

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Argus Media, Inc.)		
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Filing Date: June 12, 2020)	Case No.:	FIA-20-0035
)		
_____)		

Issued: June 24, 2020

Decision and Order

On June 12, 2020, Argus Media, Inc. (Appellant) appealed a determination letter issued by the United States Department of Energy’s (DOE) Strategic Petroleum Reserve Project Management Office (SPR) regarding Request No. SPR-2020-00710. In that letter, SPR responded to Appellant’s request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004, in which Appellant sought contract records related to an announcement posted on DOE’s website in April 2020. *See* SPR Determination Letter at 1 (May 26, 2020) (summarizing Appellant’s FOIA request). SPR responded to Appellant’s FOIA request and provided nine pages of records. *Id.* SPR redacted portions of the contracts pursuant to Exemption 4 of the FOIA. *Id.* at 1–2. Appellant asserts on appeal that SPR improperly applied Exemption 4 and that SPR should release the records without redactions. Appeal at 1–2. As explained below, we grant Appellant’s appeal.

I. Background

On April 14, 2020, DOE announced that it was “negotiating contract awards with nine U.S. companies for the purpose of storing their U.S. produced crude oil in the . . . Strategic Petroleum Reserve” in response to “the combined effects of COVID-related [crude oil] demand destruction and excess supply.” *DOE Announces Crude Oil Storage Contracts to Help Alleviate U.S. Oil Industry Storage Crunch*, DOE, <https://www.energy.gov/articles/doe-announces-crude-oil-storage-contracts-help-alleviate-us-oil-industry-storage-crunch> (last visited June 17, 2020). According to DOE’s release, “[a]wardees can schedule return of their oil through March 2021, minus a small amount of oil to cover the SPR’s cost of storage.” *Id.*

On April 30, 2020, Appellant submitted a FOIA request seeking copies of crude oil storage contracts awarded to the nine companies (the Awardees) mentioned in DOE’s announcement. SPR provided nine single-page contracts in response to Appellant’s FOIA request, and referred Appellant to a publicly-available copy of the request for proposal (RFP) which each contract incorporated by reference. Determination Letter at 1–2 (May 26, 2020). SPR redacted the grade of crude oil being stored and the monthly fixed exchange ratio from each of the contracts.¹ SPR

¹ The fixed exchanged ratio is a fraction of the total crude oil stored by each Awardee which SPR retains as compensation for storage. *See Request for Proposal DE-RP96-20PO0001* at 12, DOE,

indicated in the Determination Letter that it issued to Appellant that “certain proprietary information has been redacted . . . pursuant to 5 U.S.C.(b)(4) [sic].” *Id.*

On June 12, 2020, DOE’s Office of Hearings and Appeals (OHA) received the appeal. Appellant’s appeal asserts that the Awardees did not provide the crude oil grades or monthly fixed exchange ratios under an assurance of privacy, and therefore that this information is not confidential and is not exempt from disclosure under Exemption 4. Appeal at 1–2. Appellant also identified publicly-available reports published by SPR listing transactions in which SPR sold crude oil to private purchasers, including the volume of crude oil sold and the purchase price for each transaction. *Id.* at 2. According to Appellant, since SPR publicly disclosed transaction details when selling crude oil, the Awardees would not have reasonably anticipated that SPR would maintain transaction details as confidential when acquiring crude oil. *Id.* In support of this position, Appellant noted that a DOJ publication interpreting Exemption 4 opined that private parties could seldom reasonably anticipate the confidentiality of contract terms reflecting the government’s own actions. *Id.* Lastly, Appellant argued that the disclosure of the contract terms could not cause harm to the Awardees because the fixed exchange ratios that they agreed to pay were unique to the market conditions that existed at the time of DOE’s RFP soliciting bids to store crude oil and that the disclosure of the terms would not inform a competitor’s proposal in the event that DOE issued a similar RFP in the future. *Id.*

OHA contacted SPR concerning the basis for its determination that the contract terms were confidential under Exemption 4. SPR responded that the RFP did not contain any provisions indicating that SPR would publish contract information publicly, unlike prior solicitations seeking bids to purchase crude oil from SPR, and thus SPR inferred that the respondents to the RFP may not have been aware that the contract details might be made public if their proposals were accepted. E-mail from SPR FOIA Officer to OHA at 1 (June 16, 2020). SPR also speculated that “those offerors who received awards may have some valid business reason(s) for not wanting the ratio information associated with this procurement divulged to its competitors.” *Id.* at 4.

II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA].” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). The agency has the burden to show that information is exempt from disclosure. 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 a requested record is not possible and take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(I)–(II).

A. Applicability of Exemption 4 to the Contracts

Exemption 4 exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). The grade of oil that the Awardees contracted for SPR to store and the fixed exchange ratios identifying the compensation the Awardees agreed to pay SPR for storage were unquestionably commercial or financial information. *100Reporters, LLC v. DOJ*, 248 F.Supp.3d 115, 136 (D.D.C. 2017) (finding that records describing “specific transactions, projects, bids, and business partners” are commercial or financial information). OHA, applying judicial precedent applicable in the District of Columbia, has long held that contract terms incorporated from a successful respondent’s proposal or bid are “obtained from a person.” *See, e.g., FOIA Group, Inc.*, OHA Case No. TFA-0239 at 3 (2008) (determining that all contract terms provided by a contractor were obtained from a person);² *see also Hodes v. Dep’t of Treasury*, 342 F.Supp.3d 166, 171 n.4 (D.D.C. 2018) (noting that, unlike other jurisdictions, “controlling precedent [in the D.C. Circuit] . . . treats government contract prices as ‘obtained from a person’ (i.e., the contractor) under FOIA [E]xemption 4.”). Thus, the only question before us is whether the redacted portions of the contracts were privileged or confidential.

SPR’s Determination Letter did not specifically indicate the basis for its redactions under Exemption 4. As there is no indication that the contracts are privileged, we will consider whether the redacted information is confidential. The U.S. Supreme Court has identified “two conditions that might be required for information communicated to another to be considered confidential. In one sense, information communicated to another remains confidential whenever it is customarily kept private, or at least closely held, by the person imparting it. In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2363 (2019) (citations omitted) (*Argus Leader*). We find that neither condition is applicable in this case.

The Awardees did not provide information establishing that they customarily keep the redacted contract information private, as *Argus Leader* requires. *Id.* SPR relayed that the Awardees objected to the inclusion of information concerning the storage contracts in a DOE press release on the basis that the information was “procurement sensitive.” E-mail from SPR FOIA Officer to OHA (June 16, 2020). While the Awardees objected to the disclosure of information related to the contracts, at least in press release form, there is no indication as to the extent to which they maintain crude oil storage arrangements as confidential. Therefore, we cannot conclude that SPR’s redactions meet the first test for confidentiality under *Argus Leader*.

We also find the second test for confidentiality under *Argus Leader* inapplicable. In a publication concerning the interpretation of Exemption 4 after *Argus Leader*, DOJ recommended that agencies evaluate whether information is provided under the assurance that it will remain secret by “consider[ing] . . . the government’s treatment of similar information and its broader treatment of information related to the program or initiative to which the information relates.” *Exemption 4 after the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media*, DOJ, <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media> (last visited June 17, 2020).

² Decisions issued by OHA are available on the OHA website located at www.energy.gov/oha.

DOJ further advised that:

absent an express assurance by the agency, a submitter would not normally have a reasonable expectation of confidentiality for records the agency has historically disclosed. In addition, what the government pays a private entity to supply goods or services to the government reflects the government's own actions and will often undermine a submitter's claim to reasonably expect such information to be kept confidential.

Id.

SPR provided no express assurances to the Awardees that it would maintain the crude oil grade or fixed exchange ratio contained in each contract as confidential. Moreover, as the Appellant indicated, SPR routinely discloses transaction details related to the sale of crude oil. *Strategic Petroleum Reserve Oil Sale Archival Reports*, SPR, <https://www.spr.doe.gov/does/OilSaleArchivalReports/OilSaleArchive.htm> (last visited June 18, 2020) (providing public copies of reports on individual oil sale transactions since FY 2017). DOJ's interpretation of confidentiality under Exemption 4 supports the Appellant's claim that the Awardees had no reasonable expectation that SPR would maintain the contract terms as confidential. When an agency contracts with a private party, the private party ordinarily has no basis to assume that the bottom line terms reflecting the total amount paid by one party and the benefit conferred on the other party are exempt from disclosure "absent an express assurance by the agency . . ." *Exemption 4 after the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media*, DOJ, <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media> (last visited June 17, 2020). Thus, we find that the second *Argus Leader* test for confidentiality is not satisfied in this case.

B. Absence of Reasonably Foreseeable Harm Resulting from Disclosure

As part of the FOIA Improvement Act of 2016, Congress required agencies to only exercise FOIA exemptions to withhold records if "the agency reasonably foresees that disclosure would harm an interest protected by an exemption . . ." FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 537, 539 (2016) (codified at 5 U.S.C. § 552(a)(8)(A)(i)(I)); *see also* 10 C.F.R. § 1004.10(c)(1) (DOE FOIA regulations implementing the cited passage of the FOIA Improvement Act). Applying this standard to an agency's invocation of Exemption 4 to withhold records, the agency "must explain how disclosing, in whole or in part, the specific information withheld under Exemption 4 would harm an interest protected by this exemption, such as by causing 'genuine harm to [a business'] economic or business interests' . . ." *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 2019 WL 7372663 at 14 (D.D.C. 2019).³

³ The Supreme Court rejected reading a comparable competitive harm test into the text of Exemption 4 in *Argus Leader v. Argus Leader*, 139 S.Ct. at 2364–65. However, it should be noted that the FOIA Improvement Act of 2016 was enacted well after the 2011 denial of the FOIA request at issue in *Argus Leader*. *See Argus Leader Media v. USDA*, 224 F.Supp.3d 827, 829 (S.D. 2016) (reciting the procedural history of the case). Thus, the FOIA Improvement Act of 2016 was not before the Supreme Court when it made its decision in *Argus Leader* and the decision has no bearing on the FOIA Improvement Act's command that agencies assess whether disclosure would cause reasonably foreseeable harm to an interest protected under an exemption before withholding records for requests submitted since its passage. *Ctr. for Investigative Reporting*, 2019 WL 7372663 at 14.

In addition to its challenges to SPR's determination under Exemption 4, Appellant argues that disclosure of the redacted portions of the contracts would not expose the Awardees to a reasonable risk of competitive harm. Appeal at 2. In its answer to this assertion, SPR explained that the companies "may have some valid business reason(s) for not wanting the ratio information associated with this procurement divulged to [their] competitors." E-mail from SPR FOIA Officer to OHA at 4 (June 16, 2020). Appellant, on the other hand, argued that "[t]he 'Monthly Fixed Exchange Ratio' that companies offered in their bids would be highly specific to the exact market conditions in April, when the combination of COVID-19 demand destruction and a surplus of crude oil created unprecedented conditions, and specific to the unique conditions of the [SPR]." Appeal at 2. We find Appellant's arguments compelling.

We do not perceive any risk of competitive harm to disclosing the grade of crude oil that the Awardees contracted for SPR to store, and thus we find that SPR should not have redacted this information from the contracts. With respect to the monthly fixed exchange ratios that Awardees agreed to pay for the storage of their crude oil, SPR has not sufficiently established that disclosure of this information could harm the competitive position of the Awardees. Market conditions for crude oil storage space vary considerably over time. *See Working and Net Available Shell Storage Capacity*, U.S. Energy Information Administration, <https://www.eia.gov/petroleum/storagecapacity/> (last visited June 18, 2020) (showing significant variation in utilization of total commercial crude oil storage capacity over six-month periods since 2011). Just as SPR's practice of publicly reporting the sale price of crude oil transactions at one point in time is unlikely to cause genuine harm to a protected interest held by Awardees to a successful purchaser's future bid because changing market conditions in the crude oil market prevents competitors from simply replicating a purchaser's prior bid, we have no basis to conclude that the oil storage market is so static that a competitor could use a company's fixed exchange ratio in April 2020 to undercut that company's bid for storage space months or years in the future.

SPR has not established that disclosure of the crude oil grades or the fixed exchange ratios would cause harm to a protected interest held by any of the Awardees. Therefore, even if Exemption 4 was applicable to the redacted portions of the contracts, we would nevertheless conclude that SPR should not have withheld the redacted portions of the contracts.

III. Order

It is hereby ordered that the appeal filed by Argus Media, Inc. on June 12, 2020, No. FIA-20-0035, is granted. This matter is remanded SPR to issue a new determination in accordance with the above Decision.

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 the right to pursue litigation. OGIS may be contacted in any of the following ways:

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