United States Department of Energy
Office of Hearings and Appeals

In the Matter of La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee	)	
Filing Date: December 2, 2011	)	Case No.: FIA-11-0016

Issued: January 3, 2012

Decision and Order

On December 2, 2011, the La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee ("La Cuna") filed an appeal from determinations issued to it on September 15, 2011, and November 28, 2011, by the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO). In each determination, LGPO responded to a request for documents that La Cuna submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In response to the La Cuna's FOIA request, LGPO identified and released a number of responsive documents, but withheld portions of the documents pursuant to FOIA Exemption 4. This appeal, if granted, would require LGPO to release the withheld information to La Cuna.

I. BACKGROUND

On April 13, 2011, La Cuna filed a FOIA request for information pertaining to any DOE loan guarantee to BrightSource Energy, Inc. (BrightSource), in connection with the Ivanpah Solar Energy Generating System (Ivanpah), including any loan guarantee application from BrightSource, and any documents supporting a loan guarantee to BrightSource. *See* Letter from Mekaela M. Gladden, Briggs Law Corporation, to FOIA Officer, DOE (April 13, 2011).

In partial responses issued on September 15, 2011, and November 28, 2011, LGPO released six documents from which information was withheld pursuant to Exemption 4 of the FOIA. These six documents are (1) BrightSource's November 2008 Loan Guarantee Application; (2) an appendix to the application containing a detailed technical description of the projects for which it sought a loan guarantee; (3) an appendix to the application containing proposed terms of the loan guarantee; and (4) three documents dated January 29, 2010, in each of which the DOE "outlines the principal indicative terms and conditions" for a "potential" loan guarantee to BrightSource

related to three separate solar thermal electric generating plants. The latter three documents each bear the signature of the Chief Executive Officer of BrightSource, indicating acceptance of the terms contained therein. *See* Letter from David G. Frantz, Director, LGPO, to Mekaela M. Gladden, Briggs Law Corporation (September 15, 2011) (September Determination); Letter from David G. Frantz, Director, LGPO, to Mekaela M. Gladden, Briggs Law Corporation (November 28, 2011) (November Determination).

As grounds for its Appeal, La Cuna cites the lack of a final response from LGPO and contends that, having received "only six documents" responsive to the request, "an excessive amount of time has lapsed without a complete response." Appeal at 2. La Cuna also objects to the fact that the documents released have been "heavily redacted." *Id.* It notes that many of the topics of information withheld from the documents were discussed in a press release issued by BrightSource, a copy of which the La Cuna provided with its appeal. *Id.* La Cuna argues that the fact that information is of a type discussed in a press release "weighs against a determination that such information is confidential and proprietary, ..." *Id.*

After our receipt of the present Appeal, LGPO provided for our review unredacted versions of each of the documents at issue in this matter, as well as the redacted documents that were released to La Cuna.

II. ANALYSIS

Where the DOE decides to withhold information in response to a FOIA request, 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. These requirements aid the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Russ Choma*, Case No. TFA-0495 (2011).

In the present case, LGPO clearly identified FOIA Exemption 4 as its basis for withholding information, and therefore its determinations met the second requirement above. With regard to the other two requirements, *i.e.*, whether LGPO adequately identified the information it withheld from the Appellant and whether it adequately justified its withholdings, we find below that LGPO's determinations were adequate in certain respects, but not in others. As a result we will remand this matter to LGPO for a new determination.

A. Whether LGPO Adequately Identified the Information It Withheld

In applying Exemption 4 to the information withheld in its September and November determinations, LGPO identified the withheld information as "sensitive commercial information that is maintained in confidence by [Bright Source] and not available in public sources," including "financing plans, business strategies, and procurement plans." *See* September Determination at 1-2; November Determination at 1-2. Having reviewed the information that was withheld from the documents at issue, we find that LGPO's determination provided a reasonable description of much of the information withheld. There is, however, other information withheld from the Appellant to which the identified categories do not readily apply.

For example, nearly all of the information withheld from one of the six documents, an appendix to BrightSource's application, consists of design specifications used in BrightSource's "LPT technology," which uses mirrors to reflect and capture solar energy. In response to our query as to which of the identified categories of withheld information these design specifications belonged, LGPO stated that "they are detailed technical descriptions of project technology that contain trade secrets and information that would give a competitor insights into how BrightSource designs its products. It seems such information could fall in either the 'business strategy' or 'procurement plans' category." Email from LGPO to Steven Goering, OHA (December 20, 2011).

We disagree, and cannot find that any of these terms, "financing plans," "business strategies," or "procurement plans," reasonably describes the design specifications withheld from the appellant. LGPO explained that this "exact language is used in every response letter that describes information withheld under" Exemption 4. *Id.* However, because a variety of types of information can be withheld under Exemption 4, it is simply not sufficient to apply the same descriptor to information withheld in every case. Instead, the description contained in a determination must accurately reflect the *actual information* being withheld in that particular case.

This does not mean that the descriptions used must necessarily be more specific than those used in LGPO's determinations, but the information being withheld must at least reasonably fall into one of the categories of information listed in the determination.[1] In the present case, LGPO's description in its response to our office, "detailed technical descriptions of project technology," would have sufficed, had it been used in the November determination. On remand, LGPO should review the information it has redacted from the documents it has released and provide, in its new determination, an accurate accounting of the types of information being withheld.

B. Whether LGPO Adequately Justified the Information It Withheld

Exemption 4 exempts from mandatory 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); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in

[1] Conversely, this issue cannot be addressed by merely providing, in every determination, the same exhaustive list of categories of information, unless all the categories listed apply to the actual information being withheld. As with a determination that too narrowly describes information being withheld, an overbroad description would not accurately reflect the information being withheld in a given case.

the future or to 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.

1. Whether the Information Withheld was Commercial or Financial Information

Under Exemption 4, the first requirement is that the withheld information be "commercial or financial."[2] Here, we find that requirement is met, as information contained in a loan guarantee application, as well the proposed or accepted terms of a loan guarantee, are, by their very nature, commercial or financial.

2. Whether the Information Withheld was Obtained from a Person

The second requirement is that the information be "obtained from a person." It is well-established that "person" refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. VFA-0591 (2000). BrightSource, a corporation, satisfies this definition of "person."

It is not as certain, however, that all of the withheld information at issue was "obtained from" BrightSource. Three of the documents at issue, BrightSource's loan guarantee application and two of its appendices, were submitted by BrightSource, and therefore the information contained in those documents was clearly obtained by the DOE from BrightSource. On the other hand, the other three documents, containing terms and conditions of a potential loan guarantee, originated from DOE, appear on DOE letterhead, and are addressed *to* BrightSource. We raised this issue with LGPO, which responded that it "is difficult to determine which exact terms were submitted by whom because presumably all of the terms within the term sheet were arrived at through negotiation and thus neither 'submitted by BrightSource' nor 'submitted by DOE.'" Email from LGPO to Steven Goering, OHA (December 20, 2011).

The federal courts have held that the fact that particular information was the subject of negotiation with the federal government does not necessarily preclude a finding that it was "obtained from a person" within the meaning of Exemption 4. Rather, the courts have looked to the identity of the party from whom the information originated. *See, e.g., Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) (concluding that although a licensee's final royalty rate was the result of negotiation with the government, that did not alter the fact that the licensee is the ultimate source of the information inasmuch as the licensee had to provide the information in the first instance); *In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-103 (D.D.C. 2008) (concluding that incentive award payments negotiated by the parties were not "obtained from a person," because the agency failed to demonstrate that the contractor was the source of the information, and not the agency). Similarly, we have previously held that portions of agreements between the

[2] Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

DOE and non-federal entities may be considered to have been "obtained from a person" when the non-federal entity was the source of the information. *See, e.g., Research Focus, L.L.C.,* Case No. TFA-0247 (2008); *William E. Logan, Jr. & Associates*, Case No. VFA-0484 (1999).

Thus, we have found in a prior case that information withheld from similar documents was "obtained from a person," where "LGPO informed us that although the provisions in question were the subject of negotiations between the DOE and the three utilities, the utilities were the source of the information that was withheld." *SACE*, Case No. TFA-0442 (2011). In the present case, however, LGPO's response indicates that it has not determined whether BrightSource was the source of the information withheld from the documents at issue. On remand, if is it to continue to withhold information from these three documents, LGPO must make an affirmative finding that BrightSource was the source of the information being withheld, and therefore the information was "obtained from a person," as required under Exemption 4.

3. Whether the Information Withheld was Confidential

In order to be exempt from disclosure under Exemption 4, the information must also be "confidential." As noted above, whether information is considered "confidential" turns in part on whether the information was voluntarily submitted. Though the act of responding to a government solicitation is clearly voluntary, the federal courts have found that information required to be provided in response to such a solicitation is involuntarily submitted. *See, e.g., Mallinckrodt v. West*, 140 F. Supp. 2d 1, 5 (D.D.C. 2000) (where agency solicitation "distinguished 'added value items' from other information by not including them within the category of information that 'must' be included," only that information required to be included was submitted involuntarily).

In this case, BrightSource was required to submit the information in question as part of its participation in the agency's loan application process. 10 C.F.R. § 609.6 ("In response to a solicitation or written invitation to submit an Application, an Applicant submitting an Application must meet all requirements and provide all information specified in the solicitation and/or invitation and this part."). Accordingly, we find that the withheld information was "involuntarily submitted" and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met to find the information withheld to be confidential.

Under *National Parks*, involuntarily submitted information is considered confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. Because the application process for the project required that the information be submitted, it is questionable that release of the information would impair DOE's ability to obtain similar information in the future. The question, then, turns to whether release of the information would likely result in substantial competitive harm to the submitters of the information.

LGPO stated in its determinations that it withheld information under FOIA Exemption 4 because its release would cause substantial harm to Bright Source's competitive interests. Specifically, according to LGPO, disclosing financing information and strategies "would provide an unfair

advantage to competitors by enabling competing power suppliers to estimate supply costs and use this information to bid against [Bright Source]." Disclosure of procurement plans "would enable the applicant's power vendors to compete unfairly towards providing future goods and services to [Bright Source], in addition to allowing vendors unlicensed use of [Bright Source's] original work product." Finally, public disclosure of financing information "would enable potential customers to exert undue leverage with regards to purchasing [Bright Source's] product." *See* September Determination at 2; November Determination at 2.

Having reviewed the information withheld in this case, we agree with LGPO that the documents in question contain information that, if released, would likely cause substantial competitive harm to BrightSource, including proprietary technical information, cost data, business plans, and risk assessments. We cannot make this finding, however, with respect to all of the information withheld from the Appellant.

First, some of the information withheld by LGPO is readily available in public sources, and therefore cannot be considered "confidential" under Exemption 4. For example, LGPO withheld the Federal Tax Identification Numbers of both BrightSource and Morgan Stanley BrightSource LLC, information that can be found on public websites, such as that of the U.S. Securities and Exchange Commission. We brought this to the attention of LGPO, and they have agreed that this and other information withheld that is publicly available should be released. On remand, LGPO must release all such information.[3]

Second, there is information that was withheld by LGPO that, while not identical to that information made publicly available, is of a similar nature. In this regard, as we note above, the Appellant submitted with its appeal a copy of a press release issued by BrightSource on February 22, 2010 (Press Release), and argued that certain categories of information withheld by LGPO were topics of the press release.

LGPO points out that, while the subject matter of some of the information withheld is the same as some of the information in the press release, the information withheld contains specific data that is not included in the press release. Email from LGPO to Steven Goering, OHA (December 20, 2011). We agree with LGPO that such information should not automatically be considered non-confidential, unlike publicly available information. Nonetheless, the fact that similar information appears in a press release issued by the company should be taken into account in determining whether release of the information withheld would in fact likely cause substantial competitive harm to BrightSource.

Thus, for example, the press release states that, by using "dry-cooling," the Ivanpah project "will use only 100 acre feet of water per year, . . . 25 times less water than competing solar thermal technologies that use wet-cooling." Press Release at 4. Information withheld from Appendix B

[3] This includes previously withheld information that identifies BrightSource's patent filings, which are public and available at the web site of the U.S. Patent Office, as well as any information withheld that is also contained in those public filings. In addition, LGPO must release publicly available information that was withheld regarding the approval process for transmission access to the Ivanpah site, any clauses in Power Purchasing Agreements that are required by law to be included in all PPAs, and information that generically describes the roles and duties of governmental agencies. We pointed out specific examples of information that appears to be publicly available in an email to LGPO. Email from Steven Goering, OHA, to LGPO (December 19, 2011).

of BrightSource's loan guarantee quantifies the amount of water required by dry-cooling and that required by wet-cooling, but uses different units of measurement. As such, while the information is not the same, both the withheld information and the press release quantify the amount of water to be used by the project and the amount that would be used by wet-cooling. On remand, LGPO should consider, in light of the information contained in the press release, whether the release of similar information that was withheld would likely cause Bright Source substantial competitive harm.

Finally, there is information that LGPO withheld from the Appellant that may in fact be confidential, but it is not apparent how the release of the information would likely cause substantial competitive harm to BrightSource. For example, from a section of its application discussing the meteorological considerations of siting a solar plant, LGPO withheld a quantification of the average amount of solar energy available to "[g]ood" solar energy sites. As this does not, on its face, appear to be data that are particular to BrightSource or obtained through some proprietary methodology, it is hard to understand how its release would likely cause substantial competitive harm to BrightSource. In response to our query, LGPO stated that it was awaiting a response from BrightSource regarding this particular information. On remand, LGPO can take into account any information or arguments by BrightSource before making an independent determination as to whether this information should be withheld under Exemption 4.

We also asked LGPO about particular clauses withheld from the documents containing terms and conditions of a potential loan guarantee, three of the documents at issue that are discussed above in Section II.B.2 of this decision. Email from Steven Goering, OHA, to LGPO (December 19, 2012). LGPO stated that BrightSource requested confidential treatment of this information, and indicated that the company was able to justify "the withholding of the information by describing the harm that would occur if the information were released." Email from LGPO to Steven Goering, OHA (December 20, 2011). If LGPO intends to continue to withhold this information, it should explain, in its new determination, how any of the specific harms to BrightSource's competitive interests cited in LGPO's determination letter would result from the release of the information in question.

III. CONCLUSION

For the reasons set forth above, we are remanding this matter to LGPO for a new determination regarding its withholdings under FOIA Exemption 4. With respect to the fact that LGPO has not yet issued a final response to La Cuna's request, the DOE's regulations that implement the FOIA do not permit OHA to consider an appeal under these circumstances. 10 C.F.R. § 1004.8(a) (OHA may consider appeals when a DOE office "has denied a request for records in whole or in part or has responded that are no documents responsive to the request" or when an office "has denied a request for waiver of fees.") Accordingly, this portion of La Cuna's Appeal will be dismissed as not ripe for a determination.

It Is Therefore Ordered That:

(1) The Appeal filed on December 2, 2011, by the La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee, OHA Case No. FIA-11-0016, is hereby granted in part, as set forth in Paragraph (2) below, and dismissed in part, as set forth in Paragraph (3) below.

(2) This matter is hereby remanded to the Department of Energy's Loan Guarantee Program Office which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) That portion of the present Appeal relating to the lack of a final response to the Appellant's request is hereby dismissed.

(4) 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.

Poli A. Marmolejos
Director
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Date: January 3, 2012