

In this regard, it bears repeating that rival firms are not in all situations legally prohibited from pricing their services below cost. Such below-cost pricing is not an uncommon way for such firms to gain market share at the expense of competing firms.

**B. Cost Coverages, Outbound mail**

In many instances on the tables indicated in the previous section, and in the descriptive document accompanying this discussion, the Report presents percentage cost contribution (cost coverage) statistics for each international service category. As with attributable costs and specific contributions, the Postal Service agrees to make public cost coverages for surface and air and initiative subtotals. Furthermore the undeleted text of the Report in most instances makes clear which services the Commission has identified as failing to cover costs. In the current context, however, the Postal Service believes that providing these specific cost coverages would be competitively harmful. First, knowing which services produce the highest contributions would enhance the ability of rival firms to identify services that can most profitably be undermined, allowing such firms to concentrate their resources on getting that business. Second, knowing coverages and contributions would enable rival firms to derive specific costs from other publicly available information. Revenues and volumes of international mail are generally available from the Postal Service in the quarterly Revenue, Pieces, and Weights (RPW) Reports, which the Postal Service makes public and files periodically with the Commission. In fact, these data are presented in part in the same tables in the Commission's Report to Congress from which the Postal Service proposes to delete specific cost information. Exposing contribution levels or cost coverages would easily enable firms to derive specific costs by combining this information. Accordingly, for the reasons expressed above, the Postal Service believes that specific cost coverages should be deleted.

**C. Volumes and revenues, outbound initiatives**

In addition to the cost information discussed above, the Postal Service proposes to delete volume and revenue data for specific international "initiatives (e.g., Tables II-1, IV-2, C-1, E-1, and F-3)." Aggregated figures for the initiatives would be disclosed. For these categories, the Postal Service does not routinely make public such volume, and revenue data. The Postal Service believes that withholding this information is justified, since generally the initiatives consist of newer, less traditional, innovative services for which competition is particularly intense. For the most part, they are relatively recent additions to the Postal Service's offerings, and are relatively low volume, lower revenue categories that are more vulnerable. The Postal Service believes that these initiatives are particularly vulnerable to competition, because customer loyalty for these products has not matured. Product-specific volume, revenue, and cost information for the initiatives would give competitors a clearer understanding of

the strengths of the Postal Service's new product lines, and leave the Postal Service vulnerable to intense competition in markets where the Postal Service has begun to earn a measure of success. Disclosing current volume and revenue data, and allowing rival firms to track the progress of these nascent services over time, furthermore, would undermine the viability of the initiatives by making them more vulnerable to selective assaults by competitors, as explained above. In the markets in which it operates the Postal Service is confident that good business practice would dictate withholding all specific data concerning these categories. Although the Postal Service has traditionally routinely made public specific volume and revenue data for the non-initiative services, private firms with which it competes, and firms generally in any industry, typically do not disclose volume and revenue data for any particular products, for reasons similar to those discussed in section (A), above.

**D. Attributable costs, contributions, and cost coverages, Inbound mail**

Certain tables and pages in the Report provide data on categories of inbound international mail (e.g., Tables II-1, III-2, IV-3, pp. 37-38, and Table C-3). For these, the Postal Service agrees to provide volume and revenue data, as well as aggregated surface and air subtotals, but proposes to delete inbound attributable cost, contribution, and cost coverage data. Generally, the competitive situations of inbound international postal traffic are different from outbound mail, since inbound mail consists of services offered by foreign postal administrations. In certain contexts, however, knowledge by competitors and foreign postal administrations of the cost structures by service of Postal Service handling of such mail could have a competitive impact or financial consequences. In the context of remail practices, comparisons of Postal Service processing and delivery costs of inbound mail, with terminal dues structures, and with foreign postal rates, could contribute to the ability of firms promoting remail to make more informed strategic decisions that could lead to diversion of United States domestic mail, for which the Postal Service is adequately compensated through its domestic rates, to remail, for which the Postal Service is not adequately compensated through terminal dues or other delivery payment mechanisms. Furthermore, in certain instances, payments for domestic processing and delivery of inbound international mail are negotiated separately by country. More available information about domestic cost structures for inbound processing and delivery could in certain circumstances create disadvantages for the Postal Service in negotiating rates for these payments. Moreover, in the future, it may be feasible and economically advantageous for the Postal Service to move toward more country-specific rates for outbound traffic, as well. In the context of negotiating such rates, information about domestic processing and delivery costs could undermine the Postal Service's negotiating positions vis a vis foreign postal administrations. While the competitive considerations involved in disclosing inbound data are not as exigent as with outbound mail, the Postal Service is confident that in the typical business environment, no service-specific commercial data would be made available by

competing firms. The Postal therefore concludes that good business practice would sanction withholding this information.

**E. Cost components**

Several tables and pages in the Report disclose specific cost data by service, disaggregated by cost component or element (e.g., Appendix C, pp. 15-16, Tables F-2 through 5). For the reasons explained in section (A), above, the Postal Service believes that this commercial information would be harmful if it were disclosed. The fact that it provides an even more detailed picture of the cost structures of particular services amplifies this concern.

**F. Cost coverage t-values**

As noted earlier, in a vacuum, Cost Coverage t-values of individual products, such as those displayed in the Report in Tables III-2 and D-2 and in the text on page 27, would not generally be viewed as sensitive information. Nevertheless, under the current circumstances, such information should be redacted from any publicly-available version of the Report. This follows from the fact that the Report at page 24 explains the exact arithmetic relationship between Percent Cost Coverage, CV of Cost per Piece, and Coverage t-value. The nature of that relationship is such that, knowing the value for a particular service of any two of those three items, it is simple to calculate the value of the third. As the Postal Service is not proposing to redact the CV of Cost per Piece information, further providing specific Coverage t-values would therefore be tantamount to providing the Percent Cost Coverages. For the reasons discussed in section B. above, however, cost coverage information is sensitive and should not be disclosed. To prevent its indirect disclosure, it is necessary to redact the Cost Coverage t-values.

**G. Country-specific attributable costs, contribution, cost coverages**

Certain information in the Report (e.g., Table E-1) discloses country-specific data and data by country group. For the reasons expressed in the document filed with the Commission on April 8, 1999,<sup>4</sup> the Postal Service believes that this information is commercially sensitive and would not be disclosed under good business practices. Disclosure of country specific information would enable competitors to target Postal Service customers and divert business. It would also impair the Postal Service's bargaining position in delivery cost negotiations with foreign postal administrations with regard to all types of mail.

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<sup>4</sup> *Id.* at 3-5.

## Legal Analysis

### 1. 39 U.S.C. § 410 (c)(2)

The chief legal basis, as well as the primary policy justification, for withholding the information identified above is found in the Postal Reorganization Act. In creating the Postal Service as a unique establishment, Congress determined that major sources of constraint on Postal Service operations and finances arising from federal laws should be eliminated. This was in keeping with a dominant theme in Postal Reorganization that the Postal Service should be free to provide the nation's postal services using modern business practices. Accordingly, in 39 U.S.C. § 410(a), Congress directed that no federal statute pertaining to a wide range of topics related to postal operations should apply to the Postal Service, except as specified. This exclusion specifically included the provisions of 5 U.S.C. Chapters 5 and 7. In section 410(b), Congress then made only certain parts of Chapter 5 in title 5 specifically applicable.<sup>5</sup> It specifically applied the Freedom of Information Act (FOIA), 5 U.S.C. § 552, however, in section 410(c), it created special exemptions from mandatory disclosure under the FOIA, in addition to those provided in the FOIA itself (5 U.S.C. § 552(b)). Subsection 410(c) provides:

Subsection (b)(1) [FOIA] of this section shall not require the disclosure of

(2) 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.

As explained above, each of the items the Postal Service proposes to delete from the Commission's Report to Congress falls squarely within this provision. Furthermore, in applying the FOIA to the request made by *Business Mailers Review*, section 410(c)(2) applies in two ways.

#### a. 5 U.S.C. § 552(b)(3)

The FOIA enumerates several specific exemptions from mandatory disclosure. Section 552(b) provides:

This section shall not apply to matters that are—...(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that

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<sup>5</sup> Other parts are applied in specific contexts, e.g., 39 U.S.C. §§ 3624, 3628.

such statute (A) requires that the matters be withheld from 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.

Two federal district courts have specifically held that 39 U.S.C. § 410(c)(2) comes within the ambit of this exemption. *Weres Corporation v. United States Postal Service*, C.A. No. 95-1984, at 3-5 (D.D.C 1996)(unpublished Memorandum Opinion, copy attached hereto); *National Western Life Ins. Co. v. United States*, 512 F.Supp. 454, 458-59 (N.D. Tex. 1980). Both courts, moreover, held that subsection (c)(2) satisfies both prongs of subsection (B) in section 552(b)(3). In particular, both courts found that "good business practice" was a workable standard for evaluating whether specific information could be withheld. Referring to another court's finding of a generally expressed criterion to be sufficient to qualify under section 552(b)(3), the court in *National Western Life* stated:

"Good business practice" is no less definite a standard. This standard may not be specifically quantifiable, yet it is not so vague as to leave a Postmaster General with unfettered discretion as to what information may be withheld from disclosure. In creating the Postal Service, Congress declared that it was to be run in a businesslike manner; and in granting the Postal Service powers not ordinarily held by other government agencies, Congress intended it to operate in many ways like a private business enterprise. *May Dept. Stores v. Williamson*, 549 F.2d 1147, 1147 (8<sup>th</sup> Cir. 1977). "Good business practice" is readily ascertainable by looking to the commercial world, management techniques, and business law, as well as to the standards of practice adhered to by large corporations. Thus, I hold that "good business practice" creates a sufficiently definite standard to justify exclusion of information that would otherwise be disclosed under the FOIA, and section 410(c)(2) qualifies as an exemption under 5 U.S.C. § 552(b)(3)(B).

512 F.Supp. 459.

The decision of the court in *Weres*, furthermore, amplifies the conclusion that in applying subsection (c)(2), the opinion of the Postal Service is of primary importance, given the legislative history of the Reorganization Act and the purpose for the exemption. The court stated:

Although plaintiff argues that the phrase "good business practice" is not defined in the statute and thus disqualifies section 410(c)(2) as a "particular matter to be withheld," plaintiff's argument is unavailing. Congress enacted the Postal Act to free the USPS from, among other things:

Serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial and personnel policies that are outmoded, unnecessary, and inconsistent with modern management and business practices.

H.R. Rep. No. 91-1104, 91<sup>st</sup> Conga., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 3649, 3650. A legislative definition of "good business practices" would have injected Congress squarely into the arena of business decision-making at USPS – the very type of situation that Congress sought to eliminate by passage of the Postal Reorganization Act. See, e.g., *id.* at 3653 (congressional involvement in technical details "unjustly hampered" efforts to run USPS like a business). That Congress chose not to define "good business practices" is clear from its finding that congressional meddling in business operations was inconsistent with modern management practices. See *id.* at 3650-53.

Memorandum Opinion at 4 (copy attached).

In the discussion above, the Postal Service has carefully explained the bases for its conclusions that the material proposed to be deleted from the Commission's report is information of a commercial nature which would not in good business practices be publicly disclosed. Through 5 U.S.C. § 552(b)(3), the Commission is entitled to invoke this as a basis for withholding the material that the Postal Service has identified.

b. 39 U.S.C. § 3604(e)

Even if subsection (c)(2) did not qualify as an exemption under section 552(b)(3), the Commission could apply it independently under 39 U.S.C. § 3604(e). That provision states:

The provisions of section 410 and Chapter 10 of this title shall apply to the Commission, as appropriate.

In these circumstances, where the Commission is mandated by another provision of the same statute to produce a report to Congress that must contain confidential commercial information of the type Congress specifically exempted the Postal Service from having to disclose under FOIA, it would be appropriate for section 410(c)(2) to apply to the Commission's determination. This conclusion is reinforced by the fact that in 39 U.S.C. § 3663, which directed the Commission to create the Report and the Postal Service to provide data, Congress neither directed the report to be made public nor qualified the specific exemption in subsection (c)(2).

2. 5 U.S.C. § 552(b)(5)

In section 552(b)(5), the FOIA also exempts from mandatory disclosure

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.

While this exemption is commonly found to apply to materials revealing "deliberative process" in agency decision making, in *Federal Open Market Committee v. Merrill*, 443 U.S. 340(1979), the Supreme Court found another dimension to the fifth exemption that encompassed

for good cause shown...a trade secret or other confidential research, development or commercial information.

*Id.* at 360. This interpretation was based on the language Federal Rule of Civil Procedure 26(c)(7). While the factual context in which the Court acknowledged the exemption arose out of a situation involving government contracts, during the time prior to contract award, the logic of the Court's reasoning, namely, that disclosure of commercial information could place the Government at a competitive disadvantage, would also apply in the instant context. As explained above, here disclosure of the materials identified could place the Postal Service at a competitive disadvantage in international mail markets. Furthermore, while the Court's reasoning in *Merrill* relied significantly on the timing involved in the contracting process, a recent federal district court decision suggests that, as long as the vulnerability to damage from disclosure remains, the exemption would be valid. *Taylor Woodrow International, Ltd. v. United States*, No. C88-429R at 5 (W.D. Wash. 1989)(unpublished Slip. Op., copy attached hereto). In that case, the court stated:

The theory behind this privilege "is not that the flow of advice may be hampered, but that the Government will be placed at

a competitive disadvantage or that the consummation of the contract may be endangered." [*Merrill*] at 360. Accordingly, this privilege protects the government when it enters the marketplace as an ordinary buyer or seller. *Government Land Bank v. General Services Administration*, 671 F.2d 663, 665 (1<sup>st</sup> Cir. 1982).

In this regard, the reasoning behind this dimension of the fifth exemption is similar to the reasoning underlying a provision of the Commission's own periodic reporting rules. The Postal Service's transmittal letter to the Commission dated March 15, 1999, explained this connection as follows:

In this regard, we note the similarity between the objectives furthered by nondisclosure here and the policy embodied in Section 102(a)(10) of the Commission's periodic reporting rules (39 C.F.R. § 3001.102(a)(10)), which permits delay up to one year in providing billing determinant information for the competitive categories of domestic Express Mail, Priority Mail, and Parcel Post. This provision grew out of the Postal Service's concern, expressed in Docket No. RM89-3, that the provision of this information would result in commercial harm to the Postal Service.

The Postal Service believes that in the instant situation, section 552(b)(5) should be applied to exempt from mandatory disclosure the items described above under the interpretations presented by the Supreme Court in *Merrill* and subsequent decisions.

### 3. 5 U.S.C. § 552(b)(4)

The Postal Service also submits that the material identified above and in the accompanying materials can be withheld pursuant to the fourth exemption to mandatory disclosure under the FOIA, 5 U.S.C. § 552(b)(4). Section 552(b)(4) exempts

trade secrets and commercial and financial information obtained from a person and privileged or confidential.

This fourth exemption has been held to apply when disclosure of commercial information – as in the instant situation – would cause competitive harm to the entity supplying the information. See *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir.

1992); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In applying this exemption, the Postal Service acknowledges the body of case law that would support the conclusion that the Postal Service cannot be interpreted to be a "person" within the meaning of subsection (b)(4). See, e.g., *Allnet Communication Services v. FCC*, 800 F.Supp. 984, 988 (D.D.C. 1992); *Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392 (D.C. Cir. 1980). In this regard, however, the Postal Service submits that whether (b)(4) could be interpreted to apply to commercially sensitive information provided to the Commission by the Postal Service has never been squarely addressed by the courts. Furthermore, the logic of the fourth exemption, as it has been applied to information provided by persons outside of the agency invoking it, matches exactly the circumstances here. The Postal Service has provided the Commission sensitive commercial information and data falling within the substantive boundaries of subsection (b)(4). As the Postal Service has demonstrated, furthermore, disclosure of these data publicly would inflict substantial competitive harm. Especially in the context of the Postal Reorganization Act, which was enacted in part to create and protect the Postal Service's unique status as a government business, application of this exemption to information provided by the Postal Service would be appropriate.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<p><b>WERES CORPORATION,</b></p> <p>Plaintiff,</p> <p>v.</p> <p><b>UNITED STATES POSTAL SERVICE,</b></p> <p>Defendant.</p>
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Civil Action No. 95-1984 (NHJ)

**FILED**

**SEP 23 1996**

NANCY MAYER-WHITTINGTON, CLERK  
U.S. DISTRICT COURT

MEMORANDUM ORDER

Plaintiff Weres Corporation brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1994). Plaintiff seeks to compel the United States Postal Service ("USPS") to produce certain pricing information received by the USPS in response to a contract solicitation. The USPS contends that it may withhold the requested information from public disclosure pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3) (1994). Presently before the Court are the cross-motions of the parties for summary judgment. Upon consideration of the motions, the Court will deny the motion of plaintiff and grant summary judgment for defendant.

The following material facts are undisputed. The USPS does not procure goods and services by soliciting sealed bids which are opened in public. Instead, it employs a contract negotiation system which may involve negotiations with offerors after bid proposals are reviewed by the USPS. The solicitation at issue in this case, Solicitation No. 475630-95-1309, requested proposals for portable conveyors. The USPS made two separate awards based primarily on the lowest price received from responsible offerors.

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Plaintiff Weres Corporation, which did not participate in the USPS solicitation, requested a "complete abstract" of proposed bids. In response to plaintiff's requests for bid abstracts, the USPS identified the successful offerors, released the names of the other offerors, and released the unit and total prices of the awarded contracts. The USPS, however, withheld pricing information submitted by unsuccessful offerors. Although USPS regulations permit the disclosure of prices submitted by unsuccessful offerors, the agency customarily does not disclose this information to the public. At issue is whether FOIA Exemption (3)(B), 5 U.S.C. § 552(b)(3)(B) (1994), protects from disclosure unit and total prices submitted by unsuccessful offerors in a USPS contract solicitation.

Subsection (B) of FOIA Exemption 3 exempts from mandatory disclosure matters specifically exempted from disclosure by statute, provided that such statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(B) (1994). A statute thus falls within the FOIA disclosure exemption if it satisfies either of two disjunctive requirements: the statute provides criteria "in which discretion may be exercised in favor of withholding information that would otherwise be subject to disclosure" (hereafter "Subsection B-1"); or the statute "refers to particular matters to be withheld" (hereafter "Subsection B-2"). Association of Retired R.R. Workers, Inc. v. United States R.R. Retirement Bd., 830 F.2d 331, 333-34 (D.C. Cir. 1987).

The USPS contends that Section 410(c)(2) of the Postal Reorganization Act (the "Postal Act"), Pub. L. No. 91-375, § 114, (codified as amended at 39 U.S.C. § 410 (c)(2) (1994)),

qualifies under Subsection B as a FOIA Exemption 3 withholding statute.<sup>1</sup> The Court agrees.

Section 410 of the Postal Act provides that:

- (a) Except as otherwise provided by subsection (b) of this section, and except as otherwise provided in this title. . .
- (b) The following provisions shall apply to the Postal Service:
  - (1) section 552 (public information), section 552a (records about individuals), section 552b (open meetings)
- (c) Subsection (b)(1) of this section shall not require the disclosure of --
  - (2) 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(a)-(c)(2) (1994). Because the statute, on its face, plainly exempts the matters described in Section 410(c)(2) from FOIA disclosure, the congressional purpose in enacting the statute is clear from the words of the statute itself. *See Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). In short, the statute unambiguously provides that Section 410(c)(2) trumps FOIA disclosure requirements. Moreover, Section 410(c)(2) falls within the scope of FOIA Exemption 3 Subsection B-2's provision for nondisclosure of "particular types of matters to be withheld." *See e.g., Mudge Rose Guthrie Alexander & Ferdon v. ITC*, 846 F.2d 1527, 1530-31 (D.C. Cir. 1988) (finding that Tariff Act prohibition against disclosure of "proprietary matters" that "can be associated with" or

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<sup>1</sup> This is an issue of first impression in this Circuit. In the only published opinion on the issue, the Federal District Court in the Northern District of Texas held that 39 U.S.C. § 410(c)(2) qualifies as a withholding statute under FOIA Exemption 3(B). *See National Western Life Ins. Co. v. United States*, 512 F. Supp. 454, 459 (N.D. Tex. 1980).

"otherwise used to identify" operations of particular firms satisfies conditions of Subsection B-2).

Although plaintiff argues that the phrase "good business practice" is not defined in the statute and thus disqualifies Section 410(c)(2) as a "particular matter to be withheld," plaintiff's argument is unavailing. Congress enacted the Postal Act to free the USPS from, among other things:

serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent with modern management and business practices.

H.R. REP. NO. 91-1104, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 3649, 3650. A legislative definition of "good business practices" would have injected Congress squarely into the arena of business decision-making at USPS -- the very type of situation that Congress sought to eliminate by passage of the Postal Reorganization Act. *See e.g., id.* at 3653 (congressional involvement in technical details "unjustly hampered" efforts to run USPS like a business). That Congress chose not to define "good business practices" is clear from its finding that congressional meddling in business operations was inconsistent with modern management practices. *See id.* at 3650-53.

The Court finds no authority to support plaintiff's contention that Congress may not choose to exempt matters from disclosure under Subsection B-2 unless it provides a narrow definition of the information to be withheld. Indeed, the designation of information to be withheld under Section 410 -- "information of a commercial nature . . . which under good business practice would not be publicly disclosed" -- leaves no more room for agency discretion

than other statutes to which the Court of Appeals for this Circuit has applied Subsection B-2.

*See, e.g., Mudge Rose Guthrie Alexander & Ferdon v. ITC*, 846 at 1529-31.

Having established that 39 U.S.C. § 410(c)(2) qualifies as a withholding statute, the Court must consider whether the USPS has shown that the requested information falls within the statute's scope. *See Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). It is undisputed that the information sought by plaintiff is commercial information. Hence, the sole remaining question is whether the release of unit and total prices submitted by unsuccessful offerors in a USPS solicitation qualifies as information which, "under good business practice, would not be publicly disclosed." *See* 39 U.S.C. § 410(c)(2) (1994).

The USPS argues that were it to release unsuccessful bid prices to the public, such a disclosure could increase the agency's procurement costs. The USPS bases its argument on the following hypotheticals:

[I]f the successful offeror learns that its price is well below the next lowest proposal, it may increase its price for future proposals. Similarly, if the next-lowest proposal is the only one that is close in price to the successful proposal, and the successful offeror goes out of business or for some other reason does not submit future proposals, then the next-lowest offeror may increase its price for future proposals.

Declaration of B.E. Burchell at 3; *see also* Declaration of Jim Nails at 2.

Although plaintiff argues that potential bidders would not object to release of their unsuccessful bid proposals, plaintiff does not dispute the USPS's contention that the release of this information to the public may increase the agency's procurement costs. In sum, the agency has set forth an undisputed, non-conclusory, and logical "good business practice" rationale for its decision to withhold unsuccessful bid prices from public disclosure. *Cf. Mudge Rose Guthrie*

Alexander & Ferdon v. ITC, 846 F.2d at 1531-32 (suggesting ITC could provide hypotheticals to explain proprietary nature of withheld data). The Court finds that the requested information falls within the nondisclosure provisions of 39 U.S.C. § 410(c)(2).

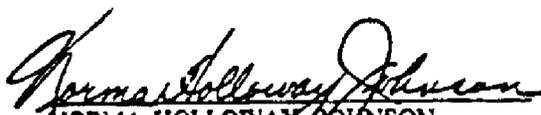
Accordingly, it is this 21<sup>st</sup> day of September 1996,

ORDERED that the motion of defendant for summary judgment be, and hereby is, granted; it is further

ORDERED that summary judgment be, and hereby is, entered in favor of defendant; it is further

ORDERED that the motion of plaintiff for summary judgment be, and hereby is, denied; and it is further

ORDERED that any pending motions in this case be, and hereby are, denied as moot.

  
NORMA HOLLOWAY JOHNSON  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TAYLOR WOODROW INTERNATIONAL, )  
LTD., et al., )  
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 Plaintiffs, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 DEPARTMENT OF THE NAVY, )  
 )  
 Defendant. )

NO. C88-429R  
ORDER DENYING PLAINTIFF'S  
SUMMARY JUDGMENT MOTION  
AND GRANTING DEFENDANT'S  
SUMMARY JUDGMENT MOTION

THIS MATTER comes before the court on plaintiffs' summary judgment motion to compel defendant to release certain documents under the Freedom of Information Act and defendant's cross motion for summary judgment to withhold release of the information.<sup>1</sup> Having reviewed the motions, together with all documents filed in support, and being fully advised, the court finds and rules as follows:

<sup>1</sup>Plaintiffs' counsel originally requested oral arguments on the motions. However, counsel for both parties have since agreed to cancel this request.

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1 I. FACTUAL BACKGROUND.

2 Plaintiffs Taylor Woodrow International, Ltd., Chris Berg,  
3 Inc., and Riedel International, Inc. formed Taywood-Berg-Riedel  
4 Joint Venture ("TBR") to bid on a construction contract offered by  
5 defendant United States Navy. The contract's three separate pro-  
6 jects require site preparation and facility support construction for  
7 a Relocatable Over The Horizon Radar system on Amchitka Island,  
8 Alaska.

9 Before soliciting bids, the government paid nearly two million  
10 dollars to an outside consultant for cost estimates on the contract.  
11 The cost estimates established reasonable project prices to compare  
12 against the submitted contract bids. These estimates describe how  
13 the contractor might construct the project and include overall cost  
14 summary sheets as well as individual cost summaries for each unit of  
15 work.

16 The government awarded the contract to TBR on February 12,  
17 1987. TBR's bid was approximately 78.2 million dollars. Since  
18 beginning the project, TBR has also submitted change order proposals  
19 of approximately twenty million dollars.

20 On August 13, 1987, TBR requested copies of all cost estimate  
21 sheets under the Freedom of Information Act ("FOIA"). 5 U.S.C.  
22 § 552. The government released the bottom line cost estimates for  
23 the contract's three projects, but refused to release the more  
24 detailed individual cost summary sheets. On October 1, 1987, TBR  
25 appealed to the General Counsel of the Navy. The General Counsel  
26 denied the appeal, claiming the materials are exempt under the FOIA.

1 TBR then filed this action to compel disclosure of the cost estimate  
2 sheets under the FOIA. Both parties now move for summary judgment.  
3

4 II. DISCUSSION.

5 A. Standard of Review.

6 Summary judgment is appropriate when there is no genuine issue  
7 as to any material fact and the moving party is entitled to judgment  
8 as a matter of law. If there is no issue of material fact, the  
9 moving party must demonstrate the right to judgment as a matter of  
10 law in the context of undisputed facts. Aronsen v. Crown  
11 Zellerbach, 662 F.2d 584, 591 (9th Cir. 1981).

12 Summary judgment is appropriate on FOIA exemption claims as  
13 long as the facts and all inferences drawn from those facts are  
14 construed in the light most favorable to the party requesting dis-  
15 closure. Miller v. United States Department of State, 779 F.2d  
16 1378, 1382 (8th Cir. 1985). Absent evidence of bad faith, summary  
17 judgment on the basis of agency affidavits is warranted if the  
18 affidavits describe, with reasonably specific detail, both the  
19 documents and the agency's justifications for nondisclosure, demon-  
20 strating that the withheld information logically falls within the  
21 claimed exemption. Military Audit Project v. Casey, 656 F.2d 724,  
22 738 (D.C. Cir. 1981).

23 B. Exemption to Disclosure Under the FOIA.

24 Under the FOIA, a federal agency must disclose agency records  
25 unless those records fall within one of nine enumerated exemptions.  
26 Department of Justice v. Julian, 108 S.Ct. 1606, 1611 (1988).

1 Courts traditionally construe these exemptions narrowly because the  
2 mandate of the FOIA calls for broad disclosure of government  
3 records. Id. This action involves Exemption 5 to the FOIA, which  
4 excludes from disclosure "inter-agency or intra-agency memorandums  
5 or letters which would not be available by law to a party other than  
6 an agency in litigation with the agency." 5 U.S.C. § 552 (b)(5).  
7 The public has a right to all memoranda that a private party could  
8 discover in litigation with the agency, EPA v. Mink, 410 U.S. 73, 86  
9 (1973); however, under Exemption 5, the agency may withhold "those  
10 documents, and only those documents, normally privileged in the  
11 civil discovery context." NLRB v. Sears Roebuck & Co., 421 U.S.  
12 132, 149 (1975); Julian, 108 S.Ct. at 1613. Moreover, the govern-  
13 ment agency bears the burden of proving that the documents are  
14 exempt from its duty to disclose. National Wildlife Federation v.  
15 United States Forest Service, 861 F.2d 1114, 1116 (9th Cir. 1988).

16 In the present action, both parties agree that the cost esti-  
17 mates are intra-agency memoranda, so the only question remaining is  
18 whether those memoranda would normally be privileged in the civil  
19 discovery context. The Navy asserts two recognized Exemption 5  
20 privileges: the "deliberative process" privilege and the "confiden-  
21 tial commercial information" privilege. Because it finds that the  
22 confidential commercial information privilege applies to the dis-  
23 puted documents, the court need not examine whether the deliberative  
24 process privilege applies.

25 The confidential commercial information privilege derives from  
26

1 Fed. R. Civ. P. 26 (c)(7).<sup>2</sup> Federal Open Market Committee v.  
 2 Merrill, 443 U.S. 340, 355 (1979). The theory behind this privilege  
 3 "is not that the flow of advice may be hampered, but that the  
 4 Government will be placed at a competitive disadvantage or that the  
 5 consummation of the contract may be endangered." Id. at 360.  
 6 Accordingly, this privilege protects the government when it enters  
 7 the marketplace as an ordinary buyer or seller. Government Land  
 8 Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir.  
 9 1982).

10 The government argues that release of the cost estimates  
 11 before completion of the contract would create a serious commercial  
 12 disadvantage for the government as it bargains with TBR over change  
 13 order negotiations. As proof, the government offers five hypotheti-  
 14 cal "scenarios" to show the potential financial damage that the Navy  
 15 would suffer if the cost estimates were released. Each scenario  
 16 shows that, if it had access to the estimates, TBR could adjust  
 17 change order proposals to fit the government's estimates. For  
 18 example, knowledge of the consultant's contemplated construction  
 19 methods might reduce TBR's incentive to discover less expensive  
 20 methods. Similarly, TBR would have no incentive to locate and

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21 <sup>2</sup>Fed. R. Civ. P. 26 (c)(7) provides:

22 Upon motion by a party or by the person from whom  
 23 discovery is sought, and for good cause shown, the court  
 24 ... may make any order which justice requires to protect  
 25 a party or person from annoyance, embarrassment, oppres-  
 26 sion, or undue burden or expense, including one or more  
 of the following: ... (7) that a trade secret or other  
 confidential research, development, or commercial infor-  
 mation not be disclosed or be disclosed only in a desig-  
 nated way;....

1 charge out materials at a lower cost, or to achieve project goals  
2 using less labor and equipment.

3 Plaintiff TBR, on the other hand, simply contends that the  
4 confidential commercial privilege ceases to exist once the govern-  
5 ment awards the contract.

6 The courts have established that cost estimates are privileged  
7 documents subject to Exemption 5 before awarding a contract, but no  
8 decisions address whether the commercial disadvantage that the  
9 government might suffer during change order negotiations justifies  
10 extending the privilege until the contract is complete. See, e.g.  
11 Merrill, 443 U.S. at 360; Morrison-Knudson Co. v. Dep't of the Army,  
12 595 F. Supp. 352, 355-56 (D.D.C. 1984), aff'd 762 F.2d 138 (D.C.  
13 Cir. 1985); Hack v. Dep't. of Energy, 538 F. Supp. 1098, 1104  
14 (D.D.C. 1982).

15 The purpose of the confidential commercial privilege is to  
16 protect the release of potentially damaging commercial information,  
17 but only while the opportunity to take unfair advantage of the  
18 government agency continues to exist. See Merrill, 443 U.S. at 360;  
19 Morrison-Knudson Co., 595 F. Supp. at 355; Hack, 538 F. Supp. at  
20 1104. In the present action, the process of contracting has not  
21 ended. Normally, once the government awards a contract, all negoti-  
22 ations end and the contract price becomes fixed. In that instance,  
23 there would be no reason to continue to withhold the information.  
24 Here, however, the Navy faces a situation in which plaintiff TBR has  
25 already submitted change order proposals amounting to approximately  
26 one fourth of the total contract cost. If the court releases the

1 cost estimate sheets, the plaintiffs could take unfair commercial  
2 advantage of the Navy. As a result, the policy behind applying the  
3 commercial confidential privilege in this particular instance is  
4 still very much alive even after the contract award.

5 By its affidavits, the Navy has described, with reasonably  
6 specific detail, both the documents and its justifications for  
7 nondisclosure. It has demonstrated that the withheld cost estimate  
8 sheets logically fall within the confidential commercial information  
9 privilege. Consequently, the Navy may continue to withhold the cost  
10 estimate sheets so long as it continues to negotiate substantial  
11 change order proposals.

12 NOW, THEREFORE, plaintiff TBR's summary judgment motion is  
13 DENIED and defendant United States Navy's summary judgment motion is  
14 GRANTED.

15 DATED at Seattle, Washington this 31st day of March, 1989.

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18 BARBARA J. ROTHSTEIN  
19 CHIEF UNITED STATES DISTRICT JUDGE  
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U.S. Department of Justice  
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## FOIA UPDATE

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### OIP Guidance: Referral and Consultation Procedures

When searching for records requested under the Freedom of Information Act, it is not uncommon for an agency to locate a responsive document that originated outside of the agency. This occurrence can present an agency with the threshold jurisdictional question of whether such a document is an "agency record" under the FOIA. In those cases in which the document is determined to be an "agency record," the agency then must decide whether it should (a) process the record for the requester directly, (b) refer the record to the originating agency for its disclosure determination and direct response to the FOIA requester, or (c) consult with that originating agency before making a direct FOIA response.

#### "Agency Record" Inquiry

The threshold question of whether a document either created or otherwise obtained by an agency is an "agency record" under the FOIA should be resolved by determining whether the document is physically possessed by the agency and whether it was within the agency's "control" at the time the FOIA request was made. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). Based upon an overall review of relevant FOIA precedents, it appears that the category of documents most frequently found not to be "agency records" under the Act are "personal materials in an employee's possession, even though the materials may be physically located at the agency." *Id.* at 145 (citing Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 157 (1980)). For a detailed discussion of the criteria to be employed by federal agencies in determining whether particular materials properly qualify as "personal records" under the FOIA, see FOIA Update, Fall 1984, at 3-4 ("OIP Guidance: 'Agency Records' vs. 'Personal Records'").

Similarly, documents originating with Congress, where that body has specifically reserved control over them, have been held not to be "agency records." See, e.g., Goland v. CIA, 607 F.2d 339, 344-48 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); Washington Post Co. v. Department of Defense, 766 F. Supp. 1, 16-18 (D.D.C. 1991). As well, documents originating with the courts, again assuming some reservation of control, cf. Department of Justice v. Tax Analysts, 492 U.S. at 146-47, also have been held not to be "agency records." See, e.g., Valenti v. Department of Justice, 503 F. Supp. 230, 232-33 (E.D. La. 1980) (grand jury transcript). One court likewise has suggested that "communications between the President and his immediate advisors" which find their way to an agency covered by the FOIA would not qualify as "agency records" either. McGehee v. CIA, 697 F.2d 1095, 1108 (D.C. Cir.) (dictum), vacated in part on other grounds upon panel reh'g, 711 F.2d 1076 (D.C. Cir. 1983).

Further, agencies should be alert to two general principles regarding FOIA referrals. First, it is never appropriate to make a full referral of records (or of the responsibility for directly responding to a requester) to an entity that itself is not subject to the Act. Accordingly, a referral may not be made to Congress, the judiciary, state governmental bodies, private businesses, or to individuals. Second, as a matter of sound administrative practice, whenever an agency refers a record to another agency for response, it should advise the requester of this fact and of the identity of the agency to which the referral was made – except in the unusual case in which to do so would itself disclose a sensitive, exempt fact. *See, e.g., FOIA Update*, Spring 1991, at 6 (advising how to make referrals to law enforcement agencies in context of third-party FOIA requests).

### Consultations

Interagency FOIA consultations, as distinct from record referrals, are particularly appropriate in two types of situations. First, they are well suited to the circumstance in which an agency deals with a responsive record that it originated itself, but which contains items of information that were furnished by (or perhaps *are of special interest to*) another agency. By carefully consulting with that other agency, either formally or informally, an agency can make a more informed disclosure decision regarding its own record. \*

Consultations also are especially useful in informing an agency of any sensitivity of records originating with entities not subject to the FOIA. Indeed, in the case of confidential business information, such consultations often are mandatory under Executive Order No. 12,600, and its implementing regulations. As with referrals, requesters ordinarily should be advised that the agency is consulting with a record's originator whenever this process delays an agency's FOIA response.

### Conclusion

In sum, an agency considering requested documents that originated outside of the agency must first determine whether the documents are "agency records." Where such a record originated with another agency, the agency must determine whether it or the originating agency can best respond to that part of the FOIA request. Only through appropriate use of referral and consultation practices can an agency ensure the making of fully informed and consistent FOIA disclosure determinations.

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On the other hand, "generally materials obtained from private parties and in the possession of a federal agency [are] agency 'records' within the meaning of FOIA." Weisberg v. Department of Justice, 631 F.2d 824, 827-28 (D.C. Cir. 1980) (copyrighted photographs used in criminal investigation held to be "agency records"); *see, e.g.*, Hercules, Inc. v. Marsh, 838 F.2d 1027, 1029 (4th Cir. 1988) (army ammunition plant telephone directory prepared by contractor at government expense held to be "agency record"); General Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (internal company report submitted in connection with licensing proceedings held to be "agency record"). Accordingly, the agency in possession of such records is responsible for making any FOIA disclosure determination that might be required.

### Referral of Records

With respect to records originating with another agency, one principle is beyond any doubt: "[W]hen an agency receives a FOIA request for 'agency records' in its possession, it must take responsibility for processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere." McGehee v. CIA, 697 F.2d at 1110. Some controversy once existed, however, over exactly what this "responsibility" entails. In the McGehee case, the D.C. Circuit Court of Appeals confronted an agency's extremely broad position that it had no obligation to take any action whatsoever regarding records originating in another agency; it responded by suggesting rigid administrative procedures by which the agency would process such records itself, primarily using consultations. *See id.* at 1110-12. This aspect of the McGehee decision was regarded as interlocutory and nonbinding on the issue, so it was advised that agencies not alter their longstanding practices of referring records to their agencies of origination. *See FOIA Update*, Summer 1983, at 5; *see also FOIA Update*, June 1982, at 5 (recommending FOIA referral as matter of practicality).

With the passage of time, this traditional FOIA practice has largely ceased to be an issue. Agencies have continued to refer requested records to originating agencies for direct FOIA responses -- and when litigation has resulted, the government generally has not raised any issue over which agency is the "proper party defendant," but instead has provided affidavits from the originating agencies to justify any contested nondisclosure. The practice has continued, as a practical matter, with acceptance both tacit and widespread. *See, e.g.*, Oglesby v. Department of the Army, 920 F.2d 57, 69 & n.15 (D.C. Cir. 1990); Fitzgibbon v. CIA, 911 F.2d 755, 757 (D.C. Cir. 1990); Zang v. FBI, 756 F. Supp. 705, 706-07 & n.1 (W.D.N.Y. 1991).

Accordingly, the question for FOIA officers now is how best to handle the records of another agency in a given case -- by acting independently, by making a full record referral, or by merely consulting with the other agency. The short answer is that the agency that is best able to determine a record's sensitivity, and in turn its exemption status, is the agency that should process that record under the Act. While this may vary in particular cases, as a general rule the agency that originated a record is usually the most appropriate agency to make a FOIA-disclosure determination regarding it. The primary advantages of record referrals are overall administrative efficiency and consistency of response.

With respect to classified information, referrals are even mandatory, because Section 3.1(b) of Executive Order No. 12,356 limits declassification authority to the agency that authorized the original classification. In addition, as a matter of agency policy, the Department of Justice generally refers all law enforcement records to their agencies of origination for their FOIA determinations. *See* 28 C.F.R. {16.4(d)} (1990) (Justice Department regulation). (However, the agency that is currently leading an ongoing law enforcement investigation most likely will be in the best position to determine whether disclosure of any record of that investigation, regardless of where it originated, would interfere with ongoing law enforcement proceedings.) In any event, agencies that routinely exchange standard types of information should consider formal or informal agreements governing treatment of one another's records in order to conserve scarce administrative resources. *See, e.g.*, 28 C.F.R. {16.4(g)} (1990) (Justice Department regulation concerning such agreements).