

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

In the Matter of Julie Reddick	)	
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Filing Date: December 24, 2015	)	Case No.: FIA-15-0067
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Issued: January 11, 2015

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**Decision and Order**

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On December 24, 2015, Julie Reddick (Appellant) appealed a determination received from the Department of Energy’s (DOE) Office of Information Resources (OIR) (Request No. HQ-2015-01887-F). In that determination, OIR responded to a request 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. OIR identified one document responsive to the request, which it released with some material redacted under Exemption 4 of the FOIA. The Appellant challenges these withholdings. If granted, this Appeal would require OIR to release the withheld material.

**I. Background**

On September 23, 2015, the Appellant filed a request for “a copy of the contract between DOE and the employer of Mr. Michael Nartker...[including] all statements of work and descriptions of compensation for Mr. Nartker associated with this contract, including amendments, additions, changes, and contract modifications.” FOIA Request from Julie Reddick (September 23, 2015).

On December 14, 2015, OIR issued a determination that included the release of one responsive document, a contract modification. Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Julie Reddick (December 14, 2015). OIR withheld material from this document under Exemption 4 of the FOIA stating that it consisted of “detailed financial information of the submitter company.... [and that] [r]elease of this information could cause substantial competitive harm to the submitting company....” *Id.* On December 24, 2015, the Appellant appealed the Exemption 4 withholdings. FOIA Appeal from Julie Reddick to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA) (December 23, 2015).

## II. Analysis

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 that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

Exemption 4 protects from mandatory public disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, 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*). The Determination Letter does not claim that release of the withheld information would reveal a trade secret, nor does it assert that the withheld information is “privileged,” but rather contends that the information is “proprietary and confidential commercial information.” Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Julie Reddick (December 14, 2015).

Federal courts have held that the terms “commercial or financial” should be given their ordinary meanings and that records are commercial as long as the submitter has a “commercial interest” in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). The information withheld from the document, *i.e.*, the cost increase to the contract, the estimated hours of audit support work, and incrementally funded amounts, clearly qualifies as commercial or financial information.

With respect to the requirement that the information be “obtained from a person,” it is well-established that a “person” refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. TFA-591 (2000). The DOE contractor who submitted the information for this contract modification satisfies this definition.

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*). Information is considered to have been submitted involuntarily if any legal authority compels its submission, including informal mandates that call for the submission of the information as a cost of doing business with the government. *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997). The document at issue in this case is a contract modification, adding work for a new position. In order to add this new position to the existing contract, the contractor was required to submit the redacted information to complete the contract modification.

Because the information was involuntarily submitted as a cost of doing business with the government, before withholding it under Exemption 4, the agency must determine 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. The Appellant challenges OIR's withholding of three types of information from this document: the cost increase to the contract, the estimated hours of audit support work, and the incrementally funded amounts. FOIA Appeal from Julie Reddick to Poli A. Marmolejos, Director, Office of Hearings and Appeals (OHA) (December 23, 2015). Based on our review, we agree with OIR that the information relating to the estimated hours of audit support work and the incrementally funded amounts "could provid[e] potential competitors with insight into the breakdown of financial information, possibly affording them the opportunity to use that information to enhance their own operations to the [submitter] company's competitive detriment." Determination Letter from Alexander C. Morris, FOIA Officer, OIR, to Julie Reddick (December 14, 2015); *see also* Memorandum of Telephone Conversation between Melanie Holt, Program Specialist, Office of Environmental Management, Jodi Gordon, Contract Specialist, and Brooke DuBois, Attorney-Advisor, OHA (January 4, 2016). Therefore, we find that the redaction of this information was appropriate.

Conversely, our review found that OIR should not have redacted the information pertaining to the cost increase of the contract. This type information is generally available in the public domain and its release provides no substantial competitive harm to the submitter company. Memorandum of Telephone Conversation between Melanie Holt, Program Specialist, Office of Environmental Management, Jodi Gordon, Contract Specialist, and Brooke DuBois, Attorney-Advisor, OHA (January 4, 2016). Because this information was not properly withheld under Exemption 4, we remand this document to OIR for a new determination.

### **III. Conclusion**

Based on the foregoing, on remand, OIR should issue a new determination, which either releases the information improperly withheld under Exemption 4 or provides further justification for the withholding. Accordingly, the Appeal should be granted in part and denied in part.

It Is Therefore Ordered That:

- (1) The Appeal filed on December 24, 2015, by Julie Reddick, Case No. FIA-15-0067, is hereby granted in part and denied in part to the extent set forth in paragraph (2) below.
- (2) This matter is hereby remanded to the Department of Energy's Office of Information Resources, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (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.

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Poli A. Marmolejos  
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