



- (3) Documents that LEEDCO provided to the DOE indicating “what LEEDCO expected the levelized cost of energy (LCOE) would be” for the project.

See Letter from Timothy J. Meeks, Deputy Director, Business Services Division, GO, to Alan Isselhard, GLWT (September 11, 2014) (Determination Letter). In its September 2014 determination, GO identified 579 pages of responsive documents, of which it released 114 pages in their entirety and 357 pages with portions withheld pursuant to FOIA Exemptions 3, 4, 5, and 6. *Id.* GO withheld the remaining 108 pages in their entirety. *Id.*

After receiving GO’s determination and the accompanying documents, the Appellant filed the instant Appeal with the DOE Office of Hearings and Appeals (OHA) challenging a portion of GO’s determination. Letter from Alan Isselhard, GLWT, to OHA (dated October 8, 2014) (Appeal). Specifically, the Appellant challenged the applicability of Exemptions 4 and 5 to two specific documents: the 14-page and 7-page documents, both titled “U.S. Offshore Wind: Advanced Technology Demonstration Projects Down-Select,” identified in the Determination Letter as pages 536 through 556 of the responsive documents.<sup>1</sup> *Id.*

## II. ANALYSIS

According to the FOIA, after conducting a search for responsive documents, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency’s intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse information. *Id.*; see also *The Oregonian*, OHA Case No. VFA-0467 (1998) (“The written determination letter informs the requester of the results of the agency’s search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency’s response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.”).<sup>2</sup>

An agency, therefore, has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *Tom Marks*, OHA Case No. TFA-0288 (2009); *F.A.C.T.S.*, OHA Case No. VFA-0339 (1997); *Research Information Servs., Inc.*, OHA Case No. VFA-0235 (1996). A determination letter must also “specifically indicate which exemptions . . . are being applied to each withholding.” *The Oregonian*, OHA Case NO. VFA-0467 (1998). Finally, a determination must adequately justify the withholding of information by explaining briefly how the claimed exemption applies to the withheld information. See, e.g., *State of New York*, OHA Case No. TFA-0269 (2008).

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<sup>1</sup> The Appellant did not challenge any other portion of GO’s determination and, therefore, the remainder of GO’s determination will not be considered.

<sup>2</sup> Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/oha>.

In this case, the two documents at issue are forms used by merit reviewers in documenting their opinions regarding the strengths and weaknesses of the LEEDCO grant application. Our review of the two forms indicates that GO withheld the documents nearly in their entirety, with every page heavily redacted. The only information released in the two documents is criteria and sub-criteria section headings, as well as boilerplate or similar generic language located on the forms. GO marked each page of the two documents as “Redacted Exemption 4” and “Redacted Exemption 5,” without indicating which portions of the document were withheld pursuant to Exemption 4 and which were withheld pursuant to Exemption 5. This is insufficient. GO’s determination contains a detailed and, on its face, well-reasoned explanation for invoking the two exemptions. However, without knowing which of the two exemptions applies to which portions of the withheld information, it is impossible to determine whether GO, in fact, properly applied each exemption to the withheld information. This is particularly significant in this case, where the two claimed exemptions – Exemption 4 and Exemption 5 – are usually mutually exclusive with respect to the origin of the exempt material.<sup>3</sup> Thus, without additional detail, an administrative appeal of the determination with respect to the two documents at issue is virtually impossible.

In cases where we determine that an office did not provide an adequate determination with respect to a FOIA request, we usually remand the request to the office with instruction to issue a new determination. *See, e.g., Stephen C. Vigg*, OHA Case No. TFA-0003 (2002). Therefore, in this case, we will remand the matter to GO so that it can issue another determination with respect to the two documents at issue in this Appeal – the 14-page and 7-page documents, both titled “U.S. Offshore Wind: Advanced Technology Demonstration Projects Down-Select,” identified in the Determination Letter as pages 536 through 556 of the responsive documents – informing the Appellant which specific portions of the documents it withheld pursuant to Exemption 4 and which it withheld pursuant to Exemption 5, and explaining how each exemption applies to the withheld information.

It Is Therefore Ordered That:

- (1) The Appeal filed on October 14, 2014, by Great Lakes Wind Truth, OHA Case No. FIA-14-0066, is hereby granted as specified in Paragraph (2) below.
- (2) This matter is hereby remanded to the Department of Energy Golden Field Office, which shall issue a new determination in accordance with the instructions set forth in the foregoing Decision.

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<sup>3</sup> 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). Courts have concluded that Exemption 4’s requirement that information be “obtained from a person” restricts the scope of the exemption to “data which have not been generated within the Government.” *Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403-04 (D.C. Cir. 1980); *see also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006). Conversely, Exemption 5 exempts from mandatory disclosure documents where are “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5); *see, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1974).

(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.

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: November 7, 2014