked both the deliberative process privilege and the attorney work-product privilege to withhold the redacted information.

a. Deliberative Process Privilege

An agency may withhold information under the deliberative process privilege if it is "predecisional" and "deliberative." *Coastal States Gas Corp*, 617 F.2d at 866. "[Information] . . . is 'predecisional' if it precedes, in temporal sequence, the 'decision' to which it relates." *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998). We "must be able to pinpoint an agency decision or policy to which the [information] contributed." *Id*. Conversely, information which explains actions an agency has already taken is not predecisional. *Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980). Information may lose its predecisional status "if it is adopted, formally or informally, as the agency position . . . ." *Coastal States*, 617 F.2d at 866.

Information is deliberative if it "reflects the give-and-take" of the decision or policy-making process or "weigh[s] the pros and cons of agency adoption of one viewpoint or another." *Coastal States*, 617 F.2d at 866. The agency must identify the role the information plays in that process. *Hinckley*, 140 F.3d at 284 (citation and internal quotation marks omitted). We "ask . . . whether the information is so candid or personal in nature that public disclosure is likely . . . to stifle honest and frank communication within the agency. . . ." *Coastal States*, 617 F.2d at 866.

The deliberative process privilege does not exempt purely factual information from disclosure. *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). However, "[t]o the extent that predecisional materials, even if 'factual' in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." *Id*. The deliberative process privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F.2d at 866.

The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id*. The privilege also "protect[s] against premature disclosure of proposed policies before they have been . . . formulated or adopted" to avoid "misleading the public by dissemination of documents suggesting reasons and rationales . . . which were not in fact the ultimate reasons for the agency's action." *Id*. (citation omitted).

We find that NNSA properly invoked the deliberative process privilege to withhold portions of the documents. Many of these documents are e-mails that are predecisional – *i.e.*, they precede the issuance of a final agency decision. The documents are also deliberative – *i.e.*, they contain evaluation of the settlement agreement by the DOE prior to it being executed by ACCLP and LANS.

b. Attorney Work-Product Privilege

The attorney work product privilege protects from disclosure documents which reveal "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to preserve a zone of privacy in which a lawyer or other representative of a party can prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by their adversaries. *Hickman*, 329 U.S. at 510-11. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

We find that NNSA properly invoked the attorney work-product privilege to withhold portions of the documents in this case. Many of these documents contain the opinions, conclusions, or legal theories of an attorney or other representative of DOE or LANS concerning the subject matter of the requested documents. The documents also include the mental impressions of DOE attorneys.

c. Segregability

Notwithstanding the above the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). We reviewed the withheld information and did not find any non-exempt, segregable information.

d. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. The Attorney General has indicated that whether or not there is a legally correct application of a FOIA exemption, it is the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency articulates a reasonably foreseeable harm to an interest protected by that exemption. Memorandum from the Attorney General to Heads of Executive Departments and Agencies, Subject: The Freedom of Information Act (FOIA) (March 19, 2009) at 2. NNSA concluded, and we agree, that disclosure of the requested information would cause an unreasonable harm to NNSA's ongoing decision-making process. Therefore, release of the withheld information would not be in the public interest.

e. Conclusion on Exemption 5

We have reviewed a large sample of the documents from which information was withheld under Exemption 5. Given the nature and our review of the sample documents, we find that Exemption 5's deliberative process privilege and attorney work-product privilege were properly applied.

3. 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. 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) (*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.

a. Privacy Interest

NNSA invoked FOIA Exemption 6 to redact the names and contact information of LANS employees from the documents it released to the Appellant. The Appellant contends that the NNSA improperly withheld information under Exemption 6, contending, that "[t]here is no expectation of privacy, even by government contractors, because all information at issue was done in a person's capacity as an employee or representative and has no bearing on one's personal affairs." Appeal at 3.

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. The Appellant's allegation that there is no expectation of privacy, even by government contractor employees, is erroneous. As stated above, courts have found a broad privacy interest. Therefore, NNSA correctly concluded that the contractor employees whose names appear in the documents have a legitimate expectation of privacy under the FOIA.

b. Public Interest

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public's understanding of the operations or activities of the government. *See Reporters Comm.*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of information, its disclosure is not "affected with the public interest." *Id*.; *see also Nat'l Ass'n of Retired Employees v. Horner*, 879 F.2d at 879.

It is clear that release of the names of LANS employees would not further the public interest by shedding light on the operations and activities of the government. Release of the names and contact information of the LANS employees who assisted in the negotiation between LANS and ACCLP would contribute little, if any, to public understanding of the issues surrounding the negotiation or any other matter of public concern. The withheld names and contact information are contained in communications between LANS employees and the DOE who are forwarding information from one entity to another, rather than actually taking part in the workings of the DOE. The emails from which the privacy information was withheld are asking for a concurrence from the DOE. In no way does the Exemption 6 information withheld from these documents shed light on the operations and activities of the DOE. In the present case, we find that the public interest in the withheld information at issue here is minimal at best. The Appellant has not established how release of the identities of the contractor employees would serve any public interest. To the contrary, we find that release of the identifying information of the contractor employees would reveal little, if anything, to the public about the workings of the government.

c. Balancing Test

Because we have found a privacy interest in the names of the contractor employees and no public interest in their disclosure, we find that release of the contractor employee's names would constitute a clearly unwarranted invasion of personal privacy. Therefore, NNSA properly withheld the information under Exemption 6.

D. Review of the Documents

We have reviewed a large sample of the documents from which information was redacted. NNSA appeared to be very careful with most of its redactions. Nonetheless, our review of the documents leads us to question some of the withholdings. In at least three instances, information was withheld and we cannot determine which Exemption was used. As an example, in Attachment 69 the names LANS and ACCLP were withheld. The redacted page references all three Exemptions for withholding information on the page. Because this information has previously been released, we are unclear why it was withheld on this document. Another example is Attachment 68, where the caption of the case, including the companies' names, before the Civilian Board of Contract Appeals was withheld. The redacted page references Exemptions 4 and 5 for withholding the information on the page. Again, because this information was released in other documents, we are unclear why it was withheld on this document. As a final example, Attachment 7 withholds the case caption, but page 2 of

Attachment 6 releases it. The redacted page in Attachment 7 references Exemptions 4 and 5 for withholding the information on the page. On remand, NNSA should clarify these inconsistencies and either release the information or issue a determination explaining the basis for the withholding.

III. Conclusion

After considering the Appellant's arguments, we are convinced that NNSA properly withheld the redacted information from the documents under Exemptions 4, 5, and 6. The Appellant's argument that the documents are subject to the FOIA but not subject to the Exemptions because the documents were between two private entities lacks merit. It is intuitive that a document that is subject to release under the FOIA is also subject to the FOIA exemptions. Second, the Appellant's argument that NNSA has waived the right to use any exemptions to the FOIA because LANS and ACCLP were involved in arbitration is erroneous. The government did not undertake an authorized, official release of the documents. Third, we find that NNSA properly applied Exemptions 4, 5, and 6 of the FOIA to the withheld information. In those instances where pages indicate that two or more Exemptions were used to withhold information on the same page, we have reviewed the documents and found that no factual information could be segregated from the withheld information**.** Finally, NNSA inconsistently withheld some of the information, *i.e.*, the case caption. For that reason, we will remand the matter to NNSA for a new determination. NNSA must review the documents for consistency of its withholdings. Accordingly, the Appeal should be granted in part and denied in all other respects.

It Is Therefore Ordered That:

(1) The Appeal filed by Carter & Burgess, Inc., Case No. FIA-12-0008, is hereby granted as specified in Paragraph (2) below and denied in all other respects.

(2) The matter is hereby remanded to the National Nuclear Security Administration 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 12, 2012