

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

In the Matter of: Partnership for)
Policy Integrity)
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Filing Date: March 8, 2013) Case No.: FIA-13-0017
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Issued: March 28, 2013

Decision and Order

On March 8, 2013, the Partnership for Policy Integrity (Appellant) filed an Appeal from two determinations issued to it on January 17, 2013, and, February 5, 2013, by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2012-01818-F). In that determination, LGPO released 80 documents responsive to a 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. LGPO, however, withheld portions of some of the released documents under FOIA Exemptions 4 and 6. This Appeal, if granted, would release some of the withheld information.

I. Background

The Appellant filed a request with DOE for copies of certain information relating to an application for a loan guarantee for the Taylor Biomass Gasification Facility (Taylor). January 17, 2013, Determination Letter at 1. On January 17, 2013, LGPO responded by issuing a partial response to the Appellant's request in which it released 69 responsive documents. *Id.* However, LGPO's January 17, 2013, Determination Letter redacted portions of 36 of those documents pursuant to Exemptions 4 and 6 of the FOIA. *Id.* On February 5, 2013, LGO issued its final Determination Letter to the Appellant, in which it released an additional 11 documents. February 5, 2013, Determination Letter at 1. However, LGPO's February 5, 2013, Determination Letter redacted portions of 10 of those documents pursuant to Exemptions 4 and 6 of the FOIA. *Id.* The Appellant challenges a number of the LGPO's withholdings under Exemption 4.¹ Appeal at 2.

¹ The Appeal does not dispute LGPO's withholdings under Exemption 6.

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(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. Only Exemption 4 is at issue in this Appeal.

Exemption 4 exempts from mandatory public 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." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines 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. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*).

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 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. 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).² The information at issue in the present case was obtained from Taylor, an applicant for a DOE Loan Guarantee, and therefore satisfies this definition. Finally, since the information at issue does not constitute a trade secret, the agency must then determine whether the information is "privileged or confidential."³

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.*

² OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.energy.gov/OHA>.

³ In the present case, LGPO does not contend that the information it is withholding is privileged, but rather contends that it is confidential.

Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). In the present case, LGPO did not indicate whether the information it withheld was voluntarily submitted. However, Taylor was required to submit the documents in question in order to be considered eligible for a loan guarantee, therefore the information was involuntarily submitted. Since the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879

Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *Kleppe*, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). If an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Smith, Pachter, McWhorter & D'Ambrosio*, Case No. VFA-0515 (1999). The only description of the information being withheld, under both determination letters, by the LGPO under Exemption 4 is that it consists of "financing plans, business strategies, and procurement plans." January 17, 2013, Determination Letter at 2; February 5, 2013, Determination Letter at 2. LGPO contends that public disclosure of this information would cause substantial harm to the applicant's competitive interests, contending that:

Disclosing financing information and strategies would provide an unfair advantage to competitors by enabling competing power suppliers to estimate supply costs and use this information to bid against the applicant. Public disclosure of procurement plans would enable the applicant's power vendors to compete unfairly towards providing future goods and services to the applicant, in addition to allowing vendors unlicensed use of the applicant's original work product. Public disclosure of financing information would enable potential customers to exert undue leverage with regard to purchasing the applicant's product.

Id. We obtained copies of the withheld documents, at issue in the present Appeal, from the LGPO. Our review of these records indicates that some of the information withheld under Exemption 4 by the LGPO does not clearly consist of "financing plans, business strategies, and procurement plans," therefore its withholding under Exemption 4 was inadequately justified. Moreover, while some of the information withheld under Exemption 4 by the LGPO, could clearly be expected to cause substantial harm to Taylor's competitive position if released to the public, other information withheld under Exemption 4 is not as obviously likely to result in substantial harm to Taylor's competitive position if released. The determination letters fail to adequately explain why this information could harm Taylor's competitive position if released. Accordingly, they fail to adequately justify the withholding of this information. We are remanding those portions of the Appeal to the LGPO. A document-by-document discussion follows. The Appellant limited the scope of its Appeal to portions of 6 documents, respectively identified as: (1) Montgomery Project DOE LGP Application Part; (2) Part II Credit Assessment

Report; (3) Supplemental Info 6-18-10 TBE response to 6-2-10 DOE Letter; (4) Taylor Biomass Gasification Ltr Rpt; (5) Montgomery Project lew Data Appendix; and (6) Part II Lifecycle Data lew Revised. Appeal at 2-3; March 14, 2013, email from Kelly Bitov, Esq. Partnership for Policy Integrity, to Steven L. Fine, Attorney-Examiner, Office of Hearings and Appeals.

(1) Montgomery Project DOE LGP Application Part

The LGPO withheld the number of tons of air pollutant reduction that the facility is expected to achieve and the amount of greenhouse gas per megawatt expected to be released by the facility. LGPO has not explained how the release of this information would likely result in substantial harm to Taylor's competitive position. Accordingly, we are remanding this portion of the Appeal to LGPO. On remand, LGPO should either release the information it has redacted from this document under Exemption 4, or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would be likely to result in substantial competitive harm.

(2) Part II Credit Assessment Report

The LGPO redacted the number of tons of municipal solid waste per day that the facility is expected to process from this document. It also redacted the number of tons per day of the biomass fractions of raw wood waste and construction and demolition wastes that will be processed by the facility. The LGPO also redacted the number of tons per day of processed biomass fuel that would be produced from these feedstocks. LGPO has not explained how the release of this information would likely result in substantial harm to Taylor's competitive position. Accordingly, we are remanding this portion of the Appeal to LGPO. On remand, LGPO should either release the information it has redacted from this document under Exemption 4, or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would be likely to result in substantial competitive harm.

(3) Supplemental Info 6-18-10 TBE response to 6-2-10 DOE Letter

The LGPO redacted information from this document that, if released, would reveal the technologies Taylor plans to employ in order to control emissions of particulate matter from the facility. It is clear that release of this information would likely reveal Taylor's technological approach to emissions control. Such information, if released to the public, might provide Taylor's competitors with information enabling them to undercut Taylor in the marketplace. Accordingly, we are denying this portion of the Appeal.

The LGPO also redacted a number of data values concerning the facility's expected particulate emissions. The Appellant contends that such information is already publicly available in Taylor's public filings with other regulatory agencies. However, the Appellant has not provided a specific example of where such information can be obtained. Accordingly, we are also denying this portion of the Appeal.

The LGPO has also redacted information data from this document derived from testing of the “Silvagas” biomass gasification technology at the McNeil demonstration project. It is not clear whether the LGPO is protecting the McNeil demonstration project’s or Taylor’s proprietary interest by withholding this information. Moreover, it appears that this information might be publicly available. Accordingly, we are remanding this portion of the appeal to the LGPO. On remand, the LGPO should further investigate these two issues. If the information is publicly available, the LGPO may not continue to withhold it under Exemption 4. If it determines whose proprietary interest may be affected by release of this data, it should then consult with that party in order to determine whether release of this withheld information could reasonably be expected to cause its owner substantial competitive harm if released to the public. Otherwise this information should be released or withheld under another properly applicable FOIA exemption.

(4) Taylor Biomass Gasification Ltr Rpt

The LGPO redacted most of two paragraphs of this document in which Taylor sets forth a logic based argument designed to convince DOE that its facility will reduce greenhouse gas emissions. It appears unlikely that the release of a logic based argument would likely result in substantial harm to Taylor’s competitive position if released. Accordingly, we are remanding this portion of the appeal to the LGPO. On remand, the LGPO should either release this information or issue a new determination in which its withholding is adequately justified.

(5) Montgomery Project lew Data Appendix, and (6) Part II Lifecycle Data lew Revised

These two documents are spreadsheets containing data concerning the facility’s emissions of greenhouse gas and other airborne pollutants. The LGPO has redacted most of the data. However, the LGPO has not adequately explained how release of this data concerning the facilities emissions to the public could reasonably be expected to cause substantial harm to Taylor’s competitive position. Therefore, we are remanding this portion of the Appeal to the LGPO. On remand, the LGPO should either release this information or issue a new determination letter which adequately justifies its withholding.

III. CONCLUSION

We are remanding this matter to LGPO for further processing in accordance with the instructions set forth above. Accordingly, the Partnership for Policy Integrity’s Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by Partnership for Policy Integrity, Case No. FIA-13-0017, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.
- (2) The Loan Guarantee Program Office shall issue a new determination either releasing the information we have remanded above, or withholding that information under another appropriately justified exemption.

(3) 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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