United States Department of Energy
Office of Hearings and Appeals

In the Matter of Columbia Riverkeeper	)		
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Filing Date: August 21, 2018	)	Case No.:	FIA-18-0031
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Issued: September 5, 2018

Decision and Order

On August 21, 2018, Columbia Riverkeeper appealed a determination letter issued to it from the Department of Energy's (DOE) Office of Public Information (OIP) regarding Request No. HQ-2018-00269-F. In that determination, OPI responded to a request 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. OPI released seven documents (Installment 1) as a partial response for an ongoing search, but redacted certain portions, in relevant part, pursuant to FOIA Exemptions (b)(4) and (5). The Appellant challenged OPI's decision to withhold information pursuant to the above listed FOIA exemptions.

I. Procedural Background

On November 7, 2017, OPI received a FOIA Request from the Appellant, which was later amended to seek an "[e]mail search of two custodians, who represent the environmental and technical components of the Northwest Innovation Works (NWIW) project at DOE," with specific keywords and with a date range of June 19, 2015, through the date of search. FOIA Appeal at 1 (August 20, 2018); OPI Determination Letter (August 16, 2018). In response, OPI provided the Appellant with a partial response containing seven responsive documents. Appeal at 1. After the Appellant appealed OPI's redactions, OPI withdrew its Determination Letter and began a review of the redactions. Appeal at 1. We dismissed the appeal as moot. Appeal at 1.

On August 16, 2018, OPI re-released the seven documents to the Appellant. Appeal at 1. OPI determined that certain information should be withheld pursuant to Exemptions 4 and 5 of the FOIA. Determination Letter at 2. In applying Exemption 4, OPI stated that releasing the withheld information—which included a loan guarantee application; the submitter's balance sheet; the identities of potential investors, partners, suppliers and customers; market analysis; and proposed investment structures, terms, and conditions—would cause substantial harm to the submitting companies' competitive interest. *Id.* Specifically, disclosing this information would give the submitter's competitors insight into the submitter's business operations and provide those competitors with a pricing advantage. *Id.* Furthermore, disclosure of the withheld information could give the submitter's competitors an unfair negotiating advantage. *Id.* In applying Exemption

5, OPI stated that the information—which included pre-decisional and deliberative comments and assessments—reflected the opinions of individuals who were consulted as part of the decision-making process and that the information was developed as part of the process that will lead to DOE's final policy decision. *Id.* at 3.

On August 21, 2018, the Office of Hearings and Appeals (OHA) received the Appellant's challenge to OPI's determination. Acknowledgement Letter at 1 (August 21, 2018). In its Appeal, the Appellant challenges OPI's use of FOIA Exemptions 4 and 5. Appeal at 1. The Appellant alleges the majority of the redacted information was factual in nature and not deliberative. Appeal at 1–2. It also alleges that OPI redacted segregable information. Appeal at 2. The Appellant further alleges that the Determination Letter "contains a single conclusory statement that 'disclosure may curtail companies from providing such information to [DOE] in the future,'" to justify its Exemption 4 redactions. Appeal at 2. Finally, the Appellant alleges that the Determination Letter "contains no information about why disclosure would cause substantial harm to NWIW's competitive position." Appeal at 3.

OPI and LPO provided me with annotated copies of the seven documents.We reviewed every page of the unredacted documents, as well as the annotations made in the redaction process.

II. Analysis

The FOIA requires, generally, that documents held by federal agencies 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). An agency is also required to "consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of the requested records is not possible." 5 U.S.C. § 552(a)(8)(A). DOE must "take reasonable steps necessary to segregate and release nonexempt information." *Id.*

A. Exemption 5

The Appellant challenges OPI's use of Exemption 5 to redact the responsive documents, alleging that DOE used the exemption too broadly. FOIA Appeal at 1–2. Exemption 5 of the FOIA exempts from mandatory disclosure "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). The courts have identified three traditional privileges, among others, that fall under Exemption 5: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). OPI asserted Exemption 5 under the deliberative process privilege.

The ultimate purpose of the deliberative process privilege is to protect the quality of agency decisions, *Sears*, 421 U.S. at 151, and to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973). Under the deliberative process privilege, agencies are permitted to withhold documents that reflect the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 151. In order to be shielded by the privilege, a record must be both predecisional (*i.e.*, generated before the adoption of agency policy) and deliberative (*i.e.*, reflecting the give-and-take of the consultative process). *Coastal States*, 617 F.2d at 866. The 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." *Id.* 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 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). If purely factual information is part of a document meant primarily to inform about the facts upon which a decision will be made, they are not deliberative and not exempted under 5 U.S.C. § 552(b)(5). *Vaughn v. Rosen*, 523 F.2d 1136, 1145-1146 (D.C. Cir. 1975). 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." *Petroleum Info. Corp.*, 976 F.2d at 1435. Selections of facts from a greater body of information may also, in some cases, be protected under Exemption 5. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974). The deliberative process may apply to purely factual information if the facts were (1) assembled through an exercise of judgment, (2) for the benefit of one called upon to take discretionary action, and (3) disclosure of those facts would reveal the decision-maker's deliberative process. *Mapother v. Dept. of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993). However, Exemption 5 is narrowly construed in favor of disclosure and "[t]his limited exception to the general principle that purely factual material may not be withheld under Exemption 5 may not be read so broadly … as to swallow the rule." *Nat'l Whistleblower Ctr. v. HHS*, 849 F. Supp. 2d 13, 37 (D.D.C. 2012). All reports contain facts that have been winnowed from some larger pool of information, and yet not all reports are protected as part of the deliberative process. *Id.* at 37–38. In such situations, Exemption 5 requires that, but for the redaction, some part of the deliberative process not known to the public would be revealed if the report was disclosed.

a. Documents 1 and 3

Documents 1 and 3 are factual presentations. They contain DOE summaries of facts about the NWIW proposed project—such as application scoring rubrics and DOE estimates of the total project cost—and about the technology to be used. Though these documents are informational in nature, they were compiled through an exercise of judgment (inclusion of only germane facts) for someone charged with making a discretionary choice (the Credit Review Board). Their disclosure would reveal the process by which DOE decides whether to guarantee a loan and for how much.

In *Montrose Chemical*, the EPA withheld from a FOIA disclosure summaries of evidence presented at a hearing. 491 F.2d at 64. The summaries had been prepared for the Administrator for the purpose of helping him make a decision. *Id.* at 65. The court held that the summaries were created through the judgment of the preparing attorneys for the purpose of assisting with an agency decision, and, therefore, were considered deliberative despite their factual nature. *Id* at 78. Specifically, the court stated that "[w]hether [the Administrator] weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process." *Id.*

Similarly, Documents 1 and 3 are DOE summaries of certain facts from NWIW's loan guarantee application; those summaries were prepared for the purpose of helping DOE's Credit Review Board make an agency decision. The Board's decisions should be free of outside pressures and focused, instead, on ensuring that its decision is in the public's interest. It cannot perform such a function if outside entities can critique whether it looked at the "right" factors, whether it gave enough weight to certain facts, or whether information was properly included or omitted. Disclosure of the DOE factual presentations in Documents 1 and 3 would open the door to such crippling criticism and impair the frank, independent discussion the deliberative process privilege exists to protect. Thus, the parts of these documents redacted under Exemption 5 are properly withheld.

b. Documents 2, 4, and 5

Documents 2, 4, and 5 provide analysis of the NWIW matter as well as recommendations for the Credit Review Board. These are internal documents created to assist with and advise DOE's decision whether to guarantee NWIW's loan. The documents' content is primarily subjective and the relatively small amount of factual information included in these documents was included to support and provide context for the subjective content. *See Montrose Chemical*, 491 F.2d at 78. Opinions and recommendations fall squarely within the purview of the deliberative process privilege. *See Coastal States*, 617 F.2d at 866. Thus, the parts of these documents redacted under Exemption 5 are properly withheld.

c. Document 6

Document 6 is a draft email from an LPO employee to an NWIW employee containing analysis and opinions. Since this is a draft, not an email shared with a third party, it is still an intra-agency record. Its content is the exact material contemplated by Exemption 5—opinions and analyses. *See Coastal States*, 617 F.2d at 866.

Furthermore, disclosure could reveal the author's deliberative process if the document was compared against the final email that was sent. In *Russel v. Dep't of the Air Force*, a FOIA requester sought draft versions of a published Air Force history. 682 F.2d 1045 (D.C. Cir. 1982). The court held that the drafts were protected by the deliberative process privilege because "a simple comparison between the pages sought and the official document would reveal what material supplied by subordinates senior officials judged appropriate for the history and what material they judged inappropriate. Exemption (b) (5) exists to prevent such disrobing of an agency decision-maker's judgment." *Id.* at 1049. Here, as in *Russell*, a simple comparison between the final email

and Document 6's draft email could reveal the author's editing and thought processes. Thus, the parts of this document redacted under Exemption 5 are properly withheld.

d. Document 7

Document 7 is a due diligence schedule comprised of lists of documents, the dates on which they were received or are expected to be received, and projected timelines. The withheld content is technically factual, but it is a list of what the LPO is considering in deciding whether to guarantee NWIW's loan. Document 7's release to the public would reveal the process LPO is using to make its decisions.

In *Mapother*, the court held that a chronology was not protected by the deliberative process privilege because it "reflect[ed] no point of view" and the "selection of the categories of facts to be recorded in no way betray[ed] the occasion that gave rise to its compilation." 3 F.3d 1533, 1540. In contrast, Document 7's facts reflect DOE's goals and expectations, and the included categories of facts clearly describe the occasion that gave rise to the document's compilation. Accordingly, the document's content is properly withheld under Exemption 5.

B. Segregability

The deliberative process privilege does not "protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *In re Sealed Case*, 121 F.3d 729, 737 (1997). Accordingly, the FOIA requires OPI to take reasonable steps to segregate nonexempt information. 5 U.S.C. § 552(a)(8)(A).

Context matters when determining whether purely factual information must be disclosed. Similar to the reasoning behind exempting Documents 1, 3, and 7 despite their factual nature, segregation is unreasonable when the disclosure of purely factual information could expose the deliberative process. *Elec. Frontier Found. v. Dep't of Justice*, 739 F.3d 1, 12–13 (D.C. Cir. 2014). Segregability may also be unreasonable when there is a relatively small amount of non-exempt material and "the cost of line-by-line analysis would be high and the result would be an essentially meaningless set of words and phrases." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). Draft documents categorically do not contain reasonably segregable information because "the ultimate decision to include or exclude facts and information in the final product reflects the deliberations of agency decisionmakers, which would be improperly exposed upon comparison of the preliminary and final versions." *Charles v. Office of the Armed Forces Med. Exam'r*, 979 F. Supp. 2d 35, 43 (D.D.C. 2013).

Documents 2, 4, and 5 represent recommendations and analysis by DOE in consideration of whether to grant NWIW's loan guarantee application. The documents contain a very small amount of purely factual information. Such information would, without the surrounding context, have relatively little meaning, except to reveal some of what DOE considers in loan guarantee deliberations. Accordingly, this information is not reasonably segregable. *See Elec. Frontier*

Found., 556 F.2d at 261; *Mead Data Cent., Inc.*, 566 F.2d at 261. Document 6 is a draft version of an email that was later sent. As a draft of a document that was later finalized externally, Document 6 does not contain reasonably segregable information. *See Charles*, 979 F. Supp. 2d at 43.

Though OPI did redact many pages and paragraphs in their entirety, the annotations accompanying those redactions show a conscious effort to redact only what was necessary and to release anything that was purely factual or already public. Exempted information should be targeted with as much precision as reasonably possible. We find that OPI has done just that.

C. Exemption 4

The Appellant challenges OPI's use of Exemption 4, alleging that OPI withheld information that the exemption does not protect. Exemption 4 shields from mandatory disclosure (a) trade secrets or (b) information that is "commercial or financial," "obtained from a person," and "privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). In this case, the Determination Letter does not claim that release of the withheld information would reveal a trade secret,[1] nor does it assert that the withheld information is "privileged." Instead, the Determination Letter contends that the information is "proprietary commercial and financial information regarding the submitter's application for a loan guarantee, the submitter's balance sheet, identities of potential investors, partners, suppliers and customers, as well as, [sic] market analysis, proposed investment structures, terms, and conditions." Determination Letter at 2.

Federal courts have held that the terms "commercial or financial" should be given their ordinary meanings and that records are commercial as long as the submitter has a "commercial interest" in them. *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). With respect to the requirement that the withheld 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]

In order to determine whether the information is "confidential," we must first determine whether the information was submitted voluntarily or involuntarily. Information is considered involuntarily submitted if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government." *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n. 3 (D.D.C. 1997), *aff'd in part, rev'd in part on other grounds*, 164 F.3d 37 (D.C. Cir. 1999).

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[1] If an agency determines that 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 (D.C. Cir. 1983).

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

Voluntarily submitted information is considered confidential 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). Involuntarily submitted information is considered confidential if its release would be likely to cause substantial harm to the competitive position of submitters. *Nat'l Parks*, 498 F.2d at 770. To qualify under the substantial harm prong, an identified harm must "flow from the affirmative use of proprietary information by competitors." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010); *Public Citizen*, 704 F.2d at 1291 n. 30. Additionally, "[t]he D.C. Circuit has recognized that the use of information by consumers, suppliers, labor unions, and other entities, even if those entities are not direct competitors, may be detrimental to a company's competitive position." *Ctr. for Auto Safety v. U.S. Dep't of Treasury*, 133 F. Supp. 3d 109, 129 (D.D.C. 2015). However, Exemption 4 does not protect against mere embarrassment in the marketplace or reputational injury. *United Techs. Corp.*, 601 F.3d at 564 (stating that an agency appropriately declined to apply Exemption 4 protection based on the harm that might result from competitors using the disclosed information to discredit a submitter in the eyes of current or potential customers). Furthermore, "[c]onclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." *Public Citizen*, 704 F.2d at 1291. However, "[c]ourts 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).

a. Voluntariness and Origin of Information

In the instant case, the redacted information in the responsive documents is considered commercial or financial, as appropriate, because NWIW maintains commercial and financial interests in the information submitted in its loan guarantee application. Information submitted by NWIW, a corporation, is considered under *Comstock* to be "obtained from a person." Because NWIW was required to submit this information as part of its loan guarantee application, we find that the withheld information was "involuntarily submitted." *See Lepelletier*, 977 F. Supp. at 460 n. 3. Because the information was submitted as a pre-condition of doing business with the federal government, it is assumed that disclosure would not likely endanger DOE's ability to collect that type of information in the future. *Nat'l Parks*, 498 F.2d at 770. Therefore, all that remains is a determination of whether disclosure would likely cause substantial harm to NWIW's competitive position.

b. Competitive Harm

OPI asserts that, if the withheld information were disclosed, NWIW's competitors would gain advantages in pricing and in business negotiations. The kinds of information withheld here under Exemption 4 have been found in the past to have the potential to cause substantial competitive harm if disclosed.

In *Judicial Watch, Inc. v. Exp.-Import Bank*, the Export-Import Bank, a government agency that provides loan guarantees and export insurance, withheld from a FOIA disclosure a document that contained financial details about a foreign project proposed by an American corporation. 108 F.

Supp. 2d 19, 33 (D.D.C. 2000). The court found that disclosure of the information—which included dollar amounts, names and roles of participants in the transaction, and the type of project—would provide the corporation's competitors with a business negotiations advantage. *Id.* This constituted substantial competitive harm sufficient to support an invocation of Exemption 4. *Id.*

The information NWIW submitted for its loan guarantee application is very similar to the information described in *Judicial Watch*. As in that case, it is not difficult to ascertain for the instant case that having access to information regarding NWIW's financial health, internal practices, vendors, and investors would allow NWIW's competitors to form complex and detailed strategies to undercut NWIW's prices and lure away crucial partners. Accordingly, LPO's allegation of likely competitive harm is sufficient to justify Exemption 4.

III. Order

It is hereby ordered that the Appeal filed on August 21, 2018, by Columbia Riverkeeper, No. FIA-18-0031 is denied.

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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Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

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