

March 10, 2003
DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Thomas G. Boyes
Date of Filing: December 20, 2002
Case Number: TFA-0010

Thomas G. Boyes filed this Appeal from a determination issued to him by the Golden Field Office (GFO) of the Department of Energy (DOE). The determination responded to a request for information Boyes filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. In his Appeal, Boyes challenges GFO's decision to withhold portions of documents responsive to his request.

BACKGROUND

Boyes submitted a request for "a copy of the grant awarded to the General Electric Company ... [and] all relevant materials related to this contract in its entirety." GFO responded by releasing some responsive documents and withholding others. Among the withheld documents were:

- a 30-page technical application, Volume I, entitled "The Design and Development of a 100 MVA HTS Generator for Commercial Entry," dated May 15, 2001;
- a 22-page business application, Volume II of the same title and date; and

- a five-page DOE analysis of General Electric Company's cost and rate structure under this cooperative agreement. 1/

GFO withheld the requested document pursuant to Exemption 4 of the FOIA. Exemption 4 exempts from mandatory public 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). 2/

ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions. 3/ 5 U.S.C. § 552(a)(3); 10 C.F.R. § 1004. These nine exemptions must be narrowly construed. *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). Thus, "an agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987).

As noted above, GFO withheld material under Exemption 4 of the FOIA. 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." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). GFO withheld some portions of the requested documents under the trade secrets prong of the Exemption, and the remaining portions

1/ GFO did release the title pages of the technical application and business application.

2/ GFO also withheld a one-page draft letter from DOE to the General Electric Company pursuant to Exemption 5 of the FOIA. Exemption 5 includes within its scope intra-agency documents that contain predecisional information. *Boyes' Appeal* does not challenge the withholding of the draft letter, so we will not consider in this Decision whether it is protected by Exemption 5.

3/ The FOIA also provides for three special law enforcement record exclusions, which are not relevant to this case.

under the confidential commercial or financial information prong. We will therefore consider GFO's determination under both prongs.

Trade Secrets

In the Determination Letter, GFO stated that portions of the requested material, apparently including the document entitled "The Design and Development of a 100 MVA HTS Generator for Commercial Entry," contained trade secrets. If the agency determines the 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. Food & Drug Admin.*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). Therefore, in order to ascertain whether this portion of the requested materials qualifies for protection under Exemption 4, we need only determine whether this portion contains one or more trade secrets.

In *Public Citizen*, the court defined a trade secret for Exemption 4 purposes as a "secret, commercially valuable plan, formula, process or device." *Public Citizen*, 704 F.2d at 1288. Clearly, a trade secret must be held in secrecy, *i.e.* kept from general knowledge. In his Appeal, however, Boyes contends that General Electric holds a patent for a device resembling the one described in the withheld documents. ^{4/} Boyes states that "the underlying patent contains a design for a ... superconducting generator ... which, based on what documents I have received and press releases I have read bears a very strong similarity to that of the funded prototype" in the withheld documents.

A patented device is not a secret, since any member of the public can obtain a copy of a patent, including technical details, from the Patent and Trademark Office. If, as Boyes claims, the withheld material is revealed in General Electric's patent documents, it cannot qualify for protection under the trade secret prong. We will therefore remand this matter to GFO for a determination on whether some or all of the material withheld under the trade secret prong qualifies for protection in light of the additional information submitted by Boyes. If

^{4/} Boyes references General Electric's patent for a superconducting generator, Patent No. 5,841,211, issued in October 2000.

any of the withheld material is contained in General Electric's patents, the material may not be deemed a trade secret and may not be withheld under the trade secret prong of Exemption 4.

Confidential Commercial and Financial Information

In addition to invoking the trade secret prong of Exemption 4, GFO also withheld some material under the confidential commercial and financial information prong. GFO states in the determination letter that the requested documents "contain protected commercial and financial information, including fringe benefit rates; indirect cost rates; labor, subcontract and material costs; proprietary technical information; and the bank account number used by the General Electric company for deposit of funds.... Information that could cause competitive harm, if released, includes data which reveal a company's labor costs ... and cost and equipment information.... The competitive harm rationale of the release of this type of data is directly applicable to the above-redacted data."

When an agency decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This requirement allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992).

Thus, if an agency withholds material under Exemption 4 on the grounds that disclosure of commercial or financial information is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result. *Larson Associated, Inc.*, 25 DOE ¶ 80,204 (1996); *Milton L. Loeb*, 23 DOE ¶ 80,124 (1993). Conclusory and generalized allegations of substantial competitive harm, on the other hand, are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen*, 704 F.2d at 1291;

Kleppe, 547 F.2d at 680 ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA"). In the present case, GFO's conclusory statements do not meet the requirements set forth above. In order to meet the requirements, GFO must provide an explanation of the reasoning underlying its conclusion that release of this information could reasonably be expected to cause General Electric substantial competitive harm.

CONCLUSION

We will remand this Appeal to GFO for a more thorough examination and justification of its withholdings under both prongs of Exemption 4. On remand, GFO must either release the information it has withheld or issue a new determination letter providing a detailed justification showing that it has applied the Exemption 4 analysis set forth above and the results of this analysis.

It Is Therefore Ordered That:

(1) The Appeal filed by Thomas G. Boyes, Case No. TFA-0010, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Golden Field Office, which 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.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 10, 2003