

October 6, 2014

SENT BY E-MAIL

Mr. Michael Ravnitzky
XXX (b)(6)

Dear Mr. Ravnitzky:

RE: 2014 – APP – 0003

You submitted a Freedom of Information Act (FOIA) request, received by NCUA on July 7, 2014, seeking a copy of an external review of the condition of the roof at NCUA's central headquarters building, located at 1775 Duke Street in Alexandria. NCUA determined that a "Roof Evaluation Report" (Report) prepared on its behalf by EMCOR Government Services (EMCOR) and dated October 18, 2013, was responsive to your request.

By letter of September 5, 2014, NCUA staff attorney Regina Metz responded to you and advised that your request was granted in part. Ms. Metz provided you with 3 pages of the Report, all of which contained one or more redactions. Sixteen pages from the Report were withheld in full. Ms. Metz determined that the redactions and withholdings were appropriate based on exemption 4 of FOIA, as codified at 5 U.S.C. §552(b)(4). As explained by Ms. Metz, exemption 4 protects from disclosure trade secrets and commercial or financial information obtained from a person that is considered privileged or confidential.

You appealed Ms. Metz's determination by letter dated September 5, 2014 (received by us on September 8th). In your appeal, you challenge the applicability of exemption 4, although you do not appeal the withholding of bidding or costing information of any type. You assert that the determination to withhold responsive materials was made reflexively, without explicit or substantiated reasons, and you assert that the determination was not in accord with the case law that has developed interpreting exemption 4. You have expressly challenged whether the withheld materials constitute trade secrets within the meaning of exemption 4, and you have contested their characterization as commercial or financial information. You also assert that the responsive materials cannot be considered confidential under FOIA, and you have questioned whether, in general, the decision to withhold some of the materials comports with guidance from the president and the Department of Justice concerning FOIA.

Your appeal is granted in part. Enclosed is the narrative portion of the Report in its entirety, except for references therein to costing or bidding information, which we have redacted. These redactions were also made in the initial release to you of the Report, as to which you have stated that you posed no objection. We have also redacted in full several photos of the roof contained in the Report, based on exemption 7(F) of FOIA, as codified at 5 U.S.C. §552(b)(7)(F).

Notwithstanding the determination to grant your appeal in part, the following clarifications relative to the arguments you made in your September 5th letter are in order. Although it is the case that the Report does not qualify as a trade secret, based on the relatively narrow interpretation that the courts have given to that term, it is not accurate to suggest that the Report does not constitute “commercial or financial information” under FOIA. The courts have routinely provided these terms with an expansive reading, and typically have little difficulty in regarding information as “commercial or financial” if it relates to a business or trade. The Court of Appeals for the District of Columbia Circuit has firmly held that these terms should be given their “ordinary meanings” and has specifically rejected the argument that the term “commercial” be confined to the records that “reveal basic commercial operations,” holding instead that records are commercial so long as the submitter has a “commercial interest” in them. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982), and *Bd. of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 403 (D.C. Cir. 1980)); see also Department of Justice *Guide to the Freedom of Information Act*, 2009 Edition, pp. 266-70. The Report, while primarily factual in content, was produced by EMCOR for compensation in response to an overture from NCUA’s property manager, who maintains an ongoing business relationship with EMCOR.

This does not end the analysis under exemption 4, however. Commercial or financial information in the hands of the government but produced by a third party qualifies for an exemption from disclosure only if the material is privileged or confidential. 5 U.S.C. §552(b)(4).¹ Courts construing this language have developed two basic criteria upon which such information may be said to be confidential. Material may be considered confidential and thus exempt from disclosure if its disclosure 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

In this case, neither of these effects would be likely to flow from a release of the Report. With respect to impairment, given the nature of the Report and the absence of any particularly sophisticated methodology or proprietary analyses used in its development, it is unlikely that its release would diminish the flow of information to the agency. Similarly, in response to our notice, EMCOR specifically disclaimed any likelihood of competitive harm flowing to it as a result of a release of the Report. Accordingly, we view the narrative portion of the Report as non-confidential and therefore not protected by exemption 4 of FOIA.

Several photographic images of the NCUA roof contained in the Report have been withheld under exemption 7(F). This exemption calls for the withholding of “records or information compiled for law enforcement purposes” that, if made public, “could reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. §552(b)(7)(F). FOIA case law has established that law enforcement is not limited to criminal law, but includes civil, criminal

¹ For purposes of this analysis, it is assumed that the Report was produced involuntarily, insofar as it was procured on NCUA’s behalf by its property manager from a third party vendor. See *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000) (declaring that “when the government requires a private party to submit information as a condition of doing business with the government” the submission is deemed required.).

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and administrative proceedings as well. *Rugiero v. Department of Justice*, 257 F.3d 534, 550 (6th Cir. 2001); *Jefferson v. Department of Justice*, 284 F. 3d 172, 178 (D.C. Cir. 2002).

Representatives of NCUA's Office of Continuity and Security Management have reviewed the Report, including the photographs, and identified several that should be withheld for security reasons. These included photos showing points of access from the roof into the building, as well as photos showing heating and cooling systems on the roof. As noted by Mr. Justice Alito in his concurring opinion in *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1272 (2011), "law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security"; thus, steps "to prevent terrorism surely fulfill 'law enforcement purposes.'"

The roof evaluation, while not initially compiled for law enforcement purposes, nevertheless qualifies for the exemption as it now fulfills such a purpose. Law enforcement need not be the original purpose for compilation, but instead only a "significant reason." *Id.*, at 1273. Further, the information need only have been used for law enforcement purposes before the agency invokes exemption 7(F). *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989). "[F]ederal building plans and related information—which may have been compiled originally for architectural planning or internal purposes—may fall within exemption 7 if that information is later compiled and given to law enforcement officers for security purposes." *Milner*, 131 S. Ct. at 1273. (Alito, J., concurring). Moreover, exemption 7(F) "does not require that a particular kind of individual be at risk of harm" and only requires NCUA to have a "reasonable expectation of endangerment." *Public Employees for Environmental Responsibility v. United States Section, Int'l Boundary & Water Commission*, 740 F.3d 195, 205 (D.C. Cir. 2014). The excluded images could reasonably jeopardize the life or physical safety of NCUA staff and visitors by disclosing potential security weaknesses or access points in the NCUA roof.

Pursuant to 5 U.S.C. §552(a)(4)(B) of the FOIA, you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court where you reside, where your principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Michael J. McKenna
General Counsel

Attachment

14-FOI-0075; 2014-APP-0003

14-0912