

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Amy Woodward)
)
Filing Date: November 13, 2012) Case No.: FIA-12-0068
_____)

Issued: November 29, 2012

Decision and Order

On November 13, 2012¹, Amy Woodward (“the Appellant”) filed an Appeal from a determination issued to her on September 27, 2012, by the Golden Field Office (GFO) of the Department of Energy (DOE) (FOIA Request Number GO-12-301). In its determination, the GFO responded to a request for information filed by the Appellant pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. In response to the FOIA request, the GFO located and produced documents, but withheld portions of those documents pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4). The Appellant appeals the applicability of Exemption 4 to the withheld material. This Appeal, if granted, would require the GFO to produce the information that it withheld pursuant to Exemption 4.

I. Background

On August 7, 2012, the Appellant submitted a FOIA request to the GFO, requesting the following:

“...access to and copies of any and all lab tests and/or analyses or module performance data tests, and/or test results for any modules submitted to NREL [National Renewable Energy Laboratory] for testing by Abound Solar.”

See Letter from Carol Battershell, Manager, the GFO, to the Appellant (Sept. 27, 2012) (Determination Letter); Letter from Kimberly J. Graber, Legal Counsel, and Michele Harrington Altieri, FOIA Officer, GFO, to Shiwali Patel, Attorney-Examiner, OHA (Nov. 19, 2012), Ex. B (Comment).

¹ While OHA received the Appellant’s letter indicating her intent to appeal the GFO’s determination on October 24, 2012, because that submission did not include a copy of the GFO’s Determination Letter, as required by the Regulations, the Appeal was not deemed filed at that time. The Appeal was deemed filed on November 13, 2012, when OHA received a copy of the Determination Letter from the GFO. *See* Acknowledgement Letter sent from Shiwali Patel, Attorney-Examiner, OHA, to the Appellant (Nov. 14, 2012).

In its Determination Letter, the GFO stated that it was providing 22 pages of responsive documents with information redacted on 15 pages of those documents pursuant to Exemption 4. *See* Determination Letter at 2. In support of its withholding of certain information, the GFO contends that the Report was involuntarily submitted and that the redacted material is confidential because it contains commercially sensitive module test data that would harm Abound Solar if it is released to its competitors. *Id.*

The Appellant challenges the GFO's partial redaction of the released documents, claiming that Abound Solar is no longer a functioning company and accordingly, it does not have any "trade secrets" or "commercial interests" to protect from the public pursuant to Exemption 4. *See* Appeal.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. However, pursuant to the FOIA, there are 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).

Exemption 4 permits the withholding of matters that are "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). In interpreting this exemption, federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to 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.

Here, the Appellant appeals the GFO's determination on the basis that Abound Solar is no longer "functioning," and accordingly, she claims that it has no "trade secrets" or "commercial interests" to protect. *See* Appeal. However, for the reasons explained below, we conclude that Abound Solar is entitled to the protections afforded under Exemption 4.

In its Comment, the GFO provided the following information to explain the current operating status of Abound Solar. On July 2, 2012, Abound Solar filed for Chapter 7 liquidation in

Bankruptcy Court, and subsequently, on August 2, 2012, the Bankruptcy Judge issued an order approving the Chapter 7 Trustee to retain a law firm, Cooch and Taylor, P.A., as general counsel in the bankruptcy case.² Comment at 2, Ex. E. Furthermore, an estate was created to temporarily maintain Abound Solar's property and assets. *Id.* at 3. Thus, the GFO contends that as the Trustee has a fiduciary duty to maximize returns for the estate, it must operate Abound Solar for a limited time and liquidate its non-exempt assets. *Id.*

Although Abound Solar commenced an action in Bankruptcy Court, as indicated by various federal district court decisions, it may nonetheless suffer competitive harm, and therefore, be entitled to the protection of Exemption 4. See *Changzhou Laosan Group v. U.S. Customs Border Protection Bureau*, 374 F. Supp. 2d 129, 132 (D.D.C. 2005) ("The current operating status of the submitting party has no effect on whether the *information* is of the type that would be publicly released.") (citing *Inter Ocean Free Zone, Inc. v. U.S. Customs Serv.*, 982 F. Supp. 867, 872 (S.D. Fla. 1997) (a weakened financial position for a company, alleged to be out of business, did not amount to a complete inability to suffer competitive harm) and *Nadler v. Fed. Deposit Ins. Corp.*, 899 F. Supp. 158, 164 (S.D.N.Y. 1995) (a company in receivership was entitled to protection of Exemption 4)). As described above, Abound Solar is still operating through its estate and Trustee. Accordingly, this Appeal, which only challenges the GFO's determination on the basis of Abound Solar's operational status, will be denied.³

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by the Appellant on November 13, 2012, OHA Case Number FIA-12-0068, 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 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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College Park, MD 20740
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² Ordering that "Cooch & Taylor, P.A. shall submit applications for compensation and reimbursement of expenses on a periodic basis as determined by the Trustee." Comment at 2, Ex. E.

³ While the GFO explains that Abound Solar has a commercial interest in the redacted material, which it also claims is confidential, we need not analyze that issue as this Appeal only concerns whether or not Abound Solar may be subject to the protections under Exemption 4 due to its bankruptcy case.

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