WESTERN ENERGY ALLIANCE

November 5, 2014

***Via electronic mail***

Neil Kornze
Director
Bureau of Land Management
1849 C Street, N.W., Rm. 5665
Washington DC 20240

Re: Request to Withdraw Instruction Memorandum No. 2014-004 – Oil and Gas Informal Expressions of Interest

Dear Mr. Kornze:

Western Energy Alliance (the Alliance) writes to urge you to repeal BLM Instruction Memorandum No. 2014-004 ("the 2014 IM"),[1] which reversed longstanding agency policy requiring BLM to maintain the confidentiality of entities submitting expressions of interest (EOIs) in leasing particular parcels for oil and gas development until after the lease sale occurs.

The 2014 IM is unlawful because it mandates that BLM publish on a website sensitive commercial and business information about entities that express interest in leasing particular parcels for oil and gas development in violation of Exemption 4 to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), and the federal Trade Secrets Act, 18 U.S.C. § 1905. Despite the Alliance's expressed interest in the EOI policy, BLM adopted the 2014 IM in private without any public process in violation of the Administrative Procedure Act, 5 U.S.C. § 553. The 2014 IM is bad policy because it encourages participants in the federal oil and gas leasing program to shield their identities from BLM when they express interest in leasing particular parcels for oil and gas development. And the 2014 IM was adopted in response to an erroneous judicial decision, in a case the Alliance was denied the opportunity to participate in, that is at odds with a subsequent decision of the same court issued after the BLM adopted the 2014 IM.

EOIs are nominations by private parties that request that BLM include certain lands in oil and gas competitive lease sales. EOIs are beneficial to the public and BLM because they help ensure that BLM efficiently makes available for lease those lands that industry actually has interest in leasing, and does not waste time making available lands in which there is little or no interest. The fact that a particular oil and natural gas company submits an EOI broadcasts that the company is interested in exploring and developing particular parcels included in the EOI. That private interest in particular parcels is sensitive

[1] The 2014 IM is enclosed as Attachment 2.

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commercial and business information. If a competitor can determine the identity of an EOI submitter, the competitor can gain valuable non-public information and may use that information in improper and harmful ways.

Since 1995, submitters of EOIs relied on BLM policy that required BLM to maintain the confidentiality of an EOI submitter's identity until two days after the lease sale. See BLM Instruction Memoranda Numbers 95-164 (1995) and 2013-026 (2013).[2] The 2013 IM balanced the privacy interests of participants in the EOI process with the public interest in disclosure by maintaining confidentiality only until shortly after the lease sale.

The 2014 IM reverses this longstanding policy. Under the new policy, a company that submits an EOI may do so anonymously. But if the submitting company chooses to disclose its identity, the agency will publish that information on a public website. While the new policy may initially appear to offer participants in the leasing program with options, the 2014 IM presents a choice between two unworkable options: either (1) disclose your identity to BLM when submitting an EOI, after which BLM will publish your identity publicly on a website; or (2) submit the EOI in secrecy without disclosing your identity and impede your ability to discuss, clarify, or follow up on it with BLM.[3]

The 2014 IM is bad policy because it encourages oil and natural gas companies to operate in secret when dealing with BLM, and discourages open communication between the regulator and regulated community. The 2014 IM is unlawful because the mandatory publication of an EOI submitter's identity violates FOIA, 5 U.S.C. § 552(b)(4), and the federal Trade Secrets Act, 18 U.S.C. § 1905. The 2014 IM violates participant's legal rights in the confidentiality of their interest in leasing particular parcels, and is a substantive rule adopted without following appropriate Administrative Procedure Act notice and comment rulemaking requirements under 5 U.S.C. § 553.

The Alliance is always interested in working collaboratively with BLM on matters of public lands policy, but also believes it is critical that BLM comply with its procedural and substantive legal obligations when it adopts Instruction Memoranda. For example, in 2010 the BLM adopted an Instruction Memorandum limiting the application of congressionally-mandated categorical exclusions from NEPA review for certain oil and gas activities. The Alliance was forced to file suit because the Instruction Memorandum violated Section 390 of the Energy Policy Act of 2005, and was adopted without following the public involvement requirements of 5 U.S.C. § 553. The United States District Court for the District of Wyoming vacated the Instruction Memorandum and enjoined its application nationwide because of these legal infirmities.[4] Like the 2010 Instruction Memorandum at issue in that case, the 2014 IM both violates federal law (FOIA and the Trade Secrets Act) and was adopted without following proper procedures (5 U.S.C. § 553).

[2] The 2013 IM is enclosed as Attachment 1.
[3] Attachment 2.
[4] Western Energy Alliance v. Salazar, 2011 U.S. Dist. LEXIS 98378 (D. Wyo. 2011).

The Alliance urges you to repeal the 2014 IM and revert to prior EOI policy expressed in the 2013 IM.

**INTEREST OF THE ALLIANCE – THE CONFIDENTIAL TREATMENT OF EOI SUBMITTERS' IDENTITY IS CRITICAL**

Western Energy Alliance, based in Denver, Colorado, is a non-profit trade association representing over 480 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members own and develop federal oil and gas leases throughout the country. The Alliance advocates for rational, efficient, and effective leasing and permitting processes for oil and gas development in the West, including on federal lands and federal minerals.

Alliance members routinely submit EOIs that request BLM to lease particular parcels of federal land and federal minerals, and participate in federal oil and gas lease sales throughout the country. An EOI expresses to BLM that a particular company believes a particular tract of federal land or minerals should be leased because it has the potential to produce oil or natural gas. Alliance members keep confidential their interest in leasing particular parcels when they submit EOIs to BLM. They view their interest in leasing a particular tract as confidential commercial or business information that they do not disclose to the public or to competitors. Alliance members devote considerable time and resources to identifying particular tracts for leasing, and therefore confidentiality of their interest in leasing particular parcels is critical to them.

Oil and natural gas exploration and development is extremely competitive. Submission of an EOI often follows years of work by the nominating party to assess the geology and commercial hydrocarbon potential of a particular parcel. This work can involve seismic testing of surrounding lands; geologic analysis of existing and acquired data; analysis of well control data; review of property records; analysis of surface use constraints, environmental issues, and stipulations contained in the applicable Resource Management Plan; and review of the availability of neighboring lands (federal, state, and private) for development.

Prior to 2014, submitters of EOIs appropriately relied on longstanding BLM policy that the identity of submitters of EOIs and their interest in particular parcels is kept confidential under Exemption 4 to FOIA until two days after the lease sale has occurred. These policies appropriately ensured that the submitter is not penalized for expending capital to evaluate and analyze the potential of federal lands for commercial hydrocarbon development, and complied with Exemption 4 to FOIA and the Trade Secrets Act by maintaining confidentiality of the submitter's identity during the period prior to the lease sale when confidentiality is critical.

The confidentiality of a submitter's interest in a particular parcel is vital. The submitter of an EOI is given no preference at the competitive lease sale in exchange for his/her work evaluating prospective land. Competitors are free to bid against the submitter at the competitive lease sale. If a competitor is able to learn that the submitter has expressed

interest in leasing particular parcels, that competitor gains valuable non-public information. The competitor may base his/her auction strategy on the EOI submitter's reputation in the industry, the submitter's known geological knowledge and prior exploration work, or the submitter's other lease holdings in the area. A competitor may purchase lease parcels with no interest in developing them in an effort to block or leverage a deal with the EOI submitter who deems the parcel critical to larger development plans. Disclosing the interest of particular EOI submitters in particular parcels prior to competitive auction poses competitive harm to the companies that have invested in developing our nation's mineral resources. That chills future investment in exploration, and only serves to drive a nomination process that was transparent to BLM into secrecy by encouraging submitters to conceal their identity from the agency.

**BLM SHOULD REPEAL THE 2014 IM**

**I. The 2014 IM Violates Exemption 4 to FOIA and the Federal Trade Secrets Act**

FOIA exempts from public disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). There is little dispute that the interest of an EOI submitter in a particular tract constitutes "commercial or financial information." These terms are to be given their ordinary meaning, and records are commercial so long as the EOI submitter has a commercial interest in them. See, e.g., Merit Energy v. U.S. Dep't of Interior, 180 F. Supp. 2d 1184, 1187 (D.D.C. 2001). Submission of an EOI expresses that a particular company is interested in future development of particular lands, revealing both future business goals and past exploration investment. The interest expressed in an EOI contains commercial information.

The identity of EOI submitters is also "confidential" within the meaning of the statute. Information required to be provided to the government is confidential "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." National Parks Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Although a showing of either effect is sufficient, both exist here.

First, disclosure of EOI submitters' identity impairs BLM's ability to obtain information, and impairs the efficiency of the nomination and leasing process. As explained below, the 2014 IM policy of disclosure incentivizes companies to either anonymously submit EOIs or to use lease brokers or other third parties to submit EOIs on their behalf. This "smoke and mirrors" approach benefits nobody, and adds unnecessary uncertainty and bureaucratic hassle to the lease sale process. The information is "confidential" under the first prong of the National Parks test.

Second, disclosure causes substantial harm to the competitive position of EOI submitters. "[I]n determining whether a showing of substantial competitive injury has been made, 'the court need not conduct a sophisticated economic analysis of the likely effects of

disclosure.'" Utah v. U.S. Dep't of Interior, 256 F.3d 967, 970 (10th Cir. 2001) (quoting Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1291 (D.C. Cir. 1983)). "*[A]ctual* economic harm need not be proved; evidence demonstrating the existence of *potential* economic harm is sufficient." Utah, 256 F.3d at 970 (emphasis in original).

Here, evidence of potential economic harm is plainly present. It is not just the *identity* of the submitter of an EOI that is at issue, it is the submitter's *interest* in a particular parcel that, if disclosed, causes economic harm to the submitter. Disclosure of that interest provides competitors valuable information regarding their rivals' future plans and prior investment. Rather than spending years and thousands of dollars developing a prospect, many competitor companies could choose to base leasing decisions on the hard work of others. This harms the entities that spend time and capital to determine which parcels have the best potential for development and are worth the time and effort of BLM to put the parcels up for lease. The information is "confidential" under the second prong of the National Parks test.

The D.C. Circuit has adopted an even more lenient test in assessing the confidentiality of information that is voluntarily submitted to the federal government. In Critical Mass Energy Project v. Nuclear Regulatory Com'n, 975 F.2d 871 (D.C. Cir. 1992) (en banc), the court held that voluntarily submitted information is confidential under Exemption 4 if it is "of a kind that would customarily not be released to the public by the person from whom it was obtained." 975 F.3d at 879. EOI submitters do not customarily release their identities to the public. Yet under the 2014 IM, if a party voluntarily discloses its identity to BLM, the agency will automatically post that information on "the website of the BLM state office where the nominated parcel is located."[5] This bizarrely gives *no* protection to voluntarily submitted information, when the D.C. Circuit has directed that voluntarily submitted information should be given *more* protection than involuntarily submitted information.

Because the identity of an EOI submitter is protected under Exemption 4 to FOIA, BLM may not lawfully disclose that information to the public. While an agency generally has discretion to disclose information covered by other exemptions to FOIA, the Trade Secrets Act, 18 U.S.C. § 1905, prohibits BLM from disclosing information to the public that is covered by Exemption 4. Canadian Commercial Corp. v. Department of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (holding that the Trade Secrets Act requires the government to withhold information covered by Exemption 4); CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1151 (D.C. Cir. 1987) ("the scope of the [Trade Secrets] Act is at least co-extensive with that of Exemption 4 of FOIA").

BLM does not have discretion to release an EOI submitter's identity, as the 2014 IM mandates. BLM's implementation of the 2014 IM will subject BLM to suit, including under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (directing courts to set aside

[5]Attachment 2.

agency actions that are "not in accordance with law."). The 2014 IM unlawfully violates the Trade Secrets Act and Exemption 4, and BLM and DOI should withdraw the policy.

## II. The Alliance Was Denied the Opportunity to Intervene in The Judicial Decision That Was the Impetus for the 2014 IM, and in a Subsequent Conflicting Decision From the Same Court That is Contrary to the Basis for the 2014 IM.

The 2014 IM states that "recent court orders have caused BLM to review its policy."[6] The 2014 IM was issued in the wake of, and appears to have been driven by, a February 2013 decision by the United States District Court for the District of Colorado (the 2013 Decision).[7] The court held in that case that a particular EOI submitter's identity was not exempt from disclosure under Exemption 4.[8] Rather than applying the law described above, the court based its decision on the court's own erroneous opinion about improper policy considerations. The court stated that it believed disclosure would foster competition and that "[c]ompetition in bidding advances the purpose of getting a fair price for a lease of publicly owned minerals."[9] The 2013 Decision is wrong because it failed to apply the law governing Exemption 4, and instead ruled based on its view of policy considerations.

Because the 2013 Decision is wrong as a matter of both law and policy, the Alliance attempted to intervene to appeal the decision. The court denied the Alliance's motion to intervene. The Alliance urged BLM to appeal, which BLM declined to do. The 2014 IM has been driven by an erroneous judicial decision, and was adopted with no public input after the regulated community was precluded from participating in the lawsuit.

The 2013 Decision was limited to its facts, and has not resolved the issue of confidentiality of EOIs. The 2013 Decision was issued by a single district court in one state, and should not serve as the basis for establishing a nationwide policy.

In 2014, after the BLM adopted the 2014 IM, the United States District Court for the District of Colorado issued a second decision that is directly contrary to the court's prior February 2013 decision.[10] Again, the Alliance was denied the opportunity to intervene in the case to assert the interests of the regulated community. The 2014 Decision held, however, that the identity of an EOI submitter was protected by Exemption 4, in part, because of the harm such disclosure will have on the submitter's "competition for leases on government land."[11] This 2014 decision did not adopt the reasoning from the 2013 decision, and calls into question the rationale for the 2014 IM.

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[6] Attachment 2.
[7] Citizens for a Healthy Community v. U.S. Dep't of the Interior, et al., No. 12-cv-01661-RPM (D. Colo. February 13, 2013). The 2013 Decision is enclosed as Attachment 3.
[8] Id.
[9] Id. at 2.
[10] The 2014 Decision is enclosed as Attachment 4.
[11] Attachment 4 at 11.

These competing decisions illustrate why BLM should revisit the 2014 IM. The 2014 IM was adopted in response to a judicial decision by a single district court that is not binding in subsequent litigation or other jurisdictions and that is wrong as a matter of law. Without overturning the 2013 Decision, the same district court subsequently issued a ruling that is directly contrary to the reasoning of the prior case. The BLM must revisit the 2014 IM in light of these facts.

## III. The 2014 IM is a Substantive Rule That was Adopted Without Following the Procedures Required by the APA.

The APA requires agencies to adhere to three steps when they promulgate rules: (1) give the public notice of the proposed rulemaking in the Federal Register; (2) afford "interested persons an opportunity to participate … through submission of written data, views, or arguments"; and (3) explain the rule ultimately adopted. See 5 U.S.C. § 553(b)-(c). The exception to this statutory command for "legislative" or "substantive" rules is where agencies adopt "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b).

The hallmark of a substantive rule is that it creates new law or establishes additional duties that carry the "force and effect of law." See, e.g., Chrysler v. Brown, 441 U.S. 281, 295 (1979). Substantive rules "affect[] individual rights and obligations." Morton v. Ruiz, 415 U.S. 199, 232 (1974). To be an interpretive rule exempt from the obligations of 5 U.S.C. § 553, the 2014 IM must be "derivable from the statute that it implements by a process fairly described as interpretive; that is, there must be a path that runs from the statute to the rule, rather than merely consistency between statute and rule." Ballesteros v. Ashcroft, 452 F.3d 1153, 1158 (10th Cir. 2006).

The 2014 IM is substantive, not procedural. It runs directly contrary to Exemption 4 to FOIA and the Trade Secrets Act. BLM has pointed to no statutory authority that authorizes the 2014 IM. The 2014 IM affects "individual rights and obligations" and has the "force and effect of law" because it mandates that BLM line officers publish the identity of an EOI submitter on a website if the submitter voluntarily discloses that information to BLM. In response to a challenge by the Alliance, the United States District Court for the District of Wyoming struck down a BLM Instruction Memorandum that similarly did not comply with federal law and that was similarly adopted without following required procedures.[12]

Because the 2014 IM was adopted without any public process, it violates 5 U.S.C. § 553(b) and the DOI and BLM should withdraw it.[13]

[12] Western Energy Alliance v. Salazar, 2011 U.S. Dist. LEXIS 98378 (D. Wyo. 2011) (vacating and enjoining nationwide BLM Instruction Memoranda that violated Section 390 of the Energy Policy Act of 2005 and was issued without notice and comment opportunities).

[13] Because the policy prior to 2014 appropriately implemented Exemption 4 and the Trade Secrets Act, including by allowing the disclosure of an EOI Submitter's identity once the information has lost its commercial value, the prior IMs were true interpretive rules not subject to the requirements of 5

## IV. The 2014 IM is Bad Policy.

The Alliance recognizes that in adopting the 2014 IM, BLM was attempting to walk a middle line that allowed EOI submitters to maintain their confidentiality by submitting EOIs anonymously. But the choice between an anonymous submission and publication on an agency website is bad policy that creates far more problems than it solves. In brief:

1. Given the critical nature of confidentiality, many or most submitters will choose the anonymous option. This hinders open communication between a submitter and BLM. BLM personnel often have questions or clarifications about a particular EOI, but will have no way of following up with the submitter to get these questions answered. This creates additional and unnecessary inefficiencies in BLM's leasing process.

2. In order to ensure the EOI has been accepted and is sufficient for BLM's purposes, an anonymous submitter must repeatedly contact BLM to check in on the status. This will strain finite agency resources as personnel must respond to needless status checks. And the submitter must awkwardly check in anonymously for fear that the disclosure of his/her identity during these follow up communications could find its way into agency notes or communications that are themselves subject to disclosure to the public under the 2014 IM. The risk of inadvertent disclosure is manifest, and will chill open communications.

3. The 2014 IM benefits nobody. The public has no access to the identity of EOI submitters who choose to submit anonymously, when under prior policy they could access this information mere days after a lease sale. The 2014 IM encourages the regulated community to act in secret in its dealings with BLM which hinders free and open communication between the regulated community and the regulator. And BLM is left without a means to easily get questions answered about EOIs it receives.

4. The 2014 IM creates perverse incentives. For example, an EOI submitter may decide he/she wants to be able to communicate openly with BLM but still protect confidential business plans and interest. In this circumstance, a company might nominate numerous parcels – some of which it is interested in and some of which it has little interest in – in order to disguise the true nature of its interest. This reduces the value of the EOI process to BLM, which is meant to signal to BLM what parcels industry is truly interested in pursuing, and creates the potential for additional inefficiencies in the system.

* * *

U.S.C. § 553(b). The Alliance therefore believes the BLM could revert to its prior policy without a rulemaking process.

The Alliance urges BLM to withdraw the 2014 IM, and to reinstate the prior policy expressed in its 2013 IM. The 2014 IM violates federal law, and was adopted without following the requisite public involvement procedures. I would be happy to discuss these concerns with you further.

Sincerely,

Kathleen M. Sgamma
Vice President of Government & Public Affairs

cc: Sally Jewell, Secretary of the Interior
Cecelia T. Greaves, Attorney Advisor, Office of the Solicitor, Department of the Interior
Terri Debin, Assistant Regional Solicitor, Rocky Mountain Region
Michael D. Nedd, Assistant Director, Minerals and Realty Management

# ATTACHMENT 1

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
**National**

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240-0036
http://www.blm.gov
December 11, 2012

In Reply Refer To:
3100/1270 (310) P

EMS TRANSMISSION 12/11/2012
Instruction Memorandum No. 2013-026
Expires: 09/30/2014

To: State Directors

From: Assistant Director, Minerals and Realty Management

Subject: Confidential Handling of Oil and Gas Informal Expressions of Interest

**Program Area**: Oil and Gas Leasing and Freedom of Information Act.

**Purpose:** This Instruction Memorandum (IM) addresses the proper handling of Expressions of Interest.

**Policy/Action:** All BLM offices must take the appropriate steps to safeguard and protect the confidentiality that is implicit within the Expressions of Interest (EOI) process to prevent the improper release of names of all parties that file an EOI. An EOI is an informal nomination to request certain lands be included in a competitive oil and gas lease sale as allowed under 43 CFR 3120.1-1(e).

Upon receipt of an EOI, all offices must:

- clearly mark all EOIs as confidential,
- attach Form 1273-2, Proprietary/Confidential Information to the oil and gas lease sale folder, and
- protect EOIs from release until 2 days following the conclusion of the competitive oil and gas lease sale to maintain the integrity of the EOI process.

If the bureau receives a Freedom of Information Act (FOIA) request for an EOI, the office must review the files to ensure that the BLM protects all confidential information from release as appropriate under exemption 4 of the FOIA. For example, the BLM must withhold the names of any EOI submitter (even if the person filing an EOI has not specifically requested it) under exemption 4 until 2 days following the conclusion of the competitive oil and gas lease sale in which the BLM listed the lands. When withholding materials under exemption 4, the BLM must include the appropriate right to appeal language while citing the reason for the partial denial.

Please provide this IM to all oil and gas lease adjudication personnel, all state and field office FOIA personnel, Information Access Center staff, and other staff that deal with oil and gas lease sale procedures and the handling of informal EOIs. Also, update all websites that contain information regarding EOIs to include this guidance.

**Timeframe:** This policy is effective immediately.

**Budget Impact:** None.

**Background:** The BLM issued onshore oil and gas leasing regulations in June 1988 allowing the public to file informal EOIs for lands they desired the BLM to offer for competitive lease sale. Washington Office (WO) IM-1995â€'164 provided guidance regarding the protection and appropriate release procedures of EOIs. This updated IM continues the policy of denying the release of EOIs until 2 days following the conclusion of the competitive oil and gas lease sale and provides guidance regarding the identification and marking of EOIs as confidential. In addition, WO-IM-1995-164 directed offices to cite exemptions 4 and 5 of the FOIA in the denial decision. This updated guidance identifies exemption 4 as the appropriate exemption for the denial of EOIs.

**Manual/Handbook Sections Affected:** The BLM will incorporate this guidance into Handbook H-3120-1, *Competitive Leases,* during the next revision, currently anticipated for issuance later in Fiscal Year 2013.

**Coordination:** The Division of Fluid Minerals (WO-310) prepared this IM in coordination with field adjudication and FOIA personnel.

**Contact:** If there are any questions concerning this IM, please contact Michael Nedd, Assistant Director, Mineral and Realty Management at 202-208-4201, or your staff may contact Steven Wells, Division Chief (WO-310), at 202-912-7143 or s1wells@blm.gov; Atanda Clark, Senior Mineral Leasing Specialist, at 202-912-7156 or aclark@blm.gov; or Teresa Thompson, Mineral Leasing Specialist, at 801-539-4047 or t3thomps@blm.gov.

Signed by:
Michael Nedd
Assistant Director
Minerals and Realty Management

Authenticated by:
Robert M. Williams
Division of IRM Governance,WO-560

# ATTACHMENT 2

U.S. DEPARTMENT OF THE INTERIOR **BUREAU OF LAND MANAGEMENT**
**National**

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Washington, DC 20240
http://www.blm.gov

October 28, 2013

In Reply Refer To:
3100/1270 (310) P
Supersedes 2013-026

EMS TRANSMISSION 10/30/2013

Instruction Memorandum No. 2014-004
Expires: 09/30/2015

To: State Directors

From: Assistant Director, Minerals and Realty Management

Subject: Oil and Gas Informal Expressions of Interest

**Program Area:** Oil and Gas Leasing and Freedom of Information Act.

**Purpose:** This Washington Office Instruction Memorandum (IM) directs offices to implement changes to the Bureau of Land Management (BLM) policy regarding the handling of Expressions of Interest (EOI) and replaces the guidance as previously directed by WO-IM-2013-026.

**Policy/Action:** In an effort to improve transparency, the BLM will publish information on EOI submissions received after January 1, 2014, on the website of the BLM state office where the nominated parcel is located. In addition, the BLM will advise EOI submitters that the BLM does not require their name and address to be on their submission. EOI submitters may exclude any information they consider privileged or confidential.

- Each state office will modify all instructions to EOI submitters and eliminate the requirement for the inclusion of the submitter's name or address.
- State offices must update state websites, handouts, etc. to reflect this change in policy.
- State offices will incorporate the following statement into future Notices of Competitive Oil and Gas Lease Sale:

*The BLM will publish EOI submissions received on or after January 1, 2014, on the website of the BLM state office where the nominated parcel is located. EOI submitters who consider their name and address confidential should not include that information in their EOI. The BLM no longer requires submitters of EOIs to provide their name or address. Submitters may still provide this information for contact purposes; however, the BLM will make this information available to the public.*

**Timeframe:** This policy is effective October 1, 2013, to provide the BLM sufficient time to notify EOI submitters of this new policy and update websites, public room notices, etc.

**Budget Impact:** Minimal.

**Background:** The BLM currently holds the names and other identifying information of EOI submitters confidential until 2 days after a sale in an effort to protect the public's interest in the outcome of the sale. The BLM denied any requests for release of this information pursuant to exemptions 4 and 5 of the Freedom of Information Act as directed by WO-IM-1995-164. The BLM reissued this guidance under WO-IM-2013-026, December 11, 2012, to use exemption 4 only. However, recent court orders regarding the BLM's handling of EOIs have caused BLM to review its policy. The BLM finds that the name of an EOI submitter is of limited value in the development of a competitive oil and gas lease sale and will no longer require it to be submitted with an EOI. Most often, the BLM uses submitter information to contact submitters to clarify the request. The BLM can resolve this issue by allowing the submitters to provide the EOI anonymously and contact the BLM regarding the status of their requests.

**Manual/Handbook Sections Affected:** The BLM will incorporate this guidance into handbook H-3120-1, *Competitive Leases*, during the next revision.

**Coordination:** The Division of Fluid Minerals coordinated preparation of this IM with state and field offices, BLM Communications, BLM Directives, and the Office of the Solicitor.

**Contacts:** If there are any questions concerning this IM, please contact me at 202-208-4201, or your staff may contact Steven Wells, Division Chief (WO-310), at 202-912-7143 or s1wells@blm.gov; or Atanda Clark, Senior Mineral Leasing Specialist, at 202-912-7156 or aclark@blm.gov.

Signed by:
Michael D. Nedd, Assistant Director
Minerals and Realty Management

Authenticated by:
Catherine Emmett
Division of IRM Governance, WO-560

# ATTACHMENT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 12-cv-01661-RPM

CITIZENS FOR A HEALTHY COMMUNITY,

Plaintiff,

v.

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

Federal Defendants,

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ORDER ON SUMMARY JUDGMENT MOTIONS

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Applying under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., Citizens for a Healthy Community ("CHC"), a non-profit 501(c)(3) organization concerned about the impact of oil and gas development in the Delta County, Colorado region, requested the Bureau of Land Management to provide 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.

After administrative appeals of the denial of that request, the agency's final decision on April 30, 2012, refused the request for the names and addresses of two submitters of Expressions of Interest ("EOI") claiming that the withheld information is protected from disclosure under Exemption 4 of the act, § 552(b)(4), because the EOI contains "commercial or financial information obtained from a person that is privileged or confidential."

Federal oil and gas leases are issued pursuant to competitive bidding at a public sale as the last step of a process that begins with the submission of an EOI and is described in the Declaration of Karen Zurek, attached as Exhibit A.

BLM policy is stated in BLM Instruction No. 95-164, dated August 19, 1995: "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."

The information required for the EOI is limited.

> -Your name or company name with mailing address and telephone number.
> -Complete legal land description broken into parcels of 2560 acres or less.
> -Name and address of any private surface owners.

The justification for applying Exemption 4 is not based on this information alone. The contention is that exploration for oil and gas on public lands is very competitive; that those engaged in that business do preliminary investigative work to consider the possibilities of the acreage they are interested in; that such work is protected information and that when the submitter's interest is known to its competitors, they obtain an unfair advantage and will bid against the submitter.

That contention runs directly contrary to the purpose of the public sale process. Competition in bidding advances the purpose of getting a fair price for a lease of publicly owned minerals. Moreover, the identity of the submitter may be relevant to the plaintiff and others who may raise concerns about the stewardship records of that potential owner, a factor relevant to the environmental impact of the proposed sale.

The information required to be provided by an EOI submitter is not protected by Exemption 4 and the plaintiff's request must be granted.

Upon the understanding that the August 9, 2012 sale has been continued indefinitely, the plaintiff's motion for preliminary injunction is moot and this civil action has now been decided on the merits. The plaintiff's APA claim is denied.

Accordingly, it is

ORDERED, that the plaintiff's motion for summary judgment is granted, the defendants' motion for summary judgment and to dismiss is denied and the clerk shall enter a final judgment ordering the United States Bureau of Land Management to release the information requested within 30 days from the entry of judgment.

DATED: February 13, 2013

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior Judge

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLORADO**

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

CITIZENS FOR A HEALTHY COMMUNITY,

Plaintiffs,

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

Defendants.

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**DECLARATION OF KAREN ZUREK**

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I, Karen Zurek, hereby declare the following:

1. I am the Chief of Adjudications Minerals in the Colorado Field Office of the Bureau of Land Management (BLM) within the Department of the Interior. While I have worked for BLM for thirty-three years in various areas in oil and gas, coal, and mining claims; I have held this position for seven years. As the Chief of Adjudications Minerals, I am responsible for all aspects of oil and gas leasing, both pre- and post-lease sale. It is in my capacity as the Chief of Adjudications Minerals that I have personal and direct knowledge of the oil and gas leasing process within the BLM and, more specifically, within the Colorado Field Office of the BLM.
2. The following summarizes the current oil and gas leasing process for the state of Colorado:
    a. In order for lands to be considered for an oil and gas lease sale, a corporation or an

individual must submit an Expression of Interest (EOI) or the BLM must make a motion to nominate particular lands. Once the leasing office receives an EOI, the EOI is entered into the BLM database and given a number known as an EOI number.

b. The lands suggested for lease sale in a particular EOI are then broken out into parcels of land no larger than 2560 acres. Each parcel is given a parcel ID number.

c. Then BLM checks the status of the land in each parcel to determine if lands are available for leasing. If lands are available for leasing, they are then slated for a specific sale. Oil and gas lease sales are held quarterly and correspond to specific regions within BLM territory.

d. The list of parcels slated to be leased are then sent to the relevant field office eleven months prior to the sale date. The field office is responsible for conducting the National Environmental Policy Act (NEPA) analysis.

e. If a listed parcel is found to be on a privately-owned surface that tops federally-owned minerals, a letter is sent to all private surface owners potentially affected by the lease sale. The letter informs them that the federal minerals below their surface lands have been nominated for leasing. This provides surface owners with notice that a lease sale may occur on their land and gives them two weeks to comment in support of or protest of the possible lease sale.

f. The field office then coordinates with the relevant BLM district office, Colorado Parks and Wildlife and any other surface management agency, in compliance with the Resource Management Plan (found on the Colorado Office's website), to apply initial stipulations to each parcel. Examples of stipulations that can be placed on parcels are those that limit lands to Controlled Surface Use, designed to protect sensitive soils; and Timing

Limitations, designed to protect wildlife in the area of the potential lease sale. Parcels may also be deferred or withdrawn at this time if found to be unsuitable for leasing e.g., for environmental or cultural reasons. Once stipulations are applied BLM, at least two weeks prior to the start of an Environmental Analysis (EA), notifies the general public that specific parcels are being considered for a lease sale. During this two-week period the public is allowed to provide comments and feedback on the potential lease sale. This is known as the two-week Scoping Period.

g. The field office then collects the comments from the Scoping Period and incorporates them into a preliminary EA. Additional stipulations may be added to parcels or parcels may be deferred or withdrawn from the sale completely as a result of the public feedback.

h. Following the analysis of public comment, the preliminary EA and data collected from Google Earth maps, GIS Shapefiles and any other maps generated by the field office are released to the public in what is known as the 30-Day Comment Period. The preliminary EA and an unsigned Finding of No Significant Impact (FONSI) are posted on the field office website and the Colorado State Office website during this period. A press release is also issued notifying the public the BLM is accepting comments in support or protest of the proposed lease sale.

i. At the conclusion of the 30-Day Comment, the BLM field office responsible for the lease sale responds to all comments and incorporates the comments into the final EA. At this time additional stipulations may be added to parcels and additional lands may be deferred or withdrawn from the sale as a result of the comments.

j. When the Colorado State Office receives the final EA, parcels are assigned a serialized case number. A Sale Notice containing all of the parcels (with any stipulations) is then

generated and posted on the Colorado State Office website 90 days prior to the lease sale. The Final EA, signed FONSI, updated Google Earth Maps, GIS Shapefiles and any other maps generated by the field office are also posted on the website at this time. This posting initiates the 30-Day Protest Period during which time the public again has an opportunity to protest the lease sale. To reiterate that the Sale Notice is an opportunity for public input, BLM issues another press release to alert the public that BLM is accepting protests on the lease sale parcels.

k. The Protest Period allows the public to express concerns about leasing on public lands and can encourage a parcel to be deferred or withdrawn from the sale. All properly filed protests are reviewed and given a written response.

l. In order for BLM to take public comments or protests into consideration, the comments or protests must provide a substantial statement of reasons for altering or withdrawing the lease sale. *See* 43 CFR § 3120.1-3. For protest information, the Colorado BLM public website is available at http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/leasing.html. The February 14, 2013, lease sale Notice is available on the same website. A statement that a particular EOI submitter or bidder is not, in the opinion of the commentator/protestor, suitable for a lease, for example, is not considered a sufficient statement of reasons. A statement of reasons filed in support of altering or withdrawing a parcel or all parcels in a lease sale should relate to the parcel(s) of land being considered for sale and should concern an issue such as the air, water, wildlife, or cultural factors that surround the parcel(s).

m. The oil and gas lease sale is open to the public. Parcels are auctioned off to the highest bidder. Leases will be issued after all protests have been responded to and dismissed.

n. In accordance with IM 2013-026 two days following the lease sale, the names and identifying information of the EOI submitters are released to the public.

3. In relation to the case at hand, the lease sale for 22 parcels/30,000 acres of land managed by the Uncompahgre Field Office (UFO), UFO-NEPA #12-09, was originally slated to take place on August 9, 2012.

4. As with other lease sales, public comments were taken during a Scoping Period, a Comment Period, and a Protest Period. Plaintiff participated in each instance. During each instance of public input, the neither the Plaintiff, nor any other submitters, had access to EOI submitters' names or other identifying information. A copy of Plaintiff's Scoping Period comment is attached as Exhibit A.

5. During the public Comment Period, which took place from March 7, 2012 until April 20, 2012, the UFO received 677 comment letters (11 from government agencies, 620 from individuals, and 46 from organizations/associations). This information is found in Chapter 4 of the October 22, 2012, Final UFO EA posted on UFO's website. The comments were both in support of the potential lease sale and against the sale.

6. Plaintiff participated in this public Comment Period and submitted comments in protest of the sale. A copy of Plaintiff's comment is attached as Exhibit B.

7. In order to ensure that BLM had sufficient time to adequately analyze and respond to the significant number of comments, BLM indefinitely deferred the lease sale on May 8, 2012.

8. As a result of the deferral and the opportunity to review and consider public comments, some of the parcels were reconfigured and additional stipulations of approval were applied to other parcels. On November 16, 2012, BLM announced that the lease sale would be rescheduled for February 14, 2013.

9. The Protest Period for the revised lease sale was from November 16, 2012, to December 17, 2012.

10. During the protest period, BLM received 171 protests, including a protest from the Plaintiff on December 14, 2012. Plaintiff's protest is attached as Exhibit C.

11. BLM is now in the process of reviewing public protests to determine whether or not the lease sale will proceed as scheduled on February 14, 2013, or if it will need to be deferred (again), withdrawn, or otherwise modified.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: December 20, 2012

Karen Zurek

Karen Zurek

Chief, Fluid Minerals Adjudication

Bureau of Land Management-Colorado

# ATTACHMENT 4

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge Robert E. Blackburn**

Civil Action No. 13-cv-02466-REB-KMT

SAN JUAN CITIZENS ALLIANCE,

Plaintiff,

v.

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

Defendants.

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**ORDER CONCERNING MOTIONS FOR SUMMARY JUDGMENT**

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**Blackburn, J.**

This matter is before me on the following: (1) the defendants' **Motion for Summary Judgment** [#42][1] filed February 26, 2014; (2) the **Plaintiff's Cross-Motion for Summary Judgment and Response To Defendant' Motion for Summary Judgment** [#45] filed March 24, 2014. The defendants filed a response [#47] to the motion of the plaintiff, and both the plaintiff and the defendants filed replies [#48 & #49] in support of their motions. I grant the motion of the defendants and deny the motion of the plaintiff.

## I. JURISDICTION

I have jurisdiction over this case under 28 U.S.C. XX 1331 (federal question) and 5 U.S.C § 552(a)(4)(B) (Freedom of Information Act).

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[1] "[#42]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

## II. STANDARD OF REVIEW

Summary judgment is proper when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.[2] FED. R. CIV. P. 56(a); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. ***Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 586 (1986); ***Farthing v. City of Shawnee***, 39 F.3d 1131, 1135 (10th Cir. 1994). A fact is "material" if it might reasonably affect the outcome of the case. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986); ***Farthing***, 39 F.3d at 1134.

A party who does not have the burden of proof at trial must show the absence of a genuine issue of fact. ***Concrete Works, Inc. v. City & County of Denver***, 36 F.3d 1513, 1517 (10th Cir. 1994), ***cert. denied***, 115 S.Ct. 1315 (1995). 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 nonmovant to show by tendering depositions, affidavits, and other competent evidence that summary judgment is not proper. ***Concrete Works***, 36 F.3d at 1518. All 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***

[2] The issues raised by and inherent to the motions for summary judgment are fully briefed, obviating the necessity for evidentiary hearing or oral argument. Thus, the motions stand submitted on the papers. *Cf.* **FED. R. CIV. P. 56(a)**. ***Geear v. Boulder Cmty. Hosp.,*** 844 F.2d 764, 766 (10th Cir.1988) (holding that any hearing requirement for summary judgment motions is satisfied by court's review of documents submitted by parties).

***Services***, 165 F.3d 1321, 1326 (10th Cir.), ***cert. denied***, 120 S.Ct. 53 (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.), ***cert. denied***, 120 S.Ct. 334 (1999).

## III. FACTS

The plaintiff, San Juan Citizens Alliance (SJCA), submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to the United States Bureau of Land Management (BLM). The Western Environmental Law Center made the submission on behalf of SJCA. [#45-1][3]. The SJCA sought documents known as expressions of interest (EOI) submitted to the BLM as part of a sale of oil and gas leases announced by the BLM. As part if its response to the FOIA request, the BLM released documents related to an EOI submitted by Mark A. O'Neal and Associates (O'Neal). Out of the 38 pages produced, one of these pages was O'Neal's cover e-mail introducing the EOI. O'Neal's client was copied via e-mail on the EOI, and the cover page included the e-mail address of O'Neal's client.

The sole issue in this case is whether the e-mail address of O'Neal's client was withheld properly from disclosure by the BLM under Exemption 4 of the FOIA. The redacted document disclosed by the BLM in response to the FOIA request is shown in Exhibit 10 [#42-10] to the BLM motion for summary judgment.

After receiving the FOIA request of SJCA and other requests, the BLM sent a letter [#42-3] to Helen Hoffpauir, an O-Neal representative, concerning the FOIA requests. Under regulations of the Department of Interior, the BLM must notify private

[3] I reference exhibits included with the motions for summary judgment by the docket number of the exhibit, e.g., [#45-1].

parties about potentially confidential commercial or financial information which may be disclosed in response to a FOIA request. O'Neal responded and objected to the release of O'Neal's information. [#42-4]. The BLM requested more information from O'Neal. [#42-5]. O'Neal objected to release of its client's e-mail address, which it equated with a release of the identity of its client. [#42-7 & #42-8]. In an e-mail sent June 14, 2013, O'Neal noted that the "EOI in question was submitted in 2011, when the BLM was operating under the former regulations that assured submitter confidentiality until after a lease sale was completed." [#42-8], p. 3. In its final response, BLM redacted the e-mail address of O'Neal's client under Exemption 4 of the FOIA. [#42-9 & #42-10].

SJCA filed an administrative appeal. During that appeal, the BLM sought additional information from O'Neal relevant to Exemption 4. SJCA sought to compel a response to it's appeal from the BLM. *Affidavit* [#45-1], ¶ 10. The BLM did not issue a decision, and SJCA then filed this case. *Id*., ¶ 11. The information sought by SJCA has not been released.

## IV. FOIA & EXEMPTION 4

The FOIA was enacted "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." ***Dep't of Air Force v. Rose***, 425 U.S. 352, 361 (1976). Congress recognized that an open government ensures accountability through transparency, and that an informed citizenry is "vital to the functioning of a democratic society." ***N.L.R.B. v. Robbins Tire & Rubber Co.***, 437 U.S. 214, 242 (1978). "FOIA is . . . a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." ***Nat'l Archives & Records Admin. v. Favish*** , 541

U.S. 157, 171 - 172 (2004) (internal citations and quotations omitted). FOIA's plain language requires that an agency of the federal government disclose documents and information to any person, except when 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."). FOIA exemptions "must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act." ***Vaughn v. Rosen***, 484 F.2d 820, 823 (D.C. Cir. 1973), ***cert. denied***, 415 U.S. 977 (1974).

The burden is on the government to justify its decision to withhold or redact documents. ***Johnson v. United States Department of Justice***, 739 F.2d 1514, 1516 (10th Cir. 1984); ***Lacefield v. United States***, 1993 WL 268392 at *2 (D. Colo. March 10, 1993). To meet this burden, the government may not rely on conclusory assertions, but "must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the [FOIA's] inspection requirements." ***Lacefield***, 1993 WL 268392 at *2 (quoting ***Perry***, 684 F.2d at 126). It may do so by providing affidavits or declarations that specify "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." ***Military Audit Project v. Casey***, 656 F.2d 724, 738 (D.C. Cir. 1981); ***see also Badalamenti v. United States Department of State***, 899 F.Supp. 542, 546 (D. Kan. 1995). Such affidavits are afforded a presumption of good faith, absent concrete evidence to the contrary. ***See SafeCard Services, Inc. v. Securities & Exchange Commission***, 926 F.2d 1197, 1200 (D.C. Cir. 1991); ***Board of County***

***Commissioners of Kane County v. Department of the Interior of the U.S.***, 2007 WL 2156613 at *6 (D. Utah July 26, 2007). In any FOIA action challenging an agency decision to withhold records, the district court reviews de novo the agency's decision not to disclose. ***Herrick v. Garvey***, 298 F.3d 1184, 1189 (10th Cir. 2002).

Exemption 4 of FOIA exempts from release under FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Exemption 4 is unique because it requires the government to account for the interests of third parties by asking for their input when it decides to release or withhold information in response to FOIA requests. See 43 C.F.R. Part 2, Subpart F; ***National Parks & Conservation Ass'n v. Morton***, 498 F.2d 765, 767 (D.C. Cir. 1974) ("The exemption . . . is intended to protect interests of both the Government and the individual."). Information falls within Exemption 4 only of the information is (1) a trade secret or (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. ***Anderson v. Department of Health and Human Services***, 907 F.2d 936, 943 - 945 (10th Cir. 1990).

## V. ANALYSIS

In the present case, there is no contention that the e-mail address at issue is a trade secret. In addition, there is no dispute that the e-mail address was obtained from a person, Mark A. O'Neal and Associates. Thus, the dispute focuses on whether the e-mail address is commercial or financial information and whether it is privileged or confidential.

### A. Commercial or Financial Information

A private entity may show that information is commercial or financial, for the purpose of Exemption 4, by showing that it has a "commercial interest" in the

information at issue. ***Baker & Hostetler LLP v. U.S. Dept. of Commerce***, 473 F.3d 312, 319 (D.C. Cir. 2006). In its affidavit [#42-15], and in its administrative submissions to the BLM, O'Neal maintains survigrously that the identity of its client, which can be discerned from the e-mail address in question, is commercial information. Referring to itself as MAO, O'Neil represents: MAO is a land services firm that is employed by oil and gas companies as an intermediary broker for the express purpose of maintaining the confidentiality of its client's area of interest from the public and its competitors. Ensuring client confidentiality by conducting its leasing efforts in a discrete manner is an integral aspect of the services MAO provides. *Affidavit* [#42-15], ¶ 6. "Clients hire MAO as a lease broker to avoid disclosure of their identity, which may have a significant economic and competitive impact upon the lease parcels of interest to the client. Specifically, the disclosure of this information may result in greater competition and increased lease acquisition costs." *Id*., ¶ 7.

In this context, the only reasonable conclusion is that O'Neal has a commercial interest in the identity of its client, including the e-mail address in question. Thus, I conclude that this information is commercial information.

B. Privileged or Confidential Information

Examining Exemption 4 in ***National Parks & Conservation Ass'n v. Morton***, 498 F.2d 765 (D.C. Cir. 1974), the court held:

> (C)ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information 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.

498 F.2d at 770 (footnote omitted). Applying the ***National Parks*** definition in ***Critical Mass Energy Project v. Nuclear Regulatory Comm'n***, the D.C. Circuit held that information submitted voluntarily is confidential under Exemption 4 if it is "of a kind that would customarily not be released to the public by the person from whom it was obtained." 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*). This is a reduced threshold for demonstrating that information is confidential. The ***Critical Mass*** court found that the government has an interest in encouraging the voluntary submission of information. 975 F.2d at 879. In addition, the ***Critical Mass*** court found that when information is submitted voluntarily, "the presumption is that [government's] interest will be threatened by disclosure as the persons whose confidences have been betrayed will, in all likelihood, refuse further cooperation." ***Id***.

As SJCA notes, many courts have criticized the voluntary versus involuntary distinction made in ***Critical Mass***. ***See, e.g., N.Y. Public Interest Research Group v. EPA***, 249 F. Supp. 2d 327, 335-36 (S.D.N.Y. 2003) ("Adoption of the ***Critical Mass*** standard would result in too liberal a test for confidentiality . . . There is no reason to believe that Congress intended to distinguish between voluntary and compelled submissions."); ***Comdisco, Inc. v. Gen. Servs. Admin.***, 864 F. Supp. 510, 517 (E.D. Va. 1994) ("It is doubtful that the Fourth Circuit would be persuaded to embrace the ***Critical Mass*** standard with respect to voluntary submissions."); ***Dow Jones Co., Inc. v. F.E.R.C.,*** 219 F.R.D. 167, 178 (C.D. Cal. 2003) ("Although defendant urges this Court to adopt ***Critical Mass,*** the Court believes that the holding therein is not consistent with Ninth Circuit jurisprudence, nor with the purposes of Congress in enacting FOIA, which mandates the courts to favor disclosure to serve the public interest. The Court also notes that the test set forth in ***Critical Mass*** has not been adopted by any Circuit other

than the District of Columbia Circuit and has been the subject of criticism by some courts.").

Nevertheless, in ***Utah v. U.S. Dept. Of Interior***, the United States Court of Appeals for the Tenth Circuit said: "The first step in an Exemption Four analysis is determining whether the information submitted to the government agency was given voluntarily or involuntarily." 256 F.3d 967, 969 (10th Cir. 2001) (citing ***Critical Mass***, 975 F.2d at 878 - 879). In ***Utah***, the parties agreed that the information in question was submitted involuntarily. Thus, the court applied the ***National Parks*** test rather than the ***Critical Mass*** test. to date, the Tenth Circuit has not applied the ***Critical Mass*** test to information found to have been submitted voluntarily.

In the present case, O'Neal was not required to submit the e-mail address in question with its EOI. Thus, the e-mail address was submitted voluntarily, though possibly inadvertently. On that basis, the government argues that the relaxed standard of ***Critical Mass*** is applicable here. The SJCA argues that the Tenth Circuit has not explicitly adopted the ***Critical Mass*** standard and that it should not be adopted, based on the reasons cited by the courts who have criticized ***Critical Mass***.

Based on the record in this case, I find and conclude that the BLM has shown that release of the e-mail address would cause substantial harm to the competitive position of O'Neal, the person from whom the information was obtained. Thus I conclude that BLM has satisfied the ***National Parks*** test. Of course, the result would be the same under the relaxed standard of ***Critical Mass***. Because the ***Critical Mass*** standard would not lead to a different result, I need not determine if that standard applies in this case. The government has satisfied the more stringent ***National Parks*** test.

Under the substantial harm prong of ***National Parks***, the party seeking to invoke Exemption 4 must show "actual competition and the likelihood of substantial competitive injury" caused by the release of the information at issue. ***Utah v. U.S. Dept. Of Interior***, 256 F.3d at 970. Conclusory and generalized allegations of substantial competitive harm are not sufficient. ***Id***. "(A)ctual economic harm need not be proved; evidence demonstrating the existence of potential economic harm is sufficient." ***Id***. In ***Utah***, affidavits from two individuals describing competitors and substantial competitive injury were found to be sufficient. ***Id***. at 970 - 971.

In its affidavit [#42-15], and in its administrative submissions to the BLM, O'Neal consistently has said that disclosure of the identity of its client, which can be discerned from the e-mail address in question, is likely to cause commercial injury to O'Neal. Referring to itself as MAO, O'Neal says: "MAO's business relationship with its client and all other oil and gas companies depends upon the confidentiality afforded to each company's identity and business prospects by MAO." *Affidavit* [#42-15], ¶ 11. "MAO is a privately held company. The value of the company is based upon our ability to execute according to client expectations. The release of MAO's client identity will permanently harm our relationship with the client and substantially undermine industry confidence in MAO's ability to function as a discrete and confidential professional land services company." *Id*., ¶ 12. "If BLM releases MAO's client email address, it is expected that MAO will suffer substantial economic and financial harm from lost business, resulting from the client's inability to use MAO as an intermediary to protect its operational interests and from MAO's severely damaged reputation as a reliable and discrete land services broker." *Id*., ¶ 13. O'Neal painted essentially the same picture

when providing information to the BLM about the FOIA requests tied to the EOI. [#42-4, #42-7 & #42-8].

In the view of SJCA, the O'Neal affidavit [#42-15] and related documents do not establish substantial competitive harm. SJCA contends that the affidavit is conclusory and fails to specify a realistic risk of competitive harm. Releasing the e-mail address, SJCA asserts, will identify a party likely to participate in the sale of a lease, but that information will not be of substantial assistance to the unidentified competitors of O'Neal in the world of oil and gas leases. SJCA notes that there is no indication that this information will permit competitors to undercut bids made by O'Neil's client. Further, SJCA notes that competition in bidding "advances the purpose of getting a fair price for a lease of publicly owned minerals." ***Citizens for a Healthy Community v. U.S. Dep't of Interior***, No. 12-cv-01661-RPM (D. Colo. February 13, 2013). SJCA also notes that O'Neal states that release of the e-mail address could result in the loss of a client, may increase leasing costs, and would allow others to benefit from the front-end research of its client. These contentions, SJCA contends, are vague and are not sufficient to show substantial economic harm.

While O'Neal does address in its submissions competition for leases on government land, the primary harm it asserts is loss if the particular client at issue here and, possibly, other clients who learn of the breach of client confidentiality. The O'Neal affidavit is not conclusory. It identifies specific relevant facts, specific economic harms, and the mechanism by which release of the information in question is likely to cause those economic harms. As in ***Utah***, here the statements of individuals who operate the business of O'Neal describing the competitive environment and likely substantial competitive injury are sufficient to establish substantial economic injury. ***Utah***, 256 F.3d

at 970 - 971. Further, although O'Neal has not shown that it is certain to suffer economic harm if the information is released, it has shown a significant potential for economic harm. the showing is sufficient for the purposes of Exemption 4. ***Id***. at 970.

## VI. CONCLUSION & ORDERS

Exemption 4 of the FOIA exempts from release under FOIA "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). FOIA exemptions must be construed narrowly to provide the maximum access to information, consistent with the overall purpose of the FOIA. The burden is on the government to justify its decision to withhold or redact documents. In this case, the government has met its burden to establish that Exemption 4 is applicable to the information redacted by the BLM. The evidence in the record shows that the information in question is confidential commercial information obtained from a person. Under Exemption 4 of the FOIA, the BLM properly may withhold the information sought by the SJCA.

**THEREFORE, IT IS ORDERED** as follows:

1. That the defendants' **Motion for Summary Judgment** [#42] filed February 26, 2014, is **GRANTED**;

2. That the **Plaintiff's Cross-Motion for Summary Judgment and Response To Defendant' Motion for Summary Judgment** [#45] filed March 24, 2014, is **DENIED**;

3. That the claim of the plaintiff under the Freedom of Information Act, stated in the complaint [#1], is **DISMISSED** with prejudice;

4. That **JUDGMENT SHALL ENTER** in favor of the defendants, the United States Department of the Interior, an agency of the United States, and the United States

Bureau of Land Management, an agency within the United States Department of the Interior;

4. That the defendants are **AWARDED** their costs to be taxed by the clerk of the court under FED. R. CIV. P. 54(d)(1) and D.C.COLO.LCivR 54.1; and

5. That this case is **DISMISSED**.

Dated September 30, 2014, at Denver, Colorado.

**BY THE COURT:**

Robert E. Blackburn
United States District Judge