

February 13, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Burkhalter, Rayson & Associates

Date of Filing: December 17, 2002

Case Number: TFA-0008

On December 17, 2002, Burkhalter, Rayson & Associates (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Oak Ridge Operations Office (OR). In that determination, OR responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OR released several responsive documents in their entirety. However, OR withheld one responsive document under FOIA Exemption 3. This Appeal, if granted, would require OR to release that document to the Appellant.

I. BACKGROUND

On April 27, 2002, the Appellant filed a request for information with OR seeking a number of documents. Determination Letter at 1. On November 22, 2002, OR issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant and withholding one document, "the proposal submitted by UT-Battelle, LLC, . . . that resulted in UT-Battelle, LLC, receiving the contract for [managing and operating the Oak Ridge National Laboratory]" (the Proposal) in its entirety under FOIA Exemption 3. Determination Letter at 1. On December 17, 2002, the Appellant submitted the present Appeal challenging OR's withholding determination.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Only Exemption 3 is at issue in the present case. Exemption 3 of the FOIA allows agencies to withhold information that is "specifically exempted from disclosure by statute [other than the FOIA

itself] provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). As articulated by the Supreme Court in *CIA v. Sims*, 471 U.S. 159, 167 (1985), application of Exemption 3 is a two-step process. First, an agency must determine whether the statutory provision in question satisfies the foregoing requirements of Exemption 3, and if so, the agency must next determine whether the subject information falls within the purview of that statutory provision. *Id. See also Kelly, Anderson & Associates, Inc.*, Case No. VFA-0638, 28 DOE ¶ 80,137 (2001).

In its determination, OR relied upon the National Defense Authorization Act for Fiscal Year 1997. Public Law 104-201, Section 821. Section 821 prohibits the release of a proposal submitted in response to a competitive solicitation. *Id.* However, this requirement “does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the [DOE] and the contractor that submitted the proposal.” 10 U.S.C.A. § 2305. The Appellant correctly notes that the Proposal was in fact incorporated by reference into the contract between DOE and UT-Battelle. Contract No. DE-AC05-00OR22725 at Section H-15, Page 11 of 27 and Section I-71, Page 91 of 236. Accordingly, we find that the Proposal is not exempted from mandatory disclosure under the FOIA by the National Defense Authorization Act for Fiscal Year 1997.

Accordingly, we are remanding this matter to OR. On remand, OR must promptly issue a new determination letter. The new determination letter must either release the Proposal to the Appellant or provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof).

It Is Therefore Ordered That:

- (1) The Appeal filed by Burkhalter, Rayson & Associates, Case No. TFA-0008, is hereby granted as set forth in Paragraph (2) and denied in all other aspects.
- (2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth above.
- (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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 13, 2003