

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

In the Matter of Ron Walli )  
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Filing Date: May 27, 2020 ) Case No.: FIA-20-0030  
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Issued: June 16, 2020

**Decision and Order**

On May 27, 2020, Ron Walli (Appellant), filed an Appeal from a Freedom of Information Act (FOIA) determination issued by the Department of Energy’s (DOE) Office of Public Information (OPI) (FOIA Request No. ORO-2019-00374-F). In that determination letter, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. OPI released one responsive document but redacted portions of the document under Exemption 4 of the FOIA. As explained below, we deny Appellant’s appeal.

**I. Background**

On December 26, 2018, the Appellant submitted a FOIA request seeking the following information:

Requesting the status structure of the Additive Manufacturing Integrated Energy (AMIE) structure, .... I’d like to know how much it cost[s] to produce and how much is spent annually to maintain the structure. I’m also requesting to know where it is stored and whether the project continues to receive funding and if so, how much.

Determination Letter at 1 (May 26, 2020).<sup>1</sup>

OPI contacted the Oak Ridge Office (ORO) to search for responsive records, and ORO in turn referred the request to the DOE Office of Efficiency and Renewable Energy (EE). EE identified one responsive document, entitled Revolutionizing Building Through Freeform Construction Statement of Work (SOW), which it submitted to ORO and OPI for review. Email Description of Search from EE to OPI and ORO at page 3 (March 17, 2020).

In its Determination, OPI released a copy of the SOW that was partially redacted pursuant to Exemption 4. Determination Letter (May 26, 2020). The Determination Letter asserted that release

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<sup>1</sup> The request also sought other types of information (*e.g.*, information pertaining to the Carbon Fiber Technology Facility and further information regarding UT-Battelle), however, the Appellant’s appeal does not challenge OPI’s Determination Letter regarding those portions of the request.

of its financial information would disclose business strategies, *e.g.*, research and development costs proposed by a firm, UT-Battelle, and that this confidential, financial information is protected from disclosure under Exemption 4. Determination Letter; *See* Oak Ridge National Laboratory (ORNL)<sup>2</sup> Letter to ORO Re: UT-Battelle Review for ORO-2019-00374-F (April 24, 2020). On May 27, 2020, the Office of Hearings and Appeals (OHA) received the Appellant’s appeal. The Appellant alleged that OPI misapplied Exemption 4 to withhold otherwise releasable information in that the responsive document does not contain “trade secrets” or “commercial or financial information” that could be considered privileged or confidential. Appeal at 1.

## II. Analysis

The FOIA requires that federal agencies disclose records to the public upon request unless the records are exempt from disclosure under one or more of nine enumerated exemptions. 5 U.S.C. § 552(b)(1)–(9). However, “these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the [FOIA].” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The nine statutory exemptions from disclosure are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)–(9). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). An agency is also required to “consider whether partial disclosure of information is possible whenever [it] determines that a full disclosure of a requested record is not possible; and take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 552(a)(8)(A)(ii)(I)–(II).

### A. Exemption 4

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.” *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2362 (2019) (*Argus Leader*).

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 Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). That broad definition includes records that “reveal basic commercial operations, relate to the income-producing aspects of a business, or bear upon the ‘commercial fortunes’ of the organization.” *Jordan v. U.S. Dep’t of Labor*, 273 F. Supp. 3d 214, 230 (D.D.C. 2017) (quoting *Baker & Hostetler LLP v. U.S. Dep’t of Commerce*, 473 F.3d 312 at 319 (D.C. Cir. 2006)). In this case, the withheld portions of the responsive document consist of UT-Battelle’s proprietary financial information that reflects costs associated with the AMIE project. Since this information relates to research and development costs proposed by the company for DOE-related projects, we find that it is sufficient to render the information commercial or financial in nature.

Turning 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.

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<sup>2</sup> UT-Battelle is the management contractor for ORNL.

1979); *see also* *Niagara Mohawk Power Corp.*, OHA Case No. TFA-591 (2000).<sup>3</sup> In this case, the information that the Appellant challenges under Exemption 4 was submitted by UT-Battelle, a private company, to DOE ORNL. Thus, we conclude that DOE obtained that information from a person.

Finally, to determine whether information is confidential, the long-standing standard articulated in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), has been changed by the Supreme Court's decision in *Argus Leader*. In *Argus Leader*, the Supreme Court found that the term "confidential" has the same meaning that it had during the enactment of the FOIA, which is information that is "private" or "secret." *Id.* at 2363. The Court further held that "contemporary dictionaries suggest two conditions that might be required for information communicated to another to be considered confidential." *Id.* First, "information communicated to another remains confidential only if the party receiving it provides some assurance that it will remain secret." *Id.*

The Court determined that the first condition – that the information customarily be kept private or closely held by the submitter – must be met, because "it is hard to see how information could be deemed confidential if its owner shares it freely." *Id.* As to the second condition – whether information must be communicated 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. *Argus Leader*, 139 S. Ct. at 2363.<sup>4</sup> In conclusion, the Court held that "at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Argus Leader*, 139 S. Ct. at 2366.

The documentation provided by ORNL reflects that the redacted information is customarily treated as private by UT-Battelle. ORNL's official correspondence to ORO reflects that UT-Battelle reviewed the responsive document prior to release, and identified its proprietary cost information contained therein. ORNL Letter to ORO Re: UT-Battelle Review for ORO-2019-00374-F (April 24, 2020). As verified by ORNL, "UT-Battelle customarily recommends protection of its financial information, regardless of format or cost breakdown." *See* Email from Diana Stanley, ORNL to ORO and OPI (May 6, 2020). We find that the above documentation sufficiently demonstrates that the information submitted by UT-Battelle was customarily and actually treated as private by its owners.

Having determined that the redacted information was "customarily kept private, or at least closely held" by UT-Battelle, we next consider whether the DOE provided an assurance of confidentiality to UT-Battelle when it submitted its commercial or financial information. As asserted by ORO, the UT-Battelle Prime Contract with ORNL contains a clause which provides an implied assurance of confidentiality for contractor-owned records submitted to the government. *See* Email from

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<sup>3</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at [www.energy.gov/oha](http://www.energy.gov/oha).

<sup>4</sup> The Court noted that USDA had a well-established history of promising retailers, through promulgation of regulations, that it will keep their store-level SNAP data confidential. *Id.*; *see e.g.*, 43 Fed. Reg. 43275 (1978).

Linda Chapman, ORO to OHA (June 10, 2020). Section I.126 (b)(2) of the contract entitled “Access To And Ownership Of Records” states that confidential contractor financial information is considered the property of the contractor and is not within the scope of government-owned records. *See* Attachment to Email from Linda Chapman, ORO to OHA (June 10, 2020). We find that the above documentation sufficiently indicates that the DOE provided UT-Battelle with an assurance of privacy at the time UT-Battelle submitted its proprietary cost information to the DOE. We therefore conclude that OPI appropriately applied Exemption 4 to redacted information contained in the SOW.

### **III. Order**

It is hereby ordered that the appeal filed on May 27, 2020, by Ron Walli, Case No. FIA-20-0030, is denied.

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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, MD 20740  
Web: [ogis.archives.gov](http://ogis.archives.gov) Email: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 202-741-5770 Fax: 202-741-5769  
Toll-free: 1-877-684-6448

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals