

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

In the Matter of Torres Consulting & Law Group, LLC )	
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Filing Date: February 1, 2013 )	Case No.: FIA-13-0004
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Issued: February 25, 2013

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**Decision and Order**  
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On February 1, 2013, Torres Consulting & Law Group, LLC, (Appellant) filed an Appeal from a determination issued to it on December 13, 2013, by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2012-01506-F). In that determination, LGPO released documents responsive 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. LGPO withheld portions of the released documents under Exemptions 4 and 6 of the FOIA. This Appeal, if granted, would release the employee wage rates and total hours worked, both daily and weekly, from the documents at issue.

**I. Background**

On June 20, 2012, the Appellant filed a request with the DOE's Office of Information Resources (OIR) for "three weeks of the most recent certified payroll records from Petrochem Insulation Inc. and Brand Energy Solution & Infrastructure" from the Solana Solar Generation Station project (Solana project) in Gila Bend, Arizona. Request Letter dated June 20, 2012, from Appellant to Alexander Morris, FOIA Officer, OIR, DOE. In addition, the Appellant also requested from the Solana project:

- Fringe Benefit Statements including apprentices;
- All conformance requested and or submitted;
- All conformance request responses, approvals, denials, and/or modifications issued by the Department of Labor (DOL);
- The name of the bona fide apprenticeship program and evidence of the formal certification by the DOL for a trainee program in which a trainee(s) may be registered, along with the terms of the trainee program for the crafts referenced; and
- Copies of the Davis-Bacon compliance interviews conducted by the contracting agency for the crafts referenced.

*Id.* at 1-2. On September 25, 2012, OIR responded, indicating that it was assigning the request to LGPO. Letter dated September 25, 2012, from Alexander Morris to Appellant. On December 13, 2012, LGPO responded by releasing a number of documents but withholding some information from those documents under Exemptions 4 and 6 of the FOIA. Determination Letter dated December 13, 2012, from LGPO to Appellant. LGPO also stated that it found nothing responsive to three of the Appellant's requests.<sup>1/</sup>

On February 1, 2013, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA) challenging only the information withheld under Exemption 4, *i.e.*, the rate of pay and hours worked both daily and weekly. Appeal Letter dated January 24, 2013, from Ashley Walkup, Appellant, to Director, OHA, DOE. The Appellant 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.

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<sup>1/</sup> The Appellant does not challenge the adequacy of LGPO's search.

In this case, the contractors were required to submit the documents in question as part of their contracts with LGPO. Accordingly, we find that the withheld information was “involuntarily submitted.” Under *National Parks*, involuntarily submitted 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, LGPO determined that release of the information would likely cause the contractors substantial competitive harm.

The Appellant states that the argument in this case turns on whether or not release of the information will substantially harm the prime contractor or sub-contractors competitively. Appeal Letter at 2. The Appellant argues that release of 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. *Id.* at 3. In addition, the Appellant argues that 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 Appellant argues that 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.

LGPO 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 because competing contractors could utilize this information to respond to a bid request which would result in a less competitive process and result in a substantial increase in the cost of a similar project. In addition, release of the financial information would give the contractors’ competitors an undue advantage in bidding on future contracts. Therefore, we find that LGPO 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 LGPO 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-13-0004, 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:

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Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: February 25, 2013