

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

In the Matter of Aerotest Operations, Inc.)
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Filing Date: June 6, 2023)
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_____)

Case No.: FIA-23-0020

Issued: June 26, 2023

Decision and Order

On June 6, 2023, Aerotest Operations, Inc. (Appellant) appealed a determination letter dated May 30, 2023, issued by the Department of Energy’s (DOE) Office of Public Information (OPI). The letter responded to Request No. HQ-2022-00904-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 noted that DOE identified one responsive document and released it with certain information redacted pursuant to FOIA Exemption 4. The Appellant challenges the decision to withhold the responsive records pursuant to Exemption 4. In this Decision, we deny the appeal.

I. Background

On June 2, 2022, Appellant submitted a FOIA request to DOE. FOIA Request from Aerotest Operations, Inc. at 1 (June 2, 2022). The request asked for a copy of the “9 year agreement between DOE and TRIGA International as mentioned in the article dated 2/3/2022 titled U.S. Department of Energy Secures New Triga Fuel of U.S. Research Reactors. Link to Article: <https://www.energy.gov/ne/articles/us-department-energy-secures-new-triga-fuel-us-research-reactors>.” *Id.* DOE provided an interim response to the request on June 6, 2022. Email from Rosa Vazquez to Kathy Reichert at 1 (June 6, 2022). OPI issued a final determination letter on May 30, 2023. Determination Letter from Alexander C. Morris to Kathy Reichert at 1 (May 30, 2023). The letter explained that the Appellant’s request had been assigned to DOE’s Office of Nuclear Energy (NE) to conduct a search of their files for responsive records. *Id.* It further stated that NE completed its search and identified one responsive record, which DOE reviewed and determined that certain information contained in the record should be redacted pursuant to FOIA Exemption 4. *Id.*

The Appellant timely appealed to the Office of Hearings and Appeals (OHA) on June 6, 2023. Appeal Letter Email from Kathy Reichert to OHA Filings at 1 (June 6, 2023). In its appeal, the

Appellant challenges¹ the withholding of the records pursuant to Exemption 4 and explains² that it wants the redacted information to determine appropriate pricing for TRIGA fuel. *Id.* at 1–2.

II. Analysis

A. Exemption 4

Exemption 4 shields “trade secrets and commercial or financial information obtained from a person and privileged or confidential” from mandatory disclosure. 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.” *Food Marketing Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2362 (2019).

The courts “have consistently held that the terms ‘commercial’ and ‘financial’ in the Exemption 4 should be given their ordinary meanings.” *Pub. Citizen Health Rsch. Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982) and *Bd. of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 (D.C. Cir. 1980)). The FOIA defines a person as an “individual, partnership, corporation, association, or public or private organization other than an agency.” 5 U.S.C. § 522(2).

The Supreme Court’s decision in *Argus Leader* sets the standard to determine whether information is confidential. In *Argus Leader*, the Court held 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 Court went on to say, “[i]n 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. *Id.* In subsequent cases, courts have held that whether the government provided such assurances is a factor, but not determinative of whether information is “confidential” for the purposes of Exemption 4. *WP Co. v. SBA*, No. 20-1614, 2020 WL 6504534, at *6, *9 (D.D.C. Nov. 5, 2020); *Gellman v. DHS*, No. 16-635, 2020 WL 1323896, at 11 & n.12 (D.D.C. Mar. 20, 2020).

¹ In the appeal, the Appellant asked “[h]ow do the other 6 US TRIGA reactors know if they are being overcharged if the price is not available to them?” Appeal at 2. While we do not believe this question is central to the Appellant’s appeal, we note that the FOIA does not require agencies to “answer questions disguised as a FOIA request.” *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). A FOIA request simply requires an agency to “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).

² The initial appeal did not contain any explicit language stating the basis of the appeal. Appeal at 1. When asked if the appeal was challenging the redaction of records pursuant to Exemption 4, the Appellant acknowledged receipt of the email but did not respond to the question. Email from Kathy Reichert to Erin Weinstock (June 12, 2023). Because we have received no indication otherwise, we have treated this appeal as a challenge to the redactions made pursuant to Exemption 4.

Our review of the redlined version of the released documents confirms that the redacted information is commercial and/or financial information related to pricing and contract terms. We have also confirmed that the contractor that authored the responsive document, TRIGA International, is a person as defined by FOIA because it is a corporation.

As to the first element of the confidentiality issue, when reviewing the responsive record, the contractor noted that TRIGA International does not typically release information of the type contained in that document to any third party, indicating the information is closely held. Attachment to Email from Rosa Vazquez to Erin Weinstock (June 8, 2023). In light of this statement, the FOIA analyst redacted all commercial and financial information in the letter that was not publicly available. Email from Rosa Vazquez to Erin Weinstock (June 8, 2023). In its appeal, Appellant argues that some of the redacted information, including the number of fuel elements purchased, was public record. Appeal at 1. That publicly available information, if segregable, *see infra*, may not be exempt from release. The information that is not part of the public record would be considered closely held. As to the second element of the confidentiality issue, DOE has indicated that it is not aware of any written record that would show that DOE provided assurances to TRIGA International that the relevant records would be confidential. Email from Kriti Achreja to Erin Weinstock (June 21, 2023). However, as we explained above, the lack of an assurance of confidentiality is not determinative, and here, there is no indication that DOE erred when it concluded that the other factors point towards the information being confidential.

B. Segregability

The FOIA requires agencies to take reasonable steps to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A)(ii)(II). However, an agency may withhold otherwise non-exempt portions of a record if those portions are “inextricably intertwined with exempt portions” of the record. *Mead Data Ctr., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

Here, the redacted portions of the responsive record do contain some publicly available information; however, the reference to the number of fuel elements is intermixed with and surrounded by other confidential contractual information. Accordingly, the small amount of nonexempt information identified by the Appellant is inextricably intertwined with information that is properly redacted pursuant to Exemption 4. Accordingly, we find the withholdings made pursuant to Exemption 4 were appropriate.

III. Order

It is hereby ordered that the appeal filed on June 6, 2023, by Aerotest Operations, Inc., FIA-23-0020, is denied.

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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