No. 15-15120

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN SMALL BUSINESS LEAGUE,

Plaintiff-Appellee,

v.

DEPARTMENT OF DEFENSE,

Defendant-Appellant,

and

SIKORSKY AIRCRAFT CORPORATION,

Intervenor-Defendant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLANT THE DEPARTMENT OF DEFENSE

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INTRODUCTION

This case involves a request by plaintiff, American Small Business League, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking the 2013 Comprehensive Small Business Subcontracting Plan submitted to the Department of Defense by Sikorsky Aircraft Corporation. In addition to providing Sikorsky's subcontracting goals for various categories of small disadvantaged businesses, the plan contains information about Sikorsky's business relationships with specific subcontractors as well as various strategies and operational processes related to its small-business subcontracting program.

In the course of denying both parties' motions for summary judgment, the district court *sua sponte* ordered the government to release the subcontracting plan in its entirety. The court rejected the government's assertion that the redacted portions of the plan contained confidential commercial information protected from disclosure under FOIA exemption 4, 5 U.S.C. § 552(b)(4), and personal employee information protected under FOIA exemption 6, *id.* § 552(b)(6).

The government has provided plaintiff with a new copy of the subcontracting plan disclosing some of the previously redacted

information. This appeal concerns only the redacted material that remains, including the identities of specific subcontractors with whom Sikorsky does business and the specific contracts that they will perform; Sikorsky's methodology for determining its small-business spending allocation and its "make or buy" decision-making process; information relating to Sikorsky's training program and other systems and strategies the company employs to enhance its small-business subcontracting program; and the signatures and business contact information of certain employees identified in the plan.

In ordering release of the redacted information, the district court erred in two respects. First, the court incorrectly concluded that *none* of the redacted material in the subcontracting plan is "confidential" commercial information under FOIA exemption 4. Second, the court erroneously held that employee information redacted under exemption 6 involves only a "trivial privacy interest," and failed to balance the privacy interests of the employees against the public interest in disclosure.

Because the redacted material that remains at issue here is exempt from disclosure, this Court should vacate the district court's

order, and remand with instructions to enter judgment for the government.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under FOIA, 5 U.S.C. § 552(a)(4)(B). On November 23, 2014, the district court ordered that the Department of Defense release the document requested by plaintiff. *See* Government's Excerpts of Record (GER) 13. The government filed a notice of appeal on January 21, 2015. *See* GER 2.[1] This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether FOIA exemption 4, 5 U.S.C. § 552(b)(4), protects from mandatory disclosure certain information in the Comprehensive Small Business Subcontracting Plan submitted to the Department of Defense by Sikorsky, including the identities of subcontractors and details about agreements with them.

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[1] On January 20, 2015, the district court granted a motion by Sikorsky to intervene for purposes of appealing the disclosure order. *See* dkt. no. 48. Sikorsky filed a notice of appeal on January 21, 2015, *see* dkt. no. 51, and its appeal was docketed separately as case number 15-15121.

2. Whether FOIA exemption 6, 5 U.S.C. § 552(b)(6), protects from mandatory disclosure individual employees' business contact information and signatures included in the plan.

STATEMENT OF THE CASE

A. Subcontracting Plans Under the Small Business Act

The Small Business Act mandates that the federal government encourage government contractors to subcontract to "small disadvantaged businesses." *See GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1110–11 (9th Cir. 1994). Defense Department contractors generally must submit a subcontracting plan as part of the bidding process for each project. The agency's Comprehensive Subcontracting Plan Test Program, however, authorizes certain large defense contractors to submit subcontracting plans on a plant-, division-, or company-wide basis. *See Comprehensive Subcontracting Plan Test Program*, U.S. Dep't of Def. Office of Small Business Programs, http://www.acq.osd.mil/osbp/sb/initiatives/subcontracting/ (last visited April 30, 2015). The subcontracting plans allow the agency to monitor compliance with subcontracting goals, and the agency

considers such subcontracting performance in evaluating proposals and awarding contracts.

The content of a subcontracting plan may vary from participant to participant, but a plan generally must include the company's subcontracting goals for various categories of small disadvantaged businesses, both by percentage and total dollar amounts, and a description of the type of supplies or services to be subcontracted. *See* 65 Fed. Reg. 7509, 7510 (Feb. 15, 2000); 48 C.F.R. § 52.219-9(d); *see also GC Micro*, 33 F.3d at 1111. Plans also typically include subcontracting business processes, corporate policy statements, and lists of subcontractors used.

B. Plaintiff's FOIA Request and the District Court Proceedings

In August 2013 plaintiff, American Small Business League, filed a FOIA request with the Defense Department seeking the then-most-recent comprehensive subcontracting plan submitted by Sikorsky Aircraft Corporation under the Defense Department program. GER 45 ¶ 5. The agency notified plaintiff by letter that it was unable to make a release determination within the statutory time period. *Id.* ¶ 6.

Plaintiff subsequently filed suit on May 12, 2014, alleging that the Defense Department was wrongfully withholding requested documents and had failed to comply with FOIA's statutory deadlines. GER 46 ¶ 9. Plaintiff then moved for summary judgment to compel the agency to complete the processing of the FOIA request.

During the course of the proceedings, the agency completed its processing of plaintiff's FOIA request and determined that the only responsive document—Sikorsky's 2013 Comprehensive Small Business Subcontracting Plan—was exempt from disclosure under FOIA exemption 4. Exemption 4 protects "trade secrets and commercial or financial information obtained from a person" that is "privileged or confidential." 5 U.S.C. § 552(b)(4).

The Defense Department moved for summary judgment, arguing that the entire document should be withheld under exemption 4. The agency supported its motion with a declaration from Sikorsky's director of supply management, whose responsibilities include the preparation and submission of the subcontracting plan. *See* GER 38 ¶¶ 2–5. She explained that the subcontracting plan contains information that Sikorsky does not release to the public, that the information is stored on

"secure IT networks that are password protected," and that Sikorsky had "marked the document as proprietary" when it submitted it to the government. GER 39 ¶ 7.

The declarant further explained that the subcontracting plan "consists of Sikorsky's operational strategies and methods," including

- "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";
- "subcontractor proposal evaluation criteria";
- "the company's socio-economic goals used in subcontracting [and] methods for developing such goals";
- "selected industry categories targeted for major outreach initiatives"; and
- "the associated organizational structure and the roles and responsibilities of specific individuals."

GER 38–39 ¶ 6. The declarant stated that, in her professional judgment, release of this information "would cause substantial harm to the company's competitive position." GER 39 ¶ 8.

Specifically, she explained that a knowledgeable competitor could "determine Sikorsky's approach to key manufacturing and sourcing decision[s] that are competitively evaluated as part [of] DoD contract

proposal review," "determine the relative strengths and weaknesses of Sikorsky's proposals," "misappropriate [Sikorsky's] operational and manufacturing strategies," and then use that information "to Sikorsky's detriment when preparing its own proposals or marketing materials" for Defense Department contracts. GER 39 ¶ 8.

The declarant explained that "the aircraft manufacturing, and particularly the helicopter manufacturing, service and supply industries are intensely competitive," with "multiple competitors," many of which "are located outside the United States and are not subject to the DoD Comprehensive Subcontracting Plan Test Program requirements." GER 39–40 ¶ 9. She further stated that disclosing the information in the subcontracting plan would "allow a competitor to better understand how Sikorsky has done business in the past, how it structures its proposals, . . . how it was able to win certain government contracts[,] . . . [and] how Sikorsky continues to strategically plan for and execute its contracts"—which would enable a competitor "to improve its own operations and to undercut Sikorsky's competitive advantage." GER 40.

In response, plaintiff conceded that the requested document "may well contain material which is exempt from disclosure," but argued that

the agency erred in asserting that "the *entire* document . . . is exempt from disclosure." GER 35. Plaintiff thus sought a determination by the Defense Department of "which *portions* of the requested document are exempt," and "the immediate disclosure of the non-exempt portions." GER 36.

At a hearing on the summary-judgment motions, the district court rejected the agency's proposal to submit a *Vaughn* index.[2] *See* GER 27–29. Instead, the court directed the agency to submit the subcontracting plan under seal for *in camera* review, and to submit a declaration explaining why specific information is exempt from disclosure. *See* GER 28–29. The court explained that the material has "got to be more than just confidential." GER 28. "It's got to be like a trade secret, something that qualifies under the statute; and then have a declaration that explains in detail with something other than blather why that should be withheld." *Id.* Congress intended that "small businesses have access to some of these projects," the court asserted, "and here is the United States covering it up." *Id.* The court stated, however, that if "this little exception applies," the court would apply it. *Id.*

[2] *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

The Defense Department provided both redacted and unredacted versions of the subcontracting plan to the district court, along with an updated supplemental declaration from Sikorsky's director of supply management explaining the basis for the redactions, *see* GER 14–20. The agency also provided plaintiff with a redacted copy of the subcontracting plan.

In addition to reiterating that competitors could use the information at issue to undercut Sikorsky's position in a highly competitive industry, the supplemental declaration explained in more detail the nature of the redacted information. As relevant here, the declaration explained that the redacted material included

- "[p]ersonal identifying information of Sikorsky employees, including their names, phone numbers and email addresses";
- "[i]nformation regarding Sikorsky's training program, which . . . distinguishes it from its competitors and likely is a relevant factor in evaluating the strength of [its] bid proposals";
- "[t]he dollar amounts of actual subcontracts awarded";
- "[t]he substantiation of the company's small business goals," which, if disclosed, would reveal "the challenges Sikorsky has in achieving its subcontracting goals";
- "[t]he company's methodology for determining its small business spending allocation," which, if disclosed, would reveal "Sikorsky's purchasing strategies and methodologies";

- the company's "strategies for achieving small business subcontracting goals," which, if disclosed, would reveal the company's "make-vs-buy decision-making processes, supply management processes and other business processes";

- "[s]pecific commodities for which Sikorsky subcontracts and the associated spending goals for each";

- "[t]he identity of specific subcontractors and a description of those relationships, including the specific contracts that subcontractors will perform, the nature of the business relationship between Sikorsky and the subcontractors and the business advantages of those relationships"; and

- "Sikorsky's specific small business subcontracting initiatives" and other strategies the company employs "to enhance its small business subcontracting program."

GER 18–20 ¶ 12.

In addition, the agency asserted exemption 6 as a basis for withholding the names and contact information of Sikorsky employees listed in the subcontracting plan, as well as the signatures of the Sikorsky and government employees who signed the document. 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).

C. The District Court's Decision

The district court denied plaintiff's motion for summary judgment as moot (since the agency had completed processing the request). *See* GER 9. The district court then denied the Defense Department's motion for summary judgment. *See* GER 10–12.

The district court first rejected the agency's claim that certain redacted information was protected under exemption 4. The court held that "the agency has not provided reasonably specific detail to explain why the redacted portions of the lodged document are exempt under Section 552(b)(4)." GER 11–12. Specifically, the court concluded that the agency's submissions did not "adequately show[] how the redacted information is likely to cause substantial competitive injury if disclosed." GER 12 (internal quotation marks omitted). The court reasoned that the declaration, "[a]t best," demonstrates "that a competitor '*could*' use such information to assess the strengths and weaknesses of Sikorsky's bid proposals to the agency," not that the release of the information "'*would* cause substantial harm to the company's competitive position.'" *Id.* And the court concluded that that was "not enough to grant summary judgment for the agency." *Id.*

The district court also rejected the agency's claim that certain information was protected under exemption 6, concluding that "[t]here is no 'clearly unwarranted invasion of personal privacy' that justifies exemption under Section 552(b)(6)." GER 12. The court asserted (apparently on the basis of its own research) that the contact information for several Sikorsky employees listed in the plan "is already accessible online." *Id.*[3] Further asserting that the declaration did not "specify why the employees' work contact information or the government officials' handwritten signatures justify redaction," the court concluded that disclosure implicated only a "trivial privacy interest" and thus that exemption 6 could not apply. *Id.*

Despite the fact that plaintiff had not moved for summary judgment on the merits, the court *sua sponte* ordered the agency to release the subcontracting plan. *See* GER 13. Following a motion by the government, the district court stayed its disclosure order until January 22, 2015, pending the Solicitor General's determination whether to appeal. *See* GER 6.

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[3] Plaintiff asserted only that the contact information of one of the Sikorsky employees identified in the subcontracting plan was available online. *See* GER 23.

Sikorsky filed a motion to intervene for purposes of appealing the disclosure order, *see* dkt. no. 36, and the district court granted the motion on January 20, 2015, *see* dkt. no. 48. The government filed a notice of appeal on January 21, 2015, *see* GER 2, as did Sikorsky, *see* dkt. no. 51. The district court then stayed its disclosure order pending appeal. *See* GER 1.

D. The Information at Issue in This Appeal

The government has provided plaintiff with a new copy of the subcontracting plan disclosing previously redacted information, including Sikorsky's aggregate dollar and percentage small-business goals, publicly available information about certain of the company's subcontracting initiatives, and the names and titles of various Sikorsky employees identified in the plan. This appeal concerns only the following categories of information:

- information relating to Sikorsky's business relationships with specific subcontractors, including the terms and conditions of those relationships and the company's strategic goals for entering into those relationships;
- information relating to the types of commodities purchased through subcontracts and the company's purchasing strategies and methodologies;

- information relating to Sikorsky's methodology for determining its small-business spending allocation and its "make or buy" decision-making process;
- the substantiation of Sikorsky's subcontracting goals, including the challenges Sikorsky faces in achieving those goals;
- information relating to Sikorsky's training program as well as other systems and strategies the company employs to enhance its small-business subcontracting program; and
- the signatures and business contact information of employees identified in the plan.

SUMMARY OF ARGUMENT

In ordering the release of the entire subcontracting plan, the district court erred in two respects. First, the court erred in holding that none of the redacted material in the plan is "confidential" commercial or financial information under FOIA exemption 4. Second, the court erred in concluding that the employee information redacted under exemption 6 involves only a "trivial privacy interest" and in failing to balance the privacy interests of the named employees against the public interest in disclosure.

A. As relevant here, information qualifies as "confidential" for purposes of exemption 4 if disclosure of the information is likely to cause substantial competitive harm to the person from whom the

information was obtained. The Defense Department properly redacted portions of the subcontracting plan that would reveal Sikorsky's business relationships with specific subcontractors and the contracts they will perform; the commodities the company purchases; the company's business methods and processes, including its process for deciding whether to "make" or "buy" items; and strategies the company employs to enhance its small-business subcontracting program. This information would allow a competitor "to improve its own operations and to undercut Sikorsky's competitive advantage." GER 18 ¶ 11.

Moreover, release of the redacted information at issue here, which relates to the internal workings of a private contractor, would contribute little to "public understanding of the operations or activities of the government." *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004) (quoting *U.S. Dep't of Def. v. Federal Labor Relations Auth.* (*FLRA*), 510 U.S. 487, 495 (1994)).

The district court's conclusion that the submitted declarations are insufficient to show a likelihood of substantial competitive harm is flawed. The court did not address the validity of any of the specific redactions. Nor did the court suggest what additional information the

declarations should have included or otherwise explain its reasoning, other than to assert that the declarations' statements that the information "could" be used by competitors is insufficient. But the government need not demonstrate *actual* competitive harm under exemption 4; it must show only actual competition in the relevant market and a likelihood of substantial competitive injury. The government has met that burden.

Even if this Court accepts the district court's general conclusion that the declarations are insufficiently detailed, a remand is warranted. The district court bypassed the traditional method of adjudicating FOIA cases, declining a *Vaughn* index and instead using *in camera* review as a first (rather than last) resort. Remand is particularly appropriate in light of the district court's summary dismissal of the declarations in one paragraph, without explaining the precise nature of the supposed deficiencies in the declarations.

B. The agency also properly redacted, under exemption 6, the business phone numbers and e-mail addresses of Sikorsky employees, as well as the signatures of Sikorsky and government employees. When, as here, "'*some* nontrivial privacy interest' is at stake," a court "must

balance the individual's interest in personal privacy against the public's interest in disclosure." *Prudential Locations LLC v. U.S. Dep't of Hous. & Urban Dev.*, 739 F.3d 424, 430 (9th Cir. 2013) (per curiam) (quoting *FLRA*, 510 U.S. at 501). This Court has recognized such a nontrivial privacy interest in the type of contact information at issue here. Nonetheless, the district court summarily concluded—with no explanation—that the information implicated only a "trivial" privacy interest and thus failed to engage in the required balancing. Indeed, plaintiff did not even assert a public interest in disclosure of the redacted contact information, or in the redacted signatures.

STANDARD OF REVIEW

In reviewing summary judgment in a FOIA case, this Court engages in a two-part inquiry. *See Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1194 (9th Cir. 2011). First, the Court determines "whether the district court had an adequate factual basis for its decision." *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1078 (9th Cir. 2004). If an adequate factual basis exists, the Court reviews "the district court's conclusions of fact . . . for clear error," and reviews its "legal rulings, including its decision that a particular

exemption applies, . . . *de novo*." *Lane v. Dep't of the Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008).

ARGUMENT

THE DISTRICT COURT ERRED IN ORDERING THE RELEASE OF THE ENTIRE SUBCONTRACTING PLAN

A. The District Court Erroneously Concluded That None of the Redacted Material Is Protected Under Exemption 4

FOIA exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); *see also GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994). Information qualifies as "confidential" for the purposes of exemption 4 if disclosure of the information is likely to either (1) impair the government's ability to obtain necessary information in the future; or (2) cause "substantial harm to the competitive position of the person from whom the information was obtained." *Id.*[4] This case involves the

[4] This standard, initially articulated by the D.C. Circuit in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. 1974), is in tension with legislative history suggesting a broader interpretation more in line with the ordinary understanding of the term "confidential" in 5 U.S.C. § 552(b)(4). When Congress enacted exemption 4, it recognized that the exemption would protect commercial

second prong of the standard, since disclosure here would cause substantial competitive harm to Sikorsky.

"While conclusory and generalized allegations of competitive harm are insufficient to show that requested information is 'confidential' . . . , the parties opposing disclosure need not show actual competitive harm." *GC Micro*, 33 F.3d at 1113. "[T]he law does not require [the government] to engage in a sophisticated economic analysis of the substantial competitive harm to its contractors that might result from disclosure." *Id.* at 1115. Rather, the government need only present evidence revealing "(1) actual competition and (2) a likelihood of substantial competitive injury." *Id.* at 1113.[5]

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information such as "business sales statistics, inventories, customer lists," "manufacturing processes," and "technical or financial data" as long as it "would not [have] customarily be[en] made public by the person from whom it was obtained." H.R. Rep. No. 89-1497, at 10 (1966); *see also* S. Rep. No. 89-813, at 9 (1965). Because a panel of this Court cannot overrule circuit precedent, however, the government does not challenge the standard at this stage of the litigation.

[5] Plaintiff did not dispute that there is actual competition in the relevant market. Indeed, the declaration submitted below stated that "the aircraft manufacturing, and particularly the helicopter manufacturing, service and supply industries are intensely competitive," with "multiple competitors," including Bell, Boeing, Agusta Westland, Eurocopter, Lockheed, Northrup-Grumman, Russian Helicopters, DynCorp, BAE Systems, and L3 MAS." GER 17–18 ¶ 11.

1. Here, the Defense Department properly redacted portions of the subcontracting plan that "would provide competitors with a profile of exactly how [Sikorsky] conducts its business with regard to the use of [small disadvantaged businesses] in various types of government contracts." *GC Micro*, 33 F.3d at 1114–15. For instance, the redacted material contains a wealth of information about Sikorsky's business relationships with specific subcontractors, as well as information about specific contracts. It includes the identity of specific subcontractors and contracts, "a description of the work performed," the "value of [the] subcontract[s]" (including the "dollar amounts of actual subcontracts"), and the "[s]pecific commodities for which Sikorsky subcontracts and the associated spending goals for each." *See* GER 19–20; *see also, e.g.*, Subcontracting Plan at 18 (details about a mentor-protégé agreement with a subcontractor); *id.* at 19–21 (charts of specific subcontracts in conjunction with the Small Business Innovative Research/Small Technology Transfer Research Program); *id.* at 15 (spending goals in two specified industry categories).[6]

[6] The unredacted subcontracting plan was submitted to the district court *in camera*. If this Court deems it helpful, the government can provide the plan to the Court for *in camera* review, and can also

It is neither vague nor speculative to conclude that disclosing this information would enable competitors to obtain a competitive advantage. Competitors would know how much it costs Sikorsky to procure certain commodities, where and how it procures them, and what it decides to purchase rather than make itself. That is precisely the sort of information that is protected by exemption 4. *See Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 169–70 (D.D.C. 2004) ("If the [agency] were to disclose the estimated value of potential ventures and the identities of potential corporate partners, the entities contributing this information could face competition that, but for the disclosure, would have never existed."). Courts have recognized, for example, that when a company "has spent years developing a network of available subcontractors . . . [c]ompetitors could be substantially benefitted by gaining access to these subcontractors without needing to expend the same time and resources," *SMS Data Prods. Grp., Inc. v. U.S. Dep't of the Air Force*, No. 88-0481, 1989 WL 201031, at *4 (D.D.C. Mar. 31, 1989), and that "a competitor could use the information [about a company's suppliers] to gain a competitive

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provide the redacted copy that was most recently provided to plaintiff.

advantage by, for example, arrogating another company's exclusive source of supply" or "otherwise disrupt[ing] the operations" of the company, *Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau*, 457 F. Supp. 2d 6, 11, 13 (D.D.C. 2006); *see also Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1196 (9th Cir. 2011) (recognizing a "substantial likelihood of competitive injury to importers . . . who zealously guard their supply chains").

Disclosing specific information about Sikorsky's subcontracts would also reveal the company's "proprietary make-vs-buy decision-making processes, supply management processes and other business processes." GER 20 ¶ 12.J. Indeed, the plan expressly discusses Sikorsky's internal process for determining whether to "make" or "buy," GER 20 ¶ 12.K, as well as the company's "methodology for determining its small business spending allocation," GER 19 ¶ 12.E. Disclosure would reveal "proprietary information about Sikorsky's manufacturing strategies, purchasing strategies [and methodologies,] and future project costs." GER 20 ¶ 12.K; *see also* GER 19 ¶ 12.E. A competitor "could use that information . . . and misappropriate operational and manufacturing strategies that are the product of Sikorsky's innovation

or substantial effort." GER 17 ¶ 9. Courts have recognized such a risk and concluded that information about proprietary business processes may therefore be subject to withholding under exemption 4. *See United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 564 (D.C. Cir. 2010) (recognizing that competitors could use information about company's manufacturing and quality-control processes to improve their own systems and holding that agency failed to provide reasoned basis for its conclusion that disclosure was not likely to cause substantial competitive harm); *Public Citizen v. U.S. Dep't of Health & Human Servs.*, 975 F. Supp. 2d 81, 115 (D.D.C. 2013) (holding that information related to company's legal- and regulatory-compliance processes was protected under exemption 4).

In addition, the plan includes candid discussions of "the challenges Sikorsky has in achieving its subcontracting goals," and the strategies it uses to reach those goals. GER 19 ¶ 12.D; *see also, e.g.*, Subcontracting Plan at 9 ("goal substantiation"). For instance, the plan includes information relating to Sikorsky's training program, as well as other systems and strategies the company employs to enhance its small-

business subcontracting program. GER 18 ¶ 12.B, GER 19 ¶ 12.G; *see also, e.g.*, Subcontracting Plan at 13 ("program enhancements").

In the highly competitive industry in which Sikorsky operates, providing these internal strategies and methods to competitors would put Sikorsky at a competitive disadvantage because this is "the kind of information competitors could use to improve their own systems and capabilities." GER 19 ¶ 12.G. Knowledge of these internal strategies—which "likely [are] a relevant factor" in the government's evaluation of "the strength of Sikorsky's bid proposals," GER 18 ¶ 12.B, would enable Sikorsky's competitors to strengthen their bids against those of Sikorsky. *Cf. New Hampshire Right to Life v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015) (concluding that clinic's operating manual was protected under exemption 4 because a competitor "could take advantage of the institutional knowledge contained in the [m]anual . . . to compete with [the clinic] for patients, grants, or other funding").

This Court's decision in *GC Micro* does not compel release of the information that remains at issue. In that case, the plaintiff sought certain reports, filed by three defense contractors, relating to

compliance with "small disadvantaged business" subcontracting goals. *See GC Micro*, 33 F.3d at 1110–11. This Court held that the government had failed to show that the disclosure of information such as the "estimated subcontract dollars per contract," "[small disadvantaged business] subcontracting goals," the "actual dollars spent by the contractor on [small disadvantaged business] subcontracts," or the "actual percentage of [small disadvantaged business] subcontracts on each contract" was likely to cause substantial competitive harm. *Id.* at 1111, 1114–15. The Court was careful to note, however, that the requested reports did *not* show "a breakdown of how the contractor is subcontracting the work, . . . the subject matter of the prime contract or subcontracts, the number of subcontracts, the items or services subcontracted, or the subcontractors' locations or identities." *Id.* at 1111; *see also id.* at 1114.

The information at issue here is precisely the sort of information that the *GC Micro* court emphasized was *not* at issue in that case. As noted above, the redacted information here includes the subject matter of specific subcontracts, the identity of the subcontractors, and the nature of the work performed. The redacted information also provides

insight into the commodities for which Sikorsky contracts, its process for deciding whether to make or buy items, the methods by which it determines its spending allocation, and the strategies it employs to enhance its small-business subcontracting program.

As Sikorsky's declaration explained, disclosure of the redacted information would create a substantial likelihood of competitive harm because it would "allow a competitor to better understand how Sikorsky has done business in the past, how it structures its proposals, . . . how it was able to win certain government contracts[,] . . . [and] how [it] continues to strategically plan for and execute its contracts." GER 18 ¶ 11. A competitor could "determine the relative strengths and weaknesses of Sikorsky's proposals and misappropriate operational and manufacturing strategies that are the product of Sikorsky's innovation or substantial effort." GER 17 ¶ 9. A competitor could thus "improve its own operations and . . . undercut Sikorsky's competitive advantage." GER 18 ¶ 11.

Moreover, the redacted information here "has little to do with the core purpose of the FOIA, namely, 'contributing significantly to public understanding of the operations or activities of the government.'"

McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182, 1193 (D.C. Cir. 2004) (quoting *U.S. Dep't of Defense v. Federal Labor Relations Auth.* (*FLRA*), 510 U.S. 487, 495 (1994)). Information about Sikorsky's business strategy and the nature of its subcontracts would merely "reveal[] the internal workings of the contractor, not those of the Government, and would seem to shed little if any light upon the 'agency's performance of its statutory duties.'" *Id.* (quoting *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 356 (1997) (per curiam)).

2. The district court's conclusion that the submitted declarations are insufficient to show a likelihood of substantial competitive injury is flawed. The court did not address the validity of any of the specific redactions. Nor did the court suggest what additional information the declarations should have included or otherwise explain its reasoning, other than to assert that the declarations' statements that the information "could" be used by competitors is insufficient. GER 12. But the government need not demonstrate *actual* competitive harm under exemption 4; it must show only actual competition in the relevant market and a likelihood of substantial competitive injury. *See Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004).

And the fact that a competitor "could" use the information is fully consistent with such a showing. *See id.* at 1081 (finding no error in the district court's finding of a likelihood of substantial competitive injury because a party "*could* deduce whether its competitors were producing a high volume of a particular type of raisin" and a party "*could* use information from the [disclosed document] to its advantage by cutting its prices for the types of raisins its competitors pack in large volumes in order to underbid them" (emphasis added)).

Release of the redacted material at issue here would provide important information to Sikorsky's competitors about its business strategy. In these circumstances, "pinpoint precision is not required to inflict substantial competitive harm." *McDonnell Douglas Corp.*, 375 F.3d at 1192–93 (rejecting argument that competitors "can never understand fully or model precisely the 'business judgment and risk assessment' that go into another firm's pricing decisions").

3. Even if one accepts the district court's general conclusion that the declarations are insufficiently detailed, a remand is warranted. The court bypassed the traditional method of adjudicating FOIA cases, rejecting the government's proposal to submit a *Vaughn* index and

instead using *in camera* review as a first (rather than last) resort. *Cf. Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) ("*In camera* review of the withheld documents by the court is not an acceptable substitute for an adequate *Vaughn* index."). And without affording the parties additional briefing,[7] the district court then *sua sponte* ordered disclosure of the subcontracting plan—even though plaintiff had conceded that the plan "may well contain material which is exempt from disclosure," GER 35, and had not moved for summary judgment on the merits. *Cf. Sohappy v. Hodel*, 911 F.2d 1312, 1320 (9th Cir.1990) (noting that "[a] close question is presented whether summary judgment should be entered in favor of the plaintiffs although they filed no such motion" and remanding to afford the defendant an opportunity to present evidence on the issue under consideration). There was no additional briefing or hearing addressing the government's explanations for the redactions. In these circumstances, the district court should

[7] The court permitted plaintiff to file a supplemental brief "on the issue of exemption under Section 552(b)(4)," but that brief was due at the same time as the government's declaration and *in camera* filing. GER 25.

have permitted the government to further explain the basis for its redactions.

A remand is particularly appropriate in light of the district court's summary dismissal of the declarations in one paragraph, without explaining the precise nature of the supposed deficiencies in the declarations. *Cf. Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969) (remanding FOIA case where the court "cannot tell from [the district court's] abbreviated and tangential comments whether its decisional approach was adequately rooted in the legislative policies underlying the exemption").

B. The District Court Erred in Failing to Balance the Privacy Interests of Employees Against the Public Interest in Disclosure

The district court also erred in rejecting the Defense Department's claim that certain employee information was protected under exemption 6. FOIA exemption 6 allows an agency to withhold "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).

"The phrase 'similar files' has a 'broad, rather than a narrow, meaning.'" *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524

F.3d 1021, 1024 (9th Cir. 2008) (quoting *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982)). The Supreme Court and this Court have defined "similar files" to include those records containing "information which applies to a particular individual." *Washington Post*, 456 U.S. at 602; *see also Forest Serv. Emps.*, 524 F.3d at 1024. That definition encompasses the employee information at issue here. *See Forest Serv. Emps.*, 524 F.3d at 1024.

The Defense Department properly redacted the business phone numbers and e-mail addresses of Sikorsky employees, as well as the signatures of the Sikorsky and government employees who signed the subcontracting plan. Production of the redacted information would constitute "a clearly unwarranted invasion of personal privacy."

A "'nontrivial privacy interest' is sufficient to justify the withholding of information under Exemption 6 unless the public interest in disclosure is sufficient to outweigh it." *Forest Serv. Emps.*, 524 F.3d at 1027 (quoting *FLRA*, 510 U.S. at 501). When "'*some* nontrivial privacy interest' is at stake," a court "must balance the individual's interest in personal privacy against the public's interest in disclosure." *Prudential Locations LLC v. U.S. Dep't of Hous. & Urban*

Dev., 739 F.3d 424, 430 (9th Cir. 2013) (per curiam) (quoting *FLRA*, 510 U.S. at 501). "[T]he only relevant public interest in [this] balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *FLRA*, 510 U.S. at 497 (fourth alteration in original) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

The district court erred in holding that the redacted information implicated only a "trivial privacy interest" and in failing to engage in the required balancing. "A broad range of personal privacy interests are cognizable under . . . Exemption 6," and the Supreme Court "has emphatically rejected a 'cramped notion of personal privacy.'" *Prudential Locations*, 739 F.3d at 430. This Court has recognized a nontrivial privacy interest in the type of contact information at issue here. *See Electronic Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 639 F.3d 876, 886–89 (9th Cir. 2010). In *Electronic Frontier Foundation*, the Court recognized a privacy interest in an employee's name and e-mail address, but concluded that the public interest in

obtaining the names of certain corporate lobbyists who lobbied the government on behalf of telecommunications companies seeking immunity for their role in government surveillance activities outweighed the privacy interest in the private individuals' identities. *See id.* The Court concluded, however, that the lobbyists' e-mail addresses, if not needed to identify an individual, were protected from release under exemption 6. *See id.* at 888–89. The Court found no public interest in the e-mail addresses. *See id.* at 888.

Here, the district court summarily concluded—with no explanation—that the employees' business contact information implicated only a "trivial privacy interest." And as a result of that conclusion, the court did not engage in the required balancing. Indeed, plaintiff did not even assert a public interest in disclosure of the redacted contact information, or in the redacted signatures. In arguing that the redacted information was not protected under exemption 6, plaintiff asserted only that the redacted phone number and e-mail address of one of the Sikorsky employees identified in the subcontracting plan was readily accessible online. *See* GER 23.

The district court reasoned that exemption 6 does not apply because "the work contact information for several Sikorsky employees listed in the [plan] is already accessible online." GER 12. But the district court's extra-record observation is incorrect. Although it is not in the record, the government subsequently disclosed previously redacted employee names and titles to the extent investigation revealed that they are readily available online. But the phone numbers and e-mail addresses for these employees are not readily available online, and that information thus remains redacted in the new copy of the subcontracting plan that the government gave plaintiff before filing this brief.

Even assuming that some of the redacted e-mail addresses and phone numbers could be found online, that *alone* is not enough to support the district court's holding that they may not be redacted in the specific context in which they appear in the plan—especially since neither plaintiff nor the district court identified any public interest in disclosure of the contact information. The fact that information may be available diminishes, but does not eliminate, a person's privacy interest. *See, e.g.*, *Reporters Comm.*, 489 U.S. at 763 n.15 (observing that "one

[does] not necessarily forfeit a privacy interest in matters made part of the public record," although the privacy interest is "diminished").

Moreover, information that is technically public may be "practical[ly] obscur[e]." *Reporters Comm.*, 489 U.S. at 762. Thus, even where it is possible to glean some of the information through public sources, courts have permitted the withholding of contact information in the absence of a countervailing public interest. *See, e.g.*, *FLRA*, 510 U.S. at 497–502 (holding that employees' home addresses need not be disclosed to unions because such disclosure did not further FOIA's purpose of open government).

The district court similarly erred in concluding that the signatures of the government and Sikorsky employees who signed the subcontracting plan implicated only a trivial privacy interest. The individuals' signatures are personal, and the release of the signatures could subject the individuals to potential harm from the misappropriation or inappropriate use of their signatures. Plaintiff asserted no public interest in disclosure of the redacted signatures, and it is difficult to imagine how release of the signatures—or any of the redacted contact information—would shed light on the agency's

performance of its statutory duties or "otherwise let citizens know what their government is up to." *FLRA*, 510 U.S. at 497 (internal quotation marks omitted).

CONCLUSION

This Court should vacate the district court's order and remand with instructions to enter judgment for the government.

Respectfully submitted,

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STATEMENT OF RELATED CASES

American Small Business League v. Department of Defense, et al., No. 15-15121, is related to this case. Following the district court's issuance of its order directing the government to release the requested subcontracting plan, Sikorsky Aircraft Corporation filed a motion to intervene for purposes of appealing the disclosure order. The district court granted the motion, and the government and Sikorsky each filed notices of appeal. Sikorsky's appeal was docketed separately as case number 15-15121.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,770 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Karen Schoen
Karen Schoen

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Karen Schoen
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