

May 27, 2004
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: B & F Repair & Maintenance Inc.

Date of Filing: April 14, 2004

Case Number: TFA-0056

On April 14, 2004, B & F Repair & Maintenance Inc. (the Appellant) filed an Appeal from a second and final determination issued by the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) Service Center (Service Center). In that determination, the Service Center 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. The Service Center released portions of a responsive document, but withheld other portions of that Document under FOIA Exemption 4. This Appeal, if granted, would require the Service Center to release the withheld portions of the document to the Appellant.

I. Background

On December 23, 2003, the Appellant filed a request for information with the Service Center seeking a number of documents. Request Letter dated December 23, 2003, from C. Brian Meadors, attorney for Appellant, to Terry Apodaca, DOE, NNSA.^{1/} On January 21, 2004, the Service Center issued a determination letter in response to this request. Determination Letter dated January 21, 2004, from Carolyn A. Becknell, FOIA Officer, DOE, NNSA, to Brian Meadors.^{2/} On March 19, 2004, the Service Center issued a second

^{1/} The Appellant originally filed its request letter on October 19, 2003, with the Small Business Program Manager. Request Letter dated October 19, 2003, from Brian Meadors to Greg Gonzales. On December 22, 2003, the Appellant requested the status of the FOIA request and was told that the request needed to be made directly to the FOIA office. Electronic Mail Message dated December 22, 2003, from Brian Meadors to Greg Gonzales.

^{2/} The Appellant filed suit in the United States District Court for the Western District of Arkansas, Fort Smith Division, after the January 21, 2004 final determination was issued by the Service Center.

and final Determination Letter, releasing one of the requested documents with portions redacted. Determination Letter dated March 19, 2004, from Carolyn Becknell to Brian Meadors (March 19, 2004 Determination Letter). On April 14, 2004, an Appeal was filed responding to the Service Center's second and final determination. Appeal Letter dated April 8, 2004, from Brian Meadors to Director, Office of Hearings and Appeals, DOE.

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 4 is at issue in the present case.

A. Exemption 4

Exemption 4 exempts from mandatory public 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). 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." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines 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. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial

harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In its March 19, 2004 Determination Letter, the Service Center withheld portions of the contract between the Service Center and Chugach McKinley, Inc. (Contractor), under Exemption 4, on the grounds that release of the withheld information would cause the submitter competitive harm. The Service Center withheld individual dollar amounts and General and Administrative (G&A) percentages for cost elements in the Contract and the names and titles of key personnel who are dedicated full-time to the Contract. March 19, 2004 Determination Letter at 2. The Service Center indicated that the information it withheld under Exemption 4 is held in the strictest confidence by the Contractor. *Id.* at 1. Specifically, the Service Center claims that the

disclosure of the deleted dollar amounts . . . would disclose the contractor's plan for remuneration of its employees, its methods of allocating costs, its indirect rate structures, its allocation of resources, both personnel and corporate, and insight into its approach to the work contracted for. Such information would provide competitors with a clear advantage in anticipating the contractor's responses in future competitions and would aid in attempting to hire away the contractor's employees.

March 19, 2004 Determination Letter at 3.

Further, in regard to the names and titles of key personnel, the Service Center claims that

the release of the identity of key Contract personnel would provide competitors with a significant opportunity to pirate away personnel who are vital to the firm's competitive position in the marketplace. Employee raiding would have the effect of depriving the company of the talent of key persons dedicated full-time to the Contract and providing a source of corporate intelligence about company plans, methods, structure, clients, and other proprietary information and disrupting performance of this and other business commitments. The information would also indicate method of allocation and commitment of its corporate personnel resources, and the company's technical approach to this and other competitions.

Id. The Service Center concludes that release of any of the withheld information would likely cause substantial competitive harm *Id.*

We will analyze this case under the *National Parks* test described above because the Contractor submitted the information in the proposals on a non-voluntary basis, as this information is required by the DOE's Acquisition Regulations. *See* 48 C.F.R. § 970.5204-22

(1992). For the information to be found to be “confidential,” it must meet one of two tests: its release would either impair the government’s ability to obtain necessary information in the future or cause substantial harm to the competitive position of the submitter. *National Parks*, 498 F.2d at 770. Release of this information is not at all likely to impair the government’s ability to obtain necessary information of this type in the future because, as stated above, it is required to be submitted under the DOE Acquisition Regulations. Consequently, the sole test for establishing confidentiality of the submitted information in this case is whether its release will substantially harm the submitter’s competitive position.

Using the “competitive harm” prong of the *National Parks* test, the Service Center withheld from the Appellant the dollar amounts, G&A percentages, and names and titles of key personnel. March 19, 2004 Determination Letter at 2. The Service Center alleges that release of the withheld information is likely to cause substantial competitive harm to the Contractor. *Id.* at 3. The Service Center goes on to state that a competitor with knowledge of the withheld information would have a clear advantage in anticipating the Contractor’s responses in future competitions and would aid in hiring away the Contractor’s employees. *Id.* We agree. Release of the information withheld by the Service Center would result in competitive harm to the Contractor from whom it was obtained. We have previously held that names of employees can be withheld, because release could allow competitors to offer employment to those personnel. *Glen M. Jameson*, 26 DOE ¶ 80,191 at 80,731 (1996). Likewise, we have held that release of similar financial information would cause competitive harm to a similarly situated Contractor. *IBEW Local 125, Case No. TVA-0695*, 28 DOE ¶ 80,197 (October 24, 2001).

B. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Martin Becker, Case No. VFA-0710*, 28 DOE ¶ 80,222 (May 2, 2002). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.

III. Conclusion

Because the Service Center has met its burden of showing that it properly withheld the information under Exemption 4, we shall deny the Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by B & F Repair & Maintenance Inc., Case No. TFA-0056, is hereby denied.

(2) 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: May 27, 2004