In the Matter of William Gagner	)	
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Filing Date: June 20, 2022	)	Case No.: FIA-22-0018
	)	
	)	

Issued: July 5, 2022

Decision and Order

On June 20, 2022, William Gagner (Appellant) of Thomson Reuters Court Express (TRCE) appealed a final determination (Determination Letter) issued by the Department of Energy's (DOE) Office of Science Consolidated Service Center (OSCSC). The Determination Letter responded to Request No. ORO-2021-00548-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The Determination Letter was accompanied by 25 pages of responsive records. As explained in the Determination Letter, OSCSC withheld portions of the responsive records pursuant to FOIA Exemptions 4, 5, and 6. The Appellant challenges the decision to withhold information pursuant to Exemptions 4 and 5, as well as the adequacy of the justifications provided in Determination Letter for making such redactions.

I. Background

On October 13, 2020, the Appellant submitted a FOIA request, asking for the following:

> 1. All communications, including notices, letters, reports, electronic mails, instant messages, facsimiles, memoranda, internal messages, records of telephone conversations, and voicemails between UT-Battelle and DOE, or within DOE, relating to state sales or use tax for the period January 2012 through the present, including but not limited to any communications between UT-Battelle and the DOE Contracting Officer (or his or her designee) pursuant to 48 CFR § 31.205-41(a)(2).
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> 2. All bills, invoices, payment vouchers, or other payment requests under the contract that include charges for state sales [or] use tax for the period January 2012 through the present, and any supporting documentation for such payment requests.
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> 3. Any DOE, DCAA, or other government audit relating to any charges under the contract for state sales [or] use tax for the period January 2012 through the present, and any supporting documentation for such audits.

Determination Letter from Kenneth Tarcza to William Gagner at 1 (March 22, 2022).

On April 22, 2021, OSCS asked the Appellant to "narrow the timeframe of [his] request" in item two or to provide more specific information regarding the documents the Appellant was seeking. Determination Letter at 2. The Appellant was also asked to provide greater specificity regarding the communication he was seeking in item one. *Id*. On May 20, 2021, the Appellant agreed to limit the scope of the search to years 2018 and 2019, and regarding the second item in his request, he "agreed to have the search focus on copies of submitted tax refund claims, tax returns, and line item and/or invoice data reconciling to the tax returns, commonly referred to as use tax reports." *Id*. The Appellant also limited the scope of the first item to emails. *Id.*

After receiving a June 30, 2021, email from the FOIA Officer "asking for greater clarification that is more in line with the original request[,]" the Appellant, in a July 27, 2021, email, asked the FOIA Officer to focus the search on "submitted refund claims, tax returns, and use tax reports…for '[a]ll bills, invoices payment vouchers, or other payment requests under the contract that include charges for state sales [or] use tax for the period January 2012 through the present, and any supporting documentation for such payment requests.'" *Id.*

Accompanying the March 22, 2022, Determination Letter were 25 pages of documents responsive to the first item. The Determination Letter notified the Appellant that any documents responsive to the second item were "considered contractor-owned by UT-Battelle[.]" *Id.*; Appeal from William Gagner at 2 (June 20, 2022). The Determination Letter also stated that OSCSC was unable to locate records responsive to the third item. Determination Letter at 3. Finally, the Determination Letter explained that redactions were made to the responsive records pursuant to FOIA Exemptions 4, 5, and 6.

On June 20, 2022, the Appellant filed an appeal which argues, first, that OSCSC's stated justification for the Exemption 4 redactions "appear[ed] to employ the 'competitive harm' test, which the Supreme Court overturned[.]" Appeal at 3. The Appellant states that because OSCSC did not "conduct the appropriate analysis for Exemption 4[,]" it failed to "meet its burden with respect to the Exemption 4 redactions." *Id*. The Appellant asserts that the DOE and UT-Battelle had previously agreed upon "when and how the DOE is required to safeguard and treat information from UT-Battelle as confidential[.]" *Id.* Under those previously agreed-upon circumstances, the Appellant argues, "to the extent permitted by law or regulation," the DOE would hold in confidence those items marked "confidential" or "proprietary" by UT-Battelle. Because the emails and the attachments that OSCSC produced were not marked "confidential" or "proprietary," the Appellant argues, "there [was] no indication that UT-Battelle treated such information as confidential[.]" *Id.* Further, nothing in the responsive documents indicated that the DOE provided any assurance that the documents would remain private or confidential. *Id.*

Regarding the Exemption 5 redaction, which the Determination Letter indicated were made to protect information that fell under the deliberative process privilege, the Appellant argues that based on the context of the email containing the redaction, the redaction "does not appear to be part of a discussion in which a 'legal or policy' decision is being made." *Id.* at 4. Accordingly, the Appellant argues that "[w]ithout further analysis or justification from the DOE to support its conclusion that the withheld information is deliberative or any attempt to identify what 'recommendations advice or opinions' have been redacted, the DOE has not met its burden [to support the propriety of the redaction]." *Id.*

The Appellant asks that the redactions be examined, and that to the extent the redactions were appropriate, an appropriate explanation for the redactions be provided. *Id.* Should the redactions be inconsistent with the requirements of the exemptions, the Appellant asks that the underlying information be released. *Id.*

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

In responding to requests for records under the FOIA, 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 must meet certain requirements to allow requesters to determine whether a response is adequate. A determination letter must: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld; and (3) specify the exceptions or exemptions under which information was withheld. *See, e.g., Center for Biological Diversity*, OHA Case No. FIA-17-0053 (2017); *Great Lakes Wind Truth,* OHA Case No. FIA-14-0066 (2014); *Tom Marks,* OHA Case No. TFA-0288 (2009).[1] Accordingly, "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.

With regard to the OSCSC's asserted justification for applying Exemption 4, the Appellant asserted that the Determination Letter did not provide the currently applicable standard addressing whether the commercial or financial information obtained from a person is privileged or confidential. 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, the information is confidential if the receiving party has provided "some assurance that it will remain secret." *Id.* at 2363. In the matter at hand, the Determination Letter states that "[t]he release of the financial information contained in these documents would have a detrimental impact to UT-Batelle's financial matters[,]" placing it "in a competitive disadvantage against its competitors[.]" Determination Letter at 3. This wording is not consistent with the legal precedent, as established by *Argus Leader,* that the "competitive-harm" test should no longer be applied in determining whether information is "confidential." Accordingly, the Determination Letter fails to provide an adequate statement on how the exemption applies, because it does not

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

specifically speak to whether the information is confidential as contemplated by *Argus Leader*. OSCSC must reconsider the explanation it provided in the Determination Letter, in light of the above-cited legal requirements, in order for the Appellant to assess whether OSCSC has a sufficient basis to apply Exemption 4.

With regard to Exemption 5, the Determination Letter explains that Exemption 5 prevents the mandatory disclosure of "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 the agency." Determination Letter at 3. It cites the "deliberative process privilege" as justifying the redactions made pursuant to Exemption 5. The Determination Letter explains that this privilege requires that the information being protected from disclosure be pre-decisional and deliberative and that the Exemption 5 documents at issue in this case contain pre-decisional and deliberative information. The Determination Letter asserts that the Exemption 5 redacted documents are pre-decisional because the withheld information "was developed before the agency adopted a final policy, and deliberative, in that it reflects the opinions of individual who were consulted as a part of the decision-making process." Determination Letter at 4. The Appellant has not identified any deficiency in this explanation, and accordingly, we find that the provided explanation meets the requirement to provide a "brief explanation" of how Exemption 5 applies to the withheld information.

B. Appropriateness of Redactions under Exemption 4

Exemption 4 was cited as a basis for withholding information from the responsive documents in the Determination Letter. The Appellant argues that OSCSC misapplied Exemption 4. Appeal at 3. 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). 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*, 139 S.Ct. at 2362.

To determine whether information is confidential, the standard provided by the cases *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 noted above, in *Argus Leader*, the Supreme Court stated that 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 went on to say, "In another sense, information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." *Id.* Regarding whether information must be submitted to the government with some assurance that it will be kept private, the Court found that it did not need to resolve that question, as that condition was clearly satisfied in the case before it. *Argus Leader*, 139 S. Ct. at 2363.

The Appellant does not challenge whether the redacted information contained either commercial or financial information or whether it was obtained from a person, only whether it was privileged or confidential. Turning to the matter of whether the documents in question were customarily treated as private, in a letter that was provided to the FOIA Officer on November 1, 2021, Oak Ridge National Laboratory (ORNL), for whom UT-Battelle is the management and operating

contractor, explained that the information responsive to item one of the Appellant's request consists of financial information which, as a "private not-for-profit company[,]" UT-Battelle keeps "confidential and does not publicly release[.]" Letter from ORNL Privacy Act Records and FOIA Coordinator to FOIA Officer at 2 (November 1, 2021). Additionally, this letter states that this information "is shared or provided to DOE in confidence." *Id.* We find that the above demonstrates that the information submitted by UT-Battelle was customarily and actually treated as private.

Turning to the matter of whether the DOE provided an assurance of confidentiality to UT-Battelle when it submitted this information, the FOIA Officer explained to OHA that "Section I.127(b)(2) of the UT-Battelle contract, *Access to and Ownership of Records*…provides that confidential contractor financial information is a Contractor-owned record." Response from FOIA Officer to OHA at 1 (June 24, 2022). As the FOIA Officer explained, this creates an "expectation that the DOE will not release the information." *Id.* Accordingly, based on the foregoing, we find that the DOE provided UT-Battelle with an implied assurance of privacy at the time the relevant documents were submitted.[2] We therefore conclude that Exemption 4 was appropriately applied to the redacted information contained in the responsive documents.

C. Appropriateness of Redactions under 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). 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 must contain information that "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." *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 151 (D.C. Cir 2006). 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.

An examination of the redaction that was made pursuant to Exemption 5, which is one portion of an email, reveals that the email was drafted by a DOE employee and sent for the purpose of seeking more information, reflecting the "give-and-take" contemplated by the exemption. Upon seeking further clarification, we were able to determine that this email was sent in relation to a decision pertaining to an annual financial report. Memorandum of Telephone Conversation between OHA and Tim Buchholz at 1 (June 30, 2022). Accordingly, we find that Exemption 5 was appropriately applied to the document in question.

[2] OHA has previously found that the DOE provided UT-Battelle with an implied assurance of privacy at the time UT-Battelle submitted information because the DOE and UT-Battelle entered a contract indicating "that confidential contractor financial information is considered the property of the contractor and is not within the scope of government-owned records." *Ron Walli*, OHA Case No. FIA-20-0030 at 6-7 (2020).

Order

It is hereby ordered that the Appeal filed on June 20, 2022, by William Gagner is granted in part and remanded for further processing as described herein and denied with respect to all other issues.

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. § 522(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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