

No. 15-15121

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AMERICAN SMALL BUSINESS LEAGUE,
Plaintiff - Appellee,

v.

DEPARTMENT OF DEFENSE,
Defendant,

and

SIKORSKY AIRCRAFT CORPORATION,
Intervenor-Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HON. WILLIAM H. ALSUP, JUDGE
CASE No. 3:14-CV-02166 WHA

BRIEF OF SIKORSKY AIRCRAFT CORPORATION

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SIKORSKY AIRCRAFT CORPORATION

CORPORATE DISCLOSURE STATEMENT

Sikorsky Aircraft Corporation hereby identifies its parent corporation and any publicly-held company that owns 10% or more of its stock as follows:

Sikorsky Aircraft Corporation is wholly owned by United Technologies Corporation.

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE.....	2
A. Factual Background.....	2
B. Procedural History.....	4
1. DoD’s Summary Judgment Motion	4
2. The District Court’s Summary Judgment Ruling	6
3. Sikorsky’s Intervention Motion	8
SUMMARY OF ARGUMENT	8
STANDARD OF REVIEW	10
ARGUMENT	11
I. SIKORSKY’S COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLAN CONTAINS CONFIDENTIAL COMMERCIAL AND FINANCIAL INFORMATION THAT IS SHIELDED FROM DISCLOSURE BY FOIA EXEMPTION 4.	12
II. THE BUSINESS EMAIL ADDRESSES AND BUSINESS PHONE NUMBERS OF THE SIKORSKY EMPLOYEES IN SIKORSKY’S COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLAN ARE SHIELDED FROM DISCLOSURE BY FOIA EXEMPTION 6.	21
CONCLUSION	25
CERTIFICATE OF COMPLIANCE.....	27
STATEMENT OF RELATED CASES	28

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Electronic Frontier Found. v. Office of the Dir. of Nat’l Intelligence</i> , 639 F.3d 876 (9th Cir. 2010).....	passim
<i>Fiduccia v. U.S. Dep’t of Justice</i> , 185 F.3d 1035 (9th Cir. 1999)	11
<i>Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.</i> , 524 F.3d 1021 (9th Cir. 2008)	22, 23
<i>Frazee v. U.S. Forest Service</i> , 97 F.3d 367 (9th Cir. 1996).....	13
<i>GC Micro Corp. v. Defense Logistics Agency</i> , 33 F.3d 1109 (9th Cir. 1994).....	passim
<i>Gulf & Western Indus., Inc. v. United States</i> , 615 F.2d 527 (D.C. Cir. 1979).....	18
<i>John Doe Agency v. John Doe Corp.</i> , 493 U.S. 146 (1989)	11
<i>Lane v. Dep’t of Interior</i> , 523 F.3d 1128 (9th Cir. 2008)	10, 11
<i>Lion Raisins Inc. v. U.S. Dep’t of Agriculture</i> , 354 F.3d 1072 (9th Cir. 2004)	9, 14, 20
<i>McDonnell Douglas Corp. v. United States Dep’t of the Air Force</i> , 375 F.3d 1182 (D.C. Cir. 2004).....	21
<i>National Ass’n of Retired Fed. Employees v. Horner</i> , 879 F.2d 873 (D.C. Cir. 1989).....	25
<i>National Parks & Conservation Ass’n v. Kleppe</i> , 547 F.2d 673 (D.C. Cir. 1976).....	19

<i>Prudential Locations LLC v. U.S. Dept. of Housing & Urban Dev.</i> , 739 F.3d 424 (9th Cir. 2013).....	24
<i>U.S. Dep’t of State v. Washington Post Co.</i> , 456 U.S. 595 (1982)	22
<i>Watkins v. U.S. Bureau of Customs and Border Protection</i> , 643 F.3d 1189 (9th Cir. 2011)	11, 12, 13
<i>Wood v. FBI</i> , 432 F.3d 78 (2d Cir. 2005)	22
STATUTES AND RULES	
5 U.S.C.	
§ 552(a)(3)	1
§ 552(b)(1)-(9)	11
§ 552(b)(4)	passim
§ 552(b)(6)	passim
28 U.S.C.	
§ 1291	1
§ 1331	1
Pub. L. 101-89	
§ 834, 103 Stat. 1352 (1989)	2
Pub. L. 113-291, § 821 (2014).....	2
Federal Rule of Appellate Procedure 4(a)(1)(B).....	1

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331. The November 23, 2014 order from which this appeal arises was final. ER 26-32. This Court thus has jurisdiction under 28 U.S.C. § 1291. The notice of appeal of Sikorsky Aircraft Corporation (“Sikorsky”) was filed on January 21, 2015. ER 1-2. It thus was timely under the 60-day notice of appeal period of Federal Rule of Appellate Procedure 4(a)(1)(B), which applies here because a federal governmental agency, the Department of Defense (“DoD”), is a party.

STATEMENT OF ISSUES

The Freedom of Information Act (“FOIA”) provides that, upon request, a federal government agency must disclose records in the agency’s possession. 5 U.S.C. § 552(a)(3). FOIA exempts from disclosure, *inter alia*, “matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . [or] (6) 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)(4), (6).

Pursuant to FOIA, the Plaintiff requested that DoD disclose to it Sikorsky’s Comprehensive Small Business Subcontracting Plan for 2013. Plaintiff sued when DoD declined the request. DoD moved for summary judgment based on FOIA exemptions 4 and 6. In support of its summary judgment motion, DoD submitted a

declaration of a high-ranking Sikorsky procurement official, who stated that the Plan contains confidential business and financial information regarding the company's use of small business subcontractors, as well as the business email addresses and business phone numbers of Sikorsky employees. The District Court deemed the declaration insufficient, held that none of the information in the Plan was shielded from disclosure by either FOIA exemptions 4 or 6, and ordered DoD to disclose the Plan to Plaintiff. The issues on appeal are:

1. Whether the declaration that DoD submitted in support of its summary judgment motion demonstrates that Sikorsky's Comprehensive Small Business Subcontracting Plan contains confidential business and financial information that is shielded from disclosure by FOIA exemption 4.

2. Whether the business email addresses and business phone numbers of Sikorsky employees that are contained in Sikorsky's Comprehensive Small Business Subcontracting Plan are shielded from disclosure by FOIA exemption 6.

STATEMENT OF THE CASE

A. Factual Background

Since 1990, Congress has authorized DoD to administer a "Comprehensive Subcontracting Plan Test Program." ER 26-27; *see* Pub. L. 101-89, § 834, 103 Stat. 1352, 1509 (1989) (initial authorization); Pub. L. 113-291, § 821 (most recent authorization, enacted in December 2014). Under this program, some prime

contractors on defense projects are permitted to submit to DoD an annual Comprehensive Small Business Subcontracting Plan “identify[ing] all subcontract amounts awarded to small businesses on all government contracts the prime contractor fulfills.” ER 27 (internal quotation omitted). The single, comprehensive subcontracting plan that the program permits is in lieu of the multiple, individual subcontracting reports and summary subcontracting reports regarding utilization of small businesses that prime contractors otherwise would be required to submit. *Id.* Sikorsky is among the program participants. *Id.*; *see also* <http://www.acq.osd.mil/osbp/sb/initiatives/subcontracting/index.shtml> (DoD website listing program participants).

Plaintiff American Small Business League (“the League”) is an organization that promotes small business interests. ER 26. In August 2013, it filed a FOIA request with DoD seeking “the most recent master comprehensive subcontracting plan submitted by Sikorsky Aircraft Corporation for participating in the Comprehensive Subcontracting Plan Test Program for the Department of Defense.” ER 26-27 (internal citation omitted). At the time of the request, the most recent such document was the Comprehensive Small Business Subcontracting Plan (the “Plan”) that Sikorsky submitted to DoD for fiscal year 2013. ER 27.

B. Procedural History

1. DoD's Summary Judgment Motion

The League sued DoD in May 2013 seeking to compel disclosure of the Plan under FOIA. ER 27. DoD moved for summary judgment on the ground that the Plan contains confidential commercial and financial information that is protected from disclosure by FOIA's exemption 4, 5 U.S.C. § 552(b)(4). *Id.* Commercial and financial information is "confidential" within the meaning of exemption 4 if its disclosure "is likely to . . . cause substantial harm to the competitive position of the person from whom the information was obtained." *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994).

In support of its summary judgment motion, DoD submitted a declaration of Amy Johnson, a high-ranking and long-time Sikorsky procurement officer who was responsible for preparing the Plan and submitting it to DoD. ER 48-51. Following the hearing on DoD's motion, and in response to the District Court's directive, ER 28, DoD submitted a supplemental declaration from Ms. Johnson that expanded upon her initial declaration. ER 33-39. Along with the supplemental Johnson declaration, DoD lodged with the District Court redacted and non-

redacted versions of the Plan, which the District Court reviewed *in camera*. ER 28.¹

Johnson's supplemental declaration explained in detail that the redactions in the Plan contain a myriad of confidential commercial and financial information on "Sikorsky's operational strategies and methods" regarding subcontracting. ER 34-38, ¶¶ 6, 12. Johnson stated that Sikorsky "does not release th[is] information . . . to the public" and marked the Plan "proprietary" when submitting it to DoD. ER 35, ¶ 7. And Johnson described with specificity how "[r]elease of the information . . . would cause substantial harm to [Sikorsky's] competitive position," ER 35-36, ¶ 8, in the "intensely competitive" industries in which Sikorsky operates, ER 36-37, ¶ 11; *see also* ER 36-39, ¶¶ 9, 12(D), (G) (further describing how competitors could gain an advantage over Sikorsky were the confidential information in the Plan made public).

Also redacted were the business email addresses and business phone numbers of several Sikorsky employees. ER 31. Johnson's supplemental declaration stated that this information was not disclosed "to protect the individuals' privacy." ER 37, ¶ 12(A). Although the exemption itself was not cited, the supplemental declaration's assertion of privacy interests to protect the

¹ Neither the redacted nor the non-redacted version of the Plan was filed below; thus, these documents are not part of the Excerpts of Record.

business contact information of the Sikorsky employees was based on FOIA exemption 6, ER 31, which shields from disclosure “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).

2. The District Court’s Summary Judgment Ruling

On November 23, 2014, the District Court denied DoD’s summary judgment motion. ER 32.

First, the District Court held that DoD had not “provided reasonably specific detail to explain why the redacted portions of the [Plan] are exempt” from disclosure under exemption 4. ER 30-31. In the District Court’s view, the supplemental Johnson declaration did not “adequately show[] how the redacted information is ‘likely to cause substantial competitive injury’ if disclosed [because] [a]t best, Johnson [stated] that the ‘[r]elease of the information . . . *would* cause substantial harm to the company’s competitive position,’ on the basis that a competitor ‘*could*’ use such information to assess the strengths and weaknesses of Sikorsky’s bid proposals to the agency.” ER 31 (quoting ER 35-37, ¶¶ 8-10, 12) (District Court’s emphasis). According to the District Court, Johnson’s statement on what competitors “could” do with the information was insufficient to support DoD’s claim that the information is confidential and thus protected by FOIA exemption 4. *Id.*

Second, the District Court held that exemption 6 did not shield from disclosure the business email addresses and business phone numbers of the Sikorsky employees referenced in the Plan. ER 31. The District Court asserted that this information “is already accessible online” and the employees’ privacy interests in the information were “trivial.” *Id.* (internal quotation omitted).

In light of its denial of DoD’s summary judgment motion, the District Court ordered DoD to disclose the Plan to the League “by December 3, 2014, subject only to appeal.” ER 32.

On December 2, 2014, DoD notified the District Court that the Solicitor General had not yet decided whether to authorize DoD to appeal the order requiring disclosure of the Plan; DoD therefore requested a 60-day stay of the order to give the Solicitor General time to make that determination. ER 25. The next day, the District Court stayed its order until January 22, 2015 “to preserve the status quo pending a determination by the Solicitor General as to whether an appeal should be taken.” *Id.* However, in issuing the temporary stay, the District Court stated that DoD must release the Plan to the League “by January 22, 2015, subject only to appeal,” and that it would grant “no further extensions. If the agency wants an additional stay beyond January 22, 2015, it must ask the court of appeals.” *Id.*

3. Sikorsky's Intervention Motion

Following DoD's notice to the District Court that the Solicitor General had not yet decided whether to authorize DoD to appeal the order requiring disclosure of the Plan, Sikorsky moved to intervene so that it could appeal the order. ER 8-9, 23.

The District Court granted Sikorsky's intervention motion on January 20, 2015. ER 24. Notwithstanding its prior statement that no further stays of the order requiring disclosure of the Plan would be granted, the District Court stayed the order pending appeal. ER 6. On January 21, 2015, Sikorsky filed a notice of appeal. ER 1-2. DoD filed its notice of appeal the same day. Dist. Ct. Dkt. No. 53.

SUMMARY OF ARGUMENT

The District Court erred in holding that information in the Plan that DoD redacted was not shielded from disclosure by FOIA exemptions 4 and 6.

I. The supplemental declaration of the high-ranking and long-time Sikorsky procurement officer that DoD submitted in support of its summary judgment motion laid out with specificity the nature of the information in the Plan and how its disclosure likely would cause substantial harm to Sikorsky's position in the highly competitive industries in which it conducts business. As the declaration explained, this information contains a detailed analysis of Sikorsky's

operational methods and strategies with respect to the utilization of small business subcontractors on its prime contracts. This Court in *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994), recognized in no uncertain terms that such information warrants treatment as confidential for purposes of FOIA exemption 4 because of its potential value to competitors seeking prime government contracts.

The District Court nevertheless held that the Sikorsky procurement officer's declaration was insufficient to demonstrate that the redacted information in the Plan is protected from disclosure by FOIA exemption 4 because, according to the District Court, the declaration referred to what competing prime government contractors "could" do with that information, rather than what they "would" do with it. The District Court's dismissal of the declaration on the basis of semantics is contrary to *Lion Raisins Inc. v. U.S. Dep't of Agriculture*, 354 F.3d 1072 (9th Cir. 2004). There, this Court held that a declaration stating that competitors of the parties that submitted the information in question "could" use the information to undercut those parties' competitive positions was sufficient to show that the information was confidential for exemption 4 purposes.

II. The business email addresses and business phone numbers of the Sikorsky employees who are referenced in the Plan are shielded from disclosure by exemption 6. First, this exemption applies to all information about a particular

individual; the information need not be intimate or deeply personal. Business email addresses and business phone numbers fall within this broad standard. Second, information is protected by exemption 6 if its disclosure would constitute a clearly unwarranted invasion of personal privacy. Such an invasion occurs if the individual's privacy interests outweigh the public interest, if any, in disclosure of the information. The District Court's ruling that the privacy interests in the business email addresses and business phone numbers of the Sikorsky employees referenced in the Plan are "trivial" and thus not protected by exemption 6 runs directly counter to *Electronic Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 639 F.3d 876, 886 (9th Cir. 2010). There, this Court held that disclosure of business email addresses would implicate non-trivial, cognizable privacy interests. This Court further held that disclosure of the addresses would serve no public interest. Thus, under *Electronic Frontier*, the business email addresses of the Sikorsky employees are protected by exemption 6. The reasoning of *Electronic Frontier* applies equally to the Sikorsky employees' business phone numbers.

STANDARD OF REVIEW

In reviewing a summary judgment decision in a FOIA case, this Court "first determines under a *de novo* standard whether an adequate factual basis exists to support the district court's decision[]." *Lane v. Dep't of Interior*, 523 F.3d 1128,

1135 (9th Cir. 2008). If not, this Court remands for further development of the factual record. *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1040 (9th Cir. 1999). If this Court determines that there is an adequate factual basis for the summary judgment decision, “then the district court’s conclusions of fact are reviewed for clear error, while legal rulings, including its decision that a particular exemption applies, are reviewed *de novo*.” *Lane*, 523 F.3d at 1135.

ARGUMENT

In general, FOIA allows for public access to information in the possession of federal government agencies. *Watkins v. U.S. Bureau of Customs and Border Protection*, 643 F.3d 1189, 1193 (9th Cir. 2011). However, “[a]t the same time, FOIA contemplates that some information may legitimately be kept from the public.” *Id.* at 1194 (internal quotations omitted). To that end, FOIA contains nine different exemptions, pursuant to which federal agencies may withhold information from the public. 5 U.S.C. § 552(b)(1)-(9). As the Supreme Court has admonished, these exemptions “are intended to have meaningful reach and application.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

Based on FOIA exemptions 4 and 6, DoD declined to disclose to the Plaintiff the 2013 Sikorsky Comprehensive Small Business Subcontracting Plan.

The District Court erred in concluding that neither exemption applies to any of the information contained in the Plan.²

I. SIKORSKY'S COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLAN CONTAINS CONFIDENTIAL COMMERCIAL AND FINANCIAL INFORMATION THAT IS SHIELDED FROM DISCLOSURE BY FOIA EXEMPTION 4.

FOIA exemption 4 shields from disclosure “commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). This Court has held that “[t]he terms ‘commercial or financial’ are given their ordinary meanings.” *Watkins*, 643 F.3d at 1194. There is no doubt that the information contained in the Sikorsky Plan is “commercial” and “financial” within the ordinary meaning of those terms because it describes how Sikorsky intends to utilize small business subcontractors in its commercial activities with respect to prime DoD contracts and the monetary implications of those efforts. ER 34-35, ¶ 6. Nor is it disputed that DoD obtained the information “from a person” -- namely, Sikorsky, which submitted the Plan to DoD pursuant to federal

² In preparing this brief, Sikorsky has concluded that the following three categories of information that were redacted in the copy of the Plan that DoD submitted to the District Court do not fall within either exemption 4 or 6 and thus should not have been redacted: (i) numerical data regarding Sikorsky’s small business subcontracting goals and its performance in achieving those goals; (ii) publicly-available information about certain of Sikorsky’s subcontracting initiatives; and (iii) the names of the Sikorsky employees referenced in the Plan and the positions they hold at Sikorsky. DoD and Sikorsky have provided to Plaintiff a revised redacted copy of the Plan in which these categories of information no longer are redacted.

procurement laws and regulations. ER 26-27. Thus, the question here is whether the Plan contains “confidential” information.

Under this Court’s precedents, “[i]nformation qualifies as ‘confidential’ for the purposes of Exemption 4 if disclosure is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained.” *GC Micro*, 33 F.3d at 1112 (internal quotation omitted); *see also Frazee v. U.S. Forest Service*, 97 F.3d 367, 371 (9th Cir. 1996).³ This standard does not require “parties opposing disclosure [to] show actual competitive harm.” *GC Micro*, 33 F.3d at 1113; *see also Watkins*, 643 F.3d at 1195 (“sophisticated economic analysis of the likely effects of disclosure” is not required). “Rather, evidence revealing (1) actual competition and (2) a likelihood of substantial competitive injury is sufficient to bring commercial information under Exemption 4.” *GC Micro*, 33 F.3d at 1113.

Importantly, this Court held in *Lion Raisins* that this evidentiary showing may be satisfied “solely” through a declaration if two requirements are met: the declarant is “knowledgeable about the information sought” and the declaration is “detailed enough to allow the court to make an independent assessment of the

³ Information is also confidential for purposes of exemption 4 if “disclosure is likely . . . to impair the Government’s ability to obtain necessary information in the future.” *GC Micro*, 33 F.3d at 1112 (internal quotation omitted). DoD did not argue below, and Sikorsky is not claiming here, that this portion of exemption 4 applies.

[party's] claim" that the information qualifies as confidential. *Lion Raisins*, 354 F.3d at 1079.

In this case, DoD submitted the supplemental declaration of Sikorsky's Amy Johnson to support its contention that redacted information in the Plan qualifies as confidential under exemption 4. The District Court deemed Johnson's supplemental declaration insufficient to show the applicability of exemption 4. ER 30-31. Whether this Court treats the District Court's decision as a factual finding that is reviewed for clear error or as a legal conclusion that is reviewed de novo, it should reverse because, under either standard, Ms. Johnson's supplemental declaration established that the redacted information in the Plan is confidential within the meaning of FOIA exemption 4.

First, Johnson is "knowledgeable about the information sought" by the League in its FOIA request. *Lion Raisins*, 354 F.3d at 1079. Johnson is a high-ranking and long-time Sikorsky procurement officer and was personally responsible for preparing and submitting the Plan. ER 34, ¶¶ 2, 5.

Second, Johnson's supplemental declaration was more than "detailed enough" to show that the redacted information is confidential for purposes of exemption 4. *Lion Raisins*, 354 F.3d at 1079. The declaration described with specificity both the nature of the information in question and how its disclosure likely would cause significant harm to Sikorsky's competitive position.

As to the nature of the information, Johnson explained that the redacted material sets forth “Sikorsky’s operational strategies and methods” for utilization of small business subcontractors. ER 34-35, ¶ 6. Johnson stated that this information encompasses “the company’s make-or-buy process, the types of supplies and services subcontracted by Sikorsky, the techniques of identification and development of potential sources, subcontract proposal evaluation criteria, flow-down of subcontracting requirements,” the particular methods that Sikorsky uses in formulating and achieving its subcontracting goals and deciding which industries to target for small business outreach, and the manner in which the company administers the Plan. *Id.* Johnson further noted that the information describes the challenges that Sikorsky faces in meeting its small business subcontracting goals and “the methods it employs in seeking to overcome those challenges.” ER 37, ¶ 12(D).⁴

This Court in *GC Micro* recognized that this kind of information about a government contractor’s use of subcontractors warrants treatment as confidential under exemption 4. At issue in *GC Micro* was a FOIA request for a prime defense contractor’s “Standard Form 294” that it submitted to the Defense Logistics Agency. 33 F.3d at 1111. Standard Form 294 was a “seminannual report of a [prime] contractor’s progress in implementing its subcontracting plan” for

⁴ Johnson also stated that Sikorsky marked the Plan “proprietary” when submitting it to DoD. ER 35, ¶ 7

achieving goals for the participation of small disadvantaged businesses (“SDBs”) in procurement contracts. *Id.*⁵ Standard Form 294 required prime contractors to report the following numerical data: “(1) the estimated subcontract dollars per contract; (2) SDB subcontracting goals, both by percentage and total dollar amounts; (3) the actual dollars spent by the contractor on SDB subcontracts; and (4) the actual percentage of SDB subcontracts on each contract.” *Id.*

This Court held in *GC Micro* that Standard Form 294’s numerical data was not confidential for purposes of exemption 4 because the figures did not reveal “the object of the contract or subcontracts, the unit prices charged by the subcontractors, and the profit or productivity rates of either the contractor or subcontractors,” and thus “would provide little if any help to competitors attempting to estimate and undercut the contractor’s bids.” 33 F.3d at 1115.

As relevant here, however, this Court in *GC Micro* took pains to distinguish for exemption 4 purposes mere numerical data about a prime contract’s utilization of subcontractors from information regarding “the subject matter of the prime contract or subcontracts, the number of subcontracts, the items or services subcontracted, how the contractor is subcontracting the work, or the

⁵ Standard Form 294 reports also had to be submitted “for each defense contract that a contractor [had] with the United States.” *GC Micro*, 33 F.3d at 1109. The Comprehensive Subcontracting Plan Test Program under which Sikorsky submitted its Plan does not require either semi-annual reports or contract-by-contract reports. It requires just an annual report. ER 27.

subcontractors' locations and identities.” *Id.* at 1114. Such information is markedly different from numerical data, the Court stressed, because it could aid “competitors attempting to estimate and undercut the contractors’ bids.” *Id.* at 1115.

The nature of the information in the Plan regarding Sikorsky’s operational methods and strategies for use of subcontractors that Johnson described in her supplemental declaration fits to a tee the type of subcontracting information that *GC Micro* stated falls within exemption 4.⁶

As to the consequences of disclosure of this information, Johnson stated in her supplemental declaration that the industries in which Sikorsky does business “are intensely competitive.” ER 36, ¶ 11. She explained that release of the information in the context of this intense competition “would cause substantial harm to [Sikorsky’s] competitive position” because “a competitor with similar expertise could readily use the information to determine Sikorsky’s approach to key manufacturing and sourcing decision[s],” ER 35-36, ¶ 8, and “the relative strength and weaknesses of Sikorsky’s proposals and . . . operational and manufacturing strategies that are the product of Sikorsky’s innovation and

⁶ The copy of the Plan that DoD submitted to the District Court contained redactions of numerical data regarding Sikorsky’s small business subcontracting goals and its performance in achieving those goals. Under *GC Micro*, such data is not confidential for purposes of exemption 4. Thus, this information is no longer redacted in the revised copy of the Plan that DoD has submitted to Plaintiff. *See supra* note 2.

substantial effort,” ER 36, ¶ 9. Johnson further stated that, armed with this information, competitors could tailor their own prime contracting proposals and marketing materials to try to gain a leg up on Sikorsky in securing defense contracts. *Id.* While the Plan covers just one year, Johnson stated that the “good visibility into Sikorsky’s approach” that the information provides would enable competitors to “predict” Sikorsky’s approach in future years and adjust their strategies accordingly. *Id.*, ¶ 10; *see also* ER 37, ¶ 11 (“This information provides valuable insight into how Sikorsky continues to strategically plan for and execute its contracts, thereby enabling the competitor to utilize Sikorsky’s proprietary information to improve its own operations and to undercut Sikorsky’s competitive advantage.”). Compounding the threat to Sikorsky’s position, disclosure of the information would give competitors a birds-eye view of how Sikorsky addresses the challenges of satisfying small business subcontracting goals and thus would enable competitors to mimic and/or refine those methods in their own utilization of small business subcontractors. ER 38, ¶¶ 12(D), (G).

The significant harms to Sikorsky’s competitive position that Johnson identified as likely to occur if the redacted information in the Plan is made public are precisely the type of negative consequences that courts long have held likely would befall government contractors if their internal procurement strategies are revealed. *E.g., Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 530

(D.C. Cir. 1979) (discussing harm arising from competitor’s ability to use contractor’s information to anticipate the bids, technical approaches, and other competitive strategies of the contractor); *National Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) (disclosure of information that offered “insights into the operational strengths and weaknesses of a [government] concessioner” likely would cause competitive harm to the concessioner within the meaning of exemption 4).

All told, Johnson’s supplemental declaration laid out concretely and precisely what the redacted information contains and why its disclosure likely would harm Sikorsky’s competitive position. As such, it was adequate -- and then some -- to support the argument that the information redacted in the Plan falls within exemption 4.

The District Court ruled to the contrary for only one reason. It stated that “[a]t best, Johnson concludes in her declaration that the ‘[r]elease of the information . . . *would* cause substantial harm to the company’s competitive position,’ on the basis that a competitor ‘*could*’ use such information to assess the strengths and weaknesses of Sikorsky’s bid proposals to the agency.” ER 31 (quoting ER 35-37, ¶¶ 8–10, 12) (District Court’s emphasis). In the District Court’s view, Johnson’s statements that a competitor “could” use the redacted information to the detriment of Sikorsky did not show that disclosure “would”

have that effect and thus the information does not qualify as confidential under FOIA exemption 4. In short, the District Court's decision rested on a semantic distinction between the words "could" and "would."

The District Court's decision cannot be squared with *Lion Raisins*. That case involved a FOIA request by a raisin handler for information that other raisin handlers in the "highly competitive" raisin industry provided to a federal agency. 354 F.3d at 1077. In moving for summary judgment, the agency submitted a declaration of one of its employees with expertise in the areas of raisin industry marketing and competition. *Id.* at 1079-80. The declarant stated that competitors in the industry "*could*" use the information in question to undercut bids for raisin handling contracts offered by the handlers that had submitted the information. *Id.* at 1077 (emphasis added); *id.* at 1081 ("with knowledge" of the information in question, a competitor "*could* deduce" the operational choices of others in the industry and "*could*" make corresponding price cuts) (emphasis added). This Court held that the declaration was adequate to show that disclosure likely would cause significant harm to the competitive position of those handlers, thus triggering application of exemption 4. *Id.* The Court found no fault with the declarant's use of the word "could" in describing the likely competitive harm arising from disclosure of the information.

In sum, *Lion Raisins* vitiates the District Court’s notion that the confidentiality standards of exemption 4 are not met if a claim of confidentiality is predicated on a declaration that speaks to what a competitor “could” do with the information that is being sought, rather than what the competitor “would” do.⁷

II. THE BUSINESS EMAIL ADDRESSES AND BUSINESS PHONE NUMBERS OF THE SIKORSKY EMPLOYEES IN SIKORSKY’S COMPREHENSIVE SMALL BUSINESS SUBCONTRACTING PLAN ARE SHIELDED FROM DISCLOSURE BY FOIA EXEMPTION 6.

FOIA exemption 6 shields from disclosure “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). In deciding if exemption 6 applies, this Court first determines whether the information that is the subject of the FOIA request is “a personal, medical, or similar file.” *Electronic Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, 639 F.3d 876, 886 (9th Cir. 2010). If it is, then the Court determines whether “release of the information would constitute a clearly unwarranted invasion of personal privacy” -- an inquiry that “balance[s] the individual’s privacy interest against” the public interest in

⁷ *McDonnell Douglas Corp. v. United States Dep’t of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), is in the same vein as *Lion Raisins*. There, the D.C. Circuit held that exemption 4 was applicable based on the statement of an aircraft manufacturer that “disclosure of option prices in [a defense] contract likely will cause it substantial competitive harm . . . because its competitors *will be able to use* that information to underbid it.” *Id.* at 1188 (emphasis added). The manufacturer was not required to show that its competitors would use that information in that way; it was sufficient that they could.

disclosure. *Id.* The public interest is served if disclosure would promote “FOIA’s central purpose of opening agency action to public scrutiny” *Id.* (internal quotation omitted). Applying these standards here, the business email addresses and business phone numbers of Sikorsky employees that are contained in the Plan are shielded from disclosure by exemption 6.

The business email addresses and business phone numbers of Sikorsky employees constitute a “similar” file for purposes of exemption 6. The Supreme Court has held that the term “similar file” is to be given a “broad, rather than a narrow meaning,” and encompasses *all* information that applies to a particular individual, not just intimate details or highly personal information about the individual. *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982); *see Forest Serv. Employees for Env’tl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1024 (9th Cir. 2008); *Wood v. FBI*, 432 F.3d 78, 86-87 (2d Cir. 2005). Under this expansive interpretation, the business email addresses and business phone numbers of the Sikorsky employees qualify as “similar files” because they contain the contact information for particular individuals.

This Court has not definitively held that business emails and business phone numbers are “similar files” within the meaning of exemption 6. But in *Electronic Frontier*, the Court assumed without any hesitation that they are.

Electronic Frontier involved a FOIA request for communications between telecommunications carriers and government agencies regarding the carriers' participation in government surveillance activities. 639 F.3d at 880-81. This Court did not address the "similar file" prong of exemption 6.⁸ But given the broad definition of the term "similar file," perhaps it was not surprising that the Court simply proceeded to the second prong and considered whether disclosure of the email addresses of agents of the telecommunications carriers who communicated with the government would constitute a clearly unwarranted invasion of the agents' personal privacy. *Id.* at 888.

The Court held that it would. *Electronic Frontier*, 639 F.3d at 888. In balancing the agents' individual privacy interests against the public interest in disclosure, the Court stated that whereas it "easily envision[ed] possible privacy invasions resulting from disclosure of the email addresses," it saw "little . . . public benefit" because disclosure of this information would shed no light on the government's conduct and thus not serve FOIA's central purpose of opening government files to public scrutiny. *Id.*; see also *Forest Serv. Employees*, 524 F.3d at 1025 ("[I]nformation about private citizens that is accumulated in various

⁸ The Court stated that it assumed without deciding that the emails themselves from the carriers' agents to the government were "similar files" for exemption 6 purposes. 639 F.3d at 886. The Court did not address whether the agents' email addresses were similar files.

governmental files but that reveals little or nothing about an agency's own conduct is not the type of information to which FOIA permits access.”).⁹

Thus, under *Electronic Frontier*, the interest in maintaining the privacy of the business email addresses of the Sikorsky employees outweighs any public interest in disclosure, and so this information is protected by exemption 6.

The reasoning of *Electronic Frontier* applies equally to the business phone numbers of the Sikorsky employees: disclosure of the numbers would lead to the same possible privacy invasions that this Court in *Electronic Frontier* foresaw would result from disclosure of the email addresses. And, like disclosure of the email addresses, disclosure of the phone numbers would contribute nothing to the public interest.

The District Court ruled that the privacy interests in the business email addresses and business phone numbers of the Sikorsky employees were “trivial” and thus exemption 6 did not shield this information from disclosure. ER 31; *see Prudential Locations LLC v. U.S. Dept. of Housing & Urban Dev.*, 739 F.3d 424, 430 (9th Cir. 2013) (“If only a trivial privacy interest is implicated, then Exemption 6 cannot apply.”). This ruling cannot be reconciled with *Electronic*

⁹ By contrast, the Court in *Electronic Frontier* held that disclosure of the agents' names would “shed light on which companies and which individuals influence government decision making.” 639 F.3d at 888. The Court said, however, that unless the agents' email addresses were “needed to identify the party communicating with the government, [they] were protected from release by Exemption 6.” *Id.*

Frontier's unequivocal recognition that privacy interests in business email addresses are non-trivial and cognizable under exemption 6.¹⁰

Even if the privacy interests in business email addresses and business phone numbers are considered to be relatively “minor,” 639 F.3d at 888, the exemption 6 balancing inquiry still weighs entirely in favor of nondisclosure of this information. If no public interest would be served by its disclosure, the information is protected by exemption 6. As one leading decision put it, “something, even a modest privacy interest, outweighs nothing every time.” *National Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). Thus, exemption 6 shields from disclosure the business email addresses and business phone numbers of the Sikorsky employees.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court’s order requiring disclosure of Sikorsky’s 2013 Comprehensive Small Business Subcontracting Plan to the Plaintiff.

¹⁰ The District Court posited that “the work contact information for several Sikorsky employees listed in the [Plan] is already accessible online.” ER 31. That is simply not the case. The business email addresses and business phone numbers of the Sikorsky employees are not readily accessible online. However, the names of the employees and the positions they hold at Sikorsky are readily accessible on certain websites, such as LinkedIn. Thus, this information is not shielded from disclosure by exemption 6. The names of the Sikorsky employees referenced in the Plan and the positions they hold are no longer redacted in the revised copy of the Plan that DoD has provided to Plaintiff. *See supra* note 2.

Respectfully submitted,

Dated: April 30, 2015

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,725 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point Times New Roman font.

Dated: April 30, 2015

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STATEMENT OF RELATED CASES

American Small Business League v. Department of Defense, Ninth Circuit

Case Number 15-15120, is a related case. That case is the Department of Defense's appeal from the District Court's order requiring disclosure of the Plan.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2015.

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By /s/ Rex S. Heinke
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