

August 19, 2008

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: State of New York

Date of Filing: July 23, 2008

Case Number: TFA-0269

On July 23, 2008, the State of New York (Appellant) filed an appeal from a determination issued to it on June 19, 2008, by the Department of Energy's (DOE) Office of Electricity Delivery and Energy Reliability (OE). In that determination, OE responded to a request for documents that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. OE identified 17 documents responsive to the Appellant's request. OE provided the Appellant with 13 of the documents in their entirety. The remaining four documents were withheld in part by OE under Exemptions 4 and 5 of the FOIA. The Appellant challenges OE's withholding of information under Exemptions 4 and 5. This appeal, if granted, would require OE to release the withheld information to the Appellant.

I. Background

On December 17, 2007, the Appellant requested from the DOE a copy of a report entitled "Grounded in Reality: Eastern Interconnection" which was prepared by the firm, Cambridge Energy Research Associates, an affiliate of CRA International (CRA). Also requested were copies of all documents, E-mails, or other correspondence between CRA and the DOE. The Appellant also requested similar documents regarding communication between CRA, DOE or any transmission developers or stakeholders concerning the DOE's August 8, 2006, Congestion Study.¹

¹ The Congestion Study concerns the percentage of maximum capacity at which existing electricity transmission lines are being used. The Congestion Study was used by DOE along with other data to designate the National Interest Electric Transmission Corridor (NIETC). Pursuant to Section 216(a) of the Federal Power Act, the DOE is required periodically to issue a congestion study. Designation of the NIETC allows entities that wish to build electricity transmission facilities within the boundaries of the NIETC to apply to the Federal Energy Regulatory Commission for permission to build notwithstanding local government disapproval of such construction. *See State of New York*, 30 DOE ¶ _____ (June 18, 2008) (Case No. TFA-0257).

In its June 19, 2008, determination letter (Determination Letter) which responded to the Appellant's request in part, OE provided the Appellant with 17 responsive documents (Document Nos. 1-11).² June 19, 2008, Determination Letter from Marshall E. Whinton, OE. Of these, two attachments to a September 13, 2005, E-mail, Document Nos. 1a and 1b, had portions redacted pursuant to Exemption 4 of the FOIA, which protects trade secrets and commercial information. OE stated in its determination letter that the withheld portions of these documents contained privileged commercial information. Information in Document No. 4, a printout of a September 7, 2005, CRA presentation to DOE entitled "Defining Transmission Corridors of National Importance," was withheld pursuant to Exemptions 4 and 5. OE also claimed that the withheld information in Document No. 4 contained privileged commercial information which would be protected from release pursuant to Exemption 4. OE also asserted that Document No. 4 contained predecisional information which would not be subject to release in litigation and was thus protected by Exemption 5. Lastly, information in Document No. 5, a July 23, 2006, draft of Chapter Four of the 2006 DOE Congestion Study, was withheld pursuant to Exemption 5, since it consisted of predecisional "deliberations and proposed language that may not be a part of the final document." Determination Letter at 2.

The Appellant challenges OE's determination on a number of grounds. First, the Appellant asserts that OE did not identify any specific reason in its Determination Letter explaining how the withheld information constituted "privileged commercial information" or "pre-decisional discussions." Second, the Appellant maintains that OE's Determination Letter fails to provide an adequate description of the withheld information to enable the appellant to understand the basis of OE's determination. Third, the Appellant also asserts that OE failed to explain how release of the withheld commercial information could be expected to cause commercial harm. Fourth, with regard to Document No. 4, the Appellant argues that the document is in essence a presentation as to the methodologies CRA would use to define the NIETC and therefore cannot be considered an agency deliberation. Fifth, the Appellant contends that OE failed to segregate factual information from the two Exemption 5 documents. Finally, the Appellant argues that if any of the Exemption 5 documents were seen by non-DOE parties, any Exemption 5 protection would be waived.

II. Analysis

A. Adequacy of the Determination

According to the FOIA, after conducting a search for responsive documents under the FOIA, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold any of the 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.*

An agency therefore has an obligation to ensure that its determination letters: (1) adequately describe the results of searches; (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, 26 DOE ¶ 80,232 at 80,888 (November 27, 1997) (Case No. VFA-0339); *Research Information*

² Some enclosures to documents were numbered using a number and a letter, such as Document Nos. 1a and 1b.

Services, Inc., 26 DOE 80,139 at 80,592 (November 27, 1996) (Case No. VFA-0235) (*RIS*). Generally, a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *Paul W. Fox*, 25 DOE ¶ 80,150 (November 30, 1995) (Case No. VFA-0096). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *RIS*, 26 DOE at 80,592.

Thus, if an agency withholds commercial material under Exemption 4 because its disclosure is likely to cause substantial competitive harm, it must state the reasons for believing such harm will result.³ *Smith, Pachter, McWhorter & D'Ambrosio*, 27 DOE ¶ 80,228 (September 1, 1999) (Case No. VFA-0515). Conversely, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976) ("conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA").

Our review of the Determination Letter indicates that OE failed to provide any explanation as to how Exemption 4 applied to any of the information withheld in Documents Nos. 1a, 1b and 4. The only explanation offered in the Determination Letter was a statement that the withheld material consisted of "privileged commercial information" referencing CRA business activities and that the documents themselves were submitted to DOE with the "understanding" that the information contained within the documents would remain confidential. Determination Letter at 1-2. While the Determination Letter stated the general Exemption 4 requirements, it did not provide any description of the withheld material or explain how the Exemption applies to the withheld information. Consequently, OE's Determination Letter was inadequate with regard to all Exemption 4 withholdings. Further, with regard to Document No. 4, from which significant portions were withheld, there is no marking as to which portions were withheld pursuant to Exemption 4 and which were withheld pursuant to Exemption 5. Thus, administrative appeal without additional information is virtually impossible with regard to Document No. 4.

As to Document No. 5, the Exemption 5 determination is sufficient. In the Determination Letter's index, OE states that Document 5 was a draft document that contained language that "may not be a part of the final document." Determination Letter Attachment at 1. The Determination Letter specifically describes the withheld material as a draft version of one chapter of the Congestion Study which also contains handwritten notes of DOE employees. The Determination Letter identifies the "deliberative process privilege" as the Exemption 5 privilege justifying the withholding. Consequently, unlike the Exemption 4 determination, the Exemption 5 determination is sufficient to meet the requirements of 10 C.F.R. § 1004.7(b)(1).

In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new

³ See discussion of requirements for application of Exemption 4 discussed *infra*.

determination letter so that the appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, 28 DOE ¶ 20,257 (December 19, 2002) (Case No. TFA-0003). This is especially important in Exemption 4 cases, where it may not be obvious, without expert information, what competitive harm would result from release of the information. In the present case, the amount of Exemption 4 material withheld in Document Nos. 1a and 1b is small and consists of a type of commercial information that OHA has reviewed in a number of Exemption 4 cases. We will therefore consider the propriety of OE's withholding of information in those documents, as well as the propriety of the withholding in Document No. 5, since the determination was adequate with regard to that document. However, with regard to Document No. 4, we will remand the matter to OE so that it can issue another determination regarding the document and inform the Appellant which specific portions of the document are being withheld pursuant to which Exemption and explain how Exemptions 4 and 5 apply to the withheld material in that document.⁴

B. Exemption 4 – Document Nos. 1a and 1b

1. Applicability of Exemption 4

The information redacted in Document 1a consists of proposed hourly rates of CRA officials, invoice submission methodology, proposed interest rates on outstanding balances, hourly rates to be charged for miscellaneous services and supplies along with CRA banking account information for payments. The information withheld in Document No. 1b consists of CRA estimation of the cost for various services for the “Transmission Corridor” study. All of this information was withheld under Exemption 4.

Exemption 4 exempts 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); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 only if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

With regard to the information withheld in the contract, CRA was required by DOE to submit the information in question. *See* E-mail from David Meyer, OE, to Richard Cronin, OHA, (August

⁴ As discussed *infra*, the FOIA also 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 under this subsection.” 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (August 15, 1995) (Case No. VFA-0060). On remand, OE should examine the material in Document No. 4 to see if it contains any non-exempt material that may be segregated for release to the Appellant.

12, 2008). Accordingly, we find that the withheld information was “involuntarily submitted” and, in order for the application of Exemption 4 to be proper with regard to the information withheld in the contract, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be “commercial or financial.”⁵ The information submitted by CRA, proposed labor rates, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the *National Parks* test is that the 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 CHPS*, 28 DOE ¶ 80,105 (July 31, 2000) (Case No. VFA-0591). All of the information withheld in the contract originated from CRA, a corporation.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be “privileged” or “confidential.” This case concerns “confidential” information. Withheld information is confidential if its release would be likely to either (a) impair the government’s ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the contract for the project required that the information be submitted, it is unlikely that release of the information would impair DOE’s ability to obtain similar information in the future.

After reviewing the information in question, we conclude that all of the information is confidential because release of the information could substantially harm CRA’s competitive position. Disclosure of the information could give competitors insight into CRA’s pricing estimation processes, rate development methods and labor charges. See *FOIA Group, Inc.*, 30 DOE ¶ 80,107 (February 5, 2008) (Case No. TFA-0239). All of this information could be used by competitors to undercut CRA’s position in future contract competitions. Consequently, we find that CRA could experience significant commercial harm from release of the material withheld in Document Nos. 1a and 1b and that OE properly withheld the information in these documents pursuant to Exemption 4.

2. Segregability

In the case of Document Nos. 1a and 1b, OE released virtually all of the documents except for the commercial Exemption 4 information. Consequently, we find that OE has satisfied its obligation under the FOIA to release all non-Exemption 4 information in the documents to the Appellant.

⁵ Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a “commercial interest” in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

C. Exemption 5 – Document No. 5

1. Applicability of Exemption 5

Document No. 5 consists of a draft of Chapter 4 of the Congestion Study. Essentially all of the document, including at least two hand-written symbolic markings concerning a portion of the draft, was withheld from the Appellant.

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "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) (*Sears*). The courts have identified several traditional privileges that fall under this definition of exclusion, including but not limited to: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding Document No. 5 information from the Appellant, OE relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document 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 exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id.*

Document No. 5 is a draft of Chapter Four of the Congestion Study. As such it represents the author's recommendation as to what the text should be regarding the Congestion Study's analysis of western U.S. electric transmission patterns and simulation modeling of future electric transmission patterns. Therefore, Document No. 5 is a predecisional, deliberative document. Further, Document No. 5 has not been expressly incorporated or adopted by reference in DOE's 2006 Congestion Study. See E-mail from David Meyer, OE, to Richard Cronin, OHA, (August 12, 2008). Consequently, we find that OE properly withheld Document No. 5 pursuant to Exemption 5.⁶

⁶ In its appeal, the Appellant suggests the possibility that OE may have waived its right to assert Exemption 5 documents because it "believes the documents withheld from disclosure may have been made available to a third party." July 22, 2008 Appeal submission from the State of New York at 3. A generalized claim that the withheld information has been made "public" by disclosure to a third party is insufficient to conclude that OE has waived its privilege to assert Exemption 5. See *Steinberg v. United States Department of Justice*, 179 F.R.D. 357, 361 (D.D.C. 1998) (finding no waiver where requester did not produce evidence that specific withheld material is public, even though general subject matter appeared to be in public domain); *Bryan Cave*, 28 DOE ¶ 80,286 at 80,893 (April 30,

2. Segregability

In the case at hand, a significant portion of the material withheld under Exemption 5 is non-factual and not deliberative in nature. As mentioned above, Document No. 5 is composed of a draft analysis of current and future Western electric transmission patterns and uses a significant amount of specific factual data and studies concerning electricity transmission capacities and usage. Release of the data used by the author would, in essence, reveal the author's recommendations. We therefore find that the factual information contained in Document No. 5 is thus so intertwined with the author's analysis as to make any segregation virtually impossible. *See Lead Industries Ass'n. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979); *see also Radioactive Waste Management Associates*, 28 DOE ¶ 80,152 (March 2, 2001) (Case No. VFA-0650).

In sum, OE properly withheld the redacted information in Document No. 5 pursuant to Exemption 5.

D. Discretionary Public Interest Disclosure of the Withheld Information

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (June 3, 1993) (Case No. LFA-0292). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. *FOIA Group, Inc.*, 30 DOE ¶ 80,198 (February 5, 2008) (Case No. TFA-0239). With regard to the withheld Exemption 5 material, given the strong public policy interest in protecting frank and independent discussion among those responsible for making governmental decisions and their advisors, we do not find that the public interest would be served by release of the Exemption 5 material in Document No. 5.

III. Conclusion

We find that OE properly withheld information in Documents Nos. 1a, 1b and 5 pursuant to Exemptions 4 or 5. However, we are remanding this matter to OE so that it may issue a new determination letter with regard to Document No. 4. Consequently, the Appellant's appeal is granted in part, and denied in all other aspects.

2003) (Case No. TFA-0026). Nevertheless, we inquired of an OE official about Document No. 5. This official informed us that to the best of his knowledge, no one had access to Document No. 5 except DOE officials and DOE-contractor personnel assigned to prepare the document. *See* E-mail from David Meyer, OE, to Richard Cronin, OHA, (August 12, 2008).

It Is Therefore Ordered That:

(1) The Appeal filed on July 23, 2008, by the State of New York, OHA Case No. TFA-0269, is hereby granted in part, and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Electricity Delivery and Energy Reliability, 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 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 19, 2008

CONCURRENCE

HG-30 rac 6/27/08

Cronin _____

Lipton _____

OGC _____