IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:12-cv-01661-RPM

CITIZENS FOR A HEALTHY COMMUNITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, an agency of the United States; and UNITED STATES BUREAU OF LAND MANAGEMENT, an agency within the United States Department of the Interior;

Federal Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

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Plaintiff, by undersigned counsel, moves for summary judgment on all claims pursuant to Fed. R. Civ. P. 56(a). Plaintiff is entitled to summary judgment because there can be only "one reasonable conclusion as to the verdict" based on the undisputed material facts. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). In support of this motion, Plaintiff submits the following:

INTRODUCTION:

Plaintiff Citizens for a Healthy Community ("CHC"), a grass-roots organization formed for the purpose of protecting people and their environment from irresponsible oil and gas development, seeks summary judgment asserting violations of both the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.,* and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et. seq.* CHC challenges the unlawful decision of the Federal Defendants, the United States Department of Interior (the "Department") and the United States Bureau of Land Management ("BLM"), to withhold documents responsive to a FOIA request made by CHC.

Extending from the Grand Mesa, the Thompson Divide, and the Ragged Mountains, and surrounded by famed places such as the Black Canyon of the Gunnison and the peaks of Mount Lamborn and Landsend Peak, the valley along the North Fork of the Gunnison River ("North Fork Valley" or "Valley") has become a leader in sustainable agriculture and is home to the largest concentration of organic farms in the Rocky Mountains. The North Fork Valley – which includes the communities of Paonia, Hotchkiss, Crawford, and Somerset, and stretches northeast along Colorado State Highway 133 to the Paonia Reservoir State Park – produces 77 percent of Colorado's apples, 71 percent of the state's peaches, and supplies food all over Colorado's

Western Slope. The Valley is also one of two certified American Viticultural Areas in Colorado, and is gaining an international reputation for handcrafted wines made from the highest altitude vineyards in the Northern Hemisphere. As the North Fork Valley's reputation for scenic beauty, organic farms, artisanal food, and world-class wine has spread, the area has seen a growing population and is increasingly an agritourism destination.

The North Fork Valley's growth and reputation was threatened when, on December 7, 2011, BLM's Uncompahgre Field Office ("UFO") announced its intent to offer 22 parcels and approximately 30,000 acres of federal mineral estate at the August 2012 competitive oil and gas lease sale. *See* Plaintiff's Exhibit 1. These 22 parcels encircle the Valley, threatening the very foundation of these communities. For example, parcel numbers 6197 and 6194 spread over the Valley's iconic peaks, Mount Lamborn and Landsend Peak. *See* Plaintiff's Exhibit 2. Other parcels come to the edge of houses and farms, as well as within a few hundred feet of schools. *Id.* And still additional parcels overlay and abut springs and aquifers serving as domestic and agricultural water sources to these communities. *Id.*

The sale of our pubic resources for the nearly exclusive benefit of private industry is shrouded in secrecy, starting at the very beginning of the process. Public lands can be nominated for lease through industry-submitted Expressions of Interest ("EOIs"). This process allows industry to pick which lands they want to develop and – at least according to BLM's Colorado State office – the government is thereafter required to offer these lands at public auction.

In an effort to better understand the circumstances that precipitated the nomination of the 30,000 acres of public lands in the North Fork Valley, and thereby gain the ability to more fully

participate in the pubic comment process surrounding the North Fork Valley lease sale, CHC submitted a FOIA request to BLM seeking information regarding two things: first, the EOIs nominating these 22 parcels, including information identifying the persons or entities who submitted the EOIs and, second, all documents related to the EOIs listed above.

As CHC has come to understand, it is BLM's policy and practice – as provided in Instruction Memorandum 95-164 ("IM 95-164") – to hold as confidential the names and identifying information of parties submitting EOIs until after a lease sale takes place. Accordingly, BLM's response to CHC's FOIA request included the release of the EOIs in question, but the agency chose to redact (black-out) the names and identifying information of the submitting parties, citing FOIA exemptions 4 and 5, 5 U.S.C. § 552(b)(4) and (5).

When BLM's oil and gas leasing process occurs in remote and unpopulated areas, the agency's secretive approach can proceed without the public's scrutiny. However, when industry's exploitive plans threaten, as here, the very foundation and livelihood of people and communities, the federal government's bias toward industry and the veil of secrecy it wishes to maintain cannot continue unopposed. Indeed, once a lease is issued, the successful bidder is guaranteed a right to develop that parcel. By maintaining this secrecy until after a lease sale takes place, the public is denied this basic information until it is too late. CHC and the public should be allowed to participate in the sale of our public lands in the North Fork Valley and elsewhere on a fully informed basis – which includes the disclosure of identifying information for the parties and entities who nominate our public lands through the submission of EOIs. In this case, and in all oil and gas leasing decisions on federal lands, anything less that full transparency is simply

unacceptable.

STATUTORY BACKGROUND:

I. Freedom of Information Act.

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.,* was enacted to ensure a broad policy favoring government transparency and the notion that the public is entitled to information. These goals are not just ideas on paper, but are required by law. The courts have long recognized the overarching policy of disclosure, noting FOIA's "basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language.'" *U.S. Dept. of State v. Ray,* 502 U.S. 164, 177 (1991) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976)); *see also NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) (providing that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," and later continuing: "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass."); *U.S. Dept. of Justice v. Landano,* 508 U.S. 165, 181 (1993) (citing *John Doe Agency v. John Doe Corp.* 493 U.S. 146, 152 (1989)) (recognizing a courts "obligation to construe FOIA exemptions narrowly in favor of disclosure."); *Soucie v. David,* 448 F.2d 1067, 1080 (D.C. Cir. 1971) ("The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly."). The Executive Branch likewise recognizes the importance of FOIA:

> A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

Memorandum from President Obama for the Heads of Executive Departments and Agencies (January 21, 2009).

FOIA's plain language requires that an agency of the federal government disclose documents and information to any person except where the document falls under a specifically enumerated exemption. *See* 5 U.S.C. § 552 (a)(3)(A) ("each agency, upon any request for records…shall make the records promptly available to any person.); *see also* § 552 (b) (identifying exemptions).

As relevant here, Exemption 4 states that FOIA "does not apply to matters that are: … trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The language of Exemption 5, which was invoked by BLM, but which was found inapplicable by the Department and Defendants, provides that FOIA "does not apply to matters that 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).

The defendant agencies have further issued their own guidance regarding the release of agency records through FOIA. For example, the Department provides: "[i]t is our policy to make records of the Department available to the public consistent with the spirit of the FOIA and the

Privacy Act." 43 C.F.R. § 2.2. BLM policy states: "It is the policy of the BLM to make records available to the public to the greatest extent possible in keeping with the spirit of the Freedom of Information Act (FOIA),"[1] and further provides: "The intent of FOIA is based on openness to citizens and the informed consent of the governed."[2]

FOIA grants district courts jurisdiction to enjoin an agency from withholding agency records and to order the production of any agency records improperly withheld. 5 U.S.C. § 552(a)(4)(B); *Long v. U.S. I.R.S.*, 693 F.2d 907, 909 (9th Cir. 1982). The burden is on the agency to justify the withholding of documents. 5 U.S.C. § 552(a)(4)(B); *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 (7th Cir. 1998).

II. Administrative Procedure Act.

The basic policy of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et. seq.*, is to facilitate court review of administrative action. To this end, the reviewing court shall: "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Moreover, the reviewing court shall: "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law." *Id.* at § 706(2)(A).

UNDISPUTED STATEMENT OF FACTS:

On December 7, 2011, the BLM UFO announced its intent to offer 22 parcels and

[1] Bureau of Land Management, *FOIA Home*, available at: http://www.blm.gov/wo/st/en/res/FOIA.html.

[2] Bureau of Land Management, *FOIA Frequently Asked Questions,* available at: http://www.blm.gov/wo/st/en/res/FOIA/questions_answers.html.

approximately 30,000 acres of Federal mineral estate located in Delta and Gunnison Counties, Colorado, at the August 9, 2012 competitive oil and gas lease sale. *See* Plaintiff's Exhibit 1. These parcels are almost entirely located on BLM managed lands and have direct proximity to the communities of Paonia, Crawford, Hotchkiss, and Somerset, Colorado, as well as the Paonia Reservoir State Park. *Docket No. 12,* at § 4, ¶ a.

On December 18, 2011, CHC submitted a FOIA request to BLM seeking the following information:

> The Expressions of Interest submitted for the parcels located in the Uncompahgre Field Office included in the August 2012 Oil and Gas Lease Sale, including information identifying the persons or entities who submitted the Expressions of Interest; and
>
> All documents related to the Expressions of Interest listed above.

Docket No. 12, at § 4, ¶ b; *see also* Plaintiff's Exhibit 3.

On December 23, 2011, BLM responded to CHC's FOIA request, signed by Ms. Hankins, and released the requested EOIs that precipitated the August 2012 lease sale, but redacted (blacked-out) information identifying the persons or entities who submitted the EOIs, citing Exemptions 4 and 5 of FOIA to withhold this information. 5 U.S.C. §§ 552 (b)(4) and (b)(5). *Docket No. 12,* at § 4, ¶ c; *see also* Plaintiff's Exhibit 4.

Federal Defendants admit to following agency policy set forth in Instruction Memorandum No. 95-164 ("IM 95-164"), dated August 14, 1995. *Docket No. 9,* at ¶ 34. IM 95-164 establishes the agency policy: "All BLM offices hold as confidential the names of all parties that file an informal EOI, even though those parties may not have requested confidential treatment, until two business days following the last day of the competitive lease sale." *Docket*

No. 12, at § 4, ¶ e; *see also* Plaintiff's Exhibit 5.

IM 95-164 further states that the following language be included in a letter of denial to those seeking this information:

> This denial is pursuant to Exemption 4 of FOIA (5 U.S.C. 552(b)(4) (1988) and 43 CFR 2.13(c)(4), which permits an agency to withhold 'commercial or financial information obtained from a person and privileged or confidential.' See e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), and Critical Mass Energy Project v. NRC, 942 F.2d 799 (D.C. Cir. 1991). In addition, the denial is pursuant to Exemption 5 of FOIA (5 U.S.C. 552(b)(5) (1988), which permits an agency to withhold commercial information, the release of which could harm the commercial interest of the U.S. Government by premature disclosure. See e.g., Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979). However, we will make the information available to you two working days after the competitive sale.

Docket No. 12, at § 4, ¶ f. The preceding language in IM 95-164 was cited in BLM's FOIA response to CHC. *Docket No. 12,* at § 4, ¶ g.

On January 26, 2012, CHC filed an administrative FOIA appeal with the Department regarding BLM's insufficient FOIA response, received by the Department on January 27, 2012, and assigned Appeal Number 2012-050. *Docket No. 12,* at § 4, ¶ h; *see also* Plaintiff's Exhibit 6.

In a letter, dated February 1, 2012, Department FOIA Appeals Officer informed CHC that its appeal had been received, and further recognized that "FOIA requires an agency to make a determination on an appeal within 20 workdays after the receipt of such appeal." *Docket No. 12,* at § 4, ¶ i; *see also* Plaintiff's Exhibit 7 (citing 5 U.S.C. § 552(a)(6)(A)(ii)).

On or about March 5, 2012, Plaintiff's counsel called the Department's FOIA Appeals Officer to inquire about the progress of CHC's FOIA appeal. In a letter memorializing this conversation, dated March 5, 2012, the FOIA Appeals Officer provided: "the Department

concludes that there is not sufficient information on the record for it to make a determination on whether the invoked exemptions apply to the withheld information," and later continued, "The Department has requested that each of the three submitters whose information the BLM has withheld provide their views on disclosure," with response letters from the submitters due to the Department no later than March 19, 2012. *Docket No. 12,* at § 4, ¶ j; *see also* Plaintiff's Exhibit 8; *Docket No. 13-1,* Exhibit A.

On April 30, 2012, the Department's FOIA Appeals Officer issued a decision on CHC's administrative appeal, granting the appeal in part and denying it in part. *Docket No. 12,* at § 4, ¶ k; *see also Docket No. 13-1,* Exhibit C. The Department's denial of CHC's administrative appeal provides Plaintiff standing to bring this action. *See* 5 U.S.C. §552(a)(3)(A), (4)(B).[3]

CHC's appeal was granted in part in that one of the entities submitting an EOI for the lease sale in question advised the Department that it did not object to disclosure and, therefore, the Department released an un-redacted copy of the EOI respective to this entity. *Docket No. 12,* at § 4, ¶ l. The Department also granted CHC's appeal with regard to Plaintiff's challenge concerning BLM's decision to invoke FOIA Exemption 5 as a basis to withhold the names and other identifying information of all of the entities, and agreed that this exemption does not apply. *Docket No. 12,* at § 4, ¶ m. Defendants concur with the administrative determination that

[3] In order to establish standing under Article III of the Constitution, plaintiffs must show: (1) that they suffer an "injury in fact"; (2) that plaintiffs' injuries can be "fairly traced" to the challenged conduct; and (3) that the injuries can be redressed by a favorable decision. *Allen v. Wright*, 468 U.S. 737 (1984). Here, CHC sought records pursuant to FOIA, but were denied those records by Defendants' non-disclosure. *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 449 (1989). A favorable decision would redress this injury. *See also* Declaration of Kyle Tisdel (providing that CHC's Administrative Appeal was denied in part).

Exemption 5 is inapplicable, and have not advanced an argument with respect to this exemption in their Motion. *Docket No. 13,* at 6.

CHC's appeal was denied in part in that the Department claimed that BLM properly invoked FOIA Exemption 4 to withhold the names and other identifying information for the other two entities that submitted EOIs. *Docket No. 12,* at § 4, ¶ n.

With specific regard to Exemption 4, the Department recognized that the withheld information is not a "'trade secret' within the meaning of exemption (4) and the BLM has not invoked this aspect of exemption (4) as a basis to withhold the information." Defendants have accepted the Department's determination regarding the inapplicability of the trade secret portion of Exemption 4. *Docket No. 12,* at § 4, ¶ o.

Rather, the Department concluded, and Defendants agree: "the withheld information falls under the second category of information protected by exemption (4), i.e., 'commercial or financial information obtained from a person [that is] privileged or confidential.'" *Docket No. 12,* at § 4, ¶ p; *Docket No. 13*, at 5.

According to the Department, BLM's Colorado State Office instructs the submitters of EOIs to ensure that they include "[y]our name or company name with the mailing address and telephone number."[4] The Department deemed this instruction to mean that the submission of this information was "required," as interpreted by relevant case law. *Docket No. 12,* at § 4, ¶ q.[5]

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[4] Citing BLM Colorado State Office's website, available at: http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/expressions_of_interest.html

[5] Citing *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 28 (D.D.C. 2000); *Lepelletier v. FDIC,* 977 F.Supp. 456, 460 n.3 (D.D.C. 1997) ("Information is considered

Defendants agree with the Department's conclusion. *Docket No. 13*, at 5.

Accordingly, the Department determined that "the analysis turns to whether disclosure of this information will have either of the following effects: (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom it was obtained." *Docket No. 12,* at § 4, ¶r. The Defendants have also adopted this analysis. *Docket No. 13*, at 5.

The Department concluded that disclosure "will not impair the government's ability to obtain this required information," but determined that disclosure is "likely to cause substantial competitive harm." *Docket No. 12,* at § 4, ¶ s. Again, the Defendants have accepted the Department's reasoning. *Docket No. 13*, at 5.

On May 2, 2012, BLM UFO issued a press release announcing the deferral of all 22 parcels considered in the August 2012 lease sale in the North Fork Valley, opting to conduct additional analysis of the proposed lease parcels based on public input. *Docket No. 12,* at § 4, ¶t; *see also* Plaintiff's Exhibit 9.

This deferral did not permanently remove these 22 parcels from consideration. *Docket No. 12,* at § 4, ¶ u.

On November 16, 2012, BLM UFO issued a press release announcing that 20 of the 22 parcels deferred from the August 2012 lease sale, totaling 20,555 acres, are to be offered in the

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'required' if any legal authority compels its submission, including informal mandates that call for the submission of the information as a condition of doing business with the government."); *Lykes Bros. S.S. v. Pena,* No. 92-2780 slip op. at 8-11 (D.D.C. Sept. 2, 1993) (submission "compelled" both by agency statute and by agency letter sent to submitters); *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 215 F.Supp.2d 200, 205 & n.3 (D.D.C. 2002); *McDonnell Douglass Corp. v. NASA*, 981 F.Supp. 12, 15 (D.D.C. 1997).

February 2013 lease sale. *See* Plaintiff's Exhibit 10. BLM UFO is not providing a public comment period on the modified Environmental Assessment for the lease sale. Plaintiff's protest of the lease sale, pursuant to the Mineral Leasing Act, is due December 17, 2012.

SUMMARY JUDGMENT STANDARD:

Judicial review of withholding under FOIA is *de novo,* with the burden of proof on the defendant agency to show its compliance with FOIA. 5 U.S.C. § 552(a)(4)(B); *see also Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 755 (1989) ("unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary and capricious, the FOIA expressly places the burden on the agency to sustain its action"); *Dep't of Justice v. Tax Analysts,* 492 U.S. 136, 142 n. 3 (1989) ("the burden is on the agency to demonstrate, not the requester to disprove, that the materials sought ... have not been improperly withheld."). This means the Court must develop its own record to determine whether documents are properly being withheld. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In applying this standard, the Court will review the factual record and reasonable inferences in the record in the light most favorable to the party opposing summary judgment. *Gray v. Phillips Petroleum Co.,* 858 F.2d 610, 613 (10th Cir. 1988). Here, the facts are undisputed. *See Docket No. 12*, at § 4.

A party who does not have the burden of proof at trial must show the absence of a genuine fact issue. *Concrete Works, Inc. v. City & County of Denver,* 36 F.3d 1513, 1517 (10th Cir. 1994). By contrast, a movant who bears the burden of proof must submit evidence to

establish every essential element of its claim or affirmative defense. *See In re Ribozyme Pharmaceuticals, Inc. Securities Litigation,* 209 F.Supp.2d 1106, 1111 (D. Colo. 2002). In either case, once the motion has been properly supported, the burden shifts to the non-movant to show, by tendering depositions, affidavits, and other competent evidence, that summary judgment is not proper. *Concrete Works, 36 F.3d at 1518.* All the evidence must be viewed in the light most favorable to the party opposing the motion. *Simms v. Oklahoma ex rel Department of Mental Health and Substance Abuse Service,* 165 F.3d 1321, 1326 (10th Cir. 1999). However, conclusory statements and testimony based merely on conjecture or subjective belief are not competent summary judgment evidence. *Rice v. United States,* 166 F.3d 1088, 1092 (10th Cir. 1999); *Nutting v. RAM Southwest, Inc.*, 106 F.Supp.2d 1121, 1123 (D. Colo. 2000).

ARGUMENT:

I. The Defendants Have Failed To Meet Their Burden Of Proof To Justify Withholding The Requested Documents Under FOIA, And Therefore The Documents Must Be Disclosed.

Defendants have failed to demonstrate that Exemption 4 should apply to allow withholding of the requested information. The burden of proof is always on the agency to demonstrate that it has fully discharged its obligations under FOIA and to prove that a given exemption applies. Thus, if the Defendant fails to make this showing, as a matter of law, a plaintiff could theoretically provide no response and still prevail. *See Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 861 (D.C. Cir. 1980). Because the agency is in the unique position of "[p]ossessing both the burden of proof and all the evidence," the agency must provide the Court and the challenging party "a measure of access without exposing the withheld

information," which would "compromis[e] its original withholdings." *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 146 (D.C. Cir. 2006). Therefore, "[t]o enable the Court to determine whether documents properly were withheld, the agency must provide a detailed description of the information withheld through the submission of a '*Vaughn* Index,' sufficiently detailed affidavits or declarations, or both." *Hussain v. U.S. Dep't of Homeland Sec.,* 674 F.Supp.2d 260, 267 (D.D.C. 2009); *see also Vaughn v. Rosen,* 523 F.2d 1136 (D.C. Cir. 1975).

Here, the Defendants offer shockingly little to justify their withholding, and, as courts have warned, such scant support cannot sustain the Defendants' burden under FOIA. The only justification offered by the Defendants is a *six-sentence* declaration by Department FOIA Appeals Officer, Darrell Strayhorn; correspondence between the Department and EOI submitters; and the Department's Administrative Decision. *Docket No. 13-1,* Exhibit C. These documents contain no detailed justification for withholding the requested information, and, at best, provide only conclusory statements of theoretical harm that could possibly result from disclosure. For example, the Department's Administrative Decision alleged that substantial competitive injury would occur because:

> Disclosure would permit the entities' competitors to enter the oil and gas lease sale with the knowledge of lands the entities are interested in leasing and seek to outbid them on those parcels with the intent to keep them for their own development, re-sell them back to the entities at higher prices, or lock the entities out of certain areas for development all together.

Docket No. 13-1, Exhibit C at 5. Defendants provide nothing to support these proffered justifications, and as such they cannot be adequate to sustain their burden of proof under FOIA. In short, Defendants cannot use an exemption to withhold disclosure of requested documents

where they cannot justify the use of that exemption. Accordingly, no material facts exist to preclude judgment for CHC. Defendants have not met their burden of proof, and disclosure is therefore required.

II. The Names and Other Identifying Information of the Persons or Entities Who Submitted the Expressions of Interest are Not Exempt From Disclosure Under Exemption 4 of FOIA.

Even if Defendants had met their burden of proof, they could not use Exemption 4 to withhold the requested information – the names of the persons or entities that submitted the EOIs – because Exemption 4 does not protect the requested information from disclosure. As identified above, FOIA mandates that an agency disclose records on request, unless they fall within one of nine exemptions. These exemptions are "explicitly made exclusive," and must be "narrowly construed." *Milner v. Department of Navy*, 131 S.Ct. 1259, 1262 (2011) (citing *EPA V. Mink*, 410 U.S. 73, 79 (1973); *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

The specific language of Exemption 4 states that FOIA "does not apply to matters that are: … trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). As discussed below, the requested information is neither a trade secret nor commercial or financial information that is privileged or confidential. FOIA's overriding policy of disclosure and government transparency can only be overcome through the unambiguous application of an exemption. Defendants have failed to demonstrate that any exemption is appropriate here, and have unlawfully relied on Exemption 4 to withhold otherwise responsive information from CHC.

A. The "Trade Secret" Element of Exemption 4 is Inapplicable.

The Department recognized in their Administrative Decision that several elements of Exemption 4 are inapplicable in the present context, and thus granted those aspects of CHC's administrative appeal. The reasoning adopted at the administrative level has been fully embraced by the Defendants, here, as set forth in their Motion. *See Docket No. 13.* Specifically, CHC supports the Defendants' conclusion that the withheld information is not a "trade secret" within the meaning of Exemption 4. *Docket No. 13*, at 5; *see also Docket No. 13-1,* Exhibit C.[6]

B. The Names and Other Identifying Information of EOI Submitting Parties are Not "Commercial" Nor "Privileged or Confidential" Within the Meaning of Exemption 4.

Aside from "trade secrets," Exemption 4 applies to "information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." 5 U.S.C. § 552(b)(4); *see also, National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974) (hereinafter *National Parks I*). The information requested here does not fit within this exemption; it is neither commercial nor privileged and confidential.

First, Defendants provide absolutely no support for the proposition that the names of EOI submitters are commercial. *See Docket No 13*, at 7-8. While Defendants allege that disclosure would "clearly reveal … that the submitters have dedicated time and money to exploring relevant

[6] Courts have held that the meaning of "trade secret" should be limited to: "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 effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). As applied here, the name of the persons or entities nominating the subject parcels cannot logically fit the definition of "trade secret."

lands, the submitters are interested in developing the lands, and the submitter have future plans to develop the lands," and that therefore "EOI submitters have a commercial interest in their names," they offer *not one* citation to support this assertion. *Id.* Moreover, and contrary to Defendants' assertions, the only information BLM requires when submitting an EOI is the submitter's name, a legal description of the nominated parcel, and the name and address of the surface estate owners (if not BLM).[7] In other words, literally *anyone* can nominate public lands for inclusion in a BLM lease sale. Defendants' blatantly unsupported assertions cannot sustain the government's burden under FOIA.

Second, the names of the entities submitting Expressions of Interest do not constitute "privileged or confidential" information. Review of the legislative history and legal authority underlying the confidentiality prong of Exemption 4 exposes the baselessness of BLM's use of this exemption to conceal the identity of EOI submitters from the light of public scrutiny.

The court in *National Parks I* stated that before holding information confidential under to Exemption 4, "[a] court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." *National Parks I,* 498 F.2d. at 767.[8] Following its

[7] *See* BLM Colorado, *Expressions of Interest*, available at: http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/expressions_of_interest.html

[8] Both the House and Senate reports speak of information that is *customarily* regarded as confidential. H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), *reprinted in* 1966 U.S.Code Cong. & Ad.News 2418, 2427; S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

However, the court's attempt to analyze FOIA's legislative history was complicated by the fact that the 1966 House Report has been discredited as an aid to interpreting the Act because it was submitted after the Senate had made its report and passed the bill. The House then passed

examination of legislative history, the court in *National Parks I* identified two important purposes served by Exemption 4:

> (1) It "encourag[es] cooperation with the Government by persons having information useful to officials;" and
>
> (2) "It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication."

National Parks I, 489 F.2d at 768. With these purposes in mind, the court concluded that "commercial or financial matter" should have an "expectation of confidentiality" if disclosure is likely to have either of the following effects:

> (1) to impair the Government's ability to obtain necessary information in the future; or
>
> (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Id. at 770. Numerous courts have adopted this two-prong test as a basis for determining whether documents are confidential within the meaning of Exemption 4. *See e.g., Orion Research, Inc. v. EPA,* 615 F.2d 551 (1st Cir. 1980); *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976); *Continental Oil Co. v. FCP*, 519 F.2d 31 (5th Cir. 1975); *Utah v. U.S. Dept. of Interior,* 256 F.3d 967, 969 (10th Cir. 2001).[9]

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the bill without amendment, thereby depriving the Senate of the opportunity to object or concur in the interpretation of the Act written into the House Report. *See Rose,* 425 U.S. at 365-67.

[9] Of note, in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (citied but not discussed by BLM in its FOIA response letter to CHC), the D.C. Circuit modified the *National Parks I* test under certain circumstances, drawing a distinction between information that was submitted voluntarily and submissions that are required. In its Administrative Decision – a position later adopted by the Defendants – the Department concluded that a parties name and identifying information is "required" for consideration of an

Defendants, as they did in the Administrative Decision, have also relied on the *National Park I* test. *Docket No. 13,* at 5, 8; *see also Docket No.13-1,* Exhibit C at 3, 4. As CHC and the Defendants agree, disclosure of the requested information will not impair the Government's ability to obtain necessary information in the future.[10] Therefore, the dispute in this case centers on the second prong of the test: whether disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks I,* 489 F.2d at 770.

Although the Defendants assert that disclosure of the EOI submitters will somehow cause them substantial harm, Defendants' Motion – yet again – provides *no* support or citation to substantiate the government's use of Exemption 4 to maintain the veil of secrecy around BLM's lease sale process. *Docket No. 13,* at 5, 7-9; *see also Docket No.13-1,* Exhibit C at 4-6.

In order to demonstrate the likelihood of substantial competitive harm to the submitter, the agency must show that the submitter: (1) faces actual competition in the relevant market; and (2) that the entities are likely to suffer substantial competitive injury from disclosure. *See Lions Raisons v. USDA,* 354 F.3d 1072, 1079 (9th Cir. 2004) (citing *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994)); *see also Public Citizen Health Research Group,* 704 F.2d at 1291; *Gulf & Western Industries, Inc. v. United States,* 615 F.2d 527, 530

EOI submission. *Docket No. 13,* at 8; *see also Docket No.13-1,* Exhibit C. Accordingly, the bifurcated *Critical Mass* analysis is not relevant to the instant case.

[10] *Docket No. 13,* at 5 (Defendants failed to provide argument regarding the first prong); *see also Docket No.13-1,* Exhibit C at 4 ("disclosure…will not impair the government's ability to obtain this required information in the future.").

(D.C. Cir. 1979). While the courts have broadly adopted this test in order to determine whether a submitter is likely to suffer substantial competitive harm, Defendants have not even mentioned this test in their Motion, let alone specifically addressed these factors.[11] The government cannot meet its burden of proof under FOIA if it fails to address what courts have recognized as threshold factors for determining the substantiality of harm.

As provided above, the courts have made clear the agency's burden to demonstrate with specific and direct evidence the likely consequences of disclosure. *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999); *see also, Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Courts have generally required agencies to submit detailed affidavits identifying the documents at issue and explaining why they fall under the claimed exemption. *Lewis*, 823 F.2d at 378; *Landfair v. Department of the Army*, 645 F.Supp. 325, 327 (D.C. Cir. 1983). With specific regard to Exemption 4, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *National Parks Conservation Ass'n v. Kleppe,* 547 F.2d 676, 680 (D.C. Cir. 1976) [hereinafter *"National Parks II"*]; *Pacific Architects & Engineers, Inc. v. Renegotiation Board,* 505 F.2d 383, 384-85 (D.C. Cir. 1974); *Public Citizen*, 704 F.2d at 1290-91. Moreover, the agency must demonstrate that the impairment will be "significant;" a "minor impairment" cannot overcome the disclosure mandate of FOIA. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 283 (D.C. Cir. 1987) (*overruled* on other grounds).

[11] While the Defendants fail to mention or apply the substantial competitive harm test, the Department's Administrative Decision recognizes this test as the applicable standard to be applied. *See Docket No. 13-1*, Exhibit C at 4.

The agency's claim of impairment must be supported by a "detailed factual justification [of] the extent to which disclosure…will cause substantial harm to the competitive position of the person from whom the information is obtained, with specific factual or evidentiary material to support the conclusion reached," not generalized or conclusory affidavits or information. *Pacific Architects*, 505 F.2d at 385; *see also Critical Mass*, 830 F.2d at 283.

As the Department acknowledged in its Administrative Decision, "[i]f there is no evidence that establishes that both [the actual competition and substantial competitive injury] elements are met, then exemption 4 does not apply to the disputed information." *Docket No.13-1,* Exhibit C at 4-5 (citing *People for the Ethical Treatment of Animals v. USDA*, 2005 U.S. Dist. LEXIS 10586, at 15-17 (D.D.C. 2005); *National Parks II*, 547 F.2d at 679)). Despite the courts explicit requirement for detailed evidence – as well as recognition of the relevant test in the Administrative Decision – the Defendants' Motion is devoid of any detailed affidavit or factual justification and does not even mention applicable test. Again, in the absence of this information the government cannot meet its burden under FOIA.

The hollowness of the Defendants' argument cannot withstand the government's burden under FOIA. Review of these two factors shows that the Defendants' application of Exemption 4 to withhold the requested information is unsupportable.

1. The Department Has Failed To Show That The Entities Submitting the EOIs Face Actual Competition.

The Defendants have failed to demonstrate that the submitters of the EOIs face actual competition. The Defendants provides only conclusory remarks describing, generally, resources that an EOI submitter may invest in exploration, competition at the lease sale from other parties,

and possible impairment of EOI submitters' ability to negotiate oil and gas leases. *Docket No. 13* at 8, 9. Yet again, Defendants provide no citation to support these general conclusions – which even taken at face value fail to provide this Court the type of detailed information the law requires. *See, e.g., National Parks II,* 547 F.2d at 680 (providing that conclusory and generalized allegations of substantial competitive harm are unacceptable). For example, the Defendants offer only broad assumptions and fail to provide any detailed description of the lease sale process itself. They provide no statistics on bidding process, the percentage of parcels that are sold without any competition, those parcels which are sold for the minimum bid amount, or the percentage of parcels which go un-purchased at the competitive sale and are then sold through a non-competitive process.

The Defendants even have the audacity to speculate that "[k]knowledge that a competitor has submitted an EOI could also open the door for collusion between companies willing to work together to unfairly limit competition and manipulate pricing." *Docket No. 13* at 9. As this Court is keenly aware, collusion between companies has already occurred, and has occurred regardless of whether the public has been made aware of EOI submitters identity – with a pending Department of Justice antitrust action before this Court regarding collusion between SG Interests and Gunnison Energy Corporation – the two primary oil and gas industry operators in the North Fork Valley. *See* Plaintiff's Exhibit 11 (documents regarding *United States v. SG Interests and Gunnison Energy Corporation,* 1:12-cv-000395-RPM).

To suggest, as the Defendants do here, that such speculation and unsubstantiated conclusions will carry the government's burden to withhold the requested information fails to

recognize the clear mandate of FOIA and the right to an informed citizenry. As the Department itself cautioned, "if there is no evidence…then exemption 4 does not apply." *Docket No. 13-1,* Exhibit C at 4-5.

2. The Department Has Failed To Show That The Entities Submitting the EOIs Face Substantial Competitive Injury.

Even if the government had met its burden on the "actual competition" element, the Defendants have also failed to address the second prong of the test: that the entities are likely to suffer substantial competitive injury from disclosure. *See National Parks I,* 489 F.2d at 770; *Lions Raisons,* 354 F.3d at 1079. Without mentioning *any* substantial competitive injury that EOI submitters would suffer from disclosure – let alone providing the type detailed evidence required by the courts – the Defendants cannot meet their burden of proof under FOIA. Nevertheless, applying the undisputed facts of this case plainly establishes that there would be no substantial competitive injury from disclosure of the requested information.

By its own terms, the purpose of Exemption 4 is to ensure that a party submitting information to the government is not disadvantaged through the disclosure of that submission. *See National Parks I,* 489 F.2d at 768 (finding through review of the legislative history that the intent of Exemption 4 is to prevent "competitive *disadvantages* which would result from publication.") (emphasis added). Here, however, the government is perverting its role under Exemption 4. By maintaining a shroud of secrecy around the public lease sale process, the government is not preventing disadvantage but, rather, affirmatively conferring an advantage to the industry nominator. The government is ensuring that the nominator has an inside track to the sale of our public lands; allowing the nominator to operate in secret until it secures a guaranteed

right to develop our public lands by successfully bidding on a parcel – albeit to the competitive disadvantage of any other interested party, and certainly to the disadvantage of the public's interest and engagement in deciding how our public lands are used and developed.[12] The application of Exemption 4 to facilitate such secrecy is adverse to FOIA's central purpose: "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361. The government should not be permitted to prioritize the interests of the oil and gas industry above those of the public and their interest in disclosure and agency transparency.

Moreover, even if the court were to accept the government's position that disclosure would result in some competitive injury to the nominator – which the Defendants have failed to argue, let alone substantiate with any detailed factual justification – the government has still failed to explain or offer any evidence to show why such injury is *substantial*, as is required under the test acknowledged by the Department (though ignored by Defendants). *See Docket No. 13-1,* Exhibit C at 4 (citing *Lions Raisons,* 354 F.3d at 1079); *see also National Parks I,* 489 F.2d at 770.

Determining the degree of impairment "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure." *Washington Post Co. v. U.S. Dept. of Health and Human Services,* 690 F.2d 252, 269 (D.C. Cir. 1982). The court in *Gulf & Western* enunciated a standard for determining

[12] The government is further undermining its ability to receive fair market rate for the sale of our public lands, to the exclusive benefit of private oil and gas industry interests and profits.

whether the disclosure of commercial information in the government's possession would likely cause substantial harm to a firm's competitive position. The court determined that the release of information would result in *substantial* competitive harm if it "would allow competitors to estimate, and undercut, [the firm's] bids." *Gulf & Western*, 615 F.2d at 530. This test does not easily translate to the instant case – as here, the party with the highest bid, regardless of any other entity's interest, will be able to successfully purchase a lease parcel – which itself points to the irrationality of the government's application of Exemption 4 to these facts.

As a result, the Defendants can only offer generalized claims of hypothetical harm, such as: "increas[ing] the cost of the parcel for the EOI submitter" or "impairing submitters' abilities to negotiate oil and gas leases." *Docket No. 13* at 9. Again, such general and conclusory claims of harm cannot sustain the government's burden to withhold information. *See National Parks II,* 547 F.2d at 680. By contrast, in *Gulf & Western*, the information the court found to be confidential included the firm's profit rate, actual loss data, general and administrative expense rates, projected scrap rates, and learning curve data. *Gulf & Western*, 615 F.2d at 529. On the other hand, courts have routinely required disclosure where specific competitive disadvantage is not found. *See, e.g., GC Micro Corp.,* 33 F.3d at 1115 (holding that the data at issue "would provide little if any help to competitors attempting to estimate and undercut the contractors' bids."); *Acumenics Research & Technology v. United States Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988) (finding no evidence that direct costs and production rates are standardized throughout industry, thus no likelihood of substantial competitive harm from disclosure of unit price information).

Where, as here, the disclosure of the party's identity would do nothing to prevent that entity from successfully purchasing a lease parcel, it would be improper to extend the protections of Exemption 4; particularly where such withholding is at the expense of the public's interest in disclosure. By maintaining a veil of secrecy around this process, the government is preventing the public from engaging in agency decision making on a fully informed basis – at the only point where public engagement can influence decisions regarding the use of our public lands – before the lease sale takes place. It would be an illogical and unlawful application of FOIA's Exemption 4 to shield the industry nominators from the light of pubic scrutiny. *See NLRB*, 437 U.S. at 242 (holding that the purpose of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). Again, the government should not be permitted to abrogate the intent of Exemption 4 in order to prioritize the interests of the oil and gas industry above those of the public and their interest in disclosure and agency transparency. The information CHC requested under FOIA must be immediately disclosed.

C. The Public Interest Would be Served by the Release of Withheld Information.

In their Motion, Defendants assert: "Plaintiff must establish with reasonable specificity, the public interest that would be served by release." *Docket No. 13* at 7, 9 (citing *Hale v. United States Dep't of Justice,* 973 F.2d 894, 900 (10th Cir. 1992), *cert. granted, judgment vacated,* 509 U.S. 918 (1993), *and overruled in later appeal,* 2 F.3d 1055 (10th Cir. 1993) (for purposes of a collateral attack on a death sentence, *Hale* sought to obtain documents under FOIA)). What Defendants fail to point out, however, is that *Hale* involved claims related to FOIA Exemption 7

– which involves the "unwarranted invasion of personal privacy" – and in *Hale's* case, specifically involved information compiled for law enforcement purposes. Regardless of the fact that the proposition upon which Defendants rely has been vacated and subsequently overruled, there is no requirement under FOIA Exemption 4 that CHC demonstrate a public interest in the disclosure. To the contrary, under Exemption 4, the agency has the sole burden to demonstrate with specific and direct evidence the likely consequences of disclosure. *Niagara*, 169 F.3d at 19; *see also Anderson v. Dep't of Health and Human Services,* 907 F.2d 936, 947 (10th Cir. 1990); *Information Network For Responsible Mining (Inform) v. Dep't of Energy,* 2008 WL 762248, 6 (D. Colo. 2008).

Nevertheless, there is a substantial public interest in the release of this information. As provided above, release of this information will allow CHC and the public to participate in the sale of public lands for oil and gas development on a fully informed basis. Moreover, the environmental enforcement and compliance history of an EOI submitter may be directly relevant to the public's participation in BLM's National Environmental Policy Act ("NEPA") analysis pertaining to oil and gas lease sales. For example, the Colorado Oil and Gas Conservation Commission ("COGCC") has a long history of violations and spill reports for the two most prominent oil and gas industry players in the North Fork Valley, SG Interests and Gunnison Energy Corporation. *See* Plaintiff's Exhibit 12. In addition, a recent report on the COGCC reveals a failure to adequately enforce existing drilling rules. *See* Plaintiff's Exhibit 13. This is but one example of how disclosure of an EOI submitter's identity could directly benefit the

public and their interest in participating in BLM's NEPA process through a broader understanding of the possible consequences of oil and gas leasing and development.

D. BLM's Policy and Practice of Withholding the Names and Identifying Information of Parties or Entities Submitting EOIs Until After a Lease Sale Occurs is Unlawful and Unsupported by Exemption 4.

Whereas CHC's abovementioned argument regarding the inapplicability of Exemption 4 to withhold the requested information is applied to the circumstances of BLM's lease sale in the North Fork Valley, the same reasoning can and should be applied in examining BLM's policy and practice of withholding EOI submitters identifying information. As provided above, IM 95-164 directs all BLM offices to deny any FOIA request seeking the name of a party that has filed an EOI until after the lease sale takes place. *See* Plaintiff's Exhibit 5, at 2. Additionally, IM 95-164 directs all BLM office's to use specific language (quoted above) in a letter of denial to a requestor, citing FOIA Exemptions 4 and 5 to withhold this information. *Id.*

As the Department provided in its Administrative Decision, and as Defendants have expressly agreed, Exemption 5 is inapplicable in withholding this information. *See Docket No. 12,* § 4, ¶ 5; *Docket No. 13*, at 6.

Moreover, and as CHC's argument above provides, Exemption 4 is also inapplicable in withholding this information from a requestor. First, the Defendants have failed to meet their burden of proof to sustain their use of Exemption 4 to deny the public this information. Second, there would be no substantial harm to the competitive position of the EOI submitter if this information were released. And, finally, to apply Exemption 4 to the circumstances of this case would distort Congressional intent.

Accordingly, BLM's policy and practice – as expressed in IM 95-164 – cannot be maintained. The public has a right under FOIA to the prompt release of EOI submitters identifying information, and, therefore, CHC requests that this Court declare BLM's policy unlawful and void.

III. Administrative Procedure Act

The Administrative Procedure Act ("APA"), 5 U.S.C. § 706 *et. seq.* provides FOIA litigants with an alternative basis for jurisdiction. The fundamental goal of the APA is to facilitate court review of administrative action. APA claims can be particularly useful when, as here, a party is challenging the extent to which an agency follows internal rules and policies regarding FOIA. *See Snyder v. CIA,* 230 F.Supp.2d 17, 24-25 (D.D.C. 2002). Here, Defendants have apparently acquiesced to this Court's jurisdiction pursuant to FOIA. *Docket No. 13,* at 9-10. Accordingly, CHC will not advance an argument regarding our APA claims at this time. However, CHC reserve the right, should Defendants decide to challenge this Court's jurisdiction under FOIA, to assert that this Court can maintain jurisdiction in this case pursuant to the APA.

CONCLUSION:

For these reasons, Citizens for a Healthy Community's motion for summary judgment should be granted.

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RESPECTFULLY SUBMITTED this 29th day of November, 2012.

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