United States Department of Energy
Office of Hearings and Appeals

In the Matter of Future Systems Enterprises	)	
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Filing Date: March 8, 2019	)	Case No.: FIA-19-0007
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	)	

Issued: March 25, 2019

Decision and Order

On March 8, 2019, Future Systems Enterprises, Inc. (Appellant) appealed a determination letter issued by the United States Department of Energy's (DOE) Golden Field Office (GFO) regarding Request No. GFO-2019-00337-F. In that letter, the GFO responded to Appellant's request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE regulations codified at 10 C.F.R. Part 1004, in which Appellant sought the identities of applicants for various DOE funding opportunities and the individuals who reviewed or consulted on the applications. The GFO identified eleven classes of documents responsive to Appellant's request, and withheld all but one document under FOIA Exemptions 4, 5, and 6. Appellant asserts that the GFO improperly asserted FOIA Exemptions 4, 5, and 6 in withholding the responsive documents. As explained below, we grant the appeal in part and remand the matter to the GFO for further processing.

I. Background

On January 8, 2019, Appellant submitted a FOIA request for "a complete list of the grant application reviewers, team members, consultants, consulting agencies [], and staff that reviewed and consulted on [ten DOE funding opportunities and] . . . the name of each applicant . . . and title of submission . . . to the [funding opportunities] . . . ." FOIA Request from Future Systems Enterprises, Inc. (January 8, 2019). The GFO processed Appellant's FOIA request with respect to eight of the ten funding opportunities identified in the FOIA request.

On February 14, 2019, the GFO issued a response to Appellant's FOIA request in which it provided Appellant with a one-page summary document "because it provides a high level overview of the letters of intent received and does not disclose any information subject to a FOIA exemption." Determination Letter from Derek G. Passarelli, Authorizing and Denying Official, GFO, to Future Systems Enterprises, Inc. at 3 (February 14, 2019) (Determination Letter). In the Determination Letter, the GFO indicated that it had identified eleven classes of records responsive to Appellant's FOIA request. *Id.* at 2. The GFO indicated that it was withholding records concerning the identities of persons who reviewed applications for DOE funding under FOIA Exemptions 5 and 6, and that it was withholding records concerning applicants for DOE funding and the titles of their applications under FOIA Exemptions 4 and 6. *Id.* at 3.

On March 8, 2019, DOE's Office of Hearings and Appeals (OHA) received Appellant's appeal. Future Enterprises Systems, Inc. FOIA Appeal (March 7, 2019) (Appeal). In the Appeal, Appellant asserted that the GFO had misapplied FOIA Exemptions 4, 5, and 6. With respect to Exemption 4, Appellant argues that the names of applicants and the titles of their applications for DOE funding were not trade secrets or commercial or financial information that is privileged and confidential, that the GFO could redact any privileged or confidential information that might appear on responsive documents, and that applicants for DOE grant funding had no reasonable expectation that their names and application titles would not be disclosed. *Id.* at 3–6. Regarding Exemption 5, Appellant asserts that the GFO could have redacted deliberative information from responsive documents while providing him with the names of persons who reviewed applications for DOE funding, that a list of names was not deliberative, that disclosing the names would not exert a chilling effect on agency deliberation, and that he believes that the completion of the award process rendered all of the documents post-decisional. *Id.* at 6–11. Finally, as to Exemption 6, Appellant argues that federal employees and consultants have no privacy interest in their names, that there is no risk of harassment of the employees because Appellant's request does not include contact information, and that there is a substantial public interest in knowing the identities of reviewers so as to reveal conflicts of interest and biases among reviewers. *Id.* at 11–13.

On March 13, 2019, the GFO provided the OHA with a response to the Appeal (Response). In its Response, the GFO asserted that the names and organizational affiliations of reviewers would provide disgruntled grant applicants whose applications were denied DOE funding ample information to find and contact the reviewers to contest or question the denial of their applications. According to the GFO, the risk of harassment of the reviewers, and the consequential harm to DOE and the public if the reviewers refused to review applications in the future out of fear of harassment, significantly outweighed any public interest in the disclosure of the records. With respect to the identities of applicants for DOE funding and the titles of their applications, the GFO asserted that "[i]t is DOE policy not to release the names of unsuccessful applicants due the potential for economic harm to these applicants. This information could be used against applicants as a potential aggravating factor by banks, lenders, or investors when deciding whether to provide loans or to invest in a particular project or line of research. The selection of a recipient gives the imprimatur of DOE acceptance of a project. Likewise the rejection of an application appears to be a rejection of the technology and may cause competitive or financial harm to an unsuccessful applicant." Response at 1.

II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). The agency has the burden to show that information is exempt from disclosure. See 5 U.S.C. § 552(a)(4)(B). An agency is also required to "consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of a requested record is not possible[] and take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(I)–(II).

A. Records Concerning Reviewers

The records responsive to Appellant's request for the identities of the persons assigned to review applications for DOE funding fall into three broad categories. The first category (the Appointment Documents) includes three documents that memorialize the persons selected to review submissions from applicants for DOE funding in the form of a letter or memorandum, and include the name, role, contact information, and employer of each person selected. Merit Review Committee Appointment Letter, DE-FOA-000486; Merit Review Appointment Memorandum, DE-FOA-0001455; Merit Review Appointment Memorandum, DE-FOA-0001837. The second category of documents (the Assignment Spreadsheets) responsive to this portion of the Appellant's request includes spreadsheets concerning the assignment of reviewers to topics or specific applications without any further elaboration. *E.g.*, Phase I Application Reviewers, DE-FOA-0001619. The last category of documents (the Detailed Spreadsheets) assigns reviewers to particular topic areas or applications, but also includes notes on the scope and limitations of particular reviewers' participation. *E.g.*, Full Application Reviewer Assignments, DE-FOA-0001836.

1. Application of Exemption 6 to Records Concerning Reviewers

Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). In order to determine the applicability of Exemption 6 to a record, an agency must first determine whether the record is a personnel, medical, or similar file and, if so, weigh the public interest in disclosure against the privacy interest of the person or persons identified in the record. *Washington Post Co. v. U.S. Dep't. of Health and Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982). Thus, Exemption 6 intends to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). The GFO asserted in its Determination Letter that disclosure of the names, addresses, and "other personally identifiable information" of reviewers could result in harassment or other invasions of personal privacy against the reviewers, and that disclosure would not shed light on the operations of government. Determination Letter at 5–6.

a. The Records are "Similar Files" Under Exemption 6

"[T]he phrase, 'similar files' [] include[s] all information that applies to a particular individual." *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999). Each of the records at issue is a "similar file" under Exemption 6 because each record describes particular individuals' assignments to review applications for DOE funding. Having determined that the records withheld by the GFO are "similar records" under Exemption 6, we must weigh the privacy interests of the reviewers against the public interest in knowing their identities.

b. The Reviewers Have a Privacy Interest in the Non-Disclosure of their Names

The GFO asserts that disclosure of the reviewers' names and organizational affiliations could reasonably expose them to harassment. Determination Letter at 6. Appellant argues that "harassment may only exist . . . if the intent was to contact each person on said lists," and that Appellant has no such intent. Appeal at 11. Contrary to Appellant's argument, how Appellant would use the reviewers' names and organizational affiliations is irrelevant to the reviewers'

privacy interests because the GFO cannot condition release of records on the identity of the party requesting them under the FOIA and must consider whether release of the records to any subsequent FOIA requester would expose the reviewers to harassment. *See Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989) (explaining that "it would be illogical as well as unfair to the person whose privacy is at stake for the court to balance the public interest in disclosure to the whole world against the private interest in avoiding disclosure only to the party making the request . . . .").

We deem it plausible that a disgruntled applicant for DOE funding might contact the reviewers for that funding opportunity in a harassing manner to demand an explanation for the denial or to seek reconsideration. Accordingly, we find that the reviewers have a privacy interest in the non-disclosure of their names.

c. Weighing the Public Interest in Disclosure Against the Reviewers' Privacy Interests

The Appellant asserts that the public has a significant interest in identifying conflicts of interest or implicit biases based on the composition of the committees assembled to review applications for DOE funding. Appeal at 11–12. We fail to perceive how revealing the names and employers of reviewers employed by federal agencies will reveal conflicts of interest or implicit biases. However, the public has a strong interest in knowing whether government consultants' outside interests have affected which applicants receive federal funds. *Washington Post Co. v. Dep't of Health & Human Servs.*, 690 F.2d 252, 264 (D.C. Cir. 1982) (*Washington Post v. HHS*). Accordingly, we will weigh the public interest in knowing the identities and employers of consultants selected to serve as reviewers against those consultants' privacy interests.

According to the GFO, the identities of reviewers are customarily kept confidential because the reviewers are leaders in their respective fields upon whom DOE depends for their scientific expertise, disclosure of their identities would likely lead to their harassment by disgruntled applicants for DOE funding, and such harassment might lead the reviewers to refuse to participate on review committees in the future, thus depriving DOE and the public of their invaluable scientific expertise. The Appellant argues that, without disclosure of the names, the public has no way to evaluate whether biases or conflicts of interest have influenced DOE grant awards. The OHA has previously found that the GFO properly withheld the names and organizational affiliations of reviewers pursuant to Exemption 6. *Matter of Robert D. Reilly*, OHA Case No. TFA-0166 (2006), *aff'd Reilly v. Dep't of Energy*, 2007 WL 4548300 (N.D. Ill. 2007). We reach the same conclusion in this case.

While the public has a strong interest in revealing conflicts of interest in the award of public funds, we must also consider the incremental value of the information proposed for disclosure towards achieving that general interest. *See Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003). In *Washington Post v. HHS*, the FOIA requester sought financial disclosure forms that contained detailed information about the financial interests of consultants who reviewed applications for HHS grants and their families. 349 F.3d at 255–56. In contrast to information sought in *Washington Post v. HHS*, which provided the public with significant insight into potential conflicts of interest among the consultants who reviewed applications for HHS grants, the information sought by the Appellant would simply reveal the primary organizational affiliation of each

reviewer. It would be extremely difficult, if not impossible, for a member of the public to use the name and primary organizational affiliation of a reviewer to gain the insight into his or her potential conflicts of interest in the same manner that the information was used in *Washington Post v. HHS*. On the other hand, with a few keystrokes into a search engine, a disgruntled grant applicant could use a reviewer's name and primary organizational affiliation to obtain the reviewer's contact information for the purpose of seeking an explanation for the denial or reconsideration.

We conclude that the reviewers have a privacy interest in the non-disclosure of their names and primary organizational affiliations, and that disclosure of that information would be more likely to aid a disgruntled grant applicant in contacting the reviewer than it would in informing the public about potential conflicts of interest. In light of the risk of harm to the public if the scientific expertise of reviewers was lost due to harassing contacts from applicants for DOE funding, we find that the reviewers' privacy interest in the non-disclosure of their personal information outweighs the public interest in its disclosure. Therefore, we determine that the GFO properly invoked Exemption 6 to withhold the records concerning the identities of the reviewers.

2. Application of Exemption 5

Having concluded that the GFO properly withheld all of the information requested by Appellant pursuant to Exemption 6, we need not evaluate the appropriateness of the GFO's conclusions with respect to Exemption 5.

B. Records Concerning Applicants

Each of the records identified by the GFO as responsive to Appellant's request for the names of applicants and the titles of their applications for DOE funding are organized as spreadsheets. Each spreadsheet contains, at a minimum, the name of the applicant and the title of the applicant's application for DOE funding. Some of the spreadsheets include the proposed project budget for each application. *E.g.*, Record of Initial Eligibility Review – Full Applications, DE-FOA-0001286. Other spreadsheets identify the name of the principal investigator for each application. *E.g.*, Letter of Intent IDs, DE-FOA-0001417.

1. Application of Exemption 4 to Records Concerning Applicants

Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). A trade secret is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). All other information is exempt from disclosure under Exemption 4 "only if it is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential." *Id.* at 1290. In this case, the GFO asserted that the names of the applicants for DOE funding and the titles of their applications were commercial information exempt from disclosure under Exemption 4 because disclosure would cause substantial competitive harm to unsuccessful applicants when seeking investors and loans. Response at 1.

a. Commercial or Financial Information

Records are commercial in nature if the entity that submits them to a government agency has a commercial or trade interest in the information. 704 F.2d at 1290. Whether an entity's name is commercial or financial information is context-specific. *Elec. Privacy Info. Ctr. v. Dep't of Homeland Security*, 117 F.Supp.3d 46, 62–63 (D.D.C. 2015). We find that the inclusion of an entity's name on a list of applicants for a DOE funding opportunity and the title of the project for which it has sought the funding reveal sufficient information about the entity's research interests and future plans to render the information commercial in nature.

b. Obtained from a Person

Information is "obtained from a person" if the information is submitted to government by "an individual, partnership, corporation, association, or public or private organization other than an agency." *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (quoting the definition of "person" set forth at 5 U.S.C. § 551(2)). Information in a government report is deemed "obtained from a person" if the report merely summarizes the contents of information submitted to an agency by a person. *See Gulf & W. Indus. v. United States*, 615 F.2d 527, 529–30 (D.C. Cir. 1979). There is no question that the spreadsheets at issue were prepared based on information contained in grant applications submitted to DOE by a "person."

c. Confidentiality of the Information

The GFO asserts that the names of applicants for DOE grant funding and the titles of their applications are confidential. Commercial or financial information alleged to be confidential which is submitted to an agency voluntarily is exempt from disclosure if "it would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992). Commercial or financial information alleged to be confidential which is submitted to an agency involuntarily is exempt from disclosure only if its disclosure is likely to "to impair the Government's ability to obtain necessary information in the future[] or [] to cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Information is submitted involuntarily when "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." *Forest County Potawatomi Cmty. v. Zinke*, 278 F.Supp.3d 181, 202 (D.D.C. 2017) (citing *Lepelletier v. FDIC*, 977 F.Supp. 456, 460 n.3 (D.D.C. 1997)). In this case, the information was submitted involuntarily because, although the applicants willingly sought DOE funding, they were required to provide their names and the titles of their projects as part of the submission of a complete application.

The GFO asserts that disclosure of the information will cause substantial harm to the competitive position of unsuccessful grant applicants. Determination Letter at 3–4. An agency "need not conduct a sophisticated economic analysis of the likely effects of disclosure . . . [but] [c]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). A court previously found that DOE's withholding of the names and bids of unsuccessful bidders for a tract of land under Exemption 4 based on the unsuccessful

bidders' claims of competitive harm was unfounded because of lack of factual evidence that disclosure of the names and bids would cause the bidders competitive harm. *Ctr. for Pub. Integrity v. Dep't of Energy*, 191 F.Supp.2d 187, 194–95 (D.D.C. 2002) (finding DOE's assertion that releasing bidders' names would cause them competitive harm was "not supported by logic or the evidence."). Subsequent to the submission of the Appeal, the GFO clarified that rejection of an application could be deemed a rejection of the underlying technology and could impair the unsuccessful applicants' ability to obtain loans or investment at favorable terms. We find this reasoning too speculative to warrant withholding the requested information.

First, it does not appear to us that denying an application for DOE funding represents a rejection of the merits of the underlying technology. Several of the funding opportunities covered by the Appellant's FOIA request concern the prestigious, highly-competitive Small Business Innovation Research (SBIR) program. In 2015, DOE funded fewer than seventeen percent (17%) of the 1,552 Phase I proposals it received for SBIR funding. U.S. SBA, SBIR ANNUAL REPORT DASHBOARD, https://www.sbir.gov/awards/annual-reports (last visited Mar. 14, 2019). Absent further information, it appears that not receiving DOE funding is a common occurrence for applicants rather than a source of stigma that might impair outside funding. Furthermore, it is apparent from the materials the GFO identified as responsive to Appellant's request that applications are denied for reasons other than defects in the technology, such as the level of outside funding that the applicant can leverage and the responsiveness of the applicant's technology to the specific funding opportunity announcement. Finally, even if potential lenders or investors became aware that an applicant had submitted an unsuccessful application for DOE funding, we fail to see why that information would be so critical to the lenders' or investors' due diligence that it would substantially harm an applicant's ability to obtain investors or credit. Accordingly, we conclude that the GFO did not satisfactorily justify withholding the names of applicants and the titles of their applications for DOE funding under Exemption 4.

2. Application of Exemption 6 to Records Concerning Applicants

As described above, Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6)." 5 U.S.C. § 552(b)(6). "Personal privacy" concerns the privacy of individuals, not of corporations or other organizations, except in cases where the financial records of a closely-held business disclose personal information about an owner's finances. *Multi Ag Media, LLC v. Dep't of Agric.*, 515 F.3d 1224, 1228 (D.C. Cir. 2008); *see also FCC v. AT&T, Inc.*, 562 U.S. 397, 403 (2011) (interpreting the term "personal privacy" in Exemption 7(C) to refer exclusively to the privacy of natural persons based on the ordinary meaning of the word "personal"). As nearly all of the applicants for DOE grant funding are not natural persons, we find Exemption 6 inapplicable.

3. Segregability

The FOIA requires agencies to take reasonable steps to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii)(II). The FOIA does not require perfection, and segregability may be unreasonable when there is a relatively small amount of non-exempt material and "the cost of line-by-line analysis would be high and the result would be an essentially meaningless set of words and phrases." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). In this case, the GFO can easily redact the columns of the spreadsheets

that contain potentially exempt information while leaving those columns that identify the applicant and the title of the applicant's project unredacted.

III. Order

It is hereby ordered that the appeal filed by Future Systems Enterprises, Inc. on March 8, 2019, No. FIA-19-0007, is granted in part and denied in part. This matter is hereby remanded to the GFO, which shall issue a new determination in accordance with 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 the right to pursue litigation. OGIS may be contacted in any of the following ways:

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