

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Southeastern Legal Foundation)
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Filing Date: September 11, 2014) Case No.: FIA-14-0050
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Issued: October 7, 2014

Decision and Order

On September 10, 2014, Southeastern Legal Foundation (Appellant) filed an Appeal from a determination issued to it on July 31, 2014, by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2010-01274-F). In that determination, OIR released documents which were responsive to the request the Appellant 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. OIR withheld portions of these documents under Exemption 4 of the FOIA. In addition to challenging the Exemption 4 withholdings, this Appeal challenges the search for responsive documents.

I. Background

On April 13, 2010, the Appellant filed a request with the OIR for records relating to federal funding for research on global climate change, including:

1. Applications;
2. Awards, grants, or funding notifications;
3. Accompanying and subsequent correspondence with applicants or recipients;
4. Denials or deferrals; and
5. Any agreements entered by the funding grantee in furtherance of or in conjunction with the research.

E-mail Request dated April 13, 2010, from Shannon L. Goessling, Appellant, to Alexander Morris, FOIA Officer, OIR, DOE. In response, OIR referred the request to the Office of Science. Letter dated April 27, 2010, from Alexander Morris to Shannon L. Goessling. On August 10, 2010, OIR sent a letter to the Appellant asking that it narrow its request and providing additional information to use to narrow the request. Letter dated August 10, 2010, from Alexander Morris to Shannon L. Goessling. On July 31, 2014, OIR issued its final determination, which released 15 documents while withholding portions of those documents under Exemption 4. Determination Letter dated July 31, 2014, from OIR to Appellant. OIR also indicated that it had no documents associated with three scientists, Stephen Sekelsky, Bruce

Hicks, and Volker Mohnen. The Appellant challenges OIR's search for responsive documents, claiming that DOE previously indicated that it had information pertaining to grants released to these three people. Appeal Letter dated August 28, 2014, from Shannon L. Goessling, Appellant, to Director, Office of Hearings and Appeals (OHA) at 4. In addition, the Appellant challenges the withholdings under Exemption 4. *Id.* at 4-5.

II. Analysis

A. Adequacy of OIR's Search for Responsive Documents

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).^{*/}

When we contacted OIR to determine what type of search was conducted in response to the request, we were informed that the Office of Science conducted a manual search for both hard copy and soft copy documents. E-mail dated September 24, 2014, from Lauren Smith, Office of Science, to Janet R. H. Fishman, Attorney-Examiner, OHA. The Appellant is challenging the search because documents related to Stephen Sekelsky, Bruce Hicks, and Volker Mohnen were not located. In August 2010, OIR had sent a spreadsheet indicating that these three individuals were awarded grants. August 10, 2010, Letter. However, in response to our query regarding why documents regarding these three scientists were not located, OIR indicated that the retention period for grant files, including grant administrative files, is six years, three months, after the final closeout of the grant. *Administrative Records Schedule 3: Procurement, Supply, and Grant Records*, September 2010, Revision 2; E-mail dated October 6, 2014, from Lauren Smith, Office of Science to Janet Fishman. The information included in the August 2010 spreadsheet indicates that the grants were awarded to the three individuals between 1995 and 2002. August 10, 2010, Letter. A search conducted in 2010 would be outside the retention period. Furthermore, the two people most knowledgeable about the subject area conducted the search, and confirmed that no responsive records were available. E-mail dated September 17, 2014, from Mohammad Pervaiz, OIR, to Janet Fishman. As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller*, 779 F.2d at 1384-85. OIR conducted a reasonable search. OIR explained why possible responsive documents were not located. It searched the files containing the grant information, and the search was conducted by those with the most knowledge. We will therefore deny the Appellant's Appeal in regard to its search for responsive documents.

B. Exemption 4

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

^{*/} OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

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. *See* 5 U.S.C. § 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

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). Accordingly, in order 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." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is "commercial or financial," "obtained from a person" and "privileged or confidential."

The information withheld by OIR consists of financial information specifically related to the grants, including salaries of employees, travel costs, and fringe benefit costs. The information withheld also includes the actual scientific proposals and strategies to carry out those proposals. OIR is not claiming that the information constitutes a "trade secret." Therefore, the first requirement is that the withheld information be "commercial or financial." Federal courts have held that these terms should be given their ordinary meanings and that records are commercial as long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290. The information submitted by the contractor, *i.e.*, Atmospheric and Environmental Research, Inc., clearly satisfies the definition of commercial or financial information. 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. TFA-591 (2000). The contractors satisfy that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be "confidential." In this case, the participating company was required to submit the documents in question as part of its contract with DOE. Accordingly, we find that the withheld information was "involuntarily submitted." Under *National Parks*, involuntarily submitted withheld information is 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 submitter. *National Parks*, 498 F.2d at 770.

OIR determined that release of the information withheld from the documents would likely cause the participating company substantial competitive harm. "Release of this information could cause substantial competitive harm to the submitting company by providing potential competitors with insight into the company's assets and business plans, possibly affording them the opportunity to use that information to enhance their own operations to the companies'

competitive detriment.” July 31, 2014, Determination Letter. Further, the company marked the pages with information withheld as proprietary. We believe that release of the information would give the competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information, in particular, would give the competitors an undue advantage. Therefore, we find that OIR properly applied Exemption 4 to the withheld information in the 15 documents.

III. Conclusion

After considering the Appellant’s arguments, we agree that OIR conducted a search reasonably calculated to uncover documents responsive to the Appellant’s request. In addition, OIR properly withheld information from the 15 documents under Exemption 4. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Southeastern Legal Foundation, Case No. FIA-14-0050, is hereby denied.

(2) 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. § 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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Poli A. Marmolejos
Director
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Date: October 7, 2014