

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

In the Matter of William Gagner)
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Filing Date: January 5, 2023)
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Case No.: FIA-23-0008

Issued: January 23, 2023

Decision and Order

On January 5, 2023, William Gagner (Appellant) of Thomas Reuters Court Express (TRCE) appealed a final determination letter (Final Determination Letter) issued by the Department of Energy's (DOE) Office of Inspector General (OIG), dated October 3, 2022. The Final Determination Letter responded to Request No. ORO-2021-00061-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The Final Determination Letter was accompanied by three pages of responsive documents and informed the Appellant that portions of the responsive documents were withheld pursuant to FOIA Exemptions 4, 6, and 7(c). The Appellant challenges the redactions made pursuant to Exemption 4, as well as the adequacy of the Final Determination Letter.

I. Background

On October 13, 2020, the Appellant submitted a FOIA request to the DOE, seeking the following information pertaining to UT-Battelle, LLC (UT-Battelle)¹:

1. All communications, including notices, letters, reports, electronic mails, instant messages, facsimiles, memoranda, internal messages, records of telephone conversations, and voicemails between UT-Battelle and DOE, or within DOE, relating to state sales or use tax for the period January 2012 through the present, including but not limited to any communications between UT-Battelle and the DOE Contracting Officer (or his or her designee) pursuant to 48 CFR § 31.205-41(a)(2).
2. All bills, invoices, payment vouchers, or other payment requests under the contract that include charges for state sales tax [or] use tax for the period January 2012 through the present, and any supporting documentation for such payment requests.
3. Any DOE, DCAA, or other government audit relating to any charges under the contract for state sales [or] use tax for the period January 2012 through the present, and any supporting documentation for such audits.

¹ UT-Battelle is the management and operating contractor for Oak Ridge National Laboratory, a laboratory of DOE's Office of Science.

Final Determination Letter from Anthony Cruz at 1 (October 3, 2022).

During the processing of the Appellant’s FOIA request, the DOE’s Office of Science Consolidated Service Center (OSCSC) determined that a responsive document originated with OIG, and accordingly, the document was transferred from OSCSC to the DOE Headquarters FOIA Office.² *Id.* The document was then sent from the DOE Headquarters FOIA Office to OIG for review. *Id.* OIG also conducted a search for documents pertaining to the third item of the Appellant’s request. *Id.* OIG’s search did not yield any additional responsive documents. *Id.*

The Final Determination Letter was accompanied by three pages of a responsive document and notified the Appellant that OIG withheld certain information from the document pursuant to Exemptions 4, 6, and 7(c). *Id.* at 2. Regarding the redactions made pursuant to Exemption 4, the Final Determination Letter stated that the information “consists of inquiries about UT-Battelle’s financial system, the release of which would reveal sensitive and confidential commercial information.” *Id.* It went on to state that “UT-Battelle’s commercial and financial information is guarded sensitive information in a competitive business environment, and release of such information would place them in a competitive disadvantage[.]” *Id.*

In the Appeal, the Appellant argues that the aforementioned language from the Final Determination Letter is consistent with the “competitive harm” test, which is no longer employed in an Exemption 4 analysis. Appeal at 2-3.

The Appellant also asserts that Exemption 4 was misapplied to the responsive documents and asks that the redacted portions be released if the exemption was, in fact, incorrectly applied. *Id.* at 2. Appellant states that the DOE and UT-Battelle had an agreement regarding “when and how the DOE is required to safeguard and treat information from UT-Battelle as confidential under clause I.9(b)(3)(ii) of the Contract[.]” with UT-Battelle. *Id.* at 3. The Appellant asserts that under the contract, the documents will only be treated as privileged or confidential by the DOE when they are marked as such by UT-Battelle. *Id.* Accordingly, the Appellant states, because the documents were not marked as privileged or confidential, there was no indication that UT-Battelle treated the documents as confidential. *Id.* The Appellant also states in his Appeal that because the documents were not marked as such, “there [was] no indication that the information . . . was provided to the government under any assurance of privacy or confidentiality[.]” *Id.*

I. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists 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).

² OSCSC located additional responsive documents, which were provided to the Appellant with a separate determination letter on March 22, 2022.

The agency has the burden to show that information is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).

A. Adequacy of Determination Letter

In responding to requests for records under the FOIA, agencies are required to notify requesters of the decisions reached “and the reasons therefor.” 5 U.S.C. § 522(a)(6)(A)(i)(I). Additionally, determination letters must meet certain requirements to allow requesters to determine whether a response is adequate. A determination letter must (1) adequately describe the results of searches; (2) clearly indicate which information was withheld; and (3) specify the exceptions or exemptions under which information was withheld. *See, e.g., Center for Biological Diversity*, OHA Case No. FIA-17-0053 at 4 (2017); *Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 at 4 (2014); *Tom Marks*, OHA Case No. TFA-0288 at 4-5 (2009).³ Accordingly, “DOE regulations provide that denials of FOIA requests must justify the withholding of information by providing a ‘brief explanation of how the exemption applies to the record withheld.’” *Center for Biological Diversity* at 4.

With regard to the OIG’s asserted justification for applying Exemption 4, the Appellant asserts that the Final Determination Letter did not provide the currently applicable standard regarding “confidential” information. The Supreme Court has determined that for information to be “confidential” the information must be the sort that is “customarily kept private, or at least closely held, by the person imparting it.” *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (*Argus Leader*). Further, the information is confidential if the receiving party has provided “some assurance that it will remain secret.” *Id.* at 2363. In the matter at hand, the Final Determination Letter states that “[t]he release of the financial information contained in these documents would have a detrimental impact to UT-Battelle’s financial matters[,]” placing it “in a competitive disadvantage against its competitors[.]” Final Determination Letter at 2. This wording is not consistent with the legal precedent, as established by *Argus Leader*. Accordingly, the Final Determination Letter fails to provide an adequate statement on how the exemption applies because it does not specifically speak to whether the information is confidential as contemplated by *Argus Leader*.

B. Appropriateness of Redactions under Exemption 4

Exemption 4 was cited as a basis for withholding information from the responsive documents in the Final Determination Letter. The Appellant argues that OIG misapplied Exemption 4. Appeal at 2-3. Exemption 4 shields 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). 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.” *Argus Leader*, 139 S.Ct. at 2362.

³ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

To determine whether information is confidential, the standard provided by the cases *National Parks & Conversation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), has been changed by the Supreme Court's decision in *Argus Leader*. As noted above, in *Argus Leader*, the Supreme Court held that to determine whether financial or commercial information is confidential, the information must be the sort that is "customarily kept private, or at least closely held, by the person imparting it." *Argus Leader*, 139 S. Ct. at 2363. The Court went on to say, "In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." *Id.* Regarding whether information must be submitted to the government with some assurance that it will be kept private, the Court found that it did not need to resolve that question, as that condition was clearly satisfied in the case before it.

As an initial matter, the responsive document in question concerns an OIG audit. OIG Response from Alexander Borman to OHA at 2 (January 11, 2023). The clause to which the Appellant refers in his Appeal is clause I.9, *Contractor Code of Business Ethics and Conduct*, of the contract between UT-Battelle and the DOE. OIG Response at 2. This clause mirrors the language in 48 C.F.R. § 52.203-13(b)(3)(ii) and pertains to "guidance regarding the [DOE's] obligation to protect from public release the 'mandatory disclosure by UT-Battelle of certain violations of federal criminal law and the False Claims Act.'" *Id.* As OIG counsel argues in OIG's response to the Appeal, and we agree, the responsive document does not constitute either a disclosure of a violation of the federal criminal law or the False Claims Act, and thus clause I.9 does not appear to apply. *Id.* In any event, the lack of any marking indicating the document is "privileged" or "confidential" is not dispositive of whether the document was in fact intended to be treated as confidential, and accordingly, an analysis must be conducted under standards set forth in *Argus Leader*.

The Appellant does not challenge whether the redacted information contains either commercial or financial information or whether it was obtained from a person. The Appellant does, however, challenge whether the information is confidential. Appeal at 2-3. Regarding the matter of whether the documents were customarily treated as private, OIG indicated in their response that an August 23, 2022, email from the UT-Battelle FOIA Coordinator stated that "UT-Battelle keeps information, of any kind, related to its finances and financial statements . . . as confidential and does not publicly release this information." *Id.* at 2; Email from Diana Stanley to Linda G. Chapman at 1 (August 23, 2022). The FOIA Coordinator went on to state that "[a]lthough this information is in response to an annual audit from the [OIG], the information redacted in these responsive documents is still information that UT-Battelle maintains as confidential with no intention of ever having such information publicly released." *Id.* Based on the foregoing, it is reasonable to conclude that this information is closely held by UT-Battelle.

Turning to the matter of whether the DOE provided an assurance of confidentiality to UT-Battelle when it submitted this information, OIG's response drew OHA's attention to clause I.127 of the management and operating contract the DOE has with UT-Battelle. OIG Response at 3. According to clause I.127, while the DOE may "inspect, copy, and audit all contractor-owned records[,] UT-Battelle's confidential financial information is owned by the contractor, UT-Battelle. *Id.* Accordingly, the confidential nature of the document is not changed simply because it was provided to OIG. *Id.* Based on the foregoing, we find that the DOE provided UT-Battelle with an

implied assurance of privacy at the time the relevant documents were submitted.⁴ We therefore conclude that the documents were confidential, as contemplated by *Argus Leader*, and that Exemption 4 was appropriately applied to the redacted information contained in the responsive documents.

I. Conclusion

It is hereby ordered that the Appeal filed on January 5, 2023, by William Gagner, FIA-23-0008, is granted with respect to Appellant's challenge to the adequacy of the Final Determination Letter, but denied in all other respects. Because OHA has determined that Exemption 4 was properly applied to the responsive documents in question, notwithstanding that OIG applied the incorrect standard, OHA declines to remand to OIG for further processing.

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. § 522(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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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⁴ OHA has previously found that the DOE provided UT-Battelle with an implied assurance of privacy at the time UT-Battelle submitted information because the DOE and UT-Battelle entered a contract indicating "that confidential contractor financial information is considered the property of the contractor and is not within the scope of government-owned records." *Ron Walli*, OHA Case No. FIA-20-0030 at 6-7 (2020).