



JUN 16 2004

Curtis Kennedy, Esq.
Attorney at Law
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Denver, CO 80237-1741

Re: Our FOIA File No. 040169

Dear Mr. Kennedy:

This is in response to your appeal under the Freedom of Information Act (FOIA) from the decision of Robert Webber, Acting Regional Director, Employee Benefits Security Administration (EBSA), on behalf of your client, Association of US West/Qwest Retirees, for information pertaining to the Qwest Pension Plan.

The Labor Department's policy is to disclose information to the maximum extent practicable. 29 C.F.R. § 70.3. In reviewing the records that are responsive to your appeal, we have kept these considerations in mind.

We have questioned EBSA as to the status of its activities with respect to the information you seek, and have carefully evaluated its response in light of the requirements of the FOIA. Based on this evaluation, I have determined that: 1) the documents you seek are records or information compiled for law enforcement purposes; 2) a final determination in the proceedings for which such records or information is being used has not been reached; and, 3) disclosure at this time of the records or information of the types you seek could reasonably be expected to interfere with enforcement proceedings. Therefore, I have decided to affirm the withholding of the records you seek pursuant to exemption 7(A) of the FOIA.

Exemption 7 applies where the records or information have been compiled for law enforcement purposes. The "law" to be enforced within the meaning of "law enforcement purposes" includes both civil and criminal statutes. See, e.g., Rural Hous. Alliance v. Dept. of Agriculture, 498 F.2d 73 at 81 & n.46 (D.C. Cir. 1974); Williams v. IRS, 479 F.2d 317, 318 (3d Cir. 1973), cert. denied, 414 U.S. 1024 (1973). The records you requested have been compiled by the Employee Benefits Security Administration, which is charged with the duty of effectively investigating and prosecuting violations of the Employee Retirement Income Security Act. Similar labor legislation has been found to be "law" within the meaning of exemption 7. See, e.g., Borton v. OSHA, 566 F. Supp. 1420, 1425 (E.D. La. 1983).

Exemption 7(A) applies to records or information compiled for law enforcement purposes when production of such law enforcement records or information could reasonably be expected to interfere with "enforcement proceedings." Thus the exemption is temporary in nature, and does not permanently exempt records from disclosure. Exemption 7(A) does apply, however, as long as the relevant proceedings remain pending or are prospective (see e.g., Southam News v. INS, 674 F. Supp. 881, 887 (D.D.C. 1987)). Proceedings are considered to be pending or prospective

until completion of all reasonably foreseeable administrative and judicial proceedings. See NLRB v. Robbins Tire and Rubber Company, 437 U.S. 214, 220 (1978). EBSA has advised us that the records or information compiled for law enforcement purposes that you seek are an integral part of the record in a case that is currently undergoing investigation. Such a proceeding meets the foregoing requirements.

Exemption 7(A) applies where release of records or information of the type sought "could reasonably be expected to interfere" with enforcement proceedings. It is not necessary to make this determination with respect to a particular record. Rather, a generic approach is proper and acceptable. NLRB v. Robbins Tire and Rubber Company, 437 U.S. at 236. Under the FOIA, I cannot look at the identity of the requester. See U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 771 (1989). Thus, I cannot limit myself in this regard to considering only the consequences of a release to you, for the FOIA compels me to release the same materials I release to you to anyone else who requests it including the possible subject of any enforcement action. With these considerations in mind, I have determined, based on information supplied by EBSA as to the types of records and documents involved in this matter, that the records or information you have requested are of the types which, if released at this time, would prematurely reveal the Government's case and impede it in any ensuing enforcement action and, therefore, could reasonably be expected to interfere with enforcement proceedings.

When exemption 7(A) is applicable, it is not our practice to decide upon the potential applicability of other exemptions of the FOIA that may affect release of any or all of the information you are seeking until the relevant proceedings are concluded. However, failure to assert any other exemption or defense that may be applicable to this appeal does not constitute a waiver of that exemption or defense.

In your FOIA appeal, you asked whether "virtually all of the FOIA requested information [is] that which was provided by Qwest." Ordinarily, exemption 7(A) of the FOIA will not afford protection when the target of the investigation has possession of or submitted the information in question. However, public release of the requested information at this time may discourage further submissions of this type of information by the target and may also hinder a voluntary resolution of the case as the targets of the investigation would have less incentive to cooperate with EBSA. Accordingly, after careful evaluation of the materials in question, we have concluded that its release at this time could undermine the successful conclusion of this investigation.


Finally, we would encourage you to stay in touch with the office handling the investigation in question as a reminder to process your request when the investigation is closed. Some offices maintain lists for this purpose, but they are under no obligation to do so.

The Freedom of Information Act provides for judicial review of administrative decisions denying a request in whole or in part. Suit may be brought in the district court of the United States in the

jurisdiction in which the complainant resides, or has his or her principal place of business, or in which the agency records are maintained, or in the U.S. District Court for the District of Columbia (5 U.S.C. 552(a)(4)(B)). This appeal determination constitutes final agency action for purposes of judicial review.

Sincerely,

Howard M. Radzely
Solicitor of Labor

By: 
Bruce A. Cohen
Deputy Associate Solicitor
for Legislation and Legal Counsel