



COALEX STATE INQUIRY REPORT - 348

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TOPIC: WHAT CONSTITUTES "RECEIPT" OF A RECORD FOR A FOIA REQUEST?

INQUIRY: A permittee asked the Wyoming regulatory authority (RA) to informally review its application for a permit amendment with its accompanying studies, maps and other records. The permittee did not intend to file the application formally unless its bid on a BLM coal lease on an adjacent area was accepted. The permittee requested the RA to consider these records confidential until they were filed formally. The BLM coal lease was awarded to the permittee's competitor who filed a FOIA request with the RA for the permittee's application for permit amendment and accompanying records. The permittee has requested that the records and the unfilled permit amendment be returned to him.

Are the permittee's records considered "property" of the state even though the application was not filed formally? Are the application records considered "public records" subject to a FOIA request? Are the records subject to a FOIA exemption [5 USCS sec. 552(b)(4)] because they contain "privileged commercial or financial information" that could provide the competitor with a financial advantage? Does it make a difference that the permittee requested that the records be considered confidential?

SEARCH RESULTS: Research conducted using the COALEX Library and other LEXIS materials identified four relevant ANNOTATIONS and five relevant OSM DIRECTIVES. The ANNOTATIONS address the "public records" and "confidentiality" issues on federal and state levels. The DIRECTIVES provide OSM's policies and procedures for implementing the FOIA in its agency.

Excerpts from the ANNOTATIONS and DIRECTIVES are quoted below. Copies of the documents listed below are attached.

ANNOTATION, "What are records' of agency which must be made available under the Freedom of Information Act (5 USCS sec. 552(a)(3)", 50 ALR Fed 336 (1998).

II. General Principles. 3. Definition of record.

"In order for requested materials to qualify as agency records,' for purposes of a Freedom of Information Act (FOIA) provision (5 USCS sec. 552(a)(4)(B)) which



authorizes an order for the production of any agency records improperly withheld,' the agency must (1) either create or obtain the requested materials, and (2) be in control of the requested materials at the time the FOIA request is made; thus, such agency records' are not restricted to materials generated internally...; the relevant issue is not (1) whether the organization from which the documents originated is itself covered by the FOIA, but (2) whether an agency covered by the FOIA has created or obtained the material sought; the FOIA applies to records which have in fact been obtained and not to records which merely could have been obtained; the control requirement for agency records' means that the materials must have come into the agency's possession in the legitimate conduct of the agency's official duties; such a control inquiry focuses on an agency's possession of the requested materials, not on the agency's power to alter the contents of the material the agency receives...."

ANNOTATION, "What are records' of agency which must be made available under State Freedom of Information Act", 27 ALR 4th 680 (1998).

I. Preliminary Matters. 2. Summary and comment.

"[D]efinitions of public records' as contained in state freedom of information acts vary widely.... In general, however, the definitions of public records' generally fall within four categories, two that allow liberal disclosure and two that are more restrictive. The most liberal public record' definition provides that all records in the possession of a public agency, regardless of their origin or the reason for their creation or acquisition, are public records unless the state codes specify otherwise. The second category of liberal definitions of public records' provides that any record made or received in connection with or relating to a law, duty of the agency, or the transaction of public business, or any record containing information regarding those matters is a public record. On the other hand, some states have enacted restrictive public records' definitions, most of which designate as public records only those materials required to be kept by law. The other category of restrictive definitions defines public records' as those made pursuant to law.

"In general, whether a record or document constitutes a public record' in a particular case and is thus subject to disclosure depends on the definition of the term public record' as provided by the particular state freedom of information law and the judicial application of that definition to the particular record or document under consideration."

See Section 13 Permit applications for a discussion of cases holding that permit and license applications filed with government agencies were " public records' within the purview of the state freedom of information law, and were thus subject to disclosure."

ANNOTATION, "What constitutes trade secrets and commercial or financial information obtained from person and privileged or confidential,' exempt from disclosure under Freedom of Information Act (5 USCS sec. 552(b)(4)) ["Exemption 4" of " FOIA"]", 139 ALR Fed 225 (1997).



I. Preliminary Matters. 2. Summary and comment.

"In determining the scope and applicability of this exemption, the initial problem requiring resolution is the determination of what classes of documents are exempt. The courts have generally concluded that the specific language of the exemption requires recognition of only two classes of material: (1) trade secrets, and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential.

...

"It has been held that in determining whether documents requested under the Freedom of Information Act are confidential' within the meaning of the fourth exemption, the applicable test is whether release of the information contained in such documents 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."

...

"The courts have held that a party need not show actual competitive harm' from disclosure of the information sought in order to qualify for the second prong of the exemption. A showing of actual competition and the likelihood of substantial competitive injury has been deemed sufficient.

...

"Several courts have adopted a more lenient test for determining the confidentiality of any information that was voluntarily submitted to the government."

...

"Finally, the courts have recognized that a decision as to the applicability and scope of section 552(b)(4) requires the court to strike a balance between the strong public interest in favor of disclosure of information and the rights of those submitting information to privacy and confidentiality."

ANNOTATION, "What constitutes trade secrets' exempt from disclosure under State Freedom of Information Act", 27 ALR 4th 773 (1996).

"In considering whether a particular matter constitutes a trade secret' for purposes of the state freedom of information law exemption, the courts have considered a number of factors, such as whether the information sought will be used for private or commercial purposes, whether the information is of a privileged or confidential nature, whether the release of the information would permit an unfair advantage to competitors, and whether the information is easily accessible to competitors."

The following decisions are also enclosed for your review:

1. NATIONAL PARKS & CONSERVATION ASSO. v MORTON, 498 F 2d 765 (App DC 1974).
2. CRITICAL MASS ENERGY PROJECT v NUCLEAR REGULATORY COMM'N, 975 F 2nd 871 (App DC 1992), cert den 507 US 984.



3. INDIAN LAW RESOURCE CENTER v DOI, 477 F Supp 144 (D DC 1979).
4. BURLINGTON NORTHERN RAILROAD CO. v OMAHA PUBLIC POWER DISTRICT, 888 F 2d 1228 (8th Cir 1989).

OSM DIRECTIVE, Subject No. INF-3, Transmittal No. 796, "Freedom of Information Act (FOIA)" (Issued 9/20/93).

Definitions:

"e. Agency Record is any form (paper, video cassette tape, or computer data tape, etc.) of information already maintained by the Agency that was created by the Agency or received from other sources in connection with the transaction of public business."

Procedures/Preparation:

"(14) Review of Documents for FOIA Exemptions. Under the FOIA, there are nine exemptions on the basis of which a document (or portion of a document) may be withheld from disclosure to the public. OSM will withhold information falling within an exemption category only if (a) release of the information is prohibited by statute or Executive Order (EO 12600 and SMCRA for example) or (b) should grounds exist for invoking one of the FOIA exemptions"

Also enclosed is:

1. DIRECTIVE INF-3, Transmittal No. 721, "FOIA" (Issued 5/14/92).

OSM DIRECTIVE, Subject No. REG-15, Transmittal No. 696, "Policy and Procedures for Maintaining Confidentiality of Permit Application Information" (Issued 11/21/91).

Definitions:

"b. Confidential Information. In the context of this directive --

(1) For mining permits, revisions, and renewals, confidential information is defined as, and limited to, the information that has been clearly identified as confidential by the applicant and submitted separately from the remainder of the application, and pertains only to the analysis of the chemical and physical properties of the coal to be mined, except information on components of such coal which are potentially toxic in the environment, or is required under section 508 of SMCRA, but is not on public file pursuant to State law."

These two OSM DIRECTIVES are enclosed for background:

1. OSM DIRECTIVE, Subject No. REG-35, "Processing Applications for Federal Permits" (Issued 1/9/90).



2. OSM DIRECTIVE, Subject No. ADS-1, "Policies and Procedures for Implementing the Privacy Act of 1974" (Issued 3/1/91).

ATTACHMENTS

- A. 5 USCS sec. 552 (b)(4) (1998).
- B. ANNOTATION, "What are records' of agency which must be made available under the Freedom of Information Act (5 USCS sec. 552(a)(3)", 50 ALR Fed 336 (1998).
- C. ANNOTATION, "What are records' of agency which must be made available under State Freedom of Information Act", 27 ALR 4th 680 (1998).
- D. ANNOTATION, "What constitutes trade secrets and commercial or financial information obtained from person and privileged or confidential,' exempt from disclosure under Freedom of Information Act (5 USCS sec. 552(b)(4)) ["Exemption 4" of " FOIA"]", 139 ALR Fed 225 (1997).
- E. ANNOTATION, "What constitutes trade secrets' exempt from disclosure under State Freedom of Information Act", 27 ALR 4th 773 (1996).
- F. NATIONAL PARKS & CONSERVATION ASSO. v MORTON, 498 F 2d 765 (App DC 1974).
- G. CRITICAL MASS ENERGY PROJECT v NUCLEAR REGULATORY COMM'N, 975 F 2nd 871 (App DC 1992), cert den 507 US 984.
- H. INDIAN LAW RESOURCE CENTER v DOI, 477 F Supp 144 (D DC 1979).
- I. BURLINGTON NORTHERN RAILROAD CO. v OMAHA PUBLIC POWER DISTRICT, 888 F 2d 1228 (8th Cir 1989).
- J. OSM DIRECTIVE, Subject No. INF-3, Transmittal No. 796, "Freedom of Information Act (FOIA)" (Issued 9/20/93).
- K. OSM DIRECTIVE INF-3, Transmittal No. 721, "FOIA" (Issued 5/14/92).
- L. OSM DIRECTIVE, Subject No. REG-15, Transmittal No. 696, "Policy and Procedures for Maintaining Confidentiality of Permit Application Information" (Issued 11/21/91).
- M. OSM DIRECTIVE, Subject No. REG-35, "Processing Applications for Federal Permits" (Issued 1/9/90).
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