

argues that release of this information will not allow a competitor to gain a “substantial competitive advantage in pricing future bids, even on exactly similar projects.” *Id.* at 3.

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. 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 Appellant is not challenging whether the information withheld, employee wage rate and total hours worked both daily and weekly, is either commercial or financial or obtained from a person. Appeal Letter at 2. We therefore must determine whether the information is privileged or confidential. For the reasons set forth below, we find that the information is confidential and therefore exempt from release under Exemption 4.

In this case, the contractors were required to submit the documents in question as part of their contracts with Golden. 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. In applying Exemption 4 to the documents at issue, Golden determined that release of the information would likely cause the contractors substantial competitive harm.

The Appellant states that the wage rate data from the certified payroll documents would not cause substantial competitive harm because all contractors are aware of the requirement to pay

the prevailing wage rate and benefits as it is stipulated and incorporated into the project contract. Appeal Letter at 2. In addition, disclosure of the hours worked on a project's jobsite should not be protected under Exemption 4 because this information is readily observable on most projects and is the primary way to establish if a contractor complies with apprenticeship guidelines mandated by federal law. *Id.* Finally, the number of hours worked, daily and weekly, for a given employee demonstrates that the worker is being paid for every hour worked and that the contractor is not simply using a required base wage rate to back into Davis-Bacon Act compliance. *Id.* In sum, the Appellant argues that the wage rate, fringe benefits, and apprenticeship guidelines cannot be considered confidential and the release of the information would not cause a competitive disadvantage to the submitter.

Golden determined that release of the commercial and financial information contained in the documents would likely cause the contractors substantial competitive harm. We believe that release of the information would give the contractors competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information would give the contractors' competitors an undue advantage in bidding on future contracts. Therefore, we find that Golden properly applied Exemption 4 to the withheld information in the released documents and properly withheld the total hours worked and total pay received.

III. Conclusion

After considering the Appellant's arguments, we are convinced that Golden properly withheld the redacted information from the documents under Exemption 4. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Torres Consulting & Law Group, LLC, Case No. FIA-12-0056, is hereby denied.
- (2) 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 your right to pursue litigation. You 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
E-mail: ogis@nara.gov

Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 19, 2012