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

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| In the Matter of Southern Alliance for Clean Energy | ) | |
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| Filing Date: November 16, 2012 | ) | Case No.: FIA-12-0072 |
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Issued: December 14, 2012

## Decision and Order

On November 16, 2012, the Southern Alliance for Clean Energy ("SACE" or Appellant) filed an Appeal from a determination issued to it on October 23, 2012, by the Department of Energy's (DOE) Loan Guarantee Program Office (LGPO). In its determination, the LGPO responded to a request for documents that SACE 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. This Appeal, if granted, would require the LGPO to release the information it withheld pursuant to FOIA Exemption 4 and to conduct another search for responsive documents.

## I. BACKGROUND

On April 27, 2012, SACE filed a FOIA request for information "related to DOE's conditional commitment to provide Georgia Power Company [GPC], Municipal Electric Authority of Georgia [MEAG], and Oglethorpe Power Corporation [OPC] (collectively, the 'Applicants') loan guarantees for the Vogtle Electric Generating Plant in Burke County, Georgia." *See* Letter from Mindy Goldstein, Turner Environmental Law Clinic, to FOIA Officer, DOE (Apr. 27, 2012). On May 4, 2012, the Appellant narrowed its request to:

> Records related to GPC, OPC and MEAG (collectively, "the applicants"), created after the terms sheets were issued that reflect:
>
> 1) DOE has offered new terms and/or conditions to the Vogtle companies (GPC, OPC, and MEAG).
>
> 2) DOE has offered a new credit subsidy fee estimate.

*See* Email from Benjamin Rashbaum, LGPO, to Mindy Goldstein, Turner Environmental Law Clinic (May 4. 2012); *see also* Letter from David Frantz, LGPO, to Mindy Goldstein, Turner Environmental Law Clinic (Sept. 18, 2012) (Initial Response Letter).

On September 18, 2012, the LGPO issued an initial response to SACE's request, providing three Conditional Commitment Letter Termination Date Extension Letters and a Conditional Commitment Term Sheet Expiration Letter. *See* Initial Response Letter. On October 23, 2012, the LGPO issued a final response to SACE's request. *See* Letter from David G. Frantz, LGPO, to Mindy Goldstein, Turner Environmental Law Clinic (Oct. 23, 2012) (Final Response Letter). In its Final Response Letter, the LGPO stated that it was only responding to Part 1 of the request as it could not locate documents responsive to Part 2. *Id.* at 2. The LGPO provided the DOE's Open Issues List for the GPC and a draft version of the Loan Guarantee Agreement (LGA) between the GPC and the DOE with information redacted from both documents. *Id.* at 1-2. In support of its redactions, the LGPO informed the Appellant that the portions it withheld consisted of sensitive commercial information concerning the Applicants, which included financing plans, business strategies and procurement plans. *Id.* at 2. Thus, the LGPO contended that disclosure of the withheld information would harm the GPC's competitive interests. *Id.*

The Appellant raises several arguments in its Appeal. First, it claims that the LGPO did not sufficiently justify its withholding of information from the requested documents. Appeal at 3. Second, it argues that Exemption 4 does not apply because the information it seeks was created by the DOE, and accordingly, the redacted information was not obtained from a "person," or in this case, the GPC. *Id.* at 4-5. Moreover, the Appellant avers that the redacted information is not privileged or confidential and will not substantially harm the competitive position of the GPC. *Id.* at 8-9. Finally, the Appellant asserts that the LGPO failed to conduct an adequate search for responsive documents. *Id.* at 10.

## II. ANALYSIS

In response to our inquiries, the LGPO explained why information was withheld from the two documents, described its search for responsive records, and provided copies of the unredacted versions of the Open Issues List and LGA for our review. *See* Email from Benjamin Rashbaum, LPO, to Shiwali Patel, OHA (Nov. 27, 2012) (LGPO Comment). Moreover, the LGPO provided copies of two letters from the GPC, dated September 6, 2012 and September 7, 2012, with its justifications to the LGPO for redacting information on the Open Issues List and the LGA pursuant to Exemption 4. *Id;* Letter from Eric A. Koontz, Troutman Sanders, to Hirsh Kravitz, Attorney-Advisor, DOE (Sept. 6, 2012) (GPC Response on Open Issues List); Letter from Eric A. Koontz to Hirsh Kravitz (Sept. 7, 2012) (GPC Response on LGA).

### A. Exemption 4

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from

disclosure. 5 U.S.C. § 552(a)(4)(B). 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 Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

Here, it is uncontested that the information contained in a loan guarantee application and supporting and related documents are, by their very nature, commercial or financial. Accordingly, at issue is whether the withheld information was obtained from a "person" and whether the information is confidential.[1]

1. Whether the Withheld Information was Obtained from a Person

In order to apply Exemption 4 to protect information from disclosure, the withheld information must 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).[2] It is without dispute that the GPC, a corporation, satisfies this definition of "person."

Federal courts have held that "information in an agency-generated report is still 'obtained from a person' if such information was supplied to the agency by a person or could allow others to 'extrapolate' such information." *SACE v. Dep't of Energy*, 853 F. Supp. 2d 60, 68 (D.D.C. 2012) (citing *Gulf & W. Indus. v. U.S.*, 615 F.2d 527, 529-30 (D.C. Cir. 1979)). "On the other hand, when the redacted information – despite relying upon other information obtained from outside the agency – constitutes that agency's own analysis, such information is the agency's information, and not 'obtained from a person' under Exemption 4." *Id.* (quoting *Philadelphia Newspapers, Inc. v. Dep't of Health & Human Servs.*, 69 F. Supp. 2d 63, 66-67 (D.D.C. 1999)). The fact that particular information was the subject of negotiation with the federal government neither necessitates nor precludes a finding that it was "obtained from a person" within the meaning of Exemption 4. *See id.* Rather, the courts have looked to the identity of the party from whom the information *originated*. *See, e.g., In Defense of Animals v. Nat'l Institute 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); *Public Citizen Health Research Group v. Nat'l Institute 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).

[1] 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 Group v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

[2] Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at http://energy.gov/oha/office-hearings-and-appeals.

We have previously held that we will consider portions of agreements between the DOE and non-federal entities 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). To that end, in a prior case, we found that information withheld from similar documents was "obtained from a person," where the "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).

For the reasons explained below, we conclude that the withheld information contained in the Open Issues List and the LGA was obtained from a person, the GPC.

a. ***Open Issues List***

The Appellant claims that redacted information contained in two columns on the Open Issues List, which are entitled "DOE Position," is generated by the agency, and not the GPC. Appeal at 7. In response, the LGPO provided us with GPC's Response on the Open Issues, wherein it stated that the information in those columns contain "DOE's written responses that reflect the information provided by Georgia Power or that would otherwise identify the substance of the information provided by Georgia Power." GPC's Response on Open Issues List at 5. Hence, as the information originated from the GPC, we conclude that the redacted information in the Open Issues List was obtained from a "person," and therefore, may be subject to Exemption 4.

b. ***LGA***

The Appellant avers that the LGA is a DOE-created document, and accordingly, the withheld information was not generated by a "person." Appeal at 6-7. While the Appellant acknowledges that the LGA is a draft agreement and that terms contained with the LGA may have been created with the GPC's input, it states that at its core, the LGA was an offer by the DOE to the GPC. *Id.* at 6. Thus, according to the Appellant, the information contained within the LGO is not subject to Exemption 4. *Id.*

However, while the LGA is a DOE-generated document, the information contained within that document may still have been obtained from the GPC. *See SACE*, 853 F.Supp.2d at 68. As stated above, it is the source of the information contained *within* the LGA that is pertinent. *See id.*

In its September 7, 2012 letter, the GPC explained why it withheld certain information in the LGA. The GPC explained that in December 2011, it provided written comments to a draft LGA that it received in November 2011. GPC Response on LGA at 2. The GPC and the DOE subsequently met on December 12, 2011, and January 27, 2012, to discuss the terms and conditions of the draft LGA, and soon after, on January 30, 2012, the GPC received the draft LGA, a copy of which was provided to the Appellant with redactions. *Id.* Some of the redacted information reflected either the GPC's comments and counter-proposals provided to the DOE on the draft LGA in December 2011 or the DOE's responses to the substance of the comments or counter-proposals. *Id.* Furthermore, the GPC asserts that other redacted material in the draft

LGA was derived from information provided to the DOE by the GPC through the due diligence process. *Id.*

Thus, based on the foregoing, we are satisfied that the redacted information in the LGA was obtained from the GPC, and that it may be subject to Exemption 4.

2. Whether the Withheld Information is Confidential

In order to be exempt from disclosure under Exemption 4, the information must also be "privileged" or "confidential." Here, the LGPO contends that the withheld information is confidential. As noted above, whether information is considered "confidential" turns in part on whether the information was voluntarily or involuntarily submitted.

a. ***Open Issues List***

The LGPO contends that the Open Issues List was voluntarily provided, and that the redacted information contained in that list would not ordinarily be provided to the public. While the Appellant avers that the Open Issues List was not voluntarily submitted, the GPC contends that it provided the Open Issues List to the DOE in order to accelerate negotiations on the draft LGA, and that the DOE regulations pertaining to the loan guarantee solicitation requirements did not require the GPC to provide the Open Issues List. GPC Response on Open Issues List at 7. Thus, we conclude that the Open Issues List was voluntarily submitted to the DOE. *See Judicial Watch, Inc. v. Dep't of Energy*, 310 F. Supp. 2d 271, 308-09 (D.D.C. 2004), *aff'd in part & rev'd in part on other grounds*, 412 F.3d 125 (D.C. Cir. 2005) (relying primarily on representations made to the agency by the companies in determining that documents provided by three different companies were voluntarily submitted).

As voluntarily submitted information, 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). Accordingly, the LGPO must demonstrate that the GPC would not customarily provide the withheld information to the public or that information identical to the withheld information is not in the public domain. *See Ctr. for Auto Safety v. Nat'l Hwy Traffic Safety Admin.*, 244 F.3d 144, 151 (D.C. Cir. 2001); *Critical Mass Energy Project*, 975 F.2d at 879. The Appellant contends that some of the withheld information was already released by the DOE in the terms sheets that it previously released; however, the "customary treatment" standard for confidentiality allows for some disclosures of the information as long as the disclosures were not made to the general public. Appeal at 8; *see Judicial Watch*, 310 F.Supp. 2d at 309 (concluding that a study, copies of which could be sold and provided to clients, was not customarily disclosed to the public); *Ctr. for Auto Safety v. Nat'l Hwy Traffic Safety Admin.*, 93 F. Supp. 2d 1, 17-18 (D.D.C. 2000) ("Limited disclosures, such as to suppliers or employees, do not preclude protection under Exemption 4, as long as those disclosures are not made to the general public."), *remanded on other grounds*, 244 F.3d 144 (D.C. Cir. 2001). Thus, the relevant question is whether or not the withheld information was already released to the *general public.*

Here, the LGPO explained that that information was voluntarily provided and that "[c]onsistent with industry practice, the applicant would not release explanations of their negotiating strategy or strategies concerning draft agreements regarding pending financial transactions." Final Response Letter at 2. In its Response, the GPC explained that the withheld information includes detailed negotiating positions with respect to the proposed terms and conditions of the financing transactions. GPC Response on Open Issues List at 7. It further stated that it would be inconsistent with the practice of the utility industry to publicly disclose the proposed terms or conditions in the draft agreement or any comments or negotiating positions exchanged. *Id.* at 8. Upon review of the redacted information in the Open Issues List, we agree that the withheld information is confidential as it would not customarily be released to the public.

b. ***LGA***

The LGPO claims that the LGA was involuntarily submitted and that disclosure of the redacted information would harm the GPC's competitive interest. We agree that the LGA was involuntarily submitted as federal courts have held 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 terms' from other information by not including them within the category of information that 'must' be included," only the information submitted involuntarily was required to be included).

As the withheld information contained in the LGA was "involuntarily submitted," in order for the application of Exemption 4 to withstand scrutiny, 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. 498 F.2d at 770. "Courts generally defer to an agency's predictions concerning the repercussions of disclosure, acknowledging that predictions about competitive harm are not capable of exact proof." *SACE*, 853 F. Supp. 2d at 71.

Having reviewed the withheld information, we agree with the LGPO that some of the information contained in the LGA, if released, would likely cause substantial competitive harm to the GPC. However, we cannot make this finding with respect to all the information withheld from the Appellant.

First, we conclude that the terms and clauses on pages 13, 14, and 61, Exhibit A – page 34, and Exhibit C-1 – page 2, which identify contractors with whom the GPC is involved in negotiations over numerous matters, were properly redacted. *See* Email from Eric Koontz, Troutman Sanders, to Benjamin Rashbaum, LGPO (Oct. 8, 2012). Disclosure of these contractors' identities may undermine the GPC's negotiating strategy with them and may subsequently cause competitive harm. Thus, we find that those redactions were proper pursuant to Exemption 4. Second, there was information concerning the title insurance on page 20 of the LGA in subsection (a) and footnote 19 that identifies an insurance amount and other information, which we have determined would harm the competitive interests of the GPC if disclosed.

The remaining information that the LGPO withheld from the Applicant, however, may in fact be confidential, but it is not apparent how the release of that information would likely cause substantial harm to the GPC. For example, two clauses in the Table of Contents were redacted. As those clauses do not, on their face, appear to contain sensitive information, it is hard to understand how their release would likely cause substantial harm to the GPC. There are numerous other instances where it is unclear why the particular information or sections were redacted and what substantial competitive harm would result from their disclosure. We asked the LGPO about that information withheld from the LGA, and specifically, what competitive harm would result from its release. The LGPO indicated that the GPC contended that withholding the information was appropriate because the LGA is a draft agreement that is currently in negotiations between the DOE and the GPC. Memorandum of Phone Conversation between Shiwali Patel, OHA, and Benjamin Rashbaum, LGPO (Dec. 6, 2012). However, while the document is a draft and is currently in negotiations, that, in and of itself, does not demonstrate that *specific harm* to the GPC's competitive interests would result if the redacted material was disclosed.

The LGPO's determination letter provided a general explanation for the redactions. In its determination letter, the LGPO stated that the information was withheld because it contained sensitive commercial information and that disclosing that information would provide a competitive advantage to competitors. Final Response Letter at 2. Specifically, the LGPO stated that the information withheld "included financing plans, business strategies, and procurement plans." *Id.* Thus, the LGPO asserted that disclosure of this information "would provide an unfair advantage to competitors by enabling competing power suppliers to estimate supply costs and use this information to bid against the applicant." *Id.* Moreover, the LGPO claimed that "[p]ublic disclosure of the 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." *Id.* Finally, the LGPO asserted in its determination letter that "[p]ublic disclosure of financing information would enable potential customers to exert undue leverage with regard to purchasing the applicant's product." *Id.*

We find that this justification was insufficient because the LGPO failed to distinguish between the various types of information that it redacted on the many pages in the LGA. Furthermore, and more importantly, the LGPO did not explain in any detail the type of competitive harm that the GPC would be subjected to should each type of information be released. We reviewed the many pages of documents and email correspondence between the LGPO and the GPC to ascertain the type of competitive harm that was at stake. Simply stated, the statements contained in the determination letter are exactly the types of conclusory and generalized allegations of substantial competitive harm that cannot support an agency's decision to withhold requested documents. *See Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir 1976); *see also Environmental Defense Institute*, Case No. TFA-0289 (2009) (citing *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

While the LGPO clarified in its Comment that it discussed specific redactions with the GPC and made efforts to provide as much non-exempt material as could be segregated, it still did not satisfy its burden to explain how the claimed exemption applies to each redacted passage. *See id.*

Thus, we are remanding in part this matter to the LGPO. If the LGPO intends to continue to withhold this information, it should either explain, in its new determination, how any specific harm to the GPC's competitive interests would result from the release of the information in question, or withhold the information pursuant to another FOIA exemption.

**B. Adequacy of Search**

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g.*, *Project on Government Oversight*, Case No. TFA-0489 (2011).

The Appellant contends that the Open Issues List and the LGA suggest that other responsive documents exist that were not provided in response to its FOIA request. Appeal at 10. Specifically, the Appellant claims that the Open Issues List indicates that there is another draft of the LGA that is more recent than the LGA that was disclosed, which is dated January 30, 2012. *Id.* The Appellant further asserts that while the LGA references documents as exhibits, the LGPO did not provide those documents. *Id.* Furthermore, the Appellant complains that while the Vogtle project and loan guarantees involved all three applicants, DOE's release only concerns the GPC. *Id.* Finally, the Appellant states that it has reason to believe that credit subsidy cost estimates may have been negotiated sometime after January 15, 2010, and therefore should have been provided in response to its FOIA request. *Id.*

In processing this Appeal, we contacted the LGPO to discuss the scope of the search for responsive records. The LGPO explained that in response to Part 1 of the request, it released four documents on September 18, 2012 with its Initial Response Letter that covered the new terms and conditions. LGPO Comment. It further explained that while it understood these four documents to be responsive to Part 1 of the request, after a conference call it had with SACE's counsel on August 13, 2012, the LGPO also determined that the Open Issues List and the LGA would be responsive to what the Appellant was seeking. *Id.* The LGPO also indicated that the LGA it provided to the Appellant was the most recent draft it had at the time it was processing the Appellant's FOIA request. Memorandum of Conversation between Benjamin Rashbaum, LGPO and Shiwali Patel, OHA (Dec. 10, 2012) (Dec. 10, 2012 Conversation). Moreover, the LGPO stated that during a meeting on July 20, 2012, it notified the Appellant that no revised credit subsidy estimates were offered after the term sheets were issued, and therefore, there were no responsive documents to Part 2 of the request. LGPO Comment.

The LGPO further explained that the three companies, the GPC, MEAG and OPC, jointly applied to the Loan Guarantee Program, and that the GPC serves as the agent of the other two companies. LGPO Comment. During its telephone conversation on August 13, 2012, SACE's counsel allegedly stated that she was seeking documentation that would only show the proposed

changes to the terms to which the GPC had referred, and accordingly, the LPGO understood that the Appellant was only interested in the GPC's draft LGA. Dec. 10, 2012 Conversation. Furthermore, the LGPO asserted that it did not provide the secondary documents – *i.e.*, the security agreements, deeds of trust, and other similar documents that are supporting to the LGA – because, based on its telephone conversation with the Appellant, it believed that the Appellant would find the draft LGA most useful to its FOIA request, and not those supporting documents. *Id.*; LGPO Comment. However, the LGPO did not provide sufficient documentation evincing that the scope of the Appellant's FOIA request was narrowed such that the draft LGAs concerning the MEAG and OPC were not requested by the Appellant and that the secondary documents were not responsive to the Appellant's FOIA request. In light of the Appellant's claim that the LGPO should have provided loan guarantee documents involving all three applicants and other responsive documents, which may include those secondary documents, we simply cannot accept the LGPO's withholding of those documents without a more detailed explanation for why they are not responsive to the Appellant's FOIA request.

The LGPO also stated that, at the time of processing the FOIA request, many of the exhibits to the LGA were not yet drafted and prepared and, accordingly, those exhibits could not be produced with the draft LGA. Dec. 10, 2012 Conversation. However, the LGPO did not identify which exhibits were not available at the time it responded to the Appellant's FOIA request, and it did not explain why it had to withhold from production the exhibits that were already drafted and prepared. Thus, on remand, the LGPO must identify which exhibits were not available for production and explain their unavailability. In addition, it must either release the already drafted exhibits, secondary documents, and loan guarantee documents involving MEAG and OPC or provide adequate justification for withholding any portion of those documents.

## III. CONCLUSION

For the reasons set forth above, we are remanding this matter in part to the LGPO for a new determination regarding its withholdings.

It Is Therefore Ordered That:

(1) The Appeal filed on November 16, 2012, by the Southern Alliance for Clean Energy, OHA Case No. FIA-12-0072, is hereby granted in part and remanded in part, as set forth in Paragraph (2) below.

(2) This matter is hereby remanded in part 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) 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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