

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

In the Matter of Cause of Action	)	
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Filing Date: March 7, 2013	)	Case No.: FIA-13-0015
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Issued: April 25, 2013

**Decision and Order**

On March 7, 2013, Cause of Action (Appellant) filed an Appeal from a determination issued to it by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2012-01351-F). In that determination, LGPO released documents in response 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. However, LGPO withheld portions of those documents under Exemption 4. This Appeal, if granted, would require LGPO to release the withheld information.

**I. Background**

On May 17, 2012, the Appellant filed a request with the DOE for:

The names of 460 applicants whom have applied to [LGPO] since its inception, along with the following information:

1. Solicitation period applicant applied under.
2. Applicant sponsor.
3. Technology sector in which applicant is engaged.
4. Date DOE issued a guarantee to an applicant (if applicable).
5. Date DOE conditionally committed to an applicant (if applicable).
6. Date DOE rejected an applicant (if applicable).
7. Date applicant withdrew application (if applicable).
8. Amount DOE guaranteed or conditionally committed for each applicant (if applicable).
9. Date closed (if applicable).

Request Letter dated May 17, 2012, from Appellant to DOE. DOE assigned the FOIA request to LGPO to conduct a search for responsive documents. The Appellant received several partial responses prior to the final response which LGPO released on February 5, 2013. In the final

response, LGPO produced responsive documents but withheld portions of those documents under Exemption 4. Determination Letter dated February 5, 2013, from LGPO to Appellant. The Appellant filed the current Appeal on March 7, 2013, claiming that LGPO did not respond in a timely fashion and its response is incomplete.<sup>1/</sup> Appeal Letter dated March 5, 2013, from Appellant to Poli Marmolejos, Director, Office of Hearings and Appeals (OHA), DOE. In addition, the Appellant challenges LGPO's determination that the redacted information was properly withheld under Exemption 4. Appeal Letter at 6.<sup>2/</sup>

## II. Analysis

### A. Adequacy of the Search

In its Appeal, the Appellant claims that "through independent research, [it] determined that the documents provided by [LGPO] are obsolete and do not contain a complete list of DOE actions taken in regards to the Loan Guarantee Program and requested by [the Appellant]." Appeal Letter at 4. The Appellant continues, "the discrepancies between the data produced by [LGPO] . . . the data that appears in the March 2012 [Government Accountability Office (GAO)] Report . . . make clear that [LGPO] has disregarded its statutory obligation to promptly comply with [the] FOIA request." *Id.* at 5.

In response to this Appeal, LGPO stated that it does not have a copy of the actual data that GAO used to draft its report. Response E-mail dated March 19, 2013, from Victor Farren, LGPO, to Janet Fishman, OHA. LGPO explained that LGPO provided raw data for GAO's Report, which GAO analyzed and used to create the tables published in the report Appellant references in its Appeal. *Id.* However, LGPO did not continue to update these raw data files after it initially provided the information to GAO. *Id.* Therefore, the Excel files that were produced in response to Appellant's FOIA request were the exact files LGPO originally provided to GAO. Because LGPO did not update the files, no additional files exist. *Id.* LGPO asserts that it is not required to create records for the purposes of responding to a FOIA request. *Id.*

LGPO is correct in its assertion that it is not required to create records for the purposes of responding to a FOIA request. The FOIA does not require an agency to create documents. 5 U.S.C. 552; 10 C.F.R. § 1004.4(d)(1), (2). *See also Tarek Farag*, Case No. TFA-0365 (2010); *Terry M. Apodaca*, Case No. TFA-0319 (2009).<sup>3/</sup> Therefore, we find that LGPO cannot be

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<sup>1/</sup> Our office cannot address the timeliness of the Appeal. Section 1004.8(a) of the DOE Regulations states that OHA has jurisdiction to consider FOIA Appeals "[w]hen the Authorizing Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request . . . or when the Freedom of Information Officer has denied a request for waiver of fees." 10 C.F.R. § 1004.8(a).

<sup>2/</sup> The Appellant claims that LGPO, by implication, withheld information under Exemption 3. At no point in the Determination Letter has LGPO claimed Exemption 3 to withhold information. Therefore, we will not address the Appellant's argument about Exemption 3 in this Decision.

<sup>3/</sup> OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

required to produce a document that does not exist. It appears to this Office that the information that LGPO possesses is in a different format from that which the Appellant believes it should possess. In its Appeal, the Appellant points to three separate pieces of information included in the GAO report, but not included in the information provided by LGPO. LGPO countered that it provided the information that it had in the format that it had. The information LGPO released is not in the same format that was used in the GAO Report, and therefore, a comparison cannot be made. We are convinced that LGPO provided the information it possessed in response to the Appellant's request.

Nevertheless, in reviewing its records in response to the Appeal, LGPO did find one piece of information that is responsive to the Appellant's request. *Id.* We will remand the matter to LGPO for a new determination either releasing that information or justifying its withholding.

#### **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 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 is at issue in this Appeal.

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 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 loan applicants 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-0591 (2000). The loan applicants satisfy that definition. However, the Appellant argues that the information was not “obtained from a person” because the document was generated by the DOE, and therefore, “[i]nformation that is generated by the government simply cannot fall within Exemption 4.” Appeal Letter at 6. We disagree. The information was provided by the loan applicants and put together in a document by LGPO. The fact that the document was compiled by the DOE does not change the fact that the information was provided by the loan applicants. In fact, a case cited by the Appellant reinforces this opinion. Appeal Letter at 6-7, n. 48. In *Bloomberg v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148 (2d Cir. 2010), the court stated that

Some courts have extended the protection of Exemption 4 to information beyond the raw data gathered from persons by the government. See, e.g., *OSHA Data/CIH, Inc. v. U.S. Dep’t of Labor*, 220 F.3d 153, 162 n. 23 (3d Cir. 2000) (holding that disclosure of a ratio derived by an agency from the numbers supplied by a person would disclose commercial information obtained from a person and would thus come within Exemption 4 if the information was confidential); *Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C.Cir.1979) (holding that disclosure of a government report containing figures from which information obtained from a company could be extrapolated would disclose information obtained from a person and came within Exemption 4).

*Bloomberg*, 601 F.3d 148-49. We find that the information withheld in this case was raw data that was merely compiled by LGPO, the release of which would not disclose the agency’s actions. Therefore, the information was “obtained from a person” and not created by the government.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be “confidential.” In this case, the loan applicants were required to submit the information in question in order to receive a loan. 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.

We must address whether release of the information would likely result in substantial competitive harm to the submitters of the information. LGPO determined that release of the commercial and financial information contained in the documents would likely cause the loan applicants substantial competitive harm. We agree. We believe that release of the withheld information would harm the loan applicants in possible future funding situations. In addition, release would give the loan applicants’ competitors information about the loan applicants’ future business interests and the funding requirements for those business interests. Therefore, we find that LGPO properly applied Exemption 4 to the withheld information in the released documents.

### III. Conclusion

After considering the Appellant's claim, we conclude that LGPO provided the information it possessed, with the exception of one responsive document that it will evaluate on remand. In addition, LGPO properly invoked Exemption 4 to withhold information. Accordingly, we will grant the Appeal in part and deny it in all other respects.

It Is Therefore Ordered That:

- (1) The Appeal filed by Cause of Action, Case No. FIA-13-0015, is hereby granted as specified in Paragraph (2) below and denied in all other respects.
- (2) The matter is hereby remanded to the Loan Guarantee Program Office of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (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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Date: April 25, 2013