

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of California-Arizona-Nevada)	
District Organization Contract)	
Compliance)	Case Nos. FIA-12-0004
)	FIA-12-0005
Filing Date: February 2, 2012)	
_____)	

Issued: March 23, 2012

Decision and Order

On February 2, 2012, California-Arizona-Nevada District Organization Contract Compliance (CANDO) filed appeals from two final determinations issued by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE). In those determinations, LGPO responded to requests for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. LGPO released substantial amounts of information responsive to each of the requests, but withheld responsive information under FOIA Exemption 4. This Appeal, if granted, would require LGPO to release to CANDO some of the information it withheld previously.

I. BACKGROUND

CANDO filed requests for information with LGPO seeking copies of ten specified documents related to loan guarantee contracts for the Agua Caliente and Gila Bend Solar Energy Projects. On October 31, and November 8, 2011, LGPO issued determination letters releasing copies of the documents CANDO requested regarding the Agua Caliente and Gila Bend projects, respectively. In both instances, however, LGPO withheld portions of the responsive documents under Exemption 4. On February 2, 2012, CANDO filed the present appeals contending that LGPO had improperly applied Exemption 4 to withhold the names and other identifying information concerning contractors and sub-contractors listed in those documents. We have assigned Case No. FIA-12-0004 to CANDO's appeal regarding the Gila Bend documents and Case No. FIA-12-0005 to its appeal regarding the Agua Caliente documents.

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 (9th 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 (9th Cir. 1987). Only Exemption 4 is at issue in the present case.

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."

In its determination letter, LGPO contended that the information it withheld from CANDO is confidential rather than privileged. 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 correctly concluded that the requested documents had been involuntarily submitted.

In responding to FOIA requests, an agency has an obligation to ensure that its determination letters adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the documents at issue. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Environmental Defense Institute*, Case No. TFA-0289 (2009).¹ Accordingly, if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. 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).

¹ OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

Moreover, 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 stated in its determination letters, which are virtually identical in content, that the information it redacted from the responsive documents "includes project cost, financing plans and business strategies, procurements plans, and marketing plans and analysis." It then specified the competitive harm that the disclosure of each of those categories of information would cause to the submitter of the information. LGPO did not specify that it had withheld the names and other information that identified contractors and sub-contractors in these documents. Nor did it offer any reasonably specific justification for withholding such information. Of the categories of withheld information it identified in its determination letters, "business strategies" and "procurement plans" are the only categories within which contractor and sub-contractor information might possibly fall. In its determination letters, LGPO provided no specific explanation of the competitive harm that disclosure of business strategies might cause, and stated that disclosure of procurement plans "would enable the applicant's power vendors to compete unfairly towards providing future goods and services to the applicant, in addition to allowing vendors unlicensed use of the applicant's original work product."

LGPO's determination letter regarding CANDO's request for the Gila Bend documents lacks the specificity required of an agency FOIA determination in two respects. First, it does not specify that names and other identifying information regarding contractors and sub-contractors have been withheld. Although such information might possibly fall within one of the broad withholding categories LGPO listed in its determination letter, even the informed requester would be hard pressed to reach this conclusion. LGPO's failure to identify with specificity the redacted information impedes the requester's ability to understand what information has been redacted from a document.² Moreover, the same lack of specificity does not permit a sufficient justification for 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). Because it did not specifically address how the disclosure of names and other information that identifies contractors and sub-contractors is likely to cause substantial competitive harm, it has not met its burden of justifying the withholding of that material. Accordingly, we are remanding to LGPO CANDO's appeal regarding the Gila Bend documents. On remand, LGPO should either release the names and other information identifying contractors and sub-contractors that it redacted from the documents it provided to CANDO or issue a new

² CANDO's appeals illustrate its inability to formulate a cohesive challenge to LGPO's determinations. Although CANDO appealed the withholding of contractor and sub-contractor information from both the Agua Caliente and Gila Bend documents, LGPO withheld that information from only the Gila Bend documents, as stated below.

determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would result in competitive harm.

With respect to the Agua Caliente documents, however, we reach a different result. LGPO has informed us that no names or other information that identifies contractors or sub-contractors was withheld, as no such information appears in those documents. Memorandum of Telephone Conversation between Janelle Jordan, LGPO, and William M. Schwartz, OHA (March 19, 2012). As a result, the challenge CANDO raises in its appeal of LGPO's determination regarding those documents lacks a factual basis and will be denied.

III. CONCLUSION

Our review of the contractor and sub-contractor information that LGPO withheld under Exemption 4 has revealed that LGPO failed to adequately describe some of the information it was withholding under Exemption 4 and failed to adequately justify its determination that release of that information would likely result in competitive harm to its submitter. Accordingly, we are remanding this matter to LGPO for further processing in accordance with the instructions set forth above.

It Is Therefore Ordered That:

(1) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance, Case No. FIA-12-0004, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.

(2) The Appeal in Case No. FIA-12-0004 is hereby remanded to the Loan Guarantee Program Office for further processing in accordance with the instructions set forth above.

(3) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance, Case No. FIA-12-0005, is hereby denied.

(4) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: March 23, 2012