

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

In the Matter of Dow Jones & Company)

Filing Date: August 7, 2013)

Case No. FIA-13-0054

Issued: August 19, 2013

Decision and Order

Dow Jones & Company (the Appellant) filed an Appeal from a determination issued by the Department of Energy’s Office of Electricity Delivery and Energy Reliability (OE) on July 24, 2013. In that determination, OE denied in part a request for information that the Appellant had submitted on June 5, 2013, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OE released eight documents that it identified as responsive to the Appellant’s request, but withheld portions of these documents under FOIA Exemption 4. This Appeal, if granted, would require OE to release this information, and to conduct an additional search for responsive documents.

I. Background

Electrical utilities that experience reportable emergency and disturbance events are required to report those events to OE by the submission of Form OE-417. On June 5, 2013, the Appellant requested all documents related to eight specific “OE-417 Electric Emergency and Disturbance events in 2011 and 2012.”¹ Appeal at 1.

On July 24, 2013, OE issued a determination in which it stated that it had identified eight responsive documents, and stated that it was withholding portions of these documents under Exemption 4. OE contended that information it withheld from the OE-417 forms “consists of descriptions of power outages and the steps taken to resolve them.” Determination Letter at 1. OE further contends that release of this information would reveal “business strategies and personnel information.” *Id.*

¹ The Appellant further requested and was granted a waiver from search, review, and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii).

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemption 4 is at issue in the present case.

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*). 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 it withheld under Exemption 4 is "confidential."

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) (*Critical Mass*). If 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. In the present case, OE did not specifically indicate whether the information it withheld was voluntarily submitted, however the record shows that the electric utilities are required to submit Form OE-417 reports, and the Determination Letter implicitly recognizes that the information at issue was not voluntarily submitted by claiming that release of the withheld information would cause substantial competitive harm

² 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*).

to its submitters and would impair OE's ability to obtain similar information in the future. Determination Letter at 1-2.

The Determination Letter contends that disclosure of information consisting of descriptions of power outages and the steps taken to resolve them would reveal the submitting electric utilities' business strategies and personnel information. However, it is not obvious that disclosure of a submitter's descriptions of power outages and the steps taken to resolve them would reveal a utility's business strategy or its personnel information. Nor does OE explain how the disclosure of business strategies or personnel information could reasonably be expected to cause substantial competitive harm to its submitters. It is well settled that if an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, as in the present case, it must state the reasons for believing such harm will result. *Partnership for Policy Integrity*, Case Number FIA-13-0017 (2013); *Larson Associated, Inc.*, Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993).³ 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").

The Determination Letter's claim that release of the withheld information would impair OE's ability to obtain similar information in the future is also conclusorily asserted without further explanation or support. In the present case, it is highly unlikely that release of the withheld information would cause such impairment, because submitters are required to include such information in their FORM OE-417 reports. See *Niagara Mohawk Power Corp. v. DOE*, 169 F.3d 16, 18 (D.C. Cir. 1999) (claim that release of withheld information obtained under compulsion would impair the ability of the agency to obtain similar information in the future is "inherently weak").

Therefore, we are remanding this portion of the Appeal to OE. On remand, OE should either release the information it has redacted from the responsive documents solely under Exemption 4, or issue a new determination in which it provides a sufficient explanation for concluding that its release would be likely to result in substantial competitive harm.

Adequacy of the Search

In responding to a request for information filed under the Freedom of Information Act (FOIA), an agency must "conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of reasonableness which we apply to agency search procedures does not

³ Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at <http://www.doe.gov/OHA>.

require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search was inadequate. *Aurimas Svitojus*, Case No. TFA-0349 (2010) (remanding where the site office performed no search).

We contacted OE to gain additional information to evaluate the adequacy of its search. OE informed us that the OE-417 form can be submitted by email, or through an online submission system. August 14, 2013, email from Brian Copeland, OE to Steven Fine, OHA at 1. OE conducted its search for documents related to the eight specific OE-417 Electric Emergency and Disturbance events, by checking the inbox to which OE-417 reports are sent by electrical utilities, by checking the database which contains the OE-417 reports submitted through the online submission system, and by checking the email inbox of the employee who was responsible for determining whether any action on the part of the DOE was required in response to the information contained in the reports. *Id.* The OE reported that it located 16 responsive documents. *Id.*

After reviewing the search for responsive documents conducted by OE in response to the Appellant’s initial request, we find that it was reasonably calculated to uncover any responsive documents and was therefore adequate. However, the discrepancy between the number of responsive documents identified in the Determination Letter, eight, and the number of responsive documents identified by the employees conducting the search, 16, needs to be explained. Accordingly, on remand, OE’s new determination letter should either release the additional eight documents or thoroughly explain this discrepancy and take appropriate action to resolve it.

III. CONCLUSION

We are remanding this matter to OE for further processing in accordance with the instructions set forth above. Accordingly, Dow Jones & Company’s Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Dow Jones & Company on August 7, 2013, Case No. FIA-13-0054, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The Office of Electricity Delivery and Energy Reliability shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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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