



September 16, 2009

Freedom of Information Act Officer (ACMC)
General Services Administration
1800 F St, NW
Washington, DC 20405

RE: Freedom of Information Act Appeal

Dear FOIA Officer:

This letter constitutes an administrative appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, of the determination by the General Services Administration, Greater Southwest Region with regard to a FOIA request filed August 14, 2009. By letter of August 24, 2009, GSA denied a subsequent review and release of material that was withheld from the initial release of the contract between the Recovery Accountability and Transparency Board and Smartronix, Inc. In his letter, George Prochaska argued that the information was protected under Exemption (b)(4) of the FOIA.

I request that the GSA reconsider the broad application of Exemption 4 to the responsive document. As you know, the FOIA creates a statutory right for citizens to access government information. The central purpose of FOIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" through the disclosure of government records. *See Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). In particular, disclosure of government contracts that have been awarded is generally favored under FOIA, to permit the public "to evaluate the wisdom and efficiency of federal programs and expenditures," *Racal-Milgo Government Systems, Inc. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981). Moreover, "one who would do business with the government must expect that more of his offer is more likely to become known to others than in the case of a purely private agreement." *EHE National Health Services, Inc. v. Department of Health and Human Services*, No. 81-1087, Mem. Op. at 4 (D.D.C. Feb. 24, 1984).

Exemption 4 protects some proprietary information contained in government contracts and other documents. In particular, the statute 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). In this case, however, the extensive redactions of the released contract document appear to extend outside of the specific category of proprietary information, confidential and obtained from a person or business that is covered by under Exemption 4. Of interest to the public, and to this requester in particular, is the nature of services for which the government is spending taxpayer money in conjunction with Recovery Act accountability. For instance, redactions include the number of visitors the website is being designed to handle, the rate of pay for programmers working on the site, as well as all description of work that major subcontractors such as KPMG are doing. These details are needed for the public to determine if tax dollars are being spent wisely and for a good product. The contract document released by GSA in this case is redacted in such a way that little meaningful insight can be gleaned about the nature of the work performed by a contractor who was paid more than \$9 million for services connected to redesigning Recovery.gov.

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In addition, Exemption 4 applies only to “privileged or confidential” information. Well-established precedent interprets “confidential” to mean information the disclosure of which “is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d at 770 (D.C. Cir. 1974). This test applies to information the submission of which is required, but where information has been submitted to the government voluntarily, the protection is somewhat broader. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n (II)*, 975 F.2d 871, 878 (D.C. Cir. 1992) (*en banc*). However, information submitted for contracting purposes is generally considered to be “required,” despite the fact that a company’s participation in the contract bidding process is voluntary. *See Washington Post Co. v. HHS*, 865 F.2d 320, 323 (D.C. Cir. 1989).

Therefore, even if some of the information redacted from the contract document in this case was obtained from the contractor, Smartronix, the appeal authority must review each portion of the information to determine whether specific information may be considered “confidential.” To justify disclosure, the agency must show that the information would cause “significant” impairment of government programs, and generally such a showing will be difficult when the information is a compulsory submission as part of the contracting process or otherwise required. *Niagara Mohawk Power Corp v. Dep’t of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). Alternatively, the agency must demonstrate that the submitter faces actual competition and that the likely consequences of disclosure would be competitive injury using specific and direct evidence not conclusive or speculative claims made by the contractor. *Id., Hercules, Inc. v. Marsh*, 839 F.2d at 1030. It is unlikely, for example, that the entirety of section 5.0 of the June 26 document under the label “Introduction” contains only proprietary information.

If portions of this document must be withheld, out of genuine concern for proprietary and commercial information under Exemption 4 of the FOIA, the redactions must be reviewed carefully under the standard of that exemption. Under this exemption nondisclosure is only permitted if information is “obtained from a person” and is “privileged or confidential.” The exemption does not allow withholding based on generalized claims of potential harm. Portions that can be segregated and released without harm to the interests protected under Exemption 4 must be released. The FOIA establishes a presumption in favor of disclosure, *United States Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991), and the limited exemptions in the statute must be narrowly construed. *Rose*, 425 U.S. at 361. Disclosure of information about government contracts is vital to taxpayers’ understanding of government spending. In particular, in the context of the current financial crisis, it is vital that the public understand the use of federal funds for work performed by private contracts to track recovery spending.

I appreciate your consideration of this appeal and look forward to your response. If you have any questions or concerns, please contact me at **202.683.4860** or at cjennings@ombwatch.org.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Craig Jennings", with a stylized flourish at the end.

Craig Jennings
Senior Policy Analyst