United States Department of Energy
Office of Hearings and Appeals

In the matter of Berger Montague	)	
	)	
Filing Date: August 20, 2024	)	Case No.: FIA-24-0045
	)	
	)	

Issued: September 9, 2024

Decision and Order

Berger Montague (Appellant) appealed a first partial response dated May 22, 2024, issued to it by the Department of Energy's (DOE) Office of Public Information (OPI), concerning a request (Request No. HQ-2024-00629-F) that it 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. In the first partial response, OPI indicated that the Appellant agreed to accept a previously released document from a similar request made by a separate requester. OPI further stated that certain information in the responsive record was redacted pursuant to FOIA Exemption 4. In its appeal, the Appellant challenged the decision to withhold portions of the responsive record pursuant to Exemption 4. In this Decision, we grant the appeal.

I. Background

On November 29, 2023, Appellant submitted a FOIA request seeking:

> 1. All Documents created by [DOE] relating to the announced conditional commitment from the Loan Programs Office ("LPO") of the DOE to Li-Cycle Holdings Corp. ("Li-Cycle") through the LPO's Advanced Technology Vehicles Manufacturing ("ATVM") program for funding for Li-Cycle's planned electric vehicle battery recovery facility located near Rochester, New York (the "Rochester Hub Project").
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> 2. All Documents created by Li-Cycle and its agents relating to the DOE's conditional commitment to loan Li-Cycle up to $375 million for the Rochester Hub Project.
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> 3. All Documents relating to the conditions established by DOE that needed to be satisfied for the closing of the Loan to take place.
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> 4. All internal status reports and updates, as well as other Documents, maintained by DOE relating to the satisfaction of conditions necessary for the closing of the Loan.
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> 5. All Documents in DOE's possession which were prepared by or transmitted by Hatch Ltd. (engineering, procurement, and construction management contractor for the Rochester Hub Project) relating to the Rochester Hub Project or the Loan.

FOIA Request from Berger Montague at 1 (November 29, 2023).

In December 2023, OPI assigned the request to LPO to search for responsive records. First Partial Response at 1 (May 22, 2024). LPO subsequently identified one responsive record which was produced in response to a similar FOIA request made by a separate requester. Email from LPO to OPI (April 4, 2024).

On April 8, 2024, OPI informed the Appellant that OPI and LPO "ha[d] come to a consensus that the most efficient way to move forward is to provide [Appellant] with a first partial response, a record previously produced under a similar request, and to work with [Appellant] to further clarify both [Appellant's] requests and the nature of the records held by DOE." Email from OPI to Berger Montague (April 8, 2024). In response, the Appellant indicated that it was "amenable to [this] proposal." Email from Berger Montague to OPI (April 8, 2024).

OPI issued a first partial response to the Appellant on May 22, 2024, and provided one responsive document, which included redactions pursuant to Exemption 4. The responsive document consisted of (1) a letter from the DOE Secretary to the Chief Financial Officer of Li-Cycle indicating DOE's "conditional commitment" to a loan (Loan) that Li-Cycle applied for under the DOE's ATVM program, and (2) a term sheet (Term Sheet) containing the "Summary of Terms and Conditions for the Loan" attached as an annex to the letter. The letter did not contain any redactions; however, the Term Sheet was redacted in full pursuant to Exemption 4.

In the first partial response, OPI asserted that the redacted information "includes confidential commercial and financial information related to the Summary Terms and Conditions for Loan for Li-Cycle U.S. Holdings, Inc. . . . that is maintained in confidence by the submitters and . . .customarily kept private, or at least, closely held by the person imparting it.'" First Partial Response at 2 (citing *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2363 (2019)). OPI further stated that "[t]he submitter companies hold the information private, and that is information not customarily released to the general public. DOE has also confirmed its commitment to keep this information confidential as it is customarily kept private by the submitter."[1] *Id.*

The Appellant timely appealed the first partial response on August 20, 2024. Appeal Letter from Berger Montague to OHA (August 20, 2024). In its appeal, the Appellant challenged the withholding of the Term Sheet pursuant to Exemption 4. *Id.* at 3–4. The Appellant argued that (1) the original summary terms of the Loan are not "privileged" under Exemption 4 because the Second Circuit has previously found that certain loan terms between the Federal Reserve and private banks were not protected under Exemption 4, (2) any confidentiality related to the Loan should be waived because the Loan has not closed, construction on the underlying project has stalled, and the Loan is the subject of litigation, (3) any information concerning the Loan will only be used by the Appellant's affiliated Canadian law firm for the purposes of litigation, and (4) the terms of the Loan are relevant to ongoing

[1] In response to the appeal, OPI additionally argued that the Appellant waived his right to appeal the first partial determination letter because it accepted a previously released document. Email from OPI to OHA (August 20, 2024). OPI indicated that it typically advises requesters that acceptance of a previously released document waives the right the appeal that document. Email from OPI to OHA (August 23, 2024). In the April 8, 2024, email to the Appellant, however, OPI did not advise the Appellant of this possibility. *See* Email from OPI to Berger Montague (April 8, 2024). When asked about this fact, OPI conceded that the Appellant could not have waived its right to appeal the first partial response if it was not advised of the possible waiver of appeal rights. *See* Email from OPI to OHA (August 23, 2024). Accordingly, we do not address whether the Appellant waived its appeal rights by accepting a responsive document that was previously produced to a separate requester.

lawsuits in the U.S. and Canada. *Id.* The Appellant additionally argued that, in the alternative, "DOE [should] release the Terms and Conditions of the DOE Loan notwithstanding their exempt status" because "[t]he public interest in the release of the original summary terms outweighs the interest in withholding them." *Id.* at 4.

II. Analysis

Exemption 4 of the FOIA exempts from 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.

The courts "have consistently held that the terms 'commercial' and 'financial' in the Exemption 4 should be given their ordinary meanings." *Pub. Citizen Health Rsch. Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982) and *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 (D.C. Cir. 1980)). The FOIA defines a person as an "individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

The Supreme Court's decision in *Argus Leader* sets the standard to determine whether information is confidential. In *Argus Leader*, the Court held that financial or commercial information is confidential if the information 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, "[i]n 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. *Id.* In subsequent cases, courts have held that whether the government provided such assurances is a factor, but not determinative of whether information is "confidential" for the purposes of Exemption 4. *WP Co. v. SBA*, 2020 WL 6504534, at *6, *9 (D.D.C. Nov. 5, 2020); *Gellman v. DHS*, 2020 WL 1323896, at *11, n.12 (D.D.C. Mar. 20, 2020).

The Appellant does not challenge whether the redacted information contains either commercial or financial information. After reviewing the unredacted Term Sheet, we agree that such information regarding the Loan is commercial and/or financial information. Although the Appellant does not directly argue that the entirety of the redacted Term Sheet was not obtained from a person, the case that the Appellant cites for the assertion that "loan terms are properly the subject of a FOIA request" does rely on such reasoning. *See Det. Watch Network v. United States Immigr. & Customs Enf't*, 215 F. Supp. 3d 256, 262 (S.D.N.Y. 2016) (noting that the Second Circuit previously held that certain terms of loan agreements between the Federal Reserve and private banks were not "obtained from an individual" under Exemption 4 (citing *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148 (2010)). In *Bloomberg*, the Second Circuit reasoned that a "loan (and its terms) cannot be said to be 'obtained from' the borrower . . . [and] [t]he fact that information about an individual can sometimes be inferred from information generated within an agency does not mean that such information was *obtained from* that person within the meaning of FOIA." *Bloomberg*, 601 F.3d at 148 (emphasis in original). The court distinguished a completed loan application, which would necessarily consist of information obtained from the applicant, from the final loan terms, which were

"generated within a Federal Reserve Bank upon its decision to grant a loan" and "did not come into existence until a Federal Reserve Bank made the decision to approve the loan request." *Id.* Because the plaintiff sought certain details regarding final loan terms, such as "the name of the borrowing bank, the amount of the loan, the origination and maturity dates, and the collateral given," the Second Circuit concluded that such information was not "obtained from a person." *Id.* at 149.

Although the Appellant relies on the Second Circuit's reasoning in *Bloomberg*, the U.S. District Court for the District of Columbia has acknowledged that this decision does not apply the D.C. Circuit's "obtained from a person" test, which asks whether "release of th[e] information would disclose data supplied to the government from a person outside the government." *Occupational Safety & Health L. Project, PLLC v. U.S. Dep't of Lab.*, 2022 WL 3444935, at *6 (D.D.C. Aug. 17, 2022) (citing *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (noting that although "the Second Circuit [in *Bloomberg*] concluded that loan documents created by the Federal Reserve were not obtained from a person because the documents were 'generated within a Federal Reserve Bank upon its decision to grant a loan[,]'. . . the D.C. Circuit and its district courts rely on a test rooted in the statute's simple text: 'obtained from a person'" (citing *Bloomberg*, 601 F.3d at 148–49; 5 U.S.C. § 552(b)(4))). However, in *S. All. for Clean Energy v. United States Dep't of Energy*, the U.S. District Court for the District of Columbia was similarly presented with the issue of whether certain information within "final," "conditional" term sheets that DOE issued to loan applicants was properly redacted pursuant to Exemption 4. 853 F. Supp. 2d 60, 64–65 (D.D.C. 2012). The court noted that information is typically "not obtained from a person" if it is generated by the federal government, however, "portions of agency-created records may be exempt if they contain information that was either supplied by a person outside the government or that could permit others to 'extrapolate' such information." *Id.* at 67 (citations and internal quotation marks omitted). The court reasoned that, based on the *Vaughn* indices supplied by DOE in support of the redactions, certain information within the term sheets "appear[ed] to be simply commercial terms constituting parts of the deal arrived at by DOE and the [a]pplicants, not commercial or financial information of the [a]pplicants that ended up in the final term sheets and that might qualify for protection from disclosure under Exemption 4." *Id.* at 69. The court further opined that, for the majority of redactions, DOE provided "an insufficient factual basis to determine whether the redactions logically fall within Exemption 4." *Id.* at 70. The court therefore ordered DOE to "revise its *Vaughn* indices to include (if it can) facts supporting its contention that the specific information redacted from the term sheets was 'obtained from' the [a]pplicants, as is required by Exemption 4." *Id.*

In the present case, the fully redacted Term Sheet is a document issued by DOE, an agency which is not considered a "person" under Exemption 4.[2] *See id.* at 67. Nevertheless, as noted above, information in an agency-generated document may be protected if it "would disclose data supplied to the government from a person outside the government." *Gulf & W. Indus.*, 615 F.2d at 530. After reviewing the unredacted Term Sheet, although it is evident that certain information, such as the "Project Costs," "Sources," and "Uses," was supplied by Li-Cycle, much of the information appears "to be simply commercial terms constituting parts of the deal arrived at by DOE and the [a]pplicants, not commercial or financial information of the [a]pplicants that ended up in the final term sheet[] and that might qualify for protection from disclosure under Exemption 4." *See S. All. For Clean Energy*, 853 F. Supp. 2d at 69. However, we do not currently have enough information to make such a

[2] Although the redacted Term Sheet in the responsive document is described as "conditional," the term sheets at issue in *S. All. for Clean Energy* were similarly "conditional" and "binding only upon the negotiation and execution of a definitive loan guarantee agreement between DOE and the [a]pplicants." *See S. All. for Clean Energy*, 853 F. Supp. 2d at 64.

determination. We therefore remand to OPI to determine which "information [in the Term Sheet] would disclose data supplied to the government from a person outside the government." *Gulf & W. Indus.*, 615 F.2d at 530.

Although the Appellant makes several additional arguments for why the Term Sheet should be released in its entirety, each argument fails. The Appellant argues that "any confidentiality should be waived" because the Loan has not closed and construction on the project has stalled. FOIA Request at 3. However, the Appellant provides no support for why such facts should negate Exemption 4 protection of information "obtained from" Li-Cycle in the Term Sheet under Exemption 4. The Appellant additionally argues that the Term Sheet should be released because it is relevant to several lawsuits, and the information will only be used by the Appellant "for purposes of litigation." FOIA Request at 4. Whether a document is relevant to litigation, however, is not a factor considered under the Exemption 4 analysis. And the Appellant provides no support for the assertion that it should be granted access to otherwise exempt information merely because such information will be used "only for the purposes of litigation."[3] Lastly, the Appellant argues that "DOE [should] release the Terms and Conditions of the DOE Loan notwithstanding their exempt status" because "[t]he public interest in the release of the original summary terms outweighs the interest in withholding them." *Id.* Such balancing of public and private interests, however, is relevant to Exemption 6, not Exemption 4. *See DOD v. FLRA*, 510 U.S. 487, 497 (1994) (outlining the Exemption 6 balancing test). Indeed, the two cases the Appellant relies on to support this argument each apply that balancing test under Exemption 6. *See Pub. Just. Found. v. Farm Serv. Agency*, 538 F. Supp. 3d 934, 944–45 (N.D. Cal. 2021) (weighing the privacy interest in nondisclosure against the public interest in disclosure under the Exemption 6 analysis); *WP Co. LLC v. U.S. Small Bus. Admin.*, 502 F. Supp. 3d 1, 17–28 (D.D.C. 2020) (same). Because OPI applied its redactions pursuant to Exemption 4, we do not consider the application of the Exemption 6 balancing test. Accordingly, for reasons stated above, we remand to OPI.

III. Order

It is hereby ordered that the appeal filed on August 20, 2024, by Berger Montague, FIA-24-0045, is granted. This matter is hereby remanded to OPI, which shall issue a new determination in accordance with the above 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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Office of Government Information Services
National Archives and Records Administration

[3] To the contrary, the Supreme Court has recognized that the FOIA is "*not* intended to function as a private discovery tool." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (emphasis in original).

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