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5 **Counsel for Plaintiffs Sierra Club
and Elders Climate Action**

7 **UNITED STATES DISTRICT COURT**
8 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
9 **OAKLAND DIVISION**

10 SIERRA CLUB and)
11)
11 ELDERS CLIMATE ACTION,)
12)
12 Plaintiffs)
13 v.)
14 LOUIS DEJOY, in his official capacity as)
14 POSTMASTER GENERAL, UNITED STATES)
15 POSTAL SERVICE)
16 Defendant.)

) Civ. No. 4:22-cv-04368

) **COMPLAINT FOR INJUNCTIVE AND
DECLATORY RELIEF**

1 the district in which the complainant resides, or has [its] principal place of business, or in which
2 the agency records are situated, or in the District of Columbia”).

3 **INTRADISTRICT ASSIGNMENT**

4 7. This case arises, within the meaning of 5 U.S.C. § 552, in Alameda County. For that
5 reason, it is properly assigned to the Oakland Division. N.D. Cal. L.R. 3-2(c)–(d).

6 **PARTIES**

7 8. Defendant USPS is a federal agency subject to FOIA. 5 U.S.C. § 552(f)(1).

8 9. Plaintiff Sierra Club is a nonprofit, membership organization incorporated in the State of
9 California with headquarters in Oakland, California. Sierra Club has over 750,000 members
10 nationwide dedicated to exploring, enjoying, and protecting the wild places of the earth. Sierra
11 Club seeks to inform and educate the public as to the activities of federal agencies such as USPS
12 with the aim of improving public understanding of government decisions impacting
13 environmental protection and a clean energy transition. Sierra Club has a long history of
14 advocacy and public education around the dangers of greenhouse gas emissions and other
15 pollution and deep expertise as to the need to transition off fossil fuels, and how to do so.

16 10. Plaintiff ECA is a project of the Elders Action Network—a not-for-profit corporation
17 organized and incorporated under the laws of California. ECA has approximately 15,000
18 members, most of whom are grandparents seeking to restore a stable, livable climate to sustain
19 the natural systems that support the ability of our 100,000 grandchildren and their children to live
20 healthy, productive lives.

21 11. Sierra Club and ECA bring this action on their own behalf and on behalf of their
22 members. Plaintiffs and their members have been and continue to be injured by USPS’s failures
23 to: 1) provide requested records within the timeframe mandated by FOIA; 2) conduct an
adequate search for responsive records; 3) properly segregate non-exempt documents; and 4)

1 provide all lawfully responsive and non-exempt records. The requested relief will redress these
2 injuries.

3 **STATUTORY BACKGROUND**

4 12. FOIA requires that federal agencies promptly release, upon request by a member of the
5 public, documents and records within the possession of the agency, unless a statutory exemption
6 applies. 5 U.S.C. § 552(a)-(b).

7 13. Within twenty business days of an agency's receipt of a FOIA request, the agency must
8 "determine . . . whether to comply" with the request. 5 U.S.C. § 552(a)(6)(A)(i). The agency
9 must "immediately notify" the requester of "such determination and the reasons therefor." *Id.* If
10 an agency determines that it will comply with the request, it must "promptly" release responsive,
11 non-exempt records to the requester. 5 U.S.C. § 552(a)(6)(C)(i).

12 14. FOIA requires each agency to make reasonable efforts to search for records in a manner
13 that is reasonably calculated to locate records that are responsive to the FOIA request. *Id.* §
14 552(a)(3)(C)-(D).

15 15. In certain limited instances, the agency may withhold records pursuant to nine specific
16 exemptions. *Id.* § 552(b). These exemptions must be narrowly construed in light of FOIA's
17 dominant objective of disclosure, not secrecy.

18 16. FOIA places the burden on the agency to prove that it may withhold responsive records
19 from a requester. *Id.* § 552(a)(4)(B).

20 17. The requester has a right to administratively appeal any adverse determination an agency
21 made on a FOIA request, and must do so within 90 days. See 5 U.S.C. § 552(a)(6)(A)

22 18. If the agency fails to comply with the statutory time limits, the requester is deemed to
23 have exhausted administrative remedies. *Id.* District courts may enjoin an agency from

1 withholding agency records and “order the production of any agency records improperly
2 withheld.” 5 U.S.C. § 552(a)(4)(B).

3 **STATEMENT OF FACTS**

4 **1. The Oshkosh Contract**

5 19. On February 23, 2021, USPS announced that it had awarded a 10-year contract to the
6 defense contractor Oshkosh Defense to manufacture 50,000 to 165,000 Next Generation
7 Delivery Vehicles (“NGDV”) to replace the existing USPS delivery fleet. The contract is
8 reported to be worth up to several billion dollars over the 10-year term.

9 20. During Congressional testimony on February 24, 2021, Postmaster General Louis DeJoy
10 informed Congressional lawmakers that battery electric vehicles (“BEV”) would only make up
11 10% of the NGDV fleet. The contract and the Postmaster General’s testimony drew immediate
12 criticism from environmental organizations and lawmakers for their lack of alignment with the
13 climate goals established by the White House.

14 21. On March 4, 2021, USPS published a Notice of Intent to prepare an Environmental
15 Impact Statement (“EIS”) for the contract to replace the NGDV fleet and invited comment on the
16 scope of the EIS. 86 Fed. Reg. 12,715 (March 4, 2021).

17 22. Pursuant to its obligations under the National Environmental Protection Act, 42 U.S.
18 Code § 4332(C), USPS published a Notice of Availability of the Final EIS on January 7, 2022.
19 On February 23, 2022, USPS issued a final Record of Decision which made clear that the
20 “Proposed Action does not commit to more than 10 percent BEVs.”

21 23. USPS announced on March 24, 2022, that the agency had placed its first order of 50,000
22 vehicles for the cost of \$2.98 billion.¹ Production of this first order is expected to begin in 2023.

23 _____
¹ *USPS Places Order for 50,000 Next Generation Delivery Vehicles; 10,019 To Be Electric*,
USPS, <https://about.usps.com/newsroom/national-releases/2022/0324-usps-places-order-for->

1 24. The USPS's decision to enter into the Oshkosh contract and its review of alternatives is
2 of enormous public interest, as evidenced by more than 35,000 comments received from federal
3 and state agencies, scientists, labor organizations, environmentalists, and members of the public
4 on the Draft EIS for the NGDV contract.² There has been widespread media coverage of USPS's
5 actions and the response from environmental groups, lawmakers, and the public, including
6 coverage of the recent lawsuits³ and the House Oversight and Reform Committee's investigation
7 into the purchase contract.⁴

8 **2. Sierra Club and ECA's FOIA Request**

9 25. In response to the Notice of Intent to prepare an EIS, Sierra Club and ECA submitted a
10 11-part FOIA request on April 19, 2021. The request, attached as Exhibit A, sought a variety of
11 records, including the request for proposal for production of vehicles, the proposals submitted in
12 response, the contract issued to Oshkosh, and reports and analyses comparing the cost and air
13 pollution from BEV versus gas-powered vehicle fleets. The request included a statement
14 explaining that the intended use of the information requested included both educating the public
15 regarding the action that USPS had taken in signing the contract, and assisting the public, Sierra
16 Club, and ECA members in preparing and submitting informed comments on the Draft EIS. The
17 request asked that USPS provide the requested records information in advance of the release of
18 any Draft EIS to facilitate effective public participation in the NEPA process.

19
20 _____
next-gen-delivery-vehicles-to-be-electric.htm (Mar. 24, 2022).

21 ³ Coral Davenport, *States Sue Postal Service Over New Gas-Powered Mail Trucks*, updated June
22 18, 2022, *The New York Times*, <https://www.nytimes.com/2022/04/28/climate/usps-gas-electric-vehicles-lawsuit.html>.

23 ⁴ Jacob Bogage, *House panel will investigate USPS plan to purchase 8.6 mpg trucks*, *The Washington Post*, May 12, 2022, <https://www.washingtonpost.com/business/2022/05/12/usps-truck-contract-house-oversight-investigation/>.

1 26. USPS acknowledged receipt of the request on the same day it was submitted and assigned
2 it the tracking number 2021-FPRO-01780.

3 27. USPS announced the release of the Draft EIS on August 26, 2021. Comments were to be
4 received no later than October 18, 2021.

5 28. Between June 3, 2021 and February 1, 2022, USPS provided responses to sections 1, 2,
6 3(a), 3(b), 4, 6, and 10 of the FOIA request. As of the date of this filing, and more than 15
7 months after the initial FOIA, USPS has failed to provide responses to sections 3(c), 5, 7, 8, 9,
8 and 11 of the request which included most of the information requested to submit informed
9 comments on the Draft EIS for the contract.

10 29. On March 4, 2022, Sierra Club inquired via email, attached as Exhibit B, about the status
11 of sections 3(c), 5, 7, 8, 9, and 11 of the FOIA request. On March 10, 2022, a USPS staff person
12 informed Sierra Club that she was “not able to get a timeframe for a response regarding the
13 records.” Exhibit C. Sierra Club followed up again via email on the status of the outstanding
14 requests on May 11, 2022. Exhibit D. USPS has not responded to this inquiry to date.

15 **USPS’s Partial Response dated June 8, 2021**

16 30. On June 8, 2021, USPS provided a partial response to sections 1 and 2 to Plaintiffs’
17 request. Exhibit E. Section 1 sought USPS’s “request for proposal (“RFP”) for NGD vehicles
18 under which the Oshkosh Defense contract was awarded, and proposals received from vendors
19 that responded to the RFP.” Section 2 sought the contract executed between USPS and Oshkosh.

20 31. While USPS’s June 8 response produced some of the requested materials, it withheld
21 large portions pursuant to Exemptions 3, 4, 5, and 6. For example, USPS withheld in their
22 entirety 329 of 450 pages of the RFP, and 471 of 534 pages of the Oshkosh contract. *See* Exhibit
23 E at 2-3. USPS also withheld in full all of the proposals of all unsuccessful offerors responding

1 to the RFP, while stating that the “proposal of the supplier that was awarded the contract” (i.e.,
2 Oshkosh) was “subject to FOIA” and would be “forthcoming at a later date.” *Id.* at 2.

3 32. USPS’s responses prior to the release of the Draft EIS did not provide the requested
4 information related to the environmental impacts of the fleet vehicles that were expected to be
5 purchased under the contract, including but not limited to: the miles expected to be driven by the
6 delivery fleet, the volume of fuel expected to be burned in the vehicles, estimated GHG
7 emissions, criteria pollutant emissions, the location of fleet operations and other data related to
8 determining the environmental impacts of the fleet.

9 **3. Sierra Club and ECA’s First Administrative Appeal**

10 33. On September 7, 2021, Plaintiffs timely appealed USPS’s June 8, 2021 partial response.
11 *See* Exhibit F. Sierra Club appealed USPS’s response on the basis that the agency had failed to
12 justify withholding and redacting records under Exemptions 3, 4, 5, and 6, and failed to
13 segregate non-exempt materials. USPS acknowledged receipt of the appeal on September 8,
14 2021 and assigned it tracking number 2021-APP-00183.

15 34. USPS responded to the appeal on October 15, 2021, affirming in part and remanding in
16 part the agency’s original response. The remand did not require USPS to produce any additional
17 portions of the RFP, contract, or any of the offerors’ proposals. Rather, it ordered only that the
18 agency: (1) make administrative corrections such as correcting the number of pages withheld; (2)
19 remove redactions for certain communications between offerors and USPS; (3) release a
20 document that had previously been made public. The remanded FOIA was assigned tracking
21 number 2022-FPRO-00127. Exhibit G. USPS responded to the remand on February 10, 2022.
22 Exhibit H, and implemented these minor changes, but did not reopen or reconsider the key issues
23 that formed the basis of Plaintiffs’ appeal. Thus, Plaintiffs did not appeal the February 10
response.

1 previously adopted in February 2022, for its NGDV acquisitions.⁵ The Supplemental EIS will
2 modify the Preferred Alternative in two ways: (1) to modify the Preferred Alternative to consider
3 a “significantly higher percentage of BEVs, and certainly not less than 50 percent” and (2) to
4 procure up to 20,000 left-hand drive Commercial-Off-the Shelf vehicles (including as many
5 BEVs as are commercially available and consistent with USPS’s delivery profile) and up to
6 14,500 right-hand drive internal combustion energy Off-the-Shelf vehicles.

7 40. USPS stated in the revised Notice of Intent that it expects that at least 40 percent of the
8 total quantity of vehicles covered by the Supplemental EIS will be BEVs.⁶ The Agency also
9 claimed in the Notice that “it will be necessary for [USPS] to procure some ICE vehicles.”

10 41. While USPS’s most recent notice indicates the agency will consider the procurement of
11 more BEVs than were considered in the February 2021 decision, transparency around the
12 existing contract, its alternatives, and the facts relied upon in the agency’s decision-making
13 remains important and time-sensitive. Sierra Club and its allies believe USPS can and should
14 achieve 100% fleet electrification and the requested information will help inform the public on
15 this issue as USPS continues to consider its approach.

16 42. As USPS’s decision-making process as to the implementation of the Oshkosh contract
17 and additional vehicle procurement is still ongoing, it is especially important that Plaintiffs and
18 the public have timely access to the requested documents such that they have the information
19 necessary to seek to influence the USPS’s procurement decisions before USPS makes an
20 irreversible commitment to fossil-fuel powered vehicles.

21 _____
22 ⁵ Notice to Postpone Public Hearing and Extend Public Comment Period for Supplement to the
Next Generation Delivery Vehicles Acquisitions Final Environmental Impact Statement, 87 Fed.
Reg. 43,561 (July 21, 2022).

23 ⁶ See also *Postal Service Modernization Enables Expanded Electric Vehicle Opportunity*, USPS,
[https://about.usps.com/newsroom/national-releases/2022/0720-postal-service-modernization-
enables-expanded-electric-vehicle-opportunity.htm](https://about.usps.com/newsroom/national-releases/2022/0720-postal-service-modernization-enables-expanded-electric-vehicle-opportunity.htm) (July 20, 2022).

1 43. The information requested by Plaintiffs remains relevant to their need to prepare and
2 submit informed analysis of the environmental impacts of the planned NGDV fleet in their
3 comments on the Supplemental EIS and educate the public on these matters.

4 **FIRST CAUSE OF ACTION**

5 **Failure to Make a Determination Within the Statutory Deadline**

6 44. The previous paragraphs are re-alleged and incorporated by reference.

7 45. USPS has failed to make a determination with regard to sections 3(c), 5, 7, 8, 9, and 11
8 of Plaintiffs' request number 2021-FPRO-01780 within FOIA's mandatory deadline and has
9 therefore violated FOIA. 5 U.S.C. § 552(a)(6)(A)(i),

10 46. Plaintiffs' organizational activities will be adversely affected if USPS is allowed to
11 continue violating FOIA's decision deadlines as it has in this case.

12 47. Unless enjoined and made subject to a declaration of the Plaintiffs' legal rights by this
13 Court, USPS will continue to violate FOIA, as well as Plaintiffs' rights to receive public records
14 under FOIA.

15 **SECOND CAUSE OF ACTION**

16 **Failure to Promptly Disclose Responsive Records**

17 48. The previous paragraphs are re-alleged and incorporated by reference.

18 49. USPS has not promptly disclosed records that are responsive to sections 3(c), 5, 7, 8, 9,
19 and 11 of the Plaintiff's FOIA request. 5 USC § 552(a)(3).

20 50. USPS has not asserted that FOIA's statutory exemptions apply to the records that the
21 Plaintiffs seek.

22 51. The Agency has thereby violated FOIA's requirement that the agency promptly make
23 responsive, non-exempt records available to requesters. 5 U.S.C. §552(a)(3).

1 52. Unless enjoined and made subject to a declaration of the Plaintiff's legal rights by this
2 Court, USPS will continue to violate FOIA and Plaintiffs' rights to receive public records.

3 **THIRD CAUSE OF ACTION**

4 **Failure to Conduct an Adequate Search**

5 53. The previous paragraphs are re-alleged and incorporated by reference.

6 54. USPS is required to process Plaintiffs' FOIA request in a manner that complies with 5
7 U.S.C. § 552(a)(3).

8 55. USPS has not undertaken a search that is reasonably calculated to locate all records that
9 are responsive to the Plaintiffs' FOIA request.

10 56. The agency has therefore violated FOIA's requirements. 5 U.S.C. §552(a)(3).

11 57. Unless enjoined and made subject to a declaration of Plaintiffs' legal rights by this Court,
12 USPS will continue to violate FOIA and Plaintiffs' rights to receive public records.

13 **FOURTH CAUSE OF ACTION**

14 **Unlawful Withholding of Non-Exempt Records**

15 58. The previous paragraphs are re-alleged and incorporated by reference.

16 59. USPS has a statutory duty to produce all responsive records that are not subject to
17 FOIA's exemptions. 5 U.S.C. § 552(d).

18 60. USPS violated FOIA by unlawfully withholding non-exempt records that are responsive
19 to Plaintiffs' FOIA request. USPS is unlawfully withholding all records responsive to parts 3(c),
20 5, 7, 8, 9, and 11 without making any assertion that these records are exempt from production,
21 and is also withholding certain records responsive to 1 and 2 without adequate justification.

22 61. USPS's responses to portions 1 and 2 of the request, and responses to Plaintiff's first and
23 second administrative appeals failed to adequately justify withholding the requested records
under FOIA's exemptions. 5 U.S.C. § 552(b)(1)–(9).

1 62. Sierra Club has exhausted its administrative remedies, and is otherwise entitled to obtain
2 the requested records.

3 63. Unless enjoined and made subject to a declaration of the Plaintiffs' legal rights by this
4 Court, USPS will continue to violate FOIA and Plaintiffs' rights to receive public records.

5 **FIFTH CAUSE OF ACTION**

6 **Failure to Provide Reasonably Segregable Portions of Exempt Records**

7 64. The previous paragraphs are re-alleged and incorporated by reference.

8 65. USPS is obligated under FOIA to produce any reasonably segregable portion of a record
9 that is otherwise being withheld to pursuant to one or more of FOIA's exemptions. 5 U.S.C. §
10 552(b).

11 66. As detailed in Exhibits F and J hereto, USPS is unlawfully withholding reasonably
12 segregable portions of records that are responsive to Plaintiffs' FOIA request and which USPS
13 asserts are exempt from FOIA

14 67. Sierra Club has exhausted its administrative remedies, and is otherwise entitled to obtain
15 the requested records.

16 68. Unless enjoined and made subject to a declaration of the Plaintiffs' legal rights by this
17 Court, USPS will continue to violate FOIA and Plaintiffs' rights to receive public records.

18 **PRAYER FOR RELIEF**

19 Wherefore, Plaintiffs respectfully request that this Court:

- 20 (1) Declare that USPS has violated FOIA, by its failure to timely respond to sections 3(c), 5,
21 7, 8, 9, and 11 of Plaintiffs' FOIA request and its failure to make the requested records
22 promptly available;

- 1 (2) Declare that USPS has violated FOIA by unlawfully withholding certain records
2 responsive to sections 1 and 2 of the Plaintiffs' FOIA request, contrary to the results of
3 Plaintiffs' administrative appeals;
- 4 (3) Order that USPS make available to Plaintiffs all non-exempt records that they seek,
5 promptly and at no cost;
- 6 (4) Retain jurisdiction over this case to rule on any new assertions by USPS that responsive
7 records held by the Agency are, in whole or in part, exempt from disclosure or by
8 Plaintiffs' that USPS's search for documents ordered to be produced was inadequate;
- 9 (5) Award Plaintiffs' litigation costs and attorneys' fees in this action;
- 10 (6) Order such other relief as the Court may deem just and proper.

11
12 Dated: July 28, 2022

13 Respectfully submitted,

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19 *Counsel for Plaintiffs*
20
21
22
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EXHIBIT A



April 19, 2021

Via Email

Manager Records Office
US Postal Service
475 L'enfant Plaza SW RM 1P830
Washington DC 20260-1101
(202) 268-2608
FOIA12@usps.gov

Re: Freedom of Information Act Request Regarding U.S. Postal Service Purchase Contract Issued to Oshkosh Defense

Dear USPS FOIA Officer,

On behalf of Elders Climate Action and Sierra Club, we write to request the records¹ described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”).

Records Requested

The U.S. Postal Service (“USPS”) recently announced that it has issued a \$482 million contract to Oshkosh Defense to for 50,000 to 165,000 “Next Generation Delivery Vehicles” (“NGD vehicles”) for mail and package delivery over 10 years.² To promote public awareness and understanding of the decision made by the U.S. Postal Service to issue a purchase contract to Oshkosh Defense, and to assist in the preparation of well-informed comments on the draft EIS

¹ “Records” means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, emails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of USPS, National Headquarters and all of its Offices, Regions and other subdivisions.

² *U.S. Postal Service Awards Contract to Launch Multi-Billion-Dollar Modernization of Postal Delivery Vehicle Fleet*, U.S. Postal Serv., Feb. 23, 2021, available at <https://about.usps.com/newsroom/national-releases/2021/0223-multi-billion-dollar-modernization-of-postal-delivery-vehicle-fleet.htm>.

that USPS announced that it intends to prepare, 86 Fed. Reg. 12715, the above referenced organizations request copies of the following documents:

1. The U.S. Postal Service's request for proposal ("RFP") for NGD vehicles under which the Oshkosh Defense contract was awarded, and proposals received from vendors that responded to the RFP.
2. The contract executed by the U.S. Postal Service and Oshkosh Defense to provide for production and delivery of new delivery vehicles, including the following related documents:
 - a. All contract attachments;
 - b. The statement of work; and
 - c. The purchase plan and any other documents related to the schedule for placing purchase orders and other decision points in the contract.
3. In a March 11, 2021 letter to Congress, Postmaster General Louis DeJoy stated, "[T]here are operational limitations to electric-only vehicles in certain postal delivery environments. This includes a lack of available infrastructure, and as many as 12,500 postal routes where distance, environmental conditions, or facility limitations make electric vehicles unfeasible or impractical."³ Please provide all documents supporting this statement including the following documents:
 - a. Inventories or operating reports showing operations facilities where the current fleet of delivery vehicles are based, fueled, maintained, parked or stored when not in service;
 - b. Documents summarizing the delivery route range data including the average, median, and longest delivery routes; and
 - c. Any reports, summaries or internal analyses of the range limitations of battery electric vehicles that might constrain their deployment on rural delivery routes.
4. Inventories, reports or other documents showing the volume of vehicle fuels purchased during 2019 and 2020 for use in, and consumed by, all U.S. Postal Service fleet vehicles, and the fraction of total fuels used or consumed by delivery vehicles.
5. Any reports, analyses or summaries containing information (a) estimating the future fuel volumes needed annually to fuel the new delivery vehicles if the internal combustion power train option is selected, and (b) used to estimate future fuel volumes, including but not limited to, the average NGD vehicles fleet miles that are expected to be driven daily, and the expected average fuel efficiency (in miles/gallon) of the NGD vehicles.
6. Any reports, analyses or summaries containing information estimating the total annual cost for motor fuels to operate NGD vehicles for any years during the expected useful life

³ Letter from Louis DeJoy, Postmaster General, to Chairman Peters et al. (Mar. 11, 2021), *available at* <https://www.documentcloud.org/documents/20519715-03-11-pmg-letter-next-gen-vehicles>.

of NGD vehicles (a) for vehicles using an internal combustion power train, or (b) for vehicles using a battery electric power train, or both. In responding to this request include documents that contain information used to estimate annual fuel costs, or that could be used to estimate annual fuel cost, including but not limited to, estimates of the future price of liquid motor fuels and electricity per kW-hr.

7. Any reports, analyses or summaries comparing total lifetime costs (including purchase, fuel, operating, and maintenance costs) of new internal combustion engine powered NGD vehicles with new battery electric motor powered NGD vehicles over the life of the new vehicle fleet.
8. Comparisons of the production and purchase costs of internal combustion engine vehicles with battery electric vehicles prepared by or for the U.S. Postal Service prior to the award of the contract to Oshkosh Defense.
9. Any reports, analyses or summaries of the cost of purchasing and installing charging infrastructure to fuel a fleet of NGD vehicles powered by battery electric motors.
10. Any reports, internal documents or summaries of analyses, modeling or estimates of greenhouse gas emissions and/or emissions of air pollutants regulated under the Clean Air Act from the new fleet of delivery vehicles to be produced pursuant to the contract with Oshkosh Defense announced on February 23, 2021.
11. Any reports, analyses or summaries that estimate the technical feasibility, design features, and incremental costs of purchasing NGD vehicles initially powered by internal combustion power trains with the capability of being subsequently converted to battery electric power trains.

Requester's Interest in Public Records

Sierra Club is the nation's oldest grassroots organization with more than 820,000 members. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

Elders Climate Action is an organization with more than 15,000 members most of whom are parents and grandparents who are dedicated to preserving natural living systems and a healthy sustainable environment for their grandchildren and future generations.

Exempt Records

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless as such disclosure would serve the public interest of educating citizens and inform our members to allow them to submit relevant, probative and thoughtful comments on the proposed draft EIS. *See* 10 C.F.R. § 1004.1 (authorizing disclosure of documents exempt from FOIA disclosure where such disclosure is in the public interest).

Should you decide to invoke a FOIA exemption, please include in your full or partial denial letter

sufficient information for Sierra Club and Elders Climate Action to appeal the denial. To comport with legal requirements this information must include:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of the records requested are exempt from disclosure, please segregate the exempt portions and provide the remaining records within the statutory time limits after the exempted material has been redacted from the records the requesters are seeking.

Fee Waiver Request

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 39 CFR § 265.9(j). Sierra Club is the nation's oldest grassroots organization with more than 3 million members and supporters nationwide. Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of environmental protection including climate change, fossil fuel energy, clean energy, and clean water. Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.

Elders Climate Action is a not-for-profit organization with 15,000 members that seeks to educate its members and the public regarding the consequences of climate change on the environment, public health, water and food supplies, ecosystem preservation, the stability of habitats and survival of species, and inform its members and the public of opportunities to participate in decisions that will affect humanity's ability to stabilize the climate and preserve natural systems and human civilization for our grandchildren and future generations.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge," if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as Sierra Club and Elders Climate Action access to government records without the payment of fees. *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (fee waiver provision intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and non-profit public interest groups.").

As explained below, this FOIA request satisfies the factors listed in USPS's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not

primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 39 CFR § 265.9(j).

1. The subject matter of the requested records specifically concerns identifiable “operations and activities of the government.”

The requested records relate to the U.S. Postal Service’s decision to issue a purchase contract to Oshkosh Defense. By their very definition, the documents concern “identifiable operations or activities of the government.”

2. The disclosure of the requested documents would be meaningfully informative and “likely to contribute to an understanding of Federal government operations or activities.”

Disclosure of the requested records will allow Sierra Club and Elders Climate Action to convey to the public information related to the controversial decision of the U.S. Postal Service to purchase new internal combustion delivery vehicles instead of electric vehicles.

Once the requested documents are made available, Sierra Club and Elders Climate Action will analyze them and present their findings to their members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of the Postal Service’s decision. The documents requested will thus be “meaningfully informative” and “likely to contribute” to an understanding of USPS’s operations. The information will also help our members, the public, and elected officials participate in the USPS decision process by submitting well-informed, thoughtful comments on the environmental impacts of the pending decision to acquire a fleet of NGD vehicles.

To our knowledge, the requested records are not otherwise in the public domain and are not accessible other than through a FOIA request. Thus, the requested documents provide information that is not already in the public domain and are accordingly likely to meaningfully contribute to public understanding of governmental operations.

3. The disclosure would contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.

Sierra Club has long-standing experience and expertise in the subject area of the FOIA requests, including issues related to government accountability and transparency, the Clean Air Act, Clean Water Act, climate policy, the protection of the natural environment, and the development and use of energy resources.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, such as: analysis and distribution to the media, distribution through publication and mailing, posting on its website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 26,298,200 unique visits and over 30 million-page views; on average, the site gets 72,049 visits per day. Sierra Magazine is a bi-monthly magazine with a printed circulation of approximately 650,000 copies. Sierra Club Insider, an electronic newsletter, is sent to nearly 3 million people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies,

and where necessary, through the judicial system. In the past, Sierra Club has published, posted, or disseminated numerous stories health, the environment and alternative energy.

Sierra Club intends to share the information received from this FOIA request with the public at large, our members, the media and our allies who share a common interest in the operations of the U.S. Postal Service.

Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure would contribute “significantly” to public understanding of government operations or activities.

As discussed in section (2) above, the records requested will significantly contribute to the public understanding of governmental operations, and activities. Specifically, disclosure of these records will significantly enhance the public’s understanding of USPS’s decision-making processes when awarding a contract to Oshkosh Defense.

5. The requester has no commercial interest that would be furthered by the requested disclosure.

Sierra Club and Elders Climate Action have no commercial interest in the requested records. Nor do they have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood.

Sierra Club is a nonprofit, tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

Elders Climate Action is a project sponsored by Elders Action Network which is a not-for-profit, tax exempt organization recognized by the IRS under section 501(c)(3) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Elder Climate Action’s mission to inform the public on matters of vital importance to restoring a stable climate and preventing the harm to the environmental and public health caused by climate change.

Sierra Club and Elders Climate Action respectfully requests that USPS waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) and 39 CFR § 265.9(j)(1) because the public will be the primary beneficiary of this requested information. In the event that your agency denies a fee waiver, please send a written explanation for the denial. In the event that fees are ultimately assessed, please do not incur expenses beyond \$250 without first contacting our office for explicit authorization.

Format of Requested Records

Under FOIA, you are obligated to provide records in the format requested if the record is readily

reproducible by the agency in that format. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B). We request that you provide electronic documents individually, and not as batched files. Specifically, for any document stored as Electronically Stored Information (“ESI”), we request that the document be produced in the native file type. This includes e-mail (whether sent, received or drafted), word-processing files, tables, charts, graphs and database files, electronic calendars, proprietary software files, and spreadsheets. ESI can also be provided in the form of a load file that includes a common file type (TIFF, HTML, PDF) while maintaining access to the native file and its source data, including the ability to keyword search documents.

Record Delivery

In responding to this request, please comply with all relevant deadlines and other obligations set forth in FOIA and the agency’s regulations 5 U.S.C. § 552(a)(6)(A)(i). Please produce the records above by sending them to Andrea Issod at the address listed below, or provide in electronic format at the email address listed below. Please produce them on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to contact me at the information provided below. I will do my best to clarify the request or otherwise expedite and simplify your efforts to comply.

Sincerely,

/s/ Andrea Issod

Andrea Issod

Sierra Club Environmental Law Program

2101 Webster Street, Suite 1300

Oakland, CA 94612

andrea.issod@sierraclub.org

/s/ Robert E. Yuhnke

Robert E. Yuhnke

Policy Committee

Elders Climate Action

4050 SE Hosner Terrace

Gresham, OR 97080

EXHIBIT B



Elena Saxonhouse <elena.saxonhouse@sierraclub.org>

USPS FOIA Request No. 2021-FPRO-01780

Miriam Raffel-Smith <miriam.raffel-smith@sierraclub.org>

Fri, Mar 4, 2022 at 9:44 AM

To: "Hunter, Brenda L - Aurora, CO" <brenda.l.hunter@usps.gov>

Cc: Elena Saxonhouse <elena.saxonhouse@sierraclub.org>, Andrea Issod <andrea.issod@sierraclub.org>

Hi Brenda,

I hope you are doing well. I am reaching out to follow-up on USPS FOIA Request No. 2021-FPRO-01780. I have been reviewing all of the responses that were provided to Sierra Club and it appears that we have not received responses to the following parts of the request: 3(c), 5, 7, 8, 9, and 11.

Could you please let me know when USPS will be able to provide responses to these outstanding sections.

Thank you,
Miriam

--



Miriam Raffel-Smith

Legal Assistant

she/her/hers

Environmental Law Program

2101 Webster St., Suite 1300

Oakland, CA 94612

Phone: (415) 977-5745

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EXHIBIT C



Elena Saxonhouse <elena.saxonhouse@sierraclub.org>

USPS FOIA Request No. 2021-FPRO-01780

Hunter, Brenda L - Aurora, CO <brenda.l.hunter@usps.gov>
To: Miriam Raffel-Smith <miriam.raffel-smith@sierraclub.org>
Cc: Elena Saxonhouse <elena.saxonhouse@sierraclub.org>, Andrea Issod <andrea.issod@sierraclub.org>

Thu, Mar 10, 2022 at 9:08 AM

Hello Ms. Raffel-Smith:

The remaining records (3, c., 5, 7, 8, 9, and 11) for FOIA Request 2021-FPRO-01780 are assigned to Engineering and are still being reviewed. I was not able to get a timeframe for a response regarding the records.

Kind Regards,

Brenda L. Hunter

Audit & FOIA Management Team

USPS ~ Supply Management Infrastructure

Office – 303-743-1305

From: Miriam Raffel-Smith <miriam.raffel-smith@sierraclub.org>
Sent: Friday, March 4, 2022 10:45 AM
To: Hunter, Brenda L - Aurora, CO <brenda.l.hunter@usps.gov>
Cc: Elena Saxonhouse <elena.saxonhouse@sierraclub.org>; Andrea Issod <andrea.issod@sierraclub.org>
Subject: [EXTERNAL] USPS FOIA Request No. 2021-FPRO-01780

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[Quoted text hidden]

EXHIBIT D



Elena Saxonhouse <elena.saxonhouse@sierraclub.org>

USPS FOIA Request No. 2021-FPRO-01780

Elena Saxonhouse <elena.saxonhouse@sierraclub.org>

Wed, May 11, 2022 at 3:55 PM

To: "Hunter, Brenda L - Aurora, CO" <brenda.l.hunter@usps.gov>

Cc: Miriam Raffel-Smith <miriam.raffel-smith@sierraclub.org>, Andrea Issod <andrea.issod@sierraclub.org>

Correction, I meant to refer to Sierra Club's **April** 2021 FOIA below. Sorry for any confusion.



Elena Saxonhouse

Managing Attorney
Sierra Club - Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
415-265-2943 (cell)

On Wed, May 11, 2022 at 3:23 PM Elena Saxonhouse <elena.saxonhouse@sierraclub.org> wrote:

Dear Ms. Hunter,

Can you please provide an update on the outstanding items from Sierra Club's September 2021 FOIA request, which you noted had been assigned to the Engineering team? Is the agency able to provide an estimated date of completion for the request?

Thank you for your help,

Elena



Elena Saxonhouse

Managing Attorney
Sierra Club - Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
415-265-2943 (cell)

On Thu, Mar 10, 2022 at 9:08 AM Hunter, Brenda L - Aurora, CO <brenda.l.hunter@usps.gov> wrote:

Hello Ms. Raffel-Smith:

The remaining records (3. c., 5, 7, 8, 9, and 11) for FOIA Request 2021-FPRO-01780 are assigned to Engineering and are still being reviewed. I was not able to get a timeframe for a response regarding the records.

Kind Regards,

Brenda L. Hunter

Audit & FOIA Management Team

USPS ~ Supply Management Infrastructure

Office – 303-743-1305

From: Miriam Raffel-Smith <miriam.raffel-smith@sierraclub.org>
Sent: Friday, March 4, 2022 10:45 AM
To: Hunter, Brenda L - Aurora, CO <brenda.l.hunter@usps.gov>
Cc: Elena Saxonhouse <elena.saxonhouse@sierraclub.org>; Andrea Issod <andrea.issod@sierraclub.org>
Subject: [EXTERNAL] USPS FOIA Request No. 2021-FPRO-01780

CAUTION: This email originated from outside USPS. **STOP and CONSIDER** before responding, clicking on links, or opening attachments.

Hi Brenda,

I hope you are doing well. I am reaching out to follow-up on USPS FOIA Request No. 2021-FPRO-01780. I have been reviewing all of the responses that were provided to Sierra Club and it appears that we have not received responses to the following parts of the request: 3(c), 5, 7, 8, 9, and 11.

Could you please let me know when USPS will be able to provide responses to these outstanding sections.

Thank you,

Miriam

--



Miriam Raffel-Smith

Legal Assistant

she/her/hers

Environmental Law Program

2101 Webster St., Suite 1300

Oakland, CA 94612

Phone: (415) 977-5745

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EXHIBIT E



June 8, 2021

Via Email: miriam.raffel-smith@sierraclub.org

Miriam Raffel-Smith
Sierra Club Environmental Law Program
2101 Webster Street
Suite 1300
Oakland, CA 94612

RE: FOIA Case No. 2021-FPRO-01780

Dear Ms. Raffel-Smith:

This is a partial response to your Freedom of Information Act (FOIA) request to the United States Postal Service (USPS) dated April 19, 2021, requesting access to the following Postal Service records:

1. The U.S. Postal Service's request for proposal ("RFP") for NGD vehicles under which the Oshkosh Defense contract was awarded, and proposals received from vendors that responded to the RFP.
2. The contract executed by the U.S. Postal Service and Oshkosh Defense to provide for production and delivery of new delivery vehicles, including the following related documents:
 - a. All contract attachments;
 - b. The statement of work; and
 - c. The purchase plan and any other documents related to the schedule for placing purchase orders and other decision points in the contract.
3. In a March 11, 2021 letter to Congress, Postmaster General Louis DeJoy stated, "[T]here are operational limitations to electric-only vehicles in certain postal delivery environments. This includes a lack of available infrastructure, and as many as 12,500 postal routes where distance, environmental conditions, or facility limitations make electric vehicles unfeasible or impractical." Please provide all documents supporting this statement including the following documents:
 - a. Inventories or operating reports showing operations facilities where the current fleet of delivery vehicles are based, fueled, maintained, parked or stored when not in service;
 - b. Documents summarizing the delivery route range data including the average, median, and longest delivery routes; and
 - c. Any reports, summaries or internal analyses of the range limitations of battery electric vehicles that might constrain their deployment on rural delivery routes.
4. Inventories, reports or other documents showing the volume of vehicle fuels purchased during 2019 and 2020 for use in, and consumed by, all U.S. Postal Service fleet vehicles, and the fraction of total fuels used or consumed by delivery vehicles.

5. Any reports, analyses or summaries containing information (a) estimating the future fuel volumes needed annually to fuel the new delivery vehicles if the internal combustion power train option is selected, and (b) used to estimate future fuel volumes, including but not limited to, the average NGD vehicles fleet miles that are expected to be driven daily, and the expected average fuel efficiency (in miles/gallon) of the NGD vehicles.
6. Any reports, analyses or summaries containing information estimating the total annual cost for motor fuels to operate NGD vehicles for any years during the expected useful life of NGD vehicles (a) for vehicles using an internal combustion power train, or (b) for vehicles using a battery electric power train, or both. In responding to this request include documents that contain information used to estimate annual fuel costs, or that could be used to estimate annual fuel cost, including but not limited to, estimates of the future price of liquid motor fuels and electricity per kW-hr.
7. Any reports, analyses or summaries comparing total lifetime costs (including purchase, fuel, operating, and maintenance costs) of new internal combustion engine powered NGD vehicles with new battery electric motor powered NGD vehicles over the life of the new vehicle fleet.
8. Comparisons of the production and purchase costs of internal combustion engine vehicles with battery electric vehicles prepared by or for the U.S. Postal Service prior to the award of the contract to Oshkosh Defense.
9. Any reports, analyses or summaries of the cost of purchasing and installing charging infrastructure to fuel a fleet of NGD vehicles powered by battery electric motors.
10. Any reports, internal documents or summaries of analyses, modeling or estimates of greenhouse gas emissions and/or emissions of air pollutants regulated under the Clean Air Act from the new fleet of delivery vehicles to be produced pursuant to the contract with Oshkosh Defense announced on February 23, 2021.
11. Any reports, analyses or summaries that estimate the technical feasibility, design features, and incremental costs of purchasing NGD vehicles initially powered by internal combustion power trains with the capability of being subsequently converted to battery electric power trains.

Under the FOIA, 5 U.S.C. § 552, agencies are required to produce records responsive to a request in accordance with statutory time frames, subject to certain exemptions. The FOIA provides nine exemptions under which records or portions of records may be withheld from public disclosure. 5 U.S.C. §§ 552(b)(1) – (9).

Your FOIA request was forwarded to the Vice President, Supply Management to directly respond to Items 1-3 and 5-11 of your request. Please see below responses for Items 1 and 2.

In response to *Item 1*, after a search was completed in our Contract Authoring and Management System (CAMS), in response to your request, attached please find a copy of the Next Generation Delivery Vehicles (NGDV) Request for Proposal under Solicitation No. 3D-20-A-0031. Of the 450 pages of responsive records, 30 pages contain deletions pursuant to Exemptions 3, 4 and 5 respectively; and 329 pages that comprise the statement of work, specifications, proposal workbook and proposal workbook instructions are being withheld in their entirety pursuant to Exemption 3. 5 U.S.C. §§ 552(b)(3), (b)(4) and (b)(5).

Additionally, the only proposal subject to the FOIA is the proposal of the supplier that was awarded the contract. Proposals received from other vendors in response to the RFP are being withheld in their entirety pursuant to Exemption 4. 5 U.S.C. §§ 552(b)(4). The technical and business proposal of the successful offeror will be forthcoming at a later date.

In response to *Item 2*, attached please find a copy of Contract No. 3DVPRT-21-B-0002 awarded to Oshkosh Defense, LLC under the NGDV Solicitation No. 3D-20-A-0031. Of the 534 pages of responsive records, 23 pages contain deletions pursuant to Exemptions 3, 4 and 6 respectively; and 471 pages that comprise the Statement of Work (Attachment 1), specifications (Attachment 2), agreements (Attachments 5 & 6), price list (Attachment 7), and schedules (Attachments 8, 9 & 10) are being withheld in their entirety pursuant to Exemptions 3 and 4. 5 U.S.C. §§ 552(b)(3), (b)(4) and (b)(6).

The purchase plan and any other documents related to the schedule for placing purchase orders and other decision points in the contract are being withheld in their entirety pursuant to Exemptions 3 and 4. 5 U.S.C. §§ 552(b)(3) and (b)(4).

FOIA Exemption 3 applies to information that is exempt from disclosure under another federal statute; e.g., the Postal Reorganization Act (39 U.S.C. § 410(c)). Section 410(c)(2) of Title 39, U.S. Code, provides that "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed" is exempt from the disclosure requirements of the FOIA. 5 U.S.C. § 552(b)(3). Applying Section 410(c)(2), we submit that it would not be good business practice to release commercially-sensitive, business information. Section 410(c)(2) protects not only commercial records generated by the Postal Service, but also information "obtained from a person outside the Postal Service."

FOIA Exemption 4 permits agencies to withhold "trade secrets and commercial or financial information obtained from a person that is privileged or confidential" such as a supplier or customer. We consider that public release of commercially sensitive, proprietary business information could seriously impair the Postal Service's ability to obtain necessary information in the future and would likely also harm the suppliers' competitive positions. Private sector businesses do not disclose such information in good business practice; rather, it is considered sensitive commercial information.

FOIA Exemption 5 pertains to certain inter and intra-agency communications protected by the deliberative process privilege. The deliberative process privilege protects advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. This information is not appropriate for discretionary disclosure.

FOIA Exemption 6 permits an agency to withhold all Information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." We do not consider that there is a public interest in the disclosure of this type of information sufficient to outweigh the privacy interests of the individuals involved.

If you are not satisfied with the response to this request, you may file an administrative appeal within 90 days of the date of this response letter by writing to the General Counsel U.S. Postal Service 475 L'Enfant Plaza SW Washington, DC 20260 or via email at FOIAAppeal@usps.gov. Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. The letter of appeal should include, as applicable:

- (1) A copy of the request, of any notification of denial or other action, and of any other related correspondence;
- (2) The FOIA tracking number assigned to the request;
- (3) A statement of the action, or failure to act, from which the appeal is taken;
- (4) A statement identifying the specific redactions to responsive records that the requester is challenging;
- (5) A statement of the relief sought; and
- (6) A statement of the reasons why the requester believes the action or failure to act is erroneous.

For further assistance and to discuss any aspect of your request, you may contact any of the following:

- Name of agency official and/or FOIA Coordinator that processed your request:

SUPPLY MANAGEMENT INFRASTRUCTURE

US POSTAL SERVICE

3300 S PARKER ROAD, SUITE 400

AURORA, CO 80014-3500

Phone: (303) 743-1305

FOIA Coordinator: Brenda Hunter, Purchasing & Supply Management Policy Specialist (A)

Email: Brenda.L.Hunter@usps.gov

- FOIA Requester Service Center:

PRIVACY & RECORDS OFFICE

US POSTAL SERVICE

475 L'ENFANT PLAZA SW RM 1P830

WASHINGTON DC 20260-1101

Phone: (202) 268-2608

Fax: (202) 268-5353

- FOIA Public Liaison: Nancy Chavannes-Battle (Can be contacted at the above Requester Service Center address and phone number)

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Thank you for your continued interest in the United States Postal Service.

Sincerely,

Brenda Hunter

Brenda L. Hunter

FOIA Coordinator

Attachments

EXHIBIT F



September 7, 2021

Via electronic mail

FOIA Appeals Officer
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260
FOIAAppeal@usps.gov

RE: Appeal of Partial Response Dated June 8, 20201, FOIA Case No. 2021-FPRO-01780

Dear FOIA Appeals Officer,

Sierra Club and Elders Climate Action hereby appeal the partial response dated June 8, 2021 to the above-referenced Freedom of Information Act (“FOIA”) request. The response at issue addressed Items 1 and 2 of the request only. The requesters reserve their right to separately appeal other partial responses to the same request.

The United States Postal Service (“USPS”) recently announced the issuance of a \$482 million contract to Oshkosh Defense for 50,000 to 165,000 Next Generation Delivery Vehicles (“NGDV”) for mail and package delivery over 10 years. On April 19, 2021, Sierra Club and Elders Climate Action submitted a FOIA request for related records. On June 8, 2021, USPS responded to Items 1 and 2 of the FOIA request by providing two documents, both of which contained many pages that were redacted. The response also noted USPS was withholding an undisclosed number of other documents responsive to the request pursuant to Exemptions 3, 4, 5, and 6. USPS failed to provide adequate explanations, as opposed to just conclusory statements, for the withholding and redactions of hundreds of pages of documents. For the reasons set forth below, USPS has violated FOIA by (1) improperly withholding and redacting responsive records without meeting the requisite standards under Exemptions 3, 4, 5, and 6; and (2) failing to take reasonable steps necessary to segregate and release nonexempt material. USPS has 20 working days to respond to this appeal, absent unusual circumstances. 5 U.S.C. § 552(a)(6)(A)(ii).

SIERRA CLUB AND ELDERS CLIMATE ACTION'S FOIA REQUEST

Items 1 and 2 of Sierra Club's April 19, 2021, FOIA request (attached as Exhibit A) sought records regarding or relating to:

- 1) USPS's request for proposal ("RFP") for NGDV under which the Oshkosh Defense contract was awarded, and proposals received from vendors that responded to the RFP.
- 2) The contract executed by USPS and Oshkosh Defense to provide for production and delivery of NGDV, including the following related documents:
 - a) All contract attachments;
 - b) The statement of work; and
 - c) The purchase plan and any other documents related to the schedule for placing purchase orders and other decision points in the contract.

On June 8, 2021, USPS provided a response (attached as Exhibit B), which included two responsive documents: 1) the NGDV solicitation (i.e., the RFP), and 2) the Oshkosh NGDV contract. Of the released records, 53 pages contain redactions. Though the RFP document listed which exemptions were associated with each redaction, the Oshkosh NGDV contract contained no such line-by-line explanations indicating which exemptions were being cited for which redactions.

USPS also withheld more than 800 pages of other responsive documents pertaining to proposals, purchase plans, and other documents related to the contract and RFP, as well as all responses to the RFP other than that of Oshkosh. *See* Exhibit B at 2-3.

DISCUSSION

I. USPS FAILED TO JUSTIFY WITHHOLDING AND REDACTING RECORDS UNDER EXEMPTION 3

USPS has withheld hundreds of pages of the requested documents in their entirety, and redacted many others, pursuant to Exemption 3 and the Postal Reorganization Act, 39 U.S.C. § 410(c)(2). Specifically, USPS withheld large portions of the RFP requested in Item 1, including the statement of work, specifications, proposal workbook and proposal workbook instructions. USPS also withheld key attachments to the Oshkosh Defense Contract, including the Statement of Work, specifications, agreements, price list, and schedules, along with the purchase plan and other documents related to the purchase schedule and other decision points in the contract.

Exemption 3 permits the withholding of materials that are "specifically exempted from disclosure by another statute provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). If an agency withholds documents under part (B) (i.e., where withholding is discretionary rather than mandatory), it must explain not only why the specific information to be withheld meets the statute's criteria, but why the agency "reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A); *Ctr. for*

Investigative Reporting v. U.S. Customs & Border Prot., 436 F. Supp. 3d 90, 107 (D.D.C. 2019). The USPS has failed to address either of these requirements, as discussed further below.

Section 410(c)(2) of the Postal Reorganization Act exempts USPS from disclosing under FOIA “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.” 39 U.S.C. §410(c)(2). The USPS has improperly withheld hundreds of pages of documents, including entire documents, citing this provision.

In order to withhold information under 410(c)(2), USPS must point to particular “knowledge, figures, or data” that qualifies as “information of a commercial nature” that would not be of the type disclosed by private businesses. *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 593-94, 596 (4th Cir. 2004) (because USPS was “trying to withhold the entire agreement and not merely particular information in it,” the contract in its entirety did not qualify as “information” under FOIA or Section 410(c)(2)) (quoting *Piper & Marbury, L.L.P. v. U.S. Postal Serv.*, 2001 WL 214217, at *4 (D.D.C. Mar. 6, 2001)).

USPS bears the initial burden of showing that businesses do not disclose information of this type and in doing so may not simply rest upon conclusory statements. *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 742 F. Supp. 2d 76, 82 (D.D.C. 2010); *Dorsey & Whitney LLP v. United States Postal Serv.*, No. CV 18-2493 (WMW/BRT), 2019 WL 3565945, at *6 (D. Minn. May 9, 2019), *report and recommendation adopted*, 402 F. Supp. 3d 598 (D. Minn. 2019). USPS has not met this burden, stating merely that “it would not be a good business practice to release commercially-sensitive, business information.” Exhibit B at 2. USPS did not provide any explanation as to why the documents in their entirety qualify as commercial information that would not be disclosed by private businesses. USPS has not provided any information or evidence as to the practices of other businesses or USPS. Nor has USPS detailed specific knowledge, figures, or data within the withheld documents that satisfy the requirements of the exemption. For instance, it is unclear why the statement of work and specifications in either the RFP or the Oshkosh contract would qualify as sensitive commercial information, especially considering the RFP has necessarily been shared outside the agency with multiple parties.

USPS in withholding and redacting documents under Exemption 3 has also failed to address the foreseeable harm standard included in the FOIA amendments of 2016. *See* 5 U.S.C. § 552(a)(8)(A). Exemption 3 references two types of exemption statutes: those under (b)(3)(A)(i), which leave the agency no discretion as to whether it can withhold the referenced documents, and those under (b)(3)(A)(ii) which establish criteria for withholding or refer to types of matters to be withheld, but permit the agency to exercise discretion on a case-by-case basis. *Cozen O'Connor*, 570 F. Supp. 2d at 775. In connection with its Exemption 3 withholdings, USPS has cited 39 U.S.C. § 410(c)(2) of the Postal Reorganization Act, which establishes discretionary criteria. *See Wickwire Gavin*, 356 F.3d at 592; *Braun v. United States Postal Serv.*, 317 F. Supp. 3d 540, 549 (D.D.C. 2018) (“Likewise, the Postal Reorganization Act describes information for which mandatory disclosure is not required by providing that the USPS *may* ‘withhold information of a commercial nature ... which under good practice would not be publicly disclosed.’ 39 U.S.C. § 410(c)(2).”) (emphasis added); *See also Robinett v. U.S. Postal Serv.*, No. CIV. A. 02-1094, 2002 WL 1728582, at *5 (E.D. La. July 24, 2002) (holding that 410(c)(2)

creates a standard for an agency to determine whether or not to disclose particular information). Because 39 U.S.C. § 410(c)(2) creates discretionary criteria for the USPS to follow, the agency must meet the foreseeable harm standard in FOIA, in addition to the Postal Reorganization Act's criteria. USPS has failed to meet that standard because it has only submitted that under 410(c)(2), "it would not be good business practice to release commercially-sensitive, business information." This explanation does not identify a particular harm tied to the particular information withheld, and is therefore insufficient.

II. USPS FAILED TO JUSTIFY WITHHOLDING AND REDACTING RECORDS UNDER EXEMPTION 4

As noted above, USPS has withheld in their entirety numerous attachments to and other portions of the Oshkosh contract, as well as an unknown number of related documents under both Exemptions 3 and 4. USPS has also withheld proposals received from vendors other than Oshkosh in response to the RFP under Exemption 4. Finally, USPS redacted 53 total pages of the contract and RFP under Exemption 4 (and other exemptions). As explained below, USPS has not justified the use of Exemption 4 for these extensive withholdings.

Exemption 4 allows agencies to withhold trade secrets and confidential commercial or financial information. USPS has not explicitly stated whether the withheld information qualifies as a trade secret or as commercial and financial information. However, trade secret information is narrowly construed as a secret, commercially valuable plan, formula, process, or device that has a direct relationship between the trade secret and productive process. *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1288-89 (D.C. Cir. 1983). USPS has not provided any information here as to why the information withheld is a trade secret.

Nor has USPS met its burden to show that the documents or portions thereof were properly withheld as "confidential commercial or financial information" pursuant to Exemption 4. Exemption 4 covers "records that actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business." *Pub. Citizen Health Rsch. Grp.*, 704 F.2d at 1290. USPS's conclusory response does not describe what is commercially sensitive about the withheld information, and the redactions of the documents are so extensive that it is impossible for Sierra Club and Elders Climate Action to evaluate this assertion without more information.

Moreover, for commercial or financial information to be "confidential," it must be both "customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 n. 17 (2019). The standard for whether information is customarily private is if the owner customarily keeps information private. *Ctr. for Investigative Reporting*, 436 F. Supp.3d at 110 (citing *Critical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992)).

Here, USPS has not provided any information as to its normal practices for maintaining the confidentiality of the type of information withheld, particularly with respect to its own RFP, which has already been shared with other parties. Further, although USPS stated in its partial response, that "private sector businesses do not disclose such information in good business

practice; rather, it is considered sensitive commercial information,” Exhibit B at 3, USPS provides no evidence that each piece of withheld information is treated as commercially sensitive by its owners.

USPS also provided no information as to whether USPS gave Oshkosh or the other companies responding to the RFP an assurance of privacy. Stating only that the information is propriety, commercially sensitive, and could harm suppliers’ positions gives no information as to whether or not the USPS actually assured the companies of confidentiality. *See* Exhibit B at 3. USPS has not indicated whether or not the submitters of the withheld information designated the information confidential at the time of submittal, or whether USPS conferred with the submitters upon receiving Sierra Club and Elders Climate Action’s FOIA request as to their position, as required by the agency’s FOIA regulations.¹ As such, USPS has failed to meet Exemption 4’s requirements for withholding commercial or financial information.

Lastly, USPS fails to satisfy the foreseeable harm standard as it has not tied its general assertion of harm to the specific information withheld. As discussed in section I, *supra*, agencies cannot rely on speculative or abstract fears or generalized assertions in withholding information. *Reps. Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350 (D.C. Cir. 2021). USPS’s response that the release of information under Exemption 4 “could seriously impair the Postal Service’s ability to obtain information in the future” is too generalized to justify withholding hundreds of pages of documents, including entire contract attachments, proposals, and plans.

III. USPS FAILED TO JUSTIFY WITHHOLDING AND REDACTING RECORDS UNDER EXEMPTION 5

USPS has redacted 30 pages of the NGDV Request for Proposal Under Solicitation No.3D-20-A-0031 pursuant to Exemption 5, in conjunction with Exemptions 3 and 4.

USPS must provide some explanation for withholding of documents under Exemption 5 beyond the conclusory assertion that the documents in question are predecisional and deliberative. *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975); *SafeCard Serv. v. SEC*, 926 F.2d 1197, 1204 (D.C. Cir. 1991). Here, USPS has only provided a brief explanation of how Exemption 5 functions. USPS does not explain how the 30 pages of redactions withheld under Exemption 5 are deliberative and predecisional. Simply asserting that the deliberative process privilege applies is inadequate to overcome FOIA’s strong presumption in favor of disclosure. *Founding Church of Scientology of Wash., D.C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979) (“conclusory and generalized allegations of exemptions are unacceptable.”) (internal quotations and citations omitted).

To be predecisional, the document must be “prepared ‘to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made.’” *Lurie v. Dep’t of Army*, 970 F. Supp. 19, 33 (D.D.C. 1997) (quoting *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976

¹*See* 39 C.F.R. § 265.7; *see also* USPS, Handbook AS-353, Guide to Privacy, the Freedom of Information Act, and Records Management, Section 5-2(c), https://about.usps.com/handbooks/as353/as353c5_002.htm.

F.2d 1429, 1434 (D.C. Cir. 1992)). Further, “[i]n order to qualify for the Exemption 5 privilege, a document must be . . . deliberative in the sense that it is actually . . . related to the process by which policies are formulated.” *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). “[T]he agency must identify ‘what deliberative process is involved, and the role played by the documents.’” *Wolk Law Firm v. United States of America National Transportation Safety Board*, 392 F. Supp. 3d 514, 525 (E.D. Pa. 2019) (citing *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)). USPS has not provided any justification for redacting records under Exemption 5, and thus it is impossible to know whether any redaction would meet the criteria for nondisclosure. Accordingly, USPS has not met its burden to justify redacting the documents.

Additionally, the 30 pages of deletions of NGDV solicitation withheld pursuant to Exemption 5 are not accompanied by an explanation as to how the withholding of these documents satisfies the foreseeable harm requirement. The foreseeable harm standard requires explanation of a particular harm; “general explanations” and “boiler plate language” are insufficient. *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106. To establish foreseeable harm in the context of Exemption 5, an agency needs to provide “context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by the disclosure.” *Id.* (quoting *Jud. Watch, Inc. v. U.S. Dep’t of Just.*, No. CV 17-0832 (CKK), 2019 WL 4644029, at *5 (D.D.C. Sept. 24, 2019)). USPS’s response for documents redacted under Exemption 5 does not provide any explanation as the particular harm that would result from the disclosures. The broad-stroke explanation of what Exemption 5 involves (“This information is not appropriate for discretionary disclosure”) is the quintessential “general explanation” deemed insufficient in *Center for Investigative Reporting*. Accordingly, the agency’s response under Exemption 5 is deficient as a matter of law.

IV. USPS FAILED TO JUSTIFY WITHHOLDING AND REDACTING RECORDS UNDER EXEMPTION 6

USPS has redacted 23 pages of Contract No. 3DVPRT-21-B-0002 pursuant to Exemption 6, along with Exemptions 3 and 4. Although Exemption 6 permits agencies to withhold certain files that would constitute a clearly unwarranted disclosure of personal privacy, that privacy interest must be more than a de minimis interest. *Cameranesi v. United States Dep’t of Defense*, 856 F.3d 626, 637 (9th Cir. 2017). A generalized, conjectural assertion of a privacy interest by an agency is not sufficient. *Id.* And, even if the privacy interest is more than de minimis, the agency must weigh whether there is a significant public interest that would be advanced by the disclosure of the requested information. *Id.*

USPS’s response that it “does not consider that there is a public interest in the disclosure of this type of information sufficient to outweigh the privacy interests of the individuals involved,” provides only a conclusory assertion of privacy, and therefore does not satisfy Exemption 6.

Further, even if the USPS does provide additional information as to a privacy interest, the USPS must also consider the significant public interest in understanding the process and facts underlying the order for the largest federal fleet of vehicles during a pivotal moment in the climate crisis. Neither USPS nor Oshkosh has made public the contractor’s specific plans as to

the share of the vehicles that will be electric, as opposed to powered by fossil fuels, the schedule by which these plans will be finalized, or other key information necessary to understanding the USPS's decision among available alternatives.² Given the size of the fleet, and its potential contribution to the climate crisis, this is matter of significant public interest – as evidenced by the substantial media attention around the contract.³

IV. USPS FAILED TO SEGREGATE NON-EXEMPT MATERIAL

Even assuming that portions of the records qualify for withholding under some of the exemptions discussed above, USPS must segregate and disclose all non-exempt material in the requested documents. 5 U.S.C. § 552(a)(8)(A)(ii)(II); *Founding Church of Scientology of Wash., D.C., Inc. v. Bell*, 603 F.2d 945, 951 (D.C. Cir. 1979) (“[I]f only part of a document need be withheld under an exemption, Congress has directed that the Government must segregate the exempt passages and disclose the remainder.”); *Vaughn*, 484 F.2d at 825 (“[T]he agency may not sweep a document under a general allegation of exemption . . . It is quite possible that part of a document should be kept secret while part should be disclosed.”); *Citizens for Responsibility & Ethics v. U.S. Dep’t of Homeland Sec.*, 648 F. Supp. 2d 152, 162 (D.D.C. 2009) (holding that facts must be separated from pre-decisional deliberative materials and disclosed). Non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions. *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). USPS has made no attempt to segregate and disclose non-exempt material, instead withholding in its entirety 329 pages of documents solely pursuant to Exemption 3, as well as 471 pages under Exemptions 3 and 4, with an additional, undisclosed number of documents related to the purchase and plan and schedule entirely withheld, as well as all responses to the RFP other than that of Oshkosh. Such overbroad withholdings contradict FOIA’s plain statutory language on segregability and disclosure.

CONCLUSION

USPS has not justified its extensive withholdings in response to Items 1 and 2 of Sierra Club and Elders Climate Action’s April 19, 2021 request. Sierra Club and Elders Climate Action respectfully requests that USPS release without further delay the full set of responsive documents if it cannot provide a thorough and legally sufficient justification for each of its withholdings.

² David Ferris, *Postal Service sidetracks Biden EV plan*, E&E NEWS, Feb. 24, 2021.

³ See, e.g., *id.*; Arianna Skibell, *Federal fleet electrification faces delays*, E&E NEWS, Aug. 27, 2021; Brian Naylor, *Company That Wasn't Picked to Make Mail Trucks is Suing the U.S. Postal Service*, NPR, July 13, 2021; Meldan Heaslip, *USPS Cannot Afford to Not Go Electric*, CLEANTECHNICA, Mar. 11, 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Elena Saxonhouse', with a long horizontal flourish extending to the right.

Elena Saxonhouse
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA, 94612
(415) 265-2943 (cell)
elena.saxonhouse@sierraclub.org

On behalf of Sierra Club and Elders Climate Action

EXHIBIT G



November 16, 2021

Via Email: miriam.raffel-smith@sierraclub.org

Miriam Raffel-Smith
Sierra Club Environmental Law Program
2101 Webster Street
Suite 1300
Oakland, CA 94612

RE: FOIA Case No. 2022-FPRO-00127

Dear Ms. Raffel-Smith:

This concerns the processing of your Freedom of Information Act (FOIA) request (2021-FPRO-01780) dated April 19, 2021 to the U. S. Postal Service and your appeal (2021-APP-00183) and subsequent partially remanded FOIA (2022-FPRO-00127) regarding the following U.S. Postal Service records:

1. The U.S. Postal Service's request for proposal ("RFP") for NGD vehicles under which the Oshkosh Defense contract was awarded, and proposals received from vendors that responded to the RFP.
2. The contract executed by the U.S. Postal Service and Oshkosh Defense to provide for production and delivery of new delivery vehicles, including the following related documents:
 - a. All contract attachments;
 - b. The statement of work; and
 - c. The purchase plan and any other documents related to the schedule for placing purchase orders and other decision points in the contract.

Under the FOIA, agencies are mandated to produce records responsive to a request in accordance with statutory timeframes, subject to certain exemptions. The FOIA allows agencies 20 working days (exclusive of Saturdays, Sundays and federal holidays) to process requests. In unusual circumstances, agencies may qualify for further extensions, and may request a modified FOIA request and/or time frame for response. See 5 U.S.C. § 552(a)(6)(B).

"Unusual circumstances" apply to the processing of a request if: (1) there is need to search for and collect requested records from field facilities or other establishments that are separate from the office processing the request; (2) there is need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (3) there is need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein. 5 U.S.C. § 552(a)(6)(B)(iii).

This letter serves as timely notice that unusual circumstances apply to your request because it requires the need to search for, collect, and examine separate and distinct records and the need for consultation with another agency or two or more components of the Postal Service having a substantial interest in the records.

- 2 -

The Postal Service responded to your appeal on October 15, 2021 and the due date for the remanded items expires today, November 16, 2021. As such, the new statutory time limit to respond to the remand with 20 additional working days expires on December 15, 2021.

Sincerely,

Brenda Hunter

Brenda L. Hunter
FOIA Coordinator

EXHIBIT H



February 10, 2022

Via Email: miriam.raffel-smith@sierraclub.org

Miriam Raffel-Smith
Sierra Club Environmental Law Program
2101 Webster Street
Suite 1300
Oakland, CA 94612

RE: FOIA Case No. 2022-FPRO-00127

Dear Ms. Raffel-Smith:

This is in response to your Freedom of Information Act (FOIA) Request (2021-FPRO-01780) dated April 19, 2021 to the U.S. Postal Service and your appeal (2021-APP-00183) and subsequent partially remanded FOIA (2022-FPRO-00127) regarding the following U.S. Postal Service records:

1. The U.S. Postal Service's request for proposal ("RFP") for NGD vehicles under which the Oshkosh Defense contract was awarded, and proposals received from vendors that responded to the RFP.
2. The contract executed by the U.S. Postal Service and Oshkosh Defense to provide for production and delivery of new delivery vehicles, including the following related documents:
 - a. All contract attachments;
 - b. The statement of work; and
 - c. The purchase plan and any other documents related to the schedule for placing purchase orders and other decision points in the contract.

Under the FOIA, 5 U.S.C. § 552, agencies are required to produce records responsive to a request in accordance with statutory time frames, subject to certain exemptions. The FOIA provides nine exemptions under which records or portions of records may be withheld from public disclosure. 5 U.S.C. §§ 552(b)(1) – (9).

This response provides the following information on remand:

1. Number of pages withheld for unsuccessful offeror proposals.

The number of pages withheld for unsuccessful offeror proposals is a total of 4,268 pages. A breakdown of the unsuccessful offeror proposals appears below. The names of the suppliers submitting offers are being withheld in full pursuant to Exemptions 3 and 4. 5 U.S.C. §§ 552(b)(3) and (b)(4).

SUPPLIER	VOL 1	VOL 2	VOL 1 Addendum	VOL 2 Addendum	TOTAL
(b)(3) 410(c)(2), (b)(4)	306	843	12	251	1412
(b)(3) 410(c)(2), (b)(4)	122	1355	19	82	1578
(b)(3) 410(c)(2), (b)(4)	65	735	13	465	1278

2. Number of pages withheld for the purchase plan and documents related to the schedule for placing purchase orders and other decision points in the contract.

The Purchase Plan consisted of 25 pages of documents related to the schedule for placing purchase orders and other decision points in the contract.

3. *Order / Solicitation / Offer / Award signature page for the RFP (P. 126) – None could be found*
4. *Order / Solicitation / Offer / Award signature page for the Contract (P. 187) – See attached Contract*
5. *Attachment 2 for the RFP -- USPS Specification – Vehicle Lock Cylinders and Keys (10 pages) – See attached RFP which contains 10 additional pages for this item*
6. *Attachment 2 for the Contract – USPS Specification – Vehicle Lock Cylinders and Keys (10 pages) – See attached Contract which contains 10 additional pages for this item*

This response also provides corrections to redactions and/or cited Exemptions throughout the RFP and Contract in accordance with the Opinion and Order for Appeal Case No. 2021-FPRO-01780 and Appeal No. 2021-APP-00183. Specifically, redactions relying on Exemption 5 also relied on Exemption 3 and Section 410(c)(2). The use of Exemption 5 was reversed and Exemption 4 is applied instead. 5 U.S.C. §§ 552(b)(3) and (b)(4).

Office telephone and fax numbers for the listed postal employees as well as various Postal Service internal organizational codes are provided. Postal email addresses of individual employees contain an additional exemption (Exemption 6). The title names of certain documents referenced in the *Schedule of Supplies/Services* within the Order / Solicitation / Offer / Award for the RFP are provided. The location of the National Materials Customer Service Center and Help Desk phone number with options to get assistance with SCRMS are provided. Regarding the *Instructions to Offerors* on how to complete the RFP and later amendment/updates to the solicitation, additional information is disclosed. Specifically, Volume 1 and Volume 2 title lines within the instructions and the names of particular workbook instructions that are being updated within their respective amendments are provided. The exemptions applied to the *Questions and Answers* associated with the RFP have been corrected to include Exemption 4 along with the existing Exemption 3 and Section 410(c)(2). In the list of attachments to the contract (*4 - Part 4 – List of Documents, Exhibits and Other Attachments*), all document titles except for attachments 5 and 6 are provided. The number of pages for each attachment, including attachments 5 and 6 are provided. Finally, the exemption applied previously to Postal personnel mobile phone numbers is corrected to Exemption 6. 5 U.S.C. §§ 552(b)(3), (b)(4) and (b)(6).

FOIA Exemption 3 applies to information that is exempt from disclosure under another federal statute; e.g., the Postal Reorganization Act (39 U.S.C. § 410(c)). Section 410(c)(2) of Title 39, U.S. Code, provides that “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed” is exempt from the disclosure requirements of the FOIA. 5 U.S.C. § 552(b)(3). Applying Section 410(c)(2),

we submit that it would not be good business practice to release commercially-sensitive, business information. Section 410(c)(2) protects not only commercial records generated by the Postal Service, but also information “obtained from a person outside the Postal Service.”

FOIA Exemption 4 permits agencies to withhold “trade secrets and commercial or financial information obtained from a person that is privileged or confidential” such as a supplier or customer. We consider that public release of commercially sensitive, proprietary business information could seriously impair the Postal Service’s ability to obtain necessary information in the future and would likely also harm the suppliers’ competitive positions. Private sector businesses do not disclose such information in good business practice; rather, it is considered sensitive commercial information.

Email addresses, names and handwritten and electronic signatures are being withheld pursuant to FOIA Exemption 6 which permits an agency to withhold all Information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” We do not consider that there is a public interest in the disclosure of this type of information sufficient to outweigh the privacy interests of the individuals involved.

If you are not satisfied with the response to this request, you may file an administrative appeal within 90 days of the date of this response letter by writing to the General Counsel U.S. Postal Service, 475 L’Enfant Plaza SW, Washington DC 20260 or via email at FOIAAppeal@usps.gov. Your appeal must be postmarked or electronically transmitted within 90 days of the date of the response to your request. The letter of appeal should include, as applicable:

- (1) A copy of the request, of any notification of denial or other action, and of any other related correspondence;
- (2) The FOIA tracking number assigned to the request;
- (3) A statement of the action, or failure to act, from which the appeal is taken;
- (4) A statement identifying the specific redactions to responsive records that the requester is challenging;
- (5) A statement of the relief sought; and
- (6) A statement of the reasons why the requester believes the action or failure to act is erroneous.

For further assistance and to discuss any aspect of your request, you may contact any of the following:

- Name of agency official and/or FOIA Coordinator that processed your request:

SUPPLY MANAGEMENT INFRASTRUCTURE
US POSTAL SERVICE
3300 S PARKER ROAD, SUITE 400
AURORA, CO 80014-3500
Phone: (303) 743-1305
FOIA Coordinator: Brenda Hunter, Program Analyst
Email: Brenda.L.Hunter@usps.gov

- FOIA Requester Service Center:

PRIVACY & RECORDS OFFICE
US POSTAL SERVICE
475 L’ENFANT PLAZA SW RM 1P830
WASHINGTON DC 20260-1101
Phone: (202) 268-2608
Fax: (202) 268-5353

- FOIA Public Liaison: Nancy Chavannes-Battle (Can be contacted at the above Requester Service Center address and phone number)

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Thank you for your interest in the United States Postal Service.

Sincerely,

Brenda Hunter

Brenda L. Hunter
FOIA Coordinator

Attachments

EXHIBIT I



February 11, 2022

Via Email: miriam.raffel-smith@sierraclub.org

Miriam Raffel-Smith
Sierra Club Environmental Law Program
2101 Webster Street
Suite 1300
Oakland, CA 94612

RE: FOIA Case No. 2021-FPRO-01780

Dear Ms. Raffel-Smith:

This responds to your Freedom of Information Act (FOIA) request to the United States Postal Service (USPS) dated April 19, 2021, requesting access to Postal Service records regarding NGD vehicles. This letter responds to your request for the proposals received from vendors that responded to the NGD vehicles RFP, to which the USPS provided information regarding the *unsuccessful* offeror proposals in partially remanded FOIA (2022-FPRO-00127) response dated February 10, 2022.

This letter responds regarding the *successful* offeror proposal portion of *Item 1* of your FOIA request and is in follow up to our FOIA response to you dated June 8, 2021, in which the USPS' response regarding your request for the proposals received from vendors that responded to the NGD vehicles RFP was "The technical and business proposal of the successful offeror will be forthcoming at a later date."

Under the FOIA, 5 U.S.C. § 552, agencies are required to produce records responsive to a request in accordance with statutory time frames, subject to certain exemptions. The FOIA provides nine exemptions under which records or portions of records may be withheld from public disclosure. 5 U.S.C. §§ 552(b)(1) – (9).

In response to your FOIA request for the proposals received from vendors that responded to the NGD vehicles RFP, *successful* offeror Oshkosh Defense LLC's proposal consisted of 936 pages for Volume 1; 1,535 pages for Volume 2; 52 addendum pages for Volume 1; and 84 addendum pages for Volume 2, for a total proposal page count of 2,607. Due to the commercially sensitive nature of the NGDV program, the proposal of the successful offeror is being withheld in full pursuant to Exemption 4. 5 U.S.C. § 552(b)(4)

FOIA Exemption 4 permits agencies to withhold "trade secrets and commercial or financial information obtained from a person that is privileged or confidential" such as a supplier or customer. We consider that public release of commercially sensitive, proprietary business information could seriously impair the Postal Service's ability to obtain necessary information in the future and would likely also harm the suppliers' competitive positions. Private sector businesses do not disclose such information in good business practice; rather, it is considered sensitive commercial information.

If you are not satisfied with the response to this request, you may file an administrative appeal within 90 days of the date of this response letter by writing to the General Counsel, U.S. Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260 or via email at FOIAAppeal@usps.gov. Your appeal must be

postmarked or electronically transmitted within 90 days of the date of the response to your request. The letter of appeal should include, as applicable:

- (1) A copy of the request, of any notification of denial or other action, and of any other related correspondence;
- (2) The FOIA tracking number assigned to the request;
- (3) A statement of the action, or failure to act, from which the appeal is taken;
- (4) A statement identifying the specific redactions to responsive records that the requester is challenging;
- (5) A statement of the relief sought; and
- (6) A statement of the reasons why the requester believes the action or failure to act is erroneous.

For further assistance and to discuss any aspect of your request, you may contact any of the following:

- Name of agency official and/or FOIA Coordinator that processed your request:

SUPPLY MANAGEMENT INFRASTRUCTURE
US POSTAL SERVICE
3300 S PARKER ROAD, SUITE 400
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Phone: (303) 743-1305
FOIA Coordinator: Brenda Hunter, Program Analyst
Email: Brenda.L.Hunter@usps.gov

- FOIA Requester Service Center:

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WASHINGTON DC 20260-1101
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Fax: (202) 268-5353

- FOIA Public Liaison: Nancy Chavannes-Battle (Can be contacted at the above Requester Service Center address and phone number)

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Thank you for your interest in the United States Postal Service.

Sincerely,

Brenda Hunter

Brenda L. Hunter
FOIA Coordinator

EXHIBIT J



May 12, 2022

Via electronic mail

FOIA Appeals Officer
United States Postal Service
475 L'Enfant Plaza, SW
Washington, D.C. 20260
FOIAAppeal@usps.gov

RE: Appeal of Partial Response Dated February 11, 2022, FOIA Case No. 2021-FPRO-01780

Dear FOIA Appeals Officer,

Sierra Club and Elders Climate Action hereby appeal the partial response dated February 11, 2022 to the above-referenced Freedom of Information Act (“FOIA”) request. The United States Postal Service (“USPS”) informed the requesters that it will not produce the proposal submitted by Oshkosh Defense LLC (“Oshkosh”) to USPS that led USPS to grant Oshkosh a \$482 million contract to provide Next Generation Delivery Vehicles (“NGDV”) for the next 10 years. The contract is highly controversial for its unjustified reliance on fossil fuel-powered vehicles as opposed to electric vehicles, and has garnered strong criticism not only from the general public but also the White House and the U.S. Environmental Protection Agency.¹

USPS had informed the requesters on June 8, 2021 that, unlike the unsuccessful proposals submitted to USPS, the Oshkosh proposal was “subject to FOIA” and would “be forthcoming at a later date.”² USPS subsequently changed course, however, and has now decided to withhold the proposal in its entirety pursuant to FOIA Exemption 4, 5 U.S.C. §552(b)(4).³

For the reasons set forth below, USPS has violated FOIA by (1) improperly withholding records without meeting the requisite standards under Exemption 4; and (2) failing to take reasonable

¹ D. Shepardson, *White House, EPA urge US Postal Service to reconsider gas-powered vehicle plan*, Reuters, Feb. 2, 2022, <https://www.reuters.com/business/sustainable-business/white-house-epa-urge-us-postal-service-conduct-new-review-vehicle-plan-2022-02-02/>.

² Letter from B. Hunter to M. Raffel-Smith, Re: FOIA Case No. 2021-FPRO-017, June 8, 2021 (attached as Exhibit A).

³ Letter from B. Hunter to M. Raffel-Smith, Re: FOIA Case No. 2021-FPRO-017, Feb. 11, 2022 (attached as Exhibit B).

steps necessary to segregate and release nonexempt material. USPS has 20 working days to respond to this appeal, absent unusual circumstances. 5 U.S.C. § 552(a)(6)(A)(ii). This appeal concerns the partial response to Item 1 of the request only. The requesters reserve their right to separately appeal other partial responses to the same request.

BACKGROUND

A. The USPS's NGDV Contract

In February 2021, USPS entered into a contract with Oshkosh to replace up to 165,000 postal delivery vehicles—a significant majority of the agency's active vehicle fleet. USPS entered into the contract at a pivotal moment in the federal government's efforts to slow the effects of climate change. President Biden has committed to channeling the “whole of government” to combat climate change, and he has specifically pledged to electrify all federal fleets, including USPS vehicles.⁴ Nonetheless, the USPS plan for Oshkosh's fleet replacement anticipates that only 10% of the replacement vehicles would be electric.

Electrifying the Postal Service fleet would reduce smog and particulate matter pollution in nearly every neighborhood in America. Postal delivery routes are stop-and-go by nature, which means that gas-powered delivery vehicles idle just outside people's homes for much of the day. This daily pollution impacts nearly every single resident in the country, but the harmful effects of this pollution are felt most significantly by low-income communities of color, which are often forced to breathe compounding sources of pollution.

The USPS's decision to enter into the Oshkosh contract and its review of alternatives is of enormous public interest, as evidenced by more than 35,000 comments recently received from federal and state agencies, scientists, labor organizations, environmentalists, and members of the public on the Draft Environmental Impact Statement for the NGDV contract.

B. The FOIA Request and Responses

On April 19, 2021, Sierra Club and Elders Climate Action submitted a FOIA request (attached as Exhibit C) for records related to the NGDV contract, including the USPS's request for proposal (“RFP”) (Item 2), and proposals received from vendors that responded to the RFP (Item 1).

On June 8, 2021, USPS provided a partial response, which stated in response to Item 1:

[T]he only proposal subject to the FOIA is the proposal of the supplier that was awarded the contract. Proposals received from other vendors in response to the RFP are being withheld in their entirety pursuant to Exemption 4. 5 U.S.C. §§ 552(b)(4). The technical and business proposal of the successful offeror will be forthcoming at a later date.

Ex. A at 2. However, in its February 11, 2022 partial response, the USPS changed course. There, it stated that it would in fact withhold in full successful offeror Oshkosh's proposal pursuant to Exemption 4 “due to the commercially sensitive nature of the

⁴ See Executive Order 14008: Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619, 7,624 (Jan. 27, 2021).

NGDV program.” Ex. B at 1. According to USPS, the withheld proposal consists of 936 pages for Volume 1; 1,535 pages for Volume 2; 52 addendum pages for Volume 1; and 84 addendum pages for Volume 2, for a total proposal page count of 2,607. *Id.*

Based on available information about the requirements for proposals set forth in the redacted copy of the RFP provided to requesters (attached as Exhibit D), the withheld records may include the following information of interest to the requesters and the general public:

- A technical description of the items offered (i.e., NGDV), including product literature or other documents. Ex. D at 8.
- Descriptions of the reliability and durability of the offered vehicles, as well as an overview of maintenance or replacement intervals for major components. *Id.* at 91 (Attachment 7).
- Data and analysis to support the fuel economic and emission performance estimates for the vehicle. *Id.*
- An Emerging Technologies Roadmap indicating the offeror’s adoption timeline for emerging vehicle technologies, including capabilities to design, develop, and adapt alternative fuel usage options for the NGDV vehicle, and autonomous vehicle plans. *Id.* at 15, 92.
- Past performance information, including recent and relevant contracts for the same or similar items or other references. *Id.* at 8.
- A statement specifying the extent of agreement with all terms and conditions included in the RFP. *Id.*
- Offers presenting alternative terms and conditions for satisfying the requirements of the solicitation. *Id.*
- Plans for complying with the small-, minority-, and woman owned business subcontracting requirements. *Id.* at 7.

DISCUSSION

I. USPS FAILED TO JUSTIFY WITHHOLDING RECORDS UNDER EXEMPTION 4

USPS has not justified its withholding of the Oshkosh proposal. Exemption 4 allows agencies to withhold trade secrets and confidential commercial or financial information. USPS provides only limited information as to why it considers the entire proposal to consist of confidential commercial or financial information. Beyond quoting Exemption 4, USPS states only:

We consider that public release of commercially sensitive, proprietary business information could seriously impair the Postal Service’s ability to obtain necessary information in the future and would likely also harm the suppliers’ competitive positions. Private sector businesses do not disclose such information in good business practice; rather, it is considered sensitive commercial information.⁵

⁵USPS does not appear to invoke the exemption for trade secrets, and in any event has not met its burden to withhold the proposal as a trade secret. Trade secret information is narrowly construed as a secret,

Exhibit B at 1. This statement fails to meet the agency’s burden to show that the proposal, or any portions thereof, were properly withheld as “confidential commercial or financial information” pursuant to Exemption 4. Even if the proposal was submitted with boilerplate assurances from the USPS that it would be held confidential if properly marked, that is not nearly the end of the inquiry given FOIA’s emphasis on disclosure and courts’ frequent reminders that agencies must construe exemptions narrowly. Further, USPS has not conferred with Oshkosh as to whether the company actually considers the information shared in the proposal confidential and takes steps to keep it that way, as would be required to qualify for the exemption.

Rather than asserting Exemption 4 in such broad strokes, USPS should aim to provide as many records from the Oshkosh proposal as possible. The proposal pertains to an issue of high public interest at the intersection of the government’s stewardship of taxpayer funds and responsible climate action. As USPS proceeds to implement the Oshkosh contract over the objections of the White House and many others, it should not keep the proposal leading to that contract secret.

A. USPS Has Not Demonstrated That the Withheld Records Contain Information Customarily and Actually Treated as Private by Oshkosh

For commercial or financial information to be “confidential,” it must be both “customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 n. 17 (2019). *See also Ctr. for Investigative Reporting*, 436 F.Supp.3d 90, 110 (2019) (“[T]he court will consider how the particular party customarily treats the information, not how the industry as a whole treats the information.”) (internal citation omitted).

USPS states in its partial response that “private sector businesses do not disclose such information in good business practice; rather, it is considered sensitive commercial information,” Exhibit B at 1. USPS provides no evidence, however, that Oshkosh treats each piece of withheld information as commercially sensitive, however, or that USPS has even conferred with Oshkosh on the matter. As “the agency invoking Exemption 4 must meet the burden of proving the [submitter’s] custom,” *Seife v. Food & Drug Admin.*, 492 F.Supp.3d 269, 275 (S.D.N.Y. 2020)) (quoting *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 110 (D.D.C. 2019)), and “furnish ‘detailed and specific information’ to justify its withholding,” *WP Company LLC v. U.S. Small Bus. Admin.*, 502 F.Supp.3d 1, 16 (D.D.C. 2020), USPS has not provided sufficient information to satisfy Exemption 4.

A similarly conclusory statement from Oshkosh itself would likewise fail to satisfy Exemption 4. “The takeaway from cases in the wake of *Argus Leader*. . . is that a company cannot readily ward off disclosure *simply* by invoking the magic words --- ‘customarily and actually kept confidential’, but must instead adequately describe the steps it takes to keep the information at issue confidential.” *New York Times v. Food & Drug Admin.*, 529 F. Supp. 3d 260, 285 (S.D.N.Y. 2021) (internal quotation and citation omitted) (emphasis in original). *See Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, slip op., No. 12-cv-04376-KAW, 2021 WL 3270666, *5 (N.D. Cal. July 30, 2021) (concluding defendant failed to satisfy its burden of

commercially valuable plan, formula, process, or device that has a direct relationship between the trade secret and a productive process. *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1288-89 (D.C. Cir. 1983).

showing that withheld information about hen houses was “customarily and *actually* treated as private” where egg producers did not take steps to ensure their suppliers or servicers did not disclose the same information) (emphasis in original).

To justify an Exemption 4 withholding, the agency must demonstrate that that the precise information sought by requesters is held confidential by the submitter. For example, in *WP Company, supra*, the court found that Exemption 4 was not properly applied to the identities of businesses receiving loans pursuant to COVID-19 relief legislation or the corresponding loan amounts “[i]n the absence of a direct link” to information actually kept confidential, like payroll information. *WP Company*, 502 F.Supp.3d at 13. USPS has not attempted to demonstrate that any of the information in the proposal is actually held confidential by Oshkosh.

USPS also has failed to show that all of the withheld information was provided by Oshkosh to the government under “an assurance of privacy.” *Food Mktg.*, 139 S. Ct. at 2366. Provision A-1 of the RFP states that “[o]fferors that include in their proposals data they do not want used or disclosed by the Postal Service for any purpose other than proposal evaluation may take the following steps[.]” Ex. D at 6. Those steps include stating on an introductory page the intent to keep certain “data” from being used for any other purpose than to evaluate the proposal, and specifically identifying on which “sheets” this data appears within the proposal. USPS has not asserted that Oshkosh properly marked every sheet of its proposal confidential as it would have had to do to be assured of privacy.

Finally, even if Oshkosh customarily keeps the information private, and USPS had offered an assurance of confidentiality, USPS is not mandated to withhold every piece of information that could conceivably be withheld. To the contrary, the agency must endeavor to be as transparent as possible.⁶ As Attorney General Garland recently advised agencies:

Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are strongly encouraged to make discretionary disclosures of information where appropriate.⁷

While Oshkosh has certain rights upon submitting information it deems confidential, those rights are not absolute. USPS regulations and its FOIA handbook make clear that even where a private party requests that information be kept confidential, the USPS may give notice that it intends to release such information and require the party to substantiate that the information is confidential if the party objects to the information’s release.⁸ USPS could follow this procedure with Oshkosh if it determines the proposal, or parts of it, should be released.

⁶Mem. from Attorney General Garland, Re: Freedom of Information Act Guidelines, Mar. 15, 2022, <https://www.justice.gov/ag/page/file/1483516/download>.

⁷ *Id.* at 1.

⁸*See* 39 C.F.R. § 265.7(e)(1) (“In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. Whenever possible, the submitter’s claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter that the information in question is in fact confidential, has not been disclosed to the public by the submitter, and is not routinely available to the public from other sources.”); *see also* USPS, Handbook AS-353,

B. USPS Has Not Demonstrated That Each Element of the Proposal Is “Commercial” Information

Even if USPS could demonstrate that the withheld information is treated as confidential by Oshkosh, it must also demonstrate that the withheld proposal is “commercial information.” *See, e.g., Pub. Citizen v. U.S. Dep’t of Health & Hum. Svcs.*, 975 F. Supp. 2d 81,104 (D.D.C. 2013) (company declarations on highly confidential nature of withheld information were not enough to satisfy “commercial” prong of Exemption 4).

Exemption 4 covers “records that actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business.” *Pub. Citizen Health Rsch. Grp.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). USPS’s conclusory response asserting that the information is “considered sensitive commercial information” does not satisfy the applicable legal standard. To properly withhold the proposal, USPS would need to explain what each element of the proposal “reveals about the company’s internal operations or income-producing activities.” *New York Times Co. v. U.S. Food & Drug Admin.*, 529 F. Supp. 3d 260, 277 (S.D.N.Y. 2021). *See also COMPTEL v. FCC*, 910 F. Supp. 2d 100, 117 (D.D.C. 2012) (agency’s “conclusory assertions” that information was “competitively sensitive” or would “reveal protected information” not sufficient to show that Exemption 4 was properly invoked).

This additional explanation is needed because “consistent with the narrow construction given to FOIA exemptions, not every bit of information submitted to the government by a commercial entity qualifies for protection under Exemption 4.” *Judicial Watch, Inc. v. U.S. Dep’t of Health & Hum. Svcs.*, 525 F.Supp.3d 90, 96 (D.D.C. 2021) (quoting *Pub. Citizen*, 975 F. Supp. 2d at 101); *100Reporters LLC v. U.S. Dep’t of Just.*, 316 F. Supp. 3d 124, 141 (D.D.C. 2018) (holding that a company’s work plan—which “do[es] not elaborate on [a company’s] business or describe its competitive landscape”—is not “commercial” information because it “does not reveal basic commercial operations that relate to the income-producing aspects of [the company’s] business”) (citing *Pub. Citizen Health Rsch. Grp.*, 704 F.2d at 1290).

In sum, USPS may not withhold the Oshkosh proposal without demonstrating that all of its elements qualify as “commercial” information.

C. USPS Has Not Satisfied the Foreseeable Harm Standard Set Forth in the FOIA Amendments of 2016

Lastly, USPS fails to satisfy the foreseeable harm standard, as it has not tied its general assertion of harm to the specific information withheld. Agencies cannot rely on speculative or abstract fears or generalized assertions in withholding information. *Reps. Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 3 F.4th 350, 369 (D.C. Cir. 2021). USPS’s response that the release of information under Exemption 4 “could seriously impair the Postal Service’s ability to obtain information in the future” is too generalized to justify withholding thousands of pages of records. Moreover, courts have rejected other similar arguments that disclosing information

received from a private entity is likely to harm an agency's function, or its ability to attract bids for extremely lucrative contracts such as the NGDV contract. As noted in *Ctr. for Pub. Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 196 (D.D.C. 2002), "the courts of [the D.C.] Circuit have found that the benefits accruing to bidders from contracting with the federal government make it unlikely that an agency's future contracting ability will suffer impairment due to disclosure of price information." See, e.g., *Racal-Milgo Gov't Sys., Inc. v. Small Bus. Admin.*, 559 F.Supp. at 6 (D.D.C. 1981) ("It is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

Nor has USPS demonstrated that release of the specific information withheld will cause harm to another "interest protected by this exemption, such as by causing 'genuine harm to [the submitter's] economic or business interests.'" *Ctr. for Investigative Reporting*, 436 F.Supp.3d at 113. See also *id.* ("[T]he foreseeable-harm requirement, as applied to Exemption 4, enhances the useful 'tool' of FOIA.") (citing *Food Mktg.*, 139 S.Ct. at 2369).

III. USPS FAILED TO SEGREGATE NON-EXEMPT MATERIAL

Even assuming that portions of the proposal qualify for withholding, USPS must segregate and disclose all non-exempt material in the requested documents. 5 U.S.C. § 552(a)(8)(A)(ii)(II); *Founding Church of Scientology of Wash., D.C., Inc. v. Bell*, 603 F.2d 945, 951 (D.C. Cir. 1979) ("[I]f only part of a document need be withheld under an exemption, Congress has directed that the Government must segregate the exempt passages and disclose the remainder."); *Vaughn*, 484 F.2d at 825 ("[T]he agency may not sweep a document under a general allegation of exemption . . . It is quite possible that part of a document should be kept secret while part should be disclosed."). Non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). USPS has made no attempt to segregate and disclose non-exempt material, instead withholding the more than 2,000-page proposal in full. Such overbroad withholdings contradict FOIA's plain statutory language on segregability and disclosure.

CONCLUSION

Sierra Club and Elders Climate Action respectfully request that USPS remand the agency's February 11, 2022 response and release without further delay the Oshkosh proposal or any non-exempt portions thereof.

Respectfully submitted,



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EXHIBIT K



via email

May 20, 2022

Ms. Miriam Raffel-Smith
Miriam.raffel-smith@sierraclub.org

Re: Freedom of Information Act Appeal No. 2022-APP-00118
FOIA Case No. 2021-FPRO-01780

Dear Ms. Raffel-Smith:

This is in response to your letter dated May 12, 2022, in which you appealed FOIA Coordinator Brenda Hunter's action on your request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for access to records concerning the successful offeror's proposal to the Next Generation Delivery Vehicle RFP. After carefully considering your appeal, we are affirming Ms. Hunter's action on your request in full. A decision on this matter is attached to this letter.

This is the final decision of the Postal Service regarding your right of access to records requested pursuant to the FOIA. You may seek judicial review of this decision by bringing suit for that purpose in the United States District Court for the district in which you reside or have a principal place of business, the district in which the records are located, or in the District of Columbia.

The Office of Government Information Services (OGIS) offers 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 requester's right to pursue litigation. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road
Room 2510
College Park, MD 20740-6001
Email: ogis@nara.gov
Telephone: 202-741-5770
Toll free: 1-877-684-6448
Facsimile: 202-741-5769

For the General Counsel,

James L. Tucker
Attorney
Ethics & Legal Compliance

Enclosure

cc: Brenda Hunter
Marthea Hodge
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475 L'ENFANT PLAZA SW
WASHINGTON, DC 20260

<https://about.usps.com/who/legal/foia/>



**OFFICE OF THE GENERAL COUNSEL
HEADQUARTERS, WASHINGTON, DC**

IN RE, APPEAL OF CASE NO.
2021-FPRO-01780

APPEAL NO. 2022-APP-00118

ATTORNEY JAMES L. TUCKER
ON BEHALF OF GENERAL COUNSEL THOMAS J. MARSHALL

OPINION AND ORDER

After careful consideration, this office is affirming FOIA Coordinator Brenda Hunter's actions on FOIA request 2021-FPRO-01780 in full.

I. STATEMENT OF FACTS

1. In a letter dated April 19, 2021, the requester submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for the "proposals received from vendors that responded to the" Postal Service's request for proposal (RFP) for Next Generation Delivery Vehicles (NGDV).
2. After the initial response to this request was remanded back to Ms. Hunter for further processing on October 15, 2021, Ms. Hunter rendered a partial response on February 10, 2022. In that response, Ms. Hunter informed the requester that "the technical and business proposal of the successful offeror will be forthcoming at a later date." To that end, in another letter, dated February 11, 2022, Ms. Hunter responded regarding the remaining open item in the February 10, 2022 letter, the successful offeror's proposal. In the February 11, 2022 letter, Ms. Hunter informed the requester that all 2,607 pages responsive to this item were being withheld in full pursuant to Exemption 4 of the FOIA.
3. The requester appealed on May 12, 2022. In her appeal, the requester only challenges Ms. Hunter's actions in the February 11, 2022 letter, withholding the successful offeror's proposal in its entirety. As such, that letter and the decision to withhold the successful offeror's proposal is the only item under consideration in this decision.

II. APPLICABLE LAW

Congress enacted the FOIA to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Congress balanced this objective by recognizing that "legitimate governmental and private interests could be harmed by release of certain types of information." *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 621 (1982). The FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions." *Milner v. Dep't of the Navy*, 562 U.S. 562, 562 (2011). In addition, other laws allow the Postal Service to withhold certain categories of records and information. See 39 U.S.C. § 410(c).

Trade secrets and commercial or financial information submitted to the Postal Service by a third party, such as a business partner, that is privileged or confidential is protected from mandatory disclosure by 5 U.S.C. § 552(b)(4) ("Exemption 4). A "person" for Exemption 4 purposes can be a natural person or any public or private entity other than a federal agency (including the Postal

Service). *Bd. of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403–04 (D.C. Cir. 1980), *abrogated on other grounds by U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982). Therefore, Exemption 4 covers information submitted to the Postal Service by a third party, such as a business partner, but does not cover information either created by the Postal Service or obtained from any federal agency.

The “commercial” aspect of Exemption 4 broadly encompasses all information in which the submitter has a commercial interest. *See Pub. Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *see also Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 (D.C. Cir. 1980), *abrogated on different grounds by, U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 598 (1982). Such information is exempt only if it is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. *COMPTEL v. Fed. Commc'ns Comm'n.*, 910 F. Supp. 2d 100, 115 (D.D.C. 2012). Information that is “instrumental” to a commercial interest is sufficiently commercial for the purposes of Exemption 4. *See Pub. Citizen Health Research Grp.*, 704 F.2d at 1290.

The word “confidential” in Exemption 4 has its ordinary meaning: information that is (1) both customarily and actually treated as private by its owner, and (2) provided to a recipient who promises to keep it secret. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). The first part is essential to a finding of confidentiality; the second part, though helpful, is perhaps not absolutely required. *See id.* And the government’s assurance of privacy may be implied. *Am. Small Bus. League v. Dept. of Defense*, --- F.Supp.3 ---, 2019 WL 6255353 at *7 (N.D. Cal. November 24, 2019) (“This order . . . does not find that Exemption 4 requires . . . written documentation or express assurances by the government. An implied assurance suffices.”). In defining “confidential” this way, the Court reversed all prior case law that had required proof that disclosure would result in “substantial competitive harm” before information could be deemed confidential. *Id.* at 2363-66.

III. LEGAL ANALYSIS

Here, the proposal in question was submitted by a third party for the purposes of trying to obtain a contract with the Postal Service for the development and production of NGDVs. Clearly, the information submitted for that purpose would be information in which the submitter has a commercial interest. It speaks directly to their line of business, their commercial capabilities, and the clients and revenue streams they are pursuing. Therefore, the only question truly in controversy is whether such submissions were “confidential.”

To that end, there is no indication that the successful offeror in this instance has a practice of publicly disclosing its proposals, offers, or business pitches to prospective clients or customers. To the contrary, this appears to be something that is routinely kept private, which aligns with routine good business practices. Moreover, the RFP for which the offeror submitted their proposal contained a specific provision in which the Postal Service promises offerors that anything they submit to the Postal Service would be marked as confidential and treated as such. In addition, the nondisclosure agreements that the Postal Service presented to offerors included language that anything related to the NGDV solicitation would be confidential.

Therefore, there is nothing left to implication here. Instead, there are explicit promises of confidentiality by all parties, which aligns with the established business customs of those parties, and the relevant responsive documents have actually been treated as confidential since the inception of this joint business endeavor. As such, it was appropriate to withhold these materials under Exemption 4.

IV. CONCLUSION

For the foregoing reasons, Ms. Hunter’s actions on FOIA request 2021-FPRO-01780 are hereby affirmed in full.

For the General Counsel,

James L. Tucker
Attorney
Ethics & Legal Compliance