



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

FOIA Appeal No. 2014-062¹

MAR 21 2014

Kyle Tisdel
Western Environmental Law Center
208 Paseo del Pueblo Sur, Unit 602
Taos, NM 87571

Dear Mr. Tisdel:

This responds to the February 12, 2014, Freedom of Information Act ("FOIA") appeal ("appeal") that you filed with the Department of the Interior ("Department") on behalf of Citizens for a Healthy Community ("CHC"), which the Department assigned as **Appeal Number 2014-062**. The appeal concerns the CHC's October 18, 2013, FOIA request to the Bureau of Land Management ("BLM") seeking 10 categories of records generally related to "the Somerset Unit (COC-073015X) Agreement in Colorado." Specifically, the CHC filed the appeal to challenge the BLM's decision to withhold, pursuant to FOIA exemption (5),¹ information on six maps submitted by Petrox Resources, Inc. ("Petrox") that are labeled as "Petrox Proposed Somerset Pipeline." The CHC also challenges the BLM's decision to withhold, pursuant to FOIA exemptions (4)² and (9),³ information on another Petrox-submitted map that has no label.

As an initial matter, please note that in connection with processing the appeal, the BLM advised the Department that it inadvertently cited to exemption (5) as a basis for withholding six of the maps. The BLM advised that, regrettably, its redaction software defaulted to mark the deleted information from those six maps under exemption (5). Further, its review of the incorrectly marked materials while preparing the FOIA response letter to the CHC caused it to also mistakenly cite to exemption (5) in its letter to the CHC. BLM advised that it intended to withhold all of the information on those six maps under exemption (4).

After fully reviewing the issues presented in the appeal, the information the BLM withheld under exemptions (4) and (9), and current case law, the Department concludes that the information is not protected from disclosure by any FOIA exemption and the Department intends to release the information to you. Therefore, your appeal is **GRANTED**. The rationale for the Department's decision follows.

¹ FOIA exemption (5) protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party...in litigation with the agency." *5 U.S.C. § 552(b)(5)*.

² FOIA exemption (4) allows an agency to withhold from public disclosure two categories of documents: (1) "trade secrets" and (2) "commercial or financial information obtained from a person [that is] privileged or confidential." *See 5 U.S.C. § 552(b)(4)*.

³ Exemption (9) of the FOIA protects "geological and geophysical information and data, including maps, concerning wells." *5 U.S.C. § 552(b)(9)*.

FOIA EXEMPTION 4

With regard to the applicability of exemption (4), please be aware that in response to the CHC's FOIA request, the BLM wrote to Petrox on November 15, 2013, to obtain its views on the disclosure of the responsive Petrox-submitted documents (including the seven maps at issue in the appeal), as it was required by the Department's FOIA regulations to do.⁴ Petrox responded to the BLM on November 26, 2013, objecting to the release of "[a]ll [Applications for Permit to Drill ("APD")] and Geological information," asserting that such information is "privileged and confidential." In evaluating whether exemption (4) applies to the seven maps at issue in the appeal, the Department considered Petrox's objections to disclosure and it determined that none were sufficient to establish that the exemption applies in this case.

The Department concludes that while all seven maps meet the exemption (4) threshold requirements of being "commercial...information obtained from a person," the withheld information is not "confidential" and, therefore, does not qualify for protection under the exemption. Please note that information that a submitter is required to provide to the government, like the maps here, is "confidential" under exemption (4) "if disclosure...is likely to 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..."⁵

For the first factor, the Department concludes that disclosure of the maps at issue here will not impair the government's ability to obtain this required information in the future. Disclosure of the maps will not result in a diminution of the "reliability" or "quality" of the data that the BLM receives in the future, which is what must be shown to demonstrate an "impairment" when information is "required" to be submitted.⁶

With regard to the second factor, in order to demonstrate that disclosure is likely to cause substantial competitive harm, the courts have ruled that there must be evidence that: 1) the submitter of the information faces actual competition in the relevant market; and 2) the submitter is likely to suffer substantial competitive injury from disclosure.⁷ If there is no evidence that establishes that both of these elements are met, then exemption (4) does not apply to the disputed information.⁸

⁴ 43 C.F.R. § 2.27.

⁵ *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Bartholdi Cable Co., Inc. v. Federal Communications Commission*, 114 F.3d 274, 281 (D.C. Cir. 1997).

⁶ See *Public Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 415 (D.D.C. 1997).

⁷ See *Lions Raisons v. USDA*, 354 F.3d 1072, 1079 (9th Cir. 2004); *Inner City Press/Community on the Move v. Federal Reserve System*, 380 F. Supp. 2d 211, 220 (S.D.N.Y. 2005); *People for the Ethical Treatment of Animals v. USDA*, 2005 U.S. Dist. LEXIS 10586, at *15 – 17 (D.D.C. May 24, 2005) ("PETA"); *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976) ("National Parks II").

⁸ See PETA, *supra*; *National Parks II*.

In this case, there is no information on the record before the Department that establishes that both elements of the substantial competitive harm standard are met (i.e., that Petrox faces actual competition and disclosure is likely to cause it substantial competitive harm). As a result, the Department concludes that the BLM had no basis to invoke exemption (4) to withhold any of the information from the seven maps at issue in the appeal. Accordingly, the aspect of your appeal challenging the BLM's invocation of exemption (4) is **GRANTED**.

As for the BLM's use of exemption (9) to withhold information on the unlabeled seventh map, the Department concludes that it too does not apply. The map does not reflect the type of technical or scientific information or data concerning wells that exemption (9) was designed to protect. Therefore, the BLM also should not have invoked this exemption.

Since no other FOIA exemptions protect the information on the maps at issue in appeal, **the Department intends to release them in full to the CHC**. However, the Department cannot release the information in the maps to the CHC at this time, as it must afford Petrox with the opportunity to obtain judicial relief to prevent it from disclosing the information over the company's objections.⁹

The Department notified Petrox on March 21, 2014, of its intent to release the information on the seven maps to the CHC on April 8, 2014, unless the company seeks judicial relief prior to that date to prevent disclosure. Should Petrox not seek judicial relief prior to April 8, 2014, the Department will promptly release the information on the seven maps to the CHC.

This completes the Department's response to your appeal. If you have any questions regarding this matter, please call me at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Ryan Witt, FOIA Officer, BLM
Debbie Suchr, FOIA Coordinator, BLM-CO
Timothy Murphy, Assistant Solicitor, SOL-DGL
Arthur Kelvin, Attorney-Advisor, SOL-Rocky Mountain Region
Cindy Cafaro, Departmental FOIA Officer

⁹ See 43 C.F.R. § 2.33.