

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

In the Matter of Center for Contract Compliance)

Filing Date: May 8, 2012)

Case No.: FIA-12-0025

Issued: May 31, 2012

Decision and Order

On May 8, 2012, the Center for Contract Compliance (“CCC”) filed an appeal from a determination the Department of Energy’s (DOE) Loan Guarantee Program Office (LGPO) issued on March 19, 2012. In its determination, LGPO responded to a request for documents that CCC submitted 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 CCC’s FOIA request, LGPO identified and released one responsive document, but withheld portions of the document pursuant to FOIA Exemption 4. This appeal, if granted, would require LGPO to release the withheld information to CCC.

I. BACKGROUND

In a September 12, 2011, request, CCC sought documents related to the Desert Sunlight Solar Farm Project, a 550-megawatt solar photovoltaic (PV) power plant project to be constructed in Riverside County, California. *See* Letter from Branden Lopez, CCC, to Alexander Morris, FOIA Office, DOE (September 12, 2011). LGPO issued a partial response to the request on February 6, 2012, and a second response on March 19, 2012. Letter from David G. Frantz, Director, LGPO, to Branden Lopez, CCC (March 19, 2012) (Determination).

With the latter determination, which is the subject of the present appeal, LGPO released, in part, one document responsive to a portion of CCC’s request seeking the names of contractors and subcontractors to be used on the project. Withheld from the document, under FOIA Exemption 4, were the names of two subcontractors, with additional information pertaining to one of the subcontractors. Exemption 4 exempts 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); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

As grounds for its Appeal, CCC contends that the name of a contractor working on a project that has received a DOE loan guarantee is not a trade secret, and that such information is normally provided in response to requests for certified payroll records of contractors required to comply with the provisions of the Davis-Bacon Act. CCC further asserts that the names of contractors do not

constitute privileged commercial or financial information, as the names of contractors licensed in the State of California are among information that can be found in an online database maintained by the California State License Board.

II. ANALYSIS

In responding to FOIA requests, an agency has an obligation to ensure that its determination letters adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the documents at issue. Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *Environmental Defense Institute*, Case No. TFA-0289 (2009).^{*} Accordingly, if the DOE decides to withhold information, the FOIA requires the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, Case No. VFA-0304 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's review of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

To determine whether information is "confidential" under Exemption 4, the agency 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.

If an agency withholds material under Exemption 4 on the grounds that its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc.*, Case No. VFA-0155 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

To aid us in reviewing the present appeal, LGPO provided an unredacted copy of the document that it released, with redactions, to CCC. As such, we can see that LGPO withheld from the document the names of two subcontractors on the project in question, as well as the labor categories of two of the workers to be employed by one of the subcontractors on the project. However, the requester did not have the benefit of a specific identification of the information withheld, as LGPO's determination only generally referred to the withheld information as "subcontractor information" and "sensitive commercial information that is maintained in confidence by the applicant and not available in public

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

sources,” and that “[s]uch proprietary information being withheld includes confidential commercial information.” Determination at 2.

Further, in explaining why the information in question was withheld, the determination provided an equally generic basis, stating that disclosure of the information “would cause substantial harm to the applicant’s competitive interest and it is not the type of commercial information that is ordinarily released to the public.” *Id.* LGPO’s determination did not state whether the information withheld was voluntarily or involuntarily submitted, but instead invoked the standard bases, noted above, for withholding both types of information. Moreover, the determination simply stated that the release of information would cause competitive harm, while providing no reasons for believing such harm will result. As we state above, such a conclusory and generalized allegation cannot form the basis for the withholding of information under the FOIA.

Accordingly, we are remanding this matter to LGPO. On remand, LGPO should either release the information that it redacted from the document it provided to CCC or issue a new determination in which it properly describes the information it is withholding and provides a sufficient explanation for concluding that its release would result in competitive harm.

It Is Therefore Ordered That:

- (1) The Appeal filed on May 8, 2012, by the Center for Contract Compliance, OHA Case No. FIA-12-0025, is hereby granted in part, 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 Loan Guarantee Program 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 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 31, 2012