United States Department of Energy
Office of Hearings and Appeals

In the Matter of Food & Water Watch	)	
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Filing Date: December 9, 2019	)	Case No.: FIA-20-0013
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	)	

Issued: January 13, 2020

Decision and Order

On December 9, 2019, Food & Water Watch ("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-2019-00759-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 fifty-one documents but redacted portions of those documents under Exemptions 4, 5, and 6 of the FOIA. This Appeal, if granted, would release information withheld under Exemptions 4 and 5.

I. Background

On April 17, 2019, the Appellant filed a request with OPI seeking information pertaining to a loan guarantee application submitted by Appalachian Development Group (ADG) for the development of a natural gas liquids storage and trading hub. The request also sought any communications between DOE staff, ADG, and Congressional offices concerning the project and its associated loan application from July 2017 to the date of DOE's final production of the requested documents.[1] Final Determination Letter from Alexander C. Morris to Appellant at 1 (September 20, 2019).

Subsequently, the DOE assigned the search to the Loan Programs Office (LPO). The LPO began its search on June 29, 2018, and subsequently provided fifty-one documents in three groups: the first group of documents was accompanied by a partial determination letter dated July 18, 2019 ("First Partial Letter"), the second group of documents was accompanied by a determination letter dated August 27, 2019 ("Second Partial Letter"), and the final group of documents was accompanied by a final determination letter ("Final Letter") dated September 20, 2019. The Appellant subsequently filed the present Appeal and identified withheld information in various documents accompanying the three letters as Attachments 1, 2, and 3, respectively, from which the Appellant sought to appeal. In the Appeal, the Appellant argued, generally, that the Department over-broadly applied Exemptions 4 and 5 to withhold otherwise releasable

[1] The Individual originally filed request HQ-2019-00688-F seeking identical information, but for a shorter time frame. Final Letter at 1 (September 20, 2019). After a discussion with OPI, the Appellant agreed to accept documents previously produced in HQ-2018-00469-F and HQ-2018-00899-F to satisfy HQ-2019-00688-F. *Id.* However, the Appellant then subsequently filed HQ-2019-00759-F, which repeated the request in HQ-2019-00688-F but extended the timeframe. *Id.*

information, failed to segregate responsive material therein, and failed to locate and provide any information related to the second phase of the loan application.

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).

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, the agency's intentions to withhold 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 determination. *Id.*; *see also The Oregonian*, OHA Case No. VFA-0467 at 6 (1999) ("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").[2]

A. Exemption 4

In the First Partial Letter and Final Letter, OPI cited Exemption 4 as a basis for withholding information from the documents at issue. The Appeal lists several instances where the Appellant alleges that OPI either misapplied or over-broadly applied the exemption. *See* Appeal at 2-8.

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."

[2] As an initial matter, we note that the Appellant's challenges to OPI's withholdings under Exemptions 4 and 5 are mainly based on an assertion that the agency over-redacted information. Upon review, OPI provided very little information in the determination letters delivered to the Appellant, which in turn provided the Appellant little basis upon which to evaluate whether the agency appropriately applied Exemptions 4 and 5. We have stated in the past that conclusory statements are not sufficient to justify the application of a FOIA exemption. *See Alliance to Protect Nantucket Sound*, OHA Case No. TFA-0399 at 9 (2010); *Kaiser Eagle Mountain*, OHA Case No. TFA-0491 at 6-7 (2011). As seen below, the determination letters in the instant case do little more than just that. Without adequate information, the Appellant is left to challenge the redactions with blanket assertions that the agency failed to appropriately apply each claimed exemption. *See, e.g.*, Appeal at 2. Nonetheless, the Appellant did not challenge the sufficiency of the determination letters' justification, and we therefore will not take that issue under review in this appeal.

See Food Marketing Institute v. Argus Leader Media, 139 S.Ct. 2356, 2362 (2019). In this case, the determination letters do not claim that release of the withheld information would reveal a trade secret,[3] nor do they assert that the withheld information is "privileged." Instead, the determination letters contend that the withheld information is commercial or financial, obtained from a person, and confidential.

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 1280, 1290 (D.C. Cir. 1983). That broad definition includes records that "reveal basic commercial operations, relate to the income-producing aspects of a business, or bear upon the 'commercial fortunes' of the organization." *Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 230 (D.D.C. 2017) (quoting *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312 at 319 (D.C. Cir. 2006)). Turning 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 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.*, OHA Case No. TFA-591 (2000).[4] In this case, the information the Appellant challenges under Exemption 4 was submitted by ADG—a business entity—to DOE. Thus, we conclude that DOE obtained that information from a person.

Finally, to determine whether information is confidential, the long-standing standard articulated in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), has been recently changed by the Supreme Court's decision in *Argus Leader* (cited above). Under *Argus Leader*, the standard for whether commercial or financial information is confidential is satisfied if the information is customarily and actually treated as private by its owners and provided to the government under an assurance of privacy.[5] *Argus Leader*, 139 S.Ct. at 2366. In this case, like *Argus Leader*, the government provided the submitter an assurance of privacy. Loan guarantee applicants are informed that the application information they provide to the DOE will be protected as confidential to the extent it meets the standard of Exemption 4. *See* Email from Renee Harris to James P. Thompson III (December 18, 2019) (providing the link to the application website that explains that DOE treats submitted information as confidential). Thus, our analysis of the Exemption 4 application in this case will hinge upon whether OPI appropriately determined the redacted information is (1) commercial or financial and (2) customarily and actually treated as private by its owner.

In this case, the documents that accompanied the First Partial Letter comprised the Loan Guarantee Application that ADG submitted to the DOE. The Appellant challenged the withholding of information as justified by the First Partial Letter, which stated that the "information being withheld under Exemption 4 consists of sensitive commercial and financial information maintained in confidence by the submitters

[3] 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).

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

[5] We note that the Court in *Argus Leader* did not go so far as to hold that the information *must* be provided under an assurance of privacy.

and not available in public sources." First Partial Letter at 2. The letter continues by stating that the withheld "proprietary information" includes "business strategies, financial models[,] . . . potential partners and investors with whom the applicant is under . . . contractual obligations not to disclose certain information[,] . . . ownership structures[,] . . . . and reports highlighting sensitive technologies . . . ." *Id.*[6]

We reviewed several instances of the challenged information which appears to be related to ADG's business strategies and financial models. *See, e.g.*, Attachment 1 at 3, 26-27, 29-31. For instance, page 3 of the application lists the total project cost; debt, equity, and loan period; critical project elements; and project description. Pages 26-27 contain redacted information under a panel heading entitled Critical Project Elements. Pages 68-70 contain technical information related to the project design. We find no basis to disagree that this information constitutes commercial or financial information. The Appellant also disputes OPI's determination that the information is confidential. Appeal at 2. After review, we agree that the information is "maintained in confidence" by the submitter because the agency conducted a review of the documents and determined that the information redacted therein is customarily treated as private by ADG. *See, e.g.*, Email chain between ADG and OPI (March 5, 2018) (demonstrating OPI reviewed the information provided by ADG to determine the applicability of Exemption 4). We therefore conclude that OPI appropriately withheld information accompanying the First Partial Letter under Exemption 4.

However, some of the same information redacted under the analysis above was later released with the Final Letter. For example, information related to the total project scope and cost is later disclosed in documents that accompanied the Final Letter. *Compare* Attachment 1 at 3, 32, *with* Attachment 3 at 73; *compare also* Attachment 1 at 26, *with* Attachment 3 at 68, *and* Attachment 1 at 9, *with* Attachment 3 at 68.

Turning to the documents that accompanied the Final Letter, we reviewed the document to determine whether, as claimed by the Appellant, OPI "over-redacted sections of production." Appeal at 3. We found examples where we cannot conclude that all of the redacted information meets the boundaries of Exemption 4. For example, on pages 6 and 11, the signature of an individual located directly above a printed name is redacted. Furthermore, pages 20 and 26-28 contain swaths of redactions that include headings that do not appear to disclose financial or commercial information and which appear to be inconsistently withheld as compared to other headings. *Compare, e.g.,* Attachment 3 at 15, 17, *with* Attachment 3 at 22, 28.

Based on our findings above, we conclude that there may be additional information contained in the documents accompanying the First Partial Letter and Final Letter that should be released to the Appellant. We therefore remand both letters and the accompanying documents for further review. After review, OPI should release the additional information or provide further justification for its withholdings under Exemption 4 or another FOIA exemption.

B. Exemption 5

[6] The letters also conclude the justification by stating that "disclosure may curtail companies from providing such information to the government in the future." *Id.* While this may be, it is no longer part of the Exemption 4 analysis post *Argus Leader*.

Exemption 5 of the FOIA exempts from mandatory disclosure "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). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Courts have identified three traditional privileges, among others, that fall under Exemption 5: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). Here, OPI withheld internal DOE communications from the documents released with the Second Partial Letter and cited the deliberative process privilege. The Appellant challenged OPI's justifications for the same.

The ultimate purpose of the deliberative process privilege is to protect the quality of agency decisions, *Sears*, 421 U.S. at 151, and to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973). Under the deliberative process privilege, agencies are permitted to withhold documents that reflect the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 151. In order to be shielded by the privilege, a record must be both predecisional (i.e., generated before the adoption of agency policy) and deliberative (i.e., reflecting the give-and-take of the consultative process). *Coastal States*, 617 F.2d at 866. The privilege routinely protects certain types of information, including "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id*. The deliberative process privilege assures that agency employees will provide decision makers with their uninhibited opinions without fear that later disclosure may bring criticism. *Id*.

The Appellant challenges the breadth of withholdings on page 26 of the documents accompanying the Second Partial Letter. Upon review, however, we conclude that the information falls within the deliberative process privilege. The information is predecisional because it is clear from the content that the writer shared the information to inform a future decision related to ADG's project. Furthermore, the information is deliberative because it contains the writer's opinion of how the information may affect the discussed project.

The Appellant also challenges the withholdings on page 31-33 of documents encompassed by the Second Partial Letter. The information consists of questions regarding ADG and the relevant market in the Appalachian region. Again, the information is predecisional because the writer created it as part of the agency's review of ADG's loan application. As to the question of whether it is deliberative, part of it clearly is because it reflects the writer's opinion on some of the information needed in order to evaluate the application and therefore reflects the give-and-take of the consultative process. However, part of the redacted material also includes factual information. *See* Attachment 2 at 32. Under the deliberative process privilege, facts "generally must be disclosed." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002). However, to determine whether factual material may nonetheless be excepted from the general rule, we evaluate "whether disclosure of the withheld information would reveal an agency's or official's mode of formulating or exercising policy-implicating judgment." *SAI v. Transportation Sec. Admin.*, 315 F. Supp. 3d 218, 257 (D.D.C. 2018) (quotation marks removed). Here, we conclude that it

would. In the withheld material, the writer is sharing factual information in an attempt to obtain further information for future discussions regarding the agency's evaluation of ADG's loan application. Disclosing the information would therefore reveal the agency's deliberative process as it initially began formulating its assessment of the loan application. We therefore conclude that OPI appropriately applied Exemption 5 to withhold the challenged information contained in the documents that accompanied the Second Partial Letter.

C. Reasonably Segregable Information

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b). Further, DOE's FOIA regulations require that determinations include "[a] statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied." 10 C.F.R. § 1004.7. Here, none of OPI's determination letters provide such a statement. Rather, OPI merely stated that "[t]he FOIA requires that any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[,]" before stating "a redacted version of the documents are being released . . . ." *See, e.g.*, First Partial Letter at 3-4. We surmise that a more detailed explanation of OPI's review may have lessened the breadth of the Appellant's Appeal. As explained above, we are remanding the First Partial Letter and Final Letter documents for further review under Exemption 4. Upon remand, OPI should conduct a further segregability analysis and include it in its forthcoming determination letter.

D. Adequacy of Search

Finally, the Appellant challenged the adequacy of OPI's search by claiming that OPI failed to provide ADG's Stage II application despite the wording of the FOIA request, which asked for "all material related to ADG's loan application." Appeal at 3.

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." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply "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., Ralph Sletager*, OHA Case No. FIA-14-0030 (2014).

We spoke with OPI, and it informed us that two separate subject matter experts conducted searches related to the present request, and that at the time of the Appellant's request, ADG had not yet submitted a Stage II application. Email from Renee Harris to James P. Thompson III (December 16, 2019) (explaining further that as of September 17, 2019, ADG had not yet filed a Stage II application).

However, upon review of the FOIA request HQ-2019-00759-F, it appears that OPI did not reasonably interpret the Appellant's request. In addition to the above, the language of the request also seeks "any and

all communication between Dept. of Energy staff, ADG, and Congressional offices concerning the project . . . ." Final Letter at 1. In response, DOE conduced a search of the email records for the three Department employees who worked on the project and limited the search parameters of their email's "to and from field" to include only "@capito.senate.gov" or "@mail.house.gov." Memorandum of Search from CIO to OPI (July 23, 2019). However, such a restricted search is not reasonably calculated to locate emails that may have come from ADG to the agency, and such emails are reasonably covered by the language in the Appellant's request.

Our concern is supported by a July 27, 2018, email in the record provided by OPI from a different request that overlapped the Appellant's request. The discovered email is between ADG and DOE, and it includes a reference to a "Part II Application." Email from Renee Harris to James P. Thompson III (December 12, 2019). This email appears to be one that should have been discovered as part of the Appellant's above request, given the date of the email and the subject matter, had the search been structured to include communication between ADG and DOE concerning the project. We therefore conclude that OPI's search was inadequate, and we remand for an additional search calculated to identify any communication between DOE and ADG concerning the project and loan application during the requested timeframe.

III. Conclusion

Based on the foregoing, we first conclude that although OPI appropriately applied Exemption 4 to withhold information contained in the documents accompanying the First Partial Letter and Final Letter, those documents may contain information that should be released after further review. Second, we conclude that OPI appropriately applied Exemption 5 to withhold information from documents accompanying the Second Partial Letter. Finally, we conclude that OPI failed to conduct an adequate search related to the Appellant's request for communications between DOE and ADG. We therefore grant the Appeal and remand the case back to OPI to (1) conduct further review of the documents accompanying the First Partial Letter and Final Letter in accordance with our decision above and (2) conduct a further search for documents in response to the Appellant's request in accordance with our decision above.

IV. Order

It is hereby ordered that the Appeal filed on December 9, 2019, by Food & Water Watch, Case No. FIA-20-0013, is granted in accordance with the explanation provided above.

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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