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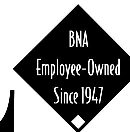

REPORT

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RECENT FOIA DEVELOPMENTS: THE IMPACT ON GOVERNMENT CONTRACTORS

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Two recent developments concerning the Freedom of Information Act ("FOIA")[1] should be of interest to companies who conduct business with the federal government. On December 31, 2007, President Bush signed into law the Open Government Act ("Act").[2] The Act reflects Congress' intent to "promote accessibility, accountability, and openness in Government" by making several changes to FOIA. The Act addresses the process by which federal agencies respond to FOIA requests, calls for additional processes to enable requestors to track requests and challenge denials, and expands the scope of records available under FOIA – specifically addressing certain records maintained under government contracts.

While Congress emphasized openness in the Act, it did not change any of FOIA's nine exemptions to disclosure of records. For instance, Exemption 4 continues to protect "trade secrets and commercial or financial information obtained from a person and privileged and confidential." With regard to that Exemption, the second recent development concerns a significant FOIA decision by the U.S. Court of Appeals for the District of Columbia Circuit. On January 29, 2008, in *Canadian Commercial Corp. v. Dep't of the Air Force*, the D.C. Circuit forcefully reaffirmed that line-item pricing data in government contracts may be protected by Exemption 4.[3]

This article discusses the likely impact of the Act's provisions on companies who conduct business with the government, and summarizes the D.C. Circuit's decision in *Canadian Commercial*.

I. The Open Government Act of 2007

A. Facilitating the Presumption of Disclosure

The Act sets forth several specific measures addressing agencies' administration of FOIA, including procedures that are designed to expedite and facilitate the disclosure of documents under FOIA.[4] Agencies have

[1] 5 U.S.C. § 552.

[2] Pub. Law 110-175.

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[3] *Canadian Commercial Corp. v. Air Force*, __ F.3d __, 2008 WL 220638 (D.C. Cir. Jan. 28, 2008) (89 FCR 131, 2/5/08).

[4] Before setting out the Act's substantive changes, Congress emphasized that openness in government and disclosure underlie FOIA. Pub. Law 110-175 § 2. The "Findings" section states that FOIA establishes a strong presumption in favor of disclosure that applies to all agencies governed by FOIA. In addition, that section notes that "disclosure, not secrecy, is the dominant objective of the [FOIA,]" followed by the finding that "in practice," FOIA has not always lived up to its ideals. These observations arguably tread no new ground. It always has been the policy of FOIA to establish a strong presumption favoring disclosure, but the practical realities of the administration of FOIA traditionally have diverged – more or less – from FOIA's underlying principles. Nevertheless, as discussed below, the Act builds upon these principles in a manner that could subtly

20 business days — subject to an exception for "unusual circumstances" or to a tolling period allowing them to obtain information necessary for processing the request — to respond to a request under FOIA.[5] However, other than the risk of potential legal action for unreasonable delay (the pursuit of which would require a frustrated requestor to assume the expense of a lawsuit), agencies faced no real consequences for failing to comply with this deadline, and, indeed, the prevailing sense among FOIA practitioners has been that the courts are tolerant of lengthy delays in responding to FOIA requests. Now, under Section 6 of the Act, an agency that does not comply with the 20-day time limit is precluded from assessing the search fees to which it otherwise would be entitled.[6] The Act also requires agencies to (1) assign an individualized tracking number for each FOIA request that will take longer than 10 days to process, (2) provide that number to the requester, and (3) establish a telephone line or Internet service that provides information to the requester about the status of the request.[7]

In addition, the Act creates the Office of Government Information Services ("OGIS") within the National Archives and Records Administration. The OGIS is tasked with general oversight of the government's implementation of FOIA and is to provide mediation as a non-exclusive alternative to litigation regarding agencies' denials of, or failures to timely respond to, FOIA requests.[8] This mediation aims to "alleviate the need for litigation whenever possible."[9]

The Act further tilts the table in favor of requesters with provisions defining certain FOIA terms. Significantly for government contractors, the Act expands the definition of "record[s]" that are available to requesters to include information that is "maintained for an agency by an entity under Government contracts, for the purposes of records management."[10]

The Act also addresses the 2001 Supreme Court decision in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, which held that plaintiffs are not entitled to an award of attorneys' fees authorized by statute if the defendant voluntarily changed its conduct.[11] Applying *Buckhannon* to FOIA requests, a requester would not be entitled to attorneys' fees if the agency unilaterally disclosed sought-after records in the absence of a court order or consent decree, even if the agency would not have disclosed the records in the absence of the lawsuit.[12] However, under the Act, *Buckhannon* no longer applies to challenges to an agency's actions regarding FOIA; a FOIA complainant now may recover attorneys' fees even if the government voluntarily changes its position. To recover attorneys' fees under this provision, however, the complainant's claim must not be "insubstantial."[13]

Additionally, the Act addresses the discipline of agency employees for the arbitrary and capricious denial of a FOIA request. Prior to the Act, 5 U.S.C. § 552(a)(4)(F) provided that, if a court found that there were questions as to whether agency personnel acted arbitrarily or capriciously when improperly withholding records, the U.S. Office of Special Counsel was required to investigate whether disciplinary action was warranted and submit recommendations to the agency administrative authority. Now, in addition to this requirement, the Act obligates the Attorney General to notify the Special Counsel of each such court decision and submit an annual report to Congress on the number of all such cases.[14]

Each agency also must designate a Chief FOIA Officer, who bears the ultimate responsibility for monitoring the implementation of the law agency-wide, responding to requests for FOIA reports by the Attorney General, and facilitating public understanding of the statutory exemptions to FOIA.[15]

Finally, the Act greatly increases agency reporting requirements. In addition to the reporting requirements discussed above, agency annual reports to the Attorney General now must include, among other information, the number of times the agency relied upon a particular exemption when denying a request or redacting information and the amount of time it took to respond to FOIA requests.[16]

affect the way agencies address FOIA requests that present close cases.

[5] 5 U.S.C. §§ 552(a)(6)(A)(i), (a)(6)(B)(i).

[6] Pub. Law 110-175 § 6(b); 5 U.S.C. §§ 552(a)(4)(A)(viii). The Act specifies that the 20-day period starts on "the date on which the request is received by the appropriate component of the agency," but in any event no later than 10 days after the request is first received by any part of the agency. 5 U.S.C. § 552(a)(6)(A)(i). The agency may toll the 20-day period only once while it is waiting for additional information it has "reasonably" sought from the requester. 5 U.S.C. § 6(a)(6)(A)(iii).

[7] Pub. Law 110-175 § 7; 5 U.S.C. § 552(a)(7).

[8] Pub. Law 110-175 § 10(a); 5 U.S.C. §§ 552(h)(1)-(3).

[9] S. Rep. No. 110-59 at 7 (2007) (*Report on the Open Government Act by the Committee on the Judiciary*). Under the Act, resort to mediation by the FOIA requester is permissive, not mandatory, and mediation is not an administrative remedy that the requester must exhaust before pursuing judicial remedies.

[10] Pub. Law 110-175 § 9; 5 U.S.C. § 552(f)(2)(b). In addition, the Act defines for the first time "a representative of news media," from whom agencies may only collect "reasonable standard charges for document duplication," taking an expansive view of that term. Pub. Law 110-175 § 3; 5 U.S.C. §§ 552(a)(4)(A)(ii)(II)-(III).

[11] *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598 (2001).

[12] *See Davy v. C.I.A.*, 456 F.3d 162, 164-66 (D.C. Cir. 2006) (summarizing the effect of *Buckhannon* in FOIA cases and holding that plaintiff was eligible for attorneys' fees on the basis of an order entered on a joint stipulation requiring the production of any responsive documents by specified dates).

[13] Pub. Law 110-175 § 4; 5 U.S.C. 552(a)(4)(E)(ii)(II).

[14] Pub. Law 110-175 § 5.

[15] Pub. Law 110-175 § 10; 5 U.S.C. § 552(j)-(k).

[16] Those annual reports also must include the average number of days it took the agency to respond, as well as the number of requests to which the agency has responded with a determination, in 20-day increments up to 200 days, the number of requests to which responses took more than 200 days but less than 301 days, 300 days to less than 401 days, and greater than 400 days. Pub. Law 110-175 § 11; 5 U.S.C. 552(e)(1). The Act further requires agency annual reports to state the average and median number of days for agency responses to administrative appeals, the number of expedited reviews granted and declined by the agency, and data on the 10 active requests and administrative appeals with the earliest filing dates. *Id.* Further, within a year of the enactment of the Act, the Office of Personnel Management must report to Congress certain information, including whether changes to personnel policies could be made to enhance the stature of officials administering FOIA. Pub. Law 110-175 § 11.

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B. The Impact on Government Contractors

The Act's findings, specific requirements, and even the title clearly demonstrate Congress' intent to underscore the presumption in favor of disclosure and increase access to agency records under FOIA. Companies who do business with federal agencies often submit to these agencies information that the companies consider to be proprietary and/or confidential, such as technical proposals, business strategies, detailed cost data, and other types of competitively-sensitive data. And, because such information can contain data that might be useful in both public and private competitions, records disclosed pursuant to a FOIA request could yield data that is valuable to companies seeking insight into their competition. The Act's changes could increase the possibility that agencies will release information provided by private entities that would have been withheld under Exemption 4 prior to the Act.[17]

Nevertheless, the intent of the Act was *not* to change the FOIA exemptions, and it therefore would be inappropriate for agencies to interpret the Act's procedural changes as implicit amendments of FOIA's substantive exemptions. As DOJ pointed out shortly after passage of the Act, "For the first time in well over a decade, Congress has enacted amendments to [FOIA]. No changes to the Act's nine exemptions were made. Rather, the amendments address a range of procedural issues impacting FOIA administration. . . ." DOJ also stated that, in conjunction with the Office of Management and Budget, it will be issuing additional guidance to agencies on certain aspects of the Act and other issues that arise under the new provisions.[18]

While Congress left FOIA's exemptions untouched, the Act expands the scope of "agency records" in a manner that specifically references government contracting. Prior to the Act, the Supreme Court in *Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989), defined "agency records" under FOIA as documents that have been created or obtained by an agency and are under the agency's control at the time of the request.[19] Now, Section 9 of the Act states that the term "record" includes "any information . . . that is maintained for an agency by an entity under Government contract, for the purposes of records management."[20]

DOJ submitted a letter to the Senate Committee on the Judiciary addressing an earlier version of the Act in which this provision indicated that agency records include information "that is maintained for an agency by an entity under a contract between the agency and the entity." The letter stated that DOJ did not object to the proposed language "if its intention is solely to clarify that agency-generated records held by a Government contractor for records-management purposes are subject to FOIA." However, the letter said that DOJ would have "serious concerns" if the intent was to overrule the *Tax Analysts* and *Forsham* decisions, and asked that the provision be clarified.

Congress subsequently added "for the purposes of records management" to Section 9 of the Act, which supports a narrow interpretation of this provision. However, Congress did not define the terms "maintained for an agency," "government contract," or "for purposes of records management." Thus, for example, it is unclear whether "government contract" is limited to procurement contracts subject to the Federal Acquisition Regulation ("FAR"), or also includes cooperative agreements and grants. Given the undefined terms in this provision, FOIA requesters may push for an expansive interpretation, notwithstanding established case law addressing records held by third parties.

Mediation provided by the OGIS under the Act also could affect the ability of government contractors to protect information from release to competitors. Because the OGIS is a newly-created entity, the manner in which it will conduct such mediations is uncertain.[21] In particular, there is no indication that a third party contractor seeking to protect its information will be permitted to participate, directly or indirectly, in an OGIS mediation. Accordingly, there is a possibility that the sub-

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[17] Thus, for example, agency employees may take their cue from Congress' express emphasis on openness, as reflected in provisions providing a consequence for failing to meet the 20-day deadline and requiring that the Attorney General notify the Special Counsel of court decisions concerning an improper withholding of records. In addition, Congress' purpose in enacting the "*Buckhannon* Fix" was to prevent obstreperous agencies from forcing requestors to assume the costs of litigating a denial of their request, only to have the agency capitulate just prior to an occurrence that would have entitled the plaintiff to recover attorney's fees. After the passage of the Act, agencies seeking to avoid litigation and the possibility of having to pay attorneys' fees after a court case has been filed may be more likely to release information prior to litigation that they otherwise would have withheld as protected under FOIA's exemptions. Note, however, that if an agency denies a request and the requester files suit, there may be an incentive for agencies to litigate cases to judgment rather than voluntarily disclose information.

[18] United States Department of Justice Office of Information Privacy FOIA Post, *Congress Passes Amendments to the FOIA* (Jan. 9, 2008), *available at*: http://www.usdoj.gov/oip/foiapost/2008foiapost9.htm. Congress did not change any exemptions, but an earlier version of the Act would have penalized an agency for failing to meet the 20-day limit by precluding the agency from asserting any exemption except in limited circumstances – if disclosure would harm national security; reveal personal, private, or "proprietary" information; or otherwise be precluded by law. S. 849, 110th Congress, § 6(b) (2007) (proposing to amend 5. U.S.C. § 552(a(6)(G)(i)). The legislative history of the Act also indicates that Congress considered overturning a post-9/11 memorandum by then-Attorney General John Ashcroft that limited discretionary disclosure of information under FOIA, cautioning agencies that "[a]ny discretionary decision . . . to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure." H.R. Rep. No. 110-45 at 5 (2007) (*Freedom of Information Act Amendments of 2007*); memorandum from John Ashcroft, Attorney General, to the Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at*: http://www.usdoj.gov/oip/011012.htm. However, Congress decided against this step, leaving the Ashcroft Memo intact.

[19] In an earlier case, the Court held that government participation in, or funding of, the generation of information does not render it an agency record for the purposes of FOIA. *Forsham v. Harris*, 445 U.S. 169 (1980).

[20] Pub. Law 110-175 § 9.

[21] As of January 25, 2008, the OGIS has not received any funding. Furthermore, according to an aide of Senator Leahy, OMB plans to provide funding for the OGIS to DOJ, in contravention of the intent of the Act. "White House Plan to Put New FOIA Office in Justice Department Draws Lawmakers' Ire," Federal Contracts Report, Jan. 29, 2008, page 93. *Senators Say White House Plans to Eliminate Special FOIA Office*, Today's Acquisition News, Jan. 25, 2008.

mitting contractor will have to rely on the agency to defend the contractor's sensitive records.

This would be a departure from current practice, in which submitters of information frequently participate, both at the agency level and in court litigation, to protect their confidential business information. It also would be contrary to the spirit (and, perhaps, the letter) of Executive Order 12600, which requires agencies to establish procedures for notifying submitters of records that are arguably protected by Exemption 4 when those records are requested under FOIA, and to afford submitters a reasonable period in which to object to disclosure of any portion of the information.[22] Thus, OGIS should consider permitting submitters of confidential business information to participate in mediations; at a minimum, agencies should confer with submitters as part of OGIS mediations that involve Exemption 4.

II. Canadian Commercial Corp. v. Dep't of the Air Force

Less than one month after the President signed into law several measures to facilitate access to non-exempt records under FOIA, the D.C. Circuit in *Canadian Commercial Corp.* rejected several U.S. Air Force arguments designed to expose contractor pricing data to competitors and affirmed the district court's protection of the pricing data in dispute under Exemption 4.[23] The case arose out of a FOIA request for a contract between Canadian Commercial Corp. (''CCC'') and the Air Force for provision of jet engine repair and maintenance services; Sabreliner, an unsuccessful offeror for the contract, submitted the request.[24] The contract contained line-item prices for three base and four option years, as well as fixed hourly labor rates for ''over and above'' work. CCC filed a ''reverse-FOIA'' action seeking to enjoin the release of this pricing data.[25] In a detailed opinion, the district court held that the Air Force's decision to release the line-item prices was ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'' but agreed with the Air Force that the ''over and above'' rates could be released.[26]

The district court relied substantially on a recent D.C. Circuit decision, *McDonnell Douglas Corp. v. Air Force*, 375 F.3d 1182 (D.C. Cir. 2004). That case held, in part, that the Air Force's decision to release option year prices was contrary to law because release would likely cause McDonnell Douglas substantial competitive harm. The district court also relied on *McDonnell Douglas v. NASA*, 180 F.3d 303 (D.C. Cir. 1999).[27] In that case, the D.C. Circuit held that line-item prices in a government contract were entitled to protection under Exemption 4. In reaching that decision, the Court held that NASA's claim that it had a long and consistent practice of releasing line-item prices was of ''no consequence,'' adding that ''[i]f commercial or financial information is likely to cause substantial competitive harm to the person who supplied it, that is the end of the matter, for the disclosure would violate the Trade Secrets Act.''[28] The Trade Secrets Act, 18 U.S.C. § 1905, provides criminal penalties for government employees who disclose certain types of confidential information.

The Air Force, but not CCC, appealed the District Court's decision in *Canadian Commercial Corp.*, and thus the D.C. Circuit's decision did not deal with the ''over and above'' labor rates but instead focused on the line-item pricing at issue. The D.C. Circuit's analysis reiterated the well-established two-pronged test under *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1970), that commercial or financial information obtained from a person involuntarily is confidential if disclosure either would (1) ''impair the government's ability to obtain necessary information in the future'' or (2) ''cause substantial harm to the competitive position of the'' submitter.[29]

The Air Force argued that the D.C. Circuit had never decided whether line-item pricing data is subject to Exemption 4, and sought a ruling that such information is categorically excluded from the protection of that Exemption.[30] The Court rejected this argument, stating

[22] Executive Order 12600 (June 23, 1987).

[23] *Canadian Commercial Corp.*, 2008 WL 220638.

[24] Under Defense Acquisition Regulation Supplement 225.870, CCC awards and administers certain contracts with contractors located in Canada. In *Canadian Commercial*, CCC contracted its duties to Orenda Aerospace Corp., which also was a plaintiff in the suit. *Canadian Commercial Corp. v. Air Force*, 442 F. Supp.2d 15, 17 (D.D.C. 2006).

[25] In a ''reverse-FOIA'' suit, a submitter of information seeks to enjoin an agency from releasing the information. Reverse-FOIA actions are brought under the Administrative Procedure Act, 5 U.S.C. § 706 (''APA''), rather than the FOIA, but the relevant FOIA Exemption(s) – here, Exemption 4 – provides the substantive rule of decision in the case. As APA cases, however, reverse-FOIA actions are subject to the ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law'' standard, rather than FOIA's *de novo* standard of review.

[26] *Canadian Commercial Corp.*, 442 F. Supp.2d at 38. With respect to the fixed hourly labor rates for ''over and above'' work, CCC and Orenda argued that competitors (through their union memberships) could learn the negotiated union wage rate, and the combination of those negotiated pay rates and the ''over and above'' rates would enable competitors to derive plaintiffs' overhead rate. In particular, the plaintiffs argued that if competitors had both labor rates and line-item pricing data, and given that the cost of material is relatively similar for all companies, they could deduce Orenda's overhead rates. The court disagreed, noting that while this multiple-step occurrence may be possible, plaintiffs offered no evidence that it was likely. Also, the argument depended on release of the line-item pricing information, which the court refused to authorize. *Id.*, n. 10.

[27] *Canadian Commercial Corp.*, 442 F. Supp.2d at 36-39.

[28] *McDonnell Douglas v. NASA*, 180 F.3d at 306. The Court also rejected NASA's argument that the data in dispute would not cause McDonnell Douglas to be underbid because price is only one of many factors the government uses in awarding contracts, commenting that the argument was ''too silly to do other than state it, and pass on.'' *Id*.

[29] *Canadian Commercial Corp.*, 2008 WL 220638 at *1. In a case decided after *National Parks*, the D.C. Circuit set forth a less demanding test for commercial or financial information provided voluntarily to an agency, holding that such information is confidential ''if it is of a kind that would customarily not be released to the public by the'' submitter. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n.*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*); *see also*, *e.g.*, *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 147-50 (D.C. Cir. 2001) (explaining and refining voluntary-submissions test).

[30] In a brief filed with the court, the Air Force stated that the administrative process had been thorough, and that the Air Force had carefully analyzed CCC's arguments, but then referred to the ''indisputably historically public nature of this information.'' Brief for Appellant at *13, *Canadian Commercial*

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that "it is the law of this circuit that line-item prices do come within Exemption 4," as set forth in both *McDonnell Douglas v. Air Force* and *McDonnell Douglas v. NASA*.[31] The Court therefore "reaffirm[ed]" that "[c]onstituent or line-item pricing information in a Government contract falls within Exemption 4 of the FOIA if its disclosure would bring it within the two-pronged *National Parks* test."[32]

The court next turned to the Air Force's argument that Congress must not have intended line-item prices to fall within the protection of Exemption 4 because FOIA was meant to broaden access to information and the Air Force regularly disclosed such prices prior to enactment of FOIA. The court also rejected this argument, observing that while FOIA's "general purpose was to make it easier for the public 'to be informed about what [its] government is up to,' " it does not follow that a specific FOIA exemption "may not be understood to have diminished access to a particular type of information if that is what its terms require." Also, the D.C. Circuit agreed with the district court that there was no evidence that the Air Force had disclosed the type of information at issue on a consistent basis. The Air Force argued that this conclusion improperly shifted the burden of persuasion to it, but the D.C. Circuit disagreed – while the burden of persuasion remained with the plaintiff, the district court properly imposed the specific burden of production on the Air Force as the party that possessed evidence of its own practices.[33]

The Air Force also contended that, even under the two *McDonnell Douglas* decisions, release of the pricing data would not enable competitors to undercut CCC's prices in bidding for option-year work because the Air Force was likely to exercise the options.[34] The court found this argument "unconvincing," noting that "the Air Force valued (and presumably paid for) the ability to switch to another vendor after three or more years." In addition, the Air Force did not document its claim that, based on past practice, it likely would continue to exercise options regularly, nor did the Air Force quantify the transaction costs associated with switching to another contractor.[35]

Finally, the Air Force argued that certain FAR provisions, including FAR 15.503(b)(1)(iv) (requiring notification to unsuccessful offerors of unit prices in a contract award) and 15.506(d)(2) (requiring unit prices in a contract award to be disclosed in post-award debriefings), authorized it to release line-item pricing data. The court disagreed, ruling that FAR 15.506(e)(1) prevents the disclosure in debriefings of any information that is exempt from release under FOIA.[36] The Air Force contended that this limitation "logically applies only to information other than the information specifically delineated as required to be disclosed." The court was not persuaded: "This statement is just illogical; the very purpose of § 15.506(e)(1) is to protect from disclosure information that the FAR would otherwise require the Air Force to disclose."[37]

In a concurring opinion, Judge Tatel noted that the Air Force had simply renewed arguments that the D.C. Circuit had previously rejected and had offered inadequate support that transaction costs will almost certainly preclude switching to another contractor. He nonetheless expressed agreement with the dissenting opinion in *McDonnell Douglas v. Air Force*, which asked whether it makes sense to regard prices paid by the government as trade secrets or confidential information obtained from a person under Exemption 4. Judge Tatel noted that it seems "quite unlikely that Congress intended to prevent the public from learning how much the government pays for goods and services." He also observed that the Air Force would prefer to disclose line-item prices "because in a competitive bidding environment such information may well save money for the government and the taxpayers who fund it."[38]

The *Canadian Commercial* decision is the third time in the last nine years that the D.C. Circuit has held that line-item prices deserve protection under Exemption 4. In reaching these decisions, the court has rejected numerous agency arguments for the disclosure of such information. As such, contractors should be able to operate with a reasonable expectation that these arguments – including the argument for a categorical rule that line-item prices must be disclosed under FOIA – have finally been put to rest, and that agencies will carefully con-

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Corp. v. Air Force, 2008 WL 220638. It is unclear why a careful analysis was necessary if the information was "indisputably historically public."

[31] As support, the court cited strong language from *McDonnell Douglas v. Air Force*: "We recoil . . . from the implication . . . of a per se rule (or at least a strong presumption) that all constituent pricing information – as opposed to the bid price itself – is to be disclosed; such a rule would be squarely at odds with the protection we have always understood Exemption 4 to provide for such pricing information." *Canadian Commercial Corp.*, 2008 WL at *4 (citing 375 F.3d at 1192).

[32] *Id.* at *2.

[33] *Id.*. The D.C. Circuit also rejected the Air Force's argument that two decisions endorsed a per se rule of disclosing pricing data, noting that the decisions predated *McDonnell Douglas v. NASA* and *McDonnell Douglas v. Air Force*. *Id.* at *6. Furthermore, the court distinguished other cases cited by the Air Force, and concluded that "[b]eyond a general paean to the benefits of public disclosure, . . . the Air Force has given us nary a reason to believe pricing information that, if disclosed, would work a substantial competitive harm, should nonetheless be categorically excluded from Exemption 4." *Id.*. In addition, the Air Force argued that pricing information is not "obtained from" contractors because that information results from contract negotiations. The court did not consider that argument because it was not part of the administrative record. *See id.* at *6, n_.

[34] The Air Force claimed that changing contractors "would be so disruptive to its operations that it is almost certain to exercise the options even if CCC's competitors submit lower bids for the option years." *Id.* at *4.

[35] *Id.* at 4-5. The Court noted that, under FAR 17.207(c)(3), agencies cannot exercise options unless they have determined that doing so is "the most advantageous method of fulfilling the Government's need," taking price into account. The Air Force did not mention this limitation, and thus did not claim that the transaction costs would be high enough to make it likely to exercise the option. *Id.*

[36] While not mentioned by the court, FAR 15.503(b)(1)(v) qualifies the notification to unsuccessful offerors by stating: "In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, and other confidential business information be disclosed to any other offeror."

[37] *Canadian Commercial Corp.*, 2008 WL at *5. Other cases have reached the same conclusion about the FAR notification and debriefing provisions. *See, e.g.*, *MCI Worldcom, Inc. v. Gen. Servs. Admin.*, 163 F. Supp.2d 28 (D.D.C. 2001).

[38] *Canadian Commercial Corp.*, 2008 WL 220638 at *6.

sider prices and other information claimed to be confidential under Exemption 4 on a case-by-case basis.[39]

Nonetheless, it is conceivable that agencies (and requesters) could attempt to justify disclosure of such information by referring to language in Judge Tatel's concurring opinion, which noted that it seemed unlikely that Congress intended keep the public from learning how much the government pays for goods and services. Submitters, however, could respond that that type of information *is* available to the public. As the court noted in *McDonnell Douglas v. Air Force*, the total contract price is routinely made public because that disclosure tells citizens ''what their government is up to.''[40] In contrast, the discrete pricing information at issue in that case revealed the inner workings of the *contractor* – not the *government* – and ''would seem to shed little if any light upon the agency's performance of its statutory duties.''[41]

Judge Tatel also noted that the Air Force would prefer to disclose line-item prices because such disclosures could save money for the government. If agencies (or requesters) adopt this position, contractors seeking to protect their pricing data can assert that ''saving the government money'' is another way of saying that competitors could use a contractor's confidential prices to undercut the contractor in government competitions – to the contractor's obvious and substantial detriment. This may be the real reason why agencies have continued to try to disclose contractor pricing data. In any event, even assuming this position could be considered fair, contractors can argue that it is not anchored in the statutory language of FOIA: the language of Exemption 4 does not carve out contractor pricing data as undeserving of protection. Further, contractors can point out that the competitive value of such data is evidenced by the fact that the FOIA requester in *Canadian Commercial* was an unsuccessful offeror for the contract at issue.

[39] Note, however, that the D.C. Circuit in *Canadian Commercial* did not consider the Air Force's argument that pricing information is not ''obtained from'' a contractor but instead emerges from negotiations. It is possible that in future cases agencies might raise this argument again in seeking to disclose pricing data.

[40] 375 F.3d at 1193 (quoting *Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S., 749, 773 (1989)).

[41] 375 F.3d at 1193 (internal citation omitted).

III. Conclusion

While the Open Government Act of 2007 might raise issues for government contractors in certain circumstances, the majority of provisions likely will not directly impact companies who conduct business with the government. The Act is directed at federal agencies. It attempts to make government records more readily available to members of the public, to provide consequences to agencies for any delay, and to increase accountability, but it is not intended to change the substantive FOIA Exemptions.

The Act's emphasis on disclosure and timely responses to requests nevertheless may lead agency employees to err on the side of disclosing records in close cases. In situations where agency employees are considering disclosing confidential contractor data, contractors should submit written arguments explaining why the data is protected under Exemption 4, and also consider noting that the Act did not alter Exemption 4 and that agency employees should continue to interpret those exemptions in accordance with relevant case law.[42]

Government contractors interested in protecting their pricing data have compelling interests in the continuing vitality of Exemption 4. The D.C. Circuit's decision in *Canadian Commercial*, building on *McDonnell Douglas v. NASA* and *McDonnell Douglas v. Air Force*, reaffirmed contractors' rights to insist that agencies protect confidential pricing data. These cases provide contractors with substantial ammunition not only to protect pricing data in government contracts but also to insist that agencies conduct careful, case-by-case analyses of contractor data sought in FOIA requests.

[42] As noted above, under Executive Order 12600 (June 23, 1987), agencies are required to establish procedures to notify submitters of records containing information that is arguably protected under Exemption 4 when those records are requested under FOIA, and to afford the submitter a reasonable period of time in which to object to the disclosure of any portion of the information.

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