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Western Environmental Law Center

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Via Electronic Mail

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Re: BLM FOIA Policy re. Expressions of Interest

Dear Director Kornze and Assistant Director Nedd:

Western Environmental Law Center, as well as Biodiversity Conservation Alliance, Blancett Ranches, Californians for Western Wilderness, Citizens for a Healthy Community, Delaware Riverkeeper Network, EcoFlight, Fractivist, Great Old Broads for Wilderness, High Country Citizens' Alliance, Los Padres ForestWatch, Montana Environmental Information Center, National Parks Conservation Association, New Mexico Sportsmen, Oil & Gas Accountability Project- Earthworks, Peach Bottom Concerned Citizens Group, People's Oil & Gas Collaborative - Ohio, San Juan Citizens Alliance, Sierra Club Rocky Mountain Chapter, Upper Green River Alliance, Western Colorado Congress of Mesa County, Western Resource Advocates, Western Slope Conservation Center, The Wilderness Society, Wilderness Workshop, and 350.org are writing to request that BLM reconsider its policy regarding the "Confidential Handling of Oil and Gas Informal Expressions of Interest" ("EOI"), as expressed in Instruction Memorandum 95-164, and reiterated in Instruction Memorandum 2013-026. Specifically, we request that BLM cease treating the identity of EOI submitters as confidential and withdraw its Instruction Memoranda requiring its field offices to do the same. Furthermore, in order to best serve the

public interest, we recommend that BLM should post the complete EOIs on BLM's state oil and gas lease sale web sites when announcing the public lands to be put up for lease at oil and gas lease auctions.

I. Background

As you are likely aware, the U.S. District Court of Colorado recently held that the identity of an EOI submitter is not protected by Exemption 4 of the Freedom of Information Act ("FOIA"), as asserted by BLM. See *Citizens for a Healthy Community v. U.S. Dep't of Interior, et al.*, Civ. No. 1:12-cv-01661-RPM, *Docket No. 27* (Order on Summary Judgment Motions, (February 13, 2013)) (attached as Exhibit 1). Rather, the court held that BLM's asserted justification for withholding the information "runs directly contrary to the purpose of the public sale process." *Id.* at 2. The court further noted that "[c]ompetition in bidding advances the purpose of getting a fair price for a lease of publicly owned minerals." *Id.* "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." *Id.* As a result, the court ordered that BLM release the names of the EOI submitters, which BLM did on April 15, 2013.

Troublingly, despite this decision, we have heard from BLM staff that BLM does not intend to amend its policy regarding the release of the identity of EOI submitters, and may continue to withhold this information pursuant to FOIA Exemption 4. As should be evident from the recent litigation and the court's opinion mentioned above, BLM's policy is inappropriate, illegal, and inconsistent with the mandates of FOIA. However, because it appears that BLM may continue to withhold this information unnecessarily, we write to reiterate why this policy must be revised.

II. Background of the Freedom of Information Act

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.*, was enacted to ensure government transparency and confirm 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).

The Department of Interior and BLM have 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

Given FOIA’s mandates, and the Department’s and BLM’s broad policies of disclosure, BLM should make the disclose the identity of EOI submitters as a matter of course. As discussed below, the identity of the EOI submitters does not fall within any exemption under FOIA, and importantly, even if it did, BLM could and should still make this information publicly available to ensure that the processes surrounding public resources are open and allow for informed public participation.

III. Exemption 4 Is Not Applicable to Expressions of Interest

Exemption 4 does not protect the identity of EOI submitters from disclosure, and BLM should revise its policy accordingly. 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

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.

confidential.” 5 U.S.C. § 552(b)(4). As discussed below, the identity of EOI submitters 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.

As common sense dictates, and indeed as BLM has conceded, the identity of EOI submitters cannot be protected as a trade secret.³ See *CHC*, Civ. No. 1:12-cv-01661-RPM, *Docket No. 13* (attached as Exhibit 2). 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, the names of EOI submitters are not commercial. See *CHC*, Civ. No. 1:12-cv-01661-RPM, *Docket No. 13*, at 7-8. BLM has alleged that disclosure would “clearly reveal . . . that the submitters have dedicated time and money to exploring relevant 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.” However, BLM has not offered, and we have not found, any authority to support this assertion. *Id.* Moreover, and contrary to BLM’s claims, the only information BLM requires of an EOI submitter 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).⁴ In short, anyone can nominate public lands for inclusion in a BLM lease sale; there is nothing requiring submitters to invest any time or resources before nominating a parcel for a lease sale.

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 that BLM’s use of this exemption to conceal the identity of EOI submitters is baseless. The court in *National Parks I* stated that before holding information confidential under 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 767.⁵ Following its examination of legislative history, the court in *National Parks I*

³ 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.”

⁴ See BLM Colorado, *Expressions of Interest*, available at: http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/expressions_of_interest.html.

⁵ 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

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).

BLM has relied on the *National Park I* test, and has agreed that the first prong is not an issue; disclosure of the identity of the EOI submitters will not impair the Government’s ability to obtain necessary information in the future. *See CHC*, Civ. No. 1:12-cv-01661-RPM, *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.”). As such, the only remaining reason that BLM could give, if it wanted to keep this information confidential, is that 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. To do so, BLM would have to demonstrate 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 (D.C. Cir. 1979).

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.*

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 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.

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). 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." *CHC*, Civ. No. 1:12-cv-01661-RPM, *Docket No. 13-1*, Exhibit C at 4-5 (attached as Exhibit 3) (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 – BLM has failed to provide any justification for its use of Exemption 4. Instead, BLM has relied upon unsubstantiated assertions.

In regard to actual competition, BLM has made 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.⁶ *See* *CHC*, Civ. No. 1:12-cv-01661-RPM, *Docket No. 13* at 8, 9. BLM has provided nothing to support these general conclusions – which even taken at face value fail to provide 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). BLM has even had the audacity to speculate that "[k]nowledge 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." *Id.* at 9. However, it appears that collusion between companies has already occurred, and has occurred regardless of whether the public has been made aware of EOI submitters' identity. *See id.*, *Docket No. 14-12* (documents regarding *United States v. SG Interests and Gunnison Energy Corporation*, 1:12-cv-000395-RPM).

⁶ Similarly, Western Energy Alliance – an oil and gas industry trade group who attempted to intervene post judgment in *CHC v. Dep't of Interior, et al.*, – also failed to offer specific allegations of substantial competitive harm that EOI submitters face if this information were disclosed. *See* *CHC*, Civ. No. 1:12-cv-01661-RPM, *Docket No. 34* at 8.

Even if the government could meet its burden on the “actual competition” element, BLM has failed to make the next required demonstration that disclosing this information would likely result in substantial competitive injury to the EOI submitters. *See National Parks I*, 489 F.2d at 770; *Lions Raisons*, 354 F.3d at 1079. In fact, BLM has failed to present any explanation of how disclosure would result in such injury.

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). 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.⁷ 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.

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 a lease sale takes place. It is an illogical and unlawful application of FOIA’s Exemption 4 to shield the industry nominators from the light of public 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.”); *see also* 43 C.F.R. 3420.3-2(c) (in competitive coal leasing context: “All information submitted under this subpart shall be available for public inspection and copying upon request. Data which are considered proprietary shall not be submitted as part of an expression of leasing interest.”). 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 its interest in disclosure and agency transparency. As such, BLM’s policy of withholding this information should not be perpetuated.

⁷ The government is further undermining its ability to receive fair market rate for the sale of our publicly owned minerals, to the exclusive benefit of private oil and gas industry interests and profits.

IV. Conclusion and Request

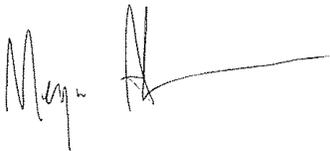
As noted above, we request that BLM end its policy protecting the identity of EOI submitters and withdraw its instruction memoranda requiring field offices to keep this information secret. As explained above and in the Colorado District Court order, BLM's policy is inconsistent with both the spirit and the letter of FOIA and must be revised.

BLM must revise its policy soon. Presently, BLM is leaving both interested parties and its own FOIA staff in limbo; it has released the names of the submitters in the case referenced above, but for other requests for EOI submitter information, BLM seems to be delaying release until it decides what to do with its questionable policy. BLM's decision to delay release of non-exempt information is troubling because it is a direct affront the Colorado District Court decision and FOIA itself. As outlined above, this information must be released, and it must be released according to FOIA deadlines. BLM's reliance on an unsupportable policy to prevent or delay the release of public information cannot continue.

Furthermore, the agency can best serve the public interest by making EOIs publicly available when lease sale notices are posted. Such a policy is consistent with the Colorado District Court's order cited above and would eliminate the needless filing of numerous FOIA requests by concerned citizens, community groups, and journalists. Such an approach would also alleviate needless staff time by BLM's FOIA officers to receive, process, and reply to FOIA requests that seek EOIs.

We look forward to hearing from you about your plans to address BLM's policy. Please do not hesitate to contact the Western Environmental Law Center if you have any questions or would like additional information.

Sincerely,



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