United States Department of Energy
Office of Hearings and Appeals

In the Matter of Torres Consulting & Law Group, LLC	)		
	)	Case No.:	FIA-13-0074
Filing Date: December 2, 2013	)		

Issued: December 16, 2013

Decision and Order

On December 2, 2013, the Department of Energy (DOE) Office of Hearings and Appeals (OHA) received an Appeal of a determination issued to the Torres Consulting & Law Group (Appellant) by DOE's Loan Programs Office (LPO) on October 23, 2013 (Request No. HQ-2013-01196-F). In its determination, LPO released partially redacted documents responsive to a request that 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. LPO withheld portions of that document under Exemptions 4 and 6 of the FOIA. 5 U.S.C. § 552(b)(4), (6). This Appeal, if granted, would require LPO to produce the withheld information.

I. Background

In its FOIA Request, the Appellant requests "Certified payroll records for Milco Constructors for the dates of 8/6/2012 thru 8/24/201 and 3/3/2013 thru 4/19/2013." *See* Determination Letter from David Frantz, Deputy Executive Director, LPO, to Appellant (Oct. 23, 2013). On October 23, 2013, LPO responded to the Appellant's FOIA Request, stating that it located responsive documents that it partially redacted pursuant to Exemptions 4 and 6. *Id.* LPO stated that it invoked Exemption 4 to withhold sensitive commercial information in order to "preserve the competitive advantage which comes from working with particular suppliers and in pricing." *Id.* It redacted financial information, including payroll information of employees, which LPO stated that if released, would reveal labor costs and cause competitive and financial harm to the project. *Id.* LPO invoked Exemption 6 to redact personal information, such as payroll deductions, check numbers and social security numbers. *Id.*

On December 2, 2013, the Appellant filed its Appeal of LPO's determination. The Appellant is a consulting firm that "oversees compliance on construction projects throughout the United States." *See* Appeal. To that end, the Appellant reviews contract data and certified payrolls in order to assess whether contracting agencies are in compliance with the Davis-Bacon and

Related Acts (DBRA). *Id.* Thus, the Appellant seeks the requested documentation in order to "monitor compliance violations and report alleged violations directly to the Department of Labor, which significantly aids in achieving and raising awareness for DBRA enforcement." *Id.* The Appellant contests the redactions, claiming that the withheld information is neither privileged nor confidential because the information it requests is required to be submitted under federal construction contracts. *Id.*

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 FOIA regulations further provide that a DOE office that withholds information from a requester must include in its determination a "statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption(s) applies to the record withheld, and a statement of why a discretionary release is not appropriate." 10 C.F.R. § 1004.7(b)(1). As explained below, we find that LPO properly invoked FOIA Exemption 4 to the information being withheld in the Weekly Certified Payroll Reporting Forms and, while LPO properly withheld certain information under Exemption 6, it also withheld information beyond that, for which it did not provide an adequate explanation.

A. <u>Exemption 4</u>

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). 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." LPO cites both "trade secrets" and confidential "commercial or financial information" as justifications for withholding information in the released documents.

The Appellant is not challenging whether the information withheld is either commercial or financial or obtained from a person. We therefore must determine whether the information is

privileged or confidential. For the reasons set forth below, we find that the information is confidential and therefore exempt from release under Exemption 4.

In this case, the contractors were required to submit the payroll records pursuant to the requirements of the Mojave Solar Project. *See* Email from Janelle Jordan, LPO, to Shiwali Patel, OHA (Dec. 11, 2013). Accordingly, we find that the withheld information was "involuntarily submitted." Hence, as the information was "involuntarily submitted," 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 the competitive position of submitters. 498 F.2d at 770. "Courts generally defer to an agency's predictions concerning the repercussions of disclosure, acknowledging that predictions about competitive harm are not capable of exact proof." *SACE v. Dep't of Energy,* 853 F. Supp. 2d 60, 71 (D.D.C. 2012). In applying Exemption 4 to the documents at issue, LPO determined that release of the information would likely cause the contractors substantial competitive harm.

We have considered a similar issue in *Torres Consulting & Law Group, LLC*, where we found that release of information in payroll records, specifically the total hours worked daily and weekly and wage rates, would provide competitors with an undue advantage, and therefore, that information was confidential and exempt from release. OHA Case No. FIA-12-0056 (2012); *see also Nat'l Parks*, 498 F.2d at 770. Moreover, release of that information would give the contractors' competitors an undue advantage in bidding on future contracts. Accordingly, we conclude that Exemption 4 has been properly invoked as to the commercial or financial information contained in the payroll records, and therefore, we need not consider whether release of such information would constitute a violation of the Trade Secrets Act or whether that same information may be withheld pursuant to Exemption 6. *See In the Matter of Newport Partners, LLC,* OHA Case No. FIA-13-0016 (2013).

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 the 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 privacy interest is identified, the record may not be withheld pursuant to this exemption. *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). 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 Ripskis*, 746 F.2d at 3.

The Appellant acknowledges, and we agree, that the names, addresses, social security numbers and other personal identifying information contained in the payroll records were properly withheld pursuant to Exemption 6. However, to the extent that there is other information that was withheld under Exemption 6, we are remanding this matter to LPO to release that information or provide additional justifications for its withholding. Specifically, LPO has not sufficiently explained how release of the other information redacted pursuant to Exemption 6 – deductions, contributions, payments, check numbers, and fringe benefit payments – would constitute an unwarranted invasion of personal privacy. The deduction, contribution and payment amounts, check numbers, and fringe benefit payments, in and of themselves, do not reveal *personal* information. Thus, we will remand this matter to LPO for a new determination either releasing that information or justifying its withholding under a different provision of the FOIA.

III. Conclusion

It Is Therefore Ordered That:

(1) The Appeal filed by the Torres Consulting & Law Group, LLC, on December 2, 2013, OHA Case No. FIA-13-0074, is hereby denied in part and remanded in part as set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Loan Programs Office, which shall issue a new determination in accordance with the instructions set forth in this 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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Director
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