



Exemption 9

Exemption 9 of the FOIA covers "geological and geophysical information and data, including maps, concerning wells."¹ This exemption has rarely been invoked or interpreted.²

More than twenty years ago, the District Court for South Dakota held in Black Hills Alliance v. U.S. Forest Service that Exemption 9 applies only to "well information of a technical or scientific nature," and not to general mineral exploration data -- such as the location, depth, or number of exploration drill holes.³ This court pointed to the legislative history of the FOIA -- specifically, to evidence that Congress intended through Exemption 9 to protect the oil and gas exploration and extraction industry from unfair competitive harm by "speculators" -- in support of its decision to order the release of generalized well data where a competitive harm argument could not readily be supported.⁴

¹ 5 U.S.C. § 552(b)(9) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

² See, e.g., Nat'l Broad. Co. v. SBA, 836 F. Supp. 121, 124 n.2 (S.D.N.Y. 1993) (noting merely that document withheld under Exemption 4 "also contains geographic or geological information which is exempted from disclosure pursuant to FOIA Exemption 9").

³ 603 F. Supp. 117, 122 (D.S.D. 1984) (requiring government to disclose number, locations, and depths of proposed uranium exploration drill holes in national forest under federally approved program, and noting that this geological exploration information "falls short of the technical and scientific information envisioned by Congress").

⁴ Id. (stating that disclosure of "exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration" (citing H.R. Rep. No. 89-1497, at 9 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428)); see also Admin. Procedure Act: Hearing on S. 1160, S. 1336, S. 1758 and S. 1879 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong. 536-38 (1965) (statement of W. Oil & Gas Ass'n) (lobbying for protection of information

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Subsequently, in Starkey v. U.S. Department of Interior,⁵ the District Court for the Southern District of California held that information related to the presence of groundwater -- including "ground water inventories, [water] well yield in gallons per minute, and the thickness of the decomposed granite aquifer" -- was exempt from disclosure under both Exemption 4⁶ and Exemption 9.⁷ Though the court discussed the two exemptions separately, with Exemption 9 receiving very little analysis, it emphasized that "water is a precious, limited resource" and that release of well data would place one party at a disadvantage in negotiations over its use.⁸

In National Resources Defense Council v. DOD,⁹ the District Court for the Central District of California held that the FOIA does not distinguish between well information pertaining to privately and publicly owned water wells.¹⁰ Rejecting the plaintiff's claim that a statement in Exemption 9's legislative history seemed to favor such a distinction,¹¹ the court relied on the well-known legal principle that "reference to legislative history is inappropriate when the text of the statute is unambiguous."¹² Two other decisions that have mentioned Exemption 9 did so in the context of the regulation of natural gas producers; however, neither case discussed its scope or application in significant detail.¹³

⁴(...continued)

furnished to government by oil and gas industries, resulting in later adoption of Exemption 9, despite proposed Exemption 4's protection of confidential commercial information, due to concerns that Exemption 4 might be narrowly construed).

⁵ 238 F. Supp. 2d 1188 (S.D. Cal. 2002).

⁶ 5 U.S.C. § 552(b)(4) (protecting "trade secrets and commercial or financial information [that is] obtained from a person [and that is] privileged or confidential").

⁷ 238 F. Supp. 2d at 1196 (affirming action of agency in withholding commercially sensitive portions of "preliminary draft supplemental environmental assessment" related to groundwater tables and wells).

⁸ Id. at 1195.

⁹ 388 F. Supp. 2d 1086 (C.D. Cal. 2005).

¹⁰ Id. at 1107-08.

¹¹ Id. at 1108 (noting plaintiff's reliance on H.R. Rep. No. 89-1497, at 11 (1966), which states that Exemption 9 was created because geological maps based on explorations by private oil companies were not "covered" by existing "trade secrets" laws).

¹² Id. (quoting United States v. Sioux, 362 F.3d 1241, 1246-47 (9th Cir. 2004)).

¹³ See Superior Oil Co. v. FERC, 563 F.2d 191, 203-04 & n.20 (5th Cir. 1977) (accepting without discussion that agency may choose to withhold information concerning regulated natural gas exploration and production by private companies under Exemption 9, but ruling that agency also may make discretionary disclosure of certain information despite risk of competitive harm) (non-FOIA case); Pennzoil Co. v. Fed. Power Comm'n, 534 F.2d 627, 629-630

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& 630 n.2 (5th Cir. 1976) (ruling that Exemption 9 may allow, but does not require, agency to withhold information concerning natural gas "reserve data" reported by regulated private companies) (non-FOIA case); see also Ecee, Inc. v. FERC, 645 F.2d 339, 348-49 (5th Cir. 1981) (holding requirement that producers of natural gas submit confidential geological data to be valid) (non-FOIA case).