

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Cause of Action)
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Filing Date: March 4, 2013) Case No.: FIA-13-0005
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Issued: April 11, 2013

Decision and Order

On March 4, 2013, Cause of Action (Appellant) filed an Appeal from a determination issued to it on December 19, 2012, by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE) (Request No. HQ-2012-01469-F).^{1/} 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.^{2/} This Appeal, if granted, would release the withheld information. The Appeal would also require LGPO to conduct a further search for responsive information.

I. Background

On June 12, 2012, the Appellant filed a request with the DOE's Office of Information Resources (OIR) for all documents from January 1, 2009, referring or relating to requests, including the requests themselves, by Secretary Chu or his representative to the Internal Revenue Service (IRS) for information concerning whether an applicant for a loan under any DOE program has a tax delinquent account. Request Letter dated June 12, 2012, from Appellant to Alexander Morris, FOIA Officer, OIR, DOE. On June 15, 2012, OIR responded, indicating that it was assigning the request to LGPO and to the Office of the Executive Secretariat. Letter dated June

^{1/} LGPO sent its determination to Cause of Action on December 19, 2012. Cause of Action had moved and did not receive the determination until January 4, 2013. Therefore, its February 4, 2013, Appeal was timely filed. That determination sent documents to the Internal Revenue Service (IRS) for its review, as those documents had originated with the IRS. After Cause of Action received and reviewed the documents from the IRS, Cause of Action believed that additional documents should be in the possession of the DOE. Therefore, it filed an additional Appeal challenging the adequacy of LGPO's search and reiterating the arguments contained in its February 4, 2013 Appeal. We are using March 4, 2013, the date we received the second Appeal, as the filing date.

^{2/} The determination also stated that LGPO did not find information responsive to three of the Appellant's requests.

15, 2012, from Alexander Morris to Appellant. On July 23, 2012, the Office of the Executive Secretariat determined that it had no responsive documents. Letter dated July 23, 2012, from Alexander Morris to Appellant. On August 6, 2012, LGPO found responsive records but withheld them in full under Exemptions 3 and 4 of the FOIA. Letter dated August 6, 2012, from David Frantz, LGPO, to Appellant. The Appellant appealed to the Office of Hearings and Appeals (OHA), which granted that Appeal in part. OHA upheld the withholdings under Exemption 3 but stated that LGPO did not properly describe the information withheld under Exemption 4. *Cause of Action*, Case No. FIA-12-0050 (2012). Further, OHA stated that if LGPO withholds information under Exemption 4, it must provide a sufficient explanation for concluding that the information's release would be likely to result in substantial competitive harm. *Id.*

On December 19, 2012, LGPO issued its final determination in this matter. Determination Letter dated December 19, 2012, from David Frantz, LGPO, to Appellant. In that determination, LGPO withheld information under Exemptions 4 and 6 of the FOIA.^{3/} *Id.* On March 4, 2013, the Appellant filed a second Appeal with OHA challenging the withholding of information. Appeal Letter dated March 4, 2013, from Daniel Epstein, Executive Director, Appellant, to Poli Marmolejos, Director, OHA, DOE. In addition, the Appellant argues that LGPO improperly withheld at least 120 documents. *Id.* at 4.

II. Analysis

A. Adequacy of the Search

The Appellant asserts that after analyzing the final production from the IRS, it is clear that the LGPO improperly withheld documents from 2009 through 2012. Appeal Letter at 4. The Appellant states that the "DOE must possess these Request Letters, since DOE authored them." Therefore, the Appellant is challenging the adequacy of LGPO's search for responsive documents.

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Project on Government Oversight*, Case No. TFA-0489 (2011).^{4/}

We contacted LGPO to determine what type of search was conducted in response to the request. We were informed that

^{3/} The Appellant challenges the withholdings under Exemption 3. However, in its final determination, LGPO did not withhold any information under Exemption 3. Therefore, we will not consider that aspect of the Appeal in this decision.

^{4/} OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha>.

The Administrative Assistant for the Acting Executive Director is responsible for managing the records requested and maintains the incoming records from the IRS in a hard file folder. i.e., not stored electronically. [LGPO has] gone through this file several times by hand to ensure that all of the records that [it has], have either been released to the IRS to direct a response to the requester or all of the DOE IRS request letters were mailed to the requester.

The outgoing request letters to the IRS are not maintained in the normal course of business by DOE/LPO. It is a template letter. The Administrative Assistant deletes the latest PII information from the template and replaces it with the new PII information and sends the letter request template to the IRS. She does not maintain hard or electronic copies of each letter. IRS would be the best source for copies of the DOE letter to IRS letter.

E-mail dated March 22, 2013, from Janelle Jordan, LGPO, to Janet R. H. Fishman, OHA. Based on the foregoing, we are satisfied that LGPO has conducted an adequate search for documents that are responsive to the Appellant's FOIA request. As stated above, the standard for agency search procedures is reasonableness, which "does not require absolute exhaustion of the files." *Miller*, 779 F.2d at 1384-85. LGPO contacted the person most likely to know whether the requested documents were in the possession of LGPO. LGPO also searched the file most likely to contain the information requested and provided a sufficient explanation for why that information does not exist. March 22, 2013, E-mail.

B. Information Withheld Under Exemptions 4 and 6

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. Exemptions 4 and 6 are at issue in this Appeal.

1. 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 (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,” which this information does not, 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.” At issue here are the names, addresses, and Tax Identification Numbers of unsuccessful loan applicants, except in one instance where the Tax Identification Number of a successful loan applicant was withheld.

The Appellant is not challenging whether the information withheld is commercial or financial. Appeal Letter at 6. Rather, it is challenging whether that information was obtained from a person and confidential. *Id.* at 6-7. For the reasons set forth below, we find that the information was obtained from a person and is confidential, and therefore, exempt from release under Exemption 4.

The information being withheld was acquired from the persons that submitted the loan applications. The fact that the information was in a letter compiled by DOE does not change from whom the DOE acquired that information. It is well-established that, in the FOIA context, “person” refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int’l, Inc., v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, Case No. TFA-591 (2000). The loan applicants satisfy that definition. Therefore, we find that the withheld information was “obtained from a person.”

In order to be exempt from disclosure under Exemption 4, the information must be “privileged or confidential.” In this case, the loan applicants were required to submit the documents in question as part of their applications. 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, LGPO determined that release of the information would likely cause the contractors substantial competitive harm. LGPO stated that

Public disclosure of this information could result in a threat of injury to the applicant’s future negotiation position and would result in competitive harm by information competitors that these applicants responded to the solicitation but were not awarded a . . . loan guarantee. Specifically, disclosing names of then potential applicants is a key financial strategy for prospective companies.

Determination Letter at 2. We agree that release of the information would give competitors an undue advantage when dealing with the applicants in the future. Therefore, we find that LGPO properly applied Exemption 4 to the withheld information in the released documents and properly withheld the names, addresses, and Tax Identification Numbers of the unsuccessful applicants.

In regard to the Tax Identification Number of the successful applicant, we do not see how it can be withheld under Exemption 4. We will remand the matter to LGPO for release of the successful applicant's Tax Identification Number or a new determination justifying its withholding.

2. Exemption 6

Exemption 6 shields from disclosure “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to “protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether or not a significant privacy interest would be compromised by the disclosure of the record. If no significant privacy interest is identified, the record may not be withheld pursuant to this exemption. *Nat’l Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990); *see also Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, if privacy interests exist, the agency must determine whether or not release of the document would further the public interest by shedding light on the operations and activities of the government. *See Reporters Comm. for Freedom of the Press v. Dep’t of Justice*, 489 U.S. 769, 773 (1989) (*Reporters Comm.*). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether release of the record would constitute a clearly unwarranted invasion of personal privacy. *See generally Nat’l Ass’n of Retired Federal Employees*, 879 F.2d at 874.

a. Privacy Interest

LGPO invoked FOIA Exemption 6 to redact the name, address, and Tax Identification Numbers from some of the documents released to the Appellant. The withheld information belonged to unsuccessful loan applicants, who are persons rather than corporations. The Appellant contends that the LGPO improperly withheld the information because the threshold question LGPO should have asked was whether the requested information is contained in a personnel, medical, or similar file. Appeal Letter at 9.

The Appellant’s argument lacks merit. The privacy interests protected by the exemptions to the FOIA are broadly construed. *See Reporters Comm.*, 489 U.S. 763. The Supreme Court stated in regard to the term “similar files:”

We do not think that congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. . . . When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person’s privacy.

Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982). The Supreme Court has stated that “information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct” is not the type of information to which FOIA permits access. *Reporters Comm.*, 489 U.S. 773. Release of the information would reveal little about DOE’s conduct and even though the information may not fall within a personnel or medical file, Exemption 6 can be applied. Therefore, the Appellant’s argument lacks merit in this case.

It is well settled that the release of an individual’s name to the public implicates a privacy interest under the FOIA. *Associated Press v. Dep’t of Justice*, 549 F.3d 62, 65 (2d Cir. 2008). Therefore, LGPO correctly concluded that the unsuccessful loan applicants whose names and other personal information appear in the documents have a legitimate expectation of privacy under the FOIA.

b. Public Interest

Having identified a privacy interest in the withheld information, it is necessary to determine whether there is a public interest in the disclosure of the information. Information falls within the public interest if it contributes significantly to the public’s understanding of the operations or activities of the government. *See Reporters Comm.*, 489 U.S. at 775. Therefore, unless the public would learn something directly about the workings of government from the release of the information, its disclosure is not “affected with the public interest.” *Id.*; *see also Nat’l Ass’n of Retire Employees*, 879 F.2d 879.

It is clear that release of the name, address, and Tax Identification Number of the unsuccessful loan applicants would not further the public interest by shedding light on the operations and activities of the government. Release of this information would contribute little, if any, to public understanding of the issues surrounding the loan process. In no way does the information withheld under Exemption 6 shed light on the operations and activities of the DOE. In the present case, we find that the public interest in the withheld information at issue here is minimal at best. We find that release of the information would reveal little, if anything, to the public about the workings of the government. *Elec. Frontier Found. v. Office of the Director of Nat’l Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010).

c. Balancing Test

Because we have found a privacy interest in the information and a minimal at best public interest in its disclosure, we find that release of the information would constitute a clearly unwarranted invasion of personal privacy. Therefore, LGPO properly withheld the names, addresses, and Tax Identification Numbers of the unsuccessful loan applicants under Exemption 6.

III. Conclusion

After considering the Appellant’s arguments, we are convinced that LGPO conducted a search reasonably calculated to uncover the requested information. In addition, LGPO properly withheld the redacted information from the documents under Exemptions 4 and 6, with the

exception of the one Tax Identification Number of the successful loan application that it withheld under Exemption 4. We will remand the matter to LGPO to issue a new determination either releasing that Tax Identification Number or justifying its withholding. Accordingly, the Appeal should be granted in part and denied in all other respects.

It Is Therefore Ordered That:

- (1) The Appeal filed by Cause of Action, Case No. FIA-13-0005, is hereby granted as specified in Paragraph (2) below and denied in all other respects.
- (2) The matter is hereby remanded to the Loan Guaranty Program Office of the Department of Energy, 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.

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