



**Department of Energy**  
Washington, DC 20585

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

In the Matter of Business Insider )

Filing Date: May 7, 2024 )

Case No.: FIA-24-0024

Issued: May 30, 2024

**Decision and Order**

On May 7, 2024, Business Insider (Appellant) appealed a final determination letter dated April 12, 2024, issued by the Department of Energy's (DOE) Office of Public Information (OPI). The letter responded to Request No. HQ-2024-01302-F, a request filed by Appellant 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 the final determination letter, OPI asserted a Glomar<sup>1</sup> response, explaining that it could "neither confirm nor deny that any records exist that are responsive." Appellant challenges the agency's assertion that a Glomar response was appropriate. In this Decision, we grant the appeal and remand to OPI to issue a new determination letter.

**I. Background**

On February 28, 2024, Appellant submitted the FOIA request to DOE. FOIA Request from Business Insider at 1 (Feb. 28, 2024). The request stated: "I would like to make a FOIA request for any available documents relating to the company Boxabl and its application for a loan from DOE. I would also like any available documents relating to the DOE's determination on that loan request." *Id.* at 1.

DOE issued an interim response letter on March 5, 2024, explaining that the request had been assigned to the DOE's Loan Program Office (LPO) to conduct a search of its files for responsive records. Interim Response Letter from DOE to Business Insider at 1 (Mar. 5, 2024). On April 2, 2024, an OPI FOIA analyst responded to a follow up email from Appellant, explaining that she had "submitted the review packet<sup>2</sup> for this case to [her supervisor]." Email from OPI to Business Insider (Apr. 2, 2024). She went on to say that she would revise according to the supervisor's

<sup>1</sup> The name "Glomar" comes from a case in which the CIA refused to confirm or deny the existence of records about "the *Hughes Glomar Explorer*, a ship used in a classified [CIA] project 'to raise a sunken Soviet submarine from the floor of the Pacific Ocean to recover the missiles, codes, and communications equipment onboard for analysis by United States military and intelligence experts.'" *Roth v. Dep't of Justice*, 642 F.3d 1161, 1171 (D.C. Cir. 2011) (quoting *Phillippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981)).

<sup>2</sup> As part of OPI's regular FOIA process, after an appropriate search is conducted, the FOIA analyst prepares a review packet consisting of the "request letter, any agreements with requester, draft response letter, [and] responsive docs if applicable." Email from OPI to OHA (May 9, 2024).

recommendations and then prepare the packet for review by the DOE Office of General Counsel (GC). *Id.*

DOE issued a final determination letter on April 12, 2024. Final Determination Letter from DOE to Business Insider (Apr. 12, 2024). The letter stated that DOE could “neither confirm nor deny that any records exist that are responsive.” *Id.* at 1. It further explained:

Confirmation of existence of such records would itself reveal exempt information. To acknowledge the existence of records would constitute a disclosure of confidential commercial or financial information obtained from a person and privileged or confidential pursuant to Exemption 4 of the FOIA. Confidential information is that information that is not ordinarily disclosed to the public by the submitters and that which is “so customarily kept private, or at least, closely held by the person imparting it.” *Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427, 434 (2019).

*Id.* The letter specifically noted that “[b]ecause of the obvious possibility of disclosure of confidential commercial or financial information, we find to even acknowledge that records may exist responsive to your request would result in a substantial violation of the protection Exemption 4 affords to submitters from the competitive disadvantages that would result from disclosure.” *Id.*

Appellant timely appealed the final determination letter on May 7, 2024. Appeal Letter Email from Business Insider to OHA Filings at 1 (May 7, 2024). In its appeal, Appellant challenges the agency’s assertion that it can neither confirm nor deny that any records responsive to its request exist. *Id.* at 1–2. Appellant argues (1) that DOE has already admitted that responsive documents exist, and thus, cannot assert a Glomar response; and (2) that even if DOE did not make such an admission, DOE has failed to assert a sufficient rationale as to why disclosure of the existence of the requested records could be withheld pursuant to Exemption 4. *Id.* at 2. DOE asserts that revealing whether or not a company had applied for a loan from LPO would reveal commercial information that is confidential. Determination Letter at 1. Specifically, DOE argues that where a company has not confirmed or denied that it submitted an application to LPO, a Glomar response is appropriate because LPO informs applicants that their application is confidential and because revealing whether or not a company applied for a loan could put the company at a competitive disadvantage. *Id.*; Email from GC to OHA (May 20, 2024).

## II. Analysis

DOE’s FOIA regulations require that the agency provide: “[a] statement of the reason for denial, containing a reference to the specific exemption under the FOIA authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.” 10 C.F.R. § 1004.7(c)(1). Further, federal courts have held that “when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” *Mead Data Central, Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). In the context of a Glomar response, an agency must explain with specificity “why the disclosure of

the *fact of the existence or non-existence* of any records . . . would cause harm to the interests protected by the FOIA exemptions cited.” *Sea Shepherd Conservation Society v. IRS*, 208 F.Supp.3d 58, 90 (D.D.C. 2016) (emphasis in original).

In the April 12, 2024 determination letter, DOE explained that “[t]o acknowledge the existence of records would constitute a disclosure of confidential commercial or financial information obtained from a person and privileged or confidential pursuant to Exemption 4 of the FOIA.” Determination Letter at 1. It goes on to say “[b]ecause of the obvious possibility of disclosure of confidential commercial or financial information, we find to even acknowledge that records may exist responsive to your request would result in a substantial violation of the protection Exemption 4 affords to submitters from the competitive disadvantages that would result from disclosure.” *Id.* Appellant argues that this justification does not explain how the disclosure of information would implicate Exemption 4. Appeal at 2. We agree. The explanation in the determination letter is non-specific and conclusory, making it difficult for the Appellant to truly understand DOE’s rationale for the Glomar response. *See Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) (finding that “conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA”).

Accordingly, we remand this matter to OPI to issue a new determination letter that more specifically explains why disclosing whether DOE possesses any records related to a company’s application to LPO would harm interests related to Exemption 4.

### **III. Order**

It is hereby ordered that the appeal filed on May 7, 2024, by Business Insider, FIA-24-0024, is granted and remanded to OPI to issue a new determination letter in accordance with this decision.

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.

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