United States Department of Energy
Office of Hearings and Appeals

In the matter of California Arizona Nevada District Organization	)	
Filing Date: September 17, 2012	)	Case No.: FIA-12-0053

Issued: October 11, 2012

Decision and Order

On September 17, 2012, the California Arizona Nevada District Organization (Appellant) filed an Appeal from a determination issued to it on August 16, 2012, by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2012-00626-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 redacted portions of the released documents. This Appeal, if granted, would release the total hours worked and total pay received from the redacted documents.

I. Background

On January 13, 2012, the Appellant filed its 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 the contractor who performed the erection of the collector assembly building on the Abengoa Solana project and by the contractor who performed the placement, tying and installation of the cooling tower basin foundation rebar only on the project. Request Letter dated January 13, 2012, from Michele Justice, Director, Appellant, to Alexander Morris, FOIA Officer, DOE. On August 16, 2012, LGPO responded releasing responsive documents that had been redacted pursuant to Exemptions 4 and 6 of the FOIA. Determination Letter dated August 16, 2012, from David G. Frantz, Acting Executive Director, LGPO, to Michele Justice, Appellant. The Appellant challenges the withholding of the total hours worked and total pay received in those documents. Appeal dated September 13, 2012, from Nina Fendel, Appellant's Attorney, to Director, Office of Hearings and Appeals (OHA), DOE.

In its Appeal, the Appellant makes a number of arguments:

1. LGPO failed to properly justify its withholdings.

2. The total hours worked and total wages received is segregable information and should be released.
3. Disclosure of the information is not likely to cause substantial harm to the competitive interest of the Employers.
4. Disclosure of the information is not likely to cause substantial harm to the interests of the DOE.
5. The information cannot be withheld under Exemption 6.[1]

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 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

[1] The Appellant also argues that "disclosure of the information . . . would not violate the Trade Secret Act." Appeal at 4. The Appellant continues that LGPO justified withholding the information under the Trade Secret Act. *Id.* At no time does LGPO rely on the Trade Secret Act. Therefore, we will not address this argument in the Appeal.

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).[2] 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 argues that LGPO misapplied Exemption 4 in redacting the total hours worked and total pay received because disclosure will not cause substantial harm to the interests of the DOE. However, LGPO did not claim that the release of the information would impair DOE's ability to obtain the information in the future. The standard set forth in *National Parks* is whether release of the information would 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.

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

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

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 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-12-0053, 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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 11, 2012