



## Department of Energy

Office of Science  
Chicago Office  
9800 South Cass Avenue  
Argonne, Illinois 60439

AUG 11 2010

Mr. Seth Stern  
Funkhouser Vegosen Liebman & Dunn Ltd.  
55 W. Monroe St., #2300  
Chicago, IL 60603

Dear Mr. Stern:

**SUBJECT: U.S. DEPARTMENT OF ENERGY (DOE) OFFICE OF SCIENCE-CHICAGO OFFICE (SC-CH)  
FREEDOM OF INFORMATION ACT (FOIA) REQUEST NO. CH-F2010-01643-F**

I am the authorizing official responsible for making the determination required by Section 1004.5(b) of the Department of Energy (DOE) regulations found at 10 CFR Part 1004, implementing the FOIA, 5 U.S.C. 552. In your subject FOIA request you are seeking "a copy of a Contract granted in 2009 to the Bolingbrook, Illinois company EPIR Technologies, Inc. by the DOE under its Small Business Innovation and Research Program and Small Business Technology Transfer Program." You also state in your request that the "Contract or Grant" is titled "HgTe/CdTe Superlattice FTIR Detectors Optimized for the 300-to-1000 cm-1 Region."

We are enclosing copies of all responsive documents, with the following redactions:

- 1) Grantee principal investigator and other key personnel salary information (Exemption (b)(4) and (b)(6))
- 2) Rates and labor hours (Exemption (b)(4))
- 3) Direct and indirect costs (Exemption (b)(4))
- 4) Information reflecting grantee business ideas and proposed technical approaches and processes (Exemption (b)(4))
- 5) Company commercialization history, including sales, revenues, sources of revenues, and market research (Exemption (b)(3) and (b)(4))

### **Exemptions (b)(3) and (b)(4)**

Item 5 is being withheld under Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)). Exemption 3 provides that if another federal statute contains non-disclosure provisions that "require that the matters be withheld from the public in such a manner as to leave no discretion on the issue," they are exempt from disclosure under FOIA Exemption (b)(3). In the case of the information listed in Item 5 above, such company commercialization information was provided to DOE for inclusion in its Small Business database. Federal statute 15 U.S.C. 638 (k)(4) specifically states that "information provided under paragraph (2) [of that statute] shall be considered privileged and confidential and not subject to



disclosure pursuant to section 552 of title 5" (i.e., the FOIA). The information listed in said "paragraph 2," is the very information listed in Item 5 above that was provided to DOE for the Small Business database.

Items 1, 2, 3, 4, and 5 above are being withheld under Exemption 4 of FOIA (5 U.S.C. 552(b)(4)). Exemption 4 protects trade secrets and commercial or financial information that is obtained from a person and privileged or confidential. The information is considered commercial because EPIR Technologies, Inc. (EPIR) submitted this financial information to the Government for the purpose of doing business with the Government. The information was obtained from a person, because "person" covers a broad range of entities including corporations. *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996). Information that is required to be submitted to an agency is confidential if its release is likely to cause either substantial harm to the competitive position of the submitter or impair the Government's ability to obtain necessary information in the future. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). EPIR's commercial and financial information was "required to be submitted" because submission of information was a prerequisite of doing business with the Government.

Grantee key personnel information has been protected under Exemption 4. See *U.S. Department of Justice Freedom of Information Act Guide*, p. 325, footnote 351 (2009 Edition). Courts have looked for reference to attempts by employers to protect their interest in key personnel, such as non-compete agreements, to further support Exemption 4 protection of key personnel information.

Courts have agreed that detailed financial information such as a company's actual costs, profits, and data describing a company's workforce that would reveal labor costs qualify for Exemption 4 protection. See, e.g. *Gulf & Western Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979); see e.g. *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), *aff'd*, 542 F.2d. 1190 (4<sup>th</sup> Cir. 1976). Where a contractor submits information to the Government in confidence containing confidential commercial and financial information including, personnel information (e.g. salary information), labor hours and costs, that would likely cause substantial competitive harm to the contractor, then the agency properly shields such information from disclosure under Exemption 4. See *Boyes v. United States*, 2005 U.S. Dist. LEXIS 4452 (D.D.C. Mar., 16, 2005); see also *Gideon Group, Inc.*, Case No. TFA-0081 (DOE OHA, March 30, 2005).

Releasing Item 1 would cause substantial competitive harm to EPIR because it would enable competitors to attempt to recruit the key personnel for their own projects at higher salary levels.

Releasing of items 1-3 would likely cause substantial competitive harm to EPIR because it would allow competitors to determine EPIR's labor hours, rates, and costs, either openly or through calculations based on released information. Further, EPIR submitted this information to the Government in confidence as part of its budget proposals. A company's labor hours, rates, and cost amounts are often critical factors in determining whether a corporation should receive an award. If in the future EPIR is involved in a solicitation with competitors, then disclosure of this information could be used by competitors to underbid EPIR.

Releasing Item 4 would reveal EPIR's business ideas, and proposed technical processes and approaches, which is the very type of confidential commercial and business information meant for protection under Exemption (b)(4). Release of that type of information would allow companies to potentially use EPIR's ideas, proposed technical processes and approaches to pattern their own processes and approaches to create a competitive advantage over EPIR.

Releasing Item 5 is not only prohibited by 15 U.S.C. 638(k)(4), but EPIR's small business commercialization history, including sales, revenues, sources of revenues, and market research is the very kind of information intended for protection under the competitive harm prong of Exemption 4. *See U.S. Department of Justice Freedom of Information Act Guide, p. 325, footnotes 348 and 350 (2009 Edition)*. Release of that information would provide potential competitors with insight into the EPIR's commercial performance affording them the opportunity to use that information to enhance their own future proposals to the competitive detriment of EPIR.

Courts have held that Exemption 4 is coextensive with the Trade Secrets Act, which imposes criminal penalties for the unauthorized disclosure of trade secrets. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1144 (D.C. Cir. 1987). The practical effect is that DOE cannot make a discretionary disclosure of Exemption 4 information.

#### **Exemption (b)(6)**

Item 1 is exempt from disclosure under Exemption 6. Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6); 10 C.F.R. Part 1004.10(b)(6). A determination under Exemption 6 requires a balancing of an individual's right to privacy against the public interest in disclosing the information.

The first step in the Exemption 6 balancing process is determining whether disclosure of the information would violate a viable privacy interest of the subject of the information. *See Schell v. HHS*, 843 F.2d 933, 938 (6<sup>th</sup> Cir. 1988). Once it has been determined that a personal privacy interest is threatened by a release of information, the next step is to assess whether there is a public interest in disclosing the information. *See FOIA Update, Vol.X, No. 2, at 7*. The Supreme Court has held that a public interest exists if disclosure would contribute to the "public understanding of the operations and activities of the Government." *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 775 (1989). Finally, the two competing interests must be weighed against one another in order to determine whether the harm to personal privacy or benefit to the public is the greater result. *See Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984).

Here, releasing the salary information of the principal investigator and other key personnel would cause a clearly unwarranted invasion of personal privacy, as prohibited by Exemption 6, 5 U.S.C. 552(b)(6). In contrast, there is no public interest in the salary information of EPIR's principal investigator and other key personnel because releasing that information would not shed substantial light on Government operations.

#### **Appeal Rights**

You are advised of your right to appeal my determination to withhold this information within 30 days of receipt of this letter, by writing to the Director, Office of Hearings and Appeals, United States

Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. Both the request and envelope should be clearly marked "Freedom of Information Appeal." Judicial review will be available thereafter in the district in which your concern is located or has its principal place of business, where the records are located, or in the District of Columbia.

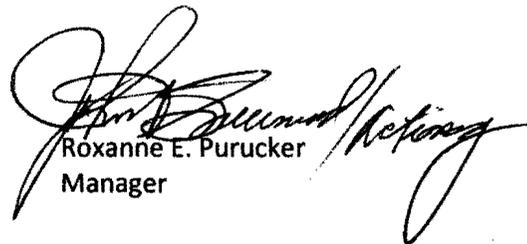
**Fees**

You have been categorized as a "Commercial Use" requester, and as such, you are subject to search, review, and duplication fees related to your request. You indicated in your request that you are willing to pay fees up to \$250.00 for your request. Fees associated with this request total **\$242.40** detailed as follows: Search and review effort – 4.75 hours at \$49.99 per hour = \$237.45; copy charges 99 pages at \$.05 per page = \$4.95. Please make your check in the amount of **\$242.40** payable to the U.S. Department of Energy, and forward it to:

Miriam Legan  
FOIA/PA Officer  
U.S. Department of Energy  
9800 S. Cass Ave., Bldg. 201  
Argonne, IL 60439

If you have any questions, please contact Miriam Legan, the DOE Chicago Office FOIA Officer, at (630) 252-2041 or [miriam.legan@ch.doe.gov](mailto:miriam.legan@ch.doe.gov), or Attorney Steven Thiede, DOE Chicago Office FOIA Counsel, at (630) 252-2014 or [steven.thiede@ch.doe.gov](mailto:steven.thiede@ch.doe.gov).

Sincerely,



Roxanne E. Purucker  
Manager

Enclosures:  
As Stated