April 5, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph K. Huffman

Date of Filing: September 15, 2005

Case Number: TFA-0120

On September 15, 2005, Joseph K. Huffman filed an Appeal, through his attorney, from a determination issued to him on August 16, 2005, by the Department of Energy's (DOE) Pacific Northwest Site Office (PNSO). That determination concerned a request for information that Mr. Huffman submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, PNSO would be ordered to release the requested information.

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 which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document 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.

I. Background

On July 21, 2005, Mr. Huffman filed a FOIA request seeking the following information pertaining to him:

> 1) complete personnel file including all performance reviews and goals and awards;
> 2) complete DOE personnel security file;
> 3) complete records of the investigation which led to my termination. Including, but not limited to, emails, memos, and meeting notes between investigators, human resources, supervisors, and co-workers;
> 4) copies of all printouts from your web site present at any meetings regarding the investigation(s) and termination of my employment;
> 5) details of why the investigation was started; and
> 6) complete copy of Pacific Northwest National Laboratory's (PNNL) policies and procedures.

See August 16, 2005 Determination Letter.

In its August 16, 2005 determination letter, PNSO responded to his information request. PNSO stated that Mr. Huffman's DOE personnel security file is maintained by DOE's Chicago Office, Safeguards and Security Services. It stated his request was forwarded to that office to complete a search for that information. Regarding his personnel file, PNSO informed Mr. Huffman that he was already provided with a copy of his official personnel file on June 21, 2005, and therefore a second copy was not provided. With respect to PNNL Policies and Procedures, PNSO withheld these documents pursuant to Exemptions 2 and 4 of the FOIA. *Id.* Finally, regarding the balance of the request, PNSO stated that no responsive documents existed in that the requested records are non-agency (contractor-owned) records. PNSO further stated that according to DOE's contract with Battelle, most employment-related records are considered contractor-owned records, and therefore are not subject to the FOIA or Privacy Act.

On September 15, 2005, Mr. Huffman filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Huffman challenges PNSO's withholding of PNNL Policies and Procedures under Exemptions 2 and 4 of the FOIA . He asserts that even if some of this information "can arguably be owned by Battelle (the contractor that operates PNNL) not all of it would cause harm to the contractor by its release." *See* Appeal Letter at 2. He further asserts that the "low two" exemption of the FOIA is not applicable to the request and that "it is inconceivable that the release of all of PNNL Policies and Procedures would cause this harm [harm to agency operations]" pursuant to the "high two" exemption of the FOIA. *Id.* Lastly, Mr. Huffman challenges PNSO's assertion that the remaining portions of the request (numbers 3, 4, and 5 stated above) are not agency records. *Id.* Mr. Huffman asks that OHA direct PNSO to release the withheld information.

II. Analysis

A. Exemption 2

The courts have interpreted Exemption 2 to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). Some of the information whose withholding is at issue in the present case involves both "low two" and "high two" information. The first category, "low two" information, includes information relating to internal matters of an agency in which the public could not reasonably be expected to have an interest, e.g., information concerning lunch hours or parking regulations. *Department of Air Force v. Rose*, 425 U.S. 352 (1976). With respect to the "high two" category, the courts have fashioned a two-prong test for determining whether information can be exempted from mandatory disclosure. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

As an initial matter, it is important to note that the PNNL Policies and Procedures at issue are agency records. Although they affect PNNL operations, they are agency records for purposes of the FOIA because the records were "obtained" by the DOE and were under DOE's control at the time of Mr. Huffman's request.

We have contacted PNSO in order to obtain a fuller explanation of how it believes the "low two" and "high two" exemptions of the FOIA apply to the PNNL Policies and Procedures. With respect to the "low two" exemption, PNSO has indicated that PNNL Policies and Procedures consist of records that describe internal PNNL practices and are drafted to assist employees in carrying out their duties in a safe, secure and compliant manner. *See* Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department, and Kimberly Jenkins-Chapman, OHA (March 13, 2006). PNSO has indicated that the policies and procedures in its web-based Standards Based Management System (SBMS) contain approximately 190 subject areas, with over 2000 web pages and include such "low two" matters as conference room scheduling, letterhead logos, arranging foreign travel and use of security badges. *Id.* We agree that this information consists of internal matters that are relatively trivial in nature, and therefore find that PNSO properly applied the "low two" exemption to this information. 1/

With respect to its application of the "high two" exemption to the information in question, PNSO has indicated that the non-public policies and procedures in this category are covered by this exemption because they include "a wide range of substantive safeguards and security practices, unclassified computer security, export control, and chemical, biological and criticality safety. These procedures cover much of the Laboratory's critical infrastructure, and making them public increases the risk of harm to system, facility and asset vulnerabilities." *Id.* We agree that this information is predominantly internal in nature because it is not intended for dissemination outside PNNL and does not purport to regulate activities among members of the public. In addition, disclosure of this information significantly risks circumvention of statutes and agency regulations created to secure the DOE's assets. Accordingly, we find that this information can be properly withheld under the "high two" prong of Exemption 2.

DOE regulations at 10 C.F.R. § 1004.1 provide that "the DOE will make records available which it is authorized to withhold under [a FOIA exemption] whenever it determines that such disclosure is in the public interest." Therefore, although we have determined that the deleted information is protected under Exemption 2, we must address whether disclosure of this information is in the public interest. We find that it is not.

As discussed above, the information covered by this category from the PNNL Policies and Procedures relates to safeguards and security practices as well as access control procedures that are password protected and accessible only to staff. The disclosure of this information would reveal agency determinations on safeguards and security practices taken to protect the safety of DOE and

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1/ In its determination letter, PNSO stated that a wide range of non-sensitive PNNL Policies and Procedures are publicly accessible on the internet.

contractor personnel and property. Clearly, disclosing such information is not in the public interest as this information could render DOE personnel and facilities vulnerable.

B. Exemption 4

PNSO also withheld the non-public portions of the PNNL Policies and Procedures under 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 requested 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 Administration*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, a different analysis applies. First, the agency must determine whether the information in question is commercial or financial. It is well settled that any information relating to business or trade meets this criterion. *See, e.g., Lepelletier v. FDIC*, 977 F. Supp. 456, 459 (D.D.C. 1997), *aff'd in part, rev'd in part and remanded on other grounds*, 164 F.3d 37 (D.C. Cir. 1999). Next, the agency must determine whether the information is "obtained from a person." 5 U.S.C. § 552 (b)(4). Finally, the agency must 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 involuntary or voluntarily 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 Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, before withholding it under Exemption 4 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.

Using the "competitive harm" prong of the *National Parks* test, PNSO withheld the non-public PNNL Policies and Procedures. Determination Letter at 2. In its Determination Letter, PNSO indicated that "other competitors could gain insight into Battelle's business practices, which are unique to them and have been developed as part of Battelle's unique approach to managing national laboratories." *Id.* It further argues that "the result of such a release would place them [Battelle] at a competitive disadvantage by giving their competitors insight into how they do business." Mr. Huffman asserts, *inter alia*, that not all of the information would cause harm to the contractor by its release. We have contacted PNSO for a fuller explanation of its application of Exemption 4 to the PNNL Policies and Procedures and to further review the comments submitted by the contractor. In the course of these discussions, PNSO reiterated that while PNNL is a federal entity, the manner, methods and approaches that Battelle uses to manage this Laboratory for DOE are matters of a competitive nature. According to the PNNL Legal Department, "Battelle's approach to managing

national laboratories is a 'brand' comprised of certain methods, policies, tools and management systems." *See* Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department and Kimberly Jenkins-Chapman, OHA (March 13, 2006). We agree. The release of the PNNL Policies and Procedures would clearly result in competitive harm to Battelle. Accordingly, we find that PNSO properly applied Exemption 4 to the non-public PNNL Policies and Procedures.

C. Agency Records

Under the FOIA, an "agency record" is a document that is (1) either created or obtained by an agency, and (2) under agency control at the time of a FOIA request. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Clear indications that a document is an "agency record" are when a document of this type is part of an agency file, and when it was used for an agency purpose. *Kissinger v. Committee for Freedom of the Press*, 445 U.S. 136, 157 (1980); *Bureau of National Affairs, Inc. v. Department of Justice*, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984) (*BNA*); *J. Eileen Price*, 25 DOE ¶ 80,114 (1995) (*Price)*. In making the "agency records" determination, we look at the totality of the circumstances surrounding the creation, maintenance and use of the documents in question. *See BNA*, 742 F.2d at 1492-93; *Pric*e.

In his Appeal, Mr. Huffman challenges PNSO's claim that the material sought in portions of his request (numbers 3, 4 and 5) are not agency records. He further argues that these records are agency records under the Privacy Act. 2/ We find his arguments to be incorrect and misplaced. In its Determination Letter, PNSO stated that it had no responsive documents with respect to numbers 3, 4, and 5 of Mr. Huffman's request because those documents are not in PNSO's possession. Thus, the documents Mr. Huffman seeks are not in DOE's possession, and therefore are not agency records.

A finding that the items at issue are not agency records, however, does not preclude the DOE from releasing them. "When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor," unless those records are otherwise exempt from public disclosure. 10 C.F.R. § 1004.3(e)(1). PNSO maintains that to the extent the documents exist elsewhere than in DOE's possession, the requested records are non-agency (contractor-owned) records. PNSO notes that "according to DOE's contract with Battelle, most employment-related records are considered contractor-owned records, and therefore, not subject to the FOIA or Privacy Act." Determination Letter at 2. We contacted PNSO and the PNNL Legal Department for further elaboration on their argument. To support its claim that the documents in this category are non-agency records, PNSO directed us to Contract Clause I-81. The pertinent portions as summarized by PNNL are the following:

2/ The definition of agency records is the same under both the FOIA and the Privacy Act.

> Paragraph (a) states that all records acquired or generated by Battelle in the performance of the Contract are government-owned records, except those identified in paragraph (b).
>
> Paragraph (b), titled Contractor-owned records, states that the following records are considered the property of the Contractor and are not within the scope of paragraph (a).
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> Subsection (b) (1) is titled Employment-related records, and includes workers' compensation files, employee relations records, salary and benefits, drug testing, labor negotiations, ethics, employee concerns, and other employee related investigations conducted under an expectation of confidentiality, EAP records, personnel and medical/health records and similar files (except those in a Privacy Act system of records).
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> Subsection (b) (4) includes legal records, litigation files, and attorney-client/attorney work product privileged material. In addition, clause H-32(b) reinforces that Contractor-owned legal records require special handling to preserve privileges and may only be inspected or audited by DOE counsel.

See Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department, and Kimberly Jenkins-Chapman, OHA (March 13, 2006). We have independently reviewed the terms of the contract and reach the conclusion that the documents Mr. Huffman seeks are not the property of DOE according to the terms of the DOE-Battelle contract.

Finally, PNNL further stated that in regard to Privacy Act systems of records excepted in paragraph (b)(1), Battelle has identified six in prime contract clause H-15 (five are security related and one concerns personnel radiation exposure). According to PNNL, none apply to Mr. Huffman's request. In regard to records generated during Battelle's investigation of the matters that led to Mr. Huffman's termination (requests numbered 3, 4 and 5), PNNL states that these records are within the scope of Contractor-owned records identified in Contract Clause I-81(b). PNNL further explains that "the investigation was conducted by Battelle's human resources staff, assisted by security staff and line management, and with direction and advice of Battelle legal counsel. The Battelle PARC (Personnel Action Review Committee) decision, and related records, to terminate Mr. Huffman is also covered by I-81(b), as well as potential claims of attorney-client privilege. Moreover, we have been informed that "all of the staff at PNNL are employees of Battelle, and fundamental employment/employee relations decisions are those of the company, not any federal agency." Record of Telephone Conversation between Steve Cooke, Assistant General Counsel, PNNL Legal Department and Kimberly Jenkins-Chapman, OHA (March 13, 2006). Consequently, items 3, 4 and 5 of Mr. Huffman's request do not fall within the Privacy Act systems of records the contents of which are property of the DOE under the terms of the contract.

Accordingly, we have examined the relevant portions of the contract between Battelle and the DOE, and we conclude that documents responsive to items 3, 4 and 5 of Mr. Huffman's request are not

agency records and not the property of DOE according to the terms of the DOE-Battelle contract. Therefore, these records are not subject to disclosure under the FOIA, under the Privacy Act, or under 10 C.F.R. § 1004.3(e)(1).

It Is Therefore Ordered That:

(1) The Appeal filed by Joseph K. Huffman, OHA Case No. TFA-0120, on September 15, 2005, 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: April 5, 2006