STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-09
October 6, 2023
Anne Arundel County Office of Central Services, Custodian
Jackie Hector (Lighting Maintenance, Inc.), Complainant

Jackie Hector has filed a complaint on behalf of Lighting Maintenance, Inc., alleging that the Anne Arundel County Office of Central Services ("OCS") violated the Public Information Act ("PIA") by redacting unit pricing information in records of two contracting bids. In response, the OCS claims that the information was properly redacted under § 4-335[1] of the PIA, which forbids the release of "confidential commercial information" and "confidential financial information" that is "provided by or obtained from any person or governmental unit." After review of the submissions we conclude that the OCS has not met its burden to justify the redactions. Accordingly, we direct the OCS to provide the responsive records to the complainant without redaction to the unit pricing information and explain further below.

Background

In June of this year, the complainant sent a PIA request to the OCS asking for the "unit pricing of the bids for all contractors" for "Contract No. SSF2200261." The request noted that "Eastern Sales is the Primary contractor." The OCS sent the complainant a letter explaining that any responsive records would be reviewed to "determine if there is confidential commercial or financial information from the vendor(s) that needs to be withheld or redacted." The OCS further explained that such information "includes certain pricing data and information regarding a vendor's equipment or processes" because "[a] vendor would customarily not release such information to the public."

The OCS determined that there were two vendors with records responsive to the complainant's PIA request. The OCS contacted each vendor separately and provided them with an unredacted copy of their bid submission and asked them to "mark up any information that [they felt] should be redacted." The OCS advised that if the vendors did not respond, it would "assume that [they] do not require any redactions" and would "release the documents unredacted." Both vendors provided the OCS with redacted versions of their bids. The OCS, in turn, provided those redacted records to the complainant, noting

[1] Statutory citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise stated.

that the redactions occurred "where a vendor would customarily not release such information to the public."

The complainant disputed the redactions and contacted the Public Access Ombudsman for assistance in resolving that dispute. After the Ombudsman issued a final determination stating that the dispute was not resolved, the complainant filed this complaint alleging that the OCS violated the PIA by redacting the unit pricing information in the records responsive to her request. The complainant maintains that disclosure of unit pricing information in government bids furthers transparency and accountability because it allows stakeholders and the public to "evaluat[e] the reasonableness of the bid and the current state of the market." In particular, the complainant asserts that disclosure would show "how the government is allocating tax revenue" thus "promoting public confidence and trust in the procurement process." The complainant argues that the unit pricing information redacted from the records here is not confidential commercial information because "it does not reveal any information to the public beyond what the government would pay for individual line items and lacks context about how bidders calculated unit pricing." Therefore, the complainant contends, there is no reason for "a bidder not to release such information to the public."

In response to the complaint, the OCS first asserts that "this identical issue regarding the redaction of confidential unit pricing was litigated to finality" in a different case before the Anne Arundel County Circuit Court. That case also involved Lighting Maintenance. Stressing that the complainant made the same arguments before the Circuit Court that she does here, the OCS argues that we should not "disturb" the Circuit Court's ruling that "the redacted unit pricing [i]s confidential commercial information of the nature that would not be shared with competitors or the general public."

The OCS explains that its records custodian's practice, upon receipt of PIA requests like the one at issue here, is to "contact the contractors for which a requester is seeking information to determine whether they consider information in their bid or contract to be confidential commercial or financial information." The OCS states that their responses are "factored into [the custodian's] review of the records and decision as to whether the information should be withheld or redacted." In this case, the OCS explains, the custodian contacted the two vendors with bids responsive to the PIA request. Both vendors asked that certain information be withheld and provided the custodian with redacted versions of their bids, which the OCS custodian then disclosed to the complainant. Noting the complainant's reliance on two cases in particular—one from our state's Supreme Court and another from the U.S. Court of Appeals for the District of Columbia—the OCS points out that the Anne Arundel Circuit Court applied those same cases when it concluded that the unit pricing information in the case mentioned above was confidential. The OCS states that its custodian "followed the direction and ruling" of the Circuit Court judge when she responded to the PIA request at issue here.

In her reply, the complainant takes issue with the OCS's process and argues that the OCS has not met its burden to demonstrate that § 4-335 applies. The complainant emphasizes that it is the custodian who is charged with making the ultimate determination as to what is disclosable under the PIA and contends that the custodian did not do that here. Rather, the complainant points out, the custodian simply asked the vendors to "mark up" any of the information that the vendor felt should be redacted and did not provide any further evidence that the redacted information is of the kind that the vendor would not customarily make public. The complainant asserts that disclosure of the unit pricing information "would not reveal potentially sensitive commercial information."

The complainant also disputes the value of the Circuit Court's ruling in the case involving Lighting Maintenance and the records of a different vendor. Arguing that the Circuit Court "did not create a categorial rule that all unit pricing information submitted by a contractor is exempt from disclosure under the MPIA," the complainant contends that the OCS failed to conduct an analysis specific to this PIA request. The complainant reiterates that disclosure of unit pricing information is essential to ensuring the integrity of government contracting, and notes that, in Lighting Maintenance's experience, the OCS is the only government entity that "consistently . . . rejects disclosure of unit pricing information."

Analysis

The PIA authorizes us to review and resolve complaints alleging certain violations of its provisions, including that a custodian denied inspection of a public record in error. *See* § 4-1A-04(a)(1)(i). Before filing a complaint, a complainant must attempt to resolve a dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a). If, after review of the submissions and information before us, we conclude that the alleged violation occurred, we must issue a written decision and order a statutory remedy. § 4-1A-04(a)(2) and (3). When we determine that a custodian wrongfully denied inspection of a public record, we must order the custodian to "produce the public record for inspection." § 4-1A-04(a)(3)(i).

The PIA's provisions "reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." *Amster v. Baker*, 453 Md. 68, 76 (2017) (quotations and citations omitted). To that end, the PIA requires that its provisions "be construed in favor of allowing inspection of a public record, with the least cost and least delay" to the requester "unless an unwarranted invasion of the privacy of a person in interest would result." § 4-103(b); *see also Office of Governor v. Washington Post Co.*, 360 Md. 520, 544 (2000) ("[T]he statute should be interpreted to favor disclosure."). Despite this strong presumption of disclosure, the PIA contains exemptions, including § 4-335, the exemption invoked here. When a custodian invokes an exemption to withhold all or part of a public record, the custodian bears the burden of justifying its application. *Lamson v. Montgomery*

County, 460 Md. 349, 367 (2018). Exemptions are to be interpreted narrowly, *Office of the Governor*, 360 Md. at 545, and close cases are generally resolved in favor of disclosure, *Immanuel v. Comptroller of Maryland*, 449 Md. 76, 88 (2016); *see also Glenn v. Maryland Dep't of Health & Mental Hygiene*, 446 Md. 378, 385-86 (2016) ("The ability to rebut the presumption [in favor of disclosure] is not to be construed liberally, however, because the PIA was established with the over-arching purpose of allowing oversight of the government, resulting in a strong practice of disclosure.").

Section 4-335 protects from disclosure "confidential commercial information" and "confidential financial information" that is "provided by or obtained from any person or governmental unit." The exemption is mandatory. If information falls with in the scope of the exemption, then a custodian may not release it. Given recent changes at the federal level, the state of the law regarding § 4-335 in Maryland is somewhat unsettled. A brief history of the exemption's application—as well as the application of the comparable exemption in the federal Freedom of Information Act ("FOIA")—is necessary.

Section 4-335 is very similar to FOIA's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C.A. § 552(b)(4), and thus federal cases interpreting that exemption are persuasive authority as to § 4-335, *see Amster*, 453 Md. at 79 ("[W]hen interpreting the MPIA, we generally give significant weight to the federal courts' interpretation of similar FOIA provisions."). Until recently, federal courts distinguished between commercial or financial information that the government *required* and such information that was *voluntarily supplied* to the government. *See, e.g.*, *Gen. Elec. Co. v. Dep't of the Air Force*, 648 F.Supp.2d 95, 101 (D.D.C. 2009) (explaining that the first step in the multi-part test for confidentiality is to "determine whether the information was submitted to the government voluntarily"). Depending on the nature of the information, the tests for confidentiality were different. Information that the government *required* was deemed confidential—and thus non-disclosable under § 552(b)(4)—if disclosure was likely either "(1) to impair the [g]overnment'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." *Amster*, 453 Md. at 78 (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), *abrogated by Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019)). Information *voluntarily supplied*, on the other hand, was considered confidential if it "would customarily not be released to the public by the person from whom it was obtained." *Id.* at 79 (quoting *Critical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992)).

National Parks and *Critical Mass* were still the two leading FOIA cases regarding confidential commercial or financial information when the Supreme Court of Maryland (then called the Court of Appeals) decided *Amster v. Baker*. That case concerned a commercial lease between Whole Foods and a developer, which the developer voluntarily provided to Prince George's County in the course of the zoning process and "ongoing

discussions of the development of the property." *Amster*, 453 Md. at 71. Because the developer provided the lease voluntarily, *Amster* primarily focused on the *Critical Mass* test, ultimately concluding that it "properly balances the need to protect confidential information *voluntarily* provided to the government with the public interest in disclosure." *Id.* at 81 (emphasis added). Thus, the Court held that "commercial information is 'confidential'—and therefore exempt from MPIA disclosure—if it 'would customarily not be released to the public by the person from whom it was obtained.'" *Id.* (quoting *Critical Mass*, 975 F.2d at 879). Though *Amster* discussed the *National Parks* test in some depth, the Court did not expressly adopt that test given that the case before it did not involve required commercial or financial information. *See id.* at 78-79.

Maryland's Attorney General has provided two opinions concerning what is now § 4-335, both of which issued before the *Amster* decision. One of them, issued not long after *National Parks*, involved a request for information similar to that at issue here—i.e., "a demand from a bidder for the responses of other bidders to a Request for Proposals." 63 Md. Op. Att'y Gen. 355, 355 (1978). Among other things, the Attorney General was asked whether the agency should "decline to disclose pricing information." *Id.* The Attorney General ultimately concluded that "commercial or financial data [should] be regarded as 'confidential' only if it is customarily so regarded in the business and only if the withholding of the data would serve a recognized governmental or private interest significantly compelling to override the general policy in favor of disclosure." *Id.* at 364. Similarly, another opinion applied the *National Parks* test to conclude that architectural drawings that must be submitted in order to obtain a building permit might be protected by what is now § 4-335 if the drawings embodied "a technique or a building component that (1) is not a common or obvious element of the type of construction in question and (ii) if disclosed, would give the competitors of the architect or engineer a concrete advantage in obtaining future work on that or a similar project." 69 Md. Op. Att'y Gen. 231, 234-35 (1984). In reaching this conclusion, the Attorney General noted that "the confidential status of information within a trade or company is relevant to, but not determinative of, the information's status under the MPIA."[2] *Id.* at 236 n.3.

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[2] In 2019, the U.S. Supreme Court decided a case that significantly changed the § 552(b)(4) landscape. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019); *see also* Stephen Gidiere, *Forget What You Thought You Knew About FOIA Exemption 4*, 51 No. 2 ABA Trends 7 (2019). *Food Marketing* abrogated *National Parks*, concluding that its focus on "competitive harm" was "a relic from a bygone era of statutory construction." 139 S. Ct. at 2364 (quotation and citation omitted). On the facts before it—which involved "store-level SNAP [redemption] data" that retail stores must provide to the U.S. Department of Agriculture, *id.* at 2361—the Supreme Court held that "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4," *id.* at 2366. Notably, while the first part of this test must be satisfied, the Court declined to definitively resolve whether commercial or financial information might "*lose* its confidential character for purposes of Exemption 4 if it's communicated to the government without

The disputed information here is unit price information provided by two vendors in their respective bids for a contract to provide the County with lighting for ball fields, sports courts, and parking lots.[3] Section 4-335's requirements that the information be "commercial" or "financial" and that it be "provided by or obtained from any person or governmental unit" are clearly met. There can be no serious dispute that unit price information provided by a commercial entity seeking to engage in business with the State is both commercial and financial in nature. And, although the PIA does not define the term "person," the definition of the term found in the "Definitions" subtitle of the General Provisions Article includes a "corporation, partnership . . . limited liability company, firm, association, or other nongovernmental entity." § 1-114. The question then, is whether the unit pricing information is "confidential" for purposes of § 4-335. Both parties seem to suggest that the information has been voluntarily provided, so we will assume without deciding that the vendors voluntarily supplied the unit pricing information to the OCS."[4] Thus, if the unit pricing information is the kind of information that "would customarily not

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assurances that the government will keep it private." *Id.* at 2363 (emphasis original). Since the Supreme Court's decision in *Food Marketing*, much of the FOIA litigation concerning § 552(b)(4) has focused on the significance of governmental assurances of privacy—or the lack thereof. *See* Dep't Just. Guide to the Freedom of Information Act, Exemption 4 15-18 (Dec. 16, 2021), https://www.justice.gov/media/1181316/dl?inline.

[3] Upon review of the redacted contracts, which both the complainant and the OCS provided, we note that one vendor—Eastern Sales & Engineering—appears to have redacted other information as well, including references and liability insurance coverage amounts. However, because the complainant focuses her challenge on the unit price information, we do not address these redactions.

[4] As discussed above, in Maryland the nature of the information—i.e., whether required or voluntarily supplied—still seems to matter as to which test for confidentiality (*Amster* or *National Parks*) is applied. Because both parties appear to be operating under the assumption that the information is voluntary here, we do not disturb that assumption. However, we note that parties' assumption may be incorrect. *See McDonnell Douglas Corp. v. NASA*, 895 F.Supp. 316, 318 (D.D.C. 1995) (concluding that "as a matter of law the price elements necessary to win a government contract are not voluntary"); *see also* Dep't of Justice Guide to the Freedom of Information Act, Exemption 4 263, 286 & n.154 (2009), https://www.justice.gov/archive/oip/foia_guide09/exemption4.pdf (noting, in a prior edition of the DOJ's FOIA guide, that "the District Court for the District of Columbia has issued a total of eight decisions that all hold—consistent with the [DOJ's] policy guidance on this issue—that prices submitted in response to a solicitation for a government contract are 'required' submissions"). The invitation for bids in this matter indicates that a specific bid response form that lists unit and extended pricing information for various items is a "mandatory" document. *See* Anne Arundel County, Bid Opportunities, Solicitation # IFB22000215, https://www.aacounty.org/central-services/purchasing/doing-business-county/bid-opportunities (last visited Oct. 4, 2023) (check "awarded" and "electrical equipment and supplies (except cable and wire)" as filters, then select "IFB22000215," and click on link number 6 under "Solicitation Attachments, Mandatory Documents").

be released to the public" by these vendors, *Amster*, 453 Md. at 81, § 4-335 precludes its release.

To argue that the unit pricing information is confidential, the OCS relies foremost on a circuit court judge's decision to sustain redaction of unit pricing information (ostensibly in a lighting-related contract, given that Lighting Maintenance, Inc. brought the suit) in the records of a different contractor. In addition, the OCS provides the emails sent to the vendors, which indicate that the vendors were advised that "certain pricing data and information regarding a vendor's equipment or processes" is information that a vendor "would customarily not release . . . to the public." In those emails, the custodian also indicated that she wished to provide the vendors with "time to determine what [they] believe is proprietary information in [their] bid response[s]," and asked them to "mark up any information that [they felt] should be redacted." Upon receipt of the redacted bids, the custodian provided them to the complainant, apparently without change.

The complainant, for her part, challenges the contention that unit price information is customarily kept confidential. She argues that the vendors have no reason not to release the information because the unit prices do not reveal anything other than what the government would pay for certain line items should the contract be awarded to that bidder/vendor. The complainant also argues—although without providing supporting evidence—that "Anne Arundel County is the only entity that consistently . . . rejects disclosure of unit pricing information," thus implicitly contending that it is not customary to withhold this sort of information.

We recognize that federal courts have routinely concluded that § 552(b)(4) precluded disclosure of unit pricing information that private entities provided to the government in the course of doing business. *See, e.g.*, *Canadian Com. Corp. v. Dep't of the Air Force*, 514 F.3d 37, 43 (D.C. Cir. 2008) (holding that line-item pricing information was "subject to Exemption 4 of the FOIA" and that the Air Force's "explanation for why disclosure of the information at issue would not cause substantial competitive harm to CCC lack[ed] empirical support and [was] unconvincing"); *Hodes v. U.S. Dep't of Treasury*, 342 F.Supp.3d 166, 176 (D.D.C. 2018) (finding that commission percentages in IRS debt collection contracts were akin to line-item or unit prices and that they were properly withheld under § 552(b)(4)); *Essex Electro Eng'rs, Inc. v. U.S. Sec'y of the Army*, 686 F.Supp.2d 91, 92, 94 (D.D.C. 2010) (concluding that unit prices contained in a bid for a contract related to "electrical feeder and distribution systems" were confidential and exempt under § 552(b)(4), and explaining that "evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply").

In addition, in his opinion concerning disclosure of bid records, the Maryland Attorney General acknowledged that "in a highly competitive business it might be customary for a firm to carefully protect . . . its pricing data," and that disclosure might "harm [that firm's] competitive position." 63 Md. Op. Att'y Gen. at 365. But, at the same

time, courts have been clear that unit pricing information is not "per se protected from disclosure." *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004); *see, e.g.*, *Boeing Co. v. U.S. Dep't of the Air Force*, 616 F.Supp.2d 40, 49 (D.D.C. 2009) (holding that the Air Force did not act arbitrarily and capriciously when it determined that certain pricing information in a contract, including line-item pricing, could be disclosed because disclosure would not cause substantial competitive harm). Thus, though we are mindful that a business's unit pricing information may be sensitive information subject to withholding for the reasons described above, we do not think that the OCS has met its burden here to show that the unit pricing information in *these contract bids* should be withheld under § 4-335. Rather, the OCS simply argues that release of the unit prices "would be inconsistent with the decision of a Circuit Court Judge"—*in a different case*—"who had the benefit of reviewing countless pleadings by both parties and considered live testimony and legal arguments before issuing her ruling in favor of the County."[5]

Further, the email exchanges between the vendors and OCS do not sufficiently demonstrate that the unit pricing information in *these contract bids* is information that would "customarily not be released to the public," *Amster*, 453 Md. at 81, by *these vendors*. While the fact that the vendors "marked up" their respective bids by redacting the unit price information is evidence that they do not want that information to be released for purposes of this PIA request, it is not necessarily evidence of their custom or the custom of their business in general. Looking closely at the emails sent to the vendors, it seems to us that the vendors were essentially instructed that "certain pricing data" is in fact information that "[a] vendor would customarily not release . . . to the public." Thus, it is not necessarily surprising that the information was redacted. To find the redactions appropriate here would be tantamount to "allow[ing] a person submitting information or that person and a custodian to definitively characterize information as 'confidential,'" a scenario that our Attorney General has explained would "allow the liberal disclosure policy of the [PIA] to be defeated merely by an assertion of one party or the agreement of both." 63 Md. Op. Att'y Gen. at 359.

The cases that have found that commercial or financial information is "confidential" because its owner customarily and actually treats the information as private generally involve concrete and specific evidence of that owner's custom and practice. For instance, the trial court in *Food Marketing* heard testimony from witnesses that "retailers closely

[5] The OCS provides a link to the audio of the circuit court's ruling with its response to the complaint. Though we consider the court's reasoning and ruling, we stress again that a court "may not impose a *per se* rule that in all cases prohibits or requires the release of one particular type of [commercial or financial] information." *Boeing*, 616 F.Supp.2d at 45. If the Legislature intended that *all* unit price information be withheld, it would have created an exemption for that specific type of information. "[I]n the absence of a *per se* rule, the set of facts in each case must be evaluated independently." *Id.*

guard store-level SNAP data and that disclosure would threaten stores' competitive positions." 139 S. Ct. at 2361; *cf. also, e.g.*, *Seife v. Food & Drug Admin.*, 492 F.Supp.3d 269, 276 (S.D.N.Y. 2020), *aff'd* 43 F.4th 231 (2d Cir. 2022) (detailing evidence that the disputed information was "subject to strict confidentiality protocols both within and outside" of the company that owned it, including limiting access to "members of specific departments and third-party providers who are bound by nondisclosure agreements"). In another case, a trial court had evidence of the protective measures the company employed to keep certain commercial and financial information—e.g., "purchase orders, individual subcontracting reports, and dollar spend reports for all supplier categories"—confidential. *Am. Small Bus. League v. U.S. Dep't of Defense*, 411 F.Supp.3d 824, 831 (N.D. Cal. 2019). Those measures included "(1) requiring employees and business partners to enter into confidentiality agreements; (2) using restrictive markings on documents and communications; (3) using secure, password-protected IT networks for the information at issue; and/or (4) limiting access to the information at issue on a 'need to know' basis." *Id.*

Conversely, in *Amster*, the Supreme Court of Maryland found that an affidavit from the owner-company's employee stating that the disputed commercial lease "was the product of extensive confidential negotiations" between the company and Whole Foods, and that the company "does not customarily publicly disclose its commercial leases" was "merely 'conclusory testimony' that [did] not carry the County's burden to justify nondisclosure." 453 Md. at 85. The arguments are similarly conclusory here. All we have regarding the OCS's decision to withhold unit price information in response to *this* PIA request are the redactions applied by two particular vendors to their contract bids after those vendors were told that "certain pricing data" is information that that a vendor would not customarily release to the public. The OCS essentially asks us to infer custom from the vendors' decision—when given free reign to "mark up *any* information that [the vendors felt] should be redacted"—to redact the unit prices from their contract bids. That is simply not enough to meet the OCS's burden to justify the application of § 4-335.

Conclusion

Based on the foregoing, we conclude that the OCS has not justified the application of § 4-335 to redact unit price information in the responsive bid records. Thus, we direct the OCS to provide the responsive records without the unit price information redacted.

Public Information Act Compliance Board

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