



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 Oshkosh Defense LLC (“Oshkosh”) submitted to USPS, which led to Oshkosh securing a \$482 million contract to provide USPS with 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.” 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).

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 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

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/>.

concerns USPS's 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. *See* Executive Order 14008: Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619, 7,624 (Jan. 27, 2021). 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 A) 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 (attached as Exhibit B), 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. B at 2. However, in its February 11, 2022 partial response (attached as Exhibit C), 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 NGDV program." Ex. C 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 (i.e., NGDV) offered, 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 or commercial terms 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.²

²USPS 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, commercially valuable plan, formula, process, or device that has a direct relationship between the trade

Exhibit C 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 it 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 C 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 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.*, Order, No. 12-cv-04376-KAW (N.D. Cal. July 30, 2021) (attached as Exhibit E) (concluding defendant failed to satisfy its burden of showing that withheld information about hen houses was “customarily and *actually* treated as

secret and a productive process. *Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1288-89 (D.C. Cir. 1983).

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 some of the information private, and USPS offered an assurance of confidentiality in its application, USPS is not mandated to withhold every piece of information that could conceivably be withheld. To the contrary, the agency should endeavor to be as transparent as possible.³

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.⁴

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 its determination that the information is confidential if the party objects to the information’s release.⁵ USPS could follow this procedure with Oshkosh if it determines the proposal or parts of it should be released.

³Mem. from Attorney General Garland, Re: Freedom of Information Act Guidelines, Mar. 15, 2022, <https://www.justice.gov/ag/page/file/1483516/download> (hereinafter “Garland FOIA Memo”).

⁴Garland Memo at 1.

⁵See 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 simply 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). *See also id.* (finding that information revealing “basic commercial operations, such as sales statistics, profits and losses, and inventories” falls into the scope of “commercial” information); *100Reporters LLC v. United States 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 (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 (“[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 under Exemption 4, 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 requests 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,

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