

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

In the Matter of Tim Hadley)	
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Filing Date: March 16, 2017)	Case No.: FIA-17-0004
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Issued: March 27, 2017

Decision and Order

On March 16, 2017, Tim Hadley (Appellant) filed an Appeal from a determination issued to him by the Office of Public Information (OPI) of the Department of Energy (DOE) (Request No. HQ-2016-01495-F). In that determination, OPI 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. OPI released forty-eight 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.

I. Background

On September 21, 2016, the Appellant requested:

“All submissions by Duke Energy Business Services (Duke Energy) in its attempt to comply with its terms of the \$200 million ARRA grant – including but not limited to; all integrated schedules, progress reports, earned value, budgeted and actual man hours extended by project, and all Project Value Management System Reporting (from requirement #10 on form 4600.2 of the grant terms).”

FOIA Request from Tim Hadley (September 21, 2016). OPI assigned the request to the Office of Electricity Delivery and Energy Reliability (OE), the Office of Acquisition and Project Management, and the Oak Ridge Office. Although this FOIA Request is still pending, OPI has released several partial responses, including the one at issue here. Determination Letter from Alexander C. Morris, FOIA Officer, OPI, to Tim Hadley (March 9, 2017).

On March 9, 2017, OPI released a partial response, which included forty-eight documents that OE identified as responsive with redactions taken from each document under Exemption 4. *Id.* The withheld information includes vendor contract information, financial information, and technology information all contained on a “Risks” spreadsheet as part of a SmartGrid Integrated Project Reporting Information System (SIPRIS) Monthly Project Reporting Template.¹ *Id.* On March 16, 2017, the Appellant challenged the determination, stating that the “FOIA response... [does not] comply with the FOIA statute.” Appeal Email from Tim Hadley to OHA Filings (March 16, 2017). In a telephone conversation, the Appellant confirmed that he was appealing the use of Exemption 4 to withhold information, stating that OPI previously released similar information for other companies in response to identical FOIA requests. Memorandum of Telephone Conversation between Brooke DuBois, Attorney-Advisor, OHA, and Tim Hadley (March 21, 2017).

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 does not claim that release of the withheld information would reveal a trade secret,² nor does it assert that the withheld information is “privileged.” Determination Letter from Alexander C. Morris, FOIA Officer, OPI, to Tim Hadley (March 16, 2017). The Determination Letter contends that the information is “sensitive commercial and financial information that is maintained in confidence by the company, Duke Energy, and that it is not available in public sources.” *Id.*

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

¹ Each responsive document is the same except the fact that they report information from different months. The redacted information is identical in each of the forty-eight documents.

² If an agency determines that 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).

them. *Public Citizen*, 704 F.2d at 1290. The redacted information in the responsive documents satisfies this definition because the release of internal risk assessments could affect Duke Energy's commercial or financial interests. With respect to the requirement that the withheld 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).³ Electric utilities companies, like Duke Energy, 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). According to OPI, Duke Energy was required to submit these monthly reports as part of the SmartGrid Project. Memorandum of Telephone Conversation between Brooke DuBois, Attorney-Advisor, OHA, and JoAnna Gorsage, OPI (March 22, 2017). 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, OPI stated that releasing the withheld information "would cause substantial harm to the company's competitive interest. Specifically, disclosing this information would provide an unfair advantage to competitors and may affect investor and public relations, and/or valuation of the company. Furthermore, disclosure may curtail companies from providing such information to the government in the future." Determination Letter from Alexander C. Morris, FOIA Officer, OPI, to Tim Hadley (March 16, 2017).

As stated above, OPI withheld information pertaining to vendor contract information, financial information, and technology information contained on the "Risks" spreadsheet of the responsive monthly reporting documents. OPI indicated that it worked with Duke Energy to identify which information could be appropriately withheld. Memorandum of Telephone Conversation between Brooke DuBois, Attorney-Advisor, OHA, and JoAnna Gorsage, OPI (March 22, 2017). The withheld information related only to Duke Energy's assessment of risks, and OPI reviewed other partial releases for this FOIA request to ensure consistency. *Id.* OPI determined that the release of the redacted risk assessments would cause substantial harm to Duke Energy's competitive position. *Id.* In response to the Appellant's claim that similar information was released on identical forms from other companies, OPI stated that because risks are specific to companies, those companies

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

may have been more confident that the identified risks would not impact their commercial or financial interests. *Id.* Based on the foregoing information, we find that OPI's withholdings under Exemption 4 were appropriate.

III. Conclusion

Consistent with the above, 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 March 16, 2017, Tim Hadley, Case No. FIA-17-0004, 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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