

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

In the Matter of Annalee Grant)	
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Filing Date: July 31, 2015)	Case No.: FIA-15-0041
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Issued: August 7, 2015

Decision and Order

On July 31, 2015, Annalee Grant (Appellant) filed an Appeal from a determination issued to her by the Office of Information Resources (OIR) of the Department of Energy (DOE) (Request No. HQ-2015-01408-F). In that determination, OIR responded to a request 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 released two documents but redacted portions of those documents under Exemption 4 of the FOIA. This Appeal, if granted, would release the information withheld under Exemption 4 from the redacted documents.

I. Background

On June 6, 2015, the Appellant filed a request with OIR for “all Electric Emergency Incident and Disturbance Reports, form OE-417, filed by Pepco Holdings Inc., Southern Maryland Electric Cooperative, Potomac Electric Power Co., the PJM Interconnection, NRG Energy and Exelon Generation or Exelon Corp. dating from April 7, 2015 to June 4, 2015.” FOIA Request from Annalee Grant to DOE (June 5, 2015). The request also sought “all applicable reports that have been made to the DOE regarding an April 7 power outage that impacted the Washington DC area and Maryland grid.” *Id.* In response to the request, OIR released two Form OE-417 reports, submitted by Potomac Electric Power Co/Pepco Holdings Inc. (Pepco), with redactions taken under Exemption 4. Determination Letter from Alexander C. Morris, FOIA Officer, OIR to Annalee Grant (July 16, 2015).

The Appellant challenges the Exemption 4 withholdings, stating that the requested information had been reported before in the public domain and that the redacted information was not

confidential.¹ Appeal Letter from Annalee Grant to Director, OHA (July 31, 2015). Along with her Appeal, the Appellant attached an article from SNL Financial and a press release from Southern Maryland Electric Cooperative, Inc., as evidence to support her claim that the information was already in the public domain. *Id.*

II. 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). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(1)(4)(B).

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). 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 & Conversation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The Determination Letter neither claims that release of the withheld information would reveal a trade secret,² nor asserts that the withheld information is “privileged,” but rather contends that the information is “proprietary and confidential.” Determination Letter from Alexander C. Morris, FOIA Officer, OIR to Annalee Grant (July 16, 2015).

Federal courts have held that the terms “commercial or financial” 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 Form OE-417 incident reports submitted in this case satisfy this definition of “commercial” as the outages reported affect Pepco's commercial interests.

With respect to the requirement that the information withheld 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.

¹ In her Appeal, the Appellant also requests that an additional search be made for more Form OE-417 reports, because she believes that more companies than Pepco were involved in the April blackout. We contacted OIR to inquire about the search conducted. We find that the search conducted included all of the companies listed in the Appeal and was reasonably calculated to uncover the requested materials. We have determined that all responsive documents were released to the Appellant. Email from Mohammad Pervaiz to Brooke DuBois, Attorney-Advisor, OHA (August 4, 2015).

² 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).

1979); *see also* *Niagara Mohawk Power Corp.*, Case No. TFA-591 (2000).³ Electric utilities companies, like Pepco, satisfy this definition.

In order to determine whether the information is “confidential,” the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, 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). In this case, Pepco, and other electric utilities companies, are required to submit a Form OE-417 incident report whenever an electrical incident or disturbance above certain thresholds occurs. *See Dow Jones & Co.*, Case No. FIA-13-0054 (2013). Accordingly, we find that the withheld information was “involuntarily submitted.”

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 v. Dep’t of Energy*, 853 F. Supp. 2d 60, 71 (D.D.C. 2012). In applying Exemption 4, OIR stated that releasing the withheld information would have “the potential to harm the competitive standing of the submitter by providing critical information on physical vulnerabilities of substations.” Determination Letter from Alexander C. Morris, FOIA Officer, OIR to Annalee Grant (July 16, 2015). The Determination Letter further states that release of the withheld information “would demonstrate to potential attackers the instrumentalities and localities for shutting down portions of the power grid and provide a ‘roadmap’ of the vulnerabilities in the submitter’s electrical transmission system.” *Id.*

In this case, OIR withheld information pertaining to specific transmission lines and the location of substations and equipment.⁴ This information was segregated from the other information in the narrative section of the Form OE-417 which was released. *But see SNL Energy*, Case No. FIA-14-0080 (2014) (OHA remanded a case where the withheld information was not specific, but general descriptions). Although the Appellant asserts the companies involved in this incident had previously released similar details of the infrastructure, our review of the original documents revealed that that the withheld information is not similar to the information contained in the evidence submitted by the Appellant. Based on the foregoing information, we find that OIR’s withholdings under Exemption 4 were appropriate.

³ FOIA decisions issued by OHA after November 19, 1996, may be accessed at <http://energy.gov/oha/foia-cases>.

⁴ OIR also withheld the name, phone number, and email address of a key and critical employee in the operation of the submitter’s business, however, the Appellant is not challenging this withholding. Email from Annalee Grant to Brooke DuBois, Attorney-Advisor, OHA (August 4, 2015).

III. Conclusion

After considering the Appellant's arguments, we have determined that the redacted information was properly withheld under Exemption 4. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed on July 31, 2015, by Annalee Grant, Case No. FIA-15-0041, 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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Director
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Date: August 7, 2015