

United States Department of Energy
Office of Hearings and Appeals

In the matter of Taras Lyssenko)
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Filing Date: March 4, 2013) Case No.: FIA-13-0013
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Issued: March 26, 2013

Decision and Order

On March 4, 2013, Taras Lyssenko (“Appellant”) filed an Appeal from a determination issued to him on January 19, 2013, by the Golden Field Office (GFO) of the United States Department of Energy (DOE) (FOIA Request Number GO-13-0037). In its determination, the GFO responded to the Appellant’s request for information filed under 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 Appellant’s request, the GFO redacted information pursuant to FOIA Exemption 4. 5 U.S.C. § 552(b)(4). The Appellant appeals the applicability of Exemption 4 to the withheld information on pages 16 through 20 of the released document. This Appeal, if granted, would require the GFO to produce the withheld information from pages 16 through 20.¹

I. Background

On January 11, 2013, the Appellant submitted a FOIA Request, which the DOE’s Office of Information Resources transferred to the GFO for processing. Comment from Kimberly J. Graber, Attorney-Advisor, and Michele Harrington Altieri, FOIA Officer, GFO, to Shiwali Patel, Attorney-Examiner, Office of Hearings and Appeals (OHA) (Mar. 15, 2013). The subject of the instant Appeal concerns the following request:

A copy of the University of Utah’s proposal entitled “A New Method for Low-Cost Production of Titanium Alloys for Reducing Energy Consumption of

¹ While the GFO redacted information on pages 6 through 10 and 16 through 20 of the proposal, the Appellant only Appeals the redactions contained on pages 16 through 20, which describe the “Technical Approach” of the proposal. *See* Appeal (“The denied part, which appears to be pages 16 through 20, was redacted because it was marked as ‘Technical Approach’ and considered Trade Secret or Confidential Proprietary Business Info. We agree that the letter was otherwise responsive in fulfillment of our FOIA request, but we disagree with the reasoning for the denials because we believe the ‘Technical Approach’ is in the public domain and improperly marked ‘Trade Secret or Confidential Proprietary Business Info.’”).

Mechanical Systems” which was awarded a grant by the DOE Energy Efficiency and Renewable Energy Office under the Innovative Manufacturing Project

See Appeal. On January 29, 2013, the GFO responded to the Appellant’s FOIA Request. Determination Letter from Carol Battershell, Manager, GFO, to Appellant (Jan. 29, 2013). In its Determination Letter, the GFO stated that it was releasing the University of Utah’s proposal, with 15 pages unredacted, 9 pages withheld in their entirety, and 2 pages with partial redactions. *Id.* at 3. The GFO made redactions pursuant to Exemption 4, stating that the withholdings contained trade secrets and confidential commercial and financial information. *Id.*

Subsequently, on March 4, 2013, the Appellant appealed the GFO’s determination. *See* Acknowledgment Letter, from Shiwali Patel, Attorney-Examiner, OHA, to Appellant (Mar. 4, 2013). The Appellant challenges the GFO’s use of Exemption 4, arguing that the redacted information on pages 16 through 20 “is in the public domain and improperly marked ‘Trade Secret or Confidential Proprietary Business Info.’” Appeal at 1. In support of this claim, the Appellant attached four documents to his Appeal, which are three articles and a patent publication, that purportedly demonstrate that the information on pages 16 through 20 is publicly available. *Id.* He also listed 12 patents and patent publications, which he alleges disclose the University of Utah’s technical approach that is contained in pages 16 through 20. *Id.*

On March 15, 2013, the GFO submitted its Comment in response to the Appeal and provided the unredacted version of the released documents. In its Comment, the GFO explains that, despite the Appellant’s arguments, the information withheld in pages 16 through 20 cannot be found in any publicly available patent applications or publications, as the plan described in the proposal “has not been published in any other forum.” Comment at 3. Hence, it argues that pages 16 through 20 contains a trade secret because that information

describes precisely how the University will identify and procure the resources necessary for the development of the materials described in the proposal, the methods the University will use to compare the quality of the materials developed, and how the University will develop the prototype materials. That plan is designed to identify the best and most cost-efficient material that can be developed using the methods and materials described in the proposal. In other words, this secret plan describes precisely how the University will identify and develop a particular trade commodity.

Comment at 3-4. The GFO also asserts that even if the information on pages 16 through 20 is not a trade secret, it would be protected as confidential commercial or financial information under Exemption 4. *Id.* at 4. Allegedly, the information discloses the University of Utah’s “low-cost predicate materials to developing novel processes described in the research protocol, to validating the processes and materials produced. . . .” Comment at 5.

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. 5 U.S.C. § 552(a)(4)(B). 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 Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

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. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). Therefore, in order to ascertain whether this portion of the requested materials qualifies for protection under Exemption 4, we need only determine whether this portion contains one or more trade secrets. For purposes of Exemption 4, the Court of Appeals for the District of Columbia Circuit has adopted a "common law" definition of the term "trade secret." *Id.* at 1280, 1288. In *Public Citizen*, the court defined "trade secret" as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Id.* at 1288. There must also be a "direct relationship" between the trade secret and the productive process. *Id.* Clearly, a trade secret must be held in secrecy, *i.e.* kept from general knowledge. Finally, trade secret protection has been recognized for product manufacturing and design information. *Appleton v. FDA*, 451 F. Supp. 2d 129, 142 & n. 7. (D.D.C. 2006).

Here, we conclude that redacted information on pages 16 through 20 contains trade secrets. First, and most obvious, the title of the redacted section, "Technical Approach," under the criterion, "Technical Approach and Project Management Plan," suggests that the section of the proposal contains a "secret, commercially valuable plan, formula, process or device." *See Public Citizen*, 704 F.2d at 1288. Moreover, in its submission to the GFO, the University of Utah explains that the withheld information "sets forth the University's research approach and plan for managing this project," and provides some details as to the plan being described in the proposal. Letter from Christopher Stout, Associate General Counsel, University of Utah, to Michele Altieri, FOIA/PA Officer, GFO (Mar. 13, 2013). The submitter further claims, contrary to the Appellant's assertions, that the plan has not been published in any other forum. *Id.* It explains that the "Technical Approach" section in its proposal "describes precisely how the University will identify and procure the resources necessary for the development of the materials described in the proposal, the methods the University will use to compare the quality of the materials developed, and how the University will develop prototype materials." *Id.* at 3. Our review of the content found on pages 16 through 20 is supported by these statements as it clearly describes a commercially valuable plan or process that is innovative and requires substantial effort. Therefore, we conclude that the GFO properly identified the "Technical Approach" section on pages 16 through 20 as containing trade secrets. Hence, we need not analyze whether pages 16 through 20 contain confidential commercial or proprietary information as we agree with the GFO that the trade secret exemption applies to the redactions. *See Public Citizen*, 704 F.2d at 1288 (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). Finally, upon our review of the redacted information, we cannot find any reasonably segregable portions that should have been provided to the requester. *See* 5 U.S.C. § 552(b) (the FOIA requires that “any reasonable segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection.”). Accordingly, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Moxon & Associates, LLC, on behalf of Taras Lyssenko, on March 4, 2013, OHA Case Number FIA-13-0013, 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.

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Poli A. Marmolejos
Director
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Date: March 26, 2013