

Exhibit H



1101 Market Street, Chattanooga, Tennessee 37402

February 20, 2024

Mr. Paul McAdoo
Reporters Committee for Freedom of the Press
Local Legal Initiative Attorney (Tennessee)
6688 Nolensville Rd. Ste. 108-20
Brentwood, TN 37027

Dear Mr. McAdoo:

This responds to your January 5, 2024, appeal of the October 20, 2023, determination by the Tennessee Valley Authority (TVA) on Melanie Faizer's April 12, 2023, Freedom of Information Act (FOIA) request in which Ms. Faizer requested "all agreements, grants or contracts entered into between Bitdeer and TVA" and related documents. Ms. Faizer's request was processed under tracking number 23-FOI-00108.

In this present administrative appeal, you have objected to the redactions made to six documents and claimed improper application of Exemptions 4, 5, and 6.

After further consideration and re-examination of the documents at issue, we have cleaned up any inconsistencies and removed certain redactions on information that we determined could be disclosed. Be aware that we have disclosed the clauses that reference ineligible industry sectors within the definition of a qualifying facility, but that information is now outdated. Please see the included revised agreements.

As to the remaining redactions, please see the following response.

Exemption 4

FOIA Exemption 4 is available for "commercial or financial information obtained from a person" that is "privileged or confidential." 5 U.S.C. § 552(b)(4). You claim

that TVA did not meet either of these criteria in its Exemption 4 redactions. TVA disagrees.

A. Commercial or Financial Information

Information is generally considered commercial if “it serves a commercial function or is of a commercial nature.” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002). This exception includes information that would “jeopardize a commercial entity’s commercial interests or reveal information about its ongoing operations.” *N.Y. Times Co. v. U.S. Dep’t of Justice*, 19 Civ. 1424, 2021 WL 371784 (S.D.N.Y. Feb. 3, 2021) (finding that certain information related to a company’s compliance program was not exempt unless it was intertwined with other commercial information).

Information is deemed confidential when it is “customarily and actually treated as private by its owner” and shared with the government “under an assurance of privacy.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). This is a fact-bound determination that can be demonstrated by, among other things, “requiring employees and business partners to enter into confidentiality agreements,” “restrictive markings on documents,” or “limiting access to the information at issue on a ‘need to know’ basis.” *Am. Small Bus. League v. United States Dep’t of Def.*, 411 F. Supp. 3d 824, 831 (N.D. Cal. 2019). In fact, Bitdeer shared sensitive anticipated usage, investment, and cost data with TVA to qualify for financial credits on the understanding that this information would be treated confidentially. In the course of responding to this FOIA request, Bitdeer was notified of the request and was given the opportunity to request the redaction of the information that it deemed to be confidential commercial and financial information, or otherwise considered competitively sensitive. They did so and confirmed this assertion in its response. TVA reviewed these redactions and agreed with their validity, independently substantiating the assertion and rationale for foreseeable harm to Bitdeer.

Specifically, the redacted information under the Investment Credit application includes performance projections, employee wages, and investment information, all commercially sensitive information. The form is marked as “not intended for further distribution.” The redactions under the Investment Credit agreement and the Grant agreement list sensitive commercial information including performance projections, investment projections, the size of the credit, and wage information. These details would be valuable to Bitdeer’s competitors as they could reveal Bitdeer’s abilities, size, and financial circumstances.

Similarly, with the Interruptible Agreements, the redacted information lists Bitdeer’s projected and contract demand and projected interruption periods. This information could be used to reveal Bitdeer’s abilities, size of the facility,

forecasts for operational uptime and projected output. Some of these details were the result of negotiations between Bitdeer and TVA. Public disclosure of such information would reveal Bitdeer's bargaining position to other energy providers and to competitors who could use the information to undercut Bitdeer.

B. TVA "Obtained" the Information

Furthermore, you have expressed concern that, by incorporating the information into the contract, the information is no longer confidential information "obtained from a person" if it is modified by the agency. Under DOJ guidance it clarifies that "the mere fact that the government supervises or directs the preparation of information submitted by the sources outside the government does not preclude that information from 'being obtained from a person'" *Merit Energy Co. v. U.S. Dep't of Interior*, 180 F. Supp. 2d 1184 (D. Colo. 2001). In fact, for the incentive agreements, the customer is directed to independently fill out an electronic application, and then nearly all of the content of the cover page of the agreement is populated from such information.

The DOJ guidance further supports the reformulation of the information provided (*i.e.* taking the information provided by the submitter and putting it into the contracts). In your appeal you cite *Occupational Safety & Health L. Project, PLLC v. U.S. Dep't of Labor*, No. 21-2028, 2022 WL 3444935 (D.D.C. Aug. 17, 2022). However, it seems that you did not cite the final decision of the Court in that case. The Court found that the Department of Labor was within Exemption 4 guidelines. The Court stated "the government has sufficiently demonstrated that the withheld details of the Abatement Plan Agreement were developed by a non-governmental party, incorporated into a governmental document after review, and were not substantially altered by the agency." *Id.* at 5. This decision also supports the reformulation of provided information by a submitter, even after negotiations, still falls under Exemption 4.

Exemption 5

For three of the agreements supplied to your client, TVA made certain redactions of the terms based on Exemption 5, specifically citing the commercial confidential information privilege, as recognized in *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340 (1979), among others. You claim that TVA improperly applied this exemption, but due to the circumstances and reasoning set forth below, TVA disagrees.

A. Exemption is Unavailable After Contract Award

The Supreme Court has recognized a privilege available under Exemption 5 which allows the government to withhold certain confidential commercial

information. *Federal Open Market Comm. of Federal Reserve System v. Merrill*, 443 U.S. 340, 360 (1979). The purpose of this governmental commercial confidentiality exemption is to prevent other parties from taking “unfair commercial advantage” against a government agency. *Id.*

As you point out, the exemption is often applied to inter-agency or intra-agency records until the final agreement is reached and the need for secrecy is reduced. However, TVA has consistently asserted, and continues to assert, that the risk of competitive harm continues after that point in certain circumstances. With regard to economic development information in particular, access to this information that TVA has deliberated over and developed internally for its economic incentive programs, including customer metrics, method of payment, types of load in consideration, and award details, would lead to competitive harm to TVA and to the economy of the Valley itself. This information, developed within intra-agency records, could be used by competitors to potentially outbid or out-incentivize TVA in bringing in new businesses to their respective service areas. This risk of harm has not been extinguished by the finalization of a contract that contains this information; in fact, the harm would increase if other utilities or potential counterparties could see exactly what TVA would agree to and why.

This position is recognized by courts who have ruled on agencies’ use of the privilege in similar situations. In *Taylor-Woodrow Intern. v. U.S. Dept of Navy*, 1989 WL 1095561, April 5, 1989, the court stated that “the purpose of the confidential commercial privilege is to protect the release of potentially damaging commercial information, but only while the opportunity to take unfair advantage of the government agency continues to exist...[n]ormally, once the government awards a contract, all negotiations end and the contract price becomes fixed. In that instance, there would be no reason to continue to withhold the information.” However, recognizing the distinguishing fact pattern in which the counterparty had submitted change order proposals, the court declared that release of certain cost estimates would allow the plaintiff to take unfair commercial advantage of the Navy and “the policy behind applying the commercial confidential privilege in this particular instance is still very much alive even after the contract award.” *Id.* at 3.

Furthermore, in *Natural Resources Defense Council, Inc. v. U.S. Dept. of Interior*, 36 F.Supp.3d 384 (2014), the Court, in examining *Merrill*, declared that *Merrill* did not categorically hold that, as a matter of law, the commercial information privilege can *never* apply to information generated by the government in the course of the process of awarding a contract after that contract has been awarded and stated that any such reading of *Merrill* would create an untended inflexible, mechanistic rule. *Id.* at 407, 411.

The Court explained that the confidential commercial information privilege—like the analogous civil discovery privilege—is not absolute; instead, it requires

balancing the need for confidentiality, as measured by such criteria as “the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure,” against the need for disclosure. *Id.* at 410.

The Court further said, “[j]ust because the rationale for protecting disclosure of competitive bidding information often will expire as soon as a contract is awarded does not mean that this is always so. Not all bidding processes are the same, and the particular features of a particular bidding process with respect to governmental assets may counsel a different outcome. In particular, where disclosure of information from the bidding process as to the award of one asset would compromise the Government’s ability to protect its interests in connection with the award of another, construing FOIA to contain such a bright-line rule could severely damage government interests.” *Id.* For this reason, a rigid rule should not be read into *Merrill*, but rather the circumstances, context, and potential harm should be considered and balanced.

TVA’s need to protect its competitive commercial information is especially important, in particular, because of its hybrid nature as recognized in *Thacker v. Tennessee Valley Authority*, 139 S.Ct. 1435 (2019). There, the Court noted that TVA is subject to suits challenging any of its commercial activities; thus the law places TVA in the same position as a private corporation supplying electricity. The Court went on to state that Congress created the TVA--a “wholly owned public corporation of the United States”--in the throes of the Great Depression to promote the Tennessee Valley’s *economic development*. *Id.* at 1439, citing *TVA v. Hill*, 437 U.S. 153, 157 (1978) (emphasis added). “As even that short description may suggest, the TVA is something of a hybrid, combining traditionally governmental functions with typically commercial ones....much of what TVA does could be done--no, *is* done routinely--by non-governmental parties. Just as the TVA produces and sells electricity in its region, privately owned power companies (*e.g.*, Con Edison, Dominion Energy) do so in theirs. As to those commonplace commercial functions, the emphasis in the oft-used label “public corporation” rests heavily on the latter word.” *Id.*

B. Foreseeable Harm

TVA disagrees that foreseeable harm was not sufficiently articulated in the previous communications, since the explanation provided specificity in its detail as to the economic harm attributed to disclosure. However, we welcome the opportunity to expound further.

Economic development is part of TVA’s historic mission of service to the Tennessee Valley (See TVA Act, Sec. 15d(d) page 25). Over many years, TVA has maintained a consistent policy of keeping incentives and other TVA commercial information similar to this confidential, as do the private utilities who

are competing with TVA for customers. This policy aligns with the purpose of the recognized government confidential commercial information privilege under FOIA Exemption 5. TVA's approach to economic development has proved successful. In 2023, companies announced projected capital investments of \$9.2 billion and were expected to create 12,276 jobs and retain 46,135 jobs in the Tennessee Valley.

TVA's foreseeable harm in disclosing the information at issue here, and the public release of specific economic incentives that TVA has provided or committed to provide a particular company, would put TVA at a competitive disadvantage in negotiating with other companies in the future to secure and retain additional jobs for the Tennessee Valley. Disclosure of terms and conditions of incentives could force TVA to increase the size, cost or type of future incentive packages it must offer to remain competitive. In competing for new jobs for the Tennessee Valley, TVA is engaged in a national competition, and sometimes an international competition.

Exemption 6

FOIA Exemption 6 prohibits the disclosures that would be an "unwarranted invasion of personal privacy." This exemption is interpreted broadly to "protect individuals from the injury and embarrassment" from the unnecessary disclosure of their information. *U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599, (1982). In the Sixth Circuit, courts first consider whether the files contain "personnel, medical, or 'similar' data" and then whether disclosure would be a "clearly unwarranted invasion of personal privacy." *Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 937 (6th Cir. 1988).

In practice, this exemption requires balancing the public's interest in disclosure against the individual's privacy interest. *Schell*, 843 F.2d at 938. The public interest must serve FOIA's purposes in enhancing the public's understanding of government operations. *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 495-96 (1994). Lastly, agencies withholding information must also "reasonably [foresee] that disclosure would harm an interest protected by" the exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I).

Accordingly, agencies have appropriately withheld individuals' names and addresses and other similar information that may "invite unwanted intrusions" even when such intrusions have not previously occurred. *Niskanen Ctr. v. FERC*, 20 F.4th 787, 791 (D.C. Cir. 2021). The law is clear that individuals do not waive their privacy interests simply because they interact with the government or apply for a government benefit, even where they are warned that the information could be subject to disclosure. *Hill v. USDA*, 77 F. Supp. 2d 6, 8 (D.D.C. 1999). The privacy interests of the individuals listed in these documents are considerable, including full names, titles, phone numbers, and

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email addresses. In the digital era, this information may be sufficient to reveal extensive personal data about an otherwise private person. On the other hand, the public interest is limited to understanding the TVA's "performance of its statutory duties." *Bibles v. Oregon Nat. Desert Ass'n*, 519 U.S. 355, 356 (1997). This does not require disclosure of Bitdeer employees' personally identifying information. See *Niskanen Ctr.*, 20 F.4th at 791 (finding that even a weighty public interest did not justify the disclosure of the names of individuals).

The individuals listed in the documents are not the subject of TVA's activities, which involve financial incentives for economic development and grid reliability services. Even when a court recently ordered TVA to disclose limited information related to TVA employees, some of which had historically been public, the Court intentionally protected identifying information like names, identification numbers, and addresses. *Perrusquia v. Tennessee Valley Auth.*, No. 3:22-CV-309, 2023 WL 6303013, at *8 (E.D. Tenn. Sept. 27, 2023) (finding that TVA employee names and addresses are private information that reveal "little about [TVA's] conduct"). Further, unlike in *Perrusquia*, disclosing the identities of Bitdeer personnel would not reveal additional information about the agency's expenditures or activities. Even worse, disclosure would harm the interest that Exemption 6 seeks to protect by needlessly invading individuals' privacy. See 5 U.S.C. § 552(a)(8)(A)(i)(I).

For the reasoning set forth above, I uphold the FOIA Officer's determination on the exemptions applied to the withheld documents.

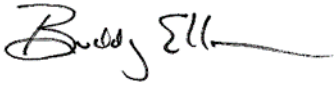
This is TVA's final determination on your FOIA request. Under FOIA, you have the opportunity to seek judicial review of this final determination. The provisions of 5 U.S.C. § 552(a)(4)(B) provide the processes for seeking such review.

Alternatively, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman, offers mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road (OGIS)
College Park, MD 20740-6001
ogis@nara.gov
ogis.archives.gov
Phone: 202-741-5770
Phone (toll-free) 1-877-684-6448

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Sincerely,

A handwritten signature in black ink that reads "Buddy Eller". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Buddy Eller
Vice President, Communications