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Bonn (Germany), July 22, 2010

Appeal to withholdings made in FOIA response to F-00003-10

Dear Sir/Madam,

I am writing to appeal withholdings made by USAID in response to my FOIA request, tracking number F-00003-10.

According to Ms Sylvia Lankford, the USAID staff member assigned to handle my FOIA request, the withholdings were made in accordance with the responses to USAID submitter notifications by the USAID grantees/contractors whose projects were covered by the FOIA request. This explains the apparent inconsistency with which information was withheld within some budgets and not within other budgets (email from Ms Lankford to me, July 20, 2010).

According to USAID (letters to me dated July 2, 2010 and July 14, 2010), all withholdings were made according to two criteria:

1. Direct and indirect costs and rates were (in some cases) withheld under 5 U.S.C. §552 FOIA Exemption (b)(4): “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential”.
2. The names of employees were withheld under 5 U.S.C. §552 FOIA Exemption (b)(6): “clearly unwarranted invasion of personal privacy”.

I hereby appeal the withholding of information under both clauses.

3. In addition, I question USAID's claim that my FOIA request only covered 19 budgets, as stated in USAID's letter from July 14, 2010. Not a single budget supplied by USAID pertains to a project implemented by a local (Georgian) NGO. The original text of my FOIA request stated that the “FOIA request covers all project proposals that were approved for funding by USAID in the period from 01 June 2008 to 31 December 2008 (approval date)”. In the unlikely event that USAID really did not approve funding for any local NGO projects during this seven-month period, please explicitly state that this was the case in your response to this appeal.

Below, I discuss in detail why withholding information under

- 5 U.S.C. §552 FOIA Exemption (b)(4), and under
- 5 U.S.C. §552 FOIA Exemption (b)(6)

is unwarranted in the case of my FOIA request.

Withholding information under 5 U.S.C. §552 FOIA Exemption (b)(4)

According to the Freedom of Information Act Guide, May 2004, published by the Department of Justice (<http://www.justice.gov/oip/exemption4.htm#trade>), Exemption 4 “covers two broad categories of information in federal agency records: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.”

The criterion of (1) trade secrets clearly does not apply in this case. In *Public Citizen Health Research Group v. FDA*, the term "trade secret" was narrowly defined as "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." This definition requires that there be a "direct relationship" between the trade secret and the productive process. This does not apply to the budgets covered by my FOIA request.

The criterion of (2) information that is (c) privileged or confidential does not apply either in the present case. The information in question is clearly not “privileged” in the legal sense.

The information is not “confidential” either. While information that was “voluntarily” submitted enjoys confidentiality, the requested budgetary information was not “voluntarily” submitted in a legal sense. (Even if it had been, it would be afforded protection as "confidential" information only if it is of a kind that would customarily not be released to the public by the person from whom it was obtained. The D.C. Circuit observed in the *Critical Mass* court case that this test was "objective" and that the agency invoking it "must meet the burden of proving the provider's custom".)

As the information was not submitted “voluntarily”, its submission must have been "required" by the government. The District Court for the District of Columbia has issued a total of seven decisions that all hold - consistent with the Department of Justice's policy guidance on this issue - that prices submitted in conjunction with a government contract are "required" (i.e., not “voluntary”) submissions. Earlier, another court had ruled that "[d]isclosure of prices charged the Government is a cost of doing business with the Government."

The District Court for the District of Columbia upheld an agency's decision to disclose three broad categories of information incorporated into a government contract - specifically, "cost and fee information, including material, labor and overhead costs, as well as target costs, target profits and fixed fees"; "component and configuration prices, including unit pricing and contract line item numbers"; and "technical and management information, including subcontracting plans" - based upon the submitter's failure to specifically demonstrate that it would suffer competitive harm from their release. In upholding release of this information, the court affirmed the agency's determination that "neither the revelation of cost and pricing data nor proprietary management strategies were likely to result in such egregious injury to [the submitter] as to disable it as an effective competitor for [the agency's] business in the future."

The Court of Appeals for the District of Columbia Circuit has emphasized that the "'important point for competitive harm in the FOIA context... is that it be limited to harm flowing from the affirmative use of proprietary information by competitors". Since 1987, submitters have been expressly required to make their case for the potential for significant competitive harm by executive order (i.e., the burden of proof is on the submitter). Mere conclusory allegations of harm are unacceptable.

In a similar challenge to an agency's decision to disclose, among other things, a contractor's unit

price information was soundly rejected in yet another decision by the District Court for the District of Columbia. In upholding the agency's decision to release the information, the court rejected the submitter's contention that disclosure would enable its competitors "to predict its costs and profit margin, significantly enhancing their ability to underbid." Declaring that "[t]he public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and indeed, even to learn how to be more effective competitors in the future," the court upheld the agency's decision to release the information because the submitter had "simply failed to demonstrate" how it would be competitively harmed by the information's disclosure. Although noting that the submitter "might prefer that less be known about its operations, and that the reasons for its past successes remain a mystery to be solved by the competitors on their own," the court held that the submitter had not shown "that it will in fact be unable to duplicate those successes unless [the agency] acquiesces in keeping the competition in the dark."

Please refer to the Freedom of Information Act Guide published by the Department of Justice (<http://www.justice.gov/oip/exemption4.htm#trade>) for a detailed discussion of all the cases cited above.

Withholding information under 5 U.S.C. §552 FOIA Exemption (b)(6)

USAID invoked 5 U.S.C. §552 FOIA Exemption (b)(6) in its letters from July 2, 2010 and from July 14, 2010 with reference to its decision to withhold the names of "employees". Both letters refer to the "unwarranted invasion of personal privacy".

However, USAID's letter from July 14, 2010, additionally stated that "[i]n this instance, we withheld the names of individuals working in a high-risk area. The release of this information may lead to physical harm or harassment of the individuals by groups hostile to US interests." The letter does not specify in which instances information was withheld due to privacy considerations, and in which instances information was withheld due to security considerations.

I wish to appeal USAID's decision to withhold the names of its contractors in the case of three projects:

1. AID-114-O-08-00019
2. AID-114-O-08-00021
3. AID-114-O-08-00022

In these three cases, 5 U.S.C. §552 FOIA Exemption (b)(6) was apparently invoked to withhold the names of parties contracted by USAID to provide services.

The parties contracted by USAID – presumably individuals, though this cannot be verified on the basis of the information released by USAID – were by definition federal contractors, and not "employees" of contractors, voiding the applicability of the term "personal privacy". In all three cases listed above, USAID has withheld the identity of the contractors without specifying the reason for doing so (privacy and/or security).

A US federal agency cannot be considered transparent or accountable if it withholds information on the very identity of contractors to which it has disbursed taxpayers' money.

Scope of this appeal

I hereby appeal USAID's decision to withhold the following information:

(1) Any and all information withheld by USAID in its response to my original FOIA request, with the sole exception of the names of individual project employees.

(2) The names and/or identities of USAID's contracting partners for the three projects AID-114-O-08-00019, AID-114-O-08-00021, and AID-114-O-08-00022.

In addition, I ask USAID to provide written confirmation that

(a) my FOIA request only covered 19 budgets, and that

(b) USAID did not approve funding for any projects by local NGOs between June 01, 2008 and December 31, 2008.

In its letter from July 2, 2010, USAID stated that I may appeal USAID's withholdings within 30 days. This letter will be posted from Bonn, Germany, by registered mail today (July 22, 2010). A copy of this letter will also be emailed to Ms Sylvia Lankford from the Public Records Division (the case officer for my FOIA) and to Mr Roberto Miranda of the Administrative Services Division today.

Thank you for your time. I look forward to hearing from you.

Yours faithfully,

/s/

Till Bruckner