United States Department of Energy
Office of Hearings and Appeals

In the Matter of Friends of the Earth	)	
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Filing Date: December 27, 2019	)	Case No.: FIA-20-0016
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Issued: January 21, 2020

Decision and Order

On December 27, 2019, Friends of the Earth (Appellant), appealed a Determination Letter issued to it from the Department of Energy's (DOE) Office of Public Information (OPI) regarding Request No. HQ-2018-00899-F. In that determination letter, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. OPI withheld portions of responsive records pursuant to FOIA exemptions 4, 5, and 6. The Appellant challenges the decision to withhold information pursuant to exemptions 4 and 5. The Appellant also argued that the DOE failed to disclose reasonably segregable material, and failed to conduct an adequate search.

I. Background

On April 4, 2018, the Appellant submitted a FOIA request in which it asked for records pertaining to the DOE's "support for the proposed Appalachia Development Groups, LLC (ADG) petrochemical projects, between periods of November 1, 2016 through the present[.]" FOIA Request from Friends of the Earth at 1. In conjunction with that request, the Appellant asked for communications between DOE headquarters personnel and Mike Catazaro, D.J. Gribbin, anyone in the office of Chief of Staff John Kelley, and anyone with the domains "@manchin.senate.gov," "@capito.senate.gov," "and @mail.house.gov." *Id.* The Appellant further asked for correspondence between DOE headquarters personnel and ADG and the West Virginia University Innovation Corporation, as well as meeting notes of DOE headquarters personnel with the words "Appalachia Development," "ADG" or petrochemical. *Id.*

In an email from the Appellant to OPI, the Appellant further clarified its FOIA request by stating: (1) the request includes the Phase I and Phase II applications submitted by ADG to the DOE Loan Guarantee Program; (2) its request was limited to communications between DOE headquarters personnel and the previously listed parties to DOE headquarters personnel and Office of the Secretary personnel from September 1, 2017, through the present; (3) the scope of requested

meeting notes should be limited to personnel in the Office of the Secretary and the Loan Programs Office (LPO) from September 1, 2017 through the present. Email from Doug Norlen to Auborn Finney at 2 (May 2, 2018).

On December 26, 2018, OPI issued the first partial response to the Appellant and provided nine documents that were partially redacted pursuant to Exemption 5, two documents that were partially redacted pursuant to Exemption 6, six documents that were partially redacted pursuant to Exemptions 5 and 6, and four documents released in their entirety. First Partial Determination Letter from Alexander C. Morris to Friends of the Earth at 5 (December 26, 2018). On August 23, 2019, OPI issued the second partial response to the Appellant with two documents released in their entirety, and nineteen documents that were partially redacted pursuant to Exemptions 4, 5, and 6. Second Partial Determination Letter from Alexander C. Morris to Friends of the Earth at 5 (August 23, 2019). On September 30, 2019, OPI issued its final response in which it provided seven documents that were partially redacted pursuant to Exemptions 4, 5, and 6, and one document released in its entirety. Final Determination Letter from Alexander C. Morris to Friends of the Earth at 5 (September 30, 2019).

The Appellant filed an Appeal on December 27, 2019, alleging a misapplication of Exemptions 4 and 5, a failure to disclose reasonably segregable materials, and a failure to conduct an adequate search.

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. 5 U.S.C. § 552(a)(4)(B).

A. Adequacy of Determination Letter

Agencies are required to notify requesters of the decisions reached "and the reasons therefor." 5 U.S.C. § 522(a)(6)(A)(i)(I). Additionally, determination letters should meet certain requirements so as to allow requesters to determine whether a response is adequate. A determination letter should: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld; (3) and specify the exceptions or exemptions under which information was withheld. *See, e.g., Center for Biological Diversity*, OHA Case No. FIA-17-0048 (2017); *Great Lakes Wind Truth*, OHA Case No. FIA-14-00066 (2014); *Tom Marks*, OHA Case No. TFA-0288 (2009).

As an initial matter, in the Appeal, the submitter broadly took issue with the adequacy of the determination letters. The Supreme Court has determined that for information to be "confidential" the information must be the sort that is "customarily kept private, or at least closely held, by the person imparting it." *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2362

(2019) (*Argus Leader*). Further, "DOE regulations provide that denials of FOIA requests must justify the withholding of information by providing a 'brief explanation of how the exemption applies to the record withheld.' " *Center for Biological Diversity* at 4. In the matter at hand, the determination letter states "The information withheld under Exemption 4 includes sensitive commercial and financial information that is maintain in confidence by the submitters and is not available in public sources." Second Partial Determination Letter at 2; Final Determination Letter at 2. The determination letter does not provide a brief statement on how the exemption applies, because it does not speak to whether the information is the sort that is "*customarily* kept private, or at least closely held…" (emphasis added) *Argus Leader*, 139 S.Ct. at 2363. Accordingly, a simple statement with regard to this requirement, as provided in *Argus Leader*, should be provided to allow an appellant to determine whether the DOE has a sufficient basis to apply Exemption 4.

B. Exemption 4

Exemption 4 was cited as a basis for withholding information from the responsive documents in the second partial response letter and the final response letter. As indicated, the second partial response letter was dated August 23, 2019 and the final response letter was dated September 30, 2019.[1] The Appeal broadly argues that the DOE misapplied Exemption 4. Appeal at 4. 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." *Argus Leader Media*, 139 S.Ct. at 2362.

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 Health Research Group v. Food and Drug Admin.*, 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).

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 partnerships. *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).[2] It has also been established that information that has "been generated within the Government" itself is not information that has been obtained from a person within the meaning contemplated by Exemption 4, and therefore, this information is not covered by Exemption 4. *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980). However, if the Government has compiled a document that consists of information (e.g. summaries or reformulations) that has been

[1] The second partial response and the final response both postdate the decision in *Argus Leader*, which was decided on June 24, 2019.

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

supplied by a source from outside the Government, then this information may still be covered by Exemption 4. *See e.g. Elec. Privacy Info. Ctr. V. DHS*, 117 F.Supp. 3d 46, 63 (D.D.C. 2015); *Nat. Res. Def. Council, Inc. v. Land Mgmt.*, 526 F. Supp. 2d 1178, 1188 (D. Or. 2007).

To determine whether information is confidential, the standard provided by the case *National Parks & Conversation 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 changed by the Supreme Court's decision in *Argus Leader.* As stated above, in *Argus Leader*, the Supreme Court states that in order to determine whether financial or commercial information is confidential, the information must be the sort that is "customarily kept private, or at least closely held, by the person imparting it." *Argus Leader*, 139 S.Ct. at 2363. The Supreme Court also went on to say "in another sense, information might be considered confidential only if the party receiving it provide some assurance that it will remain secret." *Id.* However, the Court in *Argus Leader* never held that the submitter of the information must be provided assurance of privacy or secrecy by the government. In *Argus Leader*, the government had assured the submitter the information would be kept private, and accordingly, the matter was not further analyzed by the Supreme Court. *Id.*

The LPO provides assurances of confidentiality with regard to confidential materials in the "Frequently Asked Questions" section of their webpage, with the caveat that submitted material may be subject to a FOIA request. Therefore, an assurance of confidentiality had been provided to the submitter. Further, correspondence between the OPI and counsel for the submitter, ADG, indicate that the submitter communicated its expectation of confidentiality to the DOE regarding specific information, evidencing the submitter's belief that they were providing closely held information. *See e.g.* email chain between ADG and OPI (March 5, 2018). Having determined that the submitted information is the sort that is considered confidential within the meaning established by *Argus Leader*, the OHA must determine if the withheld information meets the other elements of Exemption 4. Namely, that the withheld information is commercial or financial in nature and that this information was obtained from "a person." *Argus Leader*, 139 S.Ct. at 2362.

The Appellant asserts that withheld portions are inconsistent with Exemption 4. Having reviewed the documents released to the Appellant, we find that some of the information was withheld in a manner that is potentially inconsistent with the parameters established by Exemption 4. For instance, with regard to the "person" requirement in Exemption 4, the OHA has identified a letter on page 56 of the 610-page final responsive document that may not have originated from "a person" as contemplated by Exemption 4. Additionally, the OHA has located portions of an email dated November 17, 2017 on page 38 of the second partial response document that the OPI withheld, citing Exemption 4. An examination of the email reveals that it was sent from an employee with the LPO to individuals not in the employ of the DOE. Much like the prior example, it is unclear how this document originated with "a person," as contemplated by Exemption 4.

Additionally, an examination of the responsive documents reveals that the same signature was withheld on pages 6 and 11 of the second final responsive document, which totals 85 pages.[3] Despite the fact the signature was withheld, the individual's name appears in type directly below the withheld portion. Further, there are headings within the final responsive documents that have

[3] The OPI produced two responsive documents in their final response to the Appellant. One consisted of 610 pages, and the other consisted of 85 pages.

been withheld. In withholding the aforementioned signature and headings, the OPI cited Exemption 4. However, the financial or commercial nature of these headings and the signature discussed above are not readily apparent to the OHA. Accordingly, upon remand, the OPI should conduct further review regarding these matters, including the issue as to whether some of the withheld information originated from "a person," and provide information justifying its conclusions in the forthcoming determination letter.

C. Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with agency[.]" 5 U.S.C. § 552(b)(5). Prior case law on Exemption 5 provides that one of the purposes of this exemption is to protect the deliberative process within an agency. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975). To be considered deliberative, the document must be one which was created before the agency's final decision was made, and it "reflects the give-and-take of the consultative process." (*Elec. Frontier Found. v. DOJ*, 892 F. Supp. 2d 35, 43 (D.D.C. 2012) (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)). As the Supreme Court has stated "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *Id.* at 151. The concern is that the disclosure of the deliberative process will hinder the open discussion of agency policies and related matters within the agency. *Id.* at 150.

In this case, we reviewed the information OPI redacted pursuant to Exemption 5. These documents were comprised of emails between DOE employees and handwritten notes authored by DOE employees and clearly contain information that is deliberative in nature. The documents and communications were also authored prior to any final determination regarding the loan. These documents discussed matters like strategies for the proper delivery of information to specific audiences, questions and conversations regarding where ADG was in the loan guarantee process and why, potential next steps, and questions going back and forth regarding proposals. Having concluded that the portions of records redacted by OPI are both pre-decisional and deliberative, we conclude that OPI properly asserted Exemption 5 in this case.

D. Adequacy of Search

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.*, *In the Matter of Ayyakkannu Manivannan*, Case No. FIA-17-0035 (2017).

As stated previously, in an email from Doug Norlen to Auborn Finney, the scope of the correspondence search was clarified and included personnel in the Office of the Secretary. Email

from Doug Norlen to Auborn Finney at 2 (May 2, 2018). However, the search certificates in this case indicate that self-searches were performed by individuals in the LPO. FOIA Search Certification Form from July 20, 2018, July 11, 2018 and July 2, 2018. None of the search certificates provided to the OHA reveal that a search was performed to locate requested communication within the Office of the Secretary. Accordingly, we will remand this matter so that the requested search can be conducted pursuant to the scope established in the May 2, 2018 email from Doug Norlen to Auborn Finney.

E. 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." Further, upon review of the documents, we identified a letter on page 56 of a 610-paged responsive document that was redacted in its entirety, including the letterhead. As stated above, there is some question as to whether this document originated from "a person" as contemplated by Exemption 4. To the extent any of the contents therein are protected from disclosures by Exemption 4, upon remand, OPI should conduct a further review for segregability and provide information justifying its conclusions in the forthcoming determination letter.

Conclusion

Based on the foregoing, we first conclude that OPI should provide a statement with regard to information that is "customarily kept private" in the Exemption 4 analysis portion of the determination letter. We also conclude that the OPI withheld some information inconsistent with the parameters established by Exemption 4. We further find that there were deficiencies with the adequacy of search and the segregation of information.

We therefore grant the Appeal and remand the case back to OPI to (1) conduct further review of the documents released in accordance with our decision above and (2) conduct further search for documents in response to the Appellant's request in accordance with our decision above.

Order

It is hereby ordered that the Appeal filed December 27, 2019, by Friends of the Earth, Case file No. FIA-20-0016, is granted in accordance with 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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