

FREEDOM OF INFORMATION ACT

Legal Review of FOIA Appeal

We have reviewed the subject appeal and concur with the requester's position that some information from the previously denied document is releasable under the Freedom of Information Act (FOIA), as discussed below.

On 18 Nov 09, Subject appealed the Air Force's decision to deny in its entirety the operations manual to the "EFOIA" tool utilized by the United States Air Force. The operations manual was provided by the vendor company, AINS, Inc., when the Air Force purchased their EFOIA processing tool, named "FOIA Xpress." The manual describes what its name implies – how to operate the FOIA Xpress software. Subject contends that there should be some releasable information in the manual, such as the cover page, table of contents, and other information that does not otherwise violate the release prohibitions of the FOIA, in particular FOIA Exemption (b)(4).

The Air Force, prior to making its initial release determination, properly consulted with the AINS as to its position on the release of the information, AINS had provided to the Air Force pursuant to its contract. See DoD Regulation 5400.7/Air Force Supplement, *DoD Freedom of Information Act Program*, paragraphs C1.5.9. and C3.2.1.4.8. Ultimately, however, the release decision is the Air Force's to make, not AINS.' As the contract with AINS notes on page 10, paragraph iii., "all information, data, documentation, and/or specifications relating to contractor designed developed, produced and maintained systems/materials under this contract will become and remain the property of the U.S. Government." (Tab 5). See also, DoD Regulation 5400.7/Air Force Supplement, paragraph C1.4.3 and C1.4.5.

As discussed in our 25 Sep 09, legal opinion, we questioned AINS' position that all the information in the manual must be withheld under Exemption (b)(4). (Attachment 1). First, AINS seemed to imply that the manual was voluntarily provided to the Air Force. Therefore, under FOIA Exemption (b)(4), the manual is not releasable to the public because AINS does not customarily release it to the public. The manual, however, was not voluntarily provided by AINS to the Air Force, but was required to be provided in accordance with their contract and in consideration for the purchase by the Air Force of the FOIA Xpress software. Accordingly, the manual can only be withheld under the FOIA if release of the manual is likely to cause "substantial harm to the competitive position" of AINS; impair the Government's ability to obtain necessary information in the future; or impair the quality of the information given to the Government; or impair some other legitimate Governmental interest. "Competitive harm" is limited to "harm flowing from the affirmative use of proprietary information by competitors," not "simply any injury to [a] competitive position." *CAN Fin. Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987).

AINS further asserted that release of the manual would "violate the Trade Secrets Act, which prohibits disclosure by the U.S. Air Force of commercial information that concerns or is related to specific technical information which might pose a threat to our competitive edge, cause

competitive injury and place this company and product line at a commercial disadvantage in the marketplace.” This argument is without merit, as case law has held that information exempt from release under the Exemption 4 tests embodies the subset of information covered by the Trade Secrets Act.

AINS finally argued that the licensing agreement with the Air Force prohibited the Air Force from releasing the FOIA Xpress software to any third party, which included the “training material.” The licensing agreement does not expressly state that the training material is covered by the licensing agreement, but states it covers “technical data.” The requestor is not requesting the FOIA Xpress software. We also question whether a licensing agreement can contradict the requirements of a federal statute applicable to the federal government. In this respect, we note the release requirements of the FOIA itself, but also 10 U.S.C. § 2320, *Rights in Technical Data*. That statute allows a contractor who developed an item or process exclusively at private expense to restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the Government. However, it does not apply to technical data that “is necessary for the operation, maintenance, installation, or training (Other than detailed manufacturing or process data).” 10 U.S.C. § 2320(2)(C)(iii). We agree the Air Force cannot release the FOIA software, but the operations manual is not the software. Further, even if 10 U.S.C. § 2320 applied to the operations manual, release is still permissible (assuming no other statute or FOIA exemptions prohibits its release), if the release is made subject to a prohibition that the person receiving the data may not further disclose or use it, and the contractor is notified of the release. See 10 U.S.C. § 2320(2)(D)(ii) and (iii). If AINS believes a specific federal statute other than the Trade Secrets Act controls the dissemination of the operations manual, or that the provisions of 10 U.S.C. § 2329(2)(C)(iii) do not apply it should advise the Air Force.

We agree with the requested that under the applicable Exemption 4 test, the table of contents, at a minimum, is releasable. This amounts to about 6 pages (slides) of information. We also believe – based on AINS own position on releasing other requested information about its software – that there is other releasable information in the manual. For instance, the requester also asked for written guidance the Air Force had provided to its FOIA managers on how to use AINS’ FOIA software. An “eFOIA Processing Steps” guide, a 5 page document, was created by the AF FOIA office, explaining how to use the AINS FOIA software in particular situations. (Tab 4). We understand the information from this guide came from AINS’ operational manual. When AINS reviewed the guide for its release recommendation, AINS had no objections. (Tab 5). Accordingly, it appears that information in the operations manual that is similar to information in the “eFOIA Processing Steps” 5 page guide is releasable.

There is no information in the appeal case file that the contracting officer for the subject contract reviewed the operations manual in order to provide an opinion as to whether all information in the manual was properly withheld under FOIA Exemption 4. We previously recommended this be done prior to a decision to withhold the complete manual. Further, the inconsistency between releasing the eFOIA guide, and withholding similar information contained in the operations manual, should be addressed with AINS and the contracting officer prior to any final decision to withhold the operations manual. Finally, because of the appeal, AINS should be requested to provide a thorough analysis and adequately explain how release of particular information in their manual meets Exemption 4’s “involuntarily provided information” test. In particular, it would

be helpful to receive an explanation from them as to why they had no objection to releasing the eFOIA guide, but objected to releasing similar information contained in the operations manual.

IAW with DoD and Air Force policy, the release authority for the manual should release all information it determines is releasable to the requester after reviewing the appeal, and only forward to the appellate authority the information/records it determines should continue to be denied.

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