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Turner Environmental Law Clinic

July 16, 2010

**VIA FEDERAL EXPRESS**

Director  
Office of Hearings and Appeals  
U.S. Department of Energy  
L'Enfant Plaza Building  
1000 Independence Avenue, SW  
Washington, DC 20585-1615

**Re: Freedom of Information Act Appeal of Partial Denial of Request HQ-2010-01170-F**

Dear Director of Office of Hearings and Appeals:

On behalf of the Southern Alliance for Clean Energy ("SACE"), we write to appeal the Department of Energy's ("DOE's") July 6, 2010 partial response and denial of SACE's Freedom of Information Act ("FOIA") request HQ-2010-01170-F.

**Background**

On March 25, 2010, SACE submitted a FOIA request, via U.S. mail and facsimile, to DOE for records pertaining to DOE's issuance of conditional commitments for loan guarantees for the construction and operation of two nuclear reactors at Vogtle Electric Generating Plant in Burke County, Georgia (the "Loan Guarantees"). *See* Attachment A. As part of the FOIA request, SACE requested:

6. All records pertaining to the issuance to [Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, or the City of Dalton (collectively, "SNC")] of a term sheet, or the drafting of any final or proposed term sheet for SNC, that sets forth the general terms and conditions under which DOE may issue a loan guarantee to [Vogtle Electric Generating Plant];

Attachment A at 2.

On July 6, 2010, DOE sent a “partial response” to SACE’s request,<sup>1</sup> enclosing heavily redacted copies of three Loan Guarantee term sheets (collectively, the “Term Sheets”). See Attachment B. DOE informed SACE that while its Loan Programs Office located the responsive Term Sheets, certain “deliberative process content” was withheld pursuant to FOIA Exemption 4. 5 U.S.C. § 552(b)(4) and 10 C.F.R. § 1004.10(b)(4) (“Exemption 4”). The letter, however, did not provide a description of the withheld content.

### **Timeliness**

Appeals must be filed within 30 calendar days of DOE’s response to a FOIA request. 10 C.F.R. § 1004.8(a). This appeal is timely, having been made within 30 days of DOE’s July 6, 2010 letter.

### **DOE’s Failure to Justify Its Withholdings Violates FOIA**

In its July 6, 2010 letter, DOE notified SACE that it was withholding content responsive to part of SACE’s FOIA request under Exemption 4, but failed to justify its determination.

As the Supreme Court has recognized, FOIA generally requires that records held by federal agencies be released to the public upon request. See e.g. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Indeed, once a responsive record has been identified, it *must* be released unless it is exempt from disclosure under one of FOIA’s nine exemptions. *Id.*; see also *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (“In essence the Act provides that all documents are available to the public unless specifically exempted by the Act itself.”). These exemptions are to be narrowly construed, with all doubts resolved in favor of disclosure. *Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2<sup>nd</sup> Cir. 1999) (citing *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1245 (4<sup>th</sup> Cir.1994)).

Consistent with the “strong presumption in favor of disclosure,” the agency has the burden of proving that the requested information falls under a claimed narrow exemption. *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991). “That burden remains with the agency when it seeks to justify the redaction of ... information in a particular document as well as when it seeks to withhold an entire document.” *Id.* (citing 5 U.S.C. § 552(a)(4)(B)). And, “[i]t is well settled that the agency’s burden of justification is substantial.” *Scott A. Hodes*, Decision and Order of DOE, TFA-0096 (Feb. 16, 2006) (citing, *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 861 (D.C. Cir. 1980)). This burden cannot be sustained by mere “conclusory and generalized allegations” of confidentiality. *National Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976).

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<sup>1</sup> SACE requested records in seven numbered paragraphs. See Attachment A at 1-2. DOE’s July 6, 2010 partial response, however, addressed only those records set forth in paragraph 6 of the FOIA request. This administrative appeal concerns the inadequate partial response to the paragraph 6 request; DOE’s failure to respond entirely to the request for records set forth in paragraphs 1, 2, part of 3, 4, 5, and 7 of the FOIA request falls outside the appeal’s scope. Such a lack of response constitutes a violation of FOIA and applicable DOE regulations, and SACE does not waive its right to seek immediate judicial review of the violation pursuant to 10 C.F.R. § 1004.5(d)(4).

Despite the strong presumption in favor of disclosure, DOE heavily redacted each of the Term Sheets. To meet its substantial burden of justification for withholding the information, DOE wrote only three sentences:

Portions deleted from the documents enclosed contain “commercial” or “financial” information that relates to business activities as well as identities of applicants who have articulated a legitimate argument that publication of unsuccessful participation in this process could cause harm to their competitive position. In addition, proprietary business strategy, organization information and confidential client information has been redacted. The release of such information would give competitors an advantage in the future by providing insight on resources available to the applicant.

Attachment B at 1.

DOE’s language closely mirrors the language of the D.C. Circuit in *National Parks. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In that case, the court formulated the now-familiar test for confidential information, defining as “confidential” any “commercial or financial matter” whose disclosure would likely “cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* DOE, however, must do more than simply restate the *National Parks*’ test. To satisfy its burden, DOE is required to demonstrate how the test is satisfied. *See State of New York*, Decision and Order of DOE, TFA-0269 (July 23, 2008) (citing *Paul W. Fox*, 25 DOE ¶ 80,150 (Nov. 30, 1995)(VFA-0096)) (“A determination must also adequately justify the withholding of documents by explaining briefly *how* the claimed exemption applies to the document.”)(emphasis added).

DOE’s brief justification is insufficient. Instead of explaining its reasons for withholding information, DOE resorted to using the bare claims of confidentiality that are expressly prohibited. *See e.g. National Parks* 547 F.2d at 680; *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970).

#### **The Information Withheld Does Not Fall Under Exemption 4**

In general, DOE may withhold information under Exemption 4 if it can demonstrate that the information is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. 5 U.S.C. § 552(b)(4).<sup>2</sup> Courts have consistently held that the terms “commercial” and “financial” should be attributed their ordinary meaning. *See, e.g., Public Citizen Health*

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<sup>2</sup> DOE may also withhold information that constitutes a trade secret. However, in its determination letter, DOE makes no trade secret claim. Such an omission is unsurprising. For FOIA purposes, the term “trade secret” means “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial information.” *Public Citizen*, 704 F.2d at 1288. The general nature of the information contained in the Term Sheets, by definition, cannot constitute a trade secret.

*Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir 1983). The definition of “obtained from a person” is equally as straightforward. Quite simply, any information generated by the government is not “obtained from a person.” See *Business Week Magazine*, Decision and Order of DOE, TFA-0197 (March 21, 2007) (citing *Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 404 (abrogated on other grounds by *U.S. Dept. of State v. Washington Post Co.*, 456 U.S. 595 (1982)); *Nadler v. FDIC*, 92 F.3d 93, 95 (2d. Cir. 1996)). As noted above, the definition of the third requirement, that the information be “privileged and confidential,” wraps together these first two requirements: “confidential” information is any “*commercial or financial matter*” whose disclosure would likely “cause substantial harm to the competitive position of the *person from whom the information was obtained.*” *National Parks*, 498 F.2d at 770 (emphasis added).

Because DOE failed to provide an informative determination letter, SACE is forced to speculate about whether the information withheld satisfies the three requirements of Exemption 4. See *State of New York* (citing *Research Information Services, Inc.*, 26 DOE 80,139, 80,592 (Nov. 27, 1996)) (“Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency’s determinations.”). In general, the narrow construction of the exemption makes it unlikely that the information redacted from the Term Sheets was properly withheld. See *Vaughn* at 344 (given that the requesting party cannot know the exact content of the information withheld, the best it “can do is argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they will contain” information of the type exempt from disclosure).

#### *The Information Withheld Was Not Obtained From a Person*

Federal entities themselves are not “persons” for purposes of Exemption 4, and any commercial information of the federal government is not shielded from mandatory disclosure by this exemption. *Nadler*, 92 F.3d at 95 (“person” includes “an individual, partnership, corporation, association, or public or private organization *other than an agency*”)(emphasis added). The Term Sheets were prepared by DOE and offered to the applicants for consideration and acceptance. Executed by Secretary of Energy, Steven Chu, on behalf of DOE, the Term Sheets “set[] forth the terms and conditions of DOE’s offer to provide. . .a loan guarantee.” Attachment B at 3, 41, and 90. Thus, the Term Sheets are unequivocally *DOE’s terms and conditions*, and nothing suggests that the Term Sheets incorporate commercial information obtained from any other party. Because information provided by a federal agency is not exempt from disclosure under Exemption 4, the redacted portions of the Term Sheets must be released.

#### *The Information Withheld Was Not Privileged or Confidential*

In addition to being obtained from the applicants, for the information redacted from the Term Sheets to fall under Exemption 4, its disclosure must likely cause harm to the applicants’ competitive position. By its nature, however, a multi-billion dollar loan guarantee will enhance, not harm, the applicants’ competitive position. And, even if the applicants’ competitive position is harmed by disclosure of the terms and conditions – a dubious position – that harm must be attributed to the applicants’ choice to participate in the federal loan guarantee program, not by

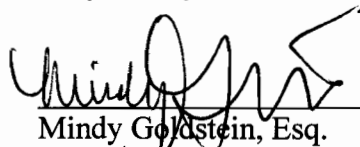
public disclosure. While the applicants may nevertheless prefer that the terms and conditions of the taxpayer subsidy not be publicly disclosed, they have no reasonable expectation of secrecy. If the applicants do not want the public to be aware of the extent of the government's largesse, then they should not seek federal loan guarantees from DOE. Under the circumstances, we fail to see how the applicants' competitive position could possibly be harmed by disclosure of the redacted terms. Accordingly, DOE may not withhold information contained in the Term Sheets under Exemption 4.

### **Conclusion**

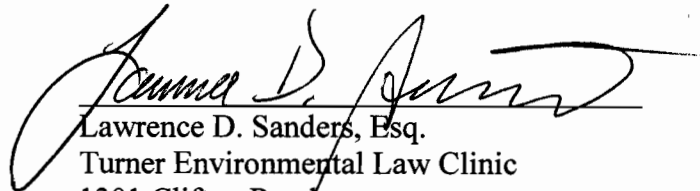
DOE has failed to provide SACE with a justification sufficient to support the withholding of information under Exemption 4. Moreover, based on the general nature of the Term Sheets, it appears that all the withheld information would fall outside the scope of the exemption.

Unless DOE provides additional information sufficient to justify its withholding of content responsive to SACE's March 25, 2010 FOIA request under Exemption 4, those records should be released within 20 working days.

Respectfully submitted,



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