

Swagelok

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July 7, 2017

*Via Email ([Charles.Mullins@nrc.gov](mailto:Charles.Mullins@nrc.gov))*

Mr. Charles E. Mullins  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852

**Re: Swagelok - Nuclear Regulatory Inspection Report No. 99901477/2017-201 (the "Inspection Report")**

Dear Charles:

Thanks again to you and the NRC team for your time on Wednesday afternoon. We appreciated the opportunity to voice our concerns about the disclosure of the names of Swagelok's suppliers. As discussed during our call, I am writing now to follow up with materials relating to Exemption 4 under FOIA.

We agree with the NRC that if a company does not seek exemption from disclosure of its supplier information, or if it fails to maintain the secrecy of its roster of suppliers, then that information may not be protected from disclosure under Exemption 4. In addition, if the competitor's roster of suppliers is not valuable information, then the information may not be protected from disclosure under Exemption 4.

Swagelok, however, does maintain the secrecy of its roster of suppliers, and its roster is valuable information (hence our efforts to protect it in this case). For the reasons discussed in the Affidavit of Swagelok's Vice President – Engineering ("Peace Affidavit," previously submitted but a copy is attached for your convenience w/o attachments), discussed during our telephone conference of July 5<sup>th</sup>, and discussed below, the identities of Swagelok's suppliers is protected from disclosure under Exemption 4, relevant case law, and various federal agency guidance.

#### FOIA Exemption 4

Exemption 4 protects from disclosure under FOIA "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). "Commercial or financial matter is "confidential" for purposes of [Exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); see also *Critical Mass Energy Project v.*

11/20/2017, original, SCNS/ review has been completed

*Nuclear Regulatory Commission*, 975 F.2d 871, 880 (D.C. Cir. 1992); *Frasee v. U.S. Forest Service*, 97 F.3d 367, 371 (9th Cir. 1996).

The U.S. Department of Justice has summarized the purpose of Exemption 4 as follows:

“This exemption is intended to protect the interests of both the government and submitters of information. The very existence of Exemption 4 encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable. **The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.** The exemption covers two distinct categories of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.”

*Department of Justice Guide to the Freedom of Information Act* at 267 (emphasis added, footnotes omitted) ([https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4\\_0.pdf](https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf)).

The identities of Swagelok’s suppliers falls within the second category identified by the Department of Justice: the information is (a) commercial or financial, and (b) obtained from a person (which is held to include corporations), and (c) privileged or confidential. The supplier identities in the Inspection Report were obtained from Swagelok, so item (b) above is satisfied. In addition, as discussed below, this information is confidential (item c) and is considered “commercial or financial” information (item a). Accordingly, the information is exempt from disclosure in the Inspection Report pursuant to Exemption 4.

### **Swagelok Supplier Identities are Confidential**

As stated during our call on July 5, 2017, Swagelok does not contend that the identities of Swagelok’s suppliers is a complete secret. The identities of materials and component suppliers may be available in telephone books, on the Internet, or through other sources. What is secret, however, is the fact that these particular companies are *suppliers to Swagelok* and, as discussed below, that fact is significant.

Swagelok does not publicly release the identities of suppliers. As stated in the Peace Affidavit, the “Confidential Information is held in confidence by Swagelok, is of a type customarily held in confidence by Swagelok . . . , and the information was transmitted to the Commission by Swagelok in confidence.” *Peace Affidavit* at paragraph 6. “Swagelok does not provide information on its suppliers to other organizations outside Swagelok,” and the fact that these companies are suppliers to Swagelok “is not available in public sources.” *Id.* at paragraph 7.

Accordingly, the fact that the suppliers identified in the Inspection Report are suppliers to Swagelok is confidential.

### **“Commercial or Financial” Information Includes Supplier Identities**

Swagelok maintains the confidentiality of supplier identities, because this information is valuable and gives Swagelok a legitimate commercial advantage. The fact that a particular company is a supplier to Swagelok is significant. While competitors might generally be aware or could learn that these companies supply or could supply the sort of products they provide, the fact that Swagelok purchases from the particular suppliers is telling, because Swagelok products have a reputation of high quality and consistent performance.

This reputation is due in part to the time and effort that Swagelok invests in its supply chain. Competitors know that if Swagelok is using a supplier, then that supplier has been rigorously vetted, has good process capabilities, and is able to produce high-quality, high-performing materials and components. In addition to the significant time, effort, and expense Swagelok spends in identifying capable suppliers, Swagelok further contributes to the abilities of these suppliers through Swagelok's (confidential) exacting requirements and specifications and its technical expertise, which further improve the quality of the supplier's processes, products, and capabilities. This is evidenced by facts discussed in the Peace Affidavit:

“In addition, public disclosure of the Confidential Information is likely to cause substantial harm to the competitive position of Swagelok due to Swagelok's investment of time and money, and the extensive process that Swagelok conducts, to identify, qualify, and develop its suppliers. Disclosing the Confidential Information would allow competitors to free ride on Swagelok's expensive and time-consuming efforts to identify, qualify, and develop its roster of suppliers without the competitors' incurring similar time and expense. In addition Swagelok's suppliers perform specialized operations, including some that utilize Swagelok trade secrets, and releasing the names of the suppliers to the public would provide information on how Swagelok products are processed.”

*Peace Affidavit* at paragraph 7.

In other words, Suppliers to companies within the nuclear industry are not fungible. Good suppliers, in addition to good design and manufacturing processes, are critical to high quality, high performance end products. The performance and reputation of Swagelok products is due in part to Swagelok's expensive and time-consuming supplier identification and development activities. A failure to redact supplier information from the Inspection Report would allow competitors to benefit from Swagelok's efforts without investing their own time, money, and expertise. The competitors would gain an unfair head start in developing and improving their own supply chains at Swagelok's expense.

If, instead of spending their own time, money, and effort finding and developing suppliers, competitors could simply free-ride on Swagelok's efforts, then Swagelok would lose the full advantage of its supply chain investments. This would act as a disincentive not only to Swagelok, but also to companies in other product areas and industries that invest in their supply chains because they currently see a commercial benefit to doing so. This does not serve Exemption 4's intent of protecting companies from “competitive disadvantages that could result from disclosure.” *Department of Justice Guide to the Freedom of Information Act* at 267. In addition, by reducing the incentive to invest, such a precedent could thwart the very intent of Exemption 4 by chilling investment and contributing to a lower quality of products (as well as, in some cases, result in less

transparent disclosures to the government). While this might result in a leveling of the quality of materials, components, and end products that are available – that level would be lower than what is available from the best companies today.

The protection of supplier identities also outweighs any small incremental value in disclosing specific supplier names. Redaction of supplier identities will not materially limit the effectiveness of the public disclosure of the Inspection Report. Readers of the report still will be able to recognize that the NRC had access to and considered the identities and capabilities of a large number of Swagelok suppliers. Readers do not need to know the actual supplier names to understand and appreciate the NRC's thorough work or evaluate the effectiveness of Swagelok's underlying processes. At the same time, protection of supplier identities in cases like this will encourage full disclosure by companies, whether such information is required to be submitted or simply is useful to the government's understanding of a matter.

#### *RMS Indus. v. Department of Defense*

As discussed in the next section below, the protection from disclosure of supplier information under Exemption 4 is well-settled among federal agencies. The supplier information case most often cited by federal agencies and Exemption 4 literature is *RMS Indus. v. DOD*, No. C92-1545 (N.D. Cal. Nov. 24, 1992) (copy attached). In that case, RMS filed an action against the Department of Defense alleging that DOD had unlawfully withheld from a FOIA disclosure various information submitted by RMS's competitors. Among the information sought by the FOIA request were the names of suppliers and subcontractors. In defending its decision to withhold supplier information, DOD argued that the disclosure of the identities of suppliers could "destroy relationships with suppliers."

The Court agreed and held that the release of this information "would cause potential harm to the competitive positions" of companies that had disclosed the information to the government and "impair the government's ability to obtain such information in the future." The Court specifically found that "Plaintiffs could use the withheld descriptions and names to undermine the manufacturing capacity of its competitors." The Court concluded that, "In light of the potential adverse effects on competition and the impairment of the government's ability to obtain such information in further, the confidentiality requirement of section 552(b)(4) is satisfied with regard to ... subcontractor names."

The Department of Justice has cited *RMS Indus.* for the principle that the "names and background of key employees and suppliers" is protected from disclosure by Exemption 4. The Department further noted that "the Courts have little difficulty in regarding information as "commercial or financial" if it relates to business or trade." *Department of Justice Guide to the Freedom of Information Act* at 267.

#### **Federal Agency Guidance Finding That Supplier Identities Fall Within Exemption 4**

The protection from disclosure of supplier information under Exemption 4 is indeed well-settled among federal agencies. While the NRC's FOIA guide does not address supplier information one way or the other, numerous federal agencies have concluded that the identity of suppliers may be exempt from disclosure under the FOIA as confidential commercial information. Agencies with specific written guidance in this regard include the Department of Energy, the Department of Justice,

the General Services Administration, the Food and Drug Administration, the Small Business Administration, and the Department of the Interior. Below are excerpts from various agency materials that provide that supplier information falls with Exemption 4. Emphasis on relevant text is added by underlining below:

- Department of Energy:

**“Examples of Exemption 4 OOU information/documents: \* \* \***  
Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor. **This includes** business sales statistics, research data, technical designs, customer and **supplier lists**, overhead and operating costs, and information on financial conditions.”  
<https://energy.gov/ehss/questions-about-making-ouo-determinations-ouo-and-foia-exemptions>

- Department of Justice:

**“Examples of items usually regarded as commercial or financial information include:** business sales statistics; research data; technical designs; customer and **supplier lists**; profit and loss data; overhead and operating costs; and information on financial condition.”  
[https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4\\_0.pdf](https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption4_0.pdf)

- General Services Administration:

“c. 5 U.S.C. 552(b)(4); fourth statutory exemption. GSA may withhold commercial or financial records submitted to the Government by a person (e.g., a business), if release of the information would involve a substantial risk of competitive injury to a business which directly or indirectly furnished information to GSA or when release would impair the Government's ability to obtain this information in the future. . . . **Examples of proprietary business information that may qualify for this exemption include:**

\* \* \*

4. **Non-Federal customer and supplier lists.**

\* \* \*

8. **Names of consultants and subcontractors.**”

<https://www.gsa.gov/portal/getMediaData?mediaId=124562>

- Food and Drug Administration:

**“The following examples are usually regarded as commercial or financial information [under FOIA Exemption 4]: . . . customer and supplier lists;”**  
<https://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/SmallBusinessAssistance/UCM441202.pdf>

Mr. Charles E. Mullins  
Office of the General Counsel  
July 7, 2017  
Page 6 of 6

- Small Business Administration:

**"commercial or financial information" - includes** financial statements, research data, overhead and operating costs, customer and **supplier lists**, a  
<https://www.sba.gov/sites/default/files/sops/SOP400331.pdf>

- Department of Interior:

**"Examples of exemption 4 records are . . . names of consultants, subcontractors, and suppliers"**

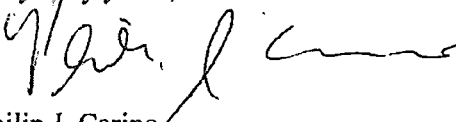
<https://www.doi.gov/complaints/FOIA/foia-exemptions-and-exclusions>

Our research has not uncovered any contrary agency guidelines suggesting that supplier identities are not exempt from disclosure under Exemption 4.

#### Conclusion

Swagelok requests that the NRC publish only a redacted version of the Inspection Report that blocks out the names of Swagelok's suppliers. (On May 4, 2017, Swagelok submitted to the NRC a version of the Inspection Report with supplier names deleted. Swagelok can provide a copy of the Inspection Report for publication that instead blacks out the supplier names, so readers will more clearly see that supplier names were considered.) Swagelok maintains the confidentiality of its roster of suppliers. This roster of suppliers is valuable, because of the reputation of Swagelok's products that result in part from its investment in its supply chain, and the value is maintained only as long as confidentiality is maintained. It is well-settled among federal agencies that supplier identities are protected by Exemption 4. Accordingly, Swagelok requests that, based on the weight of case law and federal agency guidelines, as well as the public policies they serve, supplier identities be redacted from the published Inspection Report.

Very truly yours,



Philip J. Carino

Enc.

cc: Yamir Diaz-Castillo ([Yamir.Diaz-Castillo@nrc.gov](mailto:Yamir.Diaz-Castillo@nrc.gov))  
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Steven Volcansek  
Nicholas Doljac  
Brett McGlone

**Affidavit of David Peace**  
**in connection with Swagelok Company's**  
**Nuclear Regulatory Inspection Report No. 99901477/2017-201**

I, David Peace being first duly sworn according to law, state that, to the best of my knowledge, information, and belief:

1. I am over eighteen years of age and am competent to testify herein.
2. I am employed by Swagelok Company ("Swagelok") as Vice President, Engineering. I am authorized to submit this affidavit on behalf of Swagelok.
3. This affidavit is submitted pursuant to 10 C.F.R. 2.390(b) in connection with certain information contained in Nuclear Regulatory Inspection Report No. 99901477/2017-201 (the "Report"). Swagelok requests that the information described in paragraphs 4 and 8 below ("Confidential Information") be exempt from disclosure and not be available for inspection and copying at the NRC Web site, at the NRC Public Disclosure Room, or otherwise. The basis for this request is stated in paragraphs 4 through 8 below.

4. **The document or part to be withheld – Section 2.390(b)(1)(ii)(A)**

Swagelok requests that the following portions of the Report be withheld.

- a. The identity of Swagelok's suppliers, which is found on the pages of the Report identified in paragraph 8(a) below and highlighted in the attached Exhibit A.
- b. Information related to internal evaluations of deviations which were not reported under 10 CFR Part 21 and are not public record, which is found on the pages of the Report identified in paragraph 8(b) below and highlighted in the attached Exhibit A.

5. **The official position of the person making the affidavit – Section 2.390(b)(1)(ii)(B)**

The affiant is David Peace, Vice President, Engineering of Swagelok, who is an officer of Swagelok and is authorized to make and execute this affidavit on behalf of Swagelok.

6. **The basis for proposing that the information be withheld – Section 2.390(b)(1)(ii)(C)**

The Confidential Information constitutes trade secrets and commercial or financial information that is confidential and is therefore protected from disclosure pursuant to Section 2.390(a)(4). The Confidential Information is held in confidence by Swagelok, is of a type customarily held in confidence by Swagelok for the reasons stated in paragraph 7 below, and the information was transmitted to the Commission by Swagelok in confidence.

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**7. The harm that would result if the Confidential Information is disclosed to the public – Section 2.390(b)(1)(ii)(D)**

The Confidential Information includes the names of Swagelok Company's suppliers and information related to internal evaluations of deviations which were not reported under 10 CFR Part 21 and are not public record. The disclosure of the Confidential Information is necessary for the protection of Swagelok's competitive position. Especially given the limited nature of the Confidential Information, withholding the Confidential Information would not significantly impact an understanding of the Report.

The fact that the particular entities that are part of the Confidential Information are suppliers to Swagelok is not available in public sources. In addition, public disclosure of the Confidential Information is likely to cause substantial harm to the competitive position of Swagelok due to Swagelok's investment of time and money, and the extensive process that Swagelok conducts, to identify, qualify, and develop its suppliers. Disclosing the Confidential Information would allow competitors to free ride on Swagelok's expensive and time-consuming efforts to identify, qualify, and develop its roster of suppliers without the competitors' incurring similar time and expense. In addition Swagelok's suppliers perform specialized operations, including some that utilize Swagelok trade secrets, and releasing the names of the suppliers to the public would provide information on how Swagelok products are processed. Swagelok does not provide information on its suppliers to other organizations outside Swagelok. Accordingly, all names and direct references to suppliers should be redacted as identified in the attached copy of the Report.


The inspection report also lists two 10 CFR Part 21 evaluations. The conclusion of these evaluations were that the circumstances examined did not pose a significant safety hazard. Accordingly, the titles listed in the two investigations should be redacted as identified in the attached copy of the Report (and see paragraph 8(b) below). In addition, the evaluations listed identify a specific supplier and, as stated above, Swagelok's supplier information is confidential and proprietary.

**8. The locations in the Report of Confidential Information to be withheld – Section 2.390(b)(1)(ii)(E)**

Exhibit A to this Affidavit is provided to identify the Confidential Information Swagelok seeks to redact: the Confidential Information is visible but highlighted in yellow. Exhibit B to this Affidavit is a copy of the Report with the Confidential Information actually redacted. The requested redactions are described below.

- a. The identity of Swagelok's suppliers, which is found on the following sections of the Report:
  - i. Notice of Nonconformance, paragraph number 1
  - ii. Executive Summary, Supplier Oversight section.
  - iii. Report Details, Section 1(b) (Supplier Oversight: Observations and Findings) – two instances
  - iv. Report Details, Section 1(c) (Supplier Oversight: Conclusion)
  - v. Attachment, Section 4; (Documents Reviewed: Calibration, Non-Destructive Examination, Inspection and Test Records), fifteenth, twentieth, twenty-first, and twenty-second bullet points



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As of: July 6, 2017 1:29 AM Z

*RMS Indus. v. DOD*

United States District Court for the Northern District of California

November 24, 1992, Decided; November 24, 1992, Filed

No. C-92-1545 MHP

**Reporter**

1992 U.S. Dist. LEXIS 22916 \*

RMS INDUSTRIES, Plaintiff, vs. DEPARTMENT OF DEFENSE, Defendant.

**Subsequent History:** Costs and fees proceeding at, Motion denied by *RMS Indus. v. Department of Defense*, 1993 U.S. Dist. LEXIS 10595 (N.D. Cal., July 27, 1993)

**Core Terms**

exemption, bid price, Evaluative, withheld, summary judgment, confidential, pre-decisional, solicitation, deliberative, descriptions, conclusions, Customer, impair, bids, documents, bidders, terms

**Counsel:** [\*1] For RMS Industries, Plaintiff: Richard Neil Snyder, LEAD ATTORNEY, RMS Industries, San Rafael, CA.

For Dept. of Defense, Defense Logistics Agency, Defense Personnel Support Center, Defendants: John Anthony Mendez, William Thomas McGivern, Jr., LEAD ATTORNEYS, U.S. Attorney's Office, San Jose, CA; Paul Thomas Solon, LEAD ATTORNEY, U.S. Attorney's Office, Oakland, CA; Stephen Lewis Schirle, LEAD ATTORNEY, PG&E Law Department, San Francisco, CA.

**Judges:** MARILYN HALL PATEL, United States District Judge.

**Opinion by:** MARILYN HALL PATEL

**Opinion**

**MEMORANDUM AND ORDER**

Plaintiff RMS Industries filed this action against defendant the United States Department of Defense under the Freedom of Information Act, 5 U.S.C. § 552 (1986), alleging unlawful exemption of information from disclosure. Plaintiff alleges that the requested but unreleased information does not fall within the exemptions claimed by defendant, namely, sections 552(b)(4) and 552(b)(5). FOIA exemptions (b) (4) and (b) (5) apply to confidential financial data and inter and intra-agency correspondence, respectively. The parties cross-move for summary judgment. For the following reasons, the court DENIES in part and GRANTS in part defendant's and plaintiff's cross motions [\*2] for summary judgment.

**BACKGROUND**

This is a claim brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1986), for the release of all documents related to Department of Defense ("DOD") contract bid solicitation number DLA100-91-R-0366A. The DOD's Defense Personnel Support Center ("DPSC"), Defense Logistics Agency ("DLA"), is responsible for the solicitation of bids and award of contracts for "acquiring, storing and distributing a

## RMS Indus. v. DOD

wide variety of food, clothing, and medical supplies." Affidavit in Support of Motion for Summary Judgment of Fred Sirota ("Sirota Aff.") at 1. Solicitation number DLA1-100-91-0366A concerns the acquisition of cold-weather, light weight, glove inserts, and the contract was worth about \$ 300,000. Proposed Pretrial Preparation Order ("Pretrial Order") at 3. Plaintiff was denied the job, and seeks the documents related to the solicitation to support his claim that the award was not made on a competitive basis. *Id.* In response to the DOD's failure to respond formally to the FOIA request, plaintiff filed this action for declaratory and injunctive relief.

Plaintiff's FOIA request by letter, dated December 30, 1991, was received by defendant on January [\*3] 8, 1992. It requested, all information related to the solicitation of bids and award of contracts for the manufacture of gloves for the DOD. *See* Federal Defendant's Separate List of Exhibits in Support of Motion to Dismiss with Prejudice; or, in the Alternative, for Summary Judgment ("Def. Sep. List") at 2. Following the initiation of this lawsuit, defendant formally responded to plaintiff's FOIA request. By letters dated April 23, 1992 and May 4, 1992, the DOD informed plaintiff that it would only provide plaintiff with that requested information which did not fall within the exemptions under *sections 552(b)(4) and (b)(5)*, exempting confidential financial data and inter and intra-agency pre-decisional memoranda from disclosure. Affidavit of Linda R. Brooks in Support of Motion for Dismissal and/or Summary Judgment ("Brooks Aff.") at 2. All non-exempt information was mailed to plaintiff with the above letters. *Id.* It included a competitive range determination, a price negotiation memorandum, a technical evaluation, the technical proposals of the successful offers, and certain pages of those offers. *Id.*

The DOD did not release certain information related to the solicitation at issue, [\*4] claiming that such was exempt under *sections 552(b)(4) and (b)(5)*. Information withheld under *exemption 4* was

financial information from the successful bidders that they did not want released to the general public. Sirota Aff. at 2. It included "interim pricing, type and quality of machines owned or leased by the contractor, the names and backgrounds of key technical employees and the identities of suppliers for components." *Id.* According to the DOD, this information can be used "to hire away key employees; destroy relationships with suppliers and use interim prices to discover profit margin or other costs." *Id.* According to the DOD, information withheld under *exemption 5* consisted of inter-agency and intra-agency pre-decisional memoranda that reflected the deliberative process. *Id.*

The parties cross-move for summary judgment. The plaintiff contends that the information withheld does not fall into *exemptions (b)(4) and (b)(5)*, whereas the defendant argues that it does. The issue before this court is whether *FOIA exemptions 4 and 5* were properly invoked to exclude certain documents and information from release.

#### STANDARD OF REVIEW

Under *Federal Rule of Civil Procedure 56*, summary judgment [\*5] shall be granted "against a party who fails to make a showing sufficient to establish the existence of at element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). *See also*, *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (the nonmoving party may not rely on the pleadings but must present specific facts creating a genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

The court's function, however, is not to make

credibility determinations. Anderson, 477 U.S. at 249. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. T.W. Elec. Serv., 809 F.2d at 631.

### DISCUSSION

Plaintiff's motion for summary judgment is defective for the following reasons: (1) plaintiff failed, [\*6] to provide proper notice and declarations of factual contentions, in accord with Local Rule 220-7; and (2) plaintiff failed to state accurately what issues are to be decided, as required by Local Rule 220-4. Nevertheless, since the plaintiff is pro se, the court considers plaintiff's summary judgment, along with defendant's, and decides the issue of whether, the DOD properly withheld under FOIA exemptions 4 and 5 the information requested by RMS.

#### 1. Information Properly Exempted under Section 552(b)(4)

Section 552(b)(4) of FOIA creates an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). This exemption applies "to prevent disclosure of (1) trade secrets and commercial or financial information, (2) obtained from a person or by the government, (3) that are privileged or confidential." Pacific Architects & Eng. v. U.S. Dept. of State, 906 F.2d 1345, 1347 (9th Cir. 1990). Requirements one through three are "conjunctive." *Id.* (citing National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 766, 162 U.S. App. D.C. 223 (D.C. Cir. 1974)). Information is "privileged or confidential" under requirement three, if its [\*7] release will do either of the following: "(1) 'impair the Government's ability to obtain necessary information in the future,' or (2) 'cause potential harm to the competitive position of the person from whom the information was obtained.'" *Id.* (quoting National Parks, 498 F.2d at 770).

In the instant case, the information withheld under

the section 552(b)(4) is only partly supported by the facts and law. See Appendix, List of Exemptions. The information withheld by the DOD includes description and quality of equipment, bid prices and terms, names of contacts, customers, key employees, subcontractors, and tech ratings. See Sirota Aff., Index of Documents. This information is all financial because it directly reflects the financial capability of the companies to perform the glove-insert contract, and it was all obtained by the government or the DOD in the bidding and award process. Therefore, the financial-information and government-obtained requirements of section 552(b)(4) are met with regard to all the information withheld under this exemption.

However, only some of this information satisfies the confidentiality requirement. The release of the descriptions of equipment and the names [\*8] of contacts, customers, key employees, and subcontractors would cause potential harm to the competitive positions of the successful bidders, and impair the government's ability to obtain such information in the future. Plaintiff could use the withheld descriptions and names to undermine the manufacturing capacity of its competitors. Sirota Aff. at 2-3. Consequently, government contract bidders only submit such information if it will not be released to their competitors. *Id.* In fact, the three successful bidders for the DOD glove-insert contract at issue objected to the release of the above information by letter, after being informed by letter of plaintiff's request. *Id.* at 2. Were the government to release the information containing the machine descriptions and business related names, it would impair its ability to obtain the information in the future. In light of the potential adverse effects on competition and the impairment of the government's ability to obtain such information in the future, the confidentiality requirement of section 552(b)(4) is satisfied with regard to the equipment descriptions and employee, customer, and subcontractor names.

However, the confidentiality requirement [\*9] is not satisfied with regard to the prices, terms and

## RMS Indus. v. DOD

conditions contained in the contract bid. The court is unconvinced based on the evidence that the release of contract bid prices, terms and conditions whether interim or final will harm the successful bidders. Certainly, a release will not impair the government's ability to obtain such information in the future, since bids by nature are offers to provide goods and/or services for a price and under certain terms and conditions. Therefore, the defendants properly exercised 552(b)(4) in withholding the above equipment descriptions and various names, but improperly withheld the bid prices, terms and conditions under this exemption.

## 2. Information Properly Exempted under Section 552 (b)(5)

FOIA exemption 552(b)(5) provides "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption protects the deliberative process in government, and a document must be both "pre-decisional" and "deliberative" to qualify for its protection. Assembly of State of Cal. v. U.S. Dept. of Commerce, 968 F.2d 916, 920 (9th Cir. 1992) [\*10] (citing National Wildlife Fed'n v. U.S. Forest Service, 861 F.2d 1114, 1117 (9th Cir. 1988)). A document may be considered predecisional if it was "prepared in order to assist an agency decisionmaker in arriving at his decision." Id. (quoting Renegotiation Board v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184, 95 S. Ct. 1491, 44 L. Ed. 2d 57 (1975)). A document is deliberative if "the disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Id. at 921 (quoting Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568, 259 U.S. App. D.C. 364 (D.C. Cir. 1987)).

In this case, the information withheld under section 552(b)(5) is for the most part properly characterized as "predecisional" and "deliberative."

See Appendix, List of Exemptions. The information withheld under exemption 5 of the FOIA includes pre-decisional opinion statements. See Sirota Aff., Index of Documents. Such information includes evaluative statements and conclusions. These evaluative statements and conclusions were prepared to assist the DOD in arriving at its award of the glove-insert contracts. [\*11] Consequently, they are "predecisional." However, only the evaluative statements, not the conclusions, would expose the agency's decision-making process so as to inhibit candid discussion and thereby impair the DOD from performing its function of soliciting bids and awarding contracts. Consequently, the withheld evaluative statements, not the conclusions, are "deliberative." Therefore, the DOD properly applied section 552(b)(5) to the evaluative statements but not the conclusions.

## CONCLUSION

Accordingly, this court GRANTS in part and DENIES in part defendant's and plaintiff's motions for summary judgment. See Appendix, List of Exemption (a page-by-page enumeration of what was exempted, and whether the facts and law support withholding that information from defendant).

IT IS SO ORDERED.

Dated: NOV 24 1992

/s/ Marilyn Hall Patel

MARILYN HALL PATEL

United States District Judge

## APPENDIX

List of Exemptions

Go \_\_\_\_\_ to \_\_\_\_\_ table 1

## RMS Indus. v. DOD

**Table1** (*Return to related document text*)

Page #	Type of Information	Exemption	(Un)Supported
1.	Bid price, term, etc.	(b)(4)	Unsupported
2.	Bid price, term, etc.	(b)(4)	Unsupported
8.	Customer Name	(b)(4)	Supported
9.	Customer Names Other Information	(b)(4) (b)(4)	Supported Unsupported
10.	Customer Names	(b)(4)	Supported
11.	Employee Names	(b)(4)	Supported
12.	Employee Names	(b)(4)	Supported
13.	Employee Name	(b)(4)	Supported
15.	Bid price, term, etc.	(b)(4)	Unsupported
16.	Bid price, term, etc.	(b)(4)	Unsupported
18.	Machine Descriptions	(b)(4)	Supported
19.	Bid price, term, etc.	(b)(4)	Unsupported
20.	Bid price, term, etc.	(b)(4)	Unsupported
26.	Bid price, term, etc.	(b)(4)	Unsupported
27.	Bid price, term, etc. Evaluative terms	(b)(4) (b)(5)	Unsupported Supported
28.	Evaluative statements	(b)(5)	Supported
29.	Evaluative statements	(b)(5)	Supported
30.	Bid price, term, etc.	(b)(4)	Unsupported
31.	Bid price, term, etc. Evaluative terms	(b)(4) (b)(5)	Unsupported Supported
32.	Machine Description	(b)(4)	Unsupported.
34.	Evaluative statements	(b)(5)	Supported

## RMS Indus. v. DOD

Page #	Type of Information	Exemption	(Un)Supported
35.	Bid prices, terms, etc.	(b)(4)	Unsupported
36.	Evaluative statement	(b)(5)	Supported
37.	Evaluative statements	(b)(5)	Supported
38.	Evaluative terms	(b)(6)	Supported
	Conclusions	(b)(5)	Unsupported
39.	Names	(b)(5)	Supported
	Other information	(b)(5)	Unsupported

**Table1** (*Return to related document text*)

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