

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

In the Matter of SNL Energy)
)
Filing Date: November 12, 2014)
) Case No. FIA-14-0080
_____)

Issued: December 11, 2014

Decision and Order

SNL Energy (the Appellant), an energy news and media firm, filed an Appeal from a determination issued by the Department of Energy’s Office of Information Resources (OIR) on October 29, 2014. In that determination, OIR denied in part a request for information that the Appellant had submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In its October 29, 2014, determination letter, OIR released a number of documents (consisting of various Form OE-417s) that it identified as responsive to the Appellant’s request, but withheld portions of some of these documents under FOIA Exemption 4. This Appeal, if granted, would require OIR to release some of the withheld information in six specific documents.

I. Background

Electrical utilities that experience reportable emergency and disturbance events are required to report those events to the Office of Electricity Delivery and Energy Reliability (OE) by the submission of Form OE-417. On May 8, 2014, the Appellant amended an earlier FOIA request and asked for all “Final Electric Emergency incident and Disturbance Reports with categories marked physical attack, cyber event or other under box 10 [of Form OE-417] for the fiscal year 2013 to the present.” Appeal at 5.

In September 2014, OIR made several partial responses to the Appellant’s FOIA Request and released numerous documents to the Appellant. Appeal at 1. On October 29, 2014, OIR released an additional 66 numbered documents completely or in part. OIR withheld portions of several of these documents pursuant to Exemption 4 of the FOIA.¹ Appeal at 1. In its

¹ One of the documents had information withheld pursuant to Exemption 7 of the FOIA. The Appellant does not challenge OIR’s determination regarding this withheld information.

October 29, 2014, determination letter, OIR asserts that the withheld information consists of “narrative statements that describe the investigative and corrective action taken by the submitters’ network security teams in the event of power outages” Appeal at 2. OIR also asserts that release of the information would expose submitters to an increased risk of attack [upon their facilities]. The facilitation of such attacks would cause submitters to incur additional costs to secure their security systems and additional costs to repair their systems from such attacks. Such expenses could result in a loss of market share to other competitors who would not suffer similar attacks. Appeal at 2. OIR also asserts that the withheld information could provide competitors with valuable insights into the submitters’ cyber assets and insight into submitters’ confidential business practices and operations. Appeal at 2.

The Appellant challenges OIR’s withholding of information pursuant to Exemption 4 in Document Nos. 37, 38, 41, 42, 43, and 58.² Appeal at 13. Specifically, the Appellant asserts that the withheld information in boxes 10 and 18 of the documents at issue must contain releasable information that could be segregated from the commercially sensitive information. The Appellant is not seeking commercially sensitive information but rather the details of the incidents reported in the OE-417 forms. In this regard, the Appellant notes that Document No. 39, a redacted document not challenged in this Appeal, releases the details of criminal activity but not the location of the transformer that was subject to criminal activity. Appeal at 13. The Appellant argues that the same type of information should be released in Documents Nos. 37, 38, and 58.

As for Document Nos. 41, 42, and 43, the Appellant asserts that these OE-417 forms reported criminal acts committed against electric transmission facilities in Arkansas for which most of the details have already been released to the public. Consequently, the withheld information relating to these criminal acts that is contained in these documents should be released. In support, the Appellant has submitted a news report regarding the incidents described in Documents Nos. 41, 42, and 43 along with a Criminal Complaint and accompanying affidavit filed in the U.S. District Court for the Eastern District of Arkansas regarding the incidents.³

II. Analysis

The FOIA generally requires that a federal agency release to the public, upon request, records held by that agency. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed.

² Each of these documents is a completed OE-417 form.

³ The Appellant does not challenge the Exemption 4 withholding of individuals’ names and contact information listed in the documents at issue.

Church of Scientology of California v. Department of the Army, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). As stated above, only Exemption 4 is at issue in the present case.

Exemption 4 exempts from mandatory public 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). 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." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). The October 29, 2014, determination letter does not claim that the release of the withheld information would reveal a trade secret⁴ or that the withheld information is "privileged," but contends that the information it withheld under Exemption 4 is "confidential." Appeal at 2.

In order to determine whether the information is "confidential," the agency must first decide whether the information was either 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. In the present case, OIR did not specifically indicate whether the information it withheld was voluntarily submitted, however each of the documents at issue (all Form OE-417s) indicate that submission of the documents to the DOE is mandatory. *See also Dow Jones & Company*, Case No. FIA-13-0054 (2013) (Form OE-417 is considered to be involuntarily submitted for FOIA purposes).⁵

The October 29, 2014, determination letter contends that disclosure of information consisting of narrative statements that describe the investigative and corrective action taken by the submitters' network security teams in the event of power outages would reveal the

⁴ If the agency determines 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) (*Public Citizen*).

⁵ Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at <http://www.doe.gov/OHA>.

submitting electric utilities' business strategies and potential vulnerabilities of their electric transmission systems. Further, the October 29, 2014, determination letter asserts that if the vulnerabilities described in the withheld material were disclosed, the submitters' competitive position could be harmed due to the potential costs of extra expenses for security and to repair attacks facilitated by the release of the information. We have examined the material withheld in the documents at issue. We find that the material for the most part generally describes the nature of the various criminal acts committed against various electrical transmission facilities and the fact that the incidents were reported to various law enforcement agencies. Further, contrary to the assertions made in the October 29, 2014, determination letter, we found no specific information regarding cyber systems contained in the withheld information. Given this, we find that the assertions of competitive harm based upon release of the withheld information at issue in this case are generalized, speculative, and conclusory. Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291; *National Parks and Conservation Assn' v. Kleppe*, 547 F.2d 673 at 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

Consequently, we are remanding this Appeal to OIR. On remand, OIR should either release the contested Exemption 4 information it has redacted from Document Nos. 37, 38, 41, 42, 43, and 58, or issue a new determination justifying the withholding of information.

III. CONCLUSION

We are remanding this matter to OIR for further processing in accordance with the instructions set forth above. Accordingly, SNL Energy's Appeal will be granted in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by SNL Energy on November 12, 2014, Case No. FIA-14-0080, is hereby granted to the extent set forth in paragraph (2) below.
- (2) The Office of Information Resources shall issue a new determination in accordance with the instructions set forth above.
- (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.

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