



Department of Energy
Washington, DC 20585

APR 24 2017

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Tim Hadley
6708 Rollingwood Dr.
Raleigh, NC 27613

Re: Case No. FIA-17-0006
Request No. HQ-2016-01577-F

Dear Mr. Hadley:

The Department of Energy (DOE) has considered the Freedom of Information Appeal that was filed on April 5, 2017. As the enclosed Decision and Order indicates, the DOE has determined that the Appeal, Case No. FIA-17-0006, be granted in part and denied in part.

If you have any questions regarding this Decision and Order, please contact James P. Thompson, III, Attorney-Advisor, at the Office of Hearings and Appeals, by electronic mail message at james.thompson@hq.doe.gov or by telephone number (202) 287-6954.

Sincerely,

A handwritten signature in blue ink, appearing to read "Poli A. Marmolejos".

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Enclosure





Department of Energy
Washington, DC 20585

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Tim Hadley)

Filing Date: April 5, 2017)

Case No.: FIA-17-0006)

Issued: APR 24 2017

Decision and Order

On April 5, 2017, Tim Hadley (Appellant) filed an Appeal from a Freedom of Information Act (FOIA) determination issued by the Department of Energy’s (DOE) Office of Public Information (OPI) (FOIA Request No. HQ-2016-01577-F). In that determination, OPI responded to a request for information filed under the FOIA, 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. OPI released nine documents but redacted portions of those documents under Exemption 4 of the FOIA. This Appeal, if granted, would release the information withheld under Exemption 4.

Background

On September 30, 2016, the Appellant requested:

“All submissions by Baltimore Gas and Electric Company in (an) attempt to comply with its terms of the \$200 million ARRA grant – including but not limited to; all integrated schedules, progress reports, earned value, budgeted and actual man hours expended by project, and all Project Value Management System Reporting (from requirement #10 on form 4600.2 of the grant terms).”

Determination Letter at 1 (April 5, 2017). In subsequent discussions with OPI, the Appellant amended his request to cover only the original Project Value Management System Reporting (PVMS) submittals of Baltimore Gas and Electric (BGE) to the DOE that are within the possession of the Office of Electricity Delivery and Energy Reliability (OE) for the year 2010. *Id.*

Based on the above, OPI assigned the Appellant’s request to OE, and OE conducted a search of its files for responsive documents. *Id.* On April 5, 2017, OPI released a final response, which included nine documents that OE identified as responsive with redactions taken from each document under Exemption



4. *Id.* The withheld information includes vendor contract information, specific technology standards, and security provisions. *Id.* at 2. The withheld information was itself contained within a “Risks” spreadsheet as part of a SmartGrid Integrated Project Reporting Information System (SIPRIS) Monthly Project Reporting Template. Responsive Documents 1-9.¹ On April 5, 2017, the Appellant challenged the determination, stating that the Determination Letter does not show “how the [redacted] information would impact the company’s competitiveness[] or impact it negatively.” Appeal Email from Tim Hadley to OHA Filings (April 5, 2017). In a subsequent email, the Appellant added that the “substantial competitive harm” test of Exemption 4 requires the government to “show more than a likelihood that a business might suffer some embarrassment or commercial loss if its records are disclosed,” and that the government’s Determination Letter failed to supply any evidence of competitive harm. *See* Appeal Email II from Tim Hadley to OHA Filings (April 5, 2017).

II. Analysis

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).

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). 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, 766 (D.C. Cir. 1974). In this case, the Determination Letter does not claim that release of the withheld information would reveal a trade secret,² nor does it assert that the withheld information is “privileged.” Instead, the Determination Letter contends that the information is “sensitive commercial and financial information that is maintained in confidence by the company, BGE, and that it is not available in public sources.” Determination Letter at 2.

Federal courts have held that the terms “commercial or financial” should be given their ordinary meanings and that records are commercial as long as the submitter has a “commercial interest” in them. *Public Citizen*, 704 F.2d at 1290. The redacted information in the responsive documents satisfies this definition because the release of internal risk assessments could affect BGE’s commercial or financial interests. With respect to the requirement that the withheld information be “obtained from a person,” it is well established that “person” refers to a wide-range of entities, including corporations and

¹ Each responsive document is the same except for the fact that they report information from different months. The redacted information is identical in each of the nine documents.

² If an agency determines that 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 (D.C. Cir. 1983).

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).³ Electric utilities companies, like BGE, satisfy this definition.

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). According to OPI, BGE was required to submit these monthly reports as part of the SmartGrid Project. Memorandum of Telephone Conversation between James Thompson, Attorney-Advisor, OHA, and JoAnna Gorsage, OPI (April 14, 2017) (Telephone Memorandum). Accordingly, we find that the withheld information was “involuntarily submitted.”

Under *National Parks*, involuntarily submitted information is considered 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 submitters. 498 F.2d at 770. “Courts generally defer to an agency’s predictions concerning the repercussions of disclosure, acknowledging that predictions about competitive harm are not capable of exact proof.” *SACE v. Dep’t of Energy*, 853 F. Supp. 2d 60, 71 (D.D.C. 2012). To qualify under the substantial harm prong, an identified harm must “flow from the affirmative use of proprietary information by competitors.” *United Techs. Corp. v. U.S. Dep’t of Def.*, 601 F.3d 557, 563 (D.C. Cir. 2010); *Public Citizen*, 704 F.2d at 1291 n. 30. Additionally, “[t]he D.C. Circuit has recognized that the use of information by consumers, suppliers, labor unions, and other entities, even if those entities are not direct competitors, may be detrimental to a company’s competitive position.” *Ctr. for Auto Safety v. U.S. Dep’t of Treasury*, 133 F. Supp. 3d 109, 129 (D.D.C. 2015). However, Exemption 4 does not protect against mere embarrassment in the marketplace or reputational injury. *United Techs. Corp.*, 601 F.3d at 564 (stating that an agency appropriately declined to apply Exemption 4 protection based on the harm that might result from competitors using the disclosed information to discredit a submitter in the eyes of current or potential customers). Furthermore, “[c]onclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency’s decision to withhold requested documents.” *Public Citizen*, 704 F.2d at 1291. In applying Exemption 4, OPI stated that releasing the withheld information “would cause substantial harm to the company’s competitive interest. Specifically, disclosing this information would provide an unfair advantage to competitors and may affect investor and public relations, and/or valuation of the company.” Determination Letter at 2.⁴

After reviewing the withheld information, we cannot agree with the full extent of OPI’s withholdings under Exemption 4, as currently justified by the Determination Letter. As stated above, OPI withheld

³ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at www.energy.gov/oha.

⁴ OPI also stated, without more, that “disclosure may curtail companies from providing such information to the government in the future.” Determination Letter at 2. However, “[t]he claim is inherently weak where, as here, the agency has secured the information under compulsion.” *Niagara Mohawk Power Corp. v. U.S. Dep’t of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). Furthermore, “conclusory and generalized assertions are not enough to establish the requisite risk of impairment.” *Id.*

information pertaining to vendor contract information, specific technology standards, and security provisions contained on the “Risks” spreadsheet of the responsive documents. That information essentially falls into either of two categories: information related to security risks or information related to vendor contracts.

The first category of withheld information relates to security risks within the SmartGrid infrastructure that BGE identified and listed in the SIPRIS on lines 2 and 26 of each released document. After examining the information and OPI’s justification for the limited withholdings, it remains unclear how the withheld information could be used by BGE’s *competitors* to substantially harm BGE’s competitive position. BGE’s competitors are not identified, and while the existence of competitors is not questioned by the Appellant, such an identification would assist our analysis in determining whether BGE would likely suffer a substantial harm. Additionally, the security information does not clearly demonstrate how consumers, suppliers, labor unions, or other similar entities might use the security information to substantially harm BGE’s competitive position. And the prospect of harm that might flow from public embarrassment is insufficient. Thus, we cannot find that the information and arguments presented by OPI justify withholding the security information under Exemption 4.

Our conclusion in this case is similar to our determination in *SNL Energy*, Case No. FIA-14-0080 (2014). In *SNL Energy*, an electrical utility provided security risk information in an involuntary submittal to the DOE that OPI in turn withheld from a FOIA requestor under Exemption 4. *Id.*⁵ OPI determined that the information would reveal security vulnerabilities and “expose submitters to an increased risk of attack upon their facilities . . . [and therefore] 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.” *Id.* After examining the documents, we determined that the withheld information consisted of narrative statements that generally described the nature of various criminal acts committed against various electrical transmission facilities. *Id.* Consequently, we concluded that the information could not be withheld under Exemption 4 because the assertions of likely competitive harm were generalized, speculative, and conclusory. *Id.*

In the present case, we simply do not have sufficient information to find that the release of the security risk information will likely result in substantial competitive harm to BGE. We will therefore remand the first category of withheld information to OPI for further determination.

Turning to the second category, OPI appropriately justified its withholding of the information that relates to BGE’s vendor relationships. Upon review of the redacted vendor information, we agree that the information relates to contractual agreements between BGE and its vendors. Furthermore, the information has not been disclosed to the public. Telephone Memorandum. If released, the information would provide insight into how BGE addresses vendor issues and BGE’s valuation of its vendor-related business decisions. As a result, BGE’s competitors could gain a competitive advantage by using the information to improve their own procurement agreements and methods for addressing vendor-related challenges. We therefore agree that the release of the remaining redacted information would likely cause

⁵ In *SNL Energy*, OPI is referred to by its previous title: the Department of Energy’s Office of Information Resources.

substantial harm to the company's competitive position. Thus, OPI properly withheld this second category of information under Exemption 4.

Based on the foregoing information, we will remand this Appeal to OPI to either release the withheld security risk information identified above or issue a new determination justifying its withholding of the information under a FOIA Exemption. Furthermore, we find that OPI properly withheld the remaining information related to BGE's vendor contractual relationships under Exemption 4.

III. Conclusion


Consistent with the above, we are remanding this matter to OPI for further processing in accordance with the instructions set forth in this decision. Accordingly, the Appellant's Appeal is granted in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by Tim Hadley, Case No. FIA-17-0006, is hereby granted to the extent set forth in paragraph (2) below.
- (2) The Office of Public Information 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 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.

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: APR 24 2017