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Description of document: **04-October-2006 letter sent by Pamela Auerbach of Kirkland & Ellis Law firm on behalf of the Corporate Executive Board regarding proposed release of contract W74V8H05-P-0212 by the US Army under the FOIA**

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Source of document: Department of the Army
Office of the Administrative Assistant to the Secretary
Chief Attorney & Legal Services Directorate
5200 Army Pentagon
Washington, DC 20310-5200

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DEPARTMENT OF THE ARMY
OFFICE OF THE ADMINISTRATIVE ASSISTANT TO THE SECRETARY
5200 ARMY PENTAGON
WASHINGTON, DC 20310-5200
AUGUST 28, 2007

CHIEF ATTORNEY &
LEGAL SERVICES DIRECTORATE

Re: FOIA Identification No. 07-392

This is in response to your Freedom of Information Act (FOIA) request dated August 9, 2007 in which you requested a copy of the letter sent by Pamela J. Auerbach of Kirkland & Ellis on behalf of the Corporate Executive Board on October 5, 2006. Your request was received yesterday and assigned our office tracking number FA-07-392.

We are releasing the requested documents to you with partial redactions. The following is the reasoning for the redactions which have been made:

Exemption (b)(6): Exemption (b)(6) of the FOIA protects from mandatory disclosure "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6) (1996 & Supp. I 2002). To qualify for protection under Exemption (b)(6), records must meet two criteria: (1) they must be "personnel and medical files and similar files," (2) the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." *Id.*; United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599-603 (1982). The first prong is met if the information "appl[ies] to a particular individual" and is "personal" in nature. New York Times Co. v. NASA, 952 F.2d 602, 606 (D.C. Cir. 1988). The second prong requires courts to strike a "balance between the protection of an individual's right to privacy and the preservation of the public's right to government information." United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982). The "public interest" in the analysis is limited to the "core purpose" for which Congress enacted the FOIA: to "shed . . . light on an agency's performance of its statutory duties." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

We are withholding the names of government employees under Exemption (b)(6) to protect personal privacy. See Judicial Watch, Inc. v. United States, No. 03-1160, 2004 WL 26736, at *4 (4th Cir. Jan. 6, 2004). Under the Exemption (b)(6) balancing test, the Supreme Court held in a similar case that disclosure of employee addresses "would not appreciably further the citizens' right to be informed about what their Government is up to and, indeed, would reveal little or nothing about the employing agencies or their activities." United States Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994). The same is true here. Disclosure of the names and email addresses of government employees would contribute little to the public's understanding of government activities. By contrast, such disclosure would constitute a

“non-trivial” and “not insubstantial” invasion of government employees’ privacy interests. Id. at 500, 501.

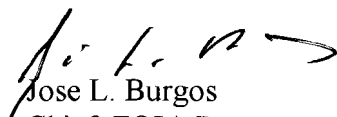
Furthermore, Department of Defense policy following September 11, 2001, allows the withholding of the names and room numbers of government employees “because of a heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.” Memorandum from D.O. Cooke, Director of Administration & Management, Office of the Secretary of Defense, Re: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA) (Nov. 9, 2001), available at <http://www.dod.mil/pubs/foi/withhold.pdf>. As such, the names of government employees are withheld under Exemption (b)(6).

Please be advised that you are entitled to receive two hours of search, and 100 pages of duplication, free of charge. Therefore, the usual fees associated with this type of request have been waived.

This partial denial is carried out as the representative of the FOIA Initial Denial Authority (IDA). The Administrative Assistant to the Secretary of the Army delegated Initial Denial Authority (IDA) under the FOIA to the Chief Attorney, to act for the Secretary of the Army on requests for records maintained by the office of the Secretary of the Army. You have the right to appeal within sixty (60) calendar days. See 32 C.F.R. § 518.17(c). If you wish to appeal this determination, write to me and I will present the matter to the IDA for consideration.

If you have questions or concerns regarding your current FOIA request, please contact Megan Romigh at (703) 697-5423 or Megan.Romigh@hqda.army.mil. In all correspondence please refer to FOIA number FA-07-392.

Sincerely,



Jose L. Burgos
Chief, FOIA Program
Office of the Chief Attorney

KIRKLAND & ELLIS LLP

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October 4, 2006

VIA FEDERAL EXPRESS

Chief Attorney
United States Army Resources & Programs Agency
c/o Contracting Center of Excellence (formerly DCC-W)
ATTN: FOIA Program, [REDACTED]
5200 Army Pentagon
Washington, DC 20310-5200

Re: FOIA Request Number FA-06-434

Dear Sir/Madam:

This letter responds to the letter of September 19, 2006 sent to our client, the Corporate Executive Board ("CEB"), regarding the proposed release of contract W74V8H-05-P-0212 ("contract") requested by FOIA Request number FA-06-434.

CEB objects to the release of Paragraphs I, II and III ("CEB Non-Releasable Material") on the grounds that these paragraphs are protected from release by Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4) ("trade secrets and commercial or financial information obtained from a person and privileged or confidential"). CEB reserves the right to supplement this opposition.

Under controlling D.C. Circuit precedent, the applicable test for whether information can be released under Exemption 4 depends upon whether a party made a voluntary or mandatory submission of the material. When a party voluntarily provides financial or commercial information to the government, *Critical Mass Energy Project v. Nuclear Regulatory Commission* ("*Critical Mass III*"), 975 F.2d 871, 878 (D.C. Cir. 1992), *cert. denied* 507 U.S. 984 (1993), is the proper test. In contrast, "when the government requires a private party to submit information as a condition of doing business with the government," the submission is mandatory, and *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks I*") is the appropriate test. *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19, 28 (D.D.C. 2000).

CEB was not required to submit the CEB Non-Releasable Material to participate in the solicitation for the Army contract. Thus, the submission of this material was voluntary and the *Critical Mass III* test applies. That said, the CEB Non-Releasable

KIRKLAND & ELLIS LLP

October 4, 2006

Page 2

Material also cannot be released under the *National Parks I* test for information that must be submitted.

In *Critical Mass III*, the D.C. Circuit addressed how to apply Exemption 4 to information that is supplied voluntarily. Because there is a unique interest in ensuring the continued availability of such information, the D.C. Circuit concluded that “[f]inancial or commercial information provided to the Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Critical Mass III*, 975 F.2d at 879.

In the context of Exemption 4, records are commercial simply if the submitting party has a “commercial interest” in the records. *See, e.g., Judicial Watch, Inc. v. United States Dep't of Energy*, 310 F. Supp. 2d 271, 309 (D.D.C. 2004) (Consultant report that was “commissioned as a multiclient study . . . and sold” is “‘commercial’ in nature” for Exemption 4 analysis), *aff'd in part, rev'd in part, and remanded in part on other grounds*, 412 F. 3d 125 (D.C. Cir. 2005). Commercial information is considered confidential if the submitting party ordinarily would not release such information to the public. *See id.* (Consultant’s report is confidential under Exemption 4 when the submitting party “indicated that [such] reports are confidential and clients who receive a copy must sign a confidentiality agreement.”).

The CEB Non-Releasable Material is both commercial and confidential within the meaning of established Exemption 4 precedent. As an initial matter, CEB provided the CEB Non-Releasable Material as part of an annual paid membership, which demonstrates CEB’s commercial interest in the Non-Releasable Material. *See Judicial Watch*, 310 F. Supp. 2d at 309 (Subscription-only consultant’s report was “commercial information” under Exemption 4).

More significantly, the CEB Non-Releasable Material is highly confidential. In fact, this material is not even available to CEB members generally, let alone to the general public, but only to subscribers to the particular CEB program at issue. CEB uses a cyclical process in order to advise its members on best business practices: members share problems and solutions within a confidential framework, and CEB proposes and develops initiatives and tools, which are available only to participating members, based on that knowledge. The information in the CEB Non-Releasable Material, which directly results from confidential meetings between CEB and members, is *itself* confidential. Knowledge of the initiatives described in the CEB Non-Releasable Material is limited to those members who participate in, and subscribe to, the referenced CEB member program. Those members — including the Army — must sign letters of agreement, which include nondisclosure provisions, to hold the proprietary initiatives confidential.

When CEB voluntarily submitted the CEB Non-Releasable Material to the Army, it did so subject to a nondisclosure provision, which made clear that the material was to be kept confidential and not disclosed to the general public. *See Judicial Watch*, 310 F. Supp. 2d at 309 (Confidential report, available only on a subscription basis and to those

KIRKLAND & ELLIS LLP

October 4, 2006

Page 3

clients that sign a confidentiality agreement, is type of information “not customarily disclosed to the public” and thus properly withheld under Exemption 4.). Because the CEB Non-Releasable Material is commercial information that was voluntarily submitted to the Army by CEB, and because the material is of a kind that CEB customarily would not release to the public, the CEB Non-Releasable Material is protected from disclosure under *Critical Mass III*.

Even if CEB had been required to submit the CEB Non-Releasable Material, Exemption 4 still prevents its release. *National Parks I* governs when information that was required by and submitted in response to a government contract solicitation cannot be disclosed pursuant to Exemption 4: “[A] commercial or financial matter is ‘confidential’ for purposes of [Exemption 4] if disclosure of the information is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained.” 498 F.2d at 770 (footnote omitted). Disclosure is likely to cause substantial harm to the competitive position of the party from whom the information was obtained where that party shows evidence of “actual competition and a likelihood of substantial competitive injury.” *Judicial Watch, Inc.*, 108 F. Supp. 2d. at 29 (quoting *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987).

Release of the CEB Non-Releasable Material would cause CEB substantial competitive injury. It would disclose CEB's strategic business judgment and efforts by providing CEB's many competitors in the best practices consulting business with a detailed road map to the services that CEB members are looking for, without those competitors having made any financial or time investment in collecting and analyzing member data. With access to CEB's highly confidential and proprietary information, CEB competitors easily could undercut CEB's existing market position by approaching CEB members with a “more advantageous offer.” See *Canadian Commercial Corp. v. Dep't of the Air Force*, No. 04-1189 (JDB), 2006 WL 2207604, at *21 (D.D.C. Aug. 3, 2006). Accordingly, the release of any of the CEB Non-Releasable Material would cause substantial competitive harm to CEB.

FOIA exemptions, including Exemption 4, admittedly are permissive. However, Exemption 4 is co-extensive with the Trade Secrets Act, 18 U.S.C. § 1905, *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987) (holding that the scope of the Trade Secrets Act is at least coextensive with that of Exemption four), *cert. denied* 485 U.S. 977 (1988), which does not provide an “authorized by law” exception. Absent such an “authorized by law” exception, Trade Secret Act materials that are within the scope of Exemption 4 cannot be released. *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997). Because the CEB Non-Releasable Material is subject to both Exemption 4 and the Trade Secrets Act, the release of this information by the Army also would constitute a criminal offense under the Trade Secrets Act, 18 U.S.C. § 1905.

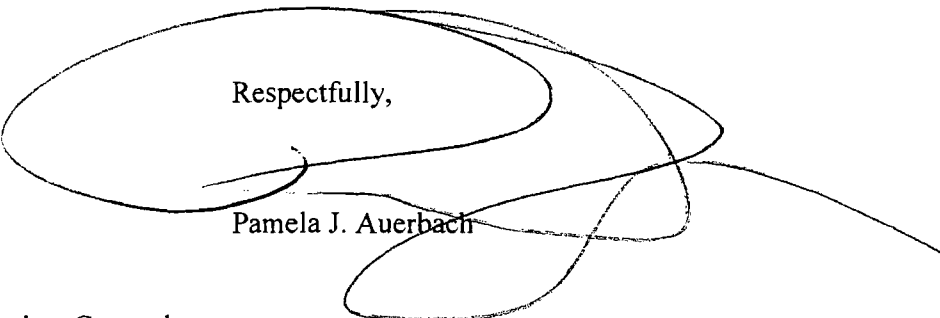
KIRKLAND & ELLIS LLP


October 4, 2006

Page 4

In light of the above, Paragraphs I, II, and III of contract W74V8H-05-P-0212 cannot be released under the Freedom of Information Act. Please do not hesitate to contact me at (202) 879-5168.

Respectfully,


Pamela J. Auerbach

Cc: , Associate Counsel
Department of the Army
U.S. Army Resources and Programs Agency
120 Army Pentagon
Washington, DC 20310-0120