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Turner Environmental Law Clinic

October 25, 2010

**VIA U.S. MAIL**  
**AND FACSIMILE WITHOUT ATTACHMENTS**

Director, Officer of Hearings and Appeals  
Department of Energy  
1000 Independence Avenue, S.W.  
Washington, D.C. 20585  
Facsimile: (202) 586-0575

**Re: Freedom of Information Appeal HQ-2010-01170-F**

Dear Sir or Madam:

On behalf of Southern Alliance for Clean Energy ("SACE"), we write to appeal the Department of Energy's ("DOE's") September 24, 2010 partial response to the above-referenced Freedom of Information Act ("FOIA") request.

**Factual Background**

On March 25, 2010, SACE submitted a FOIA request for documents pertaining to the DOE's Loan Guarantee Program as it relates to the loan guarantee applications and issuance of loan guarantees to Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Company, Municipal Electric Authority of Georgia, or the City of Dalton, Georgia for construction and operation of two nuclear reactors at the Vogtle Electric Generating Plant ("VEGP") (Attachment 1). As part of the request, SACE sought:

2. All records concerning the VEGP loan guarantee application including all correspondence between DOE and Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Company, Municipal Electric Authority of Georgia, or the City of Dalton, Georgia (collectively, "SNC").

Attachment 1.

After lengthy delay, on September 24, 2010, DOE issued a partial response to item 2 of the FOIA request. (the “Partial Response”) (Attachment 2).<sup>1</sup> In the Partial Response, DOE stated that it “is currently sending the Georgia Power Company Correspondence Packet” and “is still searching for other materials related to the Correspondence for Municipal Electric Authority of Georgia and Correspondence for Oglethorpe Power Corporation.” The Georgia Power Company Correspondence Packet (the “Correspondence Packet”) contained 116 pieces of email correspondence, covering the period between August 27, 2009 and March 12, 2010. *See* Attachment 3. Many of these emails were heavily redacted. And, many referenced attached files that were not released. According to DOE, the correspondence included “documents which are being partially withheld pursuant to Exemptions 4 and 6 of the FOIA.”<sup>2</sup>

**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 September 24, 2010 letter.

**DOE’s Search for Responsive Documents Was Inadequate**

DOE’s search for responsive documents was inadequate because it failed to produce responsive documents covering the entire timeframe requested, and also because it failed to address attachments to emails that were in the released Correspondence Packet. To determine “the adequacy of a FOIA search, the court is guided by principles of reasonableness.” *Maydak v. U.S. Dept. of Justice* 254 F.Supp. 2d 23, 38 (D.D.C. 2003). The agency is required to conduct the search “in good faith using methods reasonably expected to produce the information requested.” *Id* at 38-39 (citations omitted). The reasonable standard is also applied to the timeframe for FOIA searches. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1101 (D.D.C. 1983) (“a temporal limit pertaining to FOIA searches...is only valid when the limitation is consistent with the agency’s duty to take *reasonable* steps to ferret out requested documents.” (emphasis added)); *Public Citizen v. Department of State*, 276 F.3d 634 (D.D.C. 2002) (holding the date-of-

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<sup>1</sup> Prior to issuing the Partial Response, DOE issued several partial responses regarding items 3, 5, 6, and 7 of the FOIA request. The adequacy of these partial responses is not at issue in this appeal. Moreover, in connection with the Partial Response, DOE released documents responsive to item 1 of the FOIA request. The adequacy of the Partial Response, as it relates to these item 1 documents, is also not at issue in this appeal.

<sup>2</sup> This appeal does not address information withheld pursuant to exemption 6 of FOIA.



request temporal cutoff policy “was unreasonable both generally and as applied to organization’s second FOIA request.”).

As discussed above, DOE released Georgia Power Company correspondence for the period from August 27, 2009 to March 12, 2010. *See* Attachment 3. Georgia Power and DOE, however, remained in negotiations until the loan guarantee term sheets were finalized in May. Moreover, once executed, Georgia Power and DOE continued to follow the process the term sheets set in place for entering into a definitive agreement and issuing the loan guarantee. Therefore, correspondence between DOE and Georgia Power necessarily extended past March and through September 24, 2010 – the date of the Partial Response. *See Public Citizen*, 276 F.3d at 643-4 (holding that a search must extend past the date of the FOIA request). A reasonable search should have produced correspondence dated after March 12, 2010.

In fact, DOE acknowledged that there was additional correspondence not released in the Correspondence Packet. In an email from DOE’s counsel, Michele Lo, to SACE’s counsel, Ms. Lo noted that “there is a considerable volume of emails potentially responsive to” the item 2 request that had not been included with the Partial Response (Attachment 4). As evidenced by this email, DOE’s initial search for documents responsive to item 2 was inadequate.

In addition to failing to produce all responsive documents dated after March 12, DOE also failed to produce (or explain its reason for withholding) a series of attachments to the correspondence it did release with the Partial Response. Attachments are noted or referenced in the following emails:

1. March 12, 2010 from Steven Nichols to Nicholas Whitcombe. Six documents are attached to the email. Attachment 3 at 17.
2. November 9, 2009 from Steven Nichols to Nicholas Whitecombe. Email chain references an attached document. *Id.* at 33-34.
3. September 17, 2009 from Steven Nichols to Nicholas Whitcombe. Email chain references an attached spreadsheet. *Id.* at 36.
4. September 18, 1009 from Steven Nichols to Nicolas Whitcombe. Email chain references an attached spreadsheet. *Id.* at 37-38.
5. October 16, 2009 from Steven Nichols to Kenneth Cestari and Nicholas Whitcombe. Email references attached documents. *Id.* at 48.
6. October 20, 2009 from Steven Nichols to Nicholas Whitcombe. Email chain references attached documents. *Id.* at 49-50.
7. September 11, 2009 from Steven Nichols to [REDACTION] and Nicholas Whitcombe at 3:58 p.m. Email references an attached sponsor payment letter. *Id.* at 52-53.

8. September 11, 2009 from Steven Nichols to Nicholas Whitcombe and [REDACTION] at 4:40 p.m. Email chain references an attached sponsor payment letter. *Id.* at 54-55.
9. September 16, 2009 from Steven Nichols to [REDACTION]. Email chain references attached documents. *Id.* at 65-66.
10. November 6, 2009 from Earl Long to Todd Alexander, Steven Nichols, J. Mercer, and Eric Koontz. Email chain references an attached revised draft of the conditional commitment letter and a draft of the term sheet. *Id.* at 82-83.
11. November 13, 2009 from Steven Nichols to T. Alexander, Earl Long, L. Gordon, J. Mercer, and Eric Koontz. Email chain references an attached draft of the term sheet. *Id.* at 84-86.
12. November 13, 2009 from Earl Long to Lee Gordon, Steven Nichols, J. Mercer, and Eric Koontz. Email chain references an attached draft of the term sheet. *Id.* at 87-88.
13. December 18, 2009 from Steven Nichols to Nicholas Whitcombe at 3:58 p.m. Email chain references attached Schedules that are referenced in the Term Sheet. *Id.* at 89-90.
14. December 18, 2009 from Steven Nichols to Nicholas Whitcombe at 1:55 p.m. Email chain references attached Schedules that are referenced in the Term Sheet. *Id.* at 91-92.
15. December 8, 2009 from Steven Nichols to Nicholas Whitcombe. Email chain references attached Schedules that are referenced in the Term Sheet. *Id.* at 93-94.
16. November 23, 2009 from Steven Nichols to Nicholas Whitcombe. Email chain references attached Schedules that are referenced in the Term Sheet. *Id.* at 95-96.
17. September 9, 2009 from Earl Long to Nicholas Whitcombe. Email references and attached working group list. *Id.* at 105.
18. December 11, 2009 from Steven Nichols to Todd Alexander and Todd Yelverton. Email chain references an attached draft of the NDA. *Id.* at 139.
19. February 15, 2010 from Earl Long to Susan Richardson. Email references an attached draft press release. *Id.* at 156.
20. September 22, 2009 from Steven Nichols to Nicholas Whitcombe and Kimberly Bennett. Email references attached directions. *Id.* at 157.
21. January 27, 2010 from Earl Long to Nicholas Whitcombe. Email references attached pictures. *Id.* at 158.
22. September 8, 2009 from Steven Nichols to Nicholas Whitcombe at 5:32 p.m. Email references an attached draft of the Sponsor Payment Letter. *Id.* at 159.



23. November 6, 2009 from Steven Nichols to Nicholas Whitcombe. Email references an attached life cycle emissions analysis. *Id.* at 162.
24. September 8, 2009 from Steven Nichols to Nicholas Whitcombe at 5:51 p.m. Email chain references attached draft of the Sponsor Payment Letter. *Id.* at 160.
25. February 1, 2010 from Earl Long to Nicholas Whitcombe. Email chain references an attached power point file. *Id.* at 164.
26. December 8, 2009 from Steven Nichols to Nicholas Whitcombe at 9:25 a.m. Email chain references attached schedules referenced in the term sheets. *Id.* at 166.
27. September 15, 2009 from Steven Nichols to Richard Corrigan and Nicholas Whitcombe. Email references attached proposed term sheet and draw schedule. *Id.* at 168.
28. September 28, 2009 from Steven Nichols to Nicholas Whitcombe, T. Dunbar, and Paul Ameer. Email chain references attached items. *Id.* at 171-172.
29. November 6, 2009 from Steven Nichols to Nicholas Whitcombe. Email references attached Georgia Power's issues list. *Id.* at 174.
30. September 9, 2009 from Steven Nichols to Nicholas Whitcombe. Email references attached sponsor letter. *Id.* at 175.
31. September 15, 2008 from Steven Nichols to Richard Corrigan and Nicholas Whitcombe at 5:05 p.m. Email references attached files. *Id.* at 176.
32. December 14, 2009 from Steven Nichols to Nicholas Whitcombe. Email references attached Update on the PC Vogtle Expansion Project. *Id.* at 180.
33. November 9, 2009 from Steven Nichols to Nicholas Whitcombe. Email references attached document. *Id.* at 181.
34. September 18, 2009 from Steven Nichols to Nicholas Whitcombe. Email references attached updated Draw Schedule for GPC and attached spreadsheet. *Id.* at 182-83.
35. October 1, 2009 from Steven Nichols to Nicholas Whitcombe. Email references attached GPC draw schedule. *Id.* at 184.
36. September 11, 2009 from Steven Nichols to Nicholas Whitcombe at 11:34 a.m. Email references attached documents. *Id.* at 185.
37. September 30, 2009 from Earl Long to Peter Fitzgerald. Email references attached document. *Id.* at 187-188.
38. November 21, 2009 from Steven Nichols to Nicholas Whitcombe. Email references attached schedules reference in the term sheets. *Id.* at 191.

DOE entirely failed to identify, release, or give reasons for withholding these responsive documents in its Partial Response. Such a failure renders the Partial Response inadequate.

#### **DOE is Unlawfully Withholding Responsive Documents Pursuant to Exemption 4**

The documents DOE did produce were heavily redacted under the guise of Exemption 4. The Exemption 4 claims in the Partial Response, however, were deficient for two reasons. First, the redacted information does not seem to be covered under Exemption 4. Second, even if it is covered under Exemption 4, DOE failed to adequately justify the withholding.

##### *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>3</sup> Courts have consistently held that the terms “commercial” and “financial” should be attributed their ordinary meaning. *See, e.g., Public Citizen Health 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* 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)). 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 and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. 1974) (emphasis added).

Because DOE failed to provide specific justifications for the redactions, SACE is forced to speculate about whether the information withheld satisfies the three requirements of Exemption 4. *See State of New York*, Decision and Order of DOE, TFA-0269 (July 23, 2008) (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

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<sup>3</sup> DOE may also withhold information that constitutes a trade secret. However, in the Partial Response, DOE makes no trade secret claim.



from the correspondence was properly withheld. *See Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973) (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).

More specifically, the content redacted from the Correspondence Packet does not seem to contain the sensitive commercial information generally described in the Partial Response. For example, some emails concern a contract with an outside engineering firm selected by DOE to review the VEGP project, but the identity of the contractor is redacted. *See* Attachment 3 at 184. Other than the handwritten “b(4),” no justification for this redaction is given. The name of an independent contractor does not readily fall into the categories of information DOE claims to withhold—project costs, financing plans and business strategies, procurement plans, and marketing plans and analysis. Rather, this information likely falls outside the scope of Exemption 4.

As an additional example, information is redacted from a November 13, 2009 email. Attachment 3 at 85. In another email chain, the same email is included and the information is not redacted. Attachment 3 at 87. The information redacted from the first email but included in the second is, “Attached please find a revised draft of the term sheet, ~~including the additional changes described below and changes to the definition of financial closing date~~, as well as a two blacklines: the first marked against 11/12 draft sent last night (“GPC Term Sheet BLACKLINE”) and the second marked against GPC’s comments of 11/10 (“GPC Term Sheet CUMULATIVE BLACKLINE”).” Attachment 3 at 84-85 *c.f.* Attachment 3 at 87 (striethrough is redacted in the first email). This information does not fall under any of DOE’s generalized justifications for withholding information. Moreover, it casts doubt on the appropriateness of the other redactions.

#### *DOE Fails to Justify Withholding Information Pursuant to Exemption 4*

Even if Exemption 4 does apply, DOE failed to justify the withholding of information. 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*, 484 at 823 (“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). Despite the strong presumption in favor of disclosure, DOE heavily redacted the released correspondence.

To meet its substantial burden of justification for withholding the information, DOE simply noted Exemption 4 applied to each document, but gave no further explanation. Indeed, DOE made only one generalized statement in the Partial Response to address all the redactions. *See* Attachment 2. The Partial Response provides:

Portions deleted from the document enclosed include sensitive commercial information that is maintained in confidence by the applicant and not available in public sources. Such proprietary information being withheld includes project costs, financing plans and business strategies, procurement plans, and marketing plans and analysis. Public disclosure on this information would cause substantial harm to applicant’s competitive interests. Specifically, disclosing costs and financing information would provide an unfair advantage to competitors by enabling competing power suppliers to estimate supply costs and use this information to bid against the applicant. Public disclosure of procurement plans would enable the applicant’s power vendors to compete unfairly towards providing future goods and services to the applicant. In addition to allowing vendors unlicensed use of applicant’s original work product. Public disclosure of project costs, financing information and market analysis would enable potential customers to exert undue leverage with regards to purchasing applicant’s product. For these reasons the information is being withheld.

Attachment 2 at 3.

DOE’s generalized explanation is insufficient. FOIA requires that “a determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document.” *State of*



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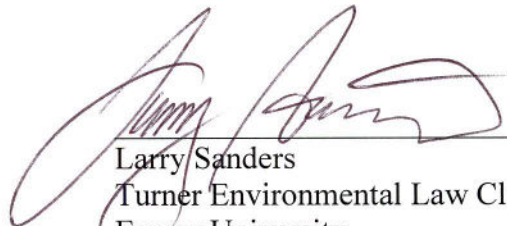
*New York*, (citing *Paul W. Fox*, 25 DOE ¶ 80,150 (Nov. 30, 1995)(VFA-0096)). Thus, justification of each redaction must be made on a document-by-document basis. DOE's Partial Response failed to include the necessary justifications.

### **Conclusion**

DOE has failed to comply with the relevant provisions of FOIA and its own regulations in its response to SACE's FOIA Request for two reasons. First, DOE failed to produce responsive documents. Second, DOE wrongfully redacted information in the responsive documents that were produced. If the documents described in the FOIA Request are not released within twenty working days, SACE may elect to exercise its right to seek judicial review.

If you wish to discuss or have questions regarding this request, please contact Larry Sanders at [Lawrence.Sanders@emory.edu](mailto:Lawrence.Sanders@emory.edu) or (404) 712-8008.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Larry Sanders', is written over a horizontal line.

Larry Sanders  
Turner Environmental Law Clinic  
Emory University  
1301 Clifton Road  
Atlanta, Georgia 30322  
Tel: (404) 727-3432  
Fax: (404) 727-7851