

matter is 'confidential' for purposes of Exemption 4 if disclosure of the information is likely to have either of the following effects: (1) To impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive process."

Because of the large amount of money LSC distributes and the substantial reliance of many programs on LSC funds for continuation, it is unlikely that the release of the narratives of applicants in response to FOIA requests will impair LSC's ability to receive applications in the future.⁶ Therefore, the next step of the analysis is whether the release of this information would "cause substantial harm to the competitive process."

In the case of *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (1973), the U.S. Court of Appeals for the DC Circuit articulated general examples of situations that might constitute "substantial competitive harm." One such example would be a situation in which information disclosed pursuant to FOIA would be useful to a competitor in devising means to improve its competitive position at the expense of the business whose information was being released.⁷ The court noted that in this circumstance, such disclosure would reveal that business' secrets without providing it with similar access to the books and records of its competitor.⁸ "This competitive disadvantage is fundamentally unfair and would be likely to cause harm to the (business) basic position."⁹ The court went on to state that:

"the likelihood of substantial harm to (the applicant's) competitive positions * * * (is) virtually axiomatic * * * (where) disclosure would provide competitors with valuable insights into the operational strengths and weaknesses of (an applicant), while the (competitors) could continue in the

customary manner of 'playing their cards close to their chest.'"¹⁰

Because LSC only intends to release information provided in the narrative of the applications after grants have been awarded for a given application period, LSC does not believe the release will cause "substantial competitive harm" to applicants as defined above in most cases.

Although federal courts have identified the disclosure of various types of documents to constitute "substantial competitive harm," the LSC application narratives which LSC proposes to release do not reach the level of detail and specificity of the kinds of documents for which release has been held to constitute this harm. The documents which have been identified by courts as properly cognizable under the competitive harm prong of the National Parks test include: Detailed financial information such as an organization's assets, liabilities, and net worth; a company's actual costs, break-even calculations, profits and profit rates; data describing an organization's workforce which would reveal labor expenses, profit margins and competitive vulnerability; a company's selling prices, purchase activity and freight charges; a company's purchase records, including prices paid for advertising; technical and commercial data; information constituting the "bread and butter" of a manufacturing company; currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information; raw research data used to support a pharmaceutical drug's safety and effectiveness information regarding an unapproved application to market the drug in a different manner, and sales and distribution data of a drug manufacturer; and technical proposals which are submitted, or could be used, in conjunction with offers on government contracts.¹¹

Based on the foregoing analysis, LSC no longer considers it appropriate under FOIA to routinely withhold the information contained in the Proposal Narrative or Application Narrative of LSC competitive grant applications once the grant decisions for a given application period have been made. While, as noted above, LSC will continue to review each request for such documents on a case by case basis and will continue to provide persons and

organizations whose applications have been requested the opportunity to seek protection from disclosure some or all of the documents requested, LSC anticipates that it will release this information in most cases.

LSC reserves the right to further amend this policy in the future, as appropriate.

Victor M. Fortuno,

General Counsel and Vice President for Legal Affairs.

[FR Doc. 03-18545 Filed 7-21-03; 8:45 am]

BILLING CODE 7050-01-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 03-081]

National Environmental Policy Act; Mars Exploration Program

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of intent to conduct scoping and to prepare a Tier 1 environmental impact statement for the Mars Exploration Program.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500-1508), and NASA's policy and procedures (14 CFR part 1216, subpart 1216.3), NASA intends to conduct scoping and to prepare a Tier 1 Environmental Impact Statement (EIS) for the Mars Exploration Program (MEP). NASA proposes a coordinated MEP that would use robotic orbital, surface, and atmospheric missions to gather scientific data on the Martian environment and that would continue planning for a potential return of Martian surface samples to Earth. Included in the program would be U.S. missions, which may or may not include foreign participation, and foreign missions with U.S. participation. The proposed MEP would include missions where the use of radioisotope heater units and radioisotope power systems are contemplated. One or more of the MEP missions may propose returning samples from the surface of Mars or its atmosphere.

The MEP would be a science-driven, technology-enabled effort to characterize and understand Mars, including its environment, climate and geological history, and biological potential. Utilizing an exploration strategy generally known as "Follow the Water", scientific and engineering

⁶ Courts have generally given substantial deference to agency determinations about whether such disclosures would impair the relevant agency's ability to receive applications in the future, noting that (1) Agencies have an incentive not to release information which will impair their ability to receive future applications, and (2) government contracting involves millions of dollars and the release of application information is unlikely to dissuade all potential applicants. See e.g. *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 39-40 (D.D.C. 1997); *McDonnell Douglas Corp. v. NASA*, 981 F. Supp. 12, 15 (1997); *C.C. Distributors v. Kinzinger*, 1995 WL 405445, *4 (D.D.C. 1995); *McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 319 (1995); and *Racal-Milgo Gov't Systems, Inc. v. Small Business Admin.*, 559 F. Supp. 4, 6 (D.D.C. 1981).

⁷ *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 678, note 18 (1973).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at page 684.

¹¹ Freedom of Information Act Guide & Privacy Act Overview, U.S. Department of Justice Office of Information and Privacy, May 2000 Edition, pages 208-09.