United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Savannah River Site Watch	)		
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Filing Date: November 20, 2018	)	Case No.:	FIA-18-0039
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	)		

Issued: December 13, 2018

Decision and Order

On November 20, 2018, Savannah River Site Watch (Appellant) appealed a Determination Letter issued to it from the Department of Energy's (DOE) Savannah River Operations Office (SRO) regarding Request No. SRO-2018-01475-F. In that determination, SRO responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. SRO withheld all responsive documents pursuant to FOIA Exemptions (b)(4) and (b)(5). The Appellant challenged the decision to withhold information pursuant to both exemptions. In this Decision, we remand this matter to SRO to issue a new determination regarding the requested documents at issue in this case.

I. BACKGROUND

On August 10, 2018, the Appellant submitted a FOIA request for copies of any agreements or contracts concerning payments relating to research and development at the Savannah River Site (SRS) regarding the processing and disposal of German graphite spent fuel during Fiscal Year 2018 between Germany, through German firm Jülicher Entsorgungsgesellschaft für Nuklearanlagen (JEN), and the Savannah River Site, its operating contractor Savannah River Nuclear Services (SRNS), and/or the Savannah River National Laboratory. SRO Determination Letter at 1 (August 28, 2018) (Determination Letter). The Appellant also requested any reports from any SRS entity provided to Germany under the requested agreements. *Id.* In response, SRO provided no documents, claiming that each responsive document was not an agency record or, in the alternative, was exempt in its entirety from disclosure pursuant to Exemption 4 or Exemption 5 of the FOIA.[1] *Id.*

[1] SRO discovered after this appeal was filed that a search was not actually conducted because the Appellant had sent a similar request in recent months and any documents responsive to the present FOIA request would have been located in the search conducted pursuant to the previous FOIA request. Memorandum of Telephone Call Between Paralegal, SRO, and Kristin L. Martin, Staff Attorney, OHA (Dec. 6, 2018).

In its Determination Letter SRO stated that the responsive contract, known as Work For Others agreement (WFO), and the documents and reports related to it were withheld because they fell into the category of contractor records. Determination Letter at 1. SRO stated that contractor records are exempt from disclosure under the FOIA pursuant to Clause 1.39(b)(3) of the SRNS Contract DE-AC09-SR-08SR22470 (SRNS M&O Contract), the contract under which SRNS manages and operates DOE's facility at SRS. *Id.* SRO asserted, in the alternative, that it withheld the requested information under Exemption 4 because it had determined that the information in these documents had been submitted voluntarily to the government by a person and that the information was confidential because the submitter did not customarily release such information to the public and such information was not available to the public from other sources. *Id.* Regarding currently pending draft contracts responsive to the Appellant's request, the SRO stated that such documents were withheld under the deliberative process privilege of Exemption 5 because they were both pre-decisional and deliberative. *Id.*

On November 20, 2018, the DOE's Office of Hearings and Appeals (OHA) received the Appellant's challenge to SRO's determination. Acknowledgement Letter at 1 (November 20, 2018). In its appeal, the Appellant challenged SRO's use of Exemptions 4 and 5.

II. ANALYSIS

An informed citizenry is a load bearing pillar in the structure of democracy. The FOIA is intended to ensure such a citizenry, which is "needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). When an agency denies a FOIA request, it is the agency's burden to justify its decision, showing that (1) the responsive records are not agency records; (2) responsive agency records were not withheld; or (3) responsive agency records were withheld properly. *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 744 F. Supp. 2d 228, 232 (D.D.C. 2010) (citing *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136 (1980)). In its Determination Letter, SRO asserted that the responsive records were not "agency records" eligible for FOIA release and that, if the records were agency records under the FOIA, they were properly withheld under Exemptions 4 and 5. For the following reasons, SRO's assertions regarding "agency records" and Exemption 4 fail while its assertions regarding Exemption 5 are justified.

A. Agency Records

As applied to the FOIA, the term "agency records" reaches beyond the scope of filing cabinets and hard drives housed inside government buildings. Much of the Government's work is conducted by contractors and public policy balks at a system that "would shield an agency from public scrutiny where the agency delegated sensitive assignments to independent contractors yet effectively created, obtained, and controlled the work." *Chi. Tribune Co. v. U.S. HHS*, No. 95 C 3917, 1997 U.S. Dist. LEXIS 2308, at *36 (N.D. Ill. Feb. 26, 1997).

1. The Requested Documents' Status as non-DOE Records

The SRNS M&O Contract states at Clause 1.39(b)(3) that records relating to procurement actions taken by SRNS are owned by the contractor. SRNS M&O Contract. Thus, SRO asserts that the requested documents are exempt from FOIA release since they are not DOE records. Appeal at 1. However, ownership is not dispositive of whether a record is an "agency record" under the FOIA and the government may not contract out of its obligations under federal law. *See Consumer Fed'n of Am. v. Dep't of Agric.*, 455 F.3d 283, 290 (2006) ("[W]ith creation, possession, and control not dispositive in determining whether the calendars are 'agency records,' we must shift our attention to the manner in which the documents were used within the agency."); *Allen v. Dep't of Veterans Affairs*, 420 F. App'x 980, 987 n.4 (Fed. Cir. 2011) (citing *Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1378 (Fed. Cir. 2001)). Moreover, DOE does not have the authority to create exemptions to the FOIA; if it unilaterally attempted to exempt contractor-owned records from FOIA release, such a clause would be contrary to existing law and, therefore, unenforceable. *Perez v. C.R. Calderon Constr., Inc.*, 221 F. Supp. 3d 115, 154 (D.D.C. 2016).

Finally, the requested information does not relate to a procurement action by SRNS. The Federal Acquisition Relation defines procurement, through reference, as "the acquiring by contract with appropriated funds of supplies or services … through purchase or lease…." 48 C.F.R. 2.101. Procurement is defined in a general legal context as "the act of getting or obtaining something or of bringing something about." PROCUREMENT, Black's Law Dictionary (10th ed. 2014). In the instant case, the requested information relates to a contract in which DOE and SRNS are selling a service. Perhaps most tellingly, the program office with oversight over the WFO does not consider it to be a procurement contract. Memorandum of Telephone Call Between Maxcine Maxted, EM, and Kristin L. Martin, Staff Attorney, OHA (Nov. 28, 2018) (Maxted Memorandum). Accordingly, the requested records do not fall under Clause 1.39(b)(3) of the SRNS Contract and thus, cannot be considered as SRNS records.

2. The Requested Records Status as "Agency Records" for Purposes of FOIA

The Supreme Court has articulated a two-part test to determine whether a record is an "agency record." First, the agency must have created or obtained the record. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144–45 (1989). Records created by third parties, including contractors, may be considered created by the agency if the agency exercised so much supervision and control over the third party that it was essentially acting on the agency's behalf. *Burka v. U.S. Dep't of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). Second, the agency must have had control over the record at the time of the FOIA request. *Tax Analysts*, 492 U.S. at 145–46. Agency control over a record is not clearly defined and courts examine "the totality of the circumstances surrounding the creation, maintenance, and use of the document to determine whether the document is in fact an 'agency record'." *Bureau of Nat'l Affairs v. U.S. Dep't of Justice*, 742 F.2d 1484, 1492–93 (D.C. Cir. 1984) (cited with approval in *Edelman v. SEC*, 172 F. Supp. 3d 133 (D.D.C. 2016)). The D.C. Circuit employs a four factor test to assist in determining whether the agency had control over the requested records at the time of the FOIA request:

> (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit;

> (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.

Burka, 87 F.3d at 515 (citing *Tax Analysts v. Dep't of Justice*, 845 F.2d 1060, 1069 (D.C. Cir. 1988), *aff'd on other grounds*, 492 U.S. 136).

In *Burka*, the appellant requested information on smoking behavior. *Id.* at 510. The agency withheld data tapes from a comprehensive study because the data had been collected and analyzed by contractors. *Id.* at 510, 512. The court held that the agency had constructively created the data tapes because of the level of supervision it had over their creation. *Id.* at 515. The agency designed the study and outsourced the actual data collection. *Id.* at 512. But for the agency's contract and instructions, the data tapes would not have been created. The court further held that the agency had control over the data tapes at the time of the FOIA request because, though they were in the contractor's possession, the agency had ordered their creation; had indicated their final disposition (to be disclosed by the agency) and prohibited the contractor from premature disclosure; and had significantly relied upon the information in its publications and policy development. *Id.* at 515.

In *In Def. of Animals v. NIH*, a requester sought records regarding activities at a contractor-managed and -operated NIH facility. 543 F. Supp. 2d 83 (D.D.C. 2008). The agency asserted that certain clinical files were not agency records because they were created and maintained by the contractor and were not necessary for the agency's oversight of the contractor. *Id.* at 99–100. The court disagreed, concluding that the clinical records were created or obtained by the agency and that the agency controlled the records. *Id.* at 100. The agency had obtained the clinical records because it owned the facility where the records were kept. *Id.* Applying the *Burka* factors, the court determined that the agency controlled the clinical records because their ownership had been transferred to the agency several years prior, the agency could access the clinical records at will, and the agency had received a commitment that the clinical records would be created and maintained on-site. *Id.* at 100–01.

SRO contended that the responsive records were contractor records and not subject to release under the FOIA. Because SRO's argument that the SRNS M&O Contract made the documents contractor records is unconvincing, we must use *Burka* and *Tax Analysts* to determine whether the records are agency records. Many of the requested documents in the instant case were created or maintained by SRNS. However, like the contractor in *In Def. of Animals*, SRNS manages and operates a DOE owned facility. While it may perform some independent work, its main purpose is to perform the work of the Government. The WFO is pursuant to an agreement between the governments of the United States and Germany. Maxted Memorandum. Like the contract in *Burka*, SRNS would not have undertaken the graphite spent fuel disposal project for JEN but for the Government's agreement with Germany, particularly because DOE retains ownership of the fuel. Alexcia Delley, *Feasibility and Alternatives for Receipt, Storage, and Processing of HTGR Pebble Fuel at SRS*, SAVANNAH RIVER NATIONAL LABORATORY 21 (Oct. 2014), https://sro.srs.gov/docs/GermanProject/HighLevelObjectivesFunctionsRequirements.pdf. Indeed, publicly available materials state that "[t]he Department's effort is to ensure US-Origin materials are stored, processed, and dispositioned to reduce, and potentially eliminate, the amount of US-origin highly enriched uranium (HEU) at civilian facilities worldwide." Maxcine Maxted, *German Fuel*

Processing Update to the South Carolina Nuclear Advisory Council, U.S. DEP'T OF ENERGY, OFFICE OF ENVTL. MGMT. 3 (Jan. 14, 2016), https://www.admin.sc.gov/files/nac/German%20Fuel%20Processing%20Update.pdf. Because SRNS is performing the work of DOE under the WFO to execute a United States program and policy, the WFO and its related documents and reports were created on behalf of the United States government.

The *Burka* factors indicate that DOE exercises significant control over the responsive documents. DOE's Office of Environmental Management (EM) has oversight over the graphite spent fuel disposal project. Maxted Memorandum. EM has physical possession of copies of the WFO and many of the related documents and records and documents responsive to the request are stored on SRS and SRNS servers, as well as on DOE's email servers. *Id.* Those that are stored on SRNS servers are subject to DOE records retention requirements. *Id.* EM's intent is that those records be saved at least until the end of the WFO and its successor contracts, and it has retained the records since the project began in 2012. *Id.* EM personnel have widely read and relied on the responsive documents in performing their work, as the WFO could lead to further contracts for the DOE. It is hardly surprising that DOE exercises such control over the requested information, given the fact that the documents relate to a bilateral international agreement to dispose of U.S. owned spent nuclear fuel. In light of the totality of the circumstances, we determine that the requested information is an "agency record" subject to release under the FOIA. However, certain information might be properly withheld under an exemption to the FOIA.

B. Applicability of Exemption 4 to the Requested Documents

In the alternative, SRO claims that the requested documents may be withheld in their entirety pursuant to Exemption 4. Appeal at 1. Exemption 4 shields from mandatory disclosure (a) trade secrets or (b) information that is "commercial or financial," "obtained from a person," and "privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). In this case, the Determination Letter does not claim that release of the withheld information would reveal a trade secret,[2] nor does it assert that the withheld information is "privileged." Instead, the Determination Letter contends that the information is "commercial or financial information" that was voluntarily submitted and is of a type that is not typically disclosed by the submitter. Determination Letter at 1.

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. *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). With respect to the requirement that the withheld information be "obtained from a person," it is well established that "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).[3]

[2] If an agency determines that 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. FDA*, 704 F.2d 1280, 1286 (D.C. Cir. 1983).

[3] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

In order to determine whether the information is "confidential," we must first determine whether the information was submitted voluntarily or involuntarily. Information is considered involuntarily submitted if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government." *Lepelletier v. FDIC*, 977 F. Supp. 456, 460 n. 3 (D.D.C. 1997), *aff'd in part, rev'd in part on other grounds*, 164 F.3d 37 (D.C. Cir. 1999).

Voluntarily submitted information is considered confidential 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). Involuntarily submitted information is considered confidential if its release would be likely to cause substantial harm to the competitive position of submitters. *Nat'l Parks*, 498 F.2d at 770. To qualify under the substantial harm prong, an identified harm must "flow from the affirmative use of proprietary information by competitors." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010); *Public Citizen*, 704 F.2d at 1291 n. 30. Furthermore, "[c]onclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents." *Public Citizen*, 704 F.2d at 1291. However, "[c]ourts generally defer to an agency's predictions concerning the repercussions of disclosure, acknowledging that predictions about competitive harm are not capable of exact proof." *SACE v. Dep't of Energy*, 853 F. Supp. 2d 60, 71 (D.D.C. 2012).

1. Voluntariness and Competitive Harm

In the instant case, the information in the responsive documents is considered commercial or financial, as appropriate, because SRNS and JEN maintain commercial and financial interests in the information. Information submitted by SRNS and JEN, both corporations, is considered under *Comstock* to be "obtained from a person." Because SRNS and JEN were required to submit this information as part of participating in the WFO, we find that the information was "involuntarily submitted." *See Lepelletier*, 977 F. Supp. at 460 n. 3. Because the information was submitted as a pre-condition of doing business with the federal government, it is assumed that disclosure would not likely endanger DOE's ability to collect that type of information in the future. *Nat'l Parks*, 498 F.2d at 770. While SRO used the *Critical Mass* standard, the information's confidentiality is correctly determined using *National Parks*, given the involuntary nature of the submissions.

SRO does not assert that SRNS or JEN will suffer competitive harm as a result of the requested information's disclosure. Because of the unique relationships between DOE, SRNS, and JEN, it is difficult to speculate as to particular harms SRNS and JEN could suffer. We decline to do so here. Accordingly, SRO has failed to demonstrate that it properly withheld information under Exemption 4. On remand, SRO can issue a more detailed determination as to the applicability, if any, of Exemption 4 to the requested documents.

2. Segregability

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." *People for the*

Ethical Treatment of Animals v. United States HHS, 901 F.3d 343, 351 (D.C. Cir. 2018) (citing 5 U.S.C. § 552(b)). However, SRO withheld all of the finalized responsive documents in their entirety and did not provide a basis for its failure to segregate non-exempt information. Upon review, many documents, including the WFO and its modifications, contained large amounts of information that was not financial or commercial. SRO, on remand, should seek to provide any segregable information from the requested documents to the requester.

C. Exemption 5

SRO also invoked Exemption 5 to withhold responsive documents that were in draft form. Appeal at 1–2. Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified traditional privileges that fall under Exemption 5, including the executive "deliberative process" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). SRO asserted Exemption 5 under the deliberative process privilege.

The ultimate purpose of the deliberative process privilege is to protect the quality of agency decisions, *Sears*, 421 U.S. at 151, and to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973). Under the deliberative process privilege, agencies are permitted to withhold documents that reflect the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 151. In order to be shielded by the privilege, a record must be both predecisional (*i.e.*, generated before the adoption of agency policy) and deliberative (*i.e.*, reflecting the give-and-take of the consultative process). *Coastal States*, 617 F.2d at 866. The privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* The deliberative process privilege assures that agency employees will provide decision makers with their "uninhibited opinions" without fear that later disclosure may bring criticism. *Id.*

While the deliberative process privilege applies only to information generated within the government and not shared outside the government, the Supreme Court has held that there is a privilege under Exemption 5 for confidential commercial information generated in the process of awarding a contract. *Fed. Open Market Comm. Of Fed. Reserve. Sys. v. Merrill*, 443 U.S. 340, 359–60 (1979) (cited with approval in *NRDC, Inc. v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 411–12 (S.D.N.Y. 2014)). *See also Southern California Edison*, OHA Case No. VFA-0723 (2002). Intended to prevent hindrances to contract consummation and competitive disadvantages, this privilege expires when the contract is awarded or the offer is withdrawn. *Merrill*, 443 U.S. 359–60.

DOE, SRNS, and JEN have an ongoing relationship regarding the processing of spent nuclear fuel. As the project develops, new contracts and contract modifications are negotiated and executed. These drafts of unexecuted contracts and modifications fall under the above privileges of Exemption 5. Drafts made in preparation for the start of negotiations are predecisional and reflect

the deliberations and thought processes of the DOE. Accordingly, the deliberative process protects them from disclosure. If drafts that are currently under negotiation were released, outside pressures could affect cost estimates or supply chains or, perhaps, even prevent the contract from being executed. Accordingly, the confidential commercial information privilege protects them from disclosure. Draft documents categorically do not contain reasonably segregable information because "the ultimate decision to include or exclude facts and information in the final product reflects the deliberations of agency decisionmakers, which would be improperly exposed upon comparison of the preliminary and final versions." *Charles v. Office of the Armed Forces Med. Exam'r*, 979 F. Supp. 2d 35, 43 (D.D.C. 2013). For the foregoing reasons, we conclude that, on remand, SRO may apply Exemption 5 to drafts of unexecuted contracts.

III. ORDER

It is hereby ordered that the Appeal filed on November 20, 2018, by Savannah River Site Watch, No. FIA-18-0039, is granted in part and denied in part.

This matter is remanded to the SRO, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect one's right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS, College Park, MD 20740
Web: https://www.archives.gov/ogis Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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