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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-73

June 4, 2024

Howard County Public School System, Custodian
Corinne Happel, Complainant

Complainant Corinne Happel challenges redactions applied by the Howard County Public School System (“HCPSS”) to an executed contract between HCPSS and Zum, a company that provides student transportation services. The complainant requested the contract under Maryland’s Public Information Act (“PIA”). HCPSS maintains that it properly redacted confidential commercial and financial information pursuant to § 4-335¹ of the PIA. After review of the submissions, we conclude that only a portion of the redactions—namely, to the line item price amounts—is permissible under § 4-335. We therefore direct HCPSS to provide the executed contract to the complainant with only those price amounts redacted.

Background

In February of this year, the complainant sent a PIA request to HCPSS asking for “a non-redacted copy of the contract(s) between Zum and HCPSS.” HCPSS responded the next day by referring the complainant to a link on its website to the “public copy” of the contract.² HCPSS explained that this copy of the contract contained redactions to Zum’s confidential commercial and financial information, which had been applied under § 4-335 of the PIA.

The complainant was not satisfied with a redacted copy of the contract, so she contacted the Public Access Ombudsman.³ In March, the Ombudsman issued a final determination stating that the dispute was not resolved. The complainant then filed this complaint with our Board.

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

² As HCPSS explains in its response to this complaint, prior to receiving the complainant’s PIA request, HCPSS had received other PIA requests for records related to its contract with Zum. HCPSS’s response to the complainant’s PIA request was based on its response to those prior requests.

³ The PIA charges the Ombudsman with making “reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records.” § 4-1B-04(a).

In her complaint, the complainant expresses concern that the contract between HCPSS and Zum, which “uses millions of public dollars,” has been provided to the public “only in heavily redacted form with financial details missing.” The complainant notes that Howard County “created a contract bid that almost all of [the] legacy local school bus contractors would not be eligible to bid on,” and that Zum is “based in California and had never operated on the east coast.” The complainant also contends that there were “massive service failures at the beginning of the school year,” that there are “ongoing safety concerns,” and that these things have prompted a legitimate desire for “transparency on how [the County is] financially committed to this company.” The complainant provides a link to a contract between Zum and the San Francisco Unified School District and stresses that the contract—which is not redacted—does not seem to “feature any trade secrets that need to be hidden.”

HCPSS provides a copy of the redacted contract with its response to this complaint. HCPSS states that section (3) of the contract is entitled “Contract Prices” and contains “line item pricing including daily and hourly rates by vehicle type and details for application of rates and services as provided by [Zum] in their price proposal.” Noting that Zum was required to provide the redacted pricing information with its bid to provide the school bus services, HCPSS argues that this information is subject to the mandatory denial in § 4-335 of the PIA.

To support the redactions, HCPSS provides more detail about its process for responding to the PIA requests related to the Zum proposal and contract. HCPSS states that it “identified potential confidential and commercial information given the nature of the records and the fact that the records contained information received from an outside company.” HCPSS believed that “the release of the financial bidding information could impact the ability of HCPSS to receive competitive bids as the different bus vendors may calculate their bids and rates to match their competitors.” In addition, HCPSS sought to determine whether release might cause “substantial competitive harm” to Zum, and whether Zum “actually and customarily keep[s] the information confidential.” Thus, HCPSS sent an email to Zum in February of 2023⁴ to explain “the nature of the request” and “the records sought,” and “specifically indicated that [Zum’s] input would be taken into consideration as [HCPSS] must ultimately make the decision on what to withhold.” HCPSS attaches this email—and Zum’s response—to its response to this complaint.

In its email to Zum, HCPSS explained that it was in the process of responding to a PIA request that sought records related to Zum’s bid proposal, including the “Technical

⁴ Regarding the PIA request made by a different individual prior to the complainant’s PIA request.

Response, Presentation, Price Proposal, and BAFO Price Proposal.”⁵ HCPSS asked for Zum’s input as to whether any information in the proposal was considered a trade secret or confidential business and financial information that would cause competitive harm if released, or was information that Zum currently treats as confidential. HCPSS suggested that “potential areas to review are unit pricing beyond the total award of the contract.”

In response to HCPSS’s outreach, Zum “pinpointed the pages” in the bid proposal records that Zum believed should be withheld. Zum advised that disclosure of the information was likely to cause “substantial harm” to its competitive position, and that Zum “both actually and customarily” treated the information as private. The information Zum identified included personnel information that Zum contended would reveal “information about a specific approach to service delivery that may be economically advantageous to a competitor” and “information about innovations developed by Zum,” as well as pricing information.

Later, after Zum had been awarded the contract, HCPSS contacted Zum to advise that it had received a PIA request for the executed contract and noted that the executed contract contained “some of the same pricing information that had been redacted under the proposal (line item pricing including daily and hourly rates).” Ultimately, Zum provided HCPSS with a version of the executed contract “with only the pricing information redacted.” As with the bid proposal records, Zum maintained that disclosure of the pricing information would harm its competitive position, and that it actually and customarily kept that pricing information private.

After receiving Zum’s input, HCPSS determined that the pricing information in the bid proposal and the contract fell within the scope of § 4-335, the PIA’s mandatory exemption for confidential commercial or financial information. HCPSS notes that this determination is consistent with federal caselaw. HCPSS acknowledges the concerns raised in the complaint—e.g., “the difficulties with transportation at the start of the 2023-2024 school year”—but argues that they are not relevant because the information is financial information that falls within a mandatory exemption. HCPSS maintains that it was “compelled to make redactions as shown in the released record.” HCPSS also stresses that “[t]he length of the contract and the overall cost has been made public.” HCPSS maintains that this case is different from another matter where we determined that a custodian had not met its burden to show that redacted unit pricing information fell within § 4-335, *see* PIACB 24-09, at 8-9 (Oct. 6, 2023), because here the “process ensured that the school system, not the vendor, made the final decision regarding redaction.”⁶

⁵ The relevant PIA request was apparently sent before Zum was awarded the contract and the contract between HCPSS and Zum was executed. We note that the complainant here seeks only the executed contract.

⁶ HCPSS also makes arguments about a redaction applied to a cell phone number under § 4-330, the PIA’s exemption for “sociological information.” For this exemption to apply, the official

In reply, the complainant suggests that “[i]f the pricing per route is what Zum/HCPSS would like to remain redacted, it seems that the dollar amount values could be individually redacted rather than having an entire section of the contract redacted.” The complainant contends that this would “at least give the public an understanding of how the contract is structured.”⁷

Analysis

The PIA authorizes us to review and resolve complaints that allege certain violations of its provisions, including that a custodian improperly redacted information in a public record.⁸ See § 4-1A-04(a)(1)(i). If the complaint and response do not provide enough information for us to resolve the complaint, the PIA empowers us to request additional information, including “a copy of the public record.” § 4-1A-06(b)(2)(ii)(1). After review, we must issue a written decision and, if we determine that the alleged violation occurred, order a statutory remedy. § 4-1A-04(a)(2) and (3). For instance, when we find that a custodian improperly denied inspection, we must “order the custodian to . . . produce the public record for inspection.” § 4-1A-04(a)(3)(i).

Maryland’s Public Information Act reflects the General Assembly’s “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) (citations omitted). This principle is given primary effect in § 4-201 of the PIA, which provides that “[e]xcept as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record and any reasonable time.” § 4-201(a)(1). This broad right of access is tempered, however, by provisions in the PIA that exempt certain records and information from disclosure. Section 4-335, at issue here, is one of those exemptions. Under § 4-335, a custodian is required to deny inspection of “the part of a public record” that contains certain information “provided by or obtained from any

custodian must have “adopted rules or regulations that define sociological information.” HCPSS attaches its “Rules for Processing Maryland Public Information Act Requests (MPIAs),” which define “sociological data” to include a personal phone number. Because the complainant does not appear to challenge the lone redaction applied under § 4-330, we do not address it.

⁷ The complainant provided an example of what the public might be interested in, asking “how are liquidated damages awarded if Zum fails its contractual obligations?” This question prompted HCPSS to provide additional information about the redactions in the contract—i.e., that “information about obligations under the contract” was not redacted. HCPSS explained that the request for proposals contained this information and provided the relevant section regarding “Service Specifications” to our Board and the complainant.

⁸ Before filing a complaint, a complainant must attempt to resolve the dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a).

person or governmental unit,” including “confidential commercial information” and “confidential financial information.”

As we explained in some detail in PIACB 24-09, the law surrounding § 4-335 and its counterpart in the federal Freedom of Information Act (“FOIA”), 5 U.S.C.A. § 552(b)(4),⁹ is somewhat unsettled. *See* PIACB 24-09, at 4-5 & n.2 (Oct. 6, 2023). The tests for whether commercial or financial information should be withheld used to differ based on whether the information was voluntarily supplied to the government or required as a condition of doing business. *Id.* at 4. The former was (and still is) considered confidential—and therefore non-disclosable—if it “would customarily not be released to the public by the person from whom it was obtained.” *Amster*, 453 Md. at 81 (quoting *Critical Mass Energy Project v. Nuclear Regul. Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992)). Under FOIA, information required by the government was confidential if disclosure was likely to “impair the Government’s ability to obtain necessary information in the future” or “cause substantial harm to the competitive position of the person from whom the information was obtained.” *Nat’l Parks & Conservation Ass’n v. Morton*, 453 Md. 68, 770 (D.C. Cir. 1974)). Though *Amster*, the leading case in Maryland on § 4-335, quoted the *National Parks* test approvingly, 453 Md. at 78, its applicability in Maryland is questionable given that (1) *Amster* involved information that was voluntarily supplied, not required, and (2) *National Parks* has since been abrogated by the U.S. Supreme Court, *see Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436-38 (2019).¹⁰ Now, for purposes of FOIA, commercial or financial information is considered “confidential” regardless of how it was obtained if it is “both customarily and actually treated as private by its owner.”¹¹ *Id.* at 440.

Section § 4-335 does not shield an entire record from disclosure just because the record contains confidential commercial or financial information. Rather, the exemption applies only to “the part of a public record” where that information is found. § 4-335. Thus, ordinarily a custodian must redact the confidential commercial or financial information and provide the rest of the public record to the requester, assuming no other exemptions apply. *See* § 4-203(c)(1)(ii) (requiring a custodian to “allow inspection of any

⁹ Providing that FOIA’s general rule of disclosure “does not apply to . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

¹⁰ *See also Maryland Public Information Act Manual* (18th ed. Oct. 2023), at 3-25 through 3-29 (discussing the U.S. Supreme Court’s decision in *Food Marketing* and the impact it may have in Maryland, and noting that “there is nothing in Maryland law that would *require* the [Supreme Court of Maryland] to depart from the *National Parks* test,” (emphasis original)).

¹¹ The Supreme Court also found the fact that the information was “provided to the government under an assurance of privacy” indicative of its confidential nature, *Food Mktg.*, 588 U.S. at 440, but did not resolve whether such assurances were necessary in order for the FOIA exemption to apply, *id.* at 434-35.

part of the record that is subject to inspection”). Because HCPSS redacted the entire “Contract Prices” section, we were unable to determine whether some or all of that “part” of the public record falls within the scope of § 4-335. We thus asked HCPSS to provide an unredacted version of the executed contract between HCPSS and Zum. We will maintain the confidentiality of the unredacted record, as required by law. § 4-1A-06(b)(5); COMAR 14.02.06. Our references to the redacted information will be by “generic descriptions or characterizations,” COMAR 14.02.06.05, so as not to disclose the information that HCPSS maintains is confidential.

As federal courts and our State’s Attorney General have recognized, a company’s unit pricing information may well be information that is actually and customarily not released to the public, and also information that could harm a company’s competitive position if publicly disclosed.¹² See, e.g., *Canadian Com. Corp. v. Dep’t of the Air Force*, 514 F.3d 37, 43 (D.C. Cir. 2008) (line item pricing information was subject to the FOIA exemption for confidential financial information); 63 Md. Op. Att’y Gen. 355, 365 (1978) (noting that “in a highly competitive business it might be customary for a firm to carefully protect . . . its pricing data”). The complainant seems to acknowledge this to some degree in her reply, suggesting that information about the “pricing per route” could be “individually redacted rather than having an entire section of the contract redacted.” In its email to HCPSS regarding the redactions to the executed contract, Zum stated that “only the pricing information” was redacted. Zum explained that it both actually and customarily kept this pricing information private, and that its release could harm Zum’s competitive position. HCPSS reviewed Zum’s response and determined that the “line item pricing,” which included “daily and hourly rates by vehicle type and details for application of rates and services” was subject to § 4-335.

We do not necessarily quarrel with HCPSS’s conclusion that the *line item pricing* information must be redacted under § 4-335. We were unable, on our own, to find any instances in which Zum appears to have disclosed its line item pricing information publicly. There is no pricing information on Zum’s website. And, while we were able to find—as noted in the complaint—a Zum contract with line item prices posted on the internet, that contract appears to have been posted by the school district with which Zum was doing business, and not Zum itself.

Upon review of the unredacted contract, however, we observe that more than the line item prices themselves has been redacted. While our confidentiality mandates preclude us from describing this information in detail in this decision, we can say that,

¹² Though the applicability of *National Parks* “competitive harm” test is perhaps questionable in Maryland at this point, as we see it, the potential for competitive harm is still relevant to the analysis. After all, an entity is more likely to hold information close—i.e., to actually and customarily keep it private—if disclosure of that information could have a detrimental effect on the entity’s competitive position.

generally, the information relates to the bus services the contract contemplates. As stated above, we are satisfied that the *prices* of those services are covered by § 4-335, but we do not think that the exemption reaches this other information. When looking closely at the communications between HCPSS and Zum, we note that Zum stated that it would “review the fully executed agreement and redact the pricing information that had been redacted under the proposal (*line item pricing including daily and hourly rates*).” This information—the “line item pricing”—is the information that Zum stated is “customarily and actually treated as private by Zum Services, Inc.” It is the disclosure of this information that Zum represented would cause harm to its competitive position. It is hard to understand how release of the other information—some of which can be discerned by, e.g., observing the operation of Zum’s vehicles—would have a similar effect.

Conclusion

Based on our review of the submissions, including the unredacted contract, and our understanding of the law regarding § 4-335 (in flux though it may be), we find that HCPSS properly redacted the line item prices in the executed contract between Zum and HCPSS. The remaining redacted information is not subject to § 4-335, however, and HCPSS violated the PIA by redacting that information. We direct HCPSS to provide the complainant with a copy of the executed contract with only the line item price amounts redacted. § 4-1A-04(a)(3)(i).

Public Information Act Compliance Board

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