

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

In the Matter of GlidePath Power LLC	)		
	)		
Filing Date: April 29, 2016	)	Case No.:	FIA-16-0030
	)		
_____	)		

Issued: May 27, 2016

---

**Decision and Order**

---

On April 29, 2016, GlidePath Power LLC (Appellant) filed an Appeal from a determination issued to it on March 29, 2016, by the Golden Field Office (GFO) of the Department of Energy (DOE) (Request No. GO-16-019). In its determination, the GFO responded to the Appellant’s request for information 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. In response to the Appellant’s request, the GFO located and produced 254 pages of responsive documents, but withheld portions of those documents pursuant to Exemptions 3, 4 and 6 of the FOIA. The Appellant challenges the GFO’s withholding of information under Exemption 4 only. This Appeal, if granted, would require the GFO to release information that it withheld pursuant to Exemption 4.

**I. Background**

On February 2, 2016, the Appellant submitted a FOIA request to the DOE. In the request, the Appellant sought:

all application [documents], supporting documentation, award documentation, contracts, and/or any other evidence used in processing the application for and awarding of the Commonwealth Edison Company microgrid community project in the SunShot Initiative that was announced by the DOE in a January 19, 2016 press release.

Request from Appellant to DOE (February 2, 2016) at 1. The DOE’s Office of Information Resources (OIR) referred the FOIA request to the GFO. *See* Letter from Alexander C. Morris, FOIA Officer, OIR, to Appellant (February 9, 2016). On March 29, 2016, the GFO issued a determination in which it released 254 pages of responsive documents. Letter from Derek G.

Passarelli, Director, GFO, to Appellant (March 29, 2016) (Determination Letter) at 1. The GFO, however, withheld portions of those documents pursuant to Exemptions 3, 4 and 6 of the FOIA. *Id.* at 1-3.

In the determination, the GFO stated that the information it withheld under Exemption 4 consisted of the confidential business information of Commonwealth Edison Company (ComEd) and its partners. *Id.* at 2-3. The GFO described that information as including: (1) information concerning the strategic planning of tasks, deliverables and project timelines, (2) budget information and cost breakdowns for personnel, equipment and other costs and (3) proprietary business information regarding battery storage and other technical processes. *Id.* at 2. The GFO further found that the information it redacted under Exemption 4 was “not publicly available” and that the information’s release could allow competitors “to undercut Commonwealth Edison and its partners on future bid proposals.” *Id.* Consequently, the GFO concluded that the release of the information “would likely cause Commonwealth Edison and its partners substantial competitive harm.” *Id.* at 3.

On April 29, 2016, the Appellant filed an Appeal in which it challenged the GFO’s withholdings under Exemption 4 but not the withholdings under Exemptions 3 or 6. Appeal from Appellant to the Office of Hearings and Appeals (April 28, 2016) (Appeal) at 1. In the Appeal, the Appellant makes three arguments. First, the Appellant asserts that ComEd is a publicly-owned, state-regulated distribution utility and that under Illinois law ComEd has the responsibility to disclose detailed business information to the Illinois Commerce Commission, including an annual infrastructure plan.<sup>1</sup> Appeal at 2-3. Thus, the Appellant argues, the information redacted under Exemption 4 is not confidential. *Id.* Second, the Appellant claims that disclosure of the redacted information would not harm ComEd’s competitive position because ComEd “is a regulated electric distribution utility in the state of Illinois and has no competition.” *Id.* at 4. Third, the Appellant requests verification that all the material that the GFO withheld as confidential had been previously marked as confidential by ComEd and its partners.<sup>2</sup> *Id.*

## 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 agencies may withhold in their discretion. 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 construe these exemptions narrowly to maintain the FOIA’s goal of broad disclosure. *See Dep’t of*

---

<sup>1</sup> As part of its Appeal, the Appellant submitted to the Office of Hearings and Appeals (OHA) a publicly-released infrastructure investment plan by ComEd that is dated April 1, 2016; an annual report from 2015 by the Illinois Commerce Commission regarding electricity, gas, water and sewer utilities in Illinois; and several web links, including a link to the Illinois Public Utilities Act. *See* Appeal.

<sup>2</sup> In response to this Appeal, the GFO submitted comments to OHA. *See* Letter from Michele H. Altieri, FOIA Officer, GFO, to Gregory Krauss, Attorney-Advisor, OHA (May 10, 2016). Along with those comments, the GFO submitted to OHA (1) comments from ComEd and its partners that the GFO received prior to issuing the determination and (2) comments that ComEd provided to the GFO in response to the Appeal.

*the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001). The agency has the burden of showing that a FOIA exemption is applicable. *See* 5 U.S.C. § 552(a)(4)(B).

#### **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). 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, 766 (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) (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 either “privileged or confidential.”

The GFO does not claim that the information it withheld under Exemption 4 constitutes a “trade secret” but rather that the latter analysis applies. Therefore, 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 relevant company or entity has a “commercial interest” in them. *Public Citizen*, 704 F.2d at 1290. The documents found to be responsive to this request are related to a grant that DOE awarded to ComEd to implement a “Microgrid-Integrated Solar-Storage Technology” in a Chicago neighborhood. Our review of unredacted versions of the documents reveals that the GFO’s description of the withheld material is accurate. The redacted information includes detailed descriptions of project tasks, deliverables and timelines. A large portion of the redacted information is budget information showing costs for personnel, travel, equipment and other expenses as well as providing justifications for those costs. We observed that redacted budget information was submitted by ComEd as well as its project partners.<sup>3</sup> We also found, as the GFO indicated in its determination, information regarding technologies that ComEd uses or plans to use, including solar technologies and computer software. In short, we find that the information redacted clearly meets 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 (U.S.A.), Inc., v. Export-Import Bank of the United States*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. VFA-0591 (2000). DOE obtained the redacted information from ComEd and its partners. Because ComEd and its partners all meet the definition of “person,” this requirement is satisfied.

---

<sup>3</sup> Those partners include the University of Denver, the Illinois Institute of Technology and the management and operations contractors for the Argonne National Laboratory and the National Renewable Energy Laboratory.

Finally, we must consider whether the information that the GFO redacted under Exemption 4 is “privileged or confidential.” The GFO found that the redacted information at issue is confidential; there is no claim here that the information is privileged. In order to determine whether the information qualifies as confidential, we must first decide whether the information was 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.

The GFO determined that the information redacted under Exemption 4 was involuntarily submitted by ComEd and its partners. Determination Letter at 2. Information submitted during the process of competing for government grants is usually considered to have been involuntarily submitted because “the grants generally would not be awarded in the absence of that information.” *Bryan Cave LLP*, Case No. TFA-0464 (2011)<sup>4</sup>; see also *Lepelletier v. F.D.I.C.*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997), *rev’d in part on other grounds*, 164 F.3d 37 (D.C. Cir. 1999) (“Information is considered ‘required’ if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government”). Consequently, we agree that the redacted information was involuntarily submitted.

The GFO next found that the information withheld under Exemption 4 was confidential because its release would likely cause ComEd and its partners substantial competitive harm. We have reached the same conclusion and have determined that release of the information could give ComEd’s competitors a significant competitive advantage in submitting future proposals. For example, information about tasks, deliverables and timelines, or about ComEd’s technologies, could allow a competitor to replicate key aspects of ComEd’s application. See ComEd Objection Log (May 9, 2016) (Objection Log) at 1. Disclosure of budget information could help competitors achieve similar or lower costs. See Letter from Michele H. Altieri, FOIA Officer, GFO, to Gregory Krauss, Attorney-Advisor, OHA (May 10, 2016) (GFO Comments) at 5. Release of budget information submitted by ComEd’s partners could give competitors an advantage by showing how ComEd forged partnerships to increase its capabilities, or it could impair ComEd’s ability to obtain financial information from partners in the future.<sup>5</sup> See Objection Log at 2.

We are further persuaded that release of the redacted information is likely to cause ComEd substantial competitive harm in future application processes due to the competitive nature of this

---

<sup>4</sup> OHA FOIA decisions issued after January 3, 2012, may be accessed at <http://energy.gov/oha/foia-cases>.

<sup>5</sup> ComEd argues it provided information beyond what DOE required and that at least some of the redacted information was therefore voluntarily submitted. See ComEd Comments (March 1, 2016) at 1; ComEd Comments on Appeal (May 9, 2016) at 4. To the extent that any redacted information was voluntarily submitted, we find that it would not be information that ComEd and its partners would customarily release to the public due to the potential of that information to cause substantial competitive harm. Consequently, such information would also qualify as confidential.

grant application process. According to the GFO, the DOE received 47 applications for this funding opportunity and chose only six proposals, one of which was ComEd's. GFO Comments at 1 n.2. The grant competition was a national competition and was not limited to Chicago or to Illinois. Memorandum of Telephone Conversation between Michele Altieri, FOIA Officer, GFO, and Gregory Krauss, Attorney-Advisor, OHA (May 20, 2016).

As to the Appellant's arguments that the withheld information is not confidential, we do not find them persuasive. It is true that an agency "may not rely on an otherwise valid exemption to justify withholding information that is already in the 'public domain.'" *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001); *see also Inner City Press/Cnty. On the Move v. Bd. Of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006) (Exemption 4 does not apply "if identical information is otherwise in the public domain"). Nevertheless, although ComEd may be required to disclose certain business information to Illinois regulators, the Appellant has not argued, let alone demonstrated, that the specific information in ComEd's application has been previously shared with Illinois regulators and subsequently released to the public. *See Northwest Coalition for Alternatives to Pesticides v. Browner*, 941 F. Supp. 197, 202 (D.D.C. 1996) (noting that a party making a claim of public availability under Exemption 4 "must initially produce evidence to support its assertion"). The Appellant has provided a copy of a ComEd infrastructure plan and an annual report on various types of utilities by the Illinois Commerce Commission, but our review of those materials did not find any information overlapping with the information redacted under Exemption 4. Indeed, those materials do not deal with the solar and battery storage technology project for which ComEd has received a DOE grant.<sup>6</sup>

The Appellant's other arguments are unavailing. The Appellant contends that ComEd does not have competition in Illinois and that therefore the notion that ComEd's competitive position would be harmed by disclosure of the redacted information is "ludicrous." Appeal at 4. The Appellant, however, neglects to consider the competition that ComEd faced in securing the grant and the competition it could face in competing for future awards. Moreover, by requesting that OHA review whether ComEd and its partners marked the documents at issue as "confidential," the Appellant appears to be arguing that information must be marked as "confidential" to be considered confidential under Exemption 4. That contention is not supported by law. The relevant issue in determining whether material is exempt from disclosure under Exemption 4 is the character of the information. *See Maydak v. United States Dep't of Justice*, 254 F. Supp. 2d 23, 48-49 (D.D.C. 2003) (agency could not rely on fact that document was labeled as confidential to withhold it under Exemption 4 but needed to consider the content of the document). Accordingly, we find that the GFO properly applied Exemption 4 in withholding the redacted information.

## **B. Public Interest**

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. In the instant matter, federal law does not permit

---

<sup>6</sup> The Appellant is also incorrect that ComEd is publicly owned. In fact, it is a private corporation and a wholly owned subsidiary of Exelon Corporation. *See* GFO Comments at 4.

disclosure of the material redacted under Exemption 4 because such a disclosure is prohibited by the Trade Secrets Act. *McDonnell Douglas v. United States Dep't of the Air Force*, 375 F.3d 1182, 1185-86 (D.C. Cir. 2004) (finding that Trade Secrets Act “effectively prohibits an agency” from disclosing Exemption 4 information).

### **C. Additional Releasable Information**

The FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . .” 5 U.S.C. § 552(b). In reviewing the redactions under Exemption 4, we observed that the GFO was careful to release segregable material, often redacting only parts of sentences. We did not find any places where information could be segregated from exempt material and released.

However, on several pages, including on pages 96, 129 and 132, we observed that the GFO redacted budget information, pursuant to Exemption 4, that was provided by DOE as an example only. This information does not appear to be Exemption 4 material because it was not obtained from ComEd or its partners. Additionally, on page 46, we found that the GFO redacted nearly two sentences, pursuant to Exemption 4, that on subsequent pages are not redacted although the material is identical. Although these are minor issues, we will remand this matter to the GFO so that it may review whether any of the identified material, or any similar material, may be released.

It Is Therefore Ordered That:

- (1) The Appeal filed on April 29, 2016, by GlidePath Power LLC, Case No. FIA-16-0030, is hereby granted as set forth in Paragraph (2) below and denied in all other respects.
- (2) This matter is hereby remanded to the Department of Energy’s Golden Field Office, 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.

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. FOIA requesters may contact OGIS 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

Date: May 27, 2016