

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

In the Matter of:)	Case No.:	FIA-12-0010
)		
Hughes Socol Piers Resnick DYM, Ltd.)	Filed:	March 9, 2012
)		
_____)		

Issued: March 30, 2012

Decision and Order

On March 9, 2012, Hughes Socol Piers Resnick DYM, Ltd. (Hughes Socol) appealed a determination issued to it on February 15, 2012, by the Chicago Office of the Department of Energy (DOE). The Chicago Office had responded to a request that Hughes Socol had 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 Chicago Office had identified eight responsive documents, but it withheld them under FOIA Exemption 4. This appeal, if granted, would require the Chicago Office to release the withheld information to Hughes Socol.

I. Background

On January 19, 2012, Hughes Socol filed a FOIA request with the Chicago Office for “Disclosure Statements, and any amendments to them, submitted by UChicago-Argonne, LLC, operator of Argonne National Laboratory, between January 1, 2008 and January 1, 2012, that disclose cost accounting practices, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs.” Appeal Letter at 1.

The Chicago Office found the following eight documents:

1. Final version of the Disclosure Statement effective October 1, 2010 (submitted March 11, 2011);
2. Revised Disclosure Statement effective October 1, 2008 (submitted February 2, 2009);
3. Second revised Disclosure Statement effective October 1, 2007 (submitted June 26, 2008);
4. Revised Disclosure Statement effective October 1, 2007 (submitted March 28, 2008);
5. Updated version of the Disclosure Statement effective October 1, 2011 (submitted December 22, 2011);

6. Disclosure Statement effective October 1, 2010 (submitted July 30, 2010);
7. Revised Disclosure Statement effective October 1, 2009 (submitted March 5, 2010); and
8. Revised Disclosure Statement effective April 1, 2009 (submitted May 7, 2009).

Determination Letter at 1. The Chicago Office invoked Exemption 4 to withhold each document in its entirety. *Id.* It explained that the documents contain confidential commercial information from UChicago-Argonne, LLC, such as direct and indirect operation costs, employee benefit plans, depreciation and capitalization practices, deferred compensation, insurance costs, and other costs and credits. Releasing this information, the Chicago Office explained, would “likely . . . cause substantial harm to [UChicago-Argonne, LLC’s] competitive position . . . by making known information to potential competitors for the Argonne National Laboratory Prime Contract to operate the Argonne facility that would enable such competitors to undercut Argonne’s positions.” *Id.* at 2.

On Appeal, Hughes Socol argues that the Disclosure Statements should be released for three reasons. First, the current Disclosure Statement supersedes six of the eight responsive documents. Thus, those six documents contain information that is stale, not competitive. Appeal Letter at 5. Second, it argues that the University of Chicago has managed the Argonne National Laboratory since 1946, under long-term contracts (the most recent ending on Sept. 30, 2015). Thus, it says, “The relevant ‘market’ is not characterized by actual competition.” *Id.* Third, Hughes Socol notes that Congress has held hearings on the indirect costs of DOE facilities and the need for oversight. Thus, it says, the DOE should release the information out of a “compelling public interest.” *Id.* at 6.

II. Analysis

A. Exemption 4

1. The Chicago Office Properly Invoked Exemption 4 to Withhold the Disclosure Statements

Exemption 4 protects information from disclosure when it is a trade secret or when it is (i) commercial or financial; (ii) obtained from a person; and (iii) privileged or confidential. 5 U.S.C. § 552(b)(4).

i. *Commercial or Financial*

Information is “commercial” if “it serves a ‘commercial function’ or is of a ‘commercial nature.’” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002) (citations omitted).

The Disclosure Statements are commercial information. They serve a “commercial function” – they describe UChicago-Argonne, LLC’s cost accounting practices and procedures for its business of running the Argonne National Laboratory.

ii. *Obtained from a Person*

“Person” includes individuals, partnerships, corporations, associations, and public or private organizations other than an agency. *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (applying the definition of person in 5 U.S.C. § 551(2)).

The Disclosure Statements were obtained “from a person.” The FOIA’s broad definition of a person includes business organizations such as UChicago-Argonne, LLC.

iii. *Privileged or Confidential*

The definition of “confidential” depends on whether the information was voluntarily or involuntarily submitted to the agency. *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). To determine whether a document was submitted voluntarily or involuntarily, the agency must rely upon “legal authority, rather than the parties’ beliefs or intentions. . . .” *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 244 F.3d 144, 149 (D.C. Cir. 2001). Information was submitted involuntarily where “any legal authority compel[led] its submission, including informal mandates that call[ed] for the submission of the information as a condition of doing business with the government.” *Lepelletier v. Fed. Deposit Ins. Corp.*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997), *rev’d in part on other grounds*, 164 F.3d 37 (1999).

Voluntarily submitted information is confidential if the submitter would not customarily release it to the public. *Critical Mass Energy Project*, 975 F.2d at 879. The agency has the burden of proving the submitter’s custom. *Id.*

Involuntarily submitted information is confidential if releasing it is likely to impair the government’s ability to obtain necessary information or cause substantial harm to the submitter’s competitive position. *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). “Conclusory and generalized allegations of substantial harm . . . cannot support an agency’s decision to withhold requested documents.” *Pub. Cit. Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

Here, the Disclosure Statements contain information submitted by UChicago-Argonne, LLC, and we find that that information is confidential. UChicago-Argonne, LLC submitted the information involuntarily because the government required it to complete the Disclosure Statements as part of a response to a solicitation from the government. *See* 48 C.F.R. 9903.202-1 (requiring Disclosure Statements from certain institutions receiving prime contracts). The information reflects UChicago-Argonne, LLC’s business format, types of sales, methods of charging the government, and whether it charges the government average costs or another rate for materials and labor. Releasing this information would allow the competitors of UChicago-Argonne, LLC to know its bidding strategy, while UChicago-Argonne, LLC would not know the bidding strategy of its competitors. This asymmetry of information would likely cause substantial competitive harm to UChicago-Argonne, LLC, by allowing its competitors to submit lower bids.

2. Hughes Socol's Arguments

i. *The Current Disclosure Statement Supersedes Six Others*

Hughes Socol argues that six of the eight Disclosure Statements contain no competitive information because they have been superseded by more recent Disclosure Statements. Appeal Letter at 5.

We find this argument unpersuasive. Much of each Disclosure Statement consists of form responses with a series of boxes to check. Regardless of whether the responses changed between earlier and current Disclosure Statements, the responses still reveal the confidential commercial information that consists of UChicago-Argonne, LLC's proprietary business strategies.

ii. *The Prime Contract Lacks Competition*

Hughes Socol also argues that the University of Chicago has managed the Argonne National Laboratory since 1946, under long-term contracts (the most recent ending on Sept. 30, 2015). Thus, it says, "The relevant 'market' is not characterized by actual competition." Appeal Letter at 5.

We find this argument unpersuasive. When the current operating contract began in October 2006, a number of companies expressed interest.¹ The contract expires every 10 years. Moreover, at any time, a competitor may express interest, and the Chicago Office can terminate UChicago-Argonne, LLC's contract.²

iii. *Releasing the Disclosure Statements Would Further the Public Interest*

If the FOIA exempts information from mandatory disclosure, the DOE should generally release it if doing so would further the public interest. 10 C.F.R. § 1004.1. Hughes Socol argues that releasing the Disclosure Statements would further the public interest. Appeal Letter at 6.

Even if that were so, agencies lack the discretion to release information properly withheld under Exemption 4. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987). The Trade Secrets Act bars the agencies from the discretionary release of information covered by the Act. 18 U.S.C. § 1905. Exemption 4 co-extends with the Trade Secrets Act, so the Trade Secrets Act also bars the agencies from the discretionary release of information withheld under Exemption 4. *CNA Fin. Corp.*, 830 F.2d at 1151-52.

B. Segregability

Even if the FOIA exempts documents from disclosure, non-exempt information that is "reasonably segregable" from those documents must be disclosed after the exempt information is redacted. *Johnson v. Exec. Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing 5 U.S.C. § 552(b)).

¹ E-mail from Jennifer Gilbert, Attorney, General Law Division, Chicago Office, Mar. 22, 2012.

² *Id.*

Exemption 4 protects UChicago-Argonne, LLC's confidential commercial information in the Disclosure Statements. But the Disclosure Statements also contain much additional, segregable information that Exemption 4 may not protect. For example, each Disclosure Statement contains instruction segments that contain no responses from UChicago-Argonne, LLC. We will remand this matter to the Chicago Office for it to release reasonably segregable information. It may do so by redacting UChicago-Argonne, LLC's responses from each Disclosure Statement.

It Is Therefore Ordered That:

- (1) The Appeal that Hughes Socol Piers Resnick DYM, Ltd. filed on March 9, 2012, OHA Case No. FIA-12-0010, is granted in part, as explained in Paragraph (2), below, and denied in all other respects.
- (2) This matter is remanded to the Chicago Office for it to release reasonably segregable information to Hughes Socol Piers Resnick DYM, Ltd.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 30, 2012