

August 13, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Appellant: UT-Battelle, LLC

Date of Filing: July 7, 2004

Case Number: TFA-0064

On July 7, 2004, UT-Battelle, LLC filed a Motion for Reconsideration of a determination issued by the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) on February 13, 2003. In that determination, OHA granted an Appeal filed by Burkhalter, Rayson & Associates (Burkhalter) 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. This Motion, if granted, would reverse OHA's February 13, 2003 determination.

I. BACKGROUND

On April 27, 2002, Burkhalter filed a request for information with DOE's Oak Ridge Operations Office (OR) seeking a number of documents. On November 22, 2002, OR issued a determination letter (the November 22, 2002 Determination Letter) releasing a number of responsive documents to Burkhalter 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, Burkhalter filed an appeal of that determination challenging OR's withholding of the Proposal. On February 13, 2003, we issued a Decision and Order holding that OR had improperly withheld the Proposal under Exemption 3. *Burkhalter, Rayson & Associates, Case No. TFA-0008*, 28 DOE ¶ 80,271 (February 13, 2003) (*Burkhalter I*). Accordingly, we remanded the matter to OR with instructions to "promptly release the Proposal to the Appellant or to provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof)." *Id.* Our holding in *Burkhalter I* is the subject of the present motion.

On July 3, 2003, OR issued a new determination letter (the July 3, 2003 Determination Letter). On July 25, 2003, Burkhalter filed an appeal of the July 3, 2003 Determination Letter, contending that OR had failed to identify three volumes (Volumes III, IV and V) of the Proposal. On September 12, 2003, we issued a decision and order granting the July 3, 2003 Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates, Case No. TFA-0037*, 28 DOE ¶ 80,302 (September 12, 2003) (*Burkhalter II*). In *Burkhalter II*, we found that OR had failed to fully comply with our order in *Burkhalter I*. *Id.* Specifically, we found that OR had effectively withheld Volume III of the Proposal by improperly failing to identify it as responsive. *Id.* Accordingly, we remanded the matter to OR instructing it to promptly issue a new determination letter which "must either release to the Appellant the contents of Volume III or provide a meaningful description of any portion of the contents of

Volume III it determines to withhold under an appropriately justified FOIA exception.” *Id.* (emphasis supplied). On January 21, 2004, OR issued a determination letter (the January 21, 2004 Determination Letter) releasing a redacted copy of Volume III to Burkhalter. However, OR deleted portions of Volume III under Exemptions 4 and 6. On February 18, 2004, Burkhalter filed an appeal of OR’s January 21, 2004 Determination, contending that OR improperly withheld information under Exemptions 4 and 6. On March 17, 2004, we issued a Decision and Order granting the February 18, 2004 Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates, Case No. TFA-0054*, 28 DOE ¶ 80,332 (March 17, 2004) (*Burkhalter III*). In *Burkhalter III*, we found that OR’s January 21, 2004 Determination had failed to provide sufficient justification for its withholdings under Exemptions 4 and 6. Accordingly, we remanded the appeal to OR for further processing instructing OR to “either release the information it is currently withholding under Exemption[s] 4 [and 6] or provide a more thorough explanation of its basis for withholding that information.” Moreover, we cautioned OR that “[b]efore releasing any of the information it is withholding, OR must, of course, notify the submitter of that information and provide it with an opportunity to explain how release of that information could cause it substantial competitive harm. Exec. Order No. 12,600, § 1.”

On July 8, 2004, UT-Battelle submitted the present motion for reconsideration. In this motion, UT-Battelle claims that OR failed to provide it with notice (as required by Executive Order 12,600 § 1) before releasing portions of the proposal in its July 3, 2003 and January 21, 2004 Determinations. UT-Battelle contends that had it been provided with the required notice of OR’s plans to release portions of the Proposal submitted by UT-Battelle, it could have provided both OR and OHA with information and explanation that would have convinced OR and OHA that the entire Proposal is exempt from the FOIA’s mandatory disclosure mandate under FOIA Exemption 3. UT-Battelle requests that we issue a new decision withholding those portions of the Proposal that have not already been released to Burkhalter and requiring the withholding of the Proposal in response to any future FOIA requests.

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*).

Exemption 3 allows the withholding of information under other statutes, but only if they meet specific criteria. *See, e.g., Essential Information, Inc. v. USIA*, 134 F.3d 1165, 1168 (D.C. Cir. 1998). Specifically, Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if the statute either “(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). The D.C. Circuit has expressly held that “a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure.” *Reporters Comm. for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev’d on other grounds*, 489 U.S. 749 (1989). An agency must also establish that the records in question fall within the withholding provision of the non-disclosure statute. *See A. Michael’s Piano v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994); *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983); *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 868 (D.C. Cir. 1981); *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978).

UT-Battelle contends, as did OR’s November 22, 2002 Determination, that Section 821 of the National Defense Authorization Act of 1997 (NDAA) exempts the Proposal from disclosure. It is well settled that the NDAA is a withholding statute within the meaning of Exemption 3. *See, e.g., Kelly, Anderson & Associates*, 28 DOE ¶ 80,137 (2001); *Center for Public Integrity*, 28 DOE ¶ 89,129 (2000); *Chemical Weapons Working Group, Inc.*, 26 DOE ¶ 80,170 (1997) (*Chemical Weapons*); *Patricia McCracken*, 26 DOE ¶ 80,227 (1997). Section 821(b)(1) of the NDAA, entitled “Prohibition On Release of Contractor Proposals, Civilian Agency Acquisitions,” provides that “a proposal in the possession or control of an executive agency *may not be made available* to any person under [the FOIA],” unless such proposal is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal. (Emphasis added). The plain language of Section 821(b)(1) allows no discretion in withholding contractor proposals that are not set forth or incorporated by reference in a contract. The section therefore satisfies Subpart A of Exemption 3. *See Chemical Weapons, supra*.

Moreover, there is no argument that the information at issue in the present case is anything but a “proposal” for purposes of Section 821(b)(1). Section 821(b)(3) of the NDAA defines “proposal” to mean “any proposal including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.”

However, Section 821(b)(1)’s 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. In *Burkhalter I*, Burkhalter contended that the Proposal was in fact incorporated by reference. In support of this contention, Burkhalter cited language in the contract between UT-Battelle and OR (the Contract). Specifically, Burkhalter cited Section H-15, Page 11 of 27 of the Contract (entitled, “Representations, Certifications and Other Statements of the Offeror”) which states, in pertinent part: “The Representations, Certifications and Other Statements of the **Offeror, dated August 2, 1999, for this contract are hereby incorporated by reference, and made a part of this contract.**” December 6, 2002 Freedom of Information Act Appeal at 2 (emphasis supplied by Burkhalter). Burkhalter also cited Section I-71 of the Contract, which contains language indicating that the Proposal was submitted on August 2, 1999 and therefore was among the “representations and certifications and other statements” incorporated by reference by Section H-15. Reasoning that the Proposal fit within the plain language definition of “Other Statements of the Offeror dated August 2, 1999,” we found this contention persuasive. To this end, *Burkhalter I* states:

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.

Burkhalter I, 28 DOE at 80,860. After *Burkhalter I*, OR has issued two additional determination letters concerning the Proposal, releasing some portions of the Proposal to Burkhalter and attempting to withhold portions of it under Exemptions 4 and 6.

On July 7, 2004, UT-Battelle filed the present Motion for Reconsideration. In its Motion, UT-Battelle asserts that OR did not solicit UT-Battelle's views concerning the appropriateness of releasing the Proposal until January 2004. Motion for Reconsideration at 2. UT-Battelle further contends that had it been given notice of OR's intentions to release portions of the Proposal prior to the July 3, 2003 Determination, it would have provided information that would have shown that the Proposal was not incorporated by reference in the Contract. UT-Battelle correctly notes that DOE's FOIA Regulations required that it be notified before any portion of the Proposal was released.

In reviewing UT-Battelle's Motion, additional information has come to light which has made us realize that our holding, in *Burkhalter I*, that the entire Proposal was incorporated by reference by Section H-15 of the Contract is not based upon an accurate reading of the Contract. Our holding in *Burkhalter I* was based upon our interpretation of the plain language meaning of the term "Representations, Certification and Other Statements of the Offeror."

It has come to our attention that the Proposal, like others made under the Federal Acquisition Regulations, consists of three volumes: one entitled Representations, Certifications and Other Statements of the Offeror, another entitled Technical Proposal and a third entitled Cost Proposal. With this information in mind, it is clear that the parties to the Contract intended to incorporate only the "Representations, Certifications and Other Statements of the Offeror" volume of the Proposal, rather than the entire Proposal, into the Contract.

III. CONCLUSION

Accordingly, we are reversing, in part, our holding in *Burkhalter I*. We now hold that only that portion of the Proposal entitled Representations, Certifications and Other Statements of the Offeror was incorporated by reference in the Contract. The rest of the Contract was not incorporated by reference. Section 821(b)(3) of the NDAA prohibits disclosure of those portions of the Proposal not incorporated by reference. Since, we have found that disclosure of those portions of the Proposal is prohibited, OR should cease its previously mandated consideration of the applicability of Exemptions 4 and 6 to those portions of the Proposal. OR should continue to withhold those portions of the Proposal under Exemption 3.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by UT-Battelle, LLC, Case No. TFA-0064, is hereby granted in part 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: August 13, 2004