



return information” under 26 U.S.C. § 6103(a) and were therefore exempt from disclosure under Exemption 3. LGPO also contended that “information related to an applicant’s tax account or any other tax information is confidential and if released could cause a substantial competitive harm to an applicant” and therefore is exempt from disclosure under Exemption 4. Determination Letter at 2. LGPO neither assessed the Appellant with search, review, and duplication fees, nor granted it a fee waiver.

In its Appeal, the Appellant contends that the responsive documents should be released to it, because “It appears from the DOE’s response that it misunderstands our request. Since the documents and information we seek constitute neither § 6103 “return information” nor information “related to an applicant’s tax account,” we respectfully appeal DOE’s denial of our request.” Appeal at 2.

## II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9<sup>th</sup> Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency’s burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). “An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” *Lewis v. IRS*, 823 F.2d 375, 378 (9<sup>th</sup> Cir. 1987). Only Exemptions 3 and 4 are at issue in the present case.

### A. Exemption 3

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). It is well settled that 26 U.S.C. § 6103 meets these criteria. *Tax Analysts*

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*Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)(*Kleppe*). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office’s review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992). Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at <http://www.oha.doe.gov/search.htm>.

*v. Internal Revenue Serv.*, 410 F.3d 715, 717 (D.C. Cir. 2005).

Federal law generally prohibits the disclosure of “return information.” 26 U.S.C. § 6103, *et seq.* 26 U.S.C. § 6103(a) states in pertinent part: “Returns and return information shall be confidential, and . . . no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise . . .” 26 U.S.C. § 6103(b) further defines return information as:

[A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, *deficiencies*, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense ... ”

26 U.S.C. § 6103(b) (emphasis supplied). Accordingly, an agency may invoke Exemption 3 to withhold information that is confidential under 26 U.S.C. § 6103(a). Therefore, the LGPO properly invoked Exemption 3 to withhold any information that would reveal a loan applicant’s tax return information if released. We have conducted an *in camera* review of the documents identified as responsive by the LGPO and find that small portions of these documents contain information that, if released, would reveal loan applicants’ return information.

#### **B. Exemption 4**

Exemption 4 exempts from mandatory public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is “commercial” or “financial,” “obtained from a person,” and “privileged or confidential.” *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is “privileged or confidential.”<sup>2</sup>

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<sup>2</sup> In the present case, LGPO does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879. In the present case, LGPO did not indicate whether the information it withheld was voluntarily submitted. The only basis supplied by LGPO for its withholding of the Application under Exemption 4 was its conclusory finding that release of the withheld information would cause substantial harm to loan applicants' competitive positions.

It is well settled that if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Larson Associated, Inc.*, Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, LGPO merely parroted the language of the FOIA statute by stating, in conclusory fashion, that disclosure of the redacted information would result in substantial competitive harm. Determination Letter at 2. Such a statement does not provide a sufficient basis for a determination withholding information under Exemption 4. *See e.g. Environmental Defense Institute*, Case No. TFA-0289 (2009) (remanding matter for a new determination explaining how Exemption 4 applies to withheld material). If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999).

Therefore, we are remanding this portion of the Appeal to LGPO. On remand, LGPO should either release the information it has redacted from the responsive documents solely under Exemption 4, or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would be likely to result in substantial competitive harm.

### **C. Duty To Segregate**

The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). LGPO withheld the responsive documents in their entirety as tax return information. Our *in camera* review revealed that LGPO, by redacting the very small portion of each of these documents which identifies the loan applicant, could have released almost all of the withheld information without revealing any of the loan applicant’s return information. Accordingly, we find that LGPO failed to comply with the FOIA’s mandate that it release any reasonably segregable portions of the responsive document. On remand, LGPO should redact only identifying information from each responsive document, and then release the remaining portions of each responsive document or issue a new determination letter withholding such information under a different exemption.

### III. CONCLUSION

We are remanding this matter to LGPO for further processing in accordance with the instructions set forth above. Accordingly, Cause of Action’s Appeal will be granted in part and denied in part. LGPO should also rule upon Cause of Action’s request for a fee waiver before assessing it any search, duplication or processing fees.

It Is Therefore Ordered That:

- (1) The Appeal filed by Cause of Action on September 10, 2012, Case No. FIA-12-0050, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) The Loan Guarantee Program Office shall issue a new determination either releasing the responsive documents discussed above, after redacting any identifying information pursuant to Exemption 3 of the Freedom of Information Act, or withholding that information under another appropriately justified exemption.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

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