

United States Department of Energy
Office of Hearings and Appeals

In the Matter of DLA Piper)
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Filing Date: September 26, 2014) Case No.: FIA-14-0056
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Issued: October 24, 2014

Decision and Order

On September 26, 2014, DLA Piper (Appellant) filed an Appeal from a determination issued to it on August 21, 2014, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2014-00669-F). In that determination, OIR released one document which was responsive to the 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. OIR withheld portions of this document under Exemption 4 of the FOIA. This Appeal challenges the Exemption 4 withholdings from the document.

I. Background

On February 28, 2014, the Appellant filed a request with the OIR for a copy of an agreement executed with a division of the DOE with the following characteristics:

1. It was likely executed with the DOE Office of Science or (less likely) with the Office of Nuclear Physics;
2. It was likely executed in January 2014, or at least between December 2013 and February 2014;
3. The head of the relevant department is Jehanne Simon-Gillo, with Marc Garland and Wolfgang Runde involved;
4. The commercial partners would be two specific companies which were identified in the FOIA request; and
5. The contract would be an eight to nine-year agreement for the supply of Am-241 or AmO₂, with each commercial partner having made advance payments of \$3,000,000, giving them 25% rights to the production output, and leaving the DOE the rights to the balance for open sale.

E-mail dated February 28, 2014, from Tim Brennan, Appellant, to FOIA-Central, DOE. In response, OIR referred the request to the Office of Science. On August 21, 2014, OIR issued its final determination, which released one document while withholding portions of that document under Exemption 4. Determination Letter dated August 21, 2014, from OIR to Appellant. OIR

stated that the information withheld under Exemption 4 consisted of the identity of the buyer, contract cost agreements, dates of contract agreements and deliveries, amounts of products delivered, or received, total costs of products, maintenance or production, and financial costs. Disclosure of such information, OIR stated, would cause “participating companies financial harm by revealing to their competitors information about their isotope usage, distribution, and or packaging methods, and could harm their ability to compete effectively in the future.” *Id.* at 2.

The Appellant challenges the withholdings under Exemption 4. Appeal Letter dated September 22, 2014, from Timothy O. Brennan, Appellant, to Director, Office of Hearings and Appeals (OHA) at 1 – 2. The Appellant argues that:

1. None of the redacted terms of the released contract were obtained from a private party, but all originated with the DOE’s original proposal and subsequent draft contract;
2. The redacted information is not “confidential” under FOIA – that the terms not revised from the DOE draft contract had already been publicized and that disclosure of any terms which were revised are harmless because such terms are routinely disclosed and provide no competitor with insight into the buyers’ profit margins or business practices;
3. The federal procurement system is strongly rooted in the use of full and open disclosure and the DOE has stated no basis for circumventing these requirements to withhold information that is routinely disclosed; and
4. The federal government has publicized contracts nearly identical to this one in the past, so no FOIA exemption can justify withholding the contract.

Id. at 2.

II. Analysis – Exemption 4

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). 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.

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) (*Public Citizen*).

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 information withheld by OIR consists of commercial or financial information related to the identity of the buyer, contract cost agreements, dates of contract agreements and deliveries, amount of product delivered, or received, total costs of products, maintenance or production, and financial costs. Determination Letter at 2. OIR is not claiming that the information constitutes a “trade secret.” Therefore, 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 withheld from the released contract clearly satisfies the 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).^{*/} The only type of entity that is not considered a “person” under Exemption 4 is an agency of the federal government. *See Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360, 360, 99 S. Ct. 2800 (1979). The document that was released to the Appellant was a contract pursuant to which the DOE would develop, produce and sell Americium-241 and the buyer would contribute to development costs and purchase Americium-241. The DOE states that the contract resulted from negotiations with commercial entities who were potential purchasers, none of which was a federal entity. *See* Memorandum of October 14, 2014, telephone conversations among Marc Garland, Office of Science, Wolfgang Runde, Los Alamos National Laboratory, and Wade Boswell, Attorney Advisor, Office of Hearings and Appeals (October 14 Memorandum). The first negotiation occurred in April 2011 when the DOE met with a group of eight to twelve of the potential purchasers. The negotiating group of potential purchasers reduced in size over the course of the negotiations and in May 2013 there remained two potential purchasers who continued to negotiate with the DOE. *Id.* and E-mail dated October 15, 2014, from Garland to Boswell. The potential purchasers, as well as the entity that ultimately signed the contract as buyer, are within the definition of “person” as that term is used in Exemption 4.

The Appellant argues that the information withheld under Exemption 4 originated with the DOE and, as the DOE is not a person under Exemption 4, cannot be withheld. In support of Appellant’s argument, the Appeal included a draft contract which Appellant states was produced by the DOE. *See* Appeal at Exhibit A. The draft contract filed in support of the Appeal has been identified by the DOE as a draft it disseminated in February 2013 to the negotiating group of potential purchasers, which incorporated proposed terms that had resulted from prior negotiations between the DOE and the group of potential purchasers. October 14 Memorandum.

The federal courts have held that the fact that particular information was the subject of negotiation with the federal government does not necessarily preclude a finding that it was “obtained from a person” within the meaning of Exemption 4. Rather, the courts have looked to

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

the identity of the party from whom the information originated. *See, e.g., Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the government, that did not alter the fact that the licensee is the ultimate source of the information inasmuch as the licensee had to provide the information in the first instance); *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-103 (D.D.C. 2008) (concluding that incentive award payments negotiated by the parties were not "obtained from a person," because agency failed to demonstrate that the contractor was the source of the information, and not the agency). Similarly, we have previously held that portions of agreements between the DOE and non-federal entities may be considered to have been "obtained from a person" when the non-federal entity was the source of the information. *See, e.g., William E. Logan, Jr. & Associates*, Case No. VFA-0484 (1999); *Research Focus, L.L.C.*, Case No. TFA-0247 (2008); *SACE*, Case No. TFA-0442 (2011); *Scott A. Hodes, Esq.*, Case No. TFA-0453 (2011) (*Hodes*).

In the present case, the information withheld falls into the following three categories: information that originated with the DOE (Category One Withholdings); terms negotiated between the DOE and the group of potential purchasers where one or more of the potential purchasers were the source of the withheld information (Category Two Withholdings); and terms negotiated between the DOE and the ultimate purchaser where the ultimate purchaser was the source of the withheld information (Category Three Withholdings). The following are Category One Withholdings, redactions of information that originated with the DOE, and cannot be withheld under Exemption 4 since the DOE does not constitute a "person" under Exemption 4:

- Page 1, Block 9;
- Page 2, Section I.3, Line 3;
- Page 2, Section I.4, Lines 2, 3 and 4;
- Page 2, Section I.5;
- Page 2, Section I.6;
- Page 3, Section II.13;
- Page 4, Section II.14;
- Page 4, Section 15.A, dates and production amounts on final four lines of the page;
- Page 5, Section 15.A, date and production amount on first line of the page;
- Page 5, Section 15.C, dates and production amounts final two lines of the table; and
- Page 10, Phase I Cost Breakdown.

See October 14 Memorandum. OIR is directed, on remand, to evaluate the Category One Withholdings and release the information, absent a determination that there exists an appropriate exemption justifying the withholding of such information.

The following are Category Two Withholdings, related to negotiated terms where one or more members of the group of potential purchasers were the source of the information:

- Page 1, Block 5;
- Page 2, paragraph preceding the heading "I. General";
- Page 3, Section I.7;
- Page 3, Section II.12;
- Page 5, Section II.15.D;
- Page 6, Section II.15.E, F and G;

Page 6, Section III.16;
Page 6, Section III.17; and
Page 6, Section III.18.

See Id.

The following are Category Three Withholdings, as they relate to negotiated terms where the ultimate purchaser under the contract was the source of the information:

Page 1, Block 3;
Page 1, Block 5;
Page 1, Block 10;
Page 2, Section I.3, Line 1;
Page 2, Section I.4, Line 1;
Page 3, Section II.11;
Page 4, Section II.15 Introductory Lines;
Page 4, Section II.15.A Lines 1, 2 and 3 and pricing information on the final four lines of the page;
Page 5, Section II.15.A pricing material on line of page and Line 2;
Page 5, Section II.15.B; and
Page 5, Section II.15.C excluding the redacted dates and production amounts on final two lines of the table.

See Id.

Category Two and Category Three Withholdings constitute “commercial or financial” information that was obtained from a “person” under Exemption 4.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be “confidential.” In this case, the potential purchasers and the ultimate purchaser were required to participate in negotiations with the DOE in order to purchase Americium-241. Accordingly, we find that the withheld information was “involuntarily submitted.” *Cf. Hodes* at 4. 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 submitter. *National Parks*, 498 F.2d at 770. Not every competitive harm to a submitter’s competitive position that might result from the release of information is protected under Exemption 4; the expected harm must be *substantial* in nature. *Id.*

OIR determined that release of the information withheld from the document “would cause participating companies financial harm by revealing to their competitors information about their isotope usage, distribution, and or packaging methods and *could* harm their ability to compete effectively in the future.” Determination Letter at 2 (emphasis added). This determination does not satisfy the requirement under Exemption 4 that withheld information is *likely* to cause *substantial* competitive harm to the submitter.

Additionally, withholding information under Exemption 4 requires a determination that release of each specific item of information is likely to cause substantial competitive harm to the submitter of that information. With respect to this requirement, we note the following three

potential deficiencies in OIR's initial determination. First, the release of the information must cause harm to the submitter of the information. In the case of Category Three Withholdings, the submitter was the ultimate purchaser under the executed contract; however, in the case of Category Two Withholdings, the submitter may have been one of the potential purchasers who withdrew from the negotiations prior to contract execution. The information provided by OIR is insufficient to determine if the proper distinction was made between the submitters of Category Two Withholdings and Category Three Withholdings in analyzing competitive harm. Second, even upon a conclusion that the contract contains information that if released is likely to cause substantial competitive harm to the submitter, that conclusion cannot be applied to every negotiated term where a non-federal entity was the source of such information. *Each* item withheld must meet the requirement that its release would likely cause substantial competitive harm to the submitter. Several of the withholdings (e.g., that from Block 5) are unlikely to survive such an evaluation. Third, the DOE based its determination that competitive harm could result to submitters upon its knowledge of the industry and its history of dealing with purchasers of similar products, without any inquiry of the actual submitters of the information withheld from this contract. October 14 Memorandum. Prior to making a final determination to withhold information in reliance upon Exemption 4, consultation with the submitter of such information needs to be undertaken. *Cf. Hodes* at 2. In this case, consulting with submitters to gauge the confidentiality of commercial or financial information seems particularly relevant as the participants engaged in negotiations with no formal confidentiality provisions in place to safeguard their exchanges of information or the dissemination of drafts. *See* Memorandum of October 16, 2014, telephone conversation between Runde and Boswell.

As noted above, the Category Two and Category Three Withholdings are of commercial or financial information obtained from a person; however, the Determination Letter does not articulate a conclusion that is sufficient to justify the withholding of such information as "confidential" under Exemption 4. Further, there is insufficient information to determine whether the Category Two and Category Three Withholdings were subjected to sufficient evaluation to reach a proper conclusion with respect to the confidentiality requirements of Exemption 4. On remand, OIR is directed to issue a new determination, either releasing the information or properly justifying its withholding under Exemption 4 or another appropriate exemption.

III. Conclusion

After considering the Appellant's arguments, we find that the Category One Withholdings cannot be withheld under Exemption 4 and there is insufficient information to determine whether the Category Two and Three Withholdings can be properly withheld under Exemption 4. This matter will be remanded to OIR for issuance of a new determination. Accordingly, the Appeal will be granted.

It Is Therefore Ordered That:

- (1) The Appeal filed by DLA Piper, Case FIA-14-0056 is hereby granted as set forth in paragraph (2) below.
- (2) This matter is hereby remanded to OIR, which shall issue a new determination in accordance with the instructions set forth in the above 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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