



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:
Appeal No. 2015-027

August 3, 2015

Justin D. Rodriguez
Atkinson, Thal & Baker, P.C.
201 Third Street NW, Suite 1850
Albuquerque, NM 87102

Dear Mr. Rodriguez:

This responds to the November 20, 2014, Freedom of Information Act ("FOIA") appeal ("appeal") (**No. 2015-027**) that you filed with the Department of the Interior ("Department") on behalf of Patrick Hegarty. Your appeal concerns Mr. Hegarty's August 20, 2014, FOIA request that sought copies of "all the correspondence, paperwork[,] digital transmissions[,] and any all attachments, exhibits, and submittals to and from Synergy Operating, LLC [("Synergy"),] relating to case number: CP12-057, docket number: ONRR-2013-0001, RIN-1012-AA14." Mr. Hegarty signed his FOIA request as "A 1/3rd owner of Synergy Operating, LLC."

The Office of Natural Resources Revenue ("ONRR") responded to the FOIA request by advising that Synergy is disputing Mr. Hegarty's "1/3rd owner[ship]" claim in the company. In light of this, ONRR advised that it "must treat [Mr. Hegarty] the same as any other citizen requesting records...because [it] cannot verify ownership..." and it invoked FOIA exemption (4)¹ as a basis to withhold 96 pages in full. ONRR also invoked FOIA exemption (7)(E)² as a basis to withhold the documents "because the release of this information could interfere with enforcement proceedings" and "could impede investigations of [a] similar nature in the future."

You filed this appeal to challenge ONRR's determination. To support your appeal, you submitted copies of two Orders from the Eleventh Judicial District Court, County of San Juan, State of New Mexico, to substantiate Mr. Hegarty's assertion that he is a 1/3rd owner of Synergy, thereby arguing that ONRR cannot use exemption (4) as a basis to deny Mr. Hegarty access to documents that ONRR submitted to or received from a company that he partially owns.

After fully reviewing the issues presented in the appeal, the Department concludes that your appeal will be **GRANTED IN PART** and **REMANDED** to ONRR for further action consistent with this decision.

Since ONRR withheld the requested documents in full under exemptions (4) and (7)(E), the Department has evaluated the applicability of both exemption to the documents. The discussion begins with an evaluation of the exemption (4) withholding.

The Department concludes that it must **REMAND** the issue of the exemption (4) withholding to ONRR for further processing, as ONRR did not put Synergy on proper notice of the information that it must provide in order to object to disclosure of the materials under exemption (4), as required by the

¹ 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).

² 5 U.S.C. § 552(b)(7)(E).

Department's FOIA regulations ("regulations").³ Specifically, ONRR did not advise Synergy that in order "[t]o rely on Exemption 4 as basis for nondisclosure, [it] must explain why the information is confidential information^[4] [in a] detailed written statement."⁵ The regulations require any such detailed written statement to "include a specific and detailed discussion of why the information is a trade secret or, if the information is not a trade secret," contain information that addresses the following three categories:

- (1) Whether the Government required the information to be submitted, and if so, how substantial competitive or other business harm would likely result from release;
- (2) Whether the submitter provided the information voluntarily and, if so, how the information fits into a category of information that the submitter does not customarily release to the public; and
- (3) A certification that the information is confidential, has not been disclosed to the public by the submitter, and is not routinely available to the public from other sources.⁶

Because ONRR did not put Synergy on notice of the need for it provide information that addresses the above three categories, it logically did not include such information in the letter that it sent to ONRR objecting to the release of the documents under, among others, exemption (4). Without the above detailed information from Synergy explaining *how* exemption (4) applies to the requested documents or the required certification in category 3, there was no basis for ONRR to invoke the exemption to withhold the documents.

Another area that raises an issue with the withholding of the requested documents under exemption (4) is your client's claim of an ownership interest in Synergy. As noted above, you provided with the appeal two court orders that address Mr. Hegarty's ownership claim. However, Synergy advised ONRR that the issue of your ownership was the subject of an appeal in ongoing litigation; though, Synergy did not provide ONRR with any documentation to substantiate its assertion that Mr. Hegarty's ownership interest was a matter still in dispute in litigation.

Your client's ownership interest in Synergy forms an important part of the analysis of whether ONRR can invoke exemption (4) as a basis to withhold the documents from him: If Mr. Hegarty is a partial owner of the company, ONRR cannot use exemption (4) as a basis to deny him access to the requested documents.⁷ The Department's conclusion here stems from a ruling by the United States Supreme Court ("Supreme Court") that an agency cannot withhold from a requester any information that implicates that requesters own interest.⁸

³ See 43 C.F.R. § 2.28 (detailing the information a bureau must include in a "notice" that it sends to a submitter).

⁴ See 43 C.F.R. § 2.70 (defining "confidential information" as trade secrets or commercial or financial information (that is privileged or confidential and obtained by the Department from a person) that may be protected from disclosure under Exemption 4 of the FOIA).

⁵ 43 C.F.R. § 2.31(a).

⁶ *Id.*

⁷ ONRR concluded in its letter responding to the FOIA request that exemption (4) applies because release "could jeopardize the competitive and financial standing of those parties associated with it."

⁸ *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989).

On the other hand, if the issue of your client's ownership interest in the company is still in dispute through litigation⁹ or has been resolved with a finding that he has no such ownership claim, the above-referenced ruling from the Supreme Court will not apply to your client's request and he must be treated as any other member of the public who may seek access to the requested documents. ONRR will withhold any portion of the requested documents that may be protected from disclosure by exemption (4).

Therefore, to resolve the exemption (4) issue in the appeal, **by copy of this letter, the Department is remanding the issue to the ONRR for it to:**

- **Send Synergy proper notice of the information that it must provide in order to object to disclosure of any portion of the documents under exemption (4), as required by section 2.28 of the regulations.**
 - **Include in the notice to Synergy a request for it to provide evidence that establishes that Mr. Hegarty's claim of an ownership interest in the company is still in dispute in litigation and if Synergy cannot/does not produce any such evidence, then ONRR cannot invoke exemption (4) as a basis to deny Mr. Hegarty access to the requested documents.**
- **Send the Appellant notice of its consultation with Synergy pursuant to section 2.35(a) of the regulations.**
- **If Synergy establishes that Mr. Hegarty's ownership interest in the company is still in dispute through litigation or there has been a finding that he has no such ownership interest, reassess any claim(s) of harm that Synergy may offer and determine anew whether exemption (4) applies to all or part of the information in the requested documents.**
- **Correspond directly with the Appellant about whether it will release the requested documents or invoke exemption (4) anew as a basis to withhold them in full or in part.**
- **Complete the processing of the remand within 20 workdays from the date of this decision, including releasing the non-exempt portions of any of the documents,¹⁰ with a copy of the letter to this Office.**

As to ONRR's withholding of the documents under exemption (7)(E), the Department notes that the exemption protects two distinct categories of "records or information compiled for law enforcement purposes" where the production of such records would disclose:

- 1) "[T]echniques and procedures for law enforcement investigations or prosecutions"; "or"
- 2) "[G]uidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."¹¹

⁹ The FOIA Appeals Office will not insert itself (or ONRR) in that litigation through the FOIA request/appeal.

¹⁰ See 5 U.S.C. § 552(b) (discussion after exemptions) (requiring an agency to release "any reasonably segregable portion of a record" after appropriate application of the FOIA's nine exemptions). See also 43 C.F.R. § 2.25 (requiring a bureau to segregate and release the nonexempt information in a requested document, unless the nonexempt material is so intertwined with the exempt material that disclosure of it would leave only meaningless words and phrases).

Information withheld under the first clause of exemption (7)(E) must reflect techniques and procedures generally unknown to the public. If release of a technique or procedure that is well known to the public could interfere with or reduce their effectiveness, then the first clause of the exemption protects that information too. The key to withholding information under the second clause of exemption (7)(E) is that the documents must reflect “guidelines for law enforcement investigations or prosecutions” that, if released, “could reasonably be expected to risk circumvention of the law.”¹²

ONRR’s rationale for withholding the documents under exemption (7)(E) does not support a finding by the Department that documents sent “to and from Synergy relating to” the referenced case (which are the documents sought in the FOIA request) contain the type of “techniques and procedures for law enforcement investigations or prosecutions” that the first clause of the exemption was designed to protect. Nor can the Department reasonably conclude that documents sent “to and from Synergy relating to” the referenced case contain “guidelines for law enforcement investigations or prosecutions” that “could reasonably be expected to risk circumvention of the law,” as the subject of ONRR’s investigation (i.e., Synergy) already received or generated those very documents. As a result, there is no basis for the Department to conclude that the requested documents are protected from disclosure by either clause of exemption (7)(E) and it will not uphold ONRR’s invocation of the exemption as a basis to deny your client access to them.

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

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Clarice Julka, FOIA Officer, OS (**FOR ACTION**)¹³
Tracey Fay, Government Information Specialist, ONRR
Office of the Solicitor, Rocky Mountain Regional Office
Cindy Cafaro, Departmental FOIA Officer

¹¹ 5 U.S.C. § 552(b)(7)(E).

¹² *Id.*

¹³ Please be aware that on October 7, 2014, the Office of the Secretary began processing all new FOIA requests submitted to ONRR and handles all FOIA appeals filed against the bureau.