

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tim Hadley)
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Filing Date: July 18, 2014) Case No.: FIA-14-0047
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Issued: August 11, 2014

Decision and Order

On July 18, 2014, Tim Hadley (Appellant) filed an Appeal from a determination issued to him by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2014-00743-F). In that determination, the DOE 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. The DOE withheld portions of four documents. This Appeal, if granted, would require the DOE to release the withheld portions of those documents. As explained below, we have determined that the Appeal should be granted in part.

I. Background

On March 19, 2014, the Appellant filed a request with the DOE for “all information relating to OAS-RA-14-03 collected from any agency, entity or company to compile report.” Request E-mail dated March 19, 2014, from Appellant to FOIA-Central, OIR, DOE. This request was referred to the OIG, which identified 30 responsive documents, six of which were referred to the Office of Electricity Delivery and Energy Reliability (OE) for review. April 29, 2014, Determination Letter from Rickey R. Hass to Appellant. On July 18, 2014, OIR issued a determination with respect to the six OE documents. OIR released two documents in full and partially released the remaining four documents, which are the documents at issue in this Appeal. On the day that the determination was issued, the Appellant filed his Appeal.

The four documents at issue concern the status of a project undertaken by Progress Energy Service Company, LLC (Progress Energy), pursuant to a Smart Grid Investment Grant (SGIG) funded by the Department of Energy with American Recovery and Reinvestment Act funds. The DOE withheld certain participant contact information, as well as financial and performance information.

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.

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*). In this case, OIR withheld the information as commercial or financial information covered by Exemption 4.

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. *Public Citizen*, 704 F.2d at 1290. The withheld information – participant contact information, as well as financial and performance information - clearly satisfies the definition of commercial or financial information.

The withheld information also was “obtained from a person.” It is well established that information “obtained from a person” includes 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).^{1/} Progress Energy is such an entity.

Finally, we address whether the withheld information is “confidential.” Progress Energy is required to provide the withheld information as part of DOE oversight over the project and, therefore, that information was “involuntarily submitted.” Under *National Parks*, involuntarily submitted 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 the submitter. *National Parks*, 498 F.2d at 770.

^{1/} OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

OIR determined that the release of the commercial and financial information would cause the harms identified in *National Parks*. OIR stated:

The information withheld under Exemption 4 consists of sensitive, proprietary information that is maintained in confidence by the company, and that is not available in public sources. The information includes portions of email addresses, the names of vendors, the identity of hardware manufacturers, costs and project performance issues. Public disclosure of this information would cause substantial harm to the company's computer networks, diminishing commercial revenue, prejudicing the conduct or outcome of contractual or other negotiations among competitors and/or potential vendors and by revealing market sensitive information and trade secrets. Furthermore, disclosure may curtail companies from providing such information to the government in the future. For these reasons, this information is being withheld under Exemption 4 of the FOIA.

July 18, 2014, Determination Letter. In his Appeal and subsequent submissions, the Appellant argues that the release of the withheld information would not cause the submitter competitive harm. *See* emails from Tim Hadley dated July 18, July 23, and August 5, 2014.

With respect to the withheld portions of the email addresses, the Appellant asserts that employees release their full work email addresses in internet sites such as "Linked-In." The Appellant does not provide a specific example of such a release, and we are not aware of any. In any event, the submitter maintains that it does not publicly disclose the withheld information, and our review of the submitter's web sites supports that assertion. Finally, there is a difference between an isolated release of an email address and the release of a group of employee email addresses. Accordingly, we reject the Appellant's assertion that the information at issue here has been made available to the public. Given the rationale provided by OIR, we find that release of employee email addresses could cause competitive harm to Progress Energy, and they are, therefore, confidential. Consequently, we find that OIR properly withheld the email addresses pursuant to Exemption 4.

With respect to the remainder of the information, the Appellant first argues that release could not cause substantial competitive harm, because the project is unique and the submitter is a "monopoly." *See* email dated July 23, 2014. We need not address the Appellant's characterizations of the current nature of the project and the submitter. The courts have held that the type of information withheld – information related to vendors and pricing and performance - is the type of information whose release is likely to cause substantial competitive harm, including compromised relationships with vendors. *See GC Micro Corp. v. Defense Logistics Agency*, 33 F. 3d 1109, 1115 (9th Cir 1994) (*citing Gulf & Western Industries, Inc. v. United States*, 615 F. 2d 527, 530 (D.C. Cir 1979) (information such as a firm's profit rate, actual loss data, general and administrative expense rates, projected scrap rates, and learning curve data); *see also California-Arizona-Nevada District Organization Contract Compliance*, Case No. FIA-12-0060 (2012) (names of contractors and subcontractors contained in loan guarantee contract for a solar energy project). The Appellant further argues, however, that some vendor information is available at recovery.gov. Our review indicates that there is some vendor information at that site, but that does not necessarily mean that OIR improperly applied

Exemption 4 when it made the vendor-related deletions from the documents at issue. Accordingly, we will remand this matter to OIR so that it can review the information at recovery.gov and determine whether the release of information on that web site affects the withholdings at issue here. With respect to the other information, financial and performance information, we have reviewed the information and determined that its release would likely cause substantial competitive harm and, therefore, that OIR properly applied Exemption 4 to withhold the information.

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 the present case, the Appellant argues that the database documents are not the type of files that may be protected under Exemption 6. However, the Supreme Court and other federal courts have given the phrase “personnel and medical files and similar files” a broad meaning when a requested document refers specifically to an individual. *See, e.g., Washington Post*, 456 U.S. at 602; *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008) (stating that the threshold test of Exemption 6 is satisfied when government records contain information applying to particular individuals).

In determining whether a record may be withheld under Exemption 6, an agency must perform a three-step analysis. First, the agency must determine if a significant privacy interest would be compromised by the disclosure of the record. If the agency cannot find a significant privacy interest, 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) (NARFE); *see also Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if an agency determines that a privacy interest exists, the agency must then determine whether the release of the information at issue would further the public interest by shedding light on the operations and activities of the government. *See Reporters Comm. for Freedom of the Press v. Dep’t of Justice*, 489 U.S. 769, 773 (1989) (Reporters Committee). Lastly, 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 NARFE*, 879 F.2d at 874.

OIR withheld the personal email addresses and telephone numbers of non-federal employees pursuant to Exemption 6. 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). Release of this personal information would not shed much, if any, light on the operations and activities of the government. *See, e.g., Voinche v. FBI*, 940 F. Supp. 323, 329-30 (D.D.C. 1996) (finding that release of private individuals’ names contained in FBI files would not further an articulable public interest). Accordingly, release of the withheld information would constitute a clearly unwarranted invasion of personal privacy. Consequently, Exemption 6 was properly invoked to withhold the redacted information.

III. Conclusion

As indicated above, we have reviewed the withheld information and concluded that OIR properly applied Exemptions 4 and 6, with the possible exception of vendor-related information for which the request is being remanded for a further determination consistent with this decision. Accordingly, the Appeal should be granted in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by Tim Hadley, Case No. FIA-14-0047, is granted in part as described in Paragraph 2 below.
- (2) This matter is remanded to the Office of Information Resources to review the vendor-related Exemption 4 withholdings as specified in this Decision and Order.
- (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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