

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

In the Matter of: Lorenzo Venneri)
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Filing Date: May 12, 2021) Case No.: FIA-21-0008
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Issued: June 11, 2021

Decision and Order

On May 12, 2021, **Error! Reference source not found.** (Appellant) appealed a Determination Letter issued to him from the Department of Energy’s (DOE) Idaho Operations Office (ID) regarding Request No. ID-2021-00601-F. In that determination, ID 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. ID stated that the records requested were exempt from disclosure under FOIA Exemption 3. Appellant challenged the decision to withhold information. In this Decision, we grant the appeal in part and deny it in part.

I. BACKGROUND

On February 17, 2021, Appellant filed a FOIA request with DOE seeking records relating to Funding Opportunity Announcement DE-FOA-0002271 (“FOA”) that concerned

DOE’s evaluation of proposals including: scoring, evaluations, and ranking of all submitted proposals under Merit Review Criteria, Federal Merit Review, and Selection/Other Program Factors as described in Section 6.2 and 6.3 of the FOA; the signed Conflict of Interest/Non-Disclosure Agreements and qualification records for all Subject Matter Experts that took part in the Merit Review Panel described in section 6.2.1 of the FOA; the signed Conflict of Interest/Non-Disclosure Agreements for all federal and non-federal Subject Matter Experts that took part in the “Federal Merit Review Panel” described in section 6.2.1.

FOIA Request at 1. In processing the request, ID consulted the contracting officer who had handled the FOA. The contracting officer informed ID’s FOIA office that scoring, evaluations, and ranking of proposals were “source selection information,” a category of information prohibited from disclosure by the Procurement Integrity Act (the PIA). She also stated that the identities and qualification records for subject matter experts that participate in review panels were source selection information. Based on that reasoning, she stated that there were no releasable records responsive to Appellant’s request. ID sent Appellant a Determination Letter which provided a link to publicly available information for the FOA at issue and informed him that the requested records were source selection information and would be withheld under FOIA Exemption 3. The letter also stated that the information sought was pre-decisional and deliberative.

Appellant timely filed the present appeal, arguing that: 1) ID had not release segregable portions of the requested records; 2) portions of applications must be segregable because they are required to be submitted in a way that marks which parts are and are not subject to release under the FOIA; 3) the final rankings and decisions were not pre-decisional; and 4) some of the information requested was not protected by the FOIA because it had already been publicly released. In response, ID submitted the email correspondence between the FOIA Officer and the contracting officer.

II. ANALYSIS

An informed citizenry is a crucial element of a functioning 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 requested records are not agency records; (2) responsive agency records were not withheld; or (3) responsive agency records were properly withheld. *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)).

Exemption 3 exempts from FOIA disclosure information which a statute unequivocally and specifically exempts from disclosure. 5 U.S.C. § 552(b)(3). The information must be specifically identified by the statute as exempt from disclosure. *Id.* Furthermore, the statute must exempt the information in a nondiscretionary manner, or it must delineate specific criteria for determining whether the information must be exempt from disclosure. *Id.* As such, we first determine whether the law at issue creates a statutory exemption from disclosure within the meaning of Exemption 3, and, if so, we then determine whether the records requested fall within the law’s protection. *CIA v. Sims*, 471 U.S. 159, 167 (1985).

The PIA prohibits the disclosure of source selection information created before the award of a federal contract.¹ 41 U.S.C. § 2102; *Am. Small Bus. League v. DOD*, 372 F. Supp. 3d 1018, 1025 (N.D. Cal. 2019). The statute defines source selection information as

any of the following information prepared for use by a Federal agency to evaluate a bid or proposal to enter into a Federal agency procurement contract, if that information previously has not been made available to the public or disclosed publicly:

- (A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.
- (B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.
- (C) Source selection plans.
- (D) Technical evaluation plans.
- (E) Technical evaluations of proposals.

¹ Because the PIA was enacted prior to 2009, Exemption 3 does not require that it specifically mention 5 U.S.C. § 552(b)(3) to fall under its purview.

- (F) Cost or price evaluations of proposals.
- (G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- (H) Rankings of bids, proposals, or competitors.
- (I) Reports and evaluations of source selection panels, boards, or advisory councils.
- (J) Other information marked as “source selection information” based on a case-by-case determination by the head of the agency, the head’s designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

41 U.S.C. § 2101(7). The statute categorically prohibits the disclosure of certain information and leaves no room for discretion. While subsection J of the definition of source selection information does allow some discretion in categorizing information, once information is categorized as such, there is no discretion to allow its disclosure. Accordingly, we find that the PIA’s prohibition on the disclosure of source selection information is a statutory exemption from disclosure within the meaning of Exemption 3.

Much of the information Appellant seeks falls squarely within the definition of source selection documents. Scoring, evaluations, and rankings of proposals fall squarely under subsections E, F, G, H, and I of the PIA’s source selection information definition. However, the qualification records and Conflict of Interest and Non-disclosure Agreements do not appear to meet any of the definition’s criteria, nor was there a determination that the release of these documents, generally, would jeopardize the integrity or successful completion of DOE’s procurement process. To be clear, these records do not appear to be categorically exempt from disclosure under Exemption 3, but may still be redacted as appropriate to protect specific information that falls within a FOIA exemption.² Accordingly, we find that, while many of the requested records fall within the scope of the PIA’s protection, the qualification records and Conflict of Interest and Non-disclosure Agreements do not, though they may contain some segregable exempt information.

For the foregoing reasons, we find that the Idaho Operations Office was justified in withholding scoring, evaluation, and ranking records under Exemption 3, but was not justified in withholding the qualification records and Conflict of Interest and Non-disclosure Agreements under that exemption.

III. ORDER

It is hereby ordered that the Appeal filed on **Error! Reference source not found.**, by Lorenzo Venneri, No. FIA-21-0008, is granted in part and denied in part. The matter is remanded to the Idaho Operations Office for processing consistent with this decision.

² Because no releasable documents were originally identified, we cannot, at this time, opine on whether redactions of these documents are appropriate.

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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